

No. ____

In the Supreme Court of the United States

JOHN C. EASTMAN,

Petitioner,

v.

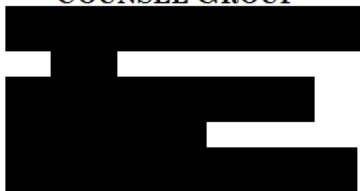
THE STATE BAR OF CALIFORNIA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case concerns whether a State may disbar an attorney for legal advice, public commentary, and petitioning activity undertaken on behalf of a client in a politically charged constitutional dispute. The Review Department of the State Bar Court of California acknowledged that the statements for which Dr. John Eastman was charged involved core political speech and even conceded that “the applicable standard is one of strict scrutiny,” yet the Review Department then set that standard aside, declaring that, “[r]egardless, our focus remains on Eastman’s false statements and whether or not they violate the rules and statutes governing attorney conduct.” App.102a n.92. The Review Department likewise refused to require narrow tailoring, characterizing such scrutiny as “compartmentaliz[ing] Eastman’s conduct into isolated events.” App.19a. Instead, the Review Department affirmed global discipline across counts one through ten for statements it deemed professional misconduct, concluding that *some* of those statements were statements of fact and thus entitled to only reduced or no constitutional protection. These errors give rise to the questions presented:

1. Whether California’s disbarment of an attorney for legal advice, public commentary, and constitutional advocacy on matters of public concern is incompatible with the First Amendment.

2. Whether California's treatment of constitutional advocacy as a conspiracy to defraud the United States under 18 U.S.C. §371 improperly expands that criminal statute in a way that impermissibly burdens speech and petitioning activity protected by the First Amendment.

3. Whether, under this Court's decision in *In re Loney*, subject matter jurisdiction to initiate discipline for allegedly false statements in a *federal* court filing lies exclusively with the *federal* tribunal.

PARTIES TO THE PROCEEDING

Petitioner is John C. Eastman, a member of the bar of this Court.

Respondent is the State Bar of California.

RELATED PROCEEDINGS

State Bar Court of California, Hearing Department:

In the Matter of John Charles Eastman, State Bar No. 193726, No. SBC-23-O-30029 (March 27, 2024)

State Bar Court of California, Review Department:

In the Matter of John Charles Eastman, State Bar No. 193726, No. SBC-23-O-30029 (June 13, 2025)

Supreme Court of California:

In re John Charles Eastman on Discipline, No. S292011 (April 15, 2026)

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OPINIONS BELOW

The order of the Supreme Court of California denying Eastman's petition for review is unpublished. App.1a-2a. The opinion of the Review Department of the State Bar Court of California is available at 2025 WL 4735186. App.3a-132a. The opinion of the Hearing Department of the State Bar Court of California is unpublished. App.133a-297a.

JURISDICTION

The decision of the Supreme Court of California denying Eastman's petition for review and thereby adopting as its own the opinion of the Review Department was issued on April 15, 2026. Justice Kagan on June 26, 2026, granted an extension of time to September 12, 2026, to file this petition. This Court has jurisdiction under 28 U.S.C. §1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution provides in relevant part:

Congress shall make no law ... 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. CONST. amend. I.

18 U.S.C. §371 provides in relevant part:

If two or more persons conspire either to commit any offense against the United States,

or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

18 U.S.C. §371.

INTRODUCTION

Censorship at its most pernicious targets not merely disfavored ideas, but the persons who dare to voice them. And since attorneys are often essential advocates for disputed propositions, censoring their arguments is especially effective, and therefore especially dangerous. This Court’s review is crucial to halt the rising trend of politicized bar disciplinary proceedings.

“The first thing we do, let’s kill all the lawyers.” *Walters v. Nat’l Ass’n of Radiation Survivors*, 473 U.S. 305, 371 n.24 (1985) (Stevens, J., dissenting) (quoting W. Shakespeare, *King Henry VI*, pt. II, Act IV, scene 2, line 72). “As a careful reading of that text will reveal, Shakespeare insightfully realized that disposing of lawyers is a step in the direction of a totalitarian form of government.” *Id.* Indeed, at least one modern superpower has illustrated how targeting attorneys can be a weapon against any challenge to powerful vested interests. Victims of Communism Memorial Foundation, *VOC Signs Letter Calling Out CCP Crackdown Against Lawyers* (July 7, 2025), <https://victimsofcommunism.org/chinese-government-impunity-for-crackdown-on-lawyers-fuels-decade-of-repression/> (decrying the “709” crackdown). *See also*

Amnesty International, *Uganda: Authorities Must Investigate Unlawful Detention and Deportation of Kenyan Human Rights Lawyer* (June 23, 2026), <https://www.amnestyusa.org/press-releases/uganda-authorities-must-investigate-unlawful-detention-and-deportation-of-kenyan-human-rights-lawyer/>.

Those are decidedly *not* the models for the United States. Our constitutional system depends upon lawyers being free to advance disputed legal positions without fear that the State will later punish those attorneys for making disfavored arguments.

This case involves the politicized use of bar disciplinary proceedings. The decision below threatens the nation’s adversarial system of justice by chilling attorneys on the “wrong” side of hotly disputed political opinions from advocating for controversial clients or causes. “Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.” *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974). The California Bar set this fundamental principle aside and punished Eastman for his ideas, treating disputed constitutional advocacy as professional dishonesty because State officials and disciplinary authorities disagreed with the legal theories he advanced.

Eastman is not alone. Many lawyers have been targeted by recent politicized bar disciplinary complaints, often initiated at the behest of partisan advocacy groups. Katelynn Richardson, *Left-Wing*

Groups Weaponize Bar Complaints Against Trump Admin Attorneys, Daily Caller News Foundation (Oct. 11, 2025), <https://dailycaller.com/2025/10/11/left-wing-groups-weaponize-bar-complaints-against-trump-admin-attorneys/>. For example, bar complaints were filed against both Eric Schmitt and Ashley Moody, former state attorneys general and now members of the Senate, for signing on to an amicus brief in *Texas v. Pennsylvania*. Avalon Zoppo, *Ethics Complaints Filed Against Florida AG Ashley Moody, Other Republican AGs that Backed Bid to Undo 2020 Election Results*, LAW.COM (last visited Aug. 31, 2026), <https://www.law.com/national-lawjournal/2022/09/21/ethics-complaints-filed-against-republican-state-ags-that-backed-bid-to-undo-2020-election-results/>.

This grotesque misuse of the bar disciplinary process cries out for this Court's review. Compounding the need for review are the markedly divergent outcomes reached by different jurisdictions for substantially similar advocacy. An attorney's freedom to advance legal propositions should not depend on the jurisdiction. California imposed professional extinction here, while Texas courts rejected similar disciplinary efforts. *Webster v. Comm'n for Law. Discipline*, 704 S.W.3d 478, 483 (Tex. 2024) (rejecting discipline for the same *Texas v. Pennsylvania* pleadings at issue in this matter); see also Jacob Scholl, *Is Utah A.G. Sean Reyes Chasing 'Frivolous' Lawsuits on Behalf of Donald Trump? A Legal Group Thinks So*, SALT LAKE TRIBUNE (Sept. 23, 2022), <https://www.sltrib.com/news/politics/2022/09/23/is-utah-ag-sean-reyes-chasing/> (discussing

decision of Utah Bar dismissing complaint arising out of same *Texas* case). Complaints were likewise filed against Georgia attorney Kurt Hilbert arising from his representation as lead counsel in the Georgia election litigation for which Eastman was disciplined, yet those proceedings did not succeed, and he remains in good standing. *Ethics Complaint Against Kurt Hilbert*, THE 65 PROJECT (Feb. 15, 2023), <https://the65project.com/ethics-complaint-against-kurt-hilbert/>; STATE BAR OF GEORGIA, *Kurt Hilbert*, <https://www.gabar.org/member-directory/?id=066EC6A98F8C6EC3D27016009618FC99>. The same advocacy thus ended one lawyer's career in California while drawing no discipline at all in Texas, Utah, or Georgia. This Court's review is needed to address the recurring question, of national importance, of the constitutional limits on state bars regulating attorneys' political and constitutional advocacy.

Here, the Review Department, ratified without opinion by the California Supreme Court, found Eastman culpable on 10 of 11 counts, for what it claimed were false statements made by Eastman during his representation of President Donald J. Trump. The Bar did not confine its charges to any properly identified discrete, objectively verifiable factual assertions; instead, it swept together public commentary outside any pending litigation, an internal brainstorming memorandum analyzing unsettled legal questions, and advocacy directed to the Vice President regarding the certification of the Electoral College vote. The latter also served as the basis for the Bar Court's holding that Eastman

conspired with the President to defraud the United States, in violation of 18 U.S.C. §371.

California disciplined Eastman for speech at the core of the First Amendment: legal advice, constitutional advocacy, public commentary, and petitioning directed to government officials on matters of extraordinary public concern. The Review Department acknowledged that this speech required strict scrutiny, but then failed to apply that standard, replacing the statement-by-statement constitutional analysis this Court's cases require with a deferential professional-discipline inquiry and an after-the-fact reasonableness judgment. That error let California collapse the essential distinction between provably false factual assertions and disputed legal opinions, treating contested constitutional advocacy as knowing dishonesty simply because State authorities disagreed with the views advanced.

Those errors matter beyond this case. If state bars may target a lawyer's license to practice because of the side he took on behalf of a client in a hotly debated matter, lawyers will be chilled from representing unpopular clients, testing unsettled constitutional questions, or urging government actors to act on disputed grievances. This Court should grant review and overturn the revocation of Eastman's bar license, reaffirming that while States may regulate genuine attorney misconduct, they may not use disciplinary authority to punish protected advocacy by relabeling it as professional misconduct.

STATEMENT OF THE CASE

California imposed professional discipline on Dr. John Eastman for speech and advocacy undertaken during his representation of President Donald J. Trump in connection with the 2020 presidential election. The challenged conduct included court filings, public commentary, internal brainstorming memoranda, and communications with the Vice President and his counsel.

The federal questions are all properly before this Court. The Hearing Department and Review Department considered and rejected Eastman's First Amendment objections. App.99a-106a, 231a-239a. The Review Department adopted 18 U.S.C. §371 as the federal-law predicate for Count One over Eastman's objections. App.96a. Eastman pressed his First Amendment and §371 objections in the Supreme Court of California, which denied review. App.1a-2a. The *Loney* objection goes to subject matter jurisdiction and thus cannot be waived (though Eastman did raise *Loney* before the Review Department, which nevertheless affirmed). See App.27a-41a.

In October 2021, a partisan advocacy group called States United Democracy Center filed a complaint with the State Bar of California against Eastman for statements and legal challenges he made during his representation of President Trump that it asserted were false. Neither the group nor any of its members had ever had an attorney-client relationship with Eastman or been adversaries in any of Eastman's litigation.

Another advocacy group, Lawyers Defending American Democracy, filed a similar complaint a few months later.

The California Bar then sent Eastman an extraordinarily broad demand letter in May 2022, requiring detailed information about every factual allegation, legal opinion, and assertion made in his court filings, in his public statements and writings, in his internal brainstorming memos, and in his conversations with the Vice President of the United States and his staff. Eastman responded extensively, providing what he believed fully answered the Bar's expressed concern that he lacked evidence or legal authority for his statements and legal positions. The Bar also sent a supplemental demand letter, to which Eastman also responded thoroughly.

On January 26, 2023, the Bar's Office of Chief Trial Counsel (OCTC) nevertheless filed a Notice of Disciplinary Charges against Eastman, alleging eleven counts of "moral turpitude," failure to uphold the law and the Constitution, and other misconduct.

The charges swept together very different kinds of speech and advocacy. Counts 3 and 6 targeted Eastman's December 23, 2020, and January 3, 2021, brainstorming memoranda concerning alleged dual slates of electors, the Electoral Count Act, and the Vice President's asserted authority during the January 6 certification. Counts 2 and 4 targeted federal court filings for which no court imposed sanctions or even issued an order to show cause: his motion to intervene in this Court on President Trump's behalf in *Texas v. Pennsylvania*, No. 220155,

which adopted Texas’s allegations concerning election irregularities; and his verified complaint in *Trump v. Kemp*, 511 F. Supp. 3d 1325 (N.D. Ga. 2021), which incorporated allegations from a Georgia election challenge. Counts 5, 7, and 9 concerned public statements: Eastman’s January 2 appearance on Steve Bannon’s podcast; his January 6 remarks at the Ellipse rally; and his January 18 article in *The American Mind*. Counts 1, 8, and 10 concerned his communications with Vice President Pence and Pence’s counsel, including his effort to persuade Pence to delay the electoral vote count based on his legal interpretation of vice-presidential authority.

Count 11, the most inflammatory charge, alleged that Eastman’s January 6 remarks at the Ellipse rally contributed to provoking the crowd to assault and breach the Capitol. The Hearing Department dismissed that count, and the Review Department affirmed dismissal with prejudice, concluding that the California Bar had not proved that Eastman’s statements contributed to the Capitol breach or that culpability could be established through OCTC’s broader conspiracy theory. App.78a-82a.

Mediation proved fruitless, and after discovery and depositions of expert witnesses, the case proceeded to trial. Originally scheduled for two weeks, the trial eventually extended to 34 days spread over 10 weeks.

The Hearing Department of the Bar Court on March 27, 2024, found Eastman “culpable” on ten of the eleven counts from the Notice of Disciplinary Charges and recommended disbarment. App.5a-6a.

Eastman appealed to the California Bar Court Review Department on May 31, 2024; OCTC filed a cross-appeal on June 10, 2024. The Review Department held oral argument on March 19, 2025, and on June 13, 2025, affirmed the recommendation of disbarment. App.3a.

The Review Department's First Amendment analysis was central to its disposition. App.99a-106a. While nominally acknowledging that Eastman's charged statements involved core political speech and that strict scrutiny was the applicable standard, the Review Department did not require the State Bar to justify punishment of particular statements under that standard. *Id.* Indeed, the Review Department stated only that, “[t]o the extent that the correct analytical standard is relevant, we believe the applicable standard is one of strict scrutiny,” while adding that, “[r]egardless, our focus remains on Eastman's false statements and whether or not they violate the rules and statutes governing attorney conduct.” App.102a n.92 (emphasis added). That formulation subordinated the constitutional standard to the disciplinary rule inquiry. The Review Department then assessed Eastman's speech under an objective reasonableness framework, declined to separate the challenged statements by count, forum, audience, or theory, and treated the charged speech as part of a broader course of conduct rather than asking which particular statements were factual, provably false, unprotected, and sanctionable. On that basis, the Review Department affirmed the ten counts of culpability and recommended disbarment.

OCTC petitioned the Supreme Court of California on September 8, 2025. Eastman filed his own petition with the Supreme Court of California on September 29, 2025. That court summarily denied Eastman's petition, thereby ratifying the disbarment, on April 15, 2026, but made no reference to OCTC's petition. App.1a-2a.

REASONS FOR GRANTING THE PETITION

The decision below is both dangerous and wrong. Dangerous because it embraces the use of the bar disciplinary process as a politicized weapon. And wrong because, in so doing, the tribunal below mangled (1) the First Amendment, (2) the interpretation of a federal criminal statute, and (3) jurisdictional boundaries stemming from Article III, each of which is addressed *infra*. This Court should grant review.

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S FIRST AMENDMENT JURISPRUDENCE.

The First Amendment forbids what California has done. This case is not about one attorney or one State's disciplinary judgment. It is about whether lawyers across the Nation may be ejected from their profession for taking the "wrong" side of a public controversy. If California's decision stands, then every lawyer who represents an unpopular client, presses a contested theory, or petitions government officials in a politically charged matter will practice under the shadow of professional ruin. The unmistakable message: advocate for the disfavored side, and a state bar may recast your arguments as dishonesty, fraud, or moral turpitude. That threat

imperils the independence of the bar and chills zealous representation in the cases where it is needed most.

Each State regulates its own bar, yet the constitutional protections governing attorney speech and petitioning are matters of national law. Under California's rule, no lawyer can know *ex ante* where protected advocacy ends and misconduct begins. Clarifying that constitutional boundary is essential to preserve a uniform national rule that lets attorneys engage in vigorous advocacy without fear that protected speech will later be recast as professional misconduct.

The decision below violated four settled First Amendment principles. First, attorneys do not surrender constitutional protection when they speak, advise, and advocate on matters of public concern. Second, States may regulate fraud, deceit, and genuine professional misconduct, but they may not evade First Amendment scrutiny by relabeling protected advocacy as factual misrepresentation. Third, when a State punishes core political and constitutional speech, strict scrutiny requires the State to identify the particular speech at issue, justify punishment of that speech with a compelling interest, and prove that the sanction imposed is narrowly tailored. Fourth, the right to petition protects efforts to urge government officials to investigate, deliberate, and act on disputed grievances, including when those efforts are made through counsel in a politically sensitive matter. Contrary to these established First Amendment norms, the decision treated advocacy concerning legal opinions as professional misconduct;

paid lip service to strict scrutiny being the standard while substituting a reasonableness-based discipline inquiry; and relabeled constitutional arguments as knowing misrepresentations without the statement-by-statement analysis the First Amendment requires.

This Court’s review is required to remove the threat the decision below poses not just to the First Amendment but to the ability of attorneys fiercely to advocate for their clients without fear of politicized disbarment.

A. Attorneys Do Not Surrender First Amendment Protection When They Engage in Core Political and Constitutional Advocacy.

The First Amendment stands as a bulwark against attempts to stifle the freedom of speech in whatever guise those may arise. Regulation of so-called professional attorney speech therefore triggers free-speech review. As this Court recently made clear, “professional speech” is not a “separate category of speech” subject to “diminished constitutional protection,” *Chiles v. Salazar*, 607 U.S. 627, 647 (2026) (quoting *Nat’l Inst. of Fam. & Life Advocs. v. Becerra*, 585 U.S. 755, 767 (2018) (*NIFLA*)); “[t]he Constitution does not protect the right of some to speak freely; it protects the right of all,” *id.* at 646. This Court reaffirmed that content-based restrictions on the speech of licensed professionals trigger strict scrutiny and expressly rejected the argument that a State may evade that standard by recasting speech as professional conduct. *Id.* at 645-48.

“The First Amendment is no word game,” the Court held. *Id.* at 645. “[T]he rights it protects cannot be renamed away or their protections nullified by ‘mere labels.’” *Id.* (quoting *NAACP v. Button*, 371 U.S. 415, 429 (1963)). “[W]hat matters is not how a government describes its law or whether the law may regulate conduct in other circumstances. What matters is whether, in fact, the law regulates speech in the case at hand.” *Id.* at 645.

Likewise, in *NIFLA*, 585 U.S. 755, this Court made clear that content-based restrictions on the speech of professionals are not governed by different standards than those governing content-based restrictions generally. This Court “has applied strict scrutiny to content-based laws that regulate the noncommercial speech of lawyers.” *Id.* at 771. Fundamentally, a “State may not, under the guise of prohibiting professional misconduct, ignore constitutional rights.” *Id.* at 769 (quoting *Button*, 371 U.S. at 439).

Attorneys are officers of the court and members of a regulated profession. They are not government-licensed mouthpieces for prevailing official views. When attorneys advise clients, challenge governmental authority, and advance constitutional arguments on matters of public concern, they engage in speech at the core of the First Amendment. A State may certainly punish fraud, deception, and genuine professional misconduct. But it may not avoid First Amendment scrutiny by recasting disputed constitutional advocacy as professional misconduct.

Chiles and *NIFLA* are but the most recent examples of this Court's close scrutiny of speech regulations of professionals that stretches back through *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991) (plurality opinion), to *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977), and *Button*, 371 U.S. 415.

In *Gentile*, this Court considered discipline imposed on a lawyer for public statements regarding a pending criminal prosecution. The Nevada Bar disciplined him under a rule prohibiting statements with a "substantial likelihood of materially prejudicing" a proceeding. 501 U.S. at 1033. This Court's analysis centered on the fundamental protection for Gentile's speech on political issues. Such "speech critical of the exercise of the State's power lies at the very center of the First Amendment." *Id.* at 1034 (citation omitted).

That same principle runs through this Court's legal advocacy cases. In *Button*, this Court addressed an attorney speech regulation, specifically, an ethical rule that prohibited "improper solicitation" in a manner defined to include the advocacy of nonprofit organizations. *Button*, 371 U.S. at 424-26. The Court observed that "abstract discussion is not the only species of communication which the Constitution protects; the First Amendment also protects vigorous advocacy, certainly of lawful ends, against governmental intrusion." *Id.* at 429. And where legal advocacy is a means of vindicating constitutional rights, "association for litigation may be the most effective form of political association." *Id.* at 431. Lawyers frequently participate in public life not merely as hired technicians, but as advocates who

translate constitutional claims into legal arguments. When the State burdens that function, fundamental principles at the heart of the First Amendment are implicated.

In fact, long before this Court's modern First Amendment cases, this Court recognized that the power to admit and discipline lawyers is not unlimited. "[T]he profession of an attorney is of great importance to an individual, and the prosperity of his whole life may depend on its exercise. The right to exercise it ought not to be lightly or capriciously taken from him." *Ex parte Burr*, 22 U.S. 529, 530 (1824) (opinion of Marshall, C.J.). In *Ex parte Secombe*, the Court explained that disciplinary authority "is not an arbitrary and despotic" power to be used with "passion, prejudice, or personal hostility," but must be exercised with "sound and just judicial discretion" so that "the rights and independence of the bar" are protected. 60 U.S. 9, 13 (1857).

That principle guided the Court in *Ex parte Garland*, which invalidated a federal loyalty-oath requirement imposed on attorneys after the Civil War. 71 U.S. 333, 374 (1867). An attorney's right to practice "is a right of which he can only be deprived by the judgment of the court, for moral or professional delinquency." *Id.* at 379.

The speech for which Eastman was disciplined included legal advice and advocacy concerning constitutional structure, the Electoral Count Act, the role of the Vice President, and the legal significance of competing electoral submissions. Count 1 treated that advocacy as part of a conspiracy to obstruct the

January 6 Joint Session; Count 3 punished the December 23 memorandum's statement that seven States had transmitted dual slates of electors; Count 6 punished the January 3 memorandum's discussion of alleged election illegality, dual slates, and the Vice President's authority; Count 8 punished Eastman's January 6 email to Vice President Pence's counsel urging a recess so State legislatures could investigate; and Count 10 punished the same memoranda and communications as a sustained effort to persuade the Vice President to delay counting electoral votes. Those questions were not ordinary commercial communications or ministerial professional conduct. They were legal and constitutional opinions at the center of a national political controversy. Whether Eastman's answers and advice were persuasive or unpersuasive, wise or unwise, California could not place them outside the First Amendment simply by labelling them as professional misconduct.

B. The Tribunal Acknowledged Strict Scrutiny but Failed to Conduct the Required Constitutional Analysis.

The Review Department correctly recognized that Eastman's discipline implicated core First Amendment interests. Contrary to the Hearing Department's invocation of lesser First Amendment protection for professional speech, the Review Department acknowledged that "strict scrutiny is the applicable standard when examining core political speech and that Eastman's charged statements involved core political speech," and it claimed to have "applied the strict scrutiny standard to the facts of this case." App.102a, 104a. That concession should

have controlled the analysis that followed. Once the tribunal recognized that the State was imposing professional discipline for speech on matters of public concern, this Court's precedents mandated that the burden shift to California to justify that punishment, as to each individual communication at issue, under the most demanding First Amendment standard. The Review Department failed to impose that burden.

Invoking strict scrutiny is not the same thing as applying it. Under strict scrutiny, the government bears the burden of proving that its restriction is "narrowly tailored to promote a compelling Government interest." *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 813, 816 (2000). Moreover, "the burden is on the Government to prove that the proposed alternatives will not be as effective[.]" *Ashcroft v. ACLU*, 542 U.S. 656, 665 (2004). The decision below did not require California to identify with precision the compelling interest served by punishing each statement at issue, prove that punishment was necessary to advance that interest, or explain why permanent disbarment was a narrowly tailored response. It instead treated the First Amendment as one interest to be balanced against the State's generalized disciplinary concerns.

The Review Department's own footnote confirms that strict scrutiny was not the actual standard applied by that body: "*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." App.102a

n.92 (emphasis added). But the correct constitutional standard is not relevant only “[t]o the extent” the tribunal chooses to consider it. Courts may not bypass First Amendment scrutiny by relabeling the inquiry or focusing on a regulatory objective divorced from the speech restriction itself. *Chiles*, 607 U.S. at 645. Once the tribunal acknowledged that Eastman’s charged statements involved core political speech, it could not set strict scrutiny aside and proceed directly to a disciplinary rule inquiry. The two modes of analysis are inherently different.

The First Amendment required the State to justify punishment of the particular speech at issue under the governing constitutional standard. The Review Department instead followed the kind of shortcut this Court rejected in *Chiles*: once protected speech is burdened, courts may not bypass First Amendment scrutiny by relabeling the inquiry or focusing on a regulatory objective divorced from the speech restriction itself. *Id.* “The First Amendment is no word game.” *Id.* Here too, the Review Department treated the constitutional inquiry as secondary, stating that its focus would remain on applying disciplinary rules rather than whether California *could* constitutionally impose discipline in the first place.

Strict scrutiny requires the State to prove that the challenged restriction advances interests of the highest order and is narrowly tailored to achieve those interests. *Fulton v. City of Philadelphia*, 593 U.S. 522, 541 (2021). Those requirements are not satisfied by asking whether a lawyer’s conduct was “objectively reasonable” considering professional

norms any more than the First Amendment would be satisfied by asking if a journalist's or protester's utterances were "objectively reasonable." Strict scrutiny asks whether the government has justified punishment of *specific* protected speech; objective reasonableness asks whether the speaker's conduct satisfies a negligence standard.

The Review Department's own formulation confirms the analytical error. Instead of asking whether California had satisfied strict scrutiny, the tribunal stated that "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." App.103a (citations omitted). A tribunal applying strict scrutiny does not describe its task as "balancing" speech rights against public protection and then assessing the attorney's conduct under an "objective, reasonableness standard." *See District of Columbia v. Heller*, 554 U.S. 570, 634-35 (2008) ("We would not apply an 'interest-balancing' approach to the prohibition of a peaceful neo-Nazi march through Skokie."). By substituting that deferential professional-discipline framework for strict scrutiny, the Review Department lowered the standard and shifted the practical burden from the State to the speaker: California did not have to justify punishment of protected speech; Eastman had to rebut negligence charges.

Under strict scrutiny analysis, "[t]he 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. Entm’t Merchs. Ass’n*, 564 U.S. 786, 799 (2011) (citing *Playboy*, 529 U.S. at 822-23). Had the Review Department applied strict scrutiny, it would have had to answer questions the decision never addresses: What specific compelling interest justified punishment of which specific speech? Why was discipline of that speech necessary? Why were ordinary adversarial mechanisms—judicial rejection of legal arguments, sanctions tied to particular misrepresentations, or discipline limited to any demonstrably false factual statements—inadequate? And why was disbarment, rather than a narrower sanction, not blatant overkill? The decision below contains no such analysis. It treated generalized concerns about public protection and the integrity of the profession as sufficient.

Rather than asking whether California had satisfied its First Amendment burden, the Review Department asked whether there was evidence “upon which a reasonable attorney would rely,” whether Eastman lacked a “reasonable factual or legal basis” for his statements, and whether his conduct was objectively “reasonable.” App.30a, 104a. But the First Amendment does not permit the government to punish speech that it deems “unreasonable.” Indeed, many of this Court’s landmark speech cases involved arguably “unreasonable” communications. *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988); *Snyder v. Phelps*, 562 U.S. 443 (2011); *Brandenburg v. Ohio*, 395 U.S. 444 (1969); *National Socialist Party v. Skokie*, 432 U.S. 43 (1977). The constitutional question is not whether the speech is reasonable, but

rather, first, whether the speech falls within an unprotected category and, if not, whether the government has satisfied strict scrutiny. The First Amendment has no exception for speech the government considers negligent or unreasonable.

Compounding the constitutional errors, the proceedings below failed to give the necessary attention to the individualized charges. The State Bar charged ten (originally eleven) counts, resting on different statements, contexts, audiences, and asserted rules of professional conduct. Strict scrutiny does not operate wholesale. Each count and each allegedly sanctionable statement must be examined separately to determine what speech was being punished, whether that speech was protected or unprotected, what compelling interest supposedly justified punishment of that particular speech, and why the sanction imposed was narrowly tailored to that specific interest. As this Court emphasized in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 916-17 (1982), “the presence of activity protected by the First Amendment imposes restraints on the grounds that may give rise to ... liability.” Thus, “[w]hen [the charged] conduct occurs in the context of constitutionally protected activity, ... ‘precision of regulation’ is demanded.” *Id.* at 916 (quoting *Button*, 371 U.S. at 438). Constitutional scrutiny must be specific enough to ensure that protected advocacy is not swept into punishment for unprotected misconduct.

In contrast, the Review Department explained that although the charged conduct arose in different settings and under different theories, it would “not

compartmentalize Eastman’s conduct into isolated events” when evaluating the evidence and intent. App.19a. Strict scrutiny does not permit a tribunal to aggregate multiple statements, across multiple forums, over multiple months, and then uphold punishment based on an overall assessment of the Gestalt. By expressly declining to compartmentalize (i.e., review individually) the charged statements, the Review Department replaced precision of regulation with Impressionism.

Strict scrutiny also required the Review Department to explain why the most severe professional sanction available was necessary and narrowly tailored to the speech at issue. California did not merely correct a filing, reject an argument, issue a warning, or impose a sanction confined to a particular proceeding. It ejected Eastman from the profession. A tribunal applying strict scrutiny cannot leap from professional concern to professional extinction without explaining why substantially narrower alternatives would not suffice.¹

¹ The disbarment was constitutionally excessive because it was not narrowly tailored to any constitutionally permissible disciplinary interest. Even when misconduct is established (unlike here), strict scrutiny does not permit the State to choose the profession’s ultimate penalty without first showing why lesser, targeted sanctions would not suffice.

C. The First Amendment Does Not Permit a State to Label Disputed Constitutional Advocacy as Knowing Misrepresentation.

California did not merely reject Eastman's constitutional arguments. It treated those arguments as evidence of intentional dishonesty. The First Amendment does not permit a State to convert disputed constitutional advocacy into professional misconduct merely because the State disagrees, even strongly, with the position advanced.

This Court has drawn a careful and well-trodden distinction between false statements of fact and statements of opinion. The First Amendment requires breathing space for erroneous or controversial advocacy, especially on matters of public moment. *Gertz*, 418 U.S. at 339-40. To ensure that public debate does not suffer, the First Amendment protects from liability any statement that “cannot reasonably be interpreted as stating actual facts[.]” *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 (1990) (citations omitted). For there to be liability, a statement must be “sufficiently factual to be susceptible of being proved true or false” based “on a core of objective evidence.” *Id.* at 21. Indeed, “a statement of opinion relating to matters of public concern which does not contain a provably false factual connotation will receive full constitutional protection.” *Id.* at 20.

The Review Department acknowledged in a footnote that Eastman raised this issue, but rejected it simply by contending that *some* of his statements “would not fall within such an exception.” App.101a n.91. That response is woefully inadequate. The

Review Department based Eastman’s punishment, not on a single, isolated factual assertion, but rather on his statements collectively, across multiple settings and legal theories. If the State seeks to punish speech on the theory that it consists of knowing misrepresentations, it must identify the particular statements that are factual, provably false, and unprotected, and *only punish based on those statements*. It cannot satisfy that burden by saying that *some* statements would not qualify as opinion and then allowing those statements to carry the rest along with them. Because Eastman’s punishment rests on *all* of the charged speech, *see* App.119a (“Based upon the totality of the evidence and guided by the cases discussed, the unique facts of this case lead to the conclusion that disbarment is appropriate and necessary”), the Review Department needed to show that *each* statement supporting discipline was a statement of fact rather than legal opinion, rhetorical characterization, or advocacy protected by the First Amendment. Its failure to conduct statement-by-statement analysis was reversible error.²

² Two examples illustrate the Review Department’s failure to sufficiently analyze each statement individually under strict scrutiny. First, the tribunal treated Eastman’s reference to “suitcases” of ballots “hidden” at State Farm Arena as a false factual assertion because it *implied* the ballots were fraudulent, when Eastman’s complaint expressly disclaimed any such claim. When Eastman argued that the gravamen of the allegation concerned ballots illegally being processed *outside the presence of poll watchers*, the Review Department brushed aside the argument as a “red herring.” App.40a. Second, in Count 5, the Review Department acknowledged that OCTC was “not technically accurate” in attributing Eastman’s phrase “massive

More fundamentally, many of Eastman’s statements cannot, by any characterization, be construed as falsifiable factual statements. Narrow tailoring must distinguish false statements of *fact* from contested *legal arguments and political advocacy*, as the latter may not constitutionally be punished, even when those arguments ultimately lose.³ Yet it is precisely those ideas for which Eastman was punished.

Glaring examples of this error are Counts 1, 3, 6, and 10 and the Review Department’s treatment of Eastman’s vice-presidential authority theory and dual-slate arguments—contested legal positions with

evidence” to “fraud,” because Eastman’s actual statement referred to “massive evidence that this election was at least conducted illegally.” App.89a-90a. Though the tribunal expressly acknowledged that Eastman *did not make the statement* OCTC attributed to him, it nevertheless upheld culpability based on what it believed listeners would infer.

³As one constitutional scholar who disagrees with Eastman on some of the electoral count issues explained,

given the textual gaps in the Twelfth Amendment, the notion that Eastman’s argument is so absurd that a lawyer should be disbarred for making it is itself so absurd that there is a better case for disbarring the lawyers bringing that charge than for disbarring Eastman. Lawyers make adventurous, and even dubious, arguments all the time—just as Congress enacts dubious statutes all the time[.]

Gary S. Lawson & Jack M. Beermann, *Congressional Meddling in Presidential Elections: Still Unconstitutional After All These Years; A Comment on Professor Sunstein*, 103 BOSTON UNIVERSITY LAW REVIEW 1189, 1196 n.37 (2023).

scholarly support⁴—as knowing misrepresentations of fact, a categorization that itself would have at least required resolving the underlying constitutional question Eastman was disciplined for supposedly getting wrong.

Eastman need not relitigate those arguments here; nor need this Court address their merit or lack thereof. The key point is that punishing an attorney for daring to make such arguments collapses the critical distinction between verifiable facts and contested legal arguments. “[E]ven when the utterance is false, the great principles of the Constitution which secure freedom of expression ... preclude attaching adverse consequences to any except the knowing or reckless falsehood.” *Garrison v. Louisiana*, 379 U.S. 64, 73 (1964). Legal advocacy on unsettled questions, especially those with scholarly support, cannot be retroactively deemed “knowingly false.”

The Review Department’s own opinion sharpens this contradiction. In the sanction section, it criticized Eastman for applying “little intellectual rigor” and accepting information that supported his conclusions rather than seeking out “true experts.” App.119a. But the Review Department’s *post hoc* disapproval of Dr.

⁴ For the scholarly sources Eastman relied upon, *see, e.g.*, Vasan Kesavan, *Is the Electoral Count Act Unconstitutional?*, 80 N.C. L. REV. 1653 (2002); Bruce Ackerman & David Fontana, *Thomas Jefferson Counts Himself Into the Presidency*, 90 VA. L. REV. 551 (2004); Nathan Colvin & Edward B. Foley, *The Twelfth Amendment: A Constitutional Ticking Time Bomb*, 64 U. MIAMI L. REV. 475 (2010); Edward B. Foley, *Preparing for A Disputed Presidential Election: An Exercise in Election Risk Assessment and Management*, 51 LOYOLA U. CHI. L.J. 309 (2019).

Eastman's constitutional arguments does not transform legal advice into moral turpitude just because it departs from a preferred set of "experts." 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." *Chiles*, 607 U.S. at 654. Indeed, a boundary that can be identified only in retrospect cannot guide the lawyer who must decide today what he may argue tomorrow.

This Court has never held that an attorney may be disciplined—let alone disbarred—for advancing a legal position that, if ultimately unsuccessful, was not frivolous at the time it was made. The legal system already has a framework for drawing the line the First Amendment requires. Rule 11 and its State equivalents, along with the general body of sanctions jurisprudence, exist precisely to distinguish frivolous arguments from non-frivolous losing arguments, which are an ordinary and necessary feature of adversarial advocacy. California's own ethical rules recognize that attorneys may—indeed must, if necessary, in furtherance of the duty to zealously represent their client—advance tenable factual and legal arguments on behalf of their clients even when those arguments are novel, controversial, or ultimately unsuccessful. CAL. R. PROF. CONDUCT 3.1; A.B.A. Code of Professional Responsibility, EC 7-1, DR 7-101(A)(1). That framework is calibrated to avoid chilling legitimate representation, particularly on novel or politically charged constitutional issues; the alternative would distort legal development by discouraging counsel from testing unsettled law or

challenging previously settled law. The vice-presidential authority question—whether the Vice President has any discretion under the Twelfth Amendment and the Electoral Count Act to resolve disputed slates—was and remains a contested legal issue. Treating advocacy as moral turpitude because the Review Department reached a negative assessment is wholly incompatible with the First Amendment. Adding to the chill, a standard applied only after the fact gives no lawyer notice, before he speaks, of where protected advocacy ends and sanctionable misconduct begins.

Historically, American lawyers have understood professional responsibility to require zealous presentation of the client’s lawful position, even when the position is unpopular. Peleg W. Chandler, a Boston lawyer and editor of the *Law Reporter*, wrote in 1843 that a lawyer was “bound fairly and fully to present to the court and jury whatever of law or fact there may be favorable to his client.” Michael S. Ariens, *The Lawyer’s Conscience: A History of American Lawyer Ethics* 60 (2023) (quoting Peleg W. Chandler, *Legal Morality*, MONTHLY LAW REPORTER 5, 12 (Apr. 1843)). That tradition is not limited to easy or popular cases. John Adams’s defense of the British soldiers charged in the Boston Massacre trials is well remembered: “it required no little independence, to appear in defence of the prisoners, when the popular sentiment was so highly adverse to his side of the case.” *Id.* at 17 (quoting William Sullivan, *An Address to the Members of the Bar of Suffolk, Mass. at Their Stated Meeting of the First Tuesday of March, 1824* (Boston: North American Review, 1825)).

This point is hardly novel: “The history of the legal profession is filled with accounts of lawyers who risked careers by asserting their independent status in opposition to popular and governmental attitudes[.]” *In re Griffiths*, 413 U.S. 717, 732-33 (1973) (Burger, C.J., dissenting). The lawyer’s duty to press a client’s position, especially against public or governmental hostility, is central to the independence of the bar. A State cannot square that tradition with a disciplinary regime that treats frowned-upon constitutional advocacy as proof of dishonesty.

The lawyers of the civil rights movement faced disbarment complaints for their willingness to defend their clients. Ariens, *supra*, at 187. This Court’s decision in *Button* “meant that some civil antidiscrimination lawsuits could be taken without fear of disbarment.” *Id.* If bar authorities may transform disputed constitutional advocacy into dishonesty whenever they disagree with the argument advanced, lawyers in high-stakes constitutional controversies will have powerful incentives to avoid novel, unpopular, or government-disfavored claims.

“[I]t is of prime importance that no constitutional freedom, least of all the guarantees of the Bill of Rights, be defeated by insubstantial findings of fact screening reality.” *Claiborne Hardware*, 458 U.S. at 924. The ability of any disciplinary panel to twist factual allegations in a complaint in order to render a finding of knowing misrepresentation opens the door to politicized enforcement. This case does not require this Court to decide whether any particular election-related assertion was meritorious. The issue is

antecedent: whether a State may impose career-ending discipline for a mixed body of legal advocacy, public commentary, and petitioning activity without first proving that the statements in question were unprotected, knowingly false statements of fact.

D. The Decision Below Threatens the Right to Petition and Constitutional Advocacy in Politically Sensitive Matters.

Requests made to government decision-makers are quintessentially the exercise of the right to petition. *See, e.g., McDonald v. Smith*, 472 U.S. 479, 482 (1985). The right to petition was designed so “that people ‘may communicate their will’ through direct petitions to the legislature and government officials.” *Id.* (quoting 1 Annals of Cong. 738 (1789)).

The Review Department’s effort to treat such importuning of government officials not as the exercise of the right to petition but as an exhibition of moral turpitude warranting disbarment is stunning in its ramifications. Any lawyer, whether on his own behalf or jointly on behalf of a client, who petitions a government decision-maker for redress of grievances arising out of disputed issues of fact and law could be disbarred if the Bar itself later disagreed with the attorney’s assertions of fact and law.

Indeed, courts elsewhere have held, in the civil context, that the “right to petition is so important to our system of government that the courts have shielded citizens from liability even when the position promoted was wrongful.” *Gibson v. City of Alexandria*, 855 F. Supp. 133, 135 (E.D. Va. 1994) (citation omitted); *Oregon Natural Resources Council v. Mohla*,

944 F.2d 531 (9th Cir. 1991) (wrongfully opposing commercial logging before regulatory body immune from suit); *In re IBP Confidential Business Docs. Litig.*, 755 F.2d 1300 (8th Cir. 1985) (allegedly libelous submission to congressional subcommittee protected); *Eaton v. Newport Bd. of Educ.*, 975 F.2d 292, 298 (6th Cir. 1992) (“A citizen’s right to petition is not limited to goals that are deemed worthy[.]”).

That problem is not abstract. Several of the counts rested directly on petitioning activity directed to government officials. Count 1 treated Eastman’s alleged agreement and efforts to persuade federal officials concerning the January 6 Joint Session as part of a conspiracy to obstruct a governmental function. Count 8 rested on Eastman’s January 6 email to counsel for the Vice President urging that the Joint Session be recessed so State legislatures could investigate asserted election illegality. Count 10 was parallel. Thus, the Bar did not merely discipline discrete private misstatements divorced from government petitioning. It punished the very act of urging legislators and the President of the Senate to investigate, deliberate, and act on disputed election-related grievances. That is petitioning activity at the core of the First Amendment, and the State could not transform it into moral turpitude without first applying exacting, count-specific constitutional scrutiny.

The Bar’s charges against Eastman, and the Review Department’s findings of culpability, thus implicate the right to petition the government for redress of grievances, one of “the most precious of the liberties safeguarded by the Bill of Rights.” *United*

Mine Workers of America, District 12 v. Illinois State Bar Association, 389 U.S. 217, 222 (1967). It is the right that “allows citizens to express their ... concerns to their government and their elected representatives.” *Borough of Duryea, Pa. v. Guarnieri*, 564 U.S. 379, 388 (2011). Indeed, “[t]he whole concept of representation depends upon the ability of the people to make their wishes known to their representatives.” *Eastern R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137 (1961). Treating the importuning of legislators to investigate and address illegality in the conduct of the election as though it were an offense warranting disbarment, as the Review Department did, strikes at the very heart of that precious constitutional right.

II. THE REVIEW DEPARTMENT’S INVOCATION OF SECTION 371 CONFIRMS THE DANGER OF USING EXPANSIVE LEGAL LABELS TO PUNISH PROTECTED ADVOCACY.

The Review Department’s interpretation of 18 U.S.C. §371 exacerbates the First Amendment problems and provides an additional basis for this Court’s intervention. The first charge against Eastman was a charge “of failing to support the Constitution and laws of the United States” under Cal. Bus. & Prof. Code, §6068, subd. (a). App.95a-96a. The sole predicate statute that the Review Department found Eastman to have violated was 18 U.S.C. §371, which makes it a felony “[i]f two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof[.]” *Id.* The Review Department’s First Amendment analysis rested on that §371 predicate,

invoking the principle that the First Amendment “does not protect speech that is employed as a tool in the commission of a crime.” App.104a. Thus, §371 supplied the federal-law predicate that allowed the tribunal to recast protected advocacy and petitioning as speech integral to criminal conduct.

Enacted in 1867, §371 was part of a broad amendment to the internal revenue laws, Act of March 2, 1867, ch. 169, §30 (14 Stat. 484), recodified at Rev. Stat. §5440 (1874). The only prosecutions brought under the “defraud” prong for the first four decades of the statute’s existence involved the common understanding of defraud, namely, schemes involving money, property, claims, or financial injury to the government. *See, e.g., United States v. Hirsch*, 100 U.S. 33, 35 (1879) (fraud mentioned in the statute “may be against the coin, or consist in cheating the government of its land or other property”).

In *Hammerschmidt v. United States*, 265 U.S. 182 (1924), the Court reinforced the limits to that statute. It reversed the convictions of the 13 defendants who had been convicted of

conspir[ing] to defraud the United States by impairing, obstructing, and defeating a lawful function of its government, to wit, that of registering for military service all male persons between the ages of twenty-one and thirty ... through the printing, publishing and circulating of handbills, dodgers, and other matter intended and designed to counsel, advise, and procure persons subject to the Selective Act to refuse to obey it.

Id. at 185. This Court held that “conspiracy to defraud the United States” cannot include “a mere open defiance of the governmental purpose to enforce a law by urging persons subject to it to disobey it.” *Id.* at 189. *Hammerschmidt* refused to let §371 reach handbills. But California has stretched §371 to reach a brainstorming memorandum. The charge that Eastman used “dishonest means” to impede government functions, therefore, even if it were true (it is not), fails to state a violation of §371.

Criminal laws are among the most powerful tools in the government’s arsenal, and this Court has accordingly emphasized the importance of interpreting laws in light of the First Amendment, refusing to read statutes in such a way as would cause them to reach common and constitutionally protected activity. *Noerr*, 365 U.S. at 138. As the Court explained, “The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms.” *Id.*

The fundamental problem lies with the “broader legal implications of the Government’s boundless interpretation[.]” *McDonnell v. United States*, 579 U.S. 550, 581 (2016); *Yates v. United States*, 574 U.S. 528 (2015). This Court has already corrected overexpansive interpretations of a criminal statute that threatened constitutional rights in conjunction with the events of January 6, 2021. *Fischer v. United States*, 603 U.S. 480 (2024). It rejected the government’s interpretation that “would criminalize a broad swath of prosaic conduct, exposing activists and lobbyists alike to decades in prison.” *Id.* at 496.

California improperly embraced a broadened construction of §371 sufficient to recategorize legal and constitutional advocacy as “dishonest means.” Broad labels like “fraud,” “defraud,” “professional misconduct,” and “conduct not speech” cannot substitute for First Amendment analysis. *See Chiles*, 607 U.S. at 645-47. This Court in *Hammerschmidt* refused to tolerate such a broad interpretation; certiorari is warranted here to reject California’s even broader interpretation.

III. THIS COURT’S DECISION IN *IN RE LONEY* DENIES THE CALIFORNIA BAR JURISDICTION INDEPENDENTLY TO INITIATE BAR DISCIPLINE FOR FEDERAL COURT LITIGATION.

Eastman’s disbarment was based in part on statements made in federal courts, despite the absence of any sanctions or even a show cause order from those courts. Absent a referral or imposition of sanctions by the federal court, that was improper as a matter of subject matter jurisdiction. The state bar’s breaching of that jurisdictional limit supplies an additional reason for this Court to grant review.

Congress has conferred exclusive jurisdiction over federal offenses on the federal courts. 18 U.S.C. §3231. In *In re Loney*, 134 U.S. 372 (1890), this Court addressed a State court criminal proceeding against a witness who testified in a federal proceeding involving a contested election for a member of Congress. “[T]he power of punishing a witness for testifying falsely in a judicial proceeding belongs peculiarly to the government in whose tribunals that proceeding is had,” the Court held. *Id.* at 375. State

tribunals have “no jurisdiction” over such matters. *Id.* at 376. This Court emphasized that it was “essential ... that witnesses should be able to testify freely before them, unrestrained by legislation of the State, or by fear of punishment in the state courts,” without fear of prosecutions that might be “instigated by local passion or prejudice.” *Id.* at 375 (see cases cited therein, e.g., *State v. Pike*, 15 N.H. 83, 86-87 (1844)).

Under *Loney*, the Bar’s finding of culpability on Counts 2 and 4, the federal court filings, represents *state* imposition of sanctions for litigation in *federal* court without either sanction or referral by the federal court. *In re Loney* bars a State from independently determining that advocacy in a federal proceeding was sanctionable misconduct where the federal tribunal itself has made no such finding or referral. See *Webster*, 704 S.W.3d at 484 (doubting that “collateral use” of a disciplinary rule, “as opposed to direct review by the court to whom the statements are made—is a proper way to scrutinize the contents of initial pleadings of any attorney.”).

The Review Department never grappled with *Loney*. It treated Counts 2 and 4 as ordinary state-discipline charges even though both rested on alleged falsity in *federal* court filings and even though the federal tribunals imposed no sanction, made no referral, and did not even issue any show-cause order.

Loney applies with even greater force where the alleged falsehood appears not in testimony by a lay witness (as in *Loney*), but in *advocacy* by counsel in a federal judicial proceeding. Federal courts possess their own tools to police filings before them, including

Rule 11, inherent authority, contempt, referral for discipline, and reciprocal-discipline mechanisms. When the federal tribunal itself neither sanctioned Eastman nor referred the matter for discipline, California's independent decision to impose culpability for those same federal filings intruded on the federal court's exclusive jurisdiction to control its own proceedings. Under *Loney*, that determination belongs in the first instance to the federal tribunal whose proceedings are at issue.

Loney held that such punishment belongs "peculiarly" to the government whose tribunal heard the proceeding because State punishment would chill participation in federal proceedings and interfere with the federal tribunal's administration of justice. 134 U.S. at 375. Counts 2 and 4 therefore rest on an unconstitutional assertion of State authority over federal court advocacy. That defect independently supports review.

IV. THE CONSTITUTIONAL ERRORS INFECTED THE DISBARMENT SANCTION.

The charges against Eastman, as explained above, fail from start to finish. Even one constitutionally defective charge warrants review and reversal. This is not a case where a constitutional error was only partial and could be excised; instead, the error pervaded the entire opinion below. The Review Department addressed the free speech argument comprehensively: "We now address Eastman's contention that *his statements in counts one through ten*, found as misconduct by the hearing judge and affirmed by us, *are protected expressions of*

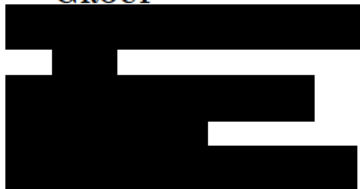
his rights under the First Amendment[.]” App.99a (emphasis added). The discipline was imposed based on the “totality of the evidence” across all ten counts, App.119a, and any constitutional infirmity therefore taints the overall sanction.

This Court does not simply defer to a lower tribunal’s characterization of speech or speculate whether the same sanction might have been imposed on different grounds. Rather, it conducts an “independent examination of the whole record” to ensure that judgment does not rest on protected expression. *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 499 (1984) (citations omitted). And where protected activity is intertwined with allegedly unlawful conduct, “precision of regulation” is required so that liability is not imposed for protected advocacy. *Claiborne Hardware*, 458 U.S. at 916-17. That principle resolves this case. The Review Department recommended disbarment based on ten affirmed counts. If even one of those counts is constitutionally infirm, then the sanction was necessarily impermissible.

CONCLUSION

This Court should grant certiorari.

Respectfully submitted,

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