No. 21-

IN THE

Supreme Court of the United States

VICTOR R. MARSHALL,

Petitioner,

v.

SUPREME COURT OF THE STATE OF NEW MEXICO,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of New Mexico

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Does the First Amendment permit a state to suspend a lawyer from practice indefinitely because it found statements in a motion, in which the lawyer sought to recuse a judge in a pending case, were frivolous and impugned the judge's integrity, when there was no showing that the statements were knowingly false or made in bad faith, or that any person, including the judge, was injured by those statements?

Does the First Amendment permit a state that has suspended a lawyer from practice to forbid that lawyer from assisting his former clients in obtaining replacement counsel in complex lawsuits, but instead, with no allegations of harm to clients, limit him to informing his clients of the state's lawyer referral service?

PARTIES TO THE PROCEEDING BELOW

The petitioner is Victor R. Marshall who was the lawyer for more than twenty organizations whose members cooperate regarding the maintenance of irrigation systems that bring water for their use in their homes, farms, and business. He represented them in a lawsuit in the state courts of New Mexico, in which the opposing parties were the Navajo Nation, the State of New Mexico, and the United States. The now retired trial judge in that case, whose potential recusal was at issue, is James Wechsler. The members of the Disciplinary Board of the Supreme Court of the State of New Mexico who recommended that petitioner be suspended from the practice of law are attorney David C. Kramer, citizen Irene Mirabal-Counts, and attorney Vickie Wilcox. The respondent in this Court is the Supreme Court of the State of New Mexico, whose members at the time that the order of discipline at issue here was imposed were Michael E. Vigil, C. Shannon Bacon, David K. Thomson, Julie J. Vargas, and Briana H. Zamora.

STATEMENT OF RELATED PROCEEDINGS

Supreme Court of the State of New Mexico

In the Matter of Victor R. Marshall, An Attorney Licensed to Practice Law Before the Courts of the State of New Mexico, NO. S-1-SC-37698. January 13, 2022.

Court of Appeals of New Mexico

State ex rel. State Engineer v. United States, 2018-NMCA-053, 425 P.3d 723. April 3, 2018.

Eleventh Judicial District Court of New Mexico

State ex rel. State Engineer v. United States, No. 1116-CV-197500184, Claims of the Navajo Nation, No. AB-07-1, Order Granting the Settlement Motion. August 16, 2013.

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The Supreme Court of the State of New Mexico did not issue an opinion in this case. Its Order of January 13, 2022, Pet. App. 1a, affirmed certain findings and included the following statement: "IT IS FURTHER ORDERED that a formal opinion will follow." Pet. App. 2a. No opinion has issued in the almost ninety days since that Order.

The findings and recommendations of the hearing panel of the Disciplinary Board of the Supreme Court of the State of New Mexico and the findings and recommendations of the Board itself are not reported; they can be found at Pet. App 4a, and Pet. App. 12a, respectively.

STATEMENT OF JURISDICTION

The final order indefinitely suspending petitioner from the practice of law was entered on January 13, 2022. Petitioner filed a Motion for Reconsideration and Rehearing on January 28, 2022, Pet. App. 51a, but no action has been taken on that motion. This Court has jurisdiction pursuant to 28 U.S.C. § 1257.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the United States Constitution provides in relevant part that "Congress shall make no law . . . abridging the freedom of speech."

The Fourteenth Amendment to the United States Constitution provides in relevant part "nor shall any State deprive any person of life, liberty, or property, without due process of law."

The relevant portion of the New Mexico Rules Governing Discipline, Rule 17-212(A), is set forth in the appendix this petition. Pet. App. 115a. The portion relevant to the second question presented in this petition is as follows:

"An attorney who has resigned, been disbarred or suspended from the practice of law, or who has signed a conditional agreement providing for the attorney's resignation, suspension or disbarment, may not recommend to the attorney's clients any other lawyer to represent them but shall inform the client that the client may contact the State Bar of New Mexico for one of its lawyer referral programs."

INTRODUCTION

In this case, petitioner found himself in a bind when he learned, based on reasonably credible evidence, that a state court judge who had ruled against his clients in the trial court, had been employed by a non-profit law firm when it advised one of petitioner's adversaries about how best to obtain water rights from the watershed which was the focus of the case. If his information were correct (as it eventually turned out to be), and if his legal arguments about the need for recusal were sustained, petitioner believed that his clients could obtain reversal of the adverse decision against them. Petitioner's problem was complicated by the fact that the case was on appeal, and he had no immediate procedural mechanism by which to find out whether his factual premises were correct. Therefore, he did the only thing that he could do: file an emergency motion and brief in the appeals court asking it to rule that the trial judge should have recused himself, with an alternative request that it provide discovery to the extent necessary to decide the motion. Pet. App. 88a. It is that filing that formed the basis of the order indefinitely suspending petitioner from practicing law.

When petitioner's adversaries disputed his factual allegations (using only averments of counsel), the appeals court did not engage in its own fact-finding, or remand the case to the district court for fact-finding. Instead, it concluded that the emergency motion was factually frivolous and directed the Clerk of the Court to forward the order

to "the Disciplinary Board of the New Mexico Supreme Court for any action it sees fit." Pet. App. 50a. The appeals court did not find that the judge named in the motion, or any other person, took offense at petitioner's statements or suffered any injury. Both the initial hearing committee and later the board ruled against petitioner, with both recommending that his law license be suspended indefinitely, even though he had an unblemished record in more than forty years as a member of the New Mexico bar. What is most troubling is that the New Mexico Supreme Court orally ordered petitioner indefinitely suspended on the day it heard argument and issued its written order without opinion the following day. Although it promised that "an opinion will follow," there still is none almost ninety days later.

On January 28, 2002, fifteen days after the suspension order was issued, petitioner filed a motion for rehearing with the New Mexico Supreme Court. First, it pointed out the serious First Amendment issues with imposing any discipline against him on the facts of this case and citing two decisions from this Court, discussed below, in which it overturned attorney discipline in situations analogous to this. Pet. App. 52a-54a. That motion also sought relief from the aspect of the suspension order that forbade him talking to his clients and helping them obtain new counsel in the pending water rights case and other complex litigations. Pet. App. 54a-55a. Once again, there

has been no response from the New Mexico Supreme Court. In the face of this silence, and because petitioner is indefinitely suspended from practicing law—petitioner's livelihood—he had little choice but to file this petition

STATEMENT OF THE CASE

Petitioner was the sole counsel for more than twenty parties engaged in very significant and contentious litigation in the New Mexico state courts over rights to water that their members use in their homes, farms, and businesses. On the other side were the State of New Mexico, the United States, and the Navajo Nation. During the litigation, Judge James Wechsler, who was then a sitting judge on the New Mexico Court of Appeals, was designated to handle the trial in the case. In 2013, Judge Wechsler had granted summary judgment against petitioner's clients. When petitioner filed the motion that gave rise to his suspension, the appeal had been fully briefed, and the appeals court could have decided the case at any time.

In January 2018 petitioner first heard rumors that Judge Wechsler had been employed in the 1970s by the DNA Law Firm when it had represented the Navajo Nation and its members. Petitioner diligently sought to learn the relevant facts regarding the Judge's prior employment and whether it formed a basis on which the Judge should have informed the parties of his prior representation and recused himself. Petitioner

concluded that counsel for the adversary Navajo Nation would not assist him in learning the facts, and because the case was on appeal and no longer before Judge Wechsler, petitioner could not simply file a suggestion of a possible basis for recusal and ask the Judge to disclose the relevant facts. With no ready means of gathering more factual information from the Judge or the Navajo Nation, petitioner filed an emergency motion and brief with the Court of Appeals on February 26, 2018, "reluctantly" (Pet. App. 85a), asking that court to set aside the Judge's grant of summary judgment against his clients on the ground that the Judge had failed to disclose his prior employment and that, under those circumstances, the Judge was required to recuse himself. Both the emergency motion and brief were firm in their legal positions, while fully respectful of Judge Wechsler and the work he had done on behalf of the Navajo Nation and its members. *See* Pet. App. 75a, 88a, 89a, & 91a.

Because petitioner was concerned that the appeals court might act any day on the merits of his appeal, he needed to act promptly. In the time available, he was able to ascertain certain facts that would, in the eyes of most lawyers, raise a question of whether Judge Wechsler's participation in this case of enormous significance to the Navajo Nation created an appearance of impropriety within the prohibition of Rule 21-211 NMRA governing recusals, which is very similar to the standard for federal judges under 28 U.S.C. § 455. The three most significant are:

> The Judge was employed by DNA beginning in 1971 when DNA represented the Navajo Nation and many of its members.
> The Judge represented members of the Nation in several very significant cases in which their membership in the Nation was of substantial relevance to their cases.
>
> The Judge lived on a portion of the Nation's reservation with his family, enabling him to learn about the Nation and its needs in ways that would be very different from what other attorneys would obtain. Pet. App. 79a.

Based on those facts, petitioner believed that he had no real choice but to fulfill his ethical duties to his clients by seeking the recusal of Judge Wechsler who had ruled against his clients and in favor of the Navajo Nation. Filing a recusal motion is an act that no lawyer likes, yet the finest traditions of the legal profession compelled petitioner to file it. Petitioner's reluctance was magnified by the fact that Judge Wechsler was, until six months before the recusal motion was made, a member of the very Court of Appeals to which petitioner was making the motion, and that Court had specially assigned the Judge preside in the trial court over the underlying water rights litigation.[1]

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[1] In the brief in support of the recusal motion, petitioner recognized that his motion would not be popular and quoted the federal judge who observed that a lawyer who sought to recuse a judge ran a serious risk of losing his license to practice law. Pet. App. 109a.

Not surprisingly, the Navajo Nation opposed the motion and argued that DNA and the Nation were legally separate. On April 3, 2018, the Court of Appeals denied the emergency motion to recuse (along with several other requests that petitioner had made on behalf of his clients), and it ordered the Clerk of Court to send a copy of the order to the Disciplinary Board of the Supreme Court of the State of New Mexico, which began the proceeding that led to this petition. Pet. App. 49a-50a.[2]

The charges against petitioner were heard by a committee of two lawyers and one lay person, and its findings were upheld by the Board and then the New Mexico Supreme Court. Each of those decisions appears to be based on the committee's belief that petitioner's recusal motion was ill-founded and even frivolous, because the factual basis for it was lacking, although they did not recognize the dilemma in which petitioner found himself or suggested what else he should have done to protect the interests of his client.

The error of the Board in this case, in which petitioner has lost his law license for exercising his First Amendment right to represent his clients, is clear from its statement of why petitioner was being disciplined: Pet App. 7a, italics in original, bold added.

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[2] Six weeks later the Court of Appeals affirmed Judge Wechsler's summary judgment ruling against petitioner's clients. None of the rulings in the underlying litigation is a subject of this petition.

> There is **no clear or convincing evidence** that DNA was acting as the "law firm for" the Navajo Nation – the various memos, newsletters, or articles unearthed by [petitioner] do not **unequivocally evidence** that DNA *actually represented* the Navajo Nation in any case including the water rights litigation.

Second, and most significant, neither the Committee nor the Board made a factual finding that petitioner acted in bad faith, and no one has even suggested that there is any basis on which such a finding could be sustained. To be sure, the committee's conclusion of law number 9 did state that petitioner "had no good faith basis for making the allegations against Judge Wechsler, whether determined under an objectively reasonable standard or a subjective standard." Pet. App. 29a-30a. Read in context, that statement is a re-affirmation of the conclusions of the committee, the Board, and the Court of Appeals that they believed that petitioner did not have a sufficient basis to file the recusal motion and that he surely should have stopped when the adverse parties said he was wrong. However, neither the committee nor the Board identified any evidence that his factual assertions were without a reasonable basis when he made them, as opposed to inadequate to support his motion.

Both the committee (Pet. App. 22a) and the Board (Pet. App. 7a) also based their disciplinary recommendations on this statement made in the

conclusion of petitioner's lengthy legal brief supporting his recusal motion:

> Under these surprising circumstances, given the facts that have now emerged –which the judge and the Navajo Nation did not disclose – the public might wonder whether the judge fixed this case for his former client. Pet. App. 113a-114a.

However infelicitous that statement may have been, and seen in light of all that came before it, including the many ways in which petitioner made clear that he was not criticizing the judge for his work at the DNA law firm, Pet. App. 75a, 88a, & 91a, it was the kind of assertion entitled to First Amendment protection and surely not a proper basis for a lawyer who was trying to protect his clients to lose his law license for making.

Nonetheless, on the basis of its factual findings, the committee recommended that petitioner be found to have violated three specified Rules and that he be suspended indefinitely. The full Board affirmed on the recommendation of violations and the proposed suspension, even though state Bar's Disciplinary Counsel had asked for only a public censure. Pet. App. 9a.

The New Mexico Supreme Court is the authority under New Mexico law that may impose discipline against lawyers. Petitioner's discipline appeal was fully briefed by the summer of 2020. Despite the cloud hanging over petitioner's law license, the Court did not schedule argument for a year and a half after briefing was completed. The

day after the argument, the Court issued the written order of indefinite suspension at issue in this petition, with its as-yet-unfulfilled promise to issue an opinion thereafter. [3]

Petitioner then filed a motion for reconsideration in the New Mexico Supreme Court in which he amplified the First Amendment objection to the discipline that he had raised in the reply brief below. In that motion, he relied on two decisions from this Court, *Gentile v. State Bar of Nevada,* 501 U.S. 1030 (1991), and *In re Sawyer,* 360 U.S. 622 (1959), in which this Court overturned on First Amendment grounds discipline imposed against lawyers in circumstances that strongly suggest constitutional infirmities with the order of indefinite suspension against petitioner. Pet. App. 52a-54a. That submission provided respondent the opportunity required to defend against this constitutional challenge and meets the requirements of Rule 14.1(g)(i) of this Court. As of the date of this petition, the New Mexico Supreme Court has not responded to that motion, let alone issued an opinion on petitioner's First Amendment defense.

Petitioner's motion also contained another First Amendment challenge. Pet. App. 54a-55a.

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[3] In September 2020, petitioner's counsel of record in this Court, who did not represent petitioner below, sought permission to file a brief amicus curiae in support of petitioner, in which, among other arguments, he pointed out the serious First Amendment issues that the proposed discipline presented. The New Mexico Supreme Court denied that motion without explanation.

New Mexico's Code of Professional Conduct contains a provision, Rule 17-212(A) NMRA, that petitioner believes is unique and that sharply limits the assistance that a suspended lawyer may give to the clients that the lawyer is no longer permitted to represent.

> An attorney who has resigned, been disbarred or suspended from the practice of law . . . may not recommend to the attorney's clients any other lawyer to represent them but shall inform the client that the client may contact the State Bar of New Mexico for one of its lawyer referral programs.

This restriction, which primarily injures petitioner's clients, is a prior restraint on petitioner in direct violation of the First Amendment because it applies regardless of what advice petitioner would provide and without regard for the needs of his clients, especially those who are involved in complex and expensive water rights litigation of the kind that most lawyers never do and for which a lawyer referral program is wholly unsuited. To date, the New Mexico Supreme Court has not responded to this part of petitioner's motion either.

REASONS FOR GRANTING THE WRIT

This case involves two violations of the First Amendment, which are compounded by the refusal of respondent Supreme Court of New Mexico to explain the basis for imposing an indefinite suspension of petitioner's license to practice law,

how its suspension is consistent with the First Amendment, or what basis that Court has for denying petitioner's clients petitioner's help in securing new counsel in representing them in complex water rights litigation or how that gag order is consistent with the First Amendment.

The Indefinite Suspension from Practice

Petitioner's suspension was based on an emergency motion he filed in a state appellate court seeking recusal of the trial judge who had ruled against his clients. His offending motion relied on petitioner's reasonable belief, based on a limited investigation in the time available to him, that the Judge had worked for a law firm that had represented the Navajo Nation in whose favor that Judge had ruled. The principal basis on which he was disciplined was that the motion lacked a factual basis, although none of the rulings below explained what petitioner should have done to protect the interests of his clients besides file that motion. Even if petitioner's conduct was properly found to violate New Mexico's attorney disciplinary rules, the First Amendment further restricts the State's ability to suspend his license, and none of the rulings below is consistent with the First Amendment for several reasons.

The committee that heard petitioner's case did not state that petitioner violated the lawyers' disciplinary rules simply for filing his motion, although the tenor of their opinion seems to suggest that the panel members held that view.

Rather, they objected to his having filed the motion when he had, what they in hindsight concluded, were insufficient facts and in continuing to seek recusal when the committee and the Court of Appeals before it believed that he should have conceded defeat when he was denied further discovery. Hence, in their view, he filed a frivolous motion and thereby violated Rule 16-301 NMRA. The committee also criticized the way that the brief characterized his references to the conduct of Judge Wechsler, as evidenced by their finding that the Judge's integrity had been impugned (Rule 16-802, and by engaging in conduct prejudicial to the administration of justice (Rule 16-804(D)). Pet App. 32a. However, in making those conclusions, it failed to adhere to the warnings of this Court in a product disparagement case in which it ruled that the First Amendment does not allow a state to punish a speaker when its principal objection is the manner in which the speaker phrased the offending statements:

> The choice of such language, though reflecting a misconception, does not place the speech beyond the outer limits of the First Amendment's broad protective umbrella. Under the District Court's analysis, any individual using a malapropism might be liable, simply because an intelligent speaker would have to know that the term was inaccurate

> in context, even though he did not realize his folly at the time.

Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 513 (1984). This Court continued by observing that the offending statement "represents the sort of inaccuracy that is commonplace in the forum of robust debate to which the New York Times [v. Sullivan] rule applies," and that the difference between how the defendant described the plaintiff's product and the way that the lower court found acceptable, "fits easily within the breathing space that gives life to the First Amendment." *Id.*

As *Consumers Union* shows, the First Amendment does not permit a state to impose civil liability, much less suspend a lawyer's license indefinitely, based on its preference for how a motion that seeks to protect the interest of the lawyer's clients was phrased. Most significantly, there is no finding that petitioner's motion was not made in the good faith belief that the facts which he had already learned, as well as those he reasonably expected he would learn if he were given further discovery, would not support the legal premises of his recusal motion. Indeed, even New Mexico Rule 16-301, which prohibits the filing of frivolous pleadings, requires only that a lawyer have "a basis in fact and law" for taking a position and Comment 2 to the Rule states a filing "is not frivolous merely because the facts have not yet been fully substantiated or because the lawyer expects to develop vital evidence only by discovery." None of the rulings below explained how even that

standard was met or on what basis the State could support a finding of bad faith or even reckless disregard for the truth that the First Amendment requires in the defamation context for public officials. *New York Times v. Sullivan,* 376 U.S. 254, 280 (1964).

Two decisions of this Court that closely resemble this case demonstrate that the First Amendment applies fully to attorney disciplinary proceedings. In *Gentile v. State Bar of Nevada,* 501 U.S. 1030 (1991), a lawyer held a press conference the day his client was indicted, where he argued that the real defendants should have been the police (whom Gentile called "crooked cops") and not his client. Based on that statement, the Nevada Supreme Court found that the lawyer violated Nevada's rule that forbids a lawyer from making a public communication " if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding." *Id.* at 1033. This Court reversed because, in the words of Justice Anthony Kennedy for the plurality, "Petitioner spoke at a time and in a manner that neither in law nor in fact created any threat of real prejudice to his client's right to a fair trial or to the State's interest in the enforcement of its criminal laws." *Id.* It further described his statement as "classic political speech" which was "critical of the government and its officials." *Id.* at 1034.

As in *Gentile,* there was no possible interference with the administration of justice here from petitioner's filing of the recusal motion that is

plainly entitled to at least as much if not more protection that statements made at a press conference. That motion asked a court to make a legal ruling – setting aside Judge Wechsler's decision against petitioner's clients because the Judge should have, but did not, recuse himself from the case. That motion was surely within the power of the Court of Appeals to grant if it found a factual basis for doing so. Nor could the filing of the motion be sufficiently without factual basis to warrant the extreme punishment of indefinite suspension of his law license, given the lack of means to obtain additional discovery, the importance of the case to his clients, and the ability of his opponents (and Judge Wechsler) to defend their positions in court, as they did. Not only does the contrary ruling violate petitioner's First Amendment right to speak, as in *Gentile,* but it also denies his clients meaningful access to the Courts under First Amendment freedom of association cases like *NAACP v. Button,* 371 U.S. 415 (1963). Based on the three facts that petitioner had established before he filed the motion, he surely had a good faith factual basis for taking the next step, yet that is essentially what the State ruled he could not do and keep his law license.[4]

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[4] Petitioner's belief that Judge Wechsler's law firm did water rights work for the Navajo Nation proved to be correct. After the Court of Appeals denied petitioner's motion and referred the matter to the Disciplinary Board, petitioner raised the issue of Judge Wechsler's prior employment and his work for the Navajo Nation in a different water rights case before Judge Wechsler. Unlike the Court of Appeals and the Disciplinary Board, the Judge granted petitioner's discovery

The First Amendment issues when discipline is imposed against a lawyer for making critical comments about a judge were fully aired in *Standing Committee on Discipline of U.S. Dist. Court for Cent. Dist. of California v. Yagman*, 55 F.3d 1430 (9th Cir. 1995). The lawyer's statements in *Yagman* were personal – the judge is antisemitic – and not made in a motion to the court, as were petitioner's here. Nonetheless, in setting aside the suspension from federal court practice (far less serious than losing a license to practice at all), the Ninth Circuit adopted a much more speech-favorable attitude than the New Mexico attorney disciplinary bodies and the State Supreme Court did here. *See also In re Snyder,* 472 U.S. 634 (1985) (setting aside federal court suspension of attorney for criticisms of judges and the court system found to be disrespectful, without reaching First Amendment defense).

The other lawyer discipline case cited by petitioner on rehearing is *In re Sawyer,* 360 U.S. 622 (1959). In that case, a lawyer was subjected to a one-year suspension from practice based on a

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request, and the Nation produced a 62-page legal memorandum written by attorneys with the DNA Law Firm during the time that Judge Wechsler was employed there. The New Mexico Supreme Court denied petitioner's motion to add the memorandum to the record. Surely, Judge Wechsler would not have granted that discovery if he thought that the request was frivolous or made in bad faith, or had he concluded, as the Hearing Committee believed, that petitioner "had clearly and publicly impugned the integrity" of the Judge. Pet. App. 6a.

critical speech he gave about a pending criminal trial in which he was one of the defense counsel. The basis of the order was that the lawyer's "speech reflected adversely upon [the trial judge's] impartiality and fairness in the conduct of the Smith Act trial and impugned his judicial integrity." *Id.* at 624-25. The trial occurred in Hawaii in a territorial court before it was a state. As a result, this Court had greater supervisory authority over proceedings involving attorney discipline than it does in this case, and for that reason it was able to set aside the suspension without reaching the constitutional questions, although the First Amendment aura overhangs the decision. The hearing committee in *Sawyer* had found that the lawyer has said that "there were 'horrible' and 'shocking' things going on at the trial, [and] that a fair trial was impossible," *id.* at 633, but the Court examined those statements in the context in which they arose, precisely what the Board and its committee did not do here. As the plurality observed later in its opinion, the "public attribution of honest error to the judiciary" – which is in essence the basis of petitioner's disagreement with Judge Wechsler – "is no cause for professional discipline in this country." *Id.* at 635. Petitioner's case is even stronger than Sawyer's because his offending statements were in a motion to a court which had the power to grant him his remedy, where opposing parties could be heard, and where there was no possibility of improper jury influence because the case was on an appeal from a grant of summary judgment.

If the suspension order against petitioner is upheld, he will be the direct loser, but many more citizens of New Mexico will feel the reverberations from this case. Lawyers will surely take note, not just of the suspension order, but the refusal of the New Mexico Supreme Court to come to grips with the First Amendment issues and not even write an opinion that defends its order. Thus, in the future, when lawyers must weigh making a motion that can be characterized as criticizing a judge, but which may provide an important protection for their clients, they will have to think long and hard about whether to support their clients or not take actions that may place their law licenses in jeopardy. Hopefully, they will follow the course that petitioner chose, but if the decision below stands, many lawyers will not, and in that case, the real losers will be their clients.

The Ban on Communicating Important Information to Clients

After the New Mexico Supreme Court entered its suspension order, petitioner began to take steps to protect the interests of his clients whom he had represented in complicated water rights litigation for many years. He soon learned that the Bar's Disciplinary Counsel intended to enforce the portion of Rule 17-212(A), which bans a suspended lawyer from communicating with existing clients in order to help them obtain new lawyers, except by telling them to seek assistance from the Bar's lawyer referral programs. His motion for rehearing and his accompanying affidavit explaining why he had made the motion

asked respondent to relieve him of that restriction because it would be difficult if not impossible for his clients to find adequate legal representation on their own or through the Bar's lawyer referral services. Pet. App. 57a. The effect of that prohibition is that the State is depriving petitioner's clients of truthful information for which they have real needs, and that deprivation is forbidden by the First Amendment. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748 (1976). Once again, there has been only silence from the New Mexico Supreme Court.

It is hard to imagine a clearer case of a prior restraint. Petitioner is forbidden from speaking to his clients except to tell them what the State has decided he may tell them. There was, of course, no finding that petitioner had circumvented the order suspending him from practice or that he was otherwise providing his clients erroneous or misleading information. If he offered his clients even the name of another lawyer, or he told them the skills or background that another lawyer should have, he would be in violation of the prohibition. His suspension order required him to abide by the applicable rules governing suspended attorneys, and, under subsection F of Rule 17-212, he could be held in contempt of court for communicating with his clients, not to mention creating a further reason for the State not to reinstate him once he had fulfilled the conditions in the suspension order.

The First Amendment does not tolerate prior restraints such as this. *New York Times v. United States,* 403 U.S. 713 (1971). The harms from this prior restraint will be felt by petitioner's clients, not petitioner himself, as he will derive no benefit from carrying out what he understands to be his duty to help his former clients when he has been prohibited from continuing as their lawyer. Moreover, there is no nexus between the prohibition on helping petitioner's former clients obtain new counsel, and the findings of violations that the Supreme Court sustained. This Court has long held that the recipient of a would-be communication has First Amendment rights to receive it, even when the speaker has no independent right to deliver it. *Kleindienst v. Mandel,* 408 U.S. 753 (1972). And when as a practical matter, as is the case here, the recipients cannot assert those rights, a third party may do so. *Singleton v. Wulff,* 428 U.S. 106 (1976); *Pierce v. Society of Sisters,* 268 U.S. 510 (1925).

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It is clear that the state courts in New Mexico do not take kindly to lawyers who call into question whether one of their judges should have disclosed his prior relations as counsel with a party appearing before him and recused himself from sitting in that case. Nor does the respondent Supreme Court of New Mexico apparently believe that it is necessary to explain the basis on which it has concluded that petitioner has violated its rules of professional conduct or to justify its decisions in the face of these First Amendment challenges.

States may enact and enforce rules that assure that lawyers properly conduct their professional activities, but they must do so in a manner consistent with the First Amendment. Because respondent has not met that standard, this Court should grant review and overturn the order suspending petitioner from the practice of law in New Mexico.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted. Because respondent has failed to provide any justification for its order that is clearly in violation of the First Amendment, the Court should consider granting the writ and summarily reversing the order suspending petitioner from practicing law.

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