[ORAL ARGUMENT NOT YET SCHEDULED]

No. 12-5038

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

EARLE A. PARTINGTON,

Appellant,

v.

JAMES W. HOUCK, *et al.,*

Appellees.

APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
(NO. 1:10-CV-1962 (FJS))

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION OF HAWAII FOUNDATION AND THE AMERICAN CIVIL LIBERTIES UNION OF THE NATION'S CAPITAL, AS *AMICI CURIAE* IN SUPPORT OF APPELLANT

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), *Amici Curiae* American Civil Liberties Union of Hawaii Foundation and American Civil Liberties Union of the Nation's Capital certify that:

(A) Parties and Amici

Except for Defendant-Appellee Robert B. Blazewick, Captain, JAG, USN, all parties, intervenors, and *amici* appearing before the district court and in this court are listed in the Brief for Appellant. *Amici* are not aware of any other *amici* seeking to appear in this Court.

(B) Rulings Under Review

References to the rulings at issue appear in the Brief of Appellant.

(C) Related Cases

Amici are not aware of any related cases in this Court or any other court.

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CORPORATE DISCLOSURE STATEMENT

The American Civil Liberties Union of Hawaii Foundation is a non-profit, non-stock corporation organized under the laws of the state of Hawaii. The American Civil Liberties Union of the Nation's Capital is a non-profit, non-stock corporation organized under the laws of the District of Columbia. Both the American Civil Liberties Union of Hawaii Foundation and the American Civil Liberties Union of the Nation's Capital are affiliates of the American Civil Liberties Union, which is likewise a non-profit, non-stock corporation. Neither the American Civil Liberties Union, American Civil Liberties Union of Hawaii Foundation, nor the American Civil Liberties Union of the Nation's Capital has issued stock, and therefore no publicly held corporation owns ten percent of the stock of any of them.

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August 24, 2012

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IN THE UNITED STATES COURT OF APPEALS
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No. 12-5038

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Appeal from the United States District
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BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION OF HAWAII FOUNDATION AND THE AMERICAN CIVIL LIBERTIES UNION OF THE NATION'S CAPITAL, AS *AMICI CURIAE* IN SUPPORT OF APPELLANT

INTEREST OF *AMICI*

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with nearly 500,000 members dedicated to the principles of liberty and equality embodied in the Bill of Rights and the nation's civil rights laws. The American Civil Liberties Union of Hawaii Foundation and the American Civil Liberties Union of the Nation's Capital are similarly dedicated, and have frequently appeared before the courts of their respective jurisdictions in cases involving civil liberties and civil rights.

The appellant in this case, Earle A. Partington, is an attorney admitted to practice in the State of Hawaii and who practiced actively in the military courts on

Hawaii, where this case arose. He has also been active in the ACLU of Hawaii. The ACLU of Hawaii thereby became aware of this case and has a particular interest in protecting the due process rights of the appellant.

Due process rights, including the procedural guarantees of notice and an opportunity to be heard, are among the core rights guaranteed by the Constitution and protected by the ACLU. Providing due process before suspending an attorney from practice before a court is essential in ensuring that the lawyer is treated fairly and is not arbitrarily deprived of a constitutionally protected interest; it is also essential in ensuring that the lawyer's clients can continue to avail themselves of the attorney of their choice unless there are good grounds for suspension. The government's denial of due process before suspending an attorney from practice before a court therefore implicates the integrity of our justice system. *Amici* hope that their brief will provide the Court with a useful analysis of this issue, on which the district court erred.[1]

ISSUE ADDRESSED BY *AMICI*

Whether a lawyer is entitled to due process before being suspended from practice before the courts of a particular jurisdiction.

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[1] Pursuant to Fed. R. App. P. 29(c)(5), undersigned counsel certify that no party or counsel for a party authored this brief in whole or in part, or contributed money that was intended or used to fund preparing or submitting this brief, and that no person other than the *amici curiae* contributed money that was intended or used to fund preparing or submitting this brief.

STATEMENT OF THE CASE

Amici rely upon appellant's statement of the case. *See* Brief of Appellant at 3-19. In short, on or about May 10, 2010, the Judge Advocate General of the Navy indefinitely suspended appellant Earle A. Partington from practice before any Navy and Marine Corps court. *Id*. at 17. As a result of this suspension, the Court of Appeals for the Armed Forces suspended Mr. Partington for one year as reciprocal discipline, and the Supreme Court of Hawaii and the Commonwealth of the Northern Mariana Islands initiated reciprocal disciplinary proceedings against him. *Id*. at 17-18.

On November 16, 2010, Mr. Partington filed a complaint against Vice Admiral James W. Houck and Captains Robert B. Blazewick and Christopher N. Morin, in both their official and personal capacities, and against the United States Court of Appeals for the Armed Forces, in the United States District Court for the District of Columbia. He asserted four claims, including a denial of procedural due process in his suspension. *Id*. at 2-3. On January 10, 2012, the district court (per Senior U.S. District Judge Frederick J. Scullin, Jr. (N.D.N.Y.), sitting by designation) issued a final order dismissing two of Mr. Partington's claims and granting summary judgment for defendants on the other two, including his due process claim. *Partington v. Houck*, 840 F. Supp. 2d 236 (D.D.C. 2012). This appeal followed.

SUMMARY OF ARGUMENT

The district court recognized, at least by implication, that a lawyer cannot be completely deprived of his or her right to practice law without due process. But the court apparently concluded that because Mr. Partington was admitted to practice in several jurisdictions, he was not entitled to due process before being suspended from practice in one. The District Court's conclusion is illogical and contrary to well established law. As this Court and other courts have recognized, lawyers are entitled to due process before being disbarred or suspended in any jurisdiction; indeed, due process is required before sanctioning an attorney in far less serious ways. Even lawyers admitted *pro hac vice* may not have their limited admissions revoked without due process. The district court's holding on this issue was erroneous and should be reversed.

ARGUMENT

The district court erred in concluding that Mr. Partington was not entitled to due process. Its grant of summary judgment is subject to *de novo* review. *See*, *e.g.*, *McGaughey v. District of Columbia*, 684 F.3d 1355, 1357 (D.C. Cir. 2012).

I. A Lawyer has a Constitutionally Protected Interest in Practicing Law.

In its decision rejecting Mr. Partington's claim that his procedural due process rights were violated, the District Court reasoned:

> [S]ince Defendants have not *completely* excluded Plaintiff from the practice of law, the Court concludes that Plaintiff has not

> identified an actionable liberty or property interest in the practice of law before naval courts. As such, the Court need not address what process is due or whether or not that process was provided to Plaintiff.

Partington, 840 F. Supp. 2d at 242 (emphasis added). *See also id*. at 241-242 ("Although Plaintiff's business may suffer as a result of his suspension, this alone is insufficient to warrant the relief Plaintiff seeks because Defendants have not wholly deprived him of his law license or his ability to practice law.").

By negative implication, the district court recognized that government action completely or wholly precluding Mr. Partington from practicing law would have required due process. That is certainly correct. *See*, *e.g.*, *In re Ruffalo*, 390 U.S. 544, 550 (1968) (holding that disbarment proceedings require due process); *Schware v. Bd. of Bar Examiners of New Mexico*, 353 U.S. 232, 238-239 (1957) (holding that a person cannot be excluded from the practice of law "in a manner or for reasons that contravene the Due Process . . . Clause"); *Ex parte Robinson,* 19 Wall. (86 U.S.) 505, 512 (1873) ("Before a judgment disbarring an attorney is rendered he should have notice of the grounds of complaint against him and ample opportunity of explanation and defence. This . . . rule . . . should be equally followed when proceedings are taken to deprive him of his right to practice his profession, as when they are taken to reach his real or personal property."); *cf. Bell v. Burson*, 402 U.S. 535 (1971) ("Once [horse racing] licenses are issued . . . their continued possession may become essential in the pursuit of a livelihood.

Suspension of issued licenses thus involves . . . important interests of the licensees . . . [and they] are not to be taken away without [] procedural due process[.]").[2]

In their unsuccessful motion for summary affirmance, appellees defended Judge Scullin's ruling on the due process issue, asserting that "It has been long established that persons possess no constitutional, statutory or regulatory right to engage in the practice of law in any particular jurisdiction. *See Yeiser v. Dysart*, 267 U.S. 540, 541 (1925)." Appellees' Motion for Summary Affirmance at 12-13 (filed Mar. 28, 2012). The Supreme Court's opinion in *Yeiser v. Dysart* was written by Justice Holmes, but it is nevertheless no longer good law. Holmes said, "an attorney practises [sic] under a license from the State and . . . it is obvious that the State may attach such conditions to the license in respect of such matters as it believes to be necessary in order to make it a public good." *Id*. at 541. That was good law (and good spelling) in 1925, but the Supreme Court explained 32 years

[2] *See also*, *e.g.*, *In re Barach*, 540 F.3d 82, 85 (1st Cir. 2008) ("We understand the importance of a lawyer's right to practice law and agree that, once granted, that right cannot be taken away in an arbitrary or capricious manner."); *In re Ming*, 469 F.2d 1352, 1355 (7th Cir. 1972) (law license is property); *Danner v. Comm'n on Continuing Legal Educ.*, No. 3:06-0687, 2008 WL 1859964, at *5-6 (M.D. Tenn. Apr. 22, 2008) ("An attorney has a property interest in his law license"), *aff'd*, 332 Fed. Appx. 228 (6th Cir. 2009); *Greening v. Moran*, 739 F. Supp. 1244, 1251 (C.D. Ill. 1990) (lawyer "clearly [has] a property interest in his law license"), *aff'd*, 953 F.2d 301 (7th Cir. 1992); *Gershenfeld v. Justices of the Supreme Court of Pa.*, 641 F. Supp. 1419, 1423 (E.D. Pa. 1986) ("It is undisputed that plaintiff's license to practice law . . . is a property interest sufficient to invoke due process protections.").

later (and 55 years ago):

> We need not enter into a discussion whether the practice of law is a "right" or "privilege." Regardless of how the State's grant of permission to engage in this occupation is characterized, it is sufficient to say that a person cannot be prevented from practicing except for valid reasons. Certainly the practice of law is not a matter of the State's grace.

Schware v. Bd. of Bar Examiners of New Mexico, 353 U.S. 232, 239 n.5 (1957). *See also* William W. Van Alstyne, The Demise of the Right-Privilege Distinction in Constitutional Law, 81 HARV. L. REV. 1439 (1968).

The district court was of the view that precluding Mr. Partington from practicing law in any particular court or courts did not require due process because he did not have "a legitimate claim of entitlement to the practice of law before these particular courts," and because "Defendants' actions did nothing more than indefinitely exclude Plaintiff from one particular job, *i.e.,* the practice of law before naval courts." *Partington*, 840 F. Supp. 2d at 242. But there is no authority for (or logic behind) the district court's apparent conclusion that a lawyer who is admitted to practice in only one jurisdiction *is* entitled to due process, whereas a lawyer admitted in multiple jurisdictions *is not* entitled to due process.

II. Disciplinary Action by a Particular Court Requires Due Process.

The district court relied primarily on *O'Donnell v. Simon*, 362 Fed. Appx. 300 (3d Cir. 2010), an unreported decision in a case that bears no resemblance to this case. In *O'Donnell*, the plaintiff claimed that certain statements by

government officials led indirectly to her loss of a private sector, employment-at-will job. She sued the officials for intentional or negligent infliction of emotional distress, tortious interference with contractual relationships, tortious interference with prospective economic advantage, defamation, and denial of due process. *Id*. at 302-03. The court held that the officials' alleged statements did not violate the plaintiff's due process rights because they did not interfere with her "'liberty to pursue a calling or occupation.'" *Id*. at 304 (quoting *Piecknick v. Pennsylvania*, 36 F.3d 1250, 1259 (3d Cir. 1994)). Ms. O'Donnell had no liberty or property interest in her private sector, employment-at-will job. *Id.*

By contrast, a lawyer does have a liberty or property interest in his or her right to continue to practice before a particular court, whether or not it is the only court to which he or she is admitted. While the courts have not been consistent regarding whether this right involves liberty or property (or both), they have been unanimous in their conclusion.

Thus, in *In re Franco*, 410 F.3d 39, 40 (1st Cir. 2005), the First Circuit recognized that a lawyer facing suspension by a district court is entitled to procedural due process, although by definition a federal court cannot be the only court in which a lawyer is admitted.

In *Mattox v. Disciplinary Panel of the United States District Court for the District of Colorado*, 758 F.2d 1362 (10th Cir. 1985), the district court had denied

an attorney's application for readmission. It "inferred that there is a difference between required federal and state procedures when it emphasized that the Supreme Court of Colorado had to concern itself with Mattox' right to sustain a livelihood, but spoke of the federal court as one of limited jurisdiction in which the purpose of bar membership is only to engage in litigation." *Id*. at 1366. Rejecting this reasoning, the Tenth Circuit held that "federal courts must afford attorneys some due process rights before suspending or disbarring them." *Id*. at 1365. The Court held that there is no "rational basis for differentiating, for constitutional due process purposes, between litigating lawyers for whom federal admission may be essential, and office practitioners." *Id*. at 1367.

Indeed, the federal courts have recognized that lawyers are entitled to due process before being disqualified from practicing in even a single case. *See*, *e.g.*, *Kleiner v. First Nat'l Bank of Atlanta*, 751 F.2d 1193, 1211 (11th Cir. 1985) (holding that "sanctions must be imposed in accordance with the due process of law," and that an attorney may not be disqualified from a case on the basis of misconduct without "an opportunity to be heard"); *Cole v. U.S. District Court*, 366 F.3d 813, 821 (9th Cir. 2004) ("for the court to sanction an attorney, procedural due process requires notice and an opportunity to be heard."); *G.J.B. & Assocs., Inc. v. Singleton*, 913 F.2d 824, 830 (10th Cir. 1990) ("The due process clause of

the fifth amendment . . . requires that an attorney facing sanctions in federal court be given notice and an opportunity to be heard[.]").

Even lawyers admitted *pro hac vice* may not have their limited admissions revoked without due process. *See*, *e.g.*, *Belue v. Leventhal*, 640 F.3d 567, 577 (4th Cir. 2011) ("[O]nce [*pro hac vice*] status is granted, attorneys must receive some modicum of due process before it is revoked."); *Lasar v. Ford Motor Co*., 399 F.3d 1101, 1109 (9th Cir. 2005) (holding that "notice and an opportunity to be heard are indispensable prerequisites" for revocation of *pro hac vice* status and a prohibition on future *pro hac vice* appearances in the court); *Martens v. Thomann*, 273 F.3d 159, 175 (2d Cir. 2001) ("[R]evocation of *pro hac vice* status is a form of sanction that cannot be imposed without notice and an opportunity to be heard."); *United States v. Collins*, 920 F.2d 619, 626 (10th Cir. 1990) ("Once admitted, *pro hac vice* counsel cannot be disqualified under standards and procedures any different or more stringent than those imposed upon regular members of the district court bar."); *Kirkland v. Nat'l Mortgage Network, Inc.*, 884 F.2d 1367, 1371 (11th Cir. 1989) ("[A]n attorney, once admitted *pro hac vice*, enjoys . . . basic procedural rights[.]"). Even a public reprimand without further sanctions requires fair notice and an opportunity to respond. *Bowers v. NCAA*, 475 F.3d 524, 544 (3d Cir. 2007).

Likewise, courts – including this Court – have recognized that a lawyer's right to practice law before a specific federal agency is protected. *See Kivitz v. SEC*, 475 F.2d 956, 962 (D.C. Cir. 1973) (recognizing an attorney's right to practice before the Securities and Exchange Commission); *Reeves v. Shalala*, No. C 96–01377 CW, 1998 WL 289312, at *8 (N.D. Cal. Apr. 16, 1998) ("Plaintiff has a property interest in continuing to practice as an attorney representative before the SSA [Social Security Administration]."), *aff'd in part, dismissed in part on other grounds,* 185 F.3d 868 (9th Cir. 1999).

It follows *a fortiori* that the sanction of suspension from practice in all cases before a court to which a lawyer has been duly admitted triggers due process protections.

The right to appear as defense counsel in naval courts is analogous to the right to appear in federal courts or to appear *pro hac vice*: an attorney must generally be licensed to practice law in some other jurisdiction and take some procedural steps for admission. *See* United States Navy-Marine Corps Court of Criminal Appeals Rules of Practice and Procedure, Rule 8 (Qualifications of Counsel). In the instant case, Mr. Partington was certified to appear in naval courts as civilian defense counsel; he cannot be stripped of that certification absent due process.

CONCLUSION

For the reasons stated above, Mr. Partington had constitutionally protected liberty and property interests in his right to continue to practice in the Navy-Marine Corps courts. The district court's contrary holding should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Brief of *Amici Curiae* complies with the word limits imposed by this Court's Rules and contains 2,752 words, as counted by the word count function of Microsoft Word for Mac 2011, version 14.2.3.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Brief of *Amici Curiae* was electronically filed and served on August 24, 2012, using this Court's CM/ECF system.

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