

**In the
Supreme Court of the United States**

JOHN C. EASTMAN,

Petitioner,

v.

THE STATE BAR OF CALIFORNIA,

Respondent.

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

**BRIEF OF AMICUS CURIAE
THE JOHN K. MACIVER INSTITUTE
FOR PUBLIC POLICY, INC.
IN SUPPORT OF PETITIONER**

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INTEREST OF AMICUS CURIAE¹

THE JOHN K. MACIVER INSTITUTE FOR PUBLIC POLICY, INC. is a nonpartisan, nonprofit think tank devoted to individual liberty and to limited government, without which liberty dies.² That mission commits MacIver to federalism. Typically, that means opposing Washington overreach.³ But the Constitution's division of authority binds the States as surely as it binds Washington.

MacIver supports review on all three questions but writes to urge this Court to reformulate the third:

Does *Loney* bar a State from finding for itself that a lawyer committed a federal crime against a federal tribunal?⁴

California answered no, without analyzing its subject-matter jurisdiction, and that answer cost Eastman his law license.⁵

¹ As required by Supreme Court Rules 37.2 and 37.6, the undersigned discloses the following: the Counsel of Record for all parties received timely notice of intent to file this brief. No party's counsel authored any part of this brief; no entity or person other than MacIver made a monetary contribution to fund its preparation or submission.

² See generally *The John K. MacIver Institute for Public Policy, Inc. Mission Statement*, MACIVER INST. (last visited Oct. 6, 2026), <https://www.maciverinstitute.com/about/mission-statement>.

³ See, e.g., Richard Moore, *A Federalism Fight Splits MAGA ...*, MACIVER INST. (Nov. 28, 2025), <https://www.maciverinstitute.com/perspectives/a-federalism-fight-splits-maga>.

⁴ *In re Loney*, 134 U.S. 372 (1890).

⁵ See Pet. 37.

In California’s mistaken view, a State may borrow a federal criminal statute, aim it like a blunderbuss at lawyers it dislikes, and call the blast “professional discipline.” MacIver has seen conservative lawyers become frequent targets of lawfare, and handing state bars this new weapon will only invite more.⁶ Federalism is a structural defense. MacIver writes to keep it intact.

SUMMARY OF ARGUMENT

According to California, Eastman committed a federal crime.⁷ Both the State Bar Court’s hearing judge and its Review Department lifted the elements of 18 U.S.C. § 371 (titled “[c]onspiracy to commit offense or to defraud United States”) from federal decisions and found each satisfied: an agreement with the President and others to impede the Joint Session of Congress on January 6, 2021; “multiple dishonest means”; “numerous overt acts”; and “the requisite mens rea.”⁸

Meanwhile, the federal government—the only sovereign with authority to try that offense—chose not to and then foreclosed the question for good. After years of investigation, federal prosecutors never

⁶ E.g., Press Release, L. Forward, *Law Forward Files a Grievance with the Office of Lawyer Regulation Against Attorney James Troupis for His Role in the Fake Electors Scheme* (Dec. 11, 2024), <https://www.lawforward.org/wp-content/uploads/2024/12/PR-Troupis-OLR.pdf>.

⁷ Pet. App. 95a–99a; *see also* Pet. App. 274a–80a.

⁸ Pet. App. 96a–99a & nn.86–88; *see also* Pet. App. 276a.

charged Eastman;⁹ and in November 2025, the President granted him a full pardon for any offenses against the United States arising from his legal advocacy about the 2020 election.¹⁰ The result: the only tribunal in the Nation that has adjudged and ever will adjudge Eastman guilty of conspiring to defraud the United States is a state bar court.

Even without that clash, *Loney* bars California from enforcing a federal criminal statute, at least when the underlying conduct was aimed at a federal tribunal.¹¹ There, this Court held that perjury committed in a proceeding before such a tribunal—a deposition taken in Virginia for a contested congressional election—was “an offense against the public justice of the United States,” within “the exclusive jurisdiction of the courts of the United States.”¹² The power to punish false testimony, this Court explained, “belongs peculiarly to the government in whose tribunals that proceeding is had.”¹³

The Joint Session at issue here was the kind of federal tribunal that *Loney* shields from state

⁹ Kerry Picket, *Trump Pardons Rudy Giuliani, Sidney Powell and Others Tied to 2020 ‘Fake Electors’ Case*, WASH. TIMES (Nov. 10, 2025), <https://www.washingtontimes.com/news/2025/nov/10/trump-pardons-rudy-giuliani-sidney-powell-others-tied-2020-fake/>.

¹⁰ *Granting Pardons for Certain Offenses Related to the 2020 Presidential Election*, 90 Fed. Reg. 51,071–73 (Nov. 14, 2025), <https://www.govinfo.gov/content/pkg/FR-2025-11-14/pdf/2025-19928.pdf>.

¹¹ See *Loney*, 134 U.S. at 375–76.

¹² *Id.* at 375.

¹³ *Id.*

interference.¹⁴ Under the Twelfth Amendment and the Electoral Count Act of 1887, the electoral votes were counted at a Joint Session of Congress where objections could be heard—“one of the very few congressional proceedings that actually *is* adjudicative.”¹⁵ And the Joint Session belongs to the Nation, not to any State. The offense California found—conspiring to impede the Joint Session—has no victim and no locus except the federal tribunal itself. It is an offense against the United States; only the United States may try it.¹⁶

The petition persuasively shows that this Court’s precedent forbade California to punish Eastman for his filings in federal courts (Counts Two and Four),¹⁷ but that precedent cuts even deeper. That same precedent, *Loney*, also reaches the finding that anchors the judgment below on Count One and that California used to prop up an otherwise faulty First Amendment analysis.¹⁸ Those parts of the judgment rest on the finding that Eastman committed a federal crime against a federal tribunal—the Joint Session of Congress for counting electoral votes—even though no federal court has ever tried him for that offense.¹⁹

This Court may—and should—reformulate the third question. It has done so in other cases when a

¹⁴ See *id.* at 375–76.

¹⁵ *United States v. McHugh*, 583 F. Supp. 3d 1, 17 (D.D.C. 2022); see *infra* Parts II–III.

¹⁶ See *Loney*, 134 U.S. at 375–76.

¹⁷ Pet. 7, 11, 36–38.

¹⁸ See *infra* notes 78–84 and accompanying text.

¹⁹ Pet. App. 96a & n.84, 99a, 104a–05a; see also Pet. 33–36.

lower court’s subject-matter jurisdiction was in doubt.²⁰ Indeed, jurisdiction is uniquely important: courts are duty-bound to consider it.²¹

This case is the right vehicle to tackle the reformulated question. The 18 U.S.C. § 371 finding is not a stray remark; it is the linchpin of the judgment below. It is the only predicate sustained for Count One;²² it supplied the crime that let California brand Eastman’s advice to the President unprotected “speech integral to unlawful conduct”;²³ and it fed the “aggravation” analysis that produced disbarment.²⁴ Lawfare is rising,

²⁰ *Osborn v. Haley*, 547 U.S. 1126, 1126–27 (2006) (mem.) (“In addition to the Questions presented by the petition, the parties are directed to brief and argue the following Question: Whether the [C]ourt of [A]ppeals had jurisdiction to review the district court’s remand order, notwithstanding 28 U.S.C. § 1447(d).”).

²¹ *See, e.g., Loc. No. 438 Constr. & Gen. Laborers’ Union, AFL-CIO v. Curry*, 371 U.S. 542, 543–47 (1963) (explaining this Court granted certiorari to consider a Georgia court’s subject-matter jurisdiction over a question reserved to the National Labor Relations Board, requested briefing on—and sustained—its own appellate jurisdiction, and then concluded that the Georgia court lacked jurisdiction); *United States v. Corrick*, 298 U.S. 435, 440 (1936) (holding a federal district court should have analyzed its subject-matter jurisdiction even though no party raised the issue before it).

²² Pet. App. 96a & n.84, 99a, 274a–76a.

²³ Pet. App. 104a (quoting *United States v. Hansen*, 599 U.S. 762, 783 (2023)); *see* Pet. App. 237a (quoting *Hansen*, 599 U.S. at 783); *see also* Pet. App. 105a.

²⁴ *See, e.g.,* Pet. App. 107a (affirming “substantial weight in aggravation” for acts of wrongdoing, including “conspiring to commit an offense against the United States in violation of title 18 U.S.C. [§] 371”); Pet. App. 116a (assigning only “nominal mitigation” because Eastman “denies that he conspired to subvert the law”).

and arming every state bar with Title 18 would only accelerate it.²⁵ This Court should reaffirm *Loney* and insulate federal tribunals from interference by fifty state governments.

ARGUMENT

I. Under *Loney*, a State may not adjudicate whether conduct aimed at corrupting a federal tribunal was a federal crime.

The Constitution commits some proceedings to Congress alone, and the States play no part in them.²⁶ Judging contested congressional elections is one: “Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members,” and in those contests the parties may submit sworn testimony to that House.²⁷

Loney arose from such a contest.²⁸ A witness gave a deposition before a Virginia notary in a dispute over one of the State’s congressional seats, and Virginia

²⁵ See, e.g., William Osmulski, *Troupis Decries Left’s Unrelenting Political Lawfare Campaign in Wisconsin*, MACIVER INST. (Dec. 12, 2024), <https://www.maciverinstitute.com/videos/news-clips/troupis-decries-lefts-unrelenting-political-lawfare-campaign-in-wisconsin>.

²⁶ E.g., *Nixon v. United States*, 506 U.S. 224, 226, 229, 237–38 (1993) (holding no court can second-guess the Senate’s procedural rules in trying an impeachment).

²⁷ U.S. Const. art. I, § 5, cl. 1; see also *Loney*, 134 U.S. at 373–74.

²⁸ *Loney*, 134 U.S. at 373–74.

charged him with perjury under its general perjury statute.²⁹ He was arrested and detained.³⁰

The witness sought federal habeas relief, and this Court held that Virginia's courts had "no jurisdiction of the matter."³¹ The witness testified under federal law, "not in the performance of any duty which he owes to the [S]tate," with "the single object" of informing the House of Representatives as it exercised "the judicial power vested in it by the [C]onstitution."³² So he was "accountable for the truth of his testimony to the United States only," and his perjury (if any) was "an offense against the public justice of the United States[] and within the exclusive jurisdiction of the courts of the United States."³³

Loney ties the power to prosecute to the sovereign whose tribunal was allegedly disrupted: "the power of punishing a witness for testifying falsely in a judicial proceeding belongs peculiarly to the government in whose tribunals that proceeding is had."³⁴ The rationale is structural, and it speaks to this case. Those who take part in federal tribunals must be free to act "unrestrained by legislation of the [S]tate[] or by fear of punishment in the state courts"; otherwise "the national tribunals would be greatly embarrassed and impeded" by state prosecutions "preferred by a

²⁹ *Id.* at 373–76.

³⁰ *Id.* at 376–77.

³¹ *Id.*

³² *Id.* at 374.

³³ *Id.* at 375.

³⁴ *Id.*

disappointed suitor or contestant[] or instigated by local passion or prejudice.”³⁵

Loney rested on a long line of caselaw establishing that rule and its limits.³⁶ This Court acknowledged that some acts—“making and uttering counterfeit money,” for instance—offend both sovereigns, and either may punish them.³⁷ But corrupting a federal tribunal’s own proceedings differs in kind.³⁸ It has no state victim and no state locus; its only immediate wrong is what it does to the federal proceeding. So a State may punish a person who passes a forged silver dollar to a local merchant; there, the problem is not only that someone counterfeited federally produced money but also that someone victimized the merchant. And a State may even be able to punish the counterfeiting itself as a prophylactic measure to protect its citizens. But it may not punish a person for a false deposition returned to the House of Representatives—even one sworn on its own soil.³⁹ That is not its proceeding, and whatever indirect interest the State has in the outcome is too remote to justify state action.

Since *Loney*, courts have applied it to other kinds of federal tribunals. For example, Kentucky’s highest

³⁵ *Id.*

³⁶ *Id.* at 376 (citing *State v. Shelley*, 11 Lea 594 (Tenn. 1883); *State v. Kirkpatrick*, 32 Ark. 117 (1877); *Ex parte Bridges*, 2 Woods 428 (C.C.N.D. Ga. 1875); *Ross v. State*, 55 Ga. 192 (1875); *People v. Kelly*, 38 Cal. 145 (1869); *State v. Pike*, 15 N.H. 83 (1844); *State v. Adams*, 4 Blackf. 146 (Ind. 1836)).

³⁷ *Id.* at 375 (citing *Fox v. Ohio*, 46 U.S. (5 How.) 410 (1847)).

³⁸ *Id.*

³⁹ *See id.* at 374–76.

court affirmed the dismissal of an indictment for false swearing before a United States commissioner: “the jurisdiction to punish perjury committed in a federal tribunal is confined to the courts of the United States.”⁴⁰ And an Arizona appellate court affirmed the dismissal of eight counts arising from alleged lies during a deposition for a federal civil suit: “If there is to be any prosecution for the alleged wrongful acts set out in these counts, such prosecution must come from Federal authorities.”⁴¹

Nor is the rule limited to false statements or perjury. In *Slawik*, the District of Delaware reasoned that the State’s bribery statute could not reach attempts to bribe a witness before a federal grand jury.⁴² Applying *Loney*, the court explained that “Delaware has absolutely no cognizable and independent interest in utilizing her existing criminal legislation to ensure the integrity of the federal grand jury process or to punish those who attempt to tamper with that process.”⁴³

In short, when the alleged wrong is an attempt to corrupt a federal tribunal—by false statements, perjury, or bribery—the offense is *against* the United States

⁴⁰ *Commonwealth v. Kitchen*, 133 S.W. 586, 586–87 (Ky. 1911).

⁴¹ *State v. Warren*, 539 P.2d 184, 185–86 (Ariz. Ct. App. 1975); see also *People v. Iadarola*, 377 N.Y.S.2d 431, 433–34 (Sup. Ct. 1975).

⁴² *United States v. Slawik*, 408 F. Supp. 190, 200–01 (D. Del. 1975).

⁴³ *Id.* at 201.

and belongs to the federal courts alone.⁴⁴ The rule is easy to state, and its purpose is simpler still: those who take part in a federal proceeding answer to one sovereign and need never fear another.

* * * * *

Before moving on, consider how 18 U.S.C. § 3231 reinforces *Loney*. That statute provides:

The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States.

Nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof.⁴⁵

Loney can be read either as a constitutional case, based on federalism, or as one grounded in § 3231's predecessor statutes, which contained similar language about federal courts' exclusive jurisdiction and not impairing state-court jurisdiction.⁴⁶ After quoting those predecessor statutes, this Court in *Loney* ruled against Virginia.⁴⁷ And the district court in *Slawik* reasoned that *both Loney* and § 3231 independently pointed in the same direction, despite the statute's second sentence: "this closing provision

⁴⁴ See *Arizona v. United States*, 567 U.S. 387, 402 (2012) (citing *Loney*, 134 U.S. at 375–76); cf. *State ex rel. Laughlin v. Bowersox*, 318 S.W.3d 695, 698 (Mo. 2010) (en banc); *Ableman v. Booth*, 62 U.S. (21 How.) 506, 516 (1859).

⁴⁵ 18 U.S.C. § 3231.

⁴⁶ *Loney*, 134 U.S. at 373.

⁴⁷ *Id.* at 375–77.

does not resolve particular jurisdictional questions arising under various state criminal statutes.”⁴⁸

Whether under *Loney* or 18 U.S.C. § 3231, the result is the same. A State has no business deciding in the first instance whether a person violated a federal criminal statute by impeding a federal tribunal.

II. The Joint Session of Congress was a federal tribunal that only the United States may police.

One question remains: Was the Joint Session of Congress on January 6, 2021, a federal tribunal of the kind *Loney* protects from state interference? Yes.

The Constitution establishes that the power to count is federal; no State shares it. The Twelfth Amendment directs the presidential electors to transmit their certified votes to the President of the Senate. After that: “[T]he President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted.”⁴⁹ Whatever else that passive voice leaves open, it lodges the count in a Joint Session of Congress presided over by the President of the Senate.

From the first contested count, Presidents of the Senate have, at a minimum, recognized that they or

⁴⁸ *Slawik*, 408 F. Supp. at 200–01 & n.12 (citing *Pennsylvania v. Nelson*, 350 U.S. 497, 501 n.10 (1956)).

⁴⁹ U.S. Const. amend. XII; see also *id.* art. II, § 1, cl. 3, *superseded by id.* amend. XII.

Congress plays some adjudicative role.⁵⁰ John Adams paused in 1797, apparently to allow objections to Vermont's votes; and Thomas Jefferson in 1801 counted Georgia's arguably irregular votes (for himself).⁵¹ As two scholars summarized the contemporaneous accounts: "He decisively resolved the issue by counting Georgia's vote[s] as part of the final tally, even though he was an interested party in the affair. Despite the extraordinary character of this action, nobody rose to protest."⁵² And they went on to argue: "[T]he Constitution delegated to Jefferson, and only Jefferson, an affirmative role in the vote-counting ritual. ... The fact that Jefferson exercised the (textually arguable) authority, therefore, as Senate President on the Georgia matter seems very significant as a legal matter."⁵³ To the extent that historical precedent is problematic, their solution was not bar complaints; it was a proposed constitutional amendment.⁵⁴

Congress, too, exercised adjudicative power over the count well into the 1800s. For example, in the count of the 1872 election, "Congress received two sets of electoral votes from Louisiana and rejected them both, accepted Mississippi and Texas's votes notwithstanding technical objections, rejected Arkansas'

⁵⁰ Bruce Ackerman & David Fontana, *Thomas Jefferson Counts Himself into the Presidency*, 90 VA. L. REV. 551, 579–81, 599–603 (2004).

⁵¹ *Id.*

⁵² *Id.* at 603.

⁵³ *Id.* at 608, 631.

⁵⁴ *Id.* at 629.

votes due to numerous technical and substantive issues, and rejected three Georgian votes”⁵⁵ And in 1877, Congress created an Electoral Commission—five Senators, five Representatives, and five Justices—to (effectively) decide who had won.⁵⁶

Those disputes prompted Congress to pass the Electoral Count Act of 1887.⁵⁷ Its framers understood that the power to adjudicate stemmed from the Constitution itself: “The power to judge of the legality of the votes is a necessary consequent of the power to count.”⁵⁸ In their view: “The interests of all the States ... demand that the ultimate tribunal to decide upon the election of President should be a constituent body, in which the States in their federal relationships and the people in their sovereign capacity should be represented.”⁵⁹

The Electoral Count Act of 1887, which supplied the additional procedures that governed in 2021, confirms the federal and adjudicative nature of the Joint Session. The two Houses convene at 1:00 p.m. on January 6; tellers read the certificates; members may object in writing; if they do, the Houses separate, debate, and vote on each objection; and the Act

⁵⁵ Majority Staff H. Comm. on House Admin., *The Electoral Count Act of 1887: Proposals for Reform* 4 n.28 (2022), https://democrats-cha.house.gov/sites/evo-subsites/democrats-cha.house.gov/files/documents/Electoral%20Count%20Act%20Staff%20Report_.pdf.

⁵⁶ Ackerman & Fontana, *supra*, at 634–40.

⁵⁷ *Id.* at 640.

⁵⁸ 18 Cong. Rec. 30 (Dec. 7, 1886) (statement of Rep. Caldwell) [hereinafter “Rep. Caldwell”], <https://www.congress.gov/bound-congressional-record/1886/12/07/house-section>.

⁵⁹ *Id.*

prescribes which votes “shall be counted” when returns conflict.⁶⁰

Modern courts agree that the count is both federal and adjudicative. When those charged with storming the Capitol argued that the Joint Session was not an “official proceeding,” they lost—the Joint Session was not a “dog-and-pony show” or a “political performance.”⁶¹ The count, one district court explained, is “unambiguously an occasion on which Congress ‘adjudicates.’”⁶² The D.C. Circuit agreed that the certification is an “official proceeding.”⁶³ And when *Fischer* reached this Court, no Justice questioned that the Joint Session was such a proceeding.⁶⁴ In that respect, it is the fraternal twin of the proceeding in *Loney*: in both, a component of the federal government sits in judgment of an election.⁶⁵

And States have no role in the Joint Session. The States wield real power over presidential elections, but that power ends when the count begins (if not earlier). Here is how a congressman during the debates

⁶⁰ 3 U.S.C. §§ 15–17 (2018) (amended 2022).

⁶¹ *E.g.*, *McHugh*, 583 F. Supp. 3d at 17.

⁶² *Id.* at 17–18; *see also United States v. Caldwell*, 581 F. Supp. 3d 1, 14–15 (D.D.C. 2021).

⁶³ *United States v. Fischer*, 64 F.4th 329, 342–43 (D.C. Cir. 2023), *vacated and remanded on other grounds*, 603 U.S. 480 (2024).

⁶⁴ *See Fischer v. United States*, 603 U.S. 480, 483–84 (2024); *see also id.* at 507 n.1 (Barrett, J., dissenting) (“The D.C. Circuit held, and this Court does not dispute, that Congress’s [J]oint [S]ession on January 6, 2021, qualifies as an ‘official proceeding.’”).

⁶⁵ *Cf. Loney*, 134 U.S. at 373–75.

on the Electoral Count Act of 1887 described the dividing line:

1. “Each State may appoint ... electors The mode of their appointment is left solely to the States, but the elector is a Federal functionary, as much so as a Senator or a Representative.”⁶⁶
2. “And the duties of an elector, as soon as he is chosen by the State, are prescribed by the Constitution”⁶⁷
3. “After the elector has ... deposited the vote in the hands of the President of the Senate, the Constitution then fixes the day when he shall open them in the presence of the Senate and House of Representatives, when ‘the vote shall be counted.’”⁶⁸

This Court’s precedent agrees: “Because federal officers ‘owe their existence and functions to the united voice of the whole, not of a portion, of the people,’ powers over their election and qualifications must be specifically ‘delegated to, rather than reserved by, the States.’”⁶⁹ Nothing delegates to any State a role in the count—still less a power to police it. In 2024, this Court refused to let a single State decide, through its own procedures and under its own evidentiary rules, a federal question about who may be President, warning

⁶⁶ Rep. Caldwell, *supra*, at 30.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Trump v. Anderson*, 601 U.S. 100, 111 (2024) (per curiam) (quoting *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 803–04 (1995)).

that “state-by-state resolution” would produce a patchwork inconsistent with “the basic principle that ‘the President ... represent[s] *all* the voters in the Nation.’”⁷⁰ The same principle governs here. Whether the President of the Senate counts the votes or the two Houses do, the count is federal. So the federal government—not any State—polices what happens in it.

None of this means that a state bar must ignore federal crimes—it means only that a federal court must go first. California’s own precedent shows the sequence. In *Segretti*, a lawyer pleaded guilty in federal court to multiple counts, one for violating 18 U.S.C. § 371 (the same federal criminal statute at issue here).⁷¹ Once notified of the convictions, the California Supreme Court referred the lawyer to the State Bar for a hearing and report.⁷² The State Bar then consolidated that proceeding (about the convictions) with another about “moral turpitude.”⁷³ Even with the convictions and additional misconduct (including misconduct involving a presidential campaign), the California Supreme Court did not disbar the lawyer; it suspended him and placed him on probation.⁷⁴ Here, the State Bar Court’s hearing judge and Review Department both invoked *Segretti* as an analogue.⁷⁵

⁷⁰ *Id.* at 116–17 (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 795 (1983)); see also *id.* at 118–19 (Sotomayor, Kagan, & Jackson, JJ., concurring in the judgment).

⁷¹ *Segretti v. State Bar*, 544 P.2d 929, 930 (Cal. 1976).

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.* at 936.

⁷⁵ Pet. App. 118a–19a; see also Pet. App. 293a–94a.

But they minimized the step that made *Segretti* legitimate—a federal *conviction*.

California’s statutes contemplate the same order: a “record of conviction shall be conclusive evidence of guilt,” and the conviction is “a cause for disbarment or suspension.”⁷⁶ The hearing judge and Review Department instead enlisted a broader, vaguer state statute about supporting the laws of the United States to reach that result—improperly, at least when the “law” Eastman allegedly failed to support was a federal criminal statute.⁷⁷

III. California did what *Loney* forbids: it applied 18 U.S.C. § 371 to Eastman, and if that judgment stands, every State may follow suit.

This case presents a clean vehicle to reaffirm *Loney* because 18 U.S.C. § 371 drove the decision below. Count One charged Eastman with failing to “support the Constitution and laws of the United States.”⁷⁸ The hearing judge found (and the Review Department affirmed) that the State Bar’s counsel had not proved a violation of the Twelfth Amendment or the Electoral Count Act of 1887; the only law of the United States that Eastman was found to have violated was § 371.⁷⁹

⁷⁶ See Cal. Bus. & Prof. Code § 6101(a).

⁷⁷ See Pet. App. 95a (citing Cal. Bus. & Prof. Code § 6068(a)).

⁷⁸ Pet. App. 95a–96a, 274a–75a (quoted source omitted) (calling Cal. Bus. & Prof. Code § 6068(a) “a conduit by which attorneys may be charged and disciplined for violations of other specific laws”).

⁷⁹ Pet. App. 96a & n.84; see also Pet. App. 275a–76a.

The Review Department “utilize[d] the elements of that federal offense,” drawn from federal decisions.⁸⁰ It found an agreement with the President and others to impede the Joint Session; “multiple dishonest means”; “numerous overt acts”; and “the requisite mens rea.”⁸¹ Its bottom line: “Eastman failed to support the law that prohibits defrauding of ‘the United States’”⁸² That is a verdict on a federal felony—one that, by its terms, adjudged a sitting President a coconspirator.⁸³

And after the Review Department made Count One the primary count covering Eastman’s campaign to persuade the President of the Senate himself to adjudicate certain electoral votes, it rejected Eastman’s First Amendment defense in part because “the First Amendment does not protect speech that is employed as a tool in the commission of a crime,” identifying the crime as “conspiring to promote and assist [the] President ... in violation of ... 18 U.S.C. [§] 371.”⁸⁴ It counted “conspiring to commit an offense against the United States” as aggravation.⁸⁵ And it recommended disbarment based on “the totality of the evidence.”⁸⁶ Remove the § 371 finding, and Count One falls, the First Amendment analysis changes, and the aggravation and sanctions analyses must be redone without an especially grave count. Although the judgment below is long and complex, this Court need not wade deeply

⁸⁰ Pet. App. 96a–97a & n.86.

⁸¹ Pet. App. 98a & nn.87–88.

⁸² Pet. App. 99a.

⁸³ Pet. App. 97a; *see also* Pet. App. 98a n.87.

⁸⁴ Pet. App. 104a.

⁸⁵ Pet. App. 107a.

⁸⁶ Pet. App. 119a.

into it; it need only recognize that the heavy reliance on § 371 requires vacatur and remand.

Therefore, the question is squarely presented. It appears on the face of the decisions below: California did not merely analogize to 18 U.S.C. § 371; it applied it.

* * * * *

If California is right, each State may try federal crimes against federal tribunals—so long as the accused holds a professional license and the State calls any sanction “discipline.” The result is the patchwork this Court condemned in 2024: “Conflicting state outcomes ... [arising] not just from differing views of the merits, but from variations in state law governing the proceedings”—one standard of proof here, another there, hearsay admissible in some, a jury in none.⁸⁷ The Review Department itself described the disciplinary proceeding as “*sui generis*—neither criminal nor civil.”⁸⁸ A tribunal that is neither criminal nor civil pronounced a citizen guilty of a federal crime by clear and convincing evidence (a standard below that required in a federal criminal court), on a record in which even hearsay was admissible, with no grand jury, no petit jury, and no Article III judge.⁸⁹

What happened below also exposes *why* allowing States any prerogative to police federal tribunals is dangerous: going forward, no California lawyer will

⁸⁷ *Trump*, 601 U.S. at 116 (per curiam).

⁸⁸ Pet. App. 96a n.85.

⁸⁹ Pet. App. 19a n.12, 134a n.2, 137a n.12.

feel comfortable advising on, say, the President of the Senate's role. After all, as this Court said long ago, "exclusion from any of the professions or any of the ordinary avocations of life for past conduct can be regarded in no other light than as punishment for such conduct."⁹⁰

The hearing judge and Review Department had to decide subsidiary questions about the internal rules of a federal tribunal. That was the only way they could find that Eastman's arguments about the role of the President of the Senate and the Twelfth Amendment were so beyond the pale as to constitute professional misconduct (indeed, *criminal* conduct). Now, California has (for all practical purposes) answered *federal* questions that scholars have long wrangled over.

For example, when Congress debated the Electoral Count Act of 1887, experts disputed the exact role of the President of the Senate in relation to Congress.⁹¹ As one congressman explained:

The passage of this bill will settle all the questions which have arisen from time to time as to the electoral count.

It will decide, first, that the power to count the vote is not in the President of the Senate.

Second, that it is in the two Houses of Congress, not ministerially merely, not as witnesses, ... but

⁹⁰ *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 377 (1867); see also *In re Ruffalo*, 390 U.S. 544, 550 (1968) ("Disbarment, designed to protect the public, is a punishment or penalty imposed on the lawyer.").

⁹¹ See Rep. Caldwell, *supra*, at 30–31.

with power to count, and the consequent power to decide upon the legality of the votes to be counted.⁹²

But whether the Electoral Count Act of 1887 settled that debate is itself debatable; some scholars have suggested that a constitutional amendment is necessary.⁹³ Professors Robert J. Delahunty and John Yoo argued that, if a State submitted “competing slates,” “the best reading of the constitutional text, structure, and history” may require the President of the Senate—“not Congress or the judiciary”—to act.⁹⁴ They concluded that “Congress has unconstitutionally arrogated to itself the authority to challenge and resolve the legitimacy of electoral votes. ... The Constitution’s text and structure vest the power to decide electoral vote questions in the [President of the Senate].”⁹⁵ In contrast, Professor Derek T. Muller, responding in the same law review and complimenting the historical research of Professors Delahunty and Yoo, argued that history confirmed that Congress, not the President of the Senate, held the power to resolve such disputes.⁹⁶

⁹² *Id.*

⁹³ Ackerman & Fontana, *supra*, at 629.

⁹⁴ Robert J. Delahunty & John Yoo, *Who Counts?: The Twelfth Amendment, the Vice President, and the Electoral Count*, 73 CASE W. RES. L. REV. 27, 34 (2022).

⁹⁵ *Id.*

⁹⁶ Derek T. Muller, *The President of the Senate, the Original Public Meaning of the Twelfth Amendment, and the Electoral Count Reform Act*, 73 CASE W. RES. L. REV. 1023, 1024 (2023).

Which scholars are right is not the point; either way, the count belongs to the federal government, not to a State. Yet if the judgment below stands, it effectively settles a disputed question of federal law. That is the problem with a state bar court deciding what arguments about a federal tribunal are not just frivolous but criminal.

The federal record heightens the need for review. Federal prosecutors investigated the events of January 6 for years and indicted the President; they never charged Eastman.⁹⁷ The President's prosecution was later dismissed.⁹⁸ And in November 2025, the President granted Eastman a "full, complete, and unconditional pardon" for conduct relating to his legal advocacy about the 2020 election.⁹⁹ As matters stand, the only judgment anywhere pronouncing Eastman guilty of conspiring to defraud the United States is and will forever be the one California entered in a lawyer-discipline proceeding.

⁹⁷ See Pet. App. 136a n.10; Andrea Margolis, David Spunt & Brooke Singman, *Judge Grants Jack Smith Request to Dismiss Jan. 6 Charges Against Trump, Appeal Dropped in Florida Docs Case*, FOX NEWS (Nov. 25, 2024), <https://www.foxnews.com/politics/judge-grants-jack-smith-request-dismiss-jan-6-charges-against-trump-appeal-dropped-florida-docs-case>.

⁹⁸ Margolis, Spunt & Singman, *supra*.

⁹⁹ *Granting Pardons for Certain Offenses Related to the 2020 Presidential Election*, *supra*.

CONCLUSION

If the judgment below stands, every State acquires a shadow power to try federal crimes under the label of professional discipline, and the line this Court drew in *Loney* will sit wherever the most eager State cares to put it. That is the machinery of lawfare. This Court should grant the petition, reformulate the third question presented, and reaffirm that only federal courts may try a wrong aimed at a federal proceeding.

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Respectfully submitted,

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