NO. 22-1733

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Zachary Greenberg,
Appellee

v.

Jerry M. Lehocky, in his official capacity as Board Chair of the Disciplinary Board of the Supreme Court of Pennsylvania, *et al.*,
Appellants

On Appeal from the United States District Court
for the Eastern District of Pennsylvania, No. 20-cv-03822

Appellee Zachary Greenberg's Petition for Panel Rehearing or Rehearing *En Banc*

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Table of Contents

Table of Authorities

Cases

Constitutional Provisions

Rules and Statutes

Other Authorities

L.A.R. 35.1 and Fed. R. App. P. 35(b)(1) Required Statement

I believe, based on reasoned and studied professional judgment, that the panel decision contradicts decisions of this Circuit and the Supreme Court, and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this Court because the decision is contrary to *DeJohn v. Temple Univ.*, 537 F.3d 301 (3d Cir. 2008), and *Already, LLC v. Nike, Inc.*, 568 U.S. 85 (2013).

This petition also involves a question of exceptional importance because the decision contradicts authoritative out-of-circuit decisions such as *Gonzalez v. U.S. Immigr. & Customs Enf't*, 975 F.3d 788 (9th Cir. 2020).

Background

This case presents a pre-enforcement First Amendment challenge to Pennsylvania's unprecedented speech code for lawyers.[1]

In 2016, the ABA introduced major changes to its antidiscrimination rule. Before, Model Rule 8.4(d) prohibited discrimination in that prejudiced the administration of justice. New Model Rule 8.4(g) not only expanded the definitions of sanctionable harassment and discrimination, it unmoored the rule to encompass all "conduct relating to the practice of law." Commentators questioned "how the august

[1] Eugene Volokh, *A speech code for lawyers, banning viewpoints that express 'bias,' including in law-related social activities*, THE VOLOKH CONSPIRACY, (Aug. 10, 2016), https://reason.com/volokh/2016/08/10/a-speech-code-for-lawyers-bann/; Eugene Volokh, *Lawyer Speech Code Blocked on First Amendment Grounds*, THE VOLOKH CONSPIRACY (Dec. 8, 2020), https://reason.com/volokh/2020/12/08/lawyer-speech-code-blocked-on-first-amendment-grounds/.

ABA could have approved such a blatantly unconstitutional stricture." *See, e.g.*, George W. Dent, Jr., *Model Rule 8.4(g): Blatantly Unconstitutional and Blatantly Political*, 32 NOTRE DAME J. L. ETHICS & PUB. POL'Y 135, 136 (2018). The ABA justified its change based on the "need for a cultural shift" in approaches to individual differences, including race and gender. ABA Standing Comm. on Ethics and Professional Responsibility, Memorandum 2 (Dec. 22, 2015).

Amid controversy surrounding 8.4(g)'s constitutionality, only Vermont and New Mexico fully adopted Model Rule 8.4(g). Other states either declined to adopt the rule or adopted significantly narrowed versions that remained tied to the representation of a client or the administration of justice. In 2020, over a dissent, the Supreme Court of Pennsylvania adopted its version of Rule 8.4(g) without those narrowing limitations. Although differing slightly from the Model Rule, it retained speech prohibitions at CLEs, bar association events, and bench-bar conferences. At base it forbids attorneys from "knowingly manifest[ing] bias or prejudice" regarding several protected classifications. JA3-4.[2]

Zachary Greenberg filed suit, seeking declaratory and injunctive relief against enforcement of the rule. Dkt.1 (initial complaint); JA145 (operative complaint). Greenberg is a Pennsylvania attorney who often speaks on hot button free-speech issues, including at CLE presentations. JA148-50. Greenberg provided several examples of audience members at his presentations who expressed offense at the language and topics of his presentations. JA159. He described many politically motivated complaints

[2] "JA" and "Dkt." refer to the joint appendix and the district court docket respectively.

of "bias" against speakers on legal issues, especially against speakers like Greenberg who pedagogically verbalize epithets in their lectures. JA166-70; JA207-08. Examples included a disciplinary investigation of Fifth Circuit Judge Edith Jones for a University of Pennsylvania Law School speech. JA163-64.

When the parties cross-moved for preliminary injunction and dismissal, the district court requested that they certify to not requiring any other facts or evidence before adjudication. Dkt.17. The parties did so, certifying that, with the filing of uncontested declarations (Dkts.22, 23), the record was complete for the motions. Dkt.21. Defendants submitted no evidence excluding Greenberg's speech from 8.4(g)'s ambit. Rather, they stipulated that "neither ODC nor the Board has issued any … opinions" that Greenberg's intended conduct "violates or does not violate Rule 8.4(g)." Dkt.21 at 12.

The district court preliminarily enjoined Defendants from enforcing 8.4(g). JA1. Applying the three-part test of *SBA List v. Driehaus*, 573 U.S. 149 (2014), the district court concluded that Greenberg had standing based on 8.4(g)'s objectively reasonable chilling effect on Greenberg's speech. JA9-23. It found that Greenberg's intended speech was arguably proscribed because 8.4(g) borrowed language from another rule that defined prohibited bias to include "epithets, slurs, [or] demeaning nicknames …" JA20. And it found a credible threat of enforcement based on Greenberg's examples of disciplinary complaints and investigations against academic and legal speakers. JA21. It declined Defendants' invitation "to trust them not to regulate and discipline…offensive speech even though they have given themselves the authority to do so" by the "plain language" of the rule. JA22

On the merits, 8.4(g) directly regulated attorney speech and exceeded the historical scope Defendants' authority, JA27-30. Because 8.4(g) sought "to remove certain ideas or perspectives from the broader debate," JA39, it was unconstitutional viewpoint discrimination, JA41-42.

Defendants appealed the district court's ruling, then dismissed their appeal to amend the rule. JA52. They proposed an amendment without public notice and comment. JA52. While Pennsylvania's Supreme Court considered and eventually approved Defendants' recommended revisions in July 2021, "Defendants chose to proceed on the same docket, continuing the pre-existing proceeding." JA61. Amended 8.4(g), rather than prohibiting manifestations of bias and prejudice, prohibits "denigrat[ing], or show[ing] hostility or aversion toward a person" on any of the rule's disfavored bases. JA52-53.

Acknowledging the amended rule, Greenberg amended his complaint. JA54. This complaint does not materially alter any allegation about the facts at the time Greenberg commenced suit. JA145. Three months later, more than a year into the litigation, Defendant Thomas Farrell, Chief Disciplinary Counsel of the Office of Disciplinary Counsel ("ODC"), declared that Greenberg's intended activities would not violate the rule and that ODC would not pursue discipline for such activities. JA276-78. Farrell admitted that his declaration did not bind Board members; that the Board played no role in his declaration's drafting; and that the Board has discretion to remove and replace Farrell. JA295-97. Farrell also acknowledged that ODC lacked any procedural safeguards against altering the positions his declaration espoused. JA286.

The parties cross-moved for summary judgment. In a 78-page decision, the district court enjoined enforcement of 8.4(g). JA47. The court's thorough analysis included twenty-two pages reaffirming Greenberg's standing and assuring its jurisdiction. JA56-78.

On standing, the district court recognized the "commencement of the litigation" as the relevant inquiry. JA57 (citation omitted); JA61-62. And it reiterated its previous conclusion: Greenberg had standing based on 8.4(g)'s chilling effect—Greenberg's "objectively reasonable" "fear of disciplinary complaint and investigation" given the "lengthy list of similar presentations" subject to public outcry, complaint, and investigation. JA59.

The mid-litigation developments—the substitution of an amended 8.4(g) and the Farrell declaration—implicated mootness, rather than standing. JA61. Defendants could not satisfy the "heavy burden" of proving the case was moot. JA66. The timing of the adaptations in response to the injunction counseled against mootness. JA67. So did Defendants' continued suggestion that they can regulate biased and prejudiced speech. JA68-69. The court concluded that the Farrell interpretation did not bind ODC, and regardless, the court could grant effective relief against the Board members. JA71-73.

On the merits, the district court found that 8.4(g) regulates "speech, not merely conduct," JA90, and unconstitutionally discriminates based on viewpoint. JA98. And it concluded that the rule failed under either strict or intermediate scrutiny. JA103-10.

Defendants appealed, and the panel reversed, finding that Greenberg lacks standing to challenge 8.4(g). The Court found that Defendants' mid-litigation actions—

amendment and disavowal—raise an issue of standing and not mootness "because Greenberg replaced his initial complaint with a subsequent pleading challenging the new Rule." Slip Op. 18 n.4. On standing, the panel held that Greenberg could not show objectively reasonable self-censorship given the "targeting" construction of the amended rule combined with the disavowal of enforcement in the Farrell declaration. Slip Op. 21-30. Because the question was one of standing, rather than mootness, the burden shifted to Greenberg to prove that Defendants would depart from Farrell's non-enforcement position. Slip. Op. 23 n.5. The panel decision cites the out-of-circuit *Abbott v. Pastides* seven times.900 F.3d 160 (4th Cir. 2018). But the panel never cites this Circuit's leading authorities on First Amendment challenges to overbroad harassment codes. *See McCauley v. Univ. of the Virgin Islands*, 618 F.3d 232 (3d Cir. 2010); *DeJohn v. Temple Univ.*, 537 F.3d 301 (3d Cir. 2008); *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200 (3d Cir. 2001) (Alito, J.).

Summary of the Argument

When developments occur in the middle of the litigation, "the pertinent justiciability doctrine is mootness," not standing. *Duncan v. Governor of the Virgin Islands*, 48 F.4th 195, 204 (3d Cir. 2022). The distinction between standing and mootness "matters because the Government, not [plaintiff], bears the burden to establish that a once-live case has become moot." *W. Va. v. EPA*, 142 S. Ct. 2587, 2607 (2022); *accord DeJohn*, 537 F.3d at 309 ("heavy, even formidable" burden to show mootness); JA 66.

The district court recognized this distinction, and properly refused to allow Defendants to "turn back the clock to the commencement of the case." JA61; *see also*

JA66 (quoting *Hartnett v. Pa. State Educ. Ass'n*, 963 F.3d 301, 306 (3d Cir. 2020)). But by treating mid-suit developments as an input for standing, the panel decision incorrectly shifts the burden to Greenberg to prove that Pennsylvania will abandon its litigation posture in the future. Slip Op. 23 n.5. This contradicts Third Circuit law.

The panel treats the mid-suit developments—the 2021 Rule 8.4(g) amendment and Farrell's subsequent disavowal—as matters of standing, simply because Greenberg filed an amended complaint challenging the amended rule. Slip Op. 18 n.4. This violates black-letter law: standing "depends upon the state of things at the time of the action brought." *Rockwell Int'l Corp. v. U.S.*, 549 U.S. 457, 473 (2007) (internal quotation omitted); *accord Nuveen Mun. Tr. v. Withumsmith Brown, P.C.*, 692 F.3d 283, 294 (3d Cir. 2012). For standing purposes, the amended complaint is relevant only to the degree that its allegations discuss the state of things at the beginning of the litigation. *Gonzalez v. U.S. Immigr. & Customs Enf't*, 975 F.3d 788, 803 (9th Cir. 2020); *S. Utah Wilderness Alliance v. Palma*, 707 F.3d 1143, 1153 (10th Cir. 2013) ("*SUWA*"). Amended pleadings ought not become "a game of skill" that prevents a "proper decision on the merits." *Riley v. Taylor*, 62 F.3d 86, 90 (3d Cir. 1995) (internal quotation omitted). No rule required Greenberg to amend his complaint; but the formality of him doing so putatively cost him jurisdiction. The panel's rule will confuse litigation, discourage litigants from amending their complaints, and impoverish the public record.

"[A]cts of strategic mooting litter the Federal Reporter." *Tucker v. Gaddis*, 40 F.4th 289, 294 (5th Cir. 2022) (Ho, J., concurring) (internal quotation omitted). "Judicial acceptance of such gamesmanship harms both good sense and individual rights and deprives the citizenry of certainty and clarity in the law by preventing the final resolution

of important legal issues." *Id.* (simplified). Until the panel decision, this Court had resisted such gamesmanship designed "to avoid deciding cases that happen to be controversial." *Id.*

For example, *DeJohn* holds that defendants' expediently timed, mid-suit revision of a university's harassment policy cannot moot a student's facial challenge to that policy. 537 F.3d at 309-11. (Like Greenberg, the student felt inhibited in expressing controversial opinions. *Id.* at 305.) This Court also holds that a statutory amendment "does not moot the claim if the updated statute differs only insignificantly from the original." *Nextel W. Corp. v. Unity Twp.*, 282 F.3d 257, 262 (3d Cir. 2002) (Alito, J.).

Panel or *en banc* rehearing is necessary to reconcile the panel decision with existing law of this Court, other circuits, and the Supreme Court.

Argument

I. The panel errs because standing is determined by the state of the facts when the action was filed, not at the time that the amended complaint was filed.

When a court determines standing, an amended complaint matters only to the extent that its allegations inform the state of things when the suit was filed. "Thus, although we examine the allegations in [the] Amended Complaint, our inquiry focuses on whether [plaintiff] had standing when the original complaint was filed." *SUWA*, 707 F.3d at 1153. Standing must be assessed "as of the time when [Greenberg] commenced suit, relying on the allegations in the operative amended complaint." *Gonzalez*, 975 F.3d at 803. For example, Gonzalez challenged ICE immigration detainers. *Id.* at 800. Immediately after Gonzalez filed his complaint, ICE cancelled his detainer and the

sheriff's department released him. *Id.* Subsequently, his amended complaints added another named plaintiff. *Id.* The government disputed Gonzalez's standing to seek prospective injunctive relief, but *Gonzalez* found he "had standing … when he commenced suit" even though the detainer no longer existed when he amended his complaint. *Id.* at 803. Having assured standing, *Gonzalez* concluded that the government could not carry the "heavy burden" of establishing mootness. *Id.* at 806.

The panel decision reverses the district court's jurisdictional analysis in a footnote that mangles this black-letter law. Footnote four rationalizes evaluating "standing and not mootness because Greenberg replaced his initial complaint with a subsequent pleading challenging the new Rule." Slip Op. 18 n.4. This is error. It muddles the difference between the state of facts—which are evaluated at *the time of the original complaint*—and the state of pleadings. "[T]he jurisdiction of the Court depends upon the state of things at the time of the action brought." *Nuveen Mun.*, 692 F.3d at 294. While "courts look to the amended complaint to determine jurisdiction," standing "depends upon the [facts] *at the time of the action brought*." *Rockwell*, 549 U.S. at 474, 473 (emphasis added). "[T]he standing inquiry remains focused on whether the party invoking jurisdiction had the requisite stake in the outcome when the suit was filed." *Davis v. FEC*, 554 U.S. 724, 735 (2008).

The district court appropriately considered jurisdictional facts existing when the suit commenced. *See* JA57 (citing cases). Greenberg's amended complaint—filed following Pennsylvania's 2021 amendment—continues to allege the same facts about the 2020 state of the world and seeks the same remedies as his initial complaint. JA145, 181. That Greenberg's amended complaint challenges 8.4(g) as amended does not

change the calculus. *See SUWA*, 707 F.3d at 1151 (amended complaint challenging mid-suit action).

Footnote four does not explain why it departs from applying *Rockwell*'s straightforward dichotomy between the "state of things" and state of pleadings. More puzzlingly, the footnote appears to directly contradict one of its own citations, which confirms how "the presence or absence of jurisdiction must be determined on the facts existing at the time the complaint under consideration was filed." *GAF Bldg. Materials Corp. v. Elk Corp.*, 90 F.3d 479, 483 (Fed. Cir. 1996). The panel quotes *GAF* as if Greenberg's "subsequent pleading" was the relevant "complaint under consideration." But *GAF* looked to the *original* complaint and would have come out differently had it considered facts at the time of the amended pleading. GAF sought a declaratory judgment that it did not infringe a pending unissued patent. *Id.* at 480. Following issuance, GAF amended its complaint. *Id. GAF* held that neither the issuance of the patent nor GAF's amendment cured the lack of jurisdiction based on "facts existing at the time the complaint under consideration was filed." *Id.* at 483. Thus, *GAF* affirmed dismissal. *Id.* If it had instead considered facts at the time of the amended complaint, the patent's issuance would have provided standing.[3]

The panel's decision contradicts *Rockwell* because it does not assess facts at the inception of the lawsuit. This pedigreed "time-of-filing" doctrine makes perfect sense. It keeps standing and mootness in their own spheres. *See Friends of Earth, Inc. v. Laidlaw Env't Servs.*, 528 U.S. 167, 190-92 (2000). Policy changes raising questions of mootness

[3] The only other case the footnote cites, *Persinger*, did not turn on amended pleadings because it had no amended complaint. No. 19-cv-853 (S.D. Ind.).

do not become matters of standing simply because the plaintiff revises his complaint to cover the new policy. *See Stradford v. Sec'y Pa. Dep't of Corr.*, 53 F.4th 67, 73 (3d Cir. 2022); *Zukerman v. USPS*, 961 F.3d 431, 441-45 (D.C. Cir. 2020). There is no qualitative difference between a plaintiff who amends his complaint to acknowledge the changed state of the facts, and one who instead waits to introduce evidence during dispositive motion practice. But there is a practical difference: the panel's rule discourages plaintiffs from amending their complaints to maintain an accurate public record on the federal docket. And that undermines the public interest in access to "an accurate and comprehensive record." *Reed v. Bernard*, 976 F.3d 302, 309 (3d Cir. 2020) (Krause, J., dissenting) (internal quotations omitted), *vacated on grant of rehearing en banc* 984 F.3d 273 (2021).

II. Mid-suit developments implicate mootness, not standing; neither the amendment to 8.4(g) nor the Farrell disavowal moots this case.

Because footnote four misapprehends the relevance of the amended complaint and loses the chronological focal point of standing, the decision cascades into further unacknowledged conflicts. Federal courts consistently hold that "intervening circumstance[s]" during the litigation present an issue of "mootness, not standing." *W. Va. v. EPA*, 142 S. Ct. 2587, 2607 (2022); *accord Duncan*, 48 F.4th at 204; *Goodwin v. C.N.J., Inc.*, 436 F.3d 44, 48 (1st Cir. 2006) ("subsequent events … assessed through the prism of mootness"). "Once the plaintiff shows standing at the outset, he need not keep doing so throughout the lawsuit." JA57 (quoting *Hartnett*, 963 F.3d at 305; alterations omitted).

This general rule applies to the two specific intervening events here:

1. Voluntary withdrawal and replacement of a challenged rule or policy. *E.g.*, *Ne. Fla. Chapter of Associated Gen. Contractors v. City of Jacksonville*, 508 U.S. 656, 662 (1993); *DeJohn*, 537 F.3d at 309; *Nextel W. Corp.*, 282 F.3d at 262; *Brusznicki v. Prince George's Cnty.*, 42 F.4th 413, 419 (4th Cir. 2022); *Kenjoh Outdoor, LLC v. Marchbanks*, 23 F.4th 686, 692 (6th Cir. 2022); *Styczinski v. Arnold*, 46 F.4th 907, 912 (8th Cir. 2022); *Cuviello v. City of Vallejo*, 944 F.3d 816, 824 (9th Cir. 2019).

2. A defendant's disavowal of intent to take the complained of action. *E.g.*, *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91-93 (2013) (covenant not to sue); *Sanofi Aventis U.S. LLC v. HHS*, 58 F.4th 696, 703 (3d Cir. 2023) (rescission of challenged opinion); *Pool v. Houston*, 978 F.3d 307, 312-14 (5th Cir. 2020) (disavowal of enforcement of challenged policy); *Speech First, Inc. v. Schlissel*, 939 F.3d 756, 769-70 (6th Cir. 2019) (statement of one official limiting enforcement plans and "affirm[ing] students' free speech rights").

When properly construed as a matter of mootness, neither the revision to 8.4(g) nor the non-binding Farrell declaration moots the controversy. JA63-78. "[A]n amendment does not moot the claim if the updated statute differs only insignificantly from the original." *Nextel W. Corp.*, 282 F.3d at 262. Here, as alleged in Greenberg's amended complaint and as determined by the district court, the revised rule threatens Greenberg and other Pennsylvania attorneys just like the initial rule. JA76-78. Defendants do not claim the 2021 revision effected a sea change; they continue to defend the initial rule. JA68-69.

There are six reasons that Defendants cannot meet their "heavy burden" of showing that the Farrell declaration moots Greenberg's claims. JA62; *DeJohn*, 537 F.3d at 309.

First, "[t]he focus is whether the defendant made the change unilaterally and so may return to its old ways later on." *Hartnett*, 963 F.3d at 307. Farrell concedes that "[t]here is no set process for amending, revising, or withdrawing the positions taken in the Farrell Declaration." JA286. Thus, Defendants' post-injunction litigation position is the "ad hoc, discretionary, and easily reversible" product of "one agency or individual." *Schlissel*, 939 F.3d at 768; *accord* JA72; *contrast Already,* 568 U.S. at 93 (covenant sufficient to overcome voluntary cessation rule when "unconditional and irrevocable").

Second, Defendants admit Farrell's declaration is non-binding, and have abandoned their "novel" claim that ODC would be bound by "official estoppel." Tr. of Oral Arg. (App. Dkt. 137) at 8:8-11; *compare* JA71-72. That claim was misguided: "estoppel cannot be created by representations or opinions concerning matters of law." *Mandler v. Commonwealth*, 247 A.3d 104, 115 (Pa. Commonwealth Ct. 2021) (internal quotation omitted).

Third, the posture and timing of the Farrell declaration weighs against mootness. Defendants submitted it well after the outset of the litigation, after they had been preliminarily enjoined, as they continue to defend the constitutionality and need for 8.4(g). JA67-69. This is exactly the type of "expedient" disavowal this Court and others generally hold insufficient. *Fields v. Speaker of the Pa. House of Reps.*, 936 F.3d 142, 161 (3d Cir. 2019); *Schlissel*, 939 F.3d at 769-70; *DeJohn*, 537 F.3d at 309; *Speech First, Inc*

v. Fenves, 979 F.3d 319, 329 (5th Cir. 2020). Because Defendants not only control rule enforcement but also drafted the rule, an actual disavowal would have included substantive changes to 8.4(g). At the beginning of the litigation—the relevant point in time—Defendants stipulated that "neither ODC nor the Board has issued any … opinions" that Greenberg's intended speech "violates or does not violate Rule 8.4(g)." Dkt.21 at 12.

Fourth, Farrell's declaration does not categorically disavow enforcement of the viewpoint discriminatory rule. When pressed on a specific situation that might arise during the question-and-answer portion of Greenberg's CLE presentations, Farrell responded that it was "not possible to answer this hypothetical without more details." JA287. A recognition that the First Amendment sets limits is insufficient when the "the distance to that horizon is unknown by the [defendant] and unknowable to those regulated by it." *Fenves*, 979 F.3d at 316; *see* JA122 & n.30.

Fifth, ODC's investigatory process by itself creates an objectively reasonable chilling effect. JA74. ODC promises confidentiality and civil immunity to all complainants. JA202-03. Each public complaint triggers an investigatory process that may involve ODC counsel contacting the attorney. JA74. Because the investigatory process itself can be chilling, it is error to "focus[] so singularly…on the…power to punish." *Speech First, Inc v. Cartwright*, 32 F.4th 1110, 1122 (11th Cir. 2022); *e.g.*, JA163-64 (two-year investigation and concomitant publicity). "A case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Knox v. SEIU*, 567 U.S. 298 (2012) (internal quotations omitted). Farrell's

declaration does not moot Greenberg's request for an injunction against reviewing and investigating 8.4(g) complaints. Dkt. 65 at 1.

Finally, the twelve Board member defendants had no role in drafting the declaration, never ratified it, and have the at-will power to replace Farrell. JA73, 295-296. Defendants do not contest the conclusion (JA73-74) that the Board defendants retain power to impose discipline even when ODC has dismissed a complaint. At the very least, Greenberg's claims are not moot against those twelve defendants.

Ultimately, the panel opinion silently extinguishes the deeply rooted voluntary cessation mootness framework. The district court was exactly right. An immediate disavowal in Defendants' "first substantive response to the complaint is distinct from a disavowal" strategically submitted after over a year of litigation, after preliminary injunction, after stipulating Defendants had issued no opinions on the application of 8.4(g) to Greenberg's speech, after an aborted appeal, and after Defendants submitted non-material revisions to 8.4(g) without including Farrell's gloss in the text or comments. JA61. The consequences of the panel opinion are "allow[ing] government officials to unilaterally avoid judicial review." *Tucker*, 40 F.4th at 297 (Ho, J., concurring). This is something this Court has been "understandably reluctant" to countenance. *Solar Turbines, Inc. v. Seif*, 879 F.2d 1073, 1079 (3d Cir. 1989) (quoting *Dow Chem. Co. v. EPA*, 605 F.2d 673, 678 (3d Cir. 1979)).

Conclusion

This Court should grant panel or *en banc* rehearing.

Dated: September 12, 2023

Respectfully submitted,

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Combined Certifications

1. Certification of Bar Membership

I hereby certify under L.A.R. 28.3(d) that I, Adam E. Schulman am a member in good standing of the bar of the United States Court of Appeals for the Third Circuit.

2. Certification of Compliance with Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

I hereby certify that this petition complies with the type-volume limitation of Fed. R. App. P. 35(b)(2)(A) because it contains 3,900 words, excluding the parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii). I hereby certify that this petition complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2019 in 14-point Garamond font.

3. Certification of Service

I hereby certify that on September 12, 2023, I electronically filed the foregoing with the Clerk of the United States Court of Appeals for the Third Circuit using the CM/ECF system, which will provide notification of such filing to all who are ECF-registered filers.

4. Certification of Virus Check

In accordance with L.A.R. 31.1(c), I hereby certify that a virus check of the electronic PDF version of the petition was performed using McAfee Internet Security software and the PDF file was found to be virus free.

Executed on September 12, 2023.

/s/ Adam E. Schulman
Adam E. Schulman