No. 22-1733

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

ZACHARY GREENBERG,
Plaintiff-Appellee,

v.

JEREMY M. LEHOCKY, in his official capacity as Board Chair of the Disciplinary Board of the Supreme Court of Pennsylvania, *et al.*,
Defendants-Appellants.

On Appeal from the United States District Court
for the Eastern District of Pennsylvania,
No. 2-20-cv-03822-CFK (Hon. Chad F. Kenney)

BRIEF OF THE NEW CIVIL LIBERTIES ALLIANCE AS *AMICUS CURIAE* IN SUPPORT OF APPELLEE'S PETITION FOR PANEL REHEARING OR REHEARING *EN BANC*

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September 19, 2023

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 and Third Circuit LAR 26.1, the New Civil Liberties Alliance (NCLA) makes the following disclosures:

(1) For non-governmental corporate parties, please list all parent corporations:

NCLA is a nonprofit corporation organized under § 501(c)(3) of the Internal Revenue Code. NCLA has no parent corporation.

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NCLA has issued no stock.

(3) If there is a publicly held corporation which is not a party to the proceeding before this Court but which has a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests.

NCLA is unaware of any such corporation, apart from those identified by the parties.

(4) In all bankruptcy appeals counsel for the debtor or trustee must list: (1) the debtor, if not identified in the case caption; (2) the members of the creditors' committee or the top 20 unsecured debtors; and (3) any entity not named in the caption which is an active participant in the bankruptcy proceeding. If the debtor or trustee is not participating in the appeal, this information must be provided by appellant.

Not applicable.

Dated: September 19, 2023

/s/ Richard A. Samp
Richard A. Samp

Attorney for New Civil Liberties Alliance

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INTRODUCTION AND INTERESTS OF *AMICUS CURIAE*

The New Civil Liberties Alliance (NCLA) is a nonpartisan, nonprofit civil-rights organization devoted to defending constitutional freedoms from violations by the administrative state.[1] The "civil liberties" of the organization's name include rights at least as old as the U.S. Constitution itself, such as jury trial, due process of law, the right to be tried in front of an impartial and independent judge, freedom of speech, and the right to live under laws made by the nation's elected lawmakers through constitutionally prescribed channels. Yet these self-same rights are also very contemporary—and in dire need of renewed vindication—precisely because legislators, executive branch officials, administrative agencies, and even sometimes the courts have neglected them for so long.

NCLA is particularly concerned by the open defiance of First Amendment norms displayed in this case by Pennsylvania officials. Both the Supreme Court and this Court have repeatedly stated that speech restrictions that discriminate on the basis of the viewpoint expressed are presumptively unconstitutional. *See, e.g., Iancu v. Brunetti*, 139 S. Ct. 2294, 2299 (2019); *Northeastern Pa. Freethought Society v. County of Lackawanna Transit System*, 938 F.3d 424, 432 (3d Cir. 2019)

[1] NCLA states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than NCLA and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief. All parties have consented to the filing of the brief.

("*Freethought Society*") (characterizing government-imposed viewpoint discrimination as "egregious" and "out of bounds"). But rather than attempting to explain why the speech restrictions challenged here should be deemed viewpoint-neutral (the defense they adopted in the district court), Appellants in this Court focused instead on challenging Appellee Zachary Greenberg's standing to challenge those restrictions.

As a result of the panel's acceptance of that no-standing argument, Greenberg and countless other Pennsylvania attorneys find themselves in an untenable position. On the one hand, they are told they must await being targeted in a disciplinary proceeding before they are permitted to raise their First Amendment claims. But on the other hand, they are required to comply with the terms of a professional-conduct rule that are, according to a district court finding not addressed by the panel, so vague that "they do not provide fair notice of the prohibited conduct." *Greenberg v. Goodrich*, 593 F. Supp. 3d 174, 222 (E.D. Pa. 2022). In the face of that uncertainty, it is inevitable that Greenberg and other attorneys will chill their speech to at least some extent—for fear that they will cross the unknowable line established by Pennsylvania and thereby trigger a disciplinary action.

Rehearing *en banc* is warranted to address whether the First Amendment authorizes Pennsylvania to force attorneys into that untenable position. Rehearing is

particularly warranted because the panel's problematic no-standing ruling has the effect of shielding a rule that is facially unconstitutional in *all* its applications.

ARGUMENT

I. OVERLY VAGUE RULES SUCH AS RULE 8.4(g) ARE PARTICULARLY LIKELY TO DETER INDIVIDUALS FROM SPEAKING FREELY

To establish Article III standing to assert a First Amendment challenge to a government rule that restricts speech, a plaintiff must demonstrate that he is curbing his speech based on "an actual and well-founded fear" of being sanctioned for violating the rule. *Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383, 393 (1988). The panel held that Greenberg lacks Article III standing because his fears of being sanctioned under Pennsylvania Rule of Professional Conduct 8.4(g) are not well-founded. Based on a declaration by Pennsylvania's Chief Disciplinary Counsel that Greenberg's planned speeches and writings do not violate the Rule, the panel held that Greenberg "faces no credible risk that the Rule will be enforced against him." Slip. Op. 28.

Left unanswered by the panel's ruling is: who *does* face a "credible risk" of an enforcement action under Rule 8.4(g)? The panel could not provide an answer because Pennsylvania itself has declined to provide an answer.

Pennsylvania clearly intends to enforce the Rule against at least *some* attorney speech; its submissions to this Court repeatedly stated that it deems the Rule an

important means of curbing speech that constitutes "harassment" or "discrimination" against protected groups. Yet, as Greenberg explains in his petition for rehearing *en banc*, Pennsylvania and Chief Disciplinary Counsel Thomas J. Farrell have steadfastly declined to provide concrete examples of prohibited speech:

> 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."

Pet. at 14 (quoting JA287). In other words, Greenberg is simply left to guess at what he is forbidden from saying.[2]

According to the panel, Greenberg has no cause for concern because Farrell has declared that Greenberg will not be charged under Rule 8.4(g) so long as he confines his speech within the contours of the statements outlined in his amended complaint. Slip Op. at 27 (stating that "Defendants have informed Greenberg that his planned

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[2] For purposes of determining Greenberg's standing, it is of no moment that Rule 8.4(g) requires a showing that a lawyer "knowingly" speaks in a harassing or discriminatory manner. In *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 163 (2014), the Supreme Court explicitly rejected an appeals court's conclusion that a "knowing" requirement makes it unlikely that one who disclaims any desire to violate a challenged speech restriction could be targeted for prosecution (stating that "nothing in this Court's decisions requires a plaintiff who wishes to challenge the constitutionality of a law to confess that he will in fact violate the law"). The "knowingly" requirement does not preclude Farrell (or his successors as Chief Disciplinary Counsel) from charging that a lawyer spoke "knowingly," regardless of whether the lawyer actually intended to discriminate against or harass anyone.

speech is not barred. The Chief Disciplinary Counsel confirms Greenberg's planned speech does not violate the Rule and disavows any enforcement for his planned speech"). But those assurances are of little solace to Greenberg in the absence of guidance from Pennsylvania regarding what he is *not* permitted to say. Few if any speakers confine themselves to a script prepared in advance; they inevitably make unscripted statements in response to what others say to them. Given Pennsylvania's refusal to provide Greenberg with any examples of speech prohibited by Rule 8.4(g), his determination that he will self-censor his speech once the Rule becomes effective is eminently reasonable.[3]

Pennsylvania's failure to provide any examples of prohibited speech is particularly problematic in light of the district court's ruling—unchallenged by the panel—that Rule 8.4(g) "do[es] not provide fair notice of the prohibited conduct to Pennsylvania attorneys." *Greenberg v. Goodrich*, 593 F. Supp. 3d at 222. Courts are particularly apt to determine that a self-censoring plaintiff has demonstrated the

[3] The panel concluded that Rule 8.4(g) does not "arguably bar" Greenberg's speech because his planned use of controversial epithets at CLE events is confined to "academic discussion[s]," and he does not plan to "direct" his speech at specific audience members—as is arguably required to establish a violation of the Rule. Slip Op. at 22. That conclusion fails to account for the likelihood that some audience members will challenge Greenberg's use of arguably offensive language. Anything he says in response to such a challenge will be "direct[ed]" at a specific audience member and thus leave him vulnerable to a Rule 8.4(g) disciplinary action.

reasonableness of his fears of enforcement when the challenged speech restriction is at least "arguably vague." *Harrell v. Florida Bar*, 608 F.3d 1241, 1254 (11th Cir. 2010).

The panel decision directly conflicts with the Fifth Circuit's decision in *Speech First, Inc. v. Fenves*, 979 F.3d 319 (5th Cir. 2020). *Fenves* involved a First Amendment challenge to a university's rules that restricted "verbal harassment." The Fifth Circuit held that students who were members of the plaintiff (a free-speech advocacy group) possessed Article III standing to challenge the rule. The appeals court concluded that the students reasonably feared disciplinary proceedings under the "verbal harassment" rule—despite the university's caveat that the rule should be construed narrowly to avoid First Amendment difficulties—because the university intended to enforce the rule while only providing vague guidance regarding what speech was prohibited. *Id.* at 337. The court upheld their standing, given that the university's stated enforcement policy "reasonably implies that the University will protect and enforce its verbal enforcement policy as far as possible" even though "the distance to that horizon is unknown to the University and unknowable to those regulated by it." *Id.* at 337-38.

The "distance to the horizon" is similarly unknowable to Greenberg. Because Pennsylvania has refused to specify what speech is prohibited by Rule 8.4(g),

Greenberg cannot determine what speech he can direct at others while using controversial epithets at CLE events.[4] Under the Fifth Circuit's *Fenves* standard, that uncertainty suffices to provide him with Article III standing. The panel, on the other hand, held that he lacked standing. Rehearing *en banc* is warranted to address whether the Court wishes to maintain the inter-circuit conflict created by the panel's decision.

II. RULE 8.4(g) IS A VIEWPOINT-BASED SPEECH RESTRICTION THAT IS INVALID IN *ALL* ITS APPLICATIONS

Rehearing is particularly warranted because the panel's problematic no-standing ruling has the effect of shielding a rule that is facially unconstitutional in *all* its applications.

Rule 8.4(g) is content-based (because it limits its speech restrictions to speech concerning 11 listed characteristics) and is viewpoint-based (because it prohibits speech that expresses disparaging views of another on the basis of any of the rule's 11 listed characteristics but permits laudatory comments on the same subjects). Appellants concede that they are engaging in viewpoint- and content-based

[4] The panel sought to distinguish *Fenves*, stating, "Unlike *Fenves*, where the bounds of regulated speech were unclear, Defendants have informed Greenberg his planned speech is not barred." But "the bounds of regulated speech" are similarly unclear under Rule 8.4(g); although Pennsylvania has told Greenberg that there are certain things he is permitted to say, it has left him in the dark regarding what he must avoid saying.

discrimination but assert that they are not bound by normal First Amendment constraints when restricting attorney speech, arguing that "First Amendment rules against viewpoint and content discrimination do not apply when the government regulates the practice of law," Appellants Br. 15, and that Rule 8.4(g)'s viewpoint discrimination is permissible because it "combat[s] harassment and discrimination" and thereby "advances States' compelling interest in protecting confidence in the legal system and the legal profession's integrity." *Id.* at 16.

NCLA trusts that this Court does not take that argument seriously. The federal courts have consistently condemned viewpoint-based speech restrictions as "egregious" and "out of bounds." *Freethought Society*, 938 F.3d at 432. *See, e.g., Iancu*, 139 S. Ct. at 2299 (where rule "is viewpoint-based, it is unconstitutional"); *Matal v. Tam*, 137 S. Ct. 1744, 1765 (2017) (Kennedy, J., concurring in part and concurring in the judgment) ("[I]t is a fundamental principle of the First Amendment that the government may not punish or suppress speech based on disapproval of the ideas or perspectives the speech conveys.").

In *Nat'l Inst. of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018) ["*NIFLA*"], the Supreme Court explicitly rejected arguments that "professional speech" is a "separate category of speech" entitled to reduced First Amendment protections. *NIFLA*, 138 S. Ct. at 2371-72 (stating that "[s]peech is not unprotected

merely because it is uttered by 'professionals'"). *NIFLA* refutes any suggestion that States are free to impose viewpoint-based restrictions on attorney speech. Because Rule 8.4(g) discriminates on the basis of viewpoint, it may not be enforced *at all*, even for otherwise benign purposes. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 384 (1992).

By adopting a professional-conduct rule that is so blatantly unconstitutional, Pennsylvania has made clear to attorneys that it will not let First Amendment norms stand in the way of its desire to discipline attorneys for disfavored speech. Such misconduct makes it eminently reasonable for Greenberg and others to fear that their speech will be targeted—and thereby provides them with the Article III standing necessary to challenge the Rule.

CONCLUSION

The Court should grant the petition for rehearing *en banc*.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I am an attorney for *amicus curiae* New Civil Liberties Alliance. Pursuant to Fed.R.App.P. 32(a)(7)(C), I hereby certify that the foregoing brief is in 14-point, proportionately spaced Times New Roman type. According to the word processing system used to prepare this brief, the word count of the brief is 2,067, not including the Rule 26.1 disclosure statement, table of contents, table of authorities, signature block, certificate of service, and this certificate of compliance. I further certify that paper copies of this brief will be identical to the electronic version.

I certify that I am a member in good standing of the bar of the United States Court of Appeals for the Third Circuit.

The electronic version of this brief was scanned with Windows Defender. It contains no known viruses.

/s/ Richard A. Samp
Richard A. Samp

Dated: September 19, 2023

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of September, 2023, I electronically filed the amicus brief of the New Civil Liberties Alliance with the Clerk of the Court for the U.S. Court of Appeals for the Third Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/CF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Richard A. Samp
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