No. 22-1733

In the United States Court of Appeals for the Third Circuit

ZACHARY GREENBERG,
Plaintiff-Appellee,

v.

JERRY 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

BRIEF OF *AMICI CURIAE* MANHATTAN INSTITUTE, BADER FAMILY FOUNDATION, AND HANS BADER IN SUPPORT OF PLAINTIFF-APPELLEE AND AFFIRMANCE

Ilya Shapiro
MANHATTAN INSTITUTE
52 Vanderbilt Ave.
New York, NY 10017
(212) 599-7000
ishapiro@manhattan-institute.org

October 25, 2022

CORPORATE DISCLOSURE STATEMENT

The Manhattan Institute and Bader Family Foundation each state that they have no parent companies, subsidiaries, or affiliates, and that they do not issue shares to the public.

Dated: October 25, 2022

/s/ *Ilya Shapiro*
Ilya Shapiro

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IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

The **Manhattan Institute** is a nonprofit public policy research foundation whose mission is to develop and disseminate new ideas that foster greater economic choice and individual responsibility. To that end, it has historically sponsored scholarship and filed briefs opposing regulations that either chill or compel speech.

The **Bader Family Foundation** is a nonprofit 501(c)(3) foundation that seeks to advance civil liberties, and thus files *amicus* briefs in civil-liberties cases. *See, e.g.*, *Meriwether v. Hartop*, 992 F.3d 492 (6th Cir. 2021).

Hans Bader is an attorney and trustee of the Bader Family Foundation. He once handled sexual-harassment issues and discrimination complaints in the U.S. Department of Education, including its Office for Civil Rights.

Amici believe that, even as harassment has no place in legal practice, the bar rule at issue here goes far beyond that and enforces a rigid ideological orthodoxy. Indeed, this brief's counsel had a "lived experience" with free-ranging harassment and antidiscrimination policies that chill speech and embroil people in Kafkaesque inquisitions. *See* Eugene Volokh, *What Are Georgetown Professors Forbidden to Say?*, Volokh Conspiracy, June 7, 2022, https://bit.ly/3SqJtU5; Ilya Shapiro, *Why I Quit Georgetown*, Wall. St. J., June 6, 2022, https://on.wsj.com/3TMGKoO.

[1] Pursuant to Fed. R. App. P. 29, counsel for *amici* states that all parties have consented to the filing of this brief. Further, no party's counsel authored any part of this brief and no person other than *amici* made a monetary contribution to fund its preparation or submission.

SUMMARY OF ARGUMENT

Pennsylvania's rule is overbroad because it defines speech as "harassment" without requiring the speech to be "severe or pervasive," as federal law requires in this context. *Compare* J.A. 119-120 & n. 29 *with Harris v. Forklift Systems*, 510 U.S. 17, 21-22 (1993) (discussing federal law). "Absent any requirement akin to a showing of severity or pervasiveness—that is, a requirement that the conduct objectively and subjectively creates a hostile environment or substantially interferes with an individual's work—[a harassment] policy provides no shelter for core protected speech." *See DeJohn v. Temple Univ.*, 537 F.3d 301, 318 (3d Cir. 2008) (invalidating college hostile-environment policy that didn't require a showing of severity or pervasiveness). Even if an antiharassment rule punishes only conduct that creates a hostile environment or unreasonably interferes with another's work, it is still unconstitutional if it applies to speech that is not severe or pervasive, because "unless harassment is qualified with a standard akin to a severe or pervasive requirement, a harassment policy may suppress core protected speech." *Id.* at 320.

Under campus hostile-environment harassment policies that did not require a showing of severity and pervasiveness, "students and campus newspapers have been charged with racial or sexual harassment for expressing commonplace views about racial or sexual subjects, such as criticizing feminism, affirmative action, sexual harassment regulations, homosexuality, gay marriage . . . or discussing the alleged

racism of the criminal justice system." U.S. Dept. of Education, *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance: Final Rule*, 85 Fed. Reg. 30026, 30140 (May 19, 2020), *citing* Jerome Woehrle, *Free Speech Shrinks Due to Bans on Hostile or Offensive Speech*, Liberty Unyielding (Nov. 23, 2017), https://bit.ly/3TLGBC8 (citing various sources).

Defendants' rule is even broader than such speech-chilling policies—and far broader than the harassment policy this Court set aside in *DeJohn*—because it is not limited to speech that creates a hostile environment, much less one that is "severe or pervasive." It is also unconstitutionally vague.

ARGUMENT

I. Pennsylvania's Rule Impermissibly Punishes Speech That Is Not Severe or Pervasive Enough to Create a Hostile Work Environment

In their opening brief, appellants did not challenge—and thus have conceded[2]—the finding of the court below that their rule has the "same design" as a "model rule" that is "designed to capture isolated circumstances not severe or pervasive enough to create a hostile environment or cause liability under Title VII of the Civil Rights Act." J.A. 119 n.29. That model rule "is not restricted to conduct that is severe or pervasive." ABA Comm. on Ethics & Pro. Resp., Formal Op. 493 (2020). Their rule "was fashioned to capture incidents that federal law normally does

[2] *See Philippines v. Westinghouse Electric Corp*., 43 F.3d 65, 71 n. 5 (3d Cir. 1994) (argument waived if not raised in opening brief; cursory statement in "initial briefing" does not suffice to preserve issue).

not find objectively hostile or abusive enough" to prohibit, and accordingly, attorneys are "subject to discipline under this regulation" even over "incidents that would normally be insufficient to cause liability under federal law." J.A. 119 n.29.

The fact that the Pennsylvania rule does not include a "severe or pervasive" requirement is further made clear by the fact it was expressly amended to remove prior language requiring that conduct amount to harassment or discrimination "as those terms are defined in applicable . . . statutes." That discarded language would likely have been interpreted to include a "severity or pervasiveness" requirement for harassment claims, because applicable statutes require such a showing. *See*, *e.g.*, *Harris v. Forklift Systems*, 510 U.S. 17, 21-22 (1993) (conduct must be "severe or pervasive" to constitute workplace harassment under Title VII); *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 633, 650, 651, 652, 654 (1999) (emphasizing five times that conduct must be "severe, pervasive, and objectively offensive" to constitute harassment in the educational setting).

That key feature distinguishes Pennsylvania's rule from those in other jurisdictions that punish attorneys for harassment or discrimination as defined in federal or state laws. *See* Add.4-27 (collecting provisions). Those state rules, like federal law, overwhelmingly require proof of severity or pervasiveness to render speech "harassment." *See, e.g.*, *Lyle v. Warner Bros.*, 132 P.3d 211 (Cal. App. 2006) (sexually offensive language must be severe or pervasive, and be based on the

victim's sex, to constitute sexual harassment under California state law; recurrent sexual discussions did not constitute unlawful harassment).

Moreover, as the appellants note, in July 2021, the Pennsylvania Supreme Court revised Rule 8.4(g) as follows:

> It is professional misconduct for a lawyer to: …
> (g) in the practice of law, ~~by words or conduct,~~ knowingly ~~manifest bias or prejudice, or~~, engage in conduct constituting harassment or discrimination ~~as those terms are defined in applicable federal, state or local statutes or ordinances~~, including but not limited to bias, prejudice, harassment or discrimination based upon race, sex, gender identity or expression, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, or socioeconomic status. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude advice or advocacy consistent with these Rules.

Appellants' Br. 10; *see* JA205; Add.1-2 (clean text of old and current Rules).

The elimination of that limiting language—"as those terms are defined in applicable . . . statutes"—leaves the rule even broader than its previous version, whose overbreadth was so obvious that defendants did not appeal the lower court's ruling against it. *See Greenberg v. Haggerty*, 491 F.Supp.3d 12 (E.D. Pa. 2020).

Where such limiting language is absent from a harassment rule, courts will not write it in. *See DeJohn v. Temple Univ.*, 537 F.3d 301, 318 (3d Cir. 2008) (invalidating harassment policy that lacked severity/pervasiveness language, rather than just adding in that requirement); *Saxe v. State College Area School Dist.*, 240 F.3d 200, 216-17 (3d Cir. 2001) (same). Here, such limiting language is not merely

absent, but was specifically removed, clarifying that the targeted speech and conduct need not be pervasive to be prohibited. *See Doe v. Chao*, 540 U.S. 614, 622 (2004) (presumed damages unavailable where "drafting history show[s] that Congress cut the very language in the bill that would have authorized any presumed damages").

Nor have appellants advocated any such limiting construction in its interpretation of the rule. Indeed, their opening brief makes clear that severity or pervasiveness is not required, by citing as instances of prohibited conduct behavior that is not severe or pervasive. *See Purgess v. Sharrock*, 33 F.3d 134, 144 (2d Cir. 1994) ("statements in briefs" are "binding judicial admissions of fact."). For example, the rule covers calling a woman "little girl" and "little mouse." *See, e.g.*, Def.-App. Brief at 67 ("And a court invoked its analog to Federal Rule of Civil Procedure 11 to sanction a lawyer who called opposing counsel 'little girl' and 'little mouse.' . . . No reasonably intelligent attorney could fail to understand that Rule 8.4(g)'s ban on harassment and discrimination would prohibit similar conduct.").

But that's nowhere near enough to create a hostile environment, or meet the requirement of severity or pervasiveness: One circuit court ruled that even sexist comments such as "fetch your husband's slippers like a good little wife" and "We've made every female in this office cry like a baby. We will do the same to you. Just give us time," and references to female employees as "slaves" were not "severe or

pervasive," and thus were insufficient to create a hostile work environment. *Hartsell v. Duplex Products*, 123 F.3d 766, 773 (4th Cir. 1997).

Appellants' brief also says that a single bigoted comment or "inappropriate advances" are banned by the rule. See Def.-App. Brief at 43 ("The harm to the profession is similar whether an attorney calls Jewish lawyers 'bloodsucking shylocks' directed at opposing counsel during litigation or participants at a bench-bar conference. . . . And female attorneys can hardly build relationships with judges and colleagues when fending off 'inappropriate advances,' which occur with unfortunate regularity at bench-bar functions."); *id*. at 59 (rule violated by "lawyer who tells a Jewish colleague that she belongs to an 'inbreeding' 'race of idiots' at a bench-bar conference"). While such behavior can properly be subject to greater regulation in a courtroom setting, or punished by state tort law when it involves unwanted touching, it is not severe or pervasive *per se*, and thus does not *ipso facto* constitute "harassment or discrimination as those terms are defined in applicable federal, state or local statutes or ordinances," as the limiting language removed by the Pennsylvania Supreme Court would have required.

Courts have long made clear that "inappropriate advances" don't usually add up to a hostile environment. *See, e.g., Weiss v. Coca-Cola Bottling Co.*, 990 F.2d 333, 337 (7th Cir. 1993) (no objectively hostile work environment where supervisor asked plaintiff for dates on repeated occasions, placed "I love you" signs in her work

area, and attempted to kiss her on multiple occasions). For example, one circuit court dismissed a harassment claim for lack of severity or pervasiveness where a supervisor repeatedly made sexual jokes and comments about plaintiff's "state of dress," once referred to her as "Hot Lips," and offered to improve her evaluation if she performed sexual favors. *Morris v. Oldham County Fiscal Ct*., 201 F.3d 784, 787 (6th Cir. 2000). And it dismissed another harassment claim where a supervisor placed a pack of cigarettes in a worker's bra strap, handed her a cough drop saying that she "lost [her] cherry," and made a vulgar remark about her sweater. *Burnett v. Tyco Corp.*, 203 F.3d 980, 986 (6th Cir. 2000).

Nor are bigoted remarks forbidden if they are not persistent. *See, e.g., Jordan v. Alternative Resources*, 467 F.3d 378 (4th Cir. 2006) (single comment that "They should put those two black monkeys in a cage with a bunch of black apes and let the apes f—k them" was not severe or pervasive); *Bolden v. PRC, Inc*., 43 F.3d 545 (10th Cir. 1994) (no hostile environment where co-workers used N-word); *DeAngelis v. El Paso Municipal Police Officers Assoc.*, 51 F.3d 595 (5th Cir. 1995) (repeated public sexist jibes in union newspaper were not severe or pervasive).

II. Pennsylvania's Rule Is Overbroad, Because It Punishes Constitutionally Protected Speech

The fact that the rule requires an intent to demean in some cases does not keep it from being overbroad or chilling speech. "'First Amendment freedoms need breathing space to survive.' An intent test provides none." *Wisc. Right to Life v.*

FEC, 551 U.S. 449, 468–69 (2007). Nor does the fact that speech may have a hidden or perceived biased motive render it unprotected or keep a ban on such speech from inhibiting free expression, as this Court explained in striking down a harassment policy that reached speech having a "purpose" to harass, even if it was not "severe or pervasive" enough to cause harm. *Saxe*, 240 F.3d at 214, 216-17 ("A regulation is unconstitutional on its face on overbreadth grounds where there is a "a likelihood that the statute's very existence will inhibit free expression" by "inhibiting the speech of third parties who are not before the Court."); *id*. (finding harassment policy overbroad for multiple other reasons, including that it "punishes not only speech that actually causes disruption, but also speech that merely intends to do so: by its terms, it covers speech 'which has the purpose or effect of' interfering with educational performance or creating a hostile environment").

Requiring a hostile or discriminatory intent for punishment does not protect the right to express competing viewpoints, as the Supreme Court made clear in *Garrison v. Louisiana*, the libel case that rejected liability based on a speaker's hostile purposes: "Debate on public issues will not be uninhibited if the speaker must run the risk that it will be proved in court that he spoke out of hatred . . . . Under a rule . . . permitting a finding of [liability] based on an intent merely to inflict harm . . . it becomes a hazardous matter to speak out against a popular politician, with the result that the dishonest and incompetent will be shielded." 379 U.S. 64, 73 (1964).

Similarly, the Supreme Court ruled that a corporation's intent to influence elections did not strip otherwise protected speech of protection, reasoning that

> [A]n intent-based test would chill core political speech by opening the door to a trial on every ad within the terms of § 203, on the theory that the speaker actually intended to affect an election, no matter how compelling the indications that the ad concerned a pending legislative or policy issue. No reasonable speaker would choose to run an ad covered by BCRA if its only defense to a criminal prosecution would be that its motives were pure. An intent-based standard "blankets with uncertainty whatever may be said," and "offers no security for free discussion." . . ."First Amendment freedoms need breathing space to survive." An intent test provides none."

Wisc. Right to Life, 551 U.S. at 468–69.

A speaker's motive has no relevance as to whether his speech is useful to listeners or the marketplace of ideas. A bad motive cannot, alone, strip a speech of protection. *See Lamont v. Postmaster General*, 381 U.S. 301, 307-08 (1965) (Brennan, J., concurring) (even if the speaker has no First Amendment rights—such as a foreign speaker—a restriction on the speech may violates listeners' rights); *see also id*. at 305 (majority op.) (invalidating the law because it limits "the unfettered exercise of the addressee's First Amendment rights").

And given the need for robust debate, "the free speech clause protects a wide variety of speech that listeners may consider deeply offensive, including statements that impugn another's race or national origin or that denigrate religious beliefs," even in contexts where the government is seeking to eradicate harassment. *Saxe*, 240 F.3d at 206. Society has a "compelling interest in the unrestrained discussion of

racial problems," *Belyeu v. Coosa County Bd. of Educ.*, 998 F.2d 925, 928 (11th Cir. 1993), that weighs against suppressing such speech unless it constitutes severe and pervasive harassment.

Moreover, there is no compelling interest in eliminating insults or hateful expression that is not severe or pervasive. *See* W.P. Marshall, *Discrimination and the Right of Association*, 81 N.W.U.L. Rev. 68, 97 (1986). "Speech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express 'the thought that we hate.'" *Matal v. Tam*, 137 S. Ct. 1744, 1764 (2017). "[T]he fact that a statement may victimize or stigmatize an individual does not, in and of itself, strip it of protection under the accepted First Amendment tests," so a harassment rule cannot "proscribe speech simply because it was found to be offensive, even gravely so, by large numbers of people." *Doe v. Univ. of Michigan*, 721 F. Supp. 852, 863, 867 (E.D. Mich. 1991).

The Pennsylvania rule's knowledge requirement doesn't even require a malicious intent. Although the rule states that it is attorney misconduct to "knowingly engage in conduct constituting harassment or discrimination, including but not limited to bias," Pa. R.P.C. 8.4(g), terms like "bias" seem to have the same meaning as in Pennsylvania Code of Judicial Conduct Rule 2.3, which provides, in

Comment 2, that "manifestations of bias include . . . epithets; slurs; demeaning nicknames . . . ." See J.A. 20.

So if the plaintiff knowingly uses an odious racial epithet like the N-word in presentations about the First Amendment, as he intends to do, J.A. 16-17, plaintiff might be presumed to harbor bias, even absent any intent to harm African-Americans—and even though the First Amendment protects such use of the N-word in presentations and other educational contexts. *See* J.A. 16-17; *Hardy v. Jefferson Community College*, 260 F.3d 671 (6th Cir. 2001) (instructor's use of the N-word to describe how it has been used to degrade was protected by the First Amendment).

That and other ambiguities about the rule's reach chill speech and thus prevent it from being narrowly tailored. *See Reno v. ACLU*, 521 U.S. 844, 874 (1997) (holding that "vague contours of the coverage of the statute" keep it from being narrowly tailored, by chilling speech, "regardless of whether the" statute "is so vague" as to be void for vagueness). As content-based, viewpoint-discriminatory restrictions on speech, harassment rules must be narrowly tailored. *See Saxe*, 240 F.3d at 206 ("[W]hen anti-discrimination laws are 'applied to . . . harassment claims founded solely on verbal insults, pictorial or literary matter, the statute[s] impose content-based, viewpoint-discriminatory restrictions on speech.' Indeed, a disparaging comment directed at an individual's sex, race, or some other personal characteristic has the potential to create an "hostile environment"—and thus come

within the ambit of anti-discrimination laws—precisely because of its sensitive subject matter and because of the odious viewpoint it expresses") (quoting *DeAngelis*, 51 F.3d at 596-97).

Rule 8.4(g) is not narrowly tailored, or anything close to it.

III. Pennsylvania's Rule Is Unconstitutionally Vague, Because It Doesn't Give Fair Warning and Sets Up Arbitrary Enforcement

The lack of a severe-or-pervasive element also renders the rule unconstitutionally vague, especially given its incorporation by reference of vague terms like "denigrate" and "aversion." *Compare Dambrot v. Central Michigan Univ.*, 55 F.3d 1177, 1182, 1184 (6th Cir. 1995) (harassment policy's ban on creating "hostile or offensive" environment by "using symbols, [epithets,] or slogans that infer negative connotations about the individual's racial or ethnic affiliation" was vague, where it relied on ambiguous terms such as "negative"; "In order to determine what conduct will be considered "negative" or "offensive" by the university, one must make a subjective reference. Though some statements might be seen as universally offensive, different people find different things offensive.") *with* J.A. 119-20 ("Comment Four to Rule 8.4(g) defines [harassment] broadly as 'conduct that is intended to intimidate, denigrate or show hostility or aversion toward a person on any of the bases listed in paragraph (g).' Pa.R.P.C. 8.4(g) cmt. 4.").

Defendants previously attempted to distinguish the old 8.4(g) from the unconstitutional policies struck down in *DeJohn* and *Saxe* by saying that it

incorporated the "well-known structure for assessing complaints" under the civil-rights laws, J.A. 343, citing Dkt. 15 at 22, which require a showing of severe or pervasive harassment. But the severe-or-pervasive limit was removed from the revised rule, so now regulated attorneys and defendants do not even have that structure to guide them in deciding what speech violates the rule. Investigated attorneys cannot avoid discipline by pointing to the body of law that has developed under Title VII of the Civil Rights Act to obtain the dismissal of the complaint against them based on the fact that such speech is not "objectively" harassing as the Supreme Court and this Court define the term. *See Harris*, 510 U.S. at 21.

In the First Amendment context, there are three objections to vague policies. "First, they trap the innocent by not providing fair warning. Second, they impermissibly delegate basic policy matters to low level officials for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, a vague policy discourages the exercise of first amendment freedoms." *Cohen v. San Bernardino Valley College*, 92 F.3d 968, 972 (9th Cir. 1996) (overturning professor's discipline under "nebulous outer reaches" of harassment policy; lack of "authoritative interpretive guidelines" led to it being unconstitutionally vague as applied to instructor's longstanding teaching techniques). Rule 8.4(g) exhibits all three of these vices.

The inclusion of the word "knowingly" does not change the analysis. Some conduct may be deemed to be biased, regardless of the speaker's subjective motivation, as discussed above. Thus, the word "knowingly" may create a deceptive safe harbor. *See Gentile v. State Bar*, 501 U.S. 1030 (1991) (imprecise safe harbor provision rendered otherwise valid bar restriction on attorney speech unconstitutionally vague). *Cf. UWM Post v. Bd. of Regents*, 774 F. Supp. 1163, 1180 (E.D. Wis. 1991) (ambiguity about whether rule punished speech that merely intended to create hostile environment, or only speech that both intended to do so and actually did so, rendered harassment rule unconstitutionally vague).

It is all too easy to impute a bad motive to speakers with disfavored or biased viewpoints, and it is virtually impossible for them to disprove a bad motive, creating abundant opportunity for discriminatory enforcement. A rule is facially vague and unconstitutional if "the Rule is so imprecise that discriminatory enforcement is a real possibility." *Gentile,* 501 U.S. at 1051. Such is the case here.

Even a speech restriction that punishes only "knowingly" speaking with a forbidden objective is unconstitutionally vague if there is a risk that speakers will be deemed to harbor that objective just because of the content of their speech. *See Cramp v. Bd. of Public Instruction*, 368 U.S. 278, 285-87 (1961) (holding that a state cannot "constitutionally compel those in its service to swear that they have never 'knowingly lent their aid, support, advice, counsel, or influence to the Communist

Party," because that is unconstitutionally vague due to potential arbitrariness of enforcement); *id*. ("it would be blinking reality not to acknowledge that there are some among us always ready to affix a Communist label upon those whose ideas they violently oppose).

Given the impossibility of disproving a bad motive, lawyers are necessarily forced to guess at whether a comment about a controversial issue will later be found to be sanctionable under Pennsylvania's rule, discouraging them from discussing these issues at all and thus chilling legal debate. That dynamic renders the rule so vague that its enforcement would violate the due process clause. *See Cramp*, 368 U.S. at 285-88 (1961); *Cohen*, 92 F.3d at 972 (holding that a policy is vague where it "discourages the exercise of first amendment freedoms").

The possibility that adjudicators will selectively find a bad motive in harassment cases is not speculative. It is already the reality in harassment cases, where intent is like Schrödinger's cat, both alive and dead depending on whether it is convenient for the adjudicator. Courts do not apply the concept of discriminatory intent consistently in harassment cases, sometimes claiming it is inherent in harassment, and other times claiming it is not. Applying such scienter requirements accurately or consistently can be an elusive task, even for experienced judges. *See*, *e.g.*, Hans Bader, *Sexual Harassment Bait and Switch*, Point of Law, Feb. 27, 2008,

https://bit.ly/3F1xrNX (collecting and discussing cases with inconsistent outcomes and rules of decision). State bar adjudicators can hardly be expected to do better.

Inconsistent intent findings may sometimes be tolerable, because a finding of sexual harassment under federal law requires that speech be "severe or pervasive" even if rooted in malice or a discriminatory intent. *See Saxe*, 240 F.3d at 216-17 (voiding "purpose" prong of harassment policy not mirrored in federal law). Imputing a bad motive does not automatically strip workplace speech of protection.

But no such safe harbor exists under Rule 8.4(g). Simply imputing a bad motive here can indeed strip protected speech of protection under the premise that the speech "knowingly" manifests "bias" and thus constitutes harassment. So the arbitrary and inconsistent way discriminatory intent is found in the real world is a further reason why Rule 8.4(g) is unconstitutionally vague under *Cramp* and overbroad under *Wisconsin Right to Life* and *Garrison*, which make clear that an intent requirement is not sufficient to provide "breathing space" for "First Amendment freedoms." *Wisc. Right to Life*, 551 U.S. at 468–69.

Intent requirements can sometimes be an important safeguard. But they are not a sufficient guardrail, by themselves, to prevent a chilling effect or remedy serious ambiguity. Under *Gentile*, the Pennsylvania rule is unconstitutionally vague because its intent requirement won't keep the rule from being applied inconsistently.

CONCLUSION

For the foregoing reasons, and those stated by the plaintiff-appellee, the judgment below should be affirmed.

Respectfully submitted,

/s/ Ilya Shapiro
Ilya Shapiro
MANHATTAN INSTITUTE
52 Vanderbilt Ave.
New York, NY 10017
(212) 599-7000
ishapiro@manhattan-institute.org

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Certificate of Bar Membership

I, Ilya Shapiro, counsel for *amici*, hereby certify pursuant to Third Circuit Rule 28.3(d) that I am a member in good standing of the Bar of the U.S. Court of Appeals for the Third Circuit.

/s/ Ilya Shapiro
ILYA SHAPIRO

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/s/ Ilya Shapiro
ILYA SHAPIRO

October 25, 2022