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, Hon. Chard F. Kenney

AMICUS BRIEF OF PROFESSORS BRUCE A. GREEN AND REBECCA ROIPHE IN SUPPORT OF PLAINTIFF-APPELLANT

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Local Rule 26.1, *amici* are natural persons and therefore they have no corporate interest to disclose.

FED. R. APP. P. 29 STATEMENT

All parties were contacted and consent to this filing. No counsel for any party authored this brief, in whole or in part; no party, and no person, other than *amici* and their counsel, contributed money to fund the preparation and submission of this brief.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

Rules

INTEREST OF AMICI CURIAE

Bruce A. Green is the Louis Stein Chair at Fordham Law School, where he directs the Louis Stein Center for Law and Ethics. He teaches and writes primarily in the areas of legal ethics and criminal law, and is involved in various bar association activities. Currently, Professor Green chairs the Multistate Professional Responsibility Examination Drafting Committee, is a liaison to the American Bar Association Standing Committee on Ethics and Professional Responsibility, and is a member and past chair of the New York State Bar Association's Committee on Professional Ethics. He previously chaired the ABA Criminal Justice Section, the ABA Criminal Justice Standards Committee, the ethics committee of the ABA Litigation Section and Criminal Justice Section, and the New York City Bar Association's Committee on Professional Ethics, and was the Reporter to both the ABA Task Force on Attorney-Client Privilege and the ABA Commission on Multijurisdictional Practice.

Rebecca Roiphe is the Joseph Solomon Distinguished Professor of Law at New York Law School, where she studies lawyers' ethics and the history of the legal profession, focusing on the interaction between lawyers' work and the rhetoric or ideals of professionalism. Prior to joining New York Law School, Professor Roiphe worked as a Manhattan prosecutor. She also served as a law clerk for The Honorable Bruce Selya of the U.S. Court of Appeals for the First Circuit. She draws on her professional experiences and her training as a historian in her writing. Her scholarship emphasizes the important, mediating role that prosecutors play in American democracy and examines the country's tradition of

prosecutorial independence, particularly with regard to the President's power to control the Department of Justice.

This case interests *amici* because as scholars of legal ethics, they have a particular investment in the development of the ethical rules that govern the legal profession. To this end, they recently published an article in the *Hofstra Law Review* regarding the free speech implications of ABA Model Rule 8.4(g), on which Pennsylvania's Rule 8.4(g) is based, and this brief draws on that research. *See* Bruce A. Green & Rebecca Roiphe, *Rule 8.4(g), Discriminatory Speech, and The First Amendment,* 50 Hofstra L. Rev. 543 (2022).

INTRODUCTION

Lawyers do not forfeit their First Amendment rights simply because they are lawyers. Rather, any restriction on lawyers' speech must be shown to closely serve a compelling government interest. *Amici* submit that many non-fanciful applications of even Pennsylvania's amended Rule 8.4(g) ("the Rule" or "Rule 8.4(g)") would flunk this test. Courts should not adopt and enforce professional conduct rules that, besides targeting bad conduct that may and should be proscribed, deliberately and unnecessarily target constitutionally protected speech, however objectionable some may find it.

In sum, when it comes to a significant amount of speech covered by Rule 8.4(g), *amici* doubt that Rule 8.4(g) closely serves a compelling interest in promoting public confidence in the legal profession or the legal system. If Rule 8.4(g) advances these interests by targeting certain biased speech that derogates, demeans, or causes emotional harm, it is

not because the particular speech itself undermines public confidence in the legal profession or the legal system—it is because the professional conduct rule itself makes a statement about the values of the profession. But states cannot condition access to a profession on agreement with the state's viewpoint, however noble or desirable that viewpoint may be.

ARGUMENT

I. Rule 8.4(g) restricts speech, not simply conduct.

A law targets the content of speech if it is directed at the idea or content of the message expressed. *Sorrel v. IMS Health Inc.*, 564 U.S. 552, 564-65 (2011); *see generally United States v. O'Brien*, 391 U.S. 367, 376-77 (1968). This is true even if the message is outrageous and offensive. *See Brandenburg v. Ohio*, 395 U.S. 494 (1969). The First Amendment protects this sort of speech not because it has inherent value, but because determining what sort of language is offensive is far too subjective an enterprise to entrust to government officials. *Hustler Magazine v. Falwell*, 485 U.S. 46, 55 (1988) ("'Outrageousness' in the area of political and social discourse has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression."). As the Supreme Court has explained, "[t]he point of the First Amendment is that majority preferences must be expressed in some fashion other than silencing speech on the basis of content." *R.A.V. v. St. Paul*, 505 U.S. 377, 392 (1992). Yet Rule 8.4(g) is directed at the content of lawyers' speech, inviting courts to make a subjective determination of what constitutes "harmful," "derogatory," or "demeaning" words.

This distinction between speech and conduct is an important one because if the banned words are part of an ongoing course of conduct, they are no longer protected speech. *See Gidoney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949). While there is substantial disagreement on how to distinguish speech from conduct, *see* Eugene Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, "Situation-Altering Utterances," and the Uncharted Zones*, 90 Cornell L. Rev. 1277, 1278-86 (2005), the Supreme Court has made clear that when the harm that words cause is personal offense or emotional pain, the speech cannot be classified as conduct. *R.A.V.*, 505 U.S. at 414; *see also Snyder v. Phelps*, 562 U.S. 443, 458 (2011) ("Indeed, 'the point of all speech protection . . . is to shield just those choices of content that in someone's eyes are misguided, or even hurtful.'") (quoting *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 574 (1995)). In other words, when speech causes emotional harm because of its offensive content, it is protected speech, not conduct. *Hustler Magazine*, 485 U.S. at 57. Speech is not an element in the tort of intentional infliction of emotional distress for this reason, and, as the Court held in *Hustler*, when emotional distress is caused solely by the content of speech, it cannot be the basis of recovery. *Id.* Insofar as Rule 8.4(g) targets words that "manifest bias or prejudice towards others" as well as "derogatory or demeaning words," ABA Model Rule 8.4(g), cmt. [3], it punishes speech that causes only emotional pain, even though such speech enjoys full protection under the First Amendment.

Policies aimed at insults, rather than conduct, are subject to the most rigorous analysis under the First Amendment because they target the content of the speech and the viewpoint of the speaker, even when

they concern race, ethnicity, gender, or another protected class. *See, e.g., DeAngelis v. El Paso Mun. Police Officers Ass'n*, 51 F.3d 591, 596 (5th Cir. 1995). Rule 8.4(g)'s definitions of "discrimination" and "harassment" include speech directed at a protected class that causes only emotional harm. Thus, 8.4(g), in part, regulates the content of speech, not conduct. By contrast, the First Amendment does not prohibit regulations that punish words only as an incident to regulating certain conduct. *R.A.V.*, 505 U.S. at 390.

Nor do Pennsylvania's amendments[1] to the ABA Model Rule resolve the First Amendment concerns. True, the amendments altered "words or conduct" to specify only "conduct." Yet in the process they unmoored the rule from any grounding in established standards of discrimination or harassment, which have been limited to the constitutional meaning of conduct not speech. Instead, they substituted the Commonwealth's own definitions of each concept, which may use the term "conduct" but

[1] The full text of the amended rule reads "It is unprofessional conduct for a lawyer to…in the practice of law, **knowingly engage in** **[by words or]** conduct **constituting** **[knowingly manifest bias or prejudice, or engage in]** 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." Pa. R. P. C. 8.4(g) Deletions from the original version are in brackets, additions are underlined.

in fact cover speech.[2] "Harassment" now means "conduct that is intended to intimidate, denigrate or show hostility or aversion toward a person" based on a protected characteristic, while "Discrimination" covers anything that "manifests an intention" to either "treat a person as inferior," "disregard . . . individual characteristics or merit," or "cause interference with the fair administration of justice." Noticeably absent are any considerations of severity, pervasiveness, or impact upon the victim. It is perhaps for this reason that Justice Mundy of the Pennsylvania Supreme Court dissented from the Rule's adoption, arguing that the amendments had not cured the defects of the old version. *See In RE: Amendment of Rule 8.4 of the Pennsylvania Rules Of Professional Conduct,* No. 213 (July 26, 2021) (Mundy, J., dissenting). As the court below explained, "[a]bsent 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—the policy provides no shelter for core protected speech." *Greenberg v. Goodrich,* No. 20-03822, 2022 U.S. Dist.

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[2] "[4] 'Harassment* means conduct that is intended to intimidate, denigrate or show hostility or aversion toward a person on any of the bases listed in paragraph (g). "Harassment" includes sexual harassment, which includes but is not limited to sexual advances, requests for sexual favors, and other conduct of a sexual nature that is unwelcome. [5] 'Discrimination' means conduct that a lawyer knows manifests an intention: to treat a person as inferior based on one or more of the characteristics listed in paragraph (g); to disregard relevant considerations of individual characteristics or merit because of one or more of the listed characteristics; or to cause or attempt to cause interference with the fair administration of justice based on one or more of the listed characteristics." Pa. R. P. C. 8.4(g) [cmts].

LEXIS 52881, at *67 (E.D. Pa. Mar. 24, 2022) (quoting *DeJohn v. Temple Univ.*, 537 F.3d 301, 317-18 (3d Cir. 2008)). For all the Commonwealth's invocation of "verbal conduct," the amended rule still covers a good deal of protected speech. What would it mean to "show hostility or aversion toward a person"? If a lawyer tells opposing counsel, say, "I don't like your kind," or "I don't think women make very good lawyers," that would seem to meet the letter of the definition—and would do so because it endorses a *viewpoint* that the government does not want lawyers to express.

Indeed, even if a court were to cabin the "conduct" at issue to non-verbal acts, the rule still would run into problems. For instance, an attorney could demonstrate hostility or aversion not by verbalization but by physical and social slights—refusing courtesies such as holding open the courthouse door, or neglecting to invite a black or female lawyer to some activity. Even in that instance, however, the Rule operates not upon the *conduct* per se but upon the *viewpoint* that motivates the conduct—it is not concerned with lawyers being rude to each other for any other reason. Likewise, an attorney might "manifest[] the intention" to discriminate in any number of ways, including verbal statements, unchivalrous acts, or nasty sideways glances. In each case, again, the amendments operate on the *motivation* behind the intent manifested.

And the Commonwealth does not seek to limit the Rule's coverage to the sort of non-verbal physical acts described above—indeed, the examples provided in the government's brief are often solely verbal or written communications. *See, e.g.*, Opening Br. at 39, 43. The Rule therefore covers pure speech. Any number of statements that could be made in the practice of law might "show hostility or aversion" or manifest an intent

in the eyes of *someone*. For instance, an attorney might espouse the view that the Supreme Court was incorrect to find that the federal constitution guarantees a right for same-sex couples to marry—a view endorsed by four justices of the Supreme Court, *see Obergefell v. Hodges*, 576 U.S. 644 (2015). The attorney might have taken this position as a matter of legal principle at odds with his own policy views, or as part of his duty to represent his client's interests, or because he personally objects to same-sex marriage. But it does not matter, because all the lawyer need do is "manifest the intention" to discriminate. The "knowing" requirement in the amended rule can only take the Commonwealth so far, as a lawyer may *know* his actions will manifest discriminatory intent in the eyes of many without possessing that intent himself—and in those cases where he does in fact possess it, the law still restricts him on the basis of his viewpoint. And as the district court pointed out, the complaint process to enforce the Rule is open to the public, which means attorneys are potentially subject to disciplinary proceedings under the Rule if any member of the public interprets the speech uncharitably. *Greenberg,* 2022 U.S. Dist. LEXIS 52881 at *45 ("It is nonsensical to say that an individual's perception is irrelevant where the Rule relies on complaints filed by the public to start an investigation into the attorney's conduct.").

In *Tam v. Matal*, 137 S. Ct. 1744 (2017), the Supreme Court invalidated a clause in the federal trademark law that denied approval to any mark that disparaged members of a racial or ethnic group. The Court held that the clause was an unconstitutional speech restriction, explaining, "that is viewpoint discrimination: Giving offense is a viewpoint." 137 S. Ct. at 1763. The opinion concluded that because it singled out a

particular viewpoint, the restriction was not adequately justified by the need to protect members of minority groups from being "bombarded with demeaning messages in commercial advertising." *Id.* at 1764.

In *R.A.V.*, the Supreme Court similarly struck down a city ordinance criminalizing the use of an object or symbol if the speaker knows that it would arouse anger or alarm based on a protected class, even though the state court had limited the reach of the law to "fighting words." 505 U.S. at 379. The Court reasoned that even though the ban applied only to "fighting words"—a category usually exempt from First Amendment protection—the government is not free to discriminate against certain viewpoints. A state cannot pick and choose which fighting words it wants to ban based on the content of the words, even if it finds those particular messages to be the most offensive. *Id.* at 384. Applying these principles to the ordinance, the Court held that it was facially invalid even though it applied to "fighting words" because it targeted only those words directed at "race, color, creed, religion, or gender." Abusive displays of any other sort were allowed under the ordinance, no matter how harmful or severe. *Id.* at 391.

Like the Minnesota ordinance in *R.A.V.*, Rule 8.4(g) singles out hateful messages based on race or other specified categories. And like both that ordinance and the law in *Tam*, the professional conduct rule addresses biased, prejudiced, demeaning, or derogatory statements only if they are aimed at one of the protected classes. Abusive words of any other sort are allowed. Furthermore, the comments to the Model Rule

specify that it addresses only those biased words that demean a protected class, not those that are aimed at promoting diversity.[3] Thus, under the Rule, a CLE program would *not* violate Rule 8.4(g) if it argued that white people are inherently racist and exploit their privilege to hurt people of color.[4]

Rule 8.4(g), like the ordinance at issue in *R.A.V.*, discriminates based on viewpoint. And unlike that ordinance, the Rule is not cabined to instances of fighting words. Rather, it allows lawyers to express tolerance or approval but not prejudice or bias. It also allows lawyers to express other forms of hateful, demeaning opinions—just not those targeting one of the Rule's protected classes. *R.A.V.*, 505 U.S. at 384. As the Court explained in *Tam*, "this law reflects the government's disapproval of a subset of messages, the essence of viewpoint discrimination." 137 S. Ct. at 1750.

A law targets the content of speech if it is directed at the idea or content of the message expressed. Viewpoint discrimination is "an egregious form of content discrimination," *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 829 (1995), but even if there is no viewpoint discrimination, a law is presumed invalid if it targets the content of speech, even if the message is outrageous and offensive. *See*

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[3] Model Rule 8.4(g), cmt. [4] ("Lawyers may engage in conduct undertaken to promote diversity and inclusion without violating this Rule by, for example, implementing initiatives aimed at recruiting, hiring, retaining and advancing
diverse employees or sponsoring diverse law student organizations")

[4] *See generally* Robin DiAngelo, *White Fragility* (2011) (arguing that white people are thin-skinned and unable to talk about race or confront their privilege, leading to a perpetuation of racist structures).

Brandenburg, 395 U.S. at 447. The First Amendment protects this sort of speech not because it has inherent value, but because determining what sort of language is offensive is a far too subjective enterprise to trust to government officials. *Hustler,* 485 U.S. at 55. Rule 8.4(g), like the Minnesota ordinance at issue in *R.A.V.*, is directed at the content of lawyers' speech. It too invites courts to make a subjective determination of what constitutes "harmful," "derogatory," or "demeaning" words.

Of course, the government is allowed to regulate some forms of discrimination and harassment, and many federal and state anti-discrimination and harassment policies have withstood challenges. *See, e.g., O'Rourke v. City of Providence*, 235 F.3d 713 (1st Cir. 2001); *Baty v. Willamette Indus., Inc.*, 172 F.3d 1232, 1246-47 (10th Cir. 1999). The Supreme Court has interpreted Title VII of the Civil Rights Act of 1964, for instance, to protect against a "hostile work environment." *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 67 (1986). But to meet that standard, a plaintiff must demonstrate harassment so severe or pervasive as to "alter the conditions of the victim's employment and create an abusive working environment." *Id.* According to Justice Scalia, the key distinction between lawful workplace harassment policies and the ordinance at issue in *R.A.V.* is that the workplace harassment laws address conduct and ban words only incidentally, while the ordinance was aimed at pure speech. He explained, "words can in some circumstances violate laws directed not against speech but against conduct," *R.A.V.*, 505 U.S. at 389, and "[w]here the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea." *Id.* at 390. As a result, "sexually derogatory 'fighting words,' among other words, may

produce a violation of Title VII's general prohibition against sexual discrimination in employment practices." *Id.* at 389.

Although the Comments to Rule 8.4(g) refer to conduct, the rule targets speech no less than conduct. The Supreme Court says that the key in determining whether a law targets speech or conduct is to assess whether there is any possibility that the government is stifling a particular message. If so, it is engaged in impermissible content regulation and viewpoint discrimination. Here, the Rule singles out offensive speech based on a protected class, so clearly it is directed at the content of the message. One might argue that the rule seeks to ban the conduct of discrimination and harassment targeting the words used to carry it out. But a rule prohibiting words that "manifest bias or prejudice" bans more speech than is necessary to prevent the acts of discrimination and harassment, which require some interference with an individual's ability to carry on her work or some other concrete harm. Unlike hostile work environment prohibitions, 8.4(g) would punish a lawyer who made an insulting remark based on a protected class even if that remark was not directed at any individual in particular and had no effect on anyone's work.

There is therefore no real way for the Commonwealth in this case to claim the Rule is limited to instances of offensive conduct. As adopted, it prohibits a great deal of core protected speech on the basis of viewpoint, and therefore must be subject to strict scrutiny. Attempting to evade the First Amendment by calling speech conduct "is a dubious constitutional enterprise" that "is unprincipled and susceptible to manipulation." *Wollschlaeger v. Governor of Florida*, 848 F.3d 1293, 1308-09 (11th Cir. 2017) (en banc) (cleaned up). "When the government restricts

professionals from speaking to their clients, it's restricting speech, not conduct," and "the impact on the speech is the purpose of the restriction, not just an incidental matter." Volokh, *Speech As Conduct* at 1346. Pennsylvania has not identified "any separately identifiable conduct" that the Rule would punish. *Cohen v. California*, 403 U.S. 15, 18 (1971). The "only 'conduct' which the State [seeks] to punish" is "the fact of communication"—in other words, speech. *Id*. at 16.

II. States' traditional powers to regulate the legal profession do not justify Rule 8.4(g)'s restriction on speech.

While states often have an interest in regulating lawyers' work, such regulation must still pass First Amendment muster. Even in the context of professional regulation, strict scrutiny applies to Rule 8.4(g)'s discrimination against the expression of disfavored viewpoints. It may be that many of the kinds of things covered by the rule would likewise run afoul of other ethical constraints on attorneys' behavior, or could be covered by a different, viewpoint-neutral anti-harassment rule. But the possibility that Pennsylvania could have adopted a better rule cannot save the rule it actually adopted—and there would remain some types of speech that both *amici* and this court might detest that would still be protected from a more circumscribed standard, just as no law may stamp-out cross-burning completely in light of the First Amendment.

The Supreme Court has repeatedly held that "disciplinary rules governing the legal profession cannot punish activity protected by the First Amendment, and that First Amendment protection survives even when the attorney violates a disciplinary rule he swore to obey when admitted to the practice of law." *Gentile v. State Bar of Nev*., 501 U.S. 1030, 1054

(1991) (citing *In re Primus*, 436 U.S. 412 (1978)); *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977). "Speech is not unprotected merely because it is uttered by 'professionals.'" *Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2371–72 (2018) ("NIFLA"). "To the contrary, professional speech may be entitled to 'the strongest protection our Constitution has to offer.'" *Conant v. Walters*, 309 F.3d 629, 637 (9th Cir. 2002) (quoting *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 634 (1995)).

The Supreme Court in *NIFLA* explained that "[a]s with other kinds of speech, regulating the content of professionals' speech poses the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information." 138 S. Ct. at 2374 (cleaned up). In short, "when the government polices the content of professional speech, it can fail to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail." *NIFLA*, 138 S. Ct. at 2374 (cleaned up). "Professionals might have a host of good-faith disagreements, both with each other and with the government, on many topics in their respective fields." *Id.* at 2374–75. In imposing restrictions that touch speech, the burden must therefore be on *the state* to explain why the particular regulation at issue is appropriately tailored to its interests in the regulation of the profession. And indeed, the state interests the Commonwealth can offer justify only a fraction of the speech covered by the rule.

Take, for instance, the question of the lawyer-client relationship. It seems easy to justify forbidding lawyers from gratuitously derogating or demeaning clients to their faces. Whether biased or not, lawyers' derogatory and demeaning attacks on clients undermine that fiduciary relationship. But this justification covers only a narrow range of statements

within the Rule's reach. The interest in protecting the fiduciary relationship does not cover derogatory and demeaning statements targeting opposing parties, opposing counsel, colleagues, or anyone else aside from clients.

This is not to say that even a rule drawn narrowly to protect only clients may permissibly discriminate based on viewpoint. Lawyers' derogatory and demeaning comments may be just as painful to the client, and just as damaging to clients' trust, when based on irrelevant personal attributes outside the Rule such as the client's appearance or lack of education. Even the compelling interest in promoting clients' trust might not justify punishing gratuitous slights and slurs based on race, sex, religion, or another attribute covered by the Rule, while exempting equally hurtful statements addressed at other unprotected classifications. Even if lawyers' gratuitously derogatory and demeaning speech could otherwise be restricted, it may not be possible to justify singling out certain biased remarks for harsher treatment. But insofar as one is concerned with protecting the fiduciary relationship, it should be possible to craft a rule that does not discriminate based on the message contained in the lawyer's speech.

Likewise, the First Amendment probably would not protect gratuitously derogatory and demeaning comments that lawyers direct at the judge, court personnel, witnesses and various others in adjudicative proceedings. By exempting "legitimate advice or advocacy," Rule 8.4(g) attempts to draw the line between advocates' speech that might be constitutionally protected, because it advances the client's lawful interests

by a procedurally permissible means, and advocates' derogatory, demeaning and biased speech that harms the administration of justice rather than advancing it.

Courts have broad authority to regulate speech in advocacy, and especially in court, to promote the administration of justice. *See, e.g., In re Williams*, 414 N.W.2d 394, 397 (Minn. 1987) ("Outside the courtroom the lawyer may, as any other citizen, freely engage in the marketplace of ideas and say all sorts of things, including things that are disagreeable and obnoxious. . . . But here respondent was in the courtroom, an officer of the court engaged in court business, and for his speech to be governed by appropriate rules of evidence, decorum, and professional conduct does not offend the first amendment.") (citations omitted). In the context of advocacy, restrictions on gratuitously derogatory and demeaning speech would probably serve compelling purposes like other restrictions on speech that are taken for granted.

For example, Model Rule 3.5(c)(3), the professional conduct rule forbidding "conduct intended to disrupt a tribunal," proscribes some abusive speech as well as physical conduct. The rule's restriction on speech is justified by the interest in preserving the decorum of the tribunal. Restricting comments in court gratuitously derogating or demeaning the judge would serve essentially the same end. Likewise, Rule 4.4(a) forbids a lawyer from "us[ing] means that have no substantial purpose other than to embarrass" a party, witness, or other third person during a representation. This restriction reaches speech gratuitously embarrassing the third person but can be justified because protecting participants from gratuitous embarrassment encourages their willingness and

ability to participate effectively in the legal process. Barring gratuitously demeaning or derogatory comments to other participants in the legal process may promote a similar end. Parties and witnesses, who are often compelled to participate in litigation, should not be distracted or discouraged by derogatory, demeaning, or personally hurtful comments that are unrelated to legitimate advocacy. Insofar as Rule 8.4(g) applies to this sort of speech, one can regard it as a special application of Rule 8.4(d), which forbids "conduct that is prejudicial to the administration of justice," and which has been applied to speech in litigation,[5] including speech that Rule 8.4(g) covers.

By contrast, lots of objectionable speech by and between attorneys can take place without impacting the administration of justice. Take, for instance, the facts of *United States v. Wunsch*, 84 F.3d 1110 (9th Cir. 1996), a disciplinary action against a criminal defense lawyer for a derogatory and demeaning communication with his female opposing counsel. After losing a disqualification motion due to a conflict of interest, the defense lawyer sent a note to the prosecutor which read, in large photocopied letters, "MALE LAWYERS PLAY BY THE RULES, DISCOVER TRUTH AND RESTORE ORDER. FEMALE LAWYERS ARE

[5] *See, e.g., Fla. Bar v. Martocci*, 791 So. 2d 1074 (Fla. 2001) (applying Rule 8.4(g) to a lawyer who disparaged the opposing party and counsel); *In re McClellan*, 754 N.E.2d 500 (Ind. 2001) (applying Rule 8.4(d) to a lawyer whose rehearing petition demeaned the legal profession); *Miss. Bar v. Lumemba*, 912 So.2d 871 (Miss. 2005) (applying Rule 8.4(d) to a lawyer's statements to a judge and to a newspaper reporter); *Bd. of Prof'l Responsibility v. Slavin*, 145 S.W.3d 538 (Tenn. 2004) (applying Rule 8.4(d) to disparaging statements in court filings).

OUTSIDE THE LAW, CLOUD TRUTH AND DESTROY ORDER." *Id.* at 1113.

The Ninth Circuit reversed the sanctions, distinguishing cases where "courts imposed sanctions based on facts showing that each attorney's sexist behavior was not only deplorable, but clearly interfered with the administration of justice." *Id.* at 1117. By contrast, while the letter at issue "reveal[ed] a patently sexist attitude on [the defense attorney's] part," it still amounted to "a single incident involving an isolated expression of a privately communicated bias with no facts that would show how that communication adversely affected the administration of justice, either in this or in any other case." The court also found that the attorney could not be sanctioned under a different rule requiring lawyers "to abstain from all offensive personality," because the rule was void for vagueness. *Id.* at 1119. Because the rule did "not sufficiently identify the conduct that is prohibited," the court said, lawyers might worry that it covered conduct in which they regularly engage as a matter of zealous advocacy, and the rule might be enforced discriminatorily. *Id.* And as the district court found in this case, "the Amendments as revised continue to restrict speech outside of the courtroom, outside of the context of a pending case, and even outside the much broader playing field of administration of justice." *Greenberg,* 2022 U.S. Dist. LEXIS 52881 at *71.

In extreme cases, the restriction on lawyers' biased speech will be justified by the interest in protecting the targeted individual from harm that is more significant than momentary upset or anger. Lawyers' demeaning or derogatory speech may be so extreme or pervasive that it interferes with the targeted individual's ability to function in the legal

workplace. At that point, the First Amendment allows the speech to be restricted because the government interest in protecting the target, and in promoting a functioning legal environment, is sufficiently compelling and well-served by restricting the objectionable statements. As previously discussed, public institutions such as public universities may adopt and enforce rules forbidding speech that is so extreme. Courts have comparable power to restrict speech that creates hostile work environments for lawyers and court employees. In determining in a particular situation whether one's speech causes cognizable harm, not just annoyance or anger, a court can take account of the content, including whether it is racist, sexist, or otherwise framed in a way that is particularly likely to create a hostile environment for its target. But Rule 8.4(g) is not directed exclusively, or primarily, at lawyers' objectionable speech that impairs the target's ability to function. In fact, the speech need not even address a particular individual or individuals, let alone harm them.

But even if the lawyer's biased speech is public, it is questionable that punishing it, ostensibly to promote public confidence in lawyers or the legal system, closely serves a compelling interest. As with the question of whether courts can punish lawyers who tell political lies in the public square, "the restriction must rest on more than mere conjecture; there must be persuasive evidence that the speech in question significantly erodes public trust." Bruce A. Green & Rebecca Roiphe, *Lawyers and the Lies They Tell*, 69 Wash. U. J. L. & Pol'y 38, 111 (2022). *Amici* are unaware of any evidence that, when the public learns of lawyers who make hurtful, biased statements relating to law practice, the public's confidence in lawyers or the legal system tends to erode.

The Supreme Court has rarely recognized public confidence as a sufficient justification for limits on lawyers' speech. When the Court has upheld restrictions on attorney speech to promote public confidence in the legal profession, the restriction has addressed speech directed at the public, such as advertising, solicitation, and campaign donation requests. *See Bates*, 433 U.S. at 369-72 (advertising); *Went For It, Inc.*, 515 U.S. at 634 (solicitation); *Williams-Yulee v. Florida Bar*, 575 U.S. 433 (2015). The first two of these cases involved limits on commercial speech, which, unlike Rule 8.4(g)'s speech restriction, are subject only to intermediate scrutiny. *Central Hudson Gas & Elec. Corp. v. Pub. Svc. Comm. of NY*, 447 U.S. 557 (1980). Even under this less exacting standard, the Court has been reluctant to uphold restrictions on speech based on this justification and has required that the government proceed not on speculation or intuition, but on a showing of actual harm to the profession that will in fact be alleviated by the regulation. *Went For It*, 515 U.S. at 625-26.

In *Williams-Yulee*, the Court did uphold a restriction on judicial campaign solicitations on the theory that it furthered the government's interest in preserving the reputation of the judiciary. 575 U.S. at 445. Justice Scalia argued in his dissent, however, that this application of strict scrutiny was inconsistent with case law: "The judges of this Court . . . evidently consider the preservation of public respect for the courts a policy objective of the highest order. So it is—but so too are preventing animal torture, protecting the innocence of children, and honoring valiant soldiers. The Court did not relax the Constitution's guarantee of freedom of speech when legislatures pursued those goals." *Id.* at 473

(Scalia, J. dissenting). In other words, even though the government interest in the integrity of the profession is a noble one, the speech restriction must nonetheless be narrowly tailored to achieve it, an extremely difficult hurdle to clear, especially when the government interest is so inchoate. It seems unlikely that the Court would agree that "promoting public confidence" is closely served by a restriction on speech that is not directed at the public and that may never even come to the public's attention.

Concern for the public perception of the legal system cannot justify restrictions on speech that have no effect on the proper functioning or fair outcomes of the legal system. This rationale is irrelevant to speech in professional educational and social events—speech that seems to be covered by Rule 8.4(g) since it is "related to the practice of law." It is also irrelevant to speech in transactional representations and other representations unrelated to the legal system. And even in advocacy, the interest in promoting public confidence in the legal system is not closely served by a restriction on off-the-record speech between lawyers—whether between opposing counsel or between co-counsel. When lawyers' biased speech has no impact on the course of justice, the speech is unlikely to erode public confidence in the legal system. If speech covered by the Rule undermines public confidence in the legal profession or the legal system, the reason cannot be because the speech itself causes some sort of harm beyond hurt feelings, because in many situations it will not. And the reason cannot be simply that the lawyers are revealed to hold the biased views that they expressed, since the lawyers are allowed to express those views as long as they are not engaged in law-related practice.

One might posit that the Rule's premise is that lawyers who express inappropriate bias related to law practice presumptively have a biased character that will spill out into other aspects of their legal work, just as other rules presuppose that a lawyer's dishonest act may reflect a general lack of integrity or a lawyer's criminal act may reflect general lawlessness. *See* ABA Model Rules of Prof'l Conduct, R. 8.4(c) & (d). But if this were a rule designed to weed out lawyers with a bad character unsuited for law practice, the rule would apply to all expressions of objectionable bias, not only to those that are linked to discrimination or harassment. It would sweep in biased statements regardless of whether they related to law practice. Given the rule's limitations, it is hard to defend it as a rule targeting bad character.

Beyond that, the profession has never adopted the view that an unbiased character is a prerequisite for law practice. To take an extreme case, although the Illinois admissions authorities denied admission to Matthew Hale, an avowed white supremacist, largely because of his overtly racist views, his conduct provided further grounds for the decision, and some questioned whether avowed racism would have sufficed.[6] With the possible exception of Hale, *amici* know of no examples of racists, sexists, religious bigots, homophobes, et al. being excluded from the profession because of their biased views. The courts, through the admissions and disciplinary processes, may exclude people who are dishonest

[6] *See* Jason O. Billy, *Confronting Racists at the Bar: Matthew Hale, Moral Character, and Regulating the Marketplace of Ideas*, 22 Harv. Blackletter J. 25, 29-32 (2006); Richard L. Sloane, Note, *Barbarian at the Gates: Revisiting the Case of Matthew F. Hale to Reaffirm that Character and Fitness Evaluations Appropriately Preclude Racists from the Practice of Law*, 15 Geo. J. Legal. Ethics 397, 416-29 (2002)

or lawless, *see, e.g., Konigsberg v. State Bar of Cal.*, 353 U.S. 252, 262-64 (1957), but it seems a stretch to say they may exclude those who are biased. Although the legal profession and law practice have been prone to racism, sexism, religious bigotry, anti-gay bias, agism, and other biases, and courts are within their rights to take countermeasures against disruptive behavior, they cannot punish lawyers who reject their views of equality.

A diverse bar is also desirable because even in their representative capacity, lawyers give voice to a wide array of different clients, some with unpopular views. As a general matter, this is important to ensure that the diverse perspectives in society can find representation. In the past, the bar has used rules that limit speech to deter or divest itself of lawyers with unpopular views. It has done so in part to exclude or deter those who would be most likely to represent unpopular clients. In the McCarthy Era, for instance, the bar used its character and fitness review process,[7] rules against offensive speech in the courtroom,[8] and rules about prejudicing ongoing proceedings,[9] to police lawyers who represented controversial clients and positions. Jerold S. Auerbach, *Unequal Justice* 231-63 (Oxford U. Pr. 1976). The bar embraced its fight against communism with the same fervor it currently invokes to battle

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[7] *Law Students Civil Rights Research Council, Inc. v. Wadmond*, 401 U.S. 154 (1971); *In re Stolar*, 401 U.S. 23 (1971); *Baird v. State Bar of Arizona*, 401 U.S. 1 (1971); *In re Anastaplo*, 366 U.S. 82 (1961); *Schware v. Board of Bar Examiners of New Mexico*, 353 U.S. 232 (1957); *Konigsberg v. State Bar of California*, 353 U.S. 252 (1957).

[8] *In re Isserman*, 345 U.S. 286 (1953), vacated on reh'g, 348 U.S. 1 (1954).

[9] *Gentile v. State Bar of Nev.*, 501 U.S. 1030 (1991); *In re Sawyer*, 360 U.S. 622 (1959).

discriminatory speech and conduct. *See The Point Where Toleration Ends,* 34 A.B.A. J. 696, 696 (1948) (insisting on a crusading effort to purge the ranks of the bar of communism). This was a dark moment in the bar's past. It is not that *amici* value lawyers who spew hateful speech—quite the contrary—but if the bar takes an expansive view of its power to police lawyers' speech, it will inevitably use this to stifle the voices of unpopular but worthy lawyers and clients in the future.

Throughout the first half of the twentieth century, the bar also exploited what it considered its special ability to repress speech to enforce rules against solicitation and advertising. These rules too were used to exclude newcomers to the profession, immigrant lawyers, and others who represented plaintiffs and had to use advertising to obtain clients. Auerbach, *Unequal Justice* at 43. The Supreme Court ultimately invalidated many of these restrictions on lawyer advertising on First Amendment grounds. *Bates*, 433 U.S. at 383. But this was only after the bar had managed to shape the course of substantive law by excluding lawyers who would represent the needs of the poor. Auerbach, *Unequal Justice* at 11.

African-American lawyers too have been the target of the bar's aggressive enforcement of speech-related offenses. The Oklahoma Bar Association, for instance, sought sanctions against a lawyer for calling a trial judge a racist, and a lawyer in Arkansas was disbarred for, among other things, accusing a white lawyer of racism. *See State ex rel. Okla. Bar Ass'n v. Porter*, 766 P.2d 958 (Okla. 1988). Cases like this do not prove a pattern, but they do show that rules targeting speech are used

differently by different authorities. The best way to protect less powerful lawyers is to avoid aggressive use of speech restrictions, not to broaden discretion in the area. Rule 8.4(g) does the latter.

The legal profession is also one that thrives on the clash of ideas, the confrontation with contrary arguments, and robust debate. Of course, this should be carried on in a civil manner, and biased and derogatory words are not only unnecessary but unwelcome in professional discourse. But there are ways of promoting civility in the profession other than pushing the limits of the First Amendment, which will invariably chill debate. Enforcing norms of the profession by imposing reputational consequences does a great deal to develop a code of conduct. If lawyers cannot model the willingness to fight unpopular, even hateful views, by arguing with them rather than punishing them, then who can? Restraints on lawyers' speech should be reserved for speech that is not constitutionally protected—for example, biased or discriminatory speech that betrays the lawyer's fiduciary obligations, interferes with the administration of justice, or harms others in a concrete way beyond angering or saddening them.

Under the guise of civility or preserving the reputation of the profession, the bar has used rules to exclude or persecute the most marginalized within the profession. Auerbach, *Unequal Justice* at 3-14. Rule 8.4(g) would create a precedent to police lawyers' speech in new ways, and that may later be used in for a nefarious purpose. Better to learn from history and back away from that line.

CONCLUSION

As Justice Brandeis famously wrote, "If there be time to expose through discussion, the falsehoods and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence." *Whitney v. California*, 274 U.S. 357, 377 (1927). This concept is not alien to the legal profession, but rather is the nature of our trade. Law school teaches us to combat words with more words. The organized bar and courts should not test the limits of the First Amendment but should encourage lawyers to use their skills and training to try to guide the public discussion in the right direction. Instead of opting for repression, lawyers trained in argument and persuasion should work to inspire the profession to become a more civil and inclusive group. There is no evidence that restrictions on speech like Model Rule 8.4(g) achieve their ambitions. The rule may deter racist and sexist lawyers from openly speaking their mind, but these lawyers' hateful views may well take a more insidious form. While it is appropriate for disciplinary rules to address harmful conduct, the better response to most hateful speech is more speech.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Third Cir. Case Number: 22-1733

I certify that this brief contains 7,328 words, excluding the items exempted by Fed. R. App. P. 32(f), in compliance with Fed. R. App. P. 28(a)(10) and 32(g)(1), and 3rd Cir. L.A.R. 31.1(c). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

Pursuant to 3rd Cir. L.A.R. 31.1(c), I also hereby certify that the text of the electronic brief filed via the ECF system is identical to the text in the paper copies provided to this Court and to the parties.

I certify that I scanned the electronic version of this brief using AVG Anti-Virus 22.9.3254 (build 22.9.7554.751), and no virus was detected.

s/ Daniel R. Suhr
October 27, 2022

CERTIFICATE OF BAR ADMISSION

Third Cir. Case Number: 21-2172

Pursuant to 3rd Cir. L.A.R. 28.3(d), I certify that I, Daniel R. Suhr, am admitted to practice before the United States Court of Appeals for the Third Circuit.

s/ Daniel R. Suhr
October 27, 2022

CERTIFICATE OF SERVICE

I hereby certify that on October 27, 2022, I electronically filed the forgoing Amicus Brief with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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October 27, 2022