No. 23-833

In the Supreme Court of the United States

ZACHARY GREENBERG,

Petitioner,

v.

JERRY M. LEHOCKY, IN HIS OFFICIAL CAPACITY AS BOARD CHAIR OF THE DISCIPLINARY BOARD OF THE SUPREME COURT OF PENNSYLVANIA, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR PETITIONER

Theodore H. Frank
Adam E. Schulman
Counsel of Record
John M. Andren
HAMILTON LINCOLN LAW INSTITUTE
1629 K Street N.W., Suite 300
Washington, D.C. 20006
(610) 457-0856
adam.schulman@hlli.org

Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

TREATISES

TABLE OF AUTHORITIES—Continued

REPLY BRIEF FOR PETITIONER

The decision below discards a centuries-old principle of jurisdiction: the time-of-filing rule. Pet.14–19. And the Third Circuit's attempted rehabilitation in *Lutter v. JNESO*, 86 F.4th 111 (3d Cir. 2023), does not mend the split that *Greenberg* opened. Pet.19–23.

Respondents do not defend the rule of decision below, nor do they defend *Lutter*'s later exposition of the rule. Instead, Respondents mint a different rule, hoping this third rule can reconcile the split of authority. On inspection, the effort crumbles. Respondents' notion that challenging an amended rule restarts the standing clock contravenes *Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville*, 508 U.S. 656 (1993), which holds that a mootness analysis does not depend on challenging the reenactment of the "*selfsame* statute." *Id.* at 662. Rather, mootness looks to plaintiff's initial complaint, and asks whether the "gravamen" of that complaint survives the statutory change. *Id.* Likewise, Respondents' "new claims" rule fails to reconcile the several decisions of the Sixth, Tenth, and Federal Circuits applying the time-of-filing rule to supplemental complaints that add new claims. Respondents cite no decision announcing their preferred rule. Thus, even if they were correct that their rule is the most consistent with jurisdictional precepts, this Court should still grant review to secure clarity and uniformity on an important question of federal jurisdiction.

This case presents an ideal vehicle for resolving the question. The Third Circuit's legal error infected its analysis, causing the court to reach the wrong decision on

Greenberg's standing. The decision will carry deleterious consequences going forward. As numerous amicus briefs detail, *Greenberg* offers government defendants a roadmap for evading Article III adjudication mid-litigation. Under *Greenberg*, states may enact legislation that casts a pall over the speech rights of their citizens without having to answer for that in federal court.

I. The Third Circuit's novel rule eliminates the distinction between standing and mootness.

Pennsylvania does not dispute the two centuries of law establishing the time-of-filing rule. Pet.14–15. They do not dispute that courts, including this Court, apply the rule to supplemental or amended complaints. Pet.15–17. Nor that the rule demarcates standing and mootness. Pet.23–25. Nor that the decision below misread the three authorities cited to justify deviating from the time-of-filing rule. Pet.17–18. Respondents even admit that this Court "analyzed jurisdiction at the time of the initial filing" in *Rockwell*. Br.16.

It isn't "odd[]" (Br.15, 25) that this Court might want to decide the question presented on a full understanding of circuit law. What is odd, however, is Pennsylvania's decision to endorse neither the rule espoused below, nor the Third Circuit's attempted rehabilitation in *Lutter*. Recall *Lutter*'s rule: standing is "evaluated as of the date of the supplemental pleading" when that pleading alleges post-suit developments that "substantively affect[]" the plaintiff's "claims and requested relief." 86 F.4th at 126. As Greenberg's petition explains, and Pennsylvania fails to dispute, this rule remains inconsistent with precedent and public policy. Pet.20–22, 29–33.

Seeking to reconcile Third Circuit law with existing doctrine, Respondents invent their own framework: a supplemental pleading restarts the standing clock for "new claims." *E.g.*, Br.16–18. And plaintiffs, like Greenberg, who seek injunctions to prevent enforcement of a rule revised during litigation, are bringing "new claims" even though they continue to plead the same causes of action under the same legal theories against the same defendants. Br.13–14. Respondents would reserve mootness determinations for ongoing challenges to the "*original* policy." Br.17.

But this Court already rejected Respondents' proposal in *Northeastern Florida*. If it were only reenactment of "the *selfsame* statute" "that prevents a case from being moot," "a defendant could moot a case by repealing the challenged statute and replacing it with one that differs only in some insignificant respect." 508 U.S. at 662. Instead, this Court asks whether the amendment moots "the gravamen of petitioner's complaint"—that is, whether it moots the entire case "so as to present a substantially different controversy." *Id.* at 662 & n.3 (quoting dissent in part); *accord Horton v. City of St. Augustine*, 272 F.3d 1318, 1327–28 (11th Cir. 2001). Whether a new statute moots the entire controversy depends on whether the new policy is "sufficiently similar" to the repealed one so that the "gravamen" of the complaint remains live. 508 U.S. at 662 n.3.

Respondents characterize Greenberg's supplemental complaint as only challenging new rule 8.4(g), and "unambiguously dropp[ing]" his original claim. Br.25. This misunderstands Greenberg's supplemental complaint which,

by definition, serves as a supplement to his still operative initial complaint. Pet.22.[1] More importantly though, Greenberg never sought to simply "enjoin 'New 8.4(g).'" *Contra* Br.13. He asked to enjoin Respondents "from enforcing the rule by … reviewing, investigating, prosecuting or adjudicating Rule 8.4(g) violations." Greenberg Summ. J. 1, D. Ct. Dkt. 65; *see generally* Jonathan Mitchell, *The Writ-of-Erasure Fallacy*, 104 VA. L. REV. 933 (2018). The district court correctly reasoned that "[w]ithout judgment, there is no certainly that Defendants will not modify the Rule in a way that incorporates the Old Rule's unconstitutional language." App.71a (citing *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283 (1982)).

The relief against Pennsylvania highlights how this litigation was one ongoing, organic controversy. It was Respondents who strategically aborted their first appeal to modify the original Rule 8.4(g). App.52a–53a, 61a. They wanted to continue the same case. App.53a. And all along they defended the original and amended rules as constitutional. App.63a. The district court correctly treated the litigation as a seamless whole, applied the mootness standard, and refused to allow Pennsylvania to turn the clock back to the beginning of the litigation. App.53a.

The Third Circuit now holds that supplemental complaints may relieve government defendants of their "burden" to satisfy the "formidable standard" to show mootness from voluntary cessation. *FBI v. Fikre*, __S.Ct.__,

---

[1] Respondents reject describing Greenberg's second complaint as "supplemental," Br.14 n.3, yet *Lutter* (correctly) so described Greenberg's second pleading. 86 F.4th at 126.

2024 U.S. LEXIS 1379, at *15 (Mar. 19, 2024). But the burden "holds for governmental defendants no less than for private ones." *Id.* at *12–*13. Respondents have never suggested that the Rule 8.4(g) amendment and the subsequent Farrell declaration could prove mootness. Pet.27.

None of this means Greenberg seeks to proceed without demonstrating his standing to enjoin Respondents from enforcing 8.4(g). *Contra* Br.10, 11, 21. The question is "how," not "if." The question is what jurisdictional facts enter the "standing" analysis. And the district court's extended standing analysis was spot on: courts consider the facts of the world at the time of filing, not a disavowal offered more than a year into the litigation. App.47a–55a; *contrast United States v. Hays*, 515 U.S. 737, 742 (1995) (district court granted relief without any standing analysis, *see* 862 F. Supp. 119, 121 (W.D. La. 1994)).[2]

Greenberg's cardinal legal error—confusing the domains of mootness and standing—permeates its entire standing analysis. Greenberg has continuously maintained that, properly analyzed, he suffers an objectively reasonable chill giving him standing to challenge Rule 8.4(g). *E.g.*, Pet.23 (citing district court's analysis at App. 48a–49a); *see also* New Civil Liberties Alliance Amicus 11–19 (explaining why Greenberg has standing); *contra* Br.2, 23. But the Third Circuit's decision credits evidence against standing that did not exist until 15 months after

[2] *Hays* cites and accords with *Northeastern Florida*. The amended map in *Hays* contained "considerabl[e] differences" from the original map such that the plaintiff was not "disadvantaged" even to a "lesser degree." 515 U.S at 741; 508 U.S. at 662; *contrast* App.73a (amended rule 8.4(g) continues to restrict CLE presentations).

Greenberg sued, and three months after he extended his challenge to the revised rule. Dkt.56. And it shifts the burden to Greenberg to prove Respondents' future behavior. App.23a n.5.

II. Other circuits correctly apply the time-of-filing rule to supplemental complaints, even when they affect the claims or relief sought.

Decisions from six circuits contradict the Third Circuit's refusal to apply the time-of-filing rule to these circumstances. Pet.15–18, 21–22. Respondents purport to harmonize all these decision with their own "new claims" rule. They cannot.

Southern Utah Wilderness Alliance v. Palma, 707 F.3d 1143 (10th Cir. 2013) ("*SUWA*"), is a prime example. In its supplemental complaint SUWA interposed challenges to new decisions that the government took mid-litigation. *Id.* at 1151. Under Respondents' rule those "new claims" trigger a standing inquiry as of the date of the supplemental complaint. The Tenth Circuit disagreed, holding that the time-of-filing controlled. *Id.* at 1153. Respondents contend (Br.20) that the temporal focal point didn't matter, but it did; that's why the Tenth Circuit had to decide the issue. At the time of the supplemental complaint, it was doubtful whether the plaintiff's member faced imminent harm. He first averred that he would return "certainly within the next year" and "the litigation ha[d] taken several years." *Id.* at 1156 (internal quotation omitted). *SUWA* follows the time-of-filing rule; "[a]ny concern that SUWA subsequently lost its interest in this litigation is relevant to mootness, not standing." *Id.* Under Respondents' rule, *SUWA* erred.

So did the Federal Circuit, which Respondents admit analyzed standing at the time of filing even though amended complaints added claims. Br.20 (citing *Abraxis Bioscience* and *Schreiber Foods*). As did the Sixth Circuit, although Respondents imagine a reason why that court looked to the time of filing. Br.19 (citing *Barber*). And so did the D.C. and Eleventh Circuits, when they confronted supplemental complaints challenging policies changed mid-litigations. Br.21–22 (citing *Horton* and *Zukerman*). The only circuit law that Respondents' rule appears to reconcile is the Ninth Circuit's *Gonzalez* decision, although *Gonzalez*'s supplemental complaint still may have materially affected the relief sought (*Lutter*'s test).

Respondents observe that the supplemental complaints in *Horton* and *Zukerman* challenged both new and old policies, and assert that that is why those courts applied mootness principles. Again, that misconstrues *Northeastern Florida* which does not depend on challenging the "selfsame" policy; it depends on the "gravamen of petitioner's complaint." 508 U.S. at 622; *accord* Pet.25 (quoting Wright & Miller, § 3533.6).

For example, in *Edelhertz v. City of Middletown*, Edelhertz sued the city over an ordinance that required property managers to reside within city limits. 2013 U.S. Dist. LEXIS 114686, 2013 WL 4038605 (S.D.N.Y. May 6, 2013). During the litigation, the city amended the code to allow property managers to reside within a ten-mile radius of the city. 2013 U.S. Dist. LEXIS 114686, at *3–*4. Plaintiff amended his complaint, challenging ***only*** enforcement of the operative ordinance. *See* First Amended Complaint, *Edelhertz v. City of Middletown*, No. 12-cv-

1800, Dkt. 9 (S.D.N.Y. Aug. 28, 2012). Middletown argued that Edelhertz lacked standing, because, as of the date of the revised complaint, he resided inside the ten-mile radius and thus could manage his city property. The court demurred, the relevant date for standing purposes was the time of filing the suit; the amendment of the city code presented a question of mootness under *Northeastern Florida*. 2013 U.S. Dist. LEXIS 114686, at *8–*10.

Against these cases, Respondents cite a rival slate of cases, from the Sixth, Ninth, and Eleventh Circuits that supposedly represent their "new claims" rule. Br.12–13. But unlike *SUWA*, *Gonzalez*, *Barber*, *Edelhertz*, and so on; and unlike *Greenberg* and *Lutter*, none of Respondents' cases consider and answer how to treat supplemental complaints. In other words, they are "driveby jurisdictional rulings" with lesser if any "precedential effect." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 91 (1998).

In any event, Pennsylvania's cases conform to *Northeastern Florida*'s analysis. In *American Diabetes Association v. Department of the Army*, the government's mid-litigation policy volte-face impelled an amended complaint that alleged a completely different theory of harm. 938 F.3d 1147, 1152 (9th Cir. 2019). The revised complaint "present[ed] a substantially different controversy." *Id.* (ultimately quoting *Northeastern Florida*, 508 U.S. at 662 n.3).

Rosen v. Tennessee Commissioner of Finance & Administration is even further afield. 288 F.3d 918 (6th Cir. 2002). *Rosen* didn't involve a rule revised during litiga-

tion; it involved a new rule distinct from the initial litigation—a rule issued months after the parties had reached a final settlement of the litigation. *Id.* at 922–23.

Common Cause/Georgia v. Billups too did not expressly consider when to measure standing. 554 F.3d 1340 (11th Cir. 2009). It, however, appears to reach the correct result because, after the statutory revision, the amended complaint replaced the original individual plaintiffs, and thus *Billups* had to assess the standing of the new lead plaintiffs when they entered the litigation. *Id.* at 1348; *contra* Br.13 ("The only relevant 'later occurring fact[]' was the enactment of the new law").

Consistent with the historical rule, assessing standing as of the date of the amended or supplemental complaint is correct when a complaint adds new parties. Pet.14 (quoting *Conolly v. Taylor*); *cf. Town of Chester v. Laroe Estates, Inc.*, 581 U.S. 433 (2017). And if the supplemental complaint fails to continue the same controversy, courts should deny leave to amend. *See Planned Parenthood v. Neely*, 130 F.3d 400, 402 (9th Cir. 1997). Thus, Greenberg never "asserts that standing is always assessed" at the initial time of filing. *Contra* Br.2.

The Third Circuit's rule below and its modified rule in *Lutter* diverge from the decisions of other courts addressing the issue of how supplemental complaints interact with the time-of-filing rule. Respondents' independent attempt at reconciliation founders, and only demonstrates the need for this Court's review. This Court should grant review to reaffirm a uniform time-of-filing rule.

III. Abandoning the time-of-filing rule for supplemental complaints would work injustice in this case and others.

As *Fikre* reminds, "The Constitution deals with substance, not strategies." 2024 U.S. LEXIS 1379, at *12 (internal quotation omitted). Respondents' theory, and the decision below, offer the government a roadmap to evade Article III adjudication. Take a free bite at the apple defending Statute 1.0, and then if you lose, simply repeal and replace with a functionally equivalent Statute 1.1, this time making sure to put in a declaration disavowing enforcement as to the plaintiff's intended speech. *Northeastern Florida* rejects that machination. 508 U.S. at 662.

The time-of-filing rule itself, and the heightened bar for mootness guard against this all-too-common gamesmanship. Pet.29–30; *see also* Liberty Justice Ctr. Amicus 3–6 (providing examples). By jettisoning these doctrines, *Greenberg* allows Respondents to chill the speech of Pennsylvania attorneys with the lurking threat of a vague rule that does not admit of even-handed enforcement. App.121a–127a; Manhattan Inst., et al. Amicus 11–15; First Liberty Inst. Amicus 11–14 (noting disproportionate chill on religious attorneys). *Greenberg* does not even consider the vagueness of the rule in its standing analysis.

Respondents' protest (Br.25) that plaintiffs "with standing have nothing to fear" from restarting the jurisdictional clock is contradicted by this very case. Government officials who can take unilateral action to undermine standing without bearing their burden on mootness can evade accountability. For example: a declaration submitted 15-months into the litigation—a declaration that does

not disavow enforcement of the rule generally but seeks only to carve the specific plaintiff's planned speech out from the text of the rule.

Respondents claim (Br.14–15) that courts routinely consider disavowals in assessing standing, but courts have reached disparate conclusions on how and whether to consider disavowals in the standing analysis. *See, e.g.*, *United States v. Stevens*, 559 U.S. 460, 480 (2010) ("[T]he First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*"); *Brown v. Kemp*, 86 F.4th 745, 769–70 (7th Cir. 2023) (disavowal by certain defendants does not undermine standing); *Isaacson v. Mayes*, 84 F.4th 1089, 1100 (9th Cir. 2023) (same).

Either way, Respondents cite no courts that credit disavowals against plaintiffs' standing when they occur long into the litigation, after defendants have vigorously defended a rule, have been preliminarily enjoined, and have taken and aborted an appeal. Pennsylvania acknowledges this distinction (Br.18 & n.7), but in the same breath suggests that the Farrell declaration was merely "explain[ing]" why the rule does not apply to Greenberg "in the first place." Br.18. But "in the first place" was long before summary judgment. "In the first place" was at preliminary injunction when Respondents stipulated that no defendant has "issued any … opinions" that Greenberg's intended speech "violates or does not violate Rule 8.4(g)." Pet.8. The district court recognized the distinction. *See* Pet.29 (citing App.54a).

Respondents do no better by suggesting that Greenberg lacked standing to challenge the initial version of

Pennsylvania's rule—the prohibition on manifesting bias or prejudice by words or conduct. Br.3, 10, 23. Nothing below casts doubt on the district court's preliminary injunction standing analysis, App.136a–149a, analysis that Respondents declined to appeal. Performing the proper standing analysis makes a difference because the wrong input (the Farrell declaration) resulted in the wrong output (no standing). For the Third Circuit, the Farrell disavowal was the essential factor of its standing analysis. App.23a–27a.

Anti-bias speech codes do more than threaten "social opprobrium." *Contra* Br.24. When Judge Jones was ensnared in a years-long professional disciplinary process that is now the centerpiece of her Wikipedia biography, that amounted to more than "social opprobrium." Likewise the scores of other examples of speakers brought up on bias or harassment charges for the verbalization of epithets or expression of controversial ideas. App.234a–257a. Rule 8.4(g) is a self-admitted attempt to impose a "cultural shift" among lawyers. Pet.5. It is not separate from the illiberal "social climate"; it resulted from it. *Contra* Br.23. Anti-bias policies like 8.4(g) create a cognizable chilling effect on speech when they "appear limitless in scope," allow easy anonymous reporting, and carry "weighty consequences." *Speech First Inc. v. Sands*, 144 S. Ct. 675, 676–77 (2024) (Thomas, J., dissenting from denial of certiorari). All true of Pennsylvania Rule 8.4(g), particularly because both versions by their terms cover "controversial issues where dissenting opinions might be deemed biased." *Id.* at 677.

CONCLUSION

The Court should grant certiorari.

Respectfully submitted,

Theodore H. Frank
Adam E. Schulman
Counsel of Record
John M. Andren
HAMILTON LINCOLN LAW INSTITUTE
1629 K Street N.W., Suite 300
Washington, D.C. 20006
(610) 457-0856
adam.schulman@hlli.org

Counsel for Petitioner

April 2, 2024