No. 23-833

IN THE

Supreme Court of the United States

ZACHERY 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 Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF *AMICI CURIAE* FOUNDATION FOR MORAL LAW IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Curiae Foundation for Moral Law is a nonprofit organization based in Montgomery, Alabama, to promote strict interpretation of the Constitution as intended by its Framers, including full protection for the First Amendment rights of free speech, free exercise of religion, and petitioning for redress of grievances.

Amicus also supports the traditional family and believes Pennsylvania Rule 8.4(g), like ABA Model Rule 8.4(g) on which it was based, was promulgated with the intent to suppress criticism of the LGBT agenda including advocacy of causes contrary to the LGBT agenda.

SUMMARY OF THE ARGUMENT

American courtrooms should be arenas of open advocacy, not closed forums in which only politically correct arguments may be heard. However, Pennsylvania Rule 8.4(g) forbids attorneys from "knowingly manifest[ing] bias or prejudice" not only in the course of representing clients, but also while participating in CLE classes, bar association events,

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[1] Counsel of record for all parties received notice at least ten days prior to the due date of *Amicus Curiae*'s intention to file this brief. Pursuant to Rule 37.6, *Amicus Curiae* certifies that no party or party's counsel authored this brief in whole or in part, or contributed money that was intended to fund its preparation or submission; and no person other than the *Amicus Curiae,* its members, or its counsel, contributed money that was intended to fund the preparation or submission of this brief.

and bench-bar conferences. App. 130a-132a. Petitioner Zachary Greenberg routinely speaks on controversial topics as a licensed Pennsylvania attorney at CLE events he teaches and sued to enjoin Rule 8.4(g) on the basis that the rule would allow individuals to file complaints against him because of his mere speech.

This attempt by the Pennsylvania Bar to suppress the expression of unpopular viewpoints so that they may not be heard in court is a blatant violation of the First Amendment guarantees of free speech, free exercise of religion, and the right to petition for redress of grievances. Furthermore, Pennsylvania's amendment of Rule 8.4(g) has not cured the constitutional defects, and it is likely that the rule will nevertheless be used to suppress speech.

This Court should grant the Petition for Writ of Certiorari to ensure that the legal profession remains a free speech haven so that justice will not be impeded by the chilling effect of political correctness Rule 8.4(g) causes.

ARGUMENT

I. Exercise of First Amendment rights is an essential aspect of the work of a trial lawyer.

A. Freedom of Speech

Trial lawyers, more than members of almost any other profession, are involved in battles of words. To zealously advocate for their clients, in and out of court, lawyers need and have the protection of the First Amendment. In *Gentile v. State Bar of Nevada,*

501 U.S. 1030, 1043 (1991), Justice Kennedy ruled for the majority that "An attorney's duties do not begin inside the courtroom door. He or she cannot ignore the practical implications of a legal proceeding on the client." The Court held that the rule prohibiting an attorney from talking to the media if his speech might affect the decision of the judge or jury did not apply in this case. *See also*, *Lafferty v. Jones,* 246 A.3d 429 (Conn. 2020) (in which the Connecticut Supreme Court held that the clear and present danger test must be applied to extrajudicial attorney speech).

As Professor Kathleen Sullivan suggests, there is a tension between the concept that lawyers are "classic speakers in public discourse, free of state control and entitled to all the ordinary protections of speech and association available to other speakers" and the concept that lawyers are "delegates of state power—officers of the court and professional licensees whose special privileges are conditioned upon foregoing some speech rights that others enjoy"[2]

One can imagine numerous situations in which an attorney, in the representation of his client, might run afoul of Pennsylvania 8.4(g) even in its amended form:

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[2] Kathleen M. Sullivan, The Intersection of Free Speech and the Legal Profession: Constraints on Lawyers' First Amendment Rights, 67 FORDHAM L. REV. 569, 569 (1998).

- An attorney may defend against a defamation suit in which his client has made statements about the LGBT lifestyle. In defense of his client, the attorney may offer evidence of the truth of his client's assertions.
- An attorney may defend against a sex discrimination claim by a woman who claims she was not hired because of her sex. In defense of his client, the attorney may offer evidence that there are bona fide occupational qualifications, such as physical strength, that justify the discrimination.
- An attorney may represent an organization that is challenging the adoption of a law that requires certain treatment of LGBT persons. The attorney may argue in favor of the organization's position that evidence exists that the LGBT lifestyle is unhealthy and/or immoral.
- An attorney may represent parents who object to a public-school rule that students must address teachers and other students by their preferred pronouns. They attorney may desire to present evidence that even men who have undergone transgender surgery are still biological males according to their DNA, or evidence that the transgender lifestyle may be harmful to children.
- An attorney may represent a church and/or pastor who is being sued for refusing to permit a same-sex wedding in the church because the church and pastor have religious

> objections to same-sex marriage and homosexual conduct based on Leviticus 18:22, Romans 1:27, and other passages, or, in the case of a Muslim cleric, Koran sura 25:165-66 and other passages.

In these and many other circumstances, the attorney may have to choose between giving his client the zealous and vigorous representation the client deserves, or compromising his standards and providing his client with less vigorous representation.

It is therefore essential that attorneys be allowed the full right of freedom of speech to give the client the representation he deserves and to ensure that the client's cause is fully presented. If the attorney's free speech rights are suppressed, the client's cause is compromised, and the courts and the public suffer by not being given the evidence and argumentation they need to make a proper decision in the case.

B. Free Exercise of Religion

Suppose in the five examples given above, the attorney has accepted the case because he sincerely believes in the client's cause for religious reasons, such as that he too believes the Bible is the Word of God and forbids LGBT practices such as same-sex marriage. If so, then Rule 8.4(g) violates the attorney's right to free exercise of religion by preventing him from bringing to the client's defense matters he believes are true, correct, and essential to the client's case.

Suppose, further, that the attorney is asked to represent LBGT clients who want to sue a school because it restricts restrooms and showers to people of the same biological sex at birth. Under Rule 8.4(g), such advocacy could be considered bias against persons because of their gender preference.

Not allowing an attorney to follow his religious beliefs and represent clients whose causes are consistent with his beliefs or decline to represent clients whose cases conflict with his religious beliefs, violates the attorney's right to free exercise of religion.

Please note also that the Pennsylvania has enacted the Religious Freedom Protection Act of 2002, P.L. 1701, No. 214, which provides heightened protection to the free exercise of religion.

C. Freedom to Petition for Redress of Grievances

The First Amendment also protects the right to petition the government for redress of grievances. As Professor Benjamin Plener Cover has explained, "Scholars, lower courts, and the Supreme Court have repeatedly recognized lawsuits as petitions,"[3] and he cites twenty cases in which lawsuits have been recognized as petitions.[4]

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[3] Benjamin Plener Cover, "The First Amendment Right to a Remedy," *University of California, Davis Law Review* 50:1741 at 1744-45 (2017).

[4] *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 134 S. Ct. 1749, 1757 (2014); *Woodford v. Ngo*, 548 U.S. 81, 122-23 (2006) (Stevens, J., dissenting); *BE & K Constr. Co. v. NLRB,* 536 U.S. 515, 525; *Christopher v. Harbury*, 536 U.S. 403 at 415 & n.12 (2002); *Lewis v. Casey*, 518 U.S. 343, 406 (1996)

The right to petition is a basic right guaranteed by the First Amendment. The right includes petitioning to all branches and levels of government, but certainly it includes the courts as a key place in which such petitions may be presented and considered. Attorneys, of course, are a key component of people exercising their right to petition through the courts and to other branches of government as well.

An attorney may petition a court or a school board or a legislature to invalidate a school policy of requiring young girls to shower with transgender biological males. To make this petition fully effective, the lawyer may want to include statistics or specific examples of sexual assaults that have taken place when this practice is adopted. Rule

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(Stevens, J., dissenting); *Fla. Bar v. Went For It, Inc.,* 515 U.S. 618, 636 (1995) (Kennedy, J., dissenting*); Prof'l Real Estate Inv'rs, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 56-57 (1993); *Hudson v. Palmer*, 468 U.S. 517, 523 (1984); *Sure-Tan, Inc. v. NLRB,* 467 U.S. 883, 896-97 (1984); *Bill Johnson's Rests., Inc. v. NLRB,* 461 U.S. 731, 741 (1983); *Rhodes v. Chapman*, 452 U.S. 337, 362 n.9 (1981) (Brennan, J., concurring in the judgment); *Montanye v. Haymes*, 427 U.S. 236, 244 (1976) (Stevens, J., dissenting); *Pell v. Procunier*, 417 U.S. 817, 828 n.6 (1974); *Ortwein v. Schwab*, 410 U.S. 656, 660 (1973); *Cruz v. Beto*, 405 U.S. 319, 321 (1972); *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 513 (1972); *United Transp. Union v. State Bar of Mich.*, 401 U.S. 576, 580 (1971); *United Mine Workers of Am., Dist. 12 v. Ill. State Bar Ass'n*, 389 U.S. 217, 221-22 (1967); *Bhd. R.R. Trainmen v. Va. ex rel. Va. State Bar*, 377 U.S. 1, 7 (1964); *NAACP v. Button*, 371 U.S. 415, 444-45 (1963).

8.4(g) may limit the lawyer's right to argue that these practices are harmful or dangerous.

Rule 8.4(g), by chilling a lawyer's use of anything in a petition that might be critical of the LGBT agenda or lifestyle, violates the First Amendment right to petition for redress of grievances.

In all of the examples given above, the threat of discipline—the kind of discipline that could ruin a lawyer's reputation, take away his right to practice his chosen profession, and even destroy his livelihood—clearly exercises a chilling effect upon the lawyer's right to free speech, free exercise of religion, and right to petition. As Judge Kennedy found in the case below, this chilling effect is all that is necessary to establish a First Amendment violation; *see Uzuegbunam v. Preczewski,* 592 U.S. ___ (2021); *Sherwin-Williams Co. v. City of Delaware, Pennsylvania,* 968 F.3d 264, 269-70 (3rd Cir. 2020); *Speech First, Inc. v. Fenves,* 979 F.3d 319, 330-31 (5th Cir. 2020); *Index Newspapers LLC v. United States Marshals Serv.,* 977 F.3d 817, 826 (9th Cir. 2020); *Speech First, Inc. v. Killeen,* 968 F.3d 628, 638 (7th Cir. 2020).

II. Pennsylvania's amendment of Rule 8.4(g) does not cure the Rule's constitutional defects and therefore does not render this case moot.

After the District Court below held that Rule 8.4(g) is unconstitutional, the Pennsylvania Supreme Court amended the Rule on July 27, 2021. The phrase "knowingly manifest bias or prejudice" is

removed, along with language defining harassment or discrimination "as those terms are defined in applicable federal, state or local statutes or ordinances." Likewise, in Comment (3) the phrase "participation in activities that are required for a lawyer to practice law" is removed and replaced with a list of such activities:

> (1) interacting with witnesses, coworkers, court personnel, lawyers, or others, while appearing in proceedings before a tribunal or in connection with the representation of a client;
>
> (2) operating or managing a law firm or law practice; or
>
> (3) participation in judicial boards, conferences, or committees; continuing legal education seminars; bench bar conferences; and bar association activities where legal education credits are offered.

Amicus believes the Defendant, who represents the Pennsylvania Bar Association with its vast legal resources, must not be allowed to defeat a ruling on this case by making minute changes in the Rule, especially when, even with the changes, the amended Rule is just as unconstitutional as before, if not more so. The phrase in Comment (3), "interacting with witnesses," could include taking depositions, cross-examining a witness about his LGBT beliefs or lifestyle, commenting thereon in opening or closing argument. Part (2) of Comment (3) could apply to any and all aspects of running a law practice, including the expression of personal opinions or Biblical passages concerning LGBT

issues. Part (3) of Comment (3) especially applies to Petitioner Greenberg because he frequently lectures for continuing legal education seminars, and this Rule will exercise a chilling effect on what he may say in those seminars.

Furthermore, Petitioner Greenberg has no way of knowing how the courts and disciplinary boards will define and apply the terminology of the new Rule. That very uncertainty will have a chilling effect on his exercise of free speech, free exercise, and the right to petition. Even if the terminology does not expressly violate the First Amendment, it is unconstitutionally void for vagueness.

III. Rule 8.4(g) can and probably will be used to suppress dissenting views.

The effect of Rule 8.4(g) is especially chilling when one recognizes that the LGBTQ+ Bar lobbied the American Bar Association to adopt Model Rule 8.4(g) [5] and will undoubtedly pressure state bar associations for its ruthless enforcement.

Decades ago, it seemed the LGBTQ goal was tolerance of its lifestyle. "You don't have to approve of our lifestyle choices," LGBTQ people would say, "all we ask is that you allow us to live according to

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[5] The LGBTQ+ Bar, "ABA Resolutions," https://lgbtqbar.org/programs/advocacy/aba-resolutions/. "The National LGBTQ+ Bar Association was instrumental in the passage of several key resolutions in the American Bar Association's House of Delegates." "Resolved, that the American Bar Association amends Rule 8.4 and Comment" is one of the resolutions for which the LGBTQ+ Bar takes credit on this site.

our lifestyle choices."

But that has changed. Now that the LGBTQ lifestyle is largely tolerated, its advocates now demand acceptance and even exaltation. It is not enough that one acknowledges that gays have a right to choose homosexual sex; the demand is now that everyone approve and affirm that choice. And as Professor D.A. Carson establishes in *The Intolerance of Tolerance,*[6] the demand that everyone accept the LGBTQ lifestyles as legitimate and valid, results in suppression of religious, scientific, and moral objections.

The result is that those who hold traditional views of marriage and sex could be forced to either withdraw from the legal profession and keep silent about their beliefs, or take up cases with which they have strong religious or moral disagreement and refuse to represent clients whose views and causes may run contrary to the prevailing orthodoxy. The courtroom would then become an arena in which only politically correct causes may be advocated and only LGBTQ arguments may be advanced.

For those who refuse to abandon their convictions, the legal profession will become like the medieval Muslim practice of *dhimmitude,* under which *dhimmis* (Christians and Jews) could exist but

> were not allowed to proselytize Muslims (and Muslims were not allowed to convert to Christianity; such apostasy was punishable by death); they were not allowed to hold

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[6] D.A. Carson, *The Intolerance of Tolerance* (Eerdmans 2012).

> certain governmental positions or practice the learned professions; they were not allowed to criticize the Muslim government; selection of Christian pastors and bishops was subject to their Muslim rulers' approval; they were not allowed to testify in court in some locations, and in others their testimony carried less weight than that of a Muslim; they were required to pay certain taxes from which Muslims were exempt or paid at lower rates; they were required to wear certain dress and prohibited from wearing Muslim dress; they were not allowed to own weapons or train in their use. Not all of these restrictions applied in all Muslim societies, but they were common.[7]

This may sound extreme. But remember Justice Alito's warning only nine years ago that the *Obergefell* decision

> will be used to vilify Americans who are unwilling to assent to the new orthodoxy. In the course of its opinion, the majority compares traditional marriage laws to laws that denied equal treatment for African–Americans and women. E.g., ante, at 2598 – 2599. The implications of this analogy will be exploited by those who are determined to

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[7] John Eidsmoe, *Historical and Theological Foundations of Law* (Nordskog 2011, 2017) II 653-54; see also Alvin J. Schmidt, *The Great Divide* (Regina Orthodox Press, 2004) 58-65; Ephraim Karsh*, Islamic Imperialism: A History* (Yale University Press 2006) 25-26, 34; Will Durant, *The Story of Civilization* (Simon & Schuster, 1944) IV:300-01.

> stamp out every vestige of dissent.
>
> . . .
>
> I assume that those who cling to old beliefs will be able to whisper their thoughts in the recesses of their homes, but if they repeat those views in public, they will risk being labeled as bigots and treated as such by governments, employers, and schools.

Obergefell v. Hodges, 135 S. Ct. 2584, 2642-43, (2015) (Alito, J., dissent).

CONCLUSION

The legal profession, above all, must be a haven in which all may speak their convictions, present their arguments and evidence, and advocate boldly for their causes as they fiercely battle for justice. This Court should not allow the Bar to reduce the profession to a closed fraternity of politically correct advocates for pre-approved causes. Nor should the Court allow the Pennsylvania Bar to use its vast resources to avoid the ultimate First Amendment issue by making minor cosmetic changes to its Rules that provide no actual relief.

Amicus urges this Court to grant this Petition for Certiorari and follow the excellent reasoning of the District Court in striking down this unconscionable and unconstitutional Rule.

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