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

BRIEF OF THE NEW CIVIL LIBERTIES ALLIANCE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

The New Civil Liberties Alliance ("NCLA") is a nonpartisan, nonprofit civil rights organization and public-interest law firm devoted to defending constitutional freedoms from the administrative state's depredations. Professor Philip Hamburger founded NCLA to challenge multiple constitutional defects in the modern administrative state through original litigation, *amicus curiae* briefs, and other advocacy.[1]

The "civil liberties" of the organization's name include rights at least as old as the U.S. Constitution itself, such as jury trial, due process of law, and the right to have laws made by the nation's elected lawmakers through constitutionally prescribed channels (*i.e.*, the right to self-government). These selfsame civil rights are also very contemporary—and in dire need of renewed vindication—precisely because Congress, the President, federal agencies, and even sometimes the Judiciary, have neglected them for so long.

NCLA aims to defend civil liberties—primarily by asserting constitutional constraints on the administrative state. Although the American People still enjoy the shell of their Republic, there has developed within it a very different sort of

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[1] No counsel for any party to this case authored this brief in whole or part, and no party or counsel other than *amicus curiae* and its counsel made a monetary contribution intended to fund the preparation or submission of this brief. Counsel for *amicus curiae* notified Petitioner and Respondent of NCLA's intention to file this brief on February 16, 2024.

government—a type, in fact, that the Constitution was designed to prevent. This unconstitutional state within the Constitution's United States is the focus of NCLA's concern.

NCLA is particularly concerned by the open defiance of First Amendment norms displayed in this case by Pennsylvania officials. The Supreme Court has repeatedly stated that speech restrictions that discriminate on the basis of the viewpoint expressed are presumptively unconstitutional. But rather than attempt to explain why the speech restrictions challenged here should be deemed viewpoint-neutral (the defense they adopted in the district court), Respondents focused instead on challenging Petitioner Zachary Greenberg's standing to challenge those restrictions.

As a result of the Third Circuit's acceptance of that no-standing argument, Greenberg and countless other Pennsylvania attorneys find themselves in an untenable position. On the one hand, they are told they must await being targeted in a disciplinary proceeding before they are permitted to raise their First Amendment claims. On the other hand, they are required to comply with the terms of a professional-conduct rule that are, according to a district court finding not addressed by the panel, so vague that "they do not provide fair notice of the prohibited conduct." *Greenberg v. Goodrich*, 593 F. Supp. 3d 174, 222 (E.D. Pa. 2022), *rev'd sub nom. Greenberg v. Lehocky*, 81 F.4th 376 (3d Cir. 2023), *cert. filed*, No. 23-833 (U.S. Jan. 31, 2024). In the face of that uncertainty, Greenberg and other attorneys will inevitably chill their speech to at least some extent—

for fear that they will cross the unknowable line established by Pennsylvania and thereby trigger a disciplinary action.

NCLA's interest in a grant of certiorari in *Greenberg* is also acute since NCLA represents clients in the Second Circuit on a similar pre-enforcement challenge to Connecticut's Rule 8.4(7), a similar rule to Pennsylvania's Rule 8.4(g). In *Cerame v. Bowler*, No. 21-cv-1502, 2022 WL 3716422 (D. Conn. Aug. 29, 2022), NCLA is appealing a decision from the federal district court in Connecticut that held that challengers to Rule 8.4(7) did not adequately establish standing because their claims to having their speech chilled were general, not particularized. *See id*. at *8. *Appeal docketed*, No. 22-3106 (2d Cir. Dec. 8, 2022).

BACKGROUND

When the American Bar Association (ABA) introduced Rule 8.4(g) to its Model Rules of Professional Conduct in 2016, the ABA altered the landscape of antidiscrimination charges a lawyer may face. Where once a lawyer would face charges of discrimination only for conduct "prejudicial to the administration of justice" while "in the course of representing a client," Model R.P.C. 8.4(d), cmt. 3 (ABA 1998), discriminating according to "race, sex, religion, national origin, disability, age, sexual orientation, [and] socioeconomic status," *id.*, a lawyer now would potentially face charges of discrimination for "harmful" speech that was deemed "derogatory or demeaning" or that "manifests bias or prejudice towards others." Model R.P.C. 8.4(g), cmt. [3] (ABA 2016). Furthermore, such charges could arise not

strictly within the lawyer-client relationship, but rather more broadly out of any activity "in the practice of law[.]" *Id.* at cmt. 4.

The Pennsylvania Supreme Court in June 2020 adopted a version of Rule 8.4(g) that closely mirrored the ABA's Model Rule. Dkt. 1 at ¶40; Dkt. 21 at ¶61.[2] Most pertinent to Petitioner Zachary Greenberg, Pennsylvania's Rule 8.4(g) applied to activities such as the teaching of Continuing Legal Education (CLE). Pa. R.P.C. 8.4 cmt. [3]. Greenberg, a Pennsylvania attorney who leads CLE courses using discussions in defense of free speech, sued Respondents to enjoin the Rule from going into effect seeking declaratory and injunctive relief. *See Greenberg v. Haggerty*, 491 F. Supp. 3d 12, 16 (E.D. Pa. 2020), *appeal dismissed*, No. 20-3602, 2021 WL 2577514 (3d Cir. Mar. 17, 2021) (noting that Greenberg has written and spoken against banning hate speech on university campuses and university regulation of hateful online expression as protected by the First Amendment).

Greenberg's standing was based on 8.4(g)'s chilling effect—Greenberg's "objectively reasonable[,]" *id.* at 20 (citing *Speech First, Inc. v. Kileen*, 968 F.3d 628, 638 (7th Cir. 2020)), "fear of a disciplinary complaint and investigation[,]" *id.* at 23, given the lengthy list of similar presentations subject to public outcry, complaint, and investigation. *Id.* at 23. The district court enjoined enforcement of the rule, *id.* at 33, holding that Greenberg had standing to sue, *id.* at 23, and ruled in his favor on the merits. *See* Order

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[2] "Dkt." refers to docket entries in *Greenberg v. Haggerty*, No. 20-cv-3822 (E.D. Pa.).

Granting Plaintiff's Mot. for Summary Judgment, *Greenberg v. Haggerty*, No. 20-cv-3822 (E.D. Pa. Mar. 24, 2022).

Rather than taking an appeal after losing at the district court, Respondents sought changes to Rule 8.4(g) at the Pennsylvania Supreme Court. Respondents succeeded in convincing the Pennsylvania Supreme Court to adopt narrow revisions to Rule 8.4(g) in July 2021, though they undertook that revision without public notice and comment. *Goodrich*, 593 F. Supp. 3d at 184. Greenberg then filed a supplemental complaint challenging the revised Rule 8.4(g) on the same grounds. *Id.* at 186. Additionally, three months later, Respondent Thomas Farrell, Chief Disciplinary Counsel at the Office of Disciplinary Counsel (ODC), conveyed to Greenberg that the types of speech Greenberg intended to utilize in his CLE courses would not implicate Rule 8.4(g) and that ODC would not discipline Greenberg. *Id.* However, Farrell admitted his declaration (Dkt. 56) did not bind the Disciplinary Board, nor its members. "[T]he Board played no role in the drafting of the … Declaration[]"; and the Board has absolute "discretion to remove [Farrell]" and replace him with someone who would prosecute Greenberg under Rule 8.4(g) for the speech at issue. Dkt. 62 at 18. Farrell also acknowledged that the ODC lacked any procedural safeguards against altering the positions his declaration espoused. *Id.* at 8; *see also* Dkt. 70 at 12.

The district court heard motions for summary judgment in Greenberg's case over the revised Rule 8.4(g), this time considering jurisdictional arguments

over standing *and* mootness. Standing to bring suit requires (1) a "concrete, particularized" "injury in fact" (2) that is traceable to the unlawful conduct of the defendant, and (3) that can be redressed by a court order. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992) (citations omitted). Yet, "[e]ven when a plaintiff's suit initially satisfies those requirements, the Court has interpretated [*sic*] Article III to require a court to dismiss the case as 'moot' should there cease to be a justiciable case or controversy at any point in the lawsuit.[]" Tyler B. Lindley, *The Constitutional Model of Mootness*, 48 BYU L. Rev. 2151, 2153 (2023) (footnote omitted).

Standing and mootness are closely related doctrines. Mootness has been described as "the doctrine of standing set in a time frame[.]" Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 Yale L.J. 1363, 1384 (1973). However, standing and mootness have different burdens of proof for how much evidence is required to determine whether the court does or does not have Article III subject-matter jurisdiction over the case. Indeed, as the district court noted, "standing and mootness are two distinct justiciability doctrines." *Goodrich*, 593 F. Supp. 3d at 187. A Plaintiff must demonstrate "requisite personal interest … at the commencement of the litigation" to establish standing. *Arizonans for Official English v. Arizona*, 520 U.S. 43, 68 n.22 (1997). By contrast, rendering a case moot requires a defendant to satisfy a "heavy burden" once a Plaintiff has achieved standing to sue. *Gonzalez v. U.S. ICE*, 975 F.3d 788, 806 (9th Cir. 2020) (quoting *Bayer v. Neiman Marcus Grp.*, 861 F.3d 853, 862 (9th Cir. 2017)). "Even if the alleged injury changes during the course of the

lawsuit yet 'secondary' or 'collateral' injuries survive, a court 'will not dismiss the case as moot[.]'" *Goodrich*, 593 F. Supp. 3d at 191 (*quoting Chong v. Dist. Dir., I.N.S.*, 264 F.3d 378, 384 (3d Cir. 2001)).

The district court held that Greenberg still had standing, despite Respondents' argument that the revised Rule deprived the court of jurisdiction, holding that because Greenberg had standing at the commencement of litigation, his standing survived the Rule's revision. *See id.* at 190-91. The district court then held that Greenberg's case was not moot since the revised Rule 8.4(g) still retained its essential character from before its revisions and its content- and viewpoint-discrimination could chill Greenberg's speech *Id.* at 191-200, 219-20. Finally, the district court determined on the merits that Rule 8.4(g) regulated speech impermissibly. *Id.* at 225. Respondents then appealed to the Third Circuit. *See Greenberg v. Lehocky*, 81 F.4th 376 (3d Cir. 2023).

The Third Circuit reversed the district court. Unlike the district court, which held that Rule 8.4(g)'s mid-litigation revisions and Farrell's assurances to Greenberg did not take away his standing, the Third Circuit held that they did. The Third Circuit held that Greenberg's supplemental complaint challenged a new version of Rule 8.4(g) and that he lacked standing to challenge the revised Rule. This impermissibly shifted the burden from Respondents to prove that the case is moot to Petitioners to re-establish standing.

SUMMARY OF ARGUMENT

The Third Circuit's erroneous ruling is already having a significant impact beyond the Third Circuit. By discouraging all pre-enforcement challenges to versions of Rule 8.4(g) in other states and territories, the Third Circuit's erroneous ruling is jeopardizing the protection of free expression for many thousands of attorneys subject to similar rules adopted by state bar authorities. Rule 8.4(g) directly regulates speech because it removes certain ideas and perspectives from the broader debate—and thus discriminates on both content and viewpoint.

The Third Circuit compounded its error by reversing the district court's finding that Petitioner established Article III standing. The Third Circuit held that Greenberg "fail[ed] to establish an 'imminent future injury," or to show that any "ongoing chill to his speech … is objectively reasonable or fairly traceable to the challenged Rule." *Greenberg v. Lehocky*, 81 F.4th 376, 385 (3d Cir. 2023). That holding cannot be squared with Rule 8.4(g)'s broad and vague speech restrictions and the many instances in which individuals have faced sanctions for speech similar to Greenberg's. *See* Pet. at 7. Because Greenberg introduced sufficient authority and evidence to survive summary judgment on standing, he also introduced sufficient case authority and evidence to establish that his claims are not moot.

The Court should grant the petition for certiorari.

ARGUMENT

I. THE RULING BELOW SUPPRESSES SPEECH BY DISCOURAGING PRE-ENFORCEMENT CHALLENGES TO RULES IN OTHER STATES

The Third Circuit's erroneous ruling is already negatively affecting attorneys' exercise of free expression across the nation because it impacts other pre-enforcement challenges to similar rules in other states and territories. Additional pre-enforcement challenges to rules similar to 8.4(g) will languish and no percolation of the underlying merits issues will occur, without resolution of the standing question by this Court.

Within the Third Circuit, New Jersey, Delaware, and U.S. Virgin Islands attorneys (and recipients of their speech) now face the prospect of chilled speech because they cannot bring pre-enforcement challenges to Rule 8.4(g) or its equivalent. New Jersey and Delaware both feature antidiscrimination provisions in their rules of professional conduct. *See, e.g.*, N.J. R.P.C. 8.4(g) and Del. Lawyers' R.P.C. 8.4, cmt. [3]. The U.S. Virgin Islands adopted fully the American Bar Association's Model Rule on 8.4(g). V.I. Sup. Ct. R. 303(a); *see also* Kristine A. Kubes, *et al.*, *The Evolution of Model Rule 8.4(g): Working to Eliminate Bias, Discrimination, and Harassment in the Practice of Law*, ABA (Mar. 12, 2019), https://perma.cc/XUB6-Z474 (The U.S. Virgin Islands followed the ABA's model language for 8.4(g) *per se*).

The Third Circuit's ruling stifles constitutionally protected speech even outside the Circuit because its

conflation of strategic mooting with standing will also discourage courts across the country from vindicating the constitutional rights of harmed parties. Pre-enforcement actions are already difficult to sustain. As renowned First Amendment scholar Eugene Volokh notes regarding pre-enforcement actions, "potential targets must often wait until they are sued and then raise the Constitution as a defense, rather than by suing up front." Eugene Volokh, *Pre-Enforcement Constitutional Challenges*, The Volokh Conspiracy *in* Reason (Dec. 10, 2021).[3] The Third Circuit decision will encourage other government actors to make mid-litigation adjustments that will make pre-enforcement challenges virtually impossible to sustain:

> Governments are sophisticated, repeat litigators, frequently immune from claims for damages. … [G]overnment entities can and do selectively change laws and policies mid-litigation to advance their longer-term interests. And worse still, lower-court deference to the government's voluntary cessation has been fashioned out of whole cloth. It has no basis in the Supreme Court's precedent, as the Court has consistently applied the same 'absolutely clear' standard to all defendants.

Joseph C. Davis & Nicholas R. Reaves, *The Point* Isn't *Moot: How Lower Courts Have Blessed Government*

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[3] https://reason.com/volokh/2021/12/10/pre-enforcement-constitutional-challenges/

Abuse of the Voluntary-Cessation Doctrine, 129 Yale L.J. Forum 325, 341 (2019).

Here, by shifting the inquiry to standing, and relieving defendants of their mootness burden, the Third Circuit ensures clear sailing for bar authorities who are all too willing to engage in strategic mooting. The panel decision's dangerous precedent incentivizes manipulation of the speech-suppressing elements of Rule 8.4 to avoid *ex ante* judicial review.

II. GREENBERG SHOULD HAVE PREVAILED AT THE THIRD CIRCUIT EVEN APPLYING MORE STRINGENT REQUIREMENTS FOR STANDING

A. Federal Courts Have Adopted a Relaxed Injury-in-Fact Standard for Plaintiffs Asserting Free-Speech Claims

Respondents argued that Greenberg lacks Article III standing because, they contended, adoption of Rule 8.4(g) has not injured him. Br. for Appellant at 18-19, *Greenberg v. Lehocky*, No. 22-1733 (3d Cir. Sept. 6, 2023). That argument is based on a misunderstanding of what a First Amendment claimant must show to demonstrate injury. When, as here, plaintiffs assert a pre-enforcement First Amendment challenge to speech restrictions, the already lenient standing requirements at the pleadings stage are even further relaxed. As the Ninth Circuit has explained, "The 'unique standing considerations' in the First Amendment context 'tilt dramatically toward a finding of standing' when a plaintiff brings a pre-enforcement challenge." *Tingley v. Ferguson*, 47 F.4th 1055, 1066-67 (9th Cir. 2022) (quoting *Lopez v.*

Candaele, 630 F.3d 775, 781 (9th Cir. 2010)). First Amendment claimants often suffer the requisite injury long before they are the direct targets of government policy. The fear of being punished for violating a government speech restriction causes many such claimants to chill their speech to reduce the likelihood of being targeted. And that chilling of speech, so long as it arises from a well-founded fear, is a present-day injury that satisfies the injury-in-fact requirement. *Tingley*, 47 F.4th at 1067 (quoting *Libertarian Party of L.A. Cnty. v. Bowen*, 709 F.3d 867, 870 (9th Cir. 2013)) (stating that "a chilling of the exercise of First Amendment rights is, itself, a constitutionally sufficient injury").

In light of the well-recognized chilling effect that government-imposed speech restrictions can have on free speech, this Court and other federal appeals courts have adopted a more relaxed injury-in-fact standard in First Amendment cases. *McCauley v. Univ. of the V.I.*, 618 F.3d 232, 237-38 (3d Cir. 2010); *Nat'l Org. for Marriage, Inc. v. Walsh*, 714 F.3d 682, 689 (2d Cir. 2013) (stating that "we assess pre-enforcement First Amendment claims, such as the ones [plaintiff] brings, under somewhat relaxed standing and ripeness rules[]"); *Speech First, Inc. v. Fenves*, 979 F.3d 319, 330-31 (5th Cir. 2020); *Harrell v. The Florida Bar*, 608 F.3d 1241, 1254 (11th Cir. 2010) (citing *Hallandale Prof'l Fire Fighters Local 2238 v. City of Hallandale*, 922 F.2d 756, 760 (11th Cir. 1991)) (stating that "we apply the injury-in-fact requirement most loosely where First Amendment rights are involved, lest free speech be chilled even before the law or regulation is enforced"). A plaintiff need only demonstrate "'an actual and well-founded

fear that the law will be enforced against' it." *Vt. Right to Life Comm., Inc. v. Sorrell*, 221 F.3d 376, 382 (2d Cir. 2000) (quoting *Va. v. Am. Booksellers Ass'n*, 484 U.S. 383, 393 (1988)).

The Supreme Court recently reaffirmed and elaborated upon its *American Booksellers* "well-founded fear" standard in *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 160 (2014). The Court explained that although the plaintiff, in order to establish standing in such cases, may not rely solely on a "fear of prosecution" that is "imaginary or wholly speculative," it need not demonstrate an actual threat of enforcement. *Id.* (quoting *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 302 (1979)).

B. Petitioner Adequately Showed an "Actual and Well-Founded Fear" He Could Be the Target of a Rule 8.4(g) Complaint

The district court properly concluded that Greenberg met the undemanding Article III standing standard for First Amendment cases. Respondents submitted no evidence to challenge Greenberg's showing that he "actual[ly]" fears an enforcement action. Moreover, Greenberg's abundant evidence regarding others who have faced sanctions for uttering statements similar to those he routinely makes suffices to demonstrate that his fears are "well-founded." *See* Pet. at 7.

Greenberg has substantial reason for believing that his continuing legal education presentations are provocative and might be deemed "denigrat[ing]" by some listeners. On multiple occasions an audience

member has approached him following one of his presentations and told him that s/he was offended by the speech. And regardless of whether a misconduct complaint filed against him by one of those listeners under Rule 8.4(g) would result in a disciplinary sanction, the prospect of being forced to defend against such a complaint would chill the speech of any reasonable speaker. As the Supreme Court recently explained in an opinion upholding the standing of a claimant asserting a pre-enforcement First Amendment claim, when (as here) a speech-restricting statute permits "any person" to initiate a misconduct complaint, a speaker who fails to temper his speech faces the risk of being forced to devote resources to defending charges filed even by his "political opponents." *Susan B. Anthony List*, 573 U.S. at 164.

Finally, for purposes of determining Greenberg's standing, it is of no moment that Rule 8.4(g) requires a showing that a lawyer "knowingly" speaks in a harassing or discriminatory manner. *Susan B. Anthony List* explicitly rejected an appeals court's conclusion that a "knowing" requirement makes it unlikely that one who disclaims any desire to violate the speech restriction could be targeted for prosecution. *Id.* at 163 (stating that "nothing in this Court's decisions requires a plaintiff who wishes to challenge the constitutionality of a law to confess that he will in fact violate the law").

C. The Evidentiary Burden to Establish Injury-in-Fact Is Particularly Relaxed with Respect to an Overbreadth Claim

Greenberg alleges, and the district court agreed, that Rule 8.4(g) is unconstitutionally overbroad. This Court has explained the overbreadth doctrine as follows: "A regulation is unconstitutional on its face on overbreadth grounds where there is '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.'" *Saxe v. State Coll. Area School Dist.*, 240 F.3d 200, 214 (3d Cir. 2001) (quoting *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 799 (1984)). "To render a law unconstitutional, the overbreadth must be 'not only real but substantial in relation to the statute's plainly legitimate reach.'" *Id.* (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973)).

Rule 8.4(g) is not simply substantially overbroad; it has no legitimate applications to speech. Because Rule 8.4(g) discriminates on the basis of viewpoint, it is facially unconstitutional, *i.e.*, unconstitutional in all its applications. While the Constitution does not prohibit Pennsylvania from regulating what lawyers may say in court proceedings where necessary to maintain the integrity of the judicial system, it may do so only in connection with a rule (such as Rule 8.4(d)) that is viewpoint neutral.

In cases involving overbreadth challenges, this Court has applied an especially relaxed standard when determining whether a plaintiff satisfies Article III standing requirements. The Third Circuit has

recognized that "[t]he Supreme Court … freely grants standing to raise overbreadth claims, on the ground that an overbroad … regulation may chill the expression of others before the court." *Amato v. Wilentz*, 952 F.2d 742, 753 (3d Cir. 1991). Applying *Amato*'s "freely grants" standard in a subsequent case involving a First Amendment overbreadth challenge to a university's code of student conduct, the Third Circuit held that a student had standing to challenge several provisions in the code despite having unadvisedly conceded in the trial court that those provisions had not caused him any injury. *McCauley*, 618 F.3d at 238-39.

Furthermore, the Third Circuit's problematic no-standing ruling has the effect of shielding a rule that is facially unconstitutional in all its applications. Rule 8.4(g) is content-based (because it limits its speech restrictions to speech concerning 11 listed characteristics) and is viewpoint-based (because it prohibits speech that expresses disparaging views of another on the basis of any of the rule's 11 listed characteristics but permits laudatory comments on the same subjects). Respondents have repeatedly conceded that they are engaging in viewpoint and content-based discrimination but assert that they are not bound by normal First Amendment constraints when restricting attorney speech.

The federal courts have consistently condemned viewpoint-based speech restrictions as "egregious" and "out of bounds." *Ne. Pa. Freethought Soc'y v. Cnty. of Lackawanna Transit Sys.*, 938 F.3d 424, 432 (3d Cir. 2019) (citation omitted); *see, e.g.*, *Matal v. Tam*, 137 S. Ct. 1744, 1765 (2017) (Kennedy, J., concurring

in part and concurring in the judgment) ("[I]t is a fundamental principle of the First Amendment that the government may not punish or suppress speech based on disapproval of the ideas or perspectives the speech conveys."). In *Nat'l Inst. of Fam. and Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018) ("*NIFLA*"), this Court explicitly rejected arguments that "professional speech" is a "separate category of speech" entitled to reduced First Amendment protections. *NIFLA*, 138 S. Ct. at 2371-72 (stating that "[s]peech is not unprotected merely because it is uttered by 'professionals'"). *NIFLA* refutes any suggestion that states are free to impose viewpoint-based restrictions on attorney speech. Because Rule 8.4(g) discriminates on the basis of viewpoint, it may not be enforced at all, even for otherwise benign purposes. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 384 (1992). By adopting a professional-conduct rule that is so blatantly unconstitutional, Pennsylvania has made clear to attorneys that it will not let First Amendment norms stand in the way of its desire to discipline attorneys for disfavored speech. Such misconduct makes it eminently reasonable for Greenberg and others to fear that their speech will be targeted—and thereby provides them with the Article III standing necessary to challenge the Rule.

By changing the chronological focal point of standing, the Third Circuit has empowered Respondents to control jurisdiction, lending judicial approval to strategic mooting and gamesmanship. Petitioners are at the mercy of the "ad hoc, discretionary, and easily reversible" whims of "one agency or individual[.]" *Speech First, Inc. v. Schlissel*, 939 F.3d 756, 768 (6th Cir. 2019). In the context of the

regulation of speech by agencies or individuals, a recognition that freedom of speech has inherent limits is insufficient when "the distance to that horizon is unknown by the [defendant] and unknowable to those regulated by it." *Speech First, Inc. v. Fenves*, 979 F.3d 319, 338 (5th Cir. 2020). Applicable Supreme Court doctrine tells lower courts to require government defendants that engage in voluntary cessation to bear the burden of making "absolutely clear" that a party with standing will not be subject to renewal of the challenged conduct. *See Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000) (quoting *United States v. Concentrated Phosphate Export Ass'n, Inc.*, 393 U.S. 199, 203 (1968)). That burden has not and cannot be established on this record. As recent scholarship notes:

> [E]ven setting aside discouraging gamesmanship and preserving judicial resources, the voluntary-cessation doctrine serves another important purpose: advancing the public's interest in having "the legality of the [challenged] practices settled." [] And cases against government defendants—often involving constitutional questions of intense interest to the citizenry at large—implicate this interest far more than most private-versus-private cases do. Weakening voluntary cessation for government defendants therefore makes it harder for courts to resolve the sorts of legal questions that most need resolving.

Davis & Reaves, *supra* pp. 10-11, at 340.

The consequences of the Third Circuit's reasoning would "allow government officials to unilaterally avoid judicial review." *Tucker v. Gaddis*, 40 F.4th 289, 297 (5th Cir. 2022) (Ho J., concurring). Federal courts have been "understandably reluctant" to countenance this type of behavior. *Solar Turbines, Inc. v. Seif*, 879 F.2d 1073, 1079 (3d Cir. 1989) (quoting *Dow Chem. Co. v. EPA*, 605 F.2d 673, 678 (3d Cir. 1979)).

CONCLUSION

The Court should grant Greenberg's petition for a writ of certiorari.

Respectfully submitted,

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