No. 23-___

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

For two centuries, this Court has maintained the "time-of-filing" rule: "jurisdiction depending on the condition of the party is governed by that condition, as it was at the commencement of the suit." *E.g.*, *Conolly v. Taylor*, 27 U.S. 556, 565 (1829) (Marshall, C.J.); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 569 n.4 (1992). In contrast, courts analyze mid-litigation developments as matters of mootness. *E.g.*, *Ne. Fla. Chapter of Associated Gen. Contractors v. City of Jacksonville*, 508 U.S. 656, 662 (1993).

Petitioner Zachary Greenberg, a Pennsylvania-licensed attorney, sued to enjoin enforcement of a speech-regulating ethics rule. After the district court preliminarily enjoined enforcement of the rule, the government revised it and Greenberg supplemented his complaint to recount the new version of the rule.

Applying the long-standing "time-of-filing" rule, the district court analyzed the mid-litigation developments—the revision of the rule and a disavowing declaration from one of the twelve defendants—as matters of mootness, finding neither mooted Greenberg's challenge. App. 47a-74a.

The Third Circuit reversed, substituting a standing inquiry for a mootness one because Greenberg had amended his complaint to reflect the state's mid-suit revision of the rule. App. 18a n.4.

The question presented is:

Does amending or supplementing a complaint to include new factual developments absolve the government of its burden to prove mootness?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Petitioner plaintiff Zachary Greenberg is an individual person. Because Greenberg is not a corporation, Supreme Court Rule 29.6 does not require a corporate disclosure statement. Greenberg was appellee in the court below.

Respondent defendants are Jerry M. Lehocky, in his official capacity as Board Chair of the Disciplinary Board of the Supreme Court of Pennsylvania; Dion G. Rassias, in his official capacity as Board Vice-Chair of the Disciplinary Board of the Supreme Court of Pennsylvania; Joshua M. Bloom, in his official capacity as Member of the Disciplinary Board of the Supreme Court of Pennsylvania; Celeste L. Dee, in her official capacity as Member of the Disciplinary Board of the Supreme Court of Pennsylvania; Laura E. Ellsworth, in her official capacity as Member of the Disciplinary Board of the Supreme Court of Pennsylvania; Christopher M. Miller, in his official capacity as Member of the Disciplinary Board of the Supreme Court of Pennsylvania; Robert J. Mongeluzzi, in his official capacity as Member of the Disciplinary Board of the Supreme Court of Pennsylvania; Gretchen A. Mundorff, in her official capacity as Member of the Disciplinary Board of the Supreme Court of Pennsylvania; John C. Rafferty, Jr., in his official capacity as Member of the Disciplinary Board of the Supreme Court of Pennsylvania; Hon. Robert L. Repard, in his official capacity as Member of the Disciplinary Board of the Supreme Court of Pennsylvania; David S. Senoff, in his official capacity as Member of the Disciplinary Board of the Supreme Court of Pennsylvania; Shohin H. Vance, in his official capacity

as Member of the Disciplinary Board of the Supreme Court of Pennsylvania; Thomas J. Farrell, in his official capacity as Chief Disciplinary Counsel of the Office of Disciplinary Counsel; and Raymond S. Wierciszewski, in his official capacity as Deputy Chief Disciplinary Counsel of the Office of Disciplinary Counsel. Respondents were appellants in the court below.

STATEMENT OF RELATED PROCEEDINGS

Greenberg v. Lehocky, et al., No. 22-1733 (3d Cir.) (opinion issued August 29, 2023; order amending caption issued September 22, 2023; order denying rehearing and rehearing en banc issued October 3, 2023)

Greenberg v. Haggerty, et al., No. 20-3602 (3d Cir.) (order of voluntary dismissal issued March 17, 2021)

Greenberg v. Haggerty, et al., No. 20-cv-03822-CFK (E.D. Pa.) (preliminary injunction issued December 8, 2020; opinion and permanent injunction issued March 24, 2022; final judgment issued March 24, 2022)

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Black letter law distinguishes standing from mootness: "The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000) (quoting *Arizonans for Off. English v. Arizona*, 520 U.S. 43, 68 n.22 (1997)). Standing "focuse[s] on whether the party invoking jurisdiction had the requisite stake in the outcome when the suit was filed." *Davis v. FEC*, 554 U.S. 724, 735 (2008); *accord Carney v. Adams*, 141 S. Ct. 493, 499 (2020). Mootness, on the other hand, "concentrate[s] attention on the peculiar problems of a suit's death, rather than its birth." 13B Charles Alan Wright *et al.*, FEDERAL PRACTICE AND PROCEDURE § 3533.1 (3d ed.).

Thus, developments during the life of the lawsuit lead this Court to ask whether those developments moot the controversy by depriving the plaintiff of an ongoing stake. For example, if a defendant repeals and replaces a challenged statute during the litigation, that presents a question of mootness. *E.g.*, *Ne. Fla. Chapter of Associated Gen. Contractors v. City of Jacksonville*, 508 U.S. 656, 662 (1993). So too if the defendant disavows an intent to take the complained of action. *E.g.*, *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91–93 (2013). Or if the defendant states its intent to rescind a challenged rule and engage in new rulemaking. *West Virginia v. EPA*, 142 S. Ct. 2587, 2606–07 (2022).

Distinguishing standing from mootness "matters because the Government, not [plaintiff], bears the burden to

establish that a once-live case has become moot." *West Virginia*, 142 S. Ct. at 2607. While the plaintiff bears the burden to show a justiciable controversy at the outset, the defendant bears a "heavy" and even "formidable" burden to show mootness from developments during the litigation. *Friends of the Earth*, 528 U.S. at 189, 190. A "plain lesson" is that "the prospect that a defendant will engage in (or resume) harmful conduct may be too speculative to support standing, but not too speculative to overcome mootness." *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 224 (2000) (quoting *Friends of the Earth*, 528 U.S. at 190).

But what if a plaintiff files an amended or supplemental complaint to recite the mid-litigation developments? Specifically, what if a plaintiff bringing a constitutional challenge to a rule or policy supplements his complaint to assert the same claims against a revised version of the rule or policy without adding new claims or defendants? What then is the relevant point in time for analyzing plaintiff's standing?

Following this Court's guidance in *Rockwell Int'l Corp. v. U.S.*[1] and the longstanding "time-of-filing" rule, most courts look to the initial complaint—the time that a party first invokes federal jurisdiction. *Barber v. Charter Twp. of Springfield*, 31 F.4th 382, 391 n.7 (6th Cir. 2022); *Gonzalez v. U.S. Immigr. & Customs Enf't*, 975 F.3d 788, 803 (9th Cir. 2020); *S. Utah Wilderness Alliance v. Palma*, 707 F.3d 1143, 1153 (10th Cir. 2013); *Abraxis Bioscience, Inc. v. Navinta LLC*, 625 F.3d 1359, 1366 n.3 (Fed. Cir.

[1] 549 U.S. 457, 473 (2007).

2010). Despite any supplemental complaint, mid-litigation developments like statutory revisions remain a question of mootness. *Zukerman v. USPS*, 961 F.3d 431, 441–45 (D.C. Cir. 2020); *Horton v. City of St. Augustine*, 272 F.3d 1318, 1325–129 (11th Cir. 2001). But the Third Circuit now diverges, holding that a supplemental pleading resets the standing clock as if it were beginning new litigation. App. 18a n.4; *Lutter v. JNESO*, 86 F.4th 111, 124–26 (3d Cir. 2023) (explaining Third Circuit's standard post *Greenberg*). In the Third Circuit, defendants bear no burden to show mootness if the plaintiff supplements his complaint to reflect the changed circumstances. App. 18a. There alone plaintiffs bear a second burden of establishing standing anew. *Id.* at 22a n.5. This Court should grant certiorari to resolve the split and repudiate the Third Circuit's novel rule.

OPINIONS BELOW

The Third Circuit's decision is reported at 81 F.4th 376 and is reproduced at App. 1a. The district court's decision granting summary judgment is reported at 593 F. Supp. 3d 174 and is reproduced at App. 34a. The district court's previous order granting a preliminary injunction is reported at 491 F. Supp. 3d 12, and is reproduced at App. 128a.

JURISDICTION

The Third Circuit issued its opinion on August 29, 2023, and Greenberg's petition for rehearing and for rehearing en banc on October 3, 2023. On December 8, 2023, Justice Alito extended the time for this petition to January 31,

2024. *See* No. 23A513. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Article III vests "[t]he judicial Power of the United States" in the federal courts and limits that power to certain "Cases" and "Controversies." U.S. Const. art. III §§1–2.

The Free Speech Clause of the First Amendment prohibits Congress from abridging "the freedom of speech"; the Fourteenth Amendment extends that prohibition to the States and guarantees "due process of law." U.S. Const. amends. I, XIV.

RULES INVOLVED

Rules 15(a) and (d) are reproduced at App. 162a. Pa. Rule of Prof. Cond. 8.4(g), as adopted on Jun. 8, 2020 is reproduced at App. 160a. Pa. Rule of Prof. Cond. 8.4(g), as amended and adopted on Jul. 26, 2021 is reproduced at App. 161a.

STATEMENT OF THE CASE

A. Pennsylvania adopts a variation of ABA Model Rule 8.4(g) and Petitioner Zachary Greenberg sues to stop it.

In 2016, the American Bar Association (ABA) introduced major changes to the antidiscrimination rule in its Model Rules of Professional Conduct, Rule 8.4(g). For decades, the rule narrowly classified as unethical any "conduct that is "prejudicial to the administration of justice" and limited the Rule's scope to work done "in the course of representing a client." Model R.P.C. 8.4(d), cmt. 3 (Am. Bar Ass'n 1998). It applied only to prejudice based on "race, sex, religion, national origin, disability, age, sexual orientation, [and] socioeconomic status." *Ibid.* But citing the "need for a cultural shift" among legal professionals, ABA Standing Comm. on Ethics and Professional Responsibility, Memorandum 2 (Dec. 22, 2015), the ABA revised Rule 8.4(g) in 2016. The ABA expanded the rule to new categories of sanctionable harassment and applied it to speech deemed "derogatory or demeaning" or that "manifests bias or prejudice towards others" and is "harmful." Model R.P.C. 8.4(g), cmt. 3 (Am. Bar Ass'n 2016). And the ABA unmoored the rule to encompass "all conduct relating to the practice of law," expanding its jurisdiction to "bar association functions" and "social activities." *Id.* at cmt. 4. Critics complained that these changes left the rule "riddled with unanswered questions" about what lawyers can say and where they can say it without professional reprisal. Halaby & Long, *New Model Rule of*

Professional Conduct 8.4(g): Legislative History, Enforceability Questions, and a Call for Scholarship, 41 J. LEGAL PRO. 201, 257 (2017).

The "cultural shift" invoked by the ABA mirrors the now ubiquitous impulses for "safetyism"—speech codes, book banning, and the like—that regulate many facets of American society. G. Lukianoff & J. Haidt, THE CODDLING OF THE AMERICAN MIND 268–69 (2018); *see also* App. 234a–246a (providing examples). As a result, about half of the citizenry today is afraid "to speak their minds," more than at any time since polling addressed this issue and four times as many as in the McCarthy era. Gibson & Sutherland, *Keeping Your Mouth Shut: Spiraling Self-Censorship in the United States*, 138(3) POL. SCI. Q. 361, 362–64 (2023). 8.4(g) imposes this trend on the legal profession.

Scholars and practitioners alike objected to the ABA's new rule as unconstitutional. *See, e.g.*, Dent, Jr., *Model Rule 8.4(g): Blatantly Unconstitutional and Blatantly Political*, 32 NOTRE DAME J. L. ETHICS. & PUB. POL'Y 135, 136 (2018); *see also* App. 265a–269a, Add. to Pet. C.A. Resp. Br. (compiling two dozen commentators and state authorities denouncing the model rule). Those objections may explain why only two states—New Mexico and Vermont—adopted Rule 8.4(g) in full. For the most part, other states either declined to adopt the rule or promulgated substantially narrower versions that remain tethered to the representation of a client or the administration of justice. *See e.g.*, La. Att'y Gen. Op. 17-0114 (2017); S.J. 0015, 2017 Leg., 65th Sess. (Mont. 2017); Tex. Att'y Gen. Op. KP-0123 (2016). But Pennsylvania is a notable

exception. In 2020, over a dissent, the Supreme Court of Pennsylvania approved a version of Rule 8.4(g) with few narrowing limitations. It forbade Pennsylvania attorneys from "knowingly manifest[ing] bias or prejudice" not just in the representation of a client, but also at CLE classes, bar association events, and bench-bar conferences. App. 130a–132a.

After Pennsylvania adopted the rule in June 2020, Petitioner Zachary Greenberg sued to enjoin it. Greenberg is a licensed Pennsylvania attorney and First Amendment activist who speaks throughout the Commonwealth on hot-button free speech issues, including at CLE events he teaches. App. 212a–216a. Greenberg's presentations mention epithets quoted in opinions or stories he's discussing. Stipulated List of Facts, Dkt. 53 ¶¶ 63–65.[2] His taboo language and defense of free speech inflame some audience members. For example, it is undisputed that some spectators at Greenberg's presentations expressed offense at what he said. App. 228a. Rule 8.4(g) opens the door to these offended individuals filing a complaint against Greenberg. To show this fear is not imagined, Greenberg catalogued several politically motivated complaints of "bias" against speakers for similarly controversial speech, including one against Fifth Circuit Judge Edith Jones that took two years to resolve when she spoke about racial disparities in criminal justice at the University of Pennsylvania Law School. App. 234a–257a.

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[2] "Dkt." refers to docket entries in *Greenberg v. Haggerty, et al.*, No. 20-cv-03822-CFK (E.D. Pa.). "C.A. Dkt." refers to docket entries in *Greenberg v. Lehocky, et al.*, No. 22-1733 (3d Cir.).

B. The district court preliminarily enjoins the rule.

Greenberg's suit sought declaratory and injunctive relief against the Respondents tasked with enforcing the rule. App. 206a. After the parties certified that the record required no other facts or evidence before adjudication (Dkts. 17, 21, 22, 23), the district court heard the parties' cross-motions for preliminary injunction and dismissal. The defendants did not submit any evidence that excluded Greenberg's speech from 8.4(g)'s ambit; instead, they stipulated that no defendant has "issued any . . . opinions" that Greenberg's intended speech "violates or does not violate Rule 8.4(g)." Dkt. 21 ¶ 70.

With all necessary evidence before it, the district court found Greenberg had standing under *Susan B. Anthony List v. Driehaus*, 573 U.S. 149 (2014), because the rule objectively chilled his desired speech. App. 136a–152a. The court's standing analysis considered all arguments submitted by the parties and scrutinized the intricacies of the rule, including its supporting comments. *Ibid.* Ultimately, it found that the words "manifest bias or prejudice" were "a palpable presence" in the rule that "hang over Pennsylvania attorneys like the sword of Damocles." App. 147a. And the court declined Respondents' invitation to eschew jurisdiction by "trust[ing] them not to regulate and discipline . . . offensive speech" because the "plain language" of the rule gave them such authority. App. 148a. Pivoting to the merits, the district court held 8.4(g) exceeded the historical scope of Respondents' regulatory powers and did not implicate the narrow category of professional speech that warrants more deferential review.

App. 158a–159a. And, following *Matal v. Tam*, 582 U.S. 218 (2017), because Rule 8.4(g) sought to remove offensive "ideas or perspectives from the broader debate," the court held it was an unconstitutional viewpoint regulation subject to injunction. App. 162a, 165a. Respondents appealed.

C. The Respondents revise the rule and Greenberg supplements his complaint to reflect the new rule.

The Respondents shifted strategy and abandoned their appeal in March 2021 to instead amend Rule 8.4(g). While the Supreme Court of Pennsylvania considered the rule's recommended revisions, the Respondents "chose to proceed on the same docket, continuing the pre-existing proceeding." App. 53a. And without any public notice and comment, they rolled out a new version of Rule 8.4(g), which the Supreme Court of Pennsylvania approved in July 2021. Dkt. 53 at ¶ 54. This roughly four-month process contrasted with the three years of "deliberation, discussion, and extensive study," 49 Pa. Bull. 4941 (Aug. 31, 2019), that Respondents exhausted before promulgating their now-defunct original rule.

In material form and function, the new Rule 8.4(g) is the same as the old regulation. Its jurisdiction still extends past client representation to legal committees, education seminars, conferences, and other bar-sponsored activities for legal education credit. Pa.R.P.C. 8.4(g) cmt. 3. It singles out the same disfavored subjects and uses the "same procedure" for enforcement as the original rule. Pa.R.P.C. 8.4(g); App. 44a. The substantive difference is

slim. Amended Rule 8.4(g) prohibits "harassment" defined beyond the ordinary legal meaning of the word to include "denigrat[ing], or show[ing] hostility or aversion toward a person" on any of the rule's protected bases, Pa.R.P.C. 8.4(g); while the original rule barred manifestations of bias and prejudice.

In response to the amended rule, Greenberg filed a supplemental complaint, incorrectly styled as an amended complaint, to update his pleading and account for the new text. App. 209a. The supplemental complaint did not name any new parties not named initially or automatically substituted under Fed. R. Civ. P. 25(d). Then, three months later—and more than a year into the litigation—Respondent Thomas Farrell, Chief Disciplinary Counsel of the Office of Disciplinary Counsel (ODC), declared that Greenberg's intended activities would not violate the rule and that ODC would not pursue discipline for such activities. Dkt. 56. But Farrell admitted his declaration did not bind the Disciplinary Board or its members; the Board played no role in its drafting; 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 17–18. At first, Farrell maintained that ODC was bound to it by "official estoppel," but Respondents later abandoned that position on appeal. Tr. of Oral Arg. (C.A. Dkt. 137) at 8:8–11.

D. The court again enjoins the rule.

The parties cross-moved for summary judgment before the district court. App. 36a. The court again engaged in a full jurisdictional analysis. App. 47a–74a. It considered not only standing and mootness (now at issue), but also

their jurisdictional relationship. "Standing ensures that each plaintiff has the 'requisite personal interest […] at the *commencement* of the litigation.'" App. 47a (quoting *Arizonans for Off. English v. Arizona*, 520 U.S. 43, 68 n.22 (1997)) (emphasis added). While "[m]ootness 'ensures that the litigant's interest continues to exist throughout the lawsuit.'" App. 47a (quoting *Cook v. Colgate Univ.*, 992 F.2d 17, 19 (2d Cir. 1993)). The district court held Greenberg already demonstrated standing when the litigation began, App. 47a–49a, but still considered and rejected new factual and legal arguments against standing based on the amended rule and Farrell's declaration. App. 49a–55a.

The district court then addressed Respondents' jurisdictional arguments under mootness, though Respondents had not argued them as such. App. 55a–57a. It analyzed every plausible avenue for mootness: (a) whether the Farrell declaration sufficiently foreclosed enforcement; (b) whether Greenberg's intended speech implicates the amended rule; (c) "official estoppel" against the Respondents based on Farrell's declaration; (d) the credibility of enforcement against Greenberg; and (e) the differences between the original and amended Rule 8.4(g). App. 56a–74a. The court concluded that the non-binding, *ad hoc*, and expediently timed Farrell declaration did not moot the case. App. 56a–67a. And it concluded that the threat of disciplinary investigation—itself "trigger[ed]" by "each complaint that ODC receives"—also prevents mootness. App. 69a. Separately, the "insignificant" differences between the first and amended Rule 8.4(g) plus its

subjective application and enforcement meant Greenberg's speech remained chilled—and thus the amended rule also failed to moot his suit. App. 70a–74a.

Proceeding to the merits, the district court again held that Rule 8.4(g) regulated speech, not conduct, and that it was an unconstitutionally vague, overbroad, and viewpoint-discriminatory regulation. App. 74a–127a. The court entered summary judgment, and Respondents appealed again, with the caption changing to reflect the automatic substitution of officeholders. Fed. R. App. Proc. 43(c)(2).

E. The Third Circuit reverses, finding Greenberg lacks standing to challenge the amended rule.

On appeal the Third Circuit panel reversed. It held that mid-case developments—the amended rule and Farrell's declaration—implicated standing, not mootness, "because Greenberg replaced his initial complaint with a subsequent pleading challenging the new Rule." App. 18a n.4. This shifted the burden off the Respondents (to prove the case moot) and on to Greenberg to freshly demonstrate standing under the supposedly new circumstances. App. 18a–20a. On standing, the panel found that Greenberg's intended speech would not implicate the amended rule because it was not "directed" at others nor "knowing[ly]" discriminatory. App. 21a–23a. And because Greenberg now had to prove standing at the time of his subsequent complaint—brought about by Respondents' strategic decision to amend the rule rather than appeal— the Farrell declaration protected him from hypothetical enforcement of Rule 8.4(g) in the court's eyes. App. 23a & n.5. Finally, the Third Circuit dismissed Greenberg's claims of chilled

speech based on the "specter of disciplinary proceedings." App. 27a. In doing so, the panel remarked that Greenberg's concerns are "largely informed by his perception of the social climate, not Rule 8.4(g)," App. 29a—an assertion at odds with the ABA's statement that the rule reflected its desire for a "cultural shift." ABA Standing Comm. on Ethics and Professional Responsibility, Memorandum 2 (Dec. 22, 2015). And it concluded that the investigation of Judge Jones—prompted by a deluge of complaints about her allegedly insensitive speech at the University of Pennsylvania law school—did not pose a "credible threat" to Greenberg. App. 25a n.6, 30a.

Greenberg petitioned the Third Circuit for rehearing or reconsideration en banc to correct the panel's decision, raising the panel's conflation of standing with mootness, its disregard of the time-of-filing rule, and its departure from the law of other circuits. The Third Circuit denied rehearing. App. 167a.

REASONS FOR GRANTING THE PETITION

Every day, litigants across the country amend and supplement their complaints in federal court. These litigants rely on the time-tested rule that "if jurisdiction exists at the time an action is commenced, such jurisdiction may not be divested by subsequent events." *Freeport-McMoran, Inc. v. K N Energy, Inc.*, 498 U.S. 426, 428 (1991) (*per curiam*). They can no longer rely on that rule in the Third Circuit following its split from other circuits.

Jurisdictional outcomes ought not turn on whether a plaintiff sues in Philadelphia, Pennsylvania, or Philadel-

phia, Mississippi. The Court should grant certiorari to secure uniformity and consistency on a significant matter of federal jurisdiction.

I. The Third Circuit diverges on how to analyze jurisdiction in the context of amended and supplemental complaints.

For two centuries, it has been "quite clear" "that the jurisdiction of the Court depends upon the state of things at the time of the action brought, and that after vesting, it cannot be ousted by subsequent events." *Mollan v. Torrance*, 22 U.S. 537, 539 (1824) (Marshall, C.J.). "Where there is no change of party, a jurisdiction depending on the condition of the party is governed by that condition, as it was at the commencement of the suit." *Conolly v. Taylor*, 27 U.S. 556, 565 (1829) (Marshall, C.J.). This "time-of-filing" rule is "hornbook law (quite literally) taught to first-year law students in any basic course on federal civil procedure." *Grupo Dataflux v. Atlas Glob. Grp., L.P.*, 541 U.S. 567, 570–71 (2004) (citing casebooks). The principle is "well-established"[3] and "consistently

[3] *Freeport-McMoran, Inc. v. K N Energy, Inc.*, 498 U.S. 426, 428 (1991).

held,"[4] "longstanding"[5] and "venerable,"[6] even "pellucid."[7] Put simply, the time-of-filing rule forms one of the most, if not the most, fundamental pillars of federal jurisdiction jurisprudence. And it applies to questions of Article III standing as it does to other elements of subject matter jurisdiction. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 569 n.4 (1992); *Davis v. Fed. Elec. Comm'n*, 554 U.S. 724, 735 (2008).

Two decades ago, this Court clarified how the time-of-filing rule interacts with amended pleadings. *Rockwell Int'l Corp. v. United States*, 549 U.S. 457 (2007). *Rockwell* answers that question by distinguishing between the state of things and the originally alleged state of things. *Id.* at 473. While "courts look to the amended complaint to determine jurisdiction," jurisdiction still "depends on the state of things *at the time of the action brought*." *Id.* at 474, 473 (emphasis added; quotation and citation omitted). In other words, courts should (1) look the amended complaint (2) to see what it says about the state of things at the time of the case was filed. *Greenberg* ignores (2).

In the wake of *Rockwell*, most circuits properly assess standing "as of the time when [plaintiff] commenced suit, relying on the allegations in the operative amended complaint." *Gonzalez v. U.S. Immigr. & Customs Enf't*, 975

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[4] *Id.*

[5] *Keene Corp. v. United States*, 508 U.S. 200, 207 (1993).

[6] *DM Arbor Court, Ltd. v. City of Houston*, 988 F.3d 215, 219 (5th Cir. 2021).

[7] *Hotze v. Hudspeth*, 16 F.4th 1121, 1127 (5th Cir. 2021) (Oldham, J., dissenting).

F.3d 788, 803 (9th Cir. 2020) (citation omitted). In *Gonzalez*, the plaintiff challenged ICE immigration detainers. *Id.* at 800. Immediately after Gonzalez filed his complaint, ICE cancelled his detainer and the sheriff's department released him. *Ibid.* Subsequently, his amended complaints added another named plaintiff. *Ibid.* The government disputed Gonzalez's standing to seek prospective injunctive relief, but *Gonzalez* found he "had standing . . . when he commenced suit" even though the detainer no longer existed when he amended his complaint. *Id.* at 803. Having assured standing, *Gonzalez* concluded that the government could not carry the "heavy burden" of establishing mootness. *Id.* at 806 (internal quotation omitted).[8]

Take, as another example, a Tenth Circuit case, *S. Utah Wilderness Alliance v. Palma*, 707 F.3d 1143 (10th Cir. 2013) ("*SUWA*"). *SUWA* involved environmental groups' challenge to administrative leasing decisions. *Id.* at 1151. A year after filing suit, the groups amended their complaint to extend their challenge to another decision that came during the litigation. *Ibid. SUWA* "examine[s] the allegations in SUWA's Amended Complaint" "focus[ing] on whether SUWA had standing when the original complaint was filed . . . ." *Id.* at 1153.

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[8] Although Gonzalez brought a class action complaint, the Ninth Circuit's decision does not turn on this distinction. Class actions can sometimes proceed after events moot the individual claims of the named representative. *See, e.g.*, *Deposit Guar. Nat. Bank v. Roper*, 445 U.S 326 (1980). Yet the fact that a suit is a class action "adds nothing to the question of standing." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 n.6 (2016) (internal quotation omitted). Thus, unsurprisingly, *Gonzalez*'s reasoning employed the general time-of-filing rule without remarking on the case's putative class action status.

The Sixth Circuit may have the most robust precedent of any. In that Circuit, the operative date for determining standing is the one that adds the relevant plaintiff to the action, notwithstanding a later amendment to the complaint. *Barber v. Charter Twp. of Springfield, Mich.*, 31 F.4th 382, 391 n.7 (6th Cir. 2022). "[I]f a plaintiff possesses standing from the start, later factual changes cannot deprive the plaintiff of standing. Those changes will create 'mootness' issues and trigger that doctrine's more forgiving rules." *Fox v. Saginaw Cty.*, 67 F.4th 284, 294–95 (6th Cir. 2023) (citations omitted). Developments during the litigation, even when they are acknowledged in an amended complaint, are "entirely irrelevant to the question of standing." *Lynch v. Leis*, 382 F.3d 642, 647 (6th Cir.2004); *Barber*, 31 F.4th at 394 (Readler, J., dissenting) (quoting *Lynch*).

But a minority of courts have errantly focused on *Rockwell*'s instruction to "look to the amended complaint to determine jurisdiction" without recognizing that the allegations that matter are those referencing the time of the initial pleading. This petition provides an opportunity for the Court to clarify *Rockwell*, as the decision below falls into this trap, concluding that "[t]he amendment to Rule 8.4(g) raises an issue of standing and not mootness because Greenberg replaced his initial complaint with a subsequent pleading challenging the new Rule." App. 18a n.4.

Besides misapprehending *Rockwell*, *Greenberg* offers two cases to support its conclusion. But neither does.

The first case *Greenberg* cites, *Persinger v. SW Credit Sys., L.P.*, 20 F.4th 1184 (7th Cir. 2021), does not address the relevant question of what point in time controls. That

is unsurprising because the case involved no amended complaint. No. 19-cv-853 (S.D. Ind.).

The second, *GAF Bldg. Materials Corp. v. Elk Corp of Dallas*, 90 F.3d 479 (Fed. Cir. 1996), directly contradicts *Greenberg*'s conclusion. *Greenberg* quotes *GAF* as if Greenberg's "subsequent pleading" was the relevant "complaint under consideration." But *GAF* looked to the *original* complaint and would have come out differently had it considered facts at the time of the amended pleading. GAF sought a declaratory judgment that it did not infringe a pending but unissued patent. *Id.* at 480. Following the patent's issuance, GAF amended its complaint. *Ibid. GAF* held that neither the issuance of the patent nor GAF's amendment cured the lack of jurisdiction based on "facts existing at the time the complaint under consideration was filed." *Id.* at 483. Thus, *GAF* affirmed dismissal. *Ibid.* If it had instead considered facts at the time of the amended complaint, the patent's issuance would have provided standing.

While *GAF*'s conclusion about whether a supplemental pleading can confer standing is controversial,[9] the Federal Circuit has repeatedly and explicitly reaffirmed

[9] This petition involves whether a supplemental pleading can *oust* standing that existed at the time of the initial pleading, but the opposite question—whether a supplemental pleading can *confer* standing that did not exist at the time of the initial pleading—also deeply divides the circuits. *See Scahill v. District of Columbia*, 909 F.3d 1177, 1183 (D.C. Cir. 2018) (cataloging six circuits that answer yes, and three that answer no); *see also United States ex rel. Jamison v. McKesson Corp.*, 649 F.3d 322, 328 (5th Cir. 2011) (following "the longstanding rule that the amendment process cannot be used to cre-

GAF's holding that the relevant time is "the date of the original complaint" not the "amended complaint." *Abraxis Bioscience, Inc. v. Navinta LLC*, 625 F.3d 1359, 1366 n.3 (Fed. Cir. 2010). "The initial standing of the original plaintiff is assessed at the time of the original complaint, even if the complaint is later amended." *Schreiber Foods, Inc. v. Beatrice Cheese, Inc.*, 402 F.3d 1198, 1202 n.3 (Fed. Cir. 2005).

After Greenberg petitioned for rehearing, the Third Circuit issued a separate decision expounding, refining, and attempting to rehabilitate *Greenberg's* rule. *See Lutter v. JNESO*, 86 F.4th 111, 124–26 (2023). *Lutter* characterizes Greenberg's revised pleading as a Rule 15(d) supplemental complaint rather than a Rule 15(a) amended complaint. *Id.* at 126. *Lutter* is correct on this score because supplemental complaints "deal with events subsequent to the pleading to be altered and represent additions to or continuations of the earlier pleadings." 6A Charles Allan Wright, Arthur Miller, & Mary Kay Kane, FED. PRAC. & PROC. § 1504 (3d ed. 2020); *accord United States v. Russell*, 241 F.2d 879, 881–83 (1st Cir. 1957). Before the codification of the federal rules, the equity practice was the same: a "supplemental bill [was] a mere adjunct to the original bill." *Shaw v. Bill*, 95 U.S. 10, 14

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ate jurisdiction retroactively where it did not previously exist" (internal quotation omitted)). Four members of this Court once declared that the time-of-filing rule should apply "categorically" to jurisdiction-destroying changes but less strictly to jurisdiction-perfecting changes. *Grupo Dataflux*, 541 U.S. at 583–84 (Ginsburg, Stevens, Souter, Breyer, JJ., dissenting).

(1877). Rule 15(a) amended complaints, by contrast, "relate to matters that occurred prior to the filing date of the original pleading and entirely replace the earlier pleading." Wright & Miller, § 1504.

Greenberg's revised complaint—filed following Pennsylvania's 2021 amendment to 8.4(g)—is supplemental. App. 209a. It continues to allege the same facts about the 2020 state of the world, brings the same causes of action against the same parties, and seeks the same remedies as his initial complaint. *Compare* App. 174a, *with* App. 209a. Although Greenberg incorrectly styled his updated pleading an "amended complaint," courts and parties "frequently" "confuse[]" "the distinction between an amended and a supplemental pleading." Wright & Miller, § 1473. "These misnomers are not of any significance" and do not prevent courts from proceeding under the correct subsection. Wright & Miller, § 1504; *accord Russell*, 241 F.2d at 882 ("of no moment"); *United States ex rel. Wulff v. CMA, Inc.*, 890 F.2d 1070, 1073 (9th Cir. 1989) ("immaterial").

Unlike *Greenberg*, *Lutter* does acknowledge the venerable "time-of-filing" rule. 84 F.4th at 125. But it cabins that rule to amended complaints; supplemental complaints like Greenberg's that "substantively affect[]" existing claims and relief do restart the standing clock. *Id.* at 125–26. *Lutter* does not resolve the circuit conflict opened in *Greenberg*. *Gonzalez* and *SUWA* both involve functionally supplemental complaints, yet still apply the time-of-filing rule. As in *Greenberg*, the two cases *Lutter* cites in support of the supposed "supplemental complaint

exception" to the time-of-filing rule provide no real support.[10]

Other cases involve even more similar postures, with supplemental complaints filed to extend constitutional challenges to revised policies, rules, or statutes. In *Horton v. City of St. Augustine*, the plaintiff challenged an anti-busker ordinance on its face. 272 F.3d 1318, 1322 (11th Cir. 2001). After the plaintiff obtained a preliminary injunction, the city repealed and replaced the ordinance. *Id.* at 1323–24. Horton followed with a supplemental complaint raising the same challenges to the new law. *Id.* at 1325–26. *Horton* did not reset the standing clock by treating the supplemental complaint as the inception of litigation. *Contra Greenberg*; *Lutter*. It analyzed the legislative amendment as a matter of mootness, and concluded that the case was not moot. *Id.* at 1326–29; *accord* Section II, *infra* (detailing this Court's jurisprudence of mootness through legislative amendments).

Zukerman v. United States Postal Serv. is of a piece with *Horton*. 961 F.3d 431 (D.C. Cir. 2020). There, a plaintiff alleged that the USPS's custom stamp policy violated

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[10] The first is *Greenberg* itself, which is wrong for the reasons provided in this petition. The second, *Common Cause/Ga. v. Billups*, supposedly "evaluat[ed] plaintiffs' Article III standing based on a subsequent complaint challenging a revised statute." *Lutter*, 84 F.3d at 126 (citing 554 F.3d 1340, 1347–52 (11th Cir. 2009)). While technically true, *Common Cause*'s standing analysis did not involve or address the later occurring facts. Thus, it's not clear how a mootness analysis could have even applied. And *Common Cause* appears consistent with the historical rule that adding plaintiffs in a revised pleading resets the standing clock. 554 F.3d at 1348 & 1351-52. Greenberg's supplemental complaint introduces no new parties.

his free speech rights by discriminating on viewpoint. *Ibid.* Mid-litigation, USPS adopted a superseding policy, and Zukerman filed a supplemental complaint to challenge the new policy. *Id.* at 437–38, 439–40. Like *Horton*, *Zukerman* analyzed the justiciability of the supplemental complaint as a matter of mootness, not standing, and again found that the government had not met its burden. *Id.* at 441–45.

The Third Circuit's reinvention of the time-of-filing rule does not just contradict other circuits, it contravenes this Court's precedent applying the doctrine to *supplemental complaints*. In *Anderson v. Watt*, this Court refused to reset the jurisdictional clock after the plaintiffs filed a partially supplemental complaint that alleged that after the filing of the complaint, one of the executor plaintiffs revoked his executorship. 138 U.S. 694, 708 (1891).

So too, *Minneapolis & St. Louis R. Co. v. Peoria & Pekin Union R. Co.* 270 U.S. 580 (1924). There, the plaintiff sought remand to file a supplemental complaint to reflect the ICC's post-complaint action. *Id.* at 586. This Court denied the motion: "The later facts alleged could not conceivably affect the result of the case before us. The jurisdiction of the lower court depends upon the state of things existing at the time the suit was brought." *Ibid.*

Not only is there no jurisprudential grounding for *Lutter*'s "supplemental complaint exception" to the time-of-filing rule, *Lutter*'s distinction is counterintuitive. A supplemental complaint serves as an adjunct to the initial complaint, which remains active. On the other hand, an amended complaint "supersedes" the antecedent complaint, which "no longer performs any function in the

case." Wright & Miller, § 1476. It seems odd that supplemental complaints would trigger a new time-of-filing when amended complaints remain anchored to initial complaints that have become a dead letter.

Thus, the district court below appropriately considered jurisdictional facts existing when the suit launched, as pled in the supplemental complaint. *See* App. 48a–49a (citing cases).[11] Outside the Third Circuit, Greenberg's supplemental complaint, challenging 8.4(g) as amended, would not change the calculus. *See, e.g.*, *Horton*, *Zuckerman*, *SUWA*.

II. The decision below departs from this Court's foundational Article III jurisprudence.

"[J]urisdiction once acquired is not defeated by a change in circumstances." *Walters v. Edgar*, 163 F.3d 430, 432 (7th Cir. 1998) (citing *Mollan v. Torrance*, 22 U.S. 537, 539 (1824) (Marshall, C.J.)). This pedigreed "time-of-

[11] District courts have reached mixed results after *Rockwell*. *Contrast e.g.*, *Edelhertz v. City of Middletown*, No. 12-cv-1800 VB, 2013 U.S. Dist. LEXIS 114686, 2013 WL 4038605, at *3 (S.D.N.Y. May 6, 2013) (following the time-of-filing rule); *United States ex rel. Carter v. Halliburton Co.*, 144 F. Supp. 3d 869, 882 (E.D. Va. 2015) (same); *United States ex rel. Branch Consultants, LLC v. Allstate Ins. Co.*, 782 F. Supp. 2d 248, 261–62 (E.D. La. 2011) (same), *with Kelly v. Vesnaver*, No. 16-CV-883, 2018 WL 1054827, 2018 U.S. Dist. LEXIS 30748, at *9 (E.D.N.Y. Jan. 11, 2018) (isolating *Rockwell*'s sentence and confusing the allegation of amended complaint with the *time* of the amended complaint); *Evanston Ins. Co. v. Dan Ryan Builders, Inc.*, 2017 WL 262620, 2017 U.S. Dist. LEXIS 8320, at *8 n.13 (D. Md. Jan. 20, 2017) (same); *United States ex rel. Digit. Healthcare, Inc. v. Affiliated Comput. Servs.*, 778 F. Supp. 2d 37, 48 n.6 (D.D.C. 2011) (same).

filing" doctrine serves an important function. It keeps standing and mootness in their own spheres. *See Friends of the Earth, Inc. v. Laidlaw Env't Servs.*, 528 U.S. 167, 190–92 (2000). Although the analogy is "not comprehensive,"[12] "mootness represents a time dimension of standing, requiring that the interests originally sufficient to confer standing persist throughout the lawsuit." Wright & Miller § 3533.1. Indeed, mootness is the "chief exception" to the time-of-filing doctrine. *Walters*, 163 F.3d at 432.

At the time of filing, Greenberg challenged enforcement of Pennsylvania's initial version of 8.4(g), prohibiting him from "manifest[ing] bias or prejudice" in his CLE lectures. Audience members had conveyed that his presentations (including the mention of specific epithets) offended them. App. 141a. Defendants stipulated that they had not "issued any . . . opinions" that Greenberg's intended speech "violates or does not violate Rule 8.4(g)." *Greenberg v. Haggerty*, Dkt. 21 ¶ 70, No. 2:20-cv-03822-CFK (E.D. Pa. Oct. 30, 2020). Such stipulations matter. *303 Creative LLC, v. Elenis*, 143 S. Ct. 2298, 2312–13, 2316–19 & n.5 (2023).

After the district court concluded Greenberg possessed standing, App. 136a–149a, the defendants did not prosecute an appeal. Instead, they revised the rule, and later submitted a declaration of Disciplinary Counsel Farrell asserting that he did not interpret Greenberg's speech to violate the rule. Rather than claiming the new circum-

[12] *Id.* at 190.

stances mooted the case, defendants insisted that Greenberg lacked standing. But the district court refused to allow defendants to "turn back the clock to the commencement of the case." App. 53a.

The district court was exactly right; "intervening circumstance[s]" during litigation implicate "mootness, not standing." *West Virginia v. EPA*, 142 S. Ct. 2587, 2607 (2022). Confusing the two domains is a "basic flaw" fundamentally reassigning the burdens of proof. *Ibid.*

Precedent leaves no doubt that the two specific intervening events here ((1) Pennsylvania's mid-litigation revision of the challenged rule and (2) one defendant's mid-litigation disavowal of intent to take the complained of action) are prototypical questions of mootness, not standing.

1. Voluntary withdrawal and replacement of a challenged rule or policy. *E.g.*, *Ne. Fla. Chapter of Assoc. Gen. Contractors of Amer. v. City of Jacksonville*, 508 U.S. 656, 661–62 (1993); *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982); *see also United States v. Washington*, 142 S. Ct. 1976 (2022). *Northeastern Florida Chapter* details the applicable standard. The case is not moot when the amended rule, statute, or policy is "sufficiently similar" "that it is permissible to say that the challenged conduct continues" even if it threatens plaintiff to "a lesser degree than the old one." 508 U.S. at 662 & n.3. "An amendment that does not satisfy the principles championed by the plaintiffs ordinarily does not moot a request for prospective relief." Wright & Miller § 3533.6.

2. A defendant's disavowal of intent to take the complained of action. *E.g.*, *W. Va. v.* EPA, 142 S. Ct. at 2606–07 (intention not to enforce); *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91–93 (2013) (covenant not to sue); *Pool v. City of Houston*, 978 F.3d 307, 313–14 (5th Cir. 2020) (disavowal of enforcement); *Speech First, Inc. v. Schlissel*, 939 F.3d 756, 767–70 (6th Cir. 2019) (one official's statement limiting enforcement plans and "affirm[ing] students' free speech rights"); *White v. Lee*, 227 F.3d 1214, 1243 (9th Cir. 2000) ("temporary policy" becoming permanent forbearance); *see also FBI v. Fikre*, No. 22-1178 (U.S.) (disavowing declaration).

Mootness standards are "notoriously strict." *W. Va. v. EPA*, 142 S. Ct. at 2628 (Kagan, J., dissenting). And defendants bear a "heavy" burden to prove mootness from their "voluntary conduct." *Id.* at 2607 (quoting *Friends of the Earth*, 528 U.S. at 189).

Relying on *Already* and *Northeastern Florida Chapter*, the district court held neither the revision to 8.4(g) nor the non-binding Farrell declaration mooted the controversy. App. 55a–74a. As alleged in Greenberg's supplemental complaint, the revised rule threatens Greenberg and other Pennsylvania attorneys just like the initial rule. App. 73a–74a. Defendants have never claimed the revision effected a sea change; they continue to defend the initial rule. App. 61a–64a. The district court then offered several reasons that defendants could not meet their "heavy burden" of showing that the expedient, ad hoc, non-binding, and qualified Farrell declaration moots Greenberg's claims. App. 56a–69a, 99a–100a; *contrast Al-*

ready, 568 U.S. at 93 (covenant sufficient to overcome voluntary cessation rule when "unconditional and irrevocable"). Again, on appeal, defendants did not contest the mootness determination or the predicates of that determination (for example, *eleven* of the twelve defendants had not accepted, let alone endorsed, the disavowal).

While members of this Court do not always agree on applying mootness doctrine, they consistently agree that mid-litigation developments implicate that doctrine rather than standing. *E.g.*, *N.Y. State Rifle & Pistol Ass'n, Inc. v. City of New York,* 140 S. Ct. 1525 (2020) (legislative amendment); *Campbell-Ewald Co. v. Gomez*, 577 U.S. 153 (2016) (offer of judgment). Lower courts generally do too. *E.g.*, *Cleveland Branch, NAACP v. City of Parma*, 263 F.3d 513, 536 (6th Cir. 2001) (Boggs, J., dissenting) (agreeing mootness doctrine applies; disagreeing on result). Here, if the Third Circuit had applied a mootness test, there is little doubt Greenberg would have prevailed. *See DeJohn v. Temple Univ.*, 537 F.3d 301, 309 (3d Cir. 2008) (conveniently timed repudiation of challenged policy); *Nextel W. Corp. v. Unity Twp.*, 282 F.3d 257, 262 (3d Cir. 2002) (Alito, J.) ("an amendment does not moot the claim if the updated statute differs only insignificantly from the original").

But rather than ask whether the revised version of 8.4(g) continued the controversy under *Northeastern Florida Chapter*, *Greenberg* ignores Greenberg's litigation in federal court for a year and a half. Mootness raises different efficiency concerns than standing because discontinuation of a case deep into litigation "may prove more wasteful than frugal." *Friends of the Earth*, 528

U.S. at 192 (discontinuation "may prove more wasteful than frugal"). And rather than hold defendants to their "heavy burden" to show that Farrell's disavowing declaration mooted the controversy, the Third Circuit, drawing on standing precedent, put the burden on Greenberg "to show some objective reason to believe Defendants would change their position." App. 23a n.5 (citation and brackets omitted).

In essence, the decision below chisels a sizable chunk out of this Court's mootness jurisprudence. One cannot reconcile the decision below with *Northeastern Florida Chapter*, *Friends of the Earth,* and *Already* unless Greenberg's supplemental complaint reset the litigation clock. Not only is that position misguided for the reasons discussed in Section I, this Court has affirmatively counseled that amending one's complaint "to attack the newly enacted legislation" is proper. *Diffenderfer v. Central Baptist Church of Miami, Fla., Inc.*, 404 U.S. 412, 415 (1972). That is how extended challenges "should [be] raised." *Lamar Adver. of Penn., LLC v. Town of Orchard Park*, 356 F.3d 365, 378 (2d Cir. 2004) (Sotomayor, J.). *Griffin v. County School Board of Prince Edward County*, for example, endorsed the use of a supplemental complaint to extend a school-segregation equal protection challenge to defendants' mid-litigation decision to close the public schools entirely. 377 U.S. 218, 226–27 (1964). None of these cases suggest that such an amendment would transform the question of mootness into one of standing.

If *Greenberg* and *Lutter* are correct that supplemental complaints effectively trigger a new time of filing, there are two possible results. Either the realm of standing will

devour the realm of mootness, or, more likely, plaintiffs will simply avoid updating their pleadings.

III. The Third Circuit's novel rule complicates jurisdiction, begets gamesmanship, and will impoverish the public record.

Ultimately, the panel opinion silently extinguishes the deeply rooted voluntary cessation mootness framework. Immediate disavowal in defendants' "first substantive response to the complaint is distinct from a disavowal" strategically submitted after over a year of litigation, after preliminary injunction, after stipulating defendants had issued no opinions on the application of 8.4(g) to Greenberg's speech, after an aborted appeal, and after the defendants submitted non-material revisions to 8.4(g) without including Farrell's gloss in the text or comments. App. 54a.

Defendants play games with voluntary cessation to strategically avoid litigation. Davis & Reaves, *The Point Isn't Moot: How Lower Courts Have Blessed Government Abuse of Voluntary-Cessation Doctrine*, 129 YALE L.J. FORUM. 325, 329–31 (2019) (providing examples nationwide); Amicus Br. of the Liberty Justice Ctr. at 2-3, *FBI v. Fikre*, No. 22-1178 (U.S. December 19, 2023) (providing others). "[A]cts of strategic mooting litter the Federal Reporter." *Tucker v. Gaddis*, 40 F.4th 289, 294 (5th Cir. 2022) (Ho, J., concurring) (internal quotation omitted). "Judicial acceptance of such gamesmanship harms both good sense and individual rights and deprives the citizenry of certainty and clarity in the law by preventing the final resolution of important legal issues." *Ibid.* (simplified).

Avoiding that gamesmanship is a major feature—if not the entire point—of the heavy burden defendants must carry to prove actual mootness. Since the Court's early mootness cases, it has distinguished defendants' intervening action from "the plaintiff's own act" or "a power beyond the control of either party." *Mills v. Green*, 159 U.S. 651, 654 (1895). The former does not "deprive[]" courts of "the authority, whenever in its opinion justice requires it, to deal with the rights of the parties as they stood at the commencement of the suit." *Ibid.*

Avoiding gamesmanship is also a feature of the time-of-filing rule. Take the context of removal. "As the party invoking federal jurisdiction, [the defendants] had to establish that all elements of jurisdiction . . . existed at the time of removal. *Collier v. SP Plus Corp.*, 889 F.3d 894, 896 (7th Cir. 2018). But once defendant has removed a case, plaintiffs cannot defeat jurisdiction by pleading different facts. *See canonically St. Paul Mercury Indem. Co. v. Red Cab Co.,* 303 U.S. 283 (1938).

The decision below does more than reopen the door to gamesmanship. It blows the door off its hinges by demanding the opposing party prove non-mootness. App. 23a n.5. It allows parties to "turn back the clock to the commencement of the case" and evade judicial review, a result neither "equitable, nor efficient." App. 53a; *accord Friends of the Earth*, 528 U.S. at 192.

Beyond preventing gamesmanship, the traditional time-of-filing rule's "reliability as a convenient bright-line mechanical rule that is clearly compatible with general notions of the attachment of jurisdiction has assured its

uninterrupted continuation from the beginning." *Rowland v. Patterson*, 882 F.2d 97, 98 (4th Cir. 1989) (en banc). It "insures greater certitude in making the jurisdictional determination" by "provid[ing] a uniform reference point." *Id.* at 100. In contrast, the Third Circuit's novel rule depends on subjective evaluation of whether a supplemental complaint alleges post-suit developments that "substantively affect" the plaintiffs' "claims and requested relief." *Lutter*, 86 F.4th at 126. How that standard cashes out in any case is opaque.

Imagine a student litigates for years an ongoing violation of her constitutional rights at school. After she graduates, she files a supplemental complaint advising the court of her graduation and amending her prayer for relief to seek expungement of the school's record of her unlawful punishment. Again, a classic issue of mootness. *Cf. Defunis v. Odegaard*, 416 U.S. 312 (1974). But the Third Circuit would now treat this as question of standing. What if the plaintiff's first complaint already sought expungement of interim records? Does the supplemental complaint's extension to final records "substantively affect" the relief sought? What if the change is even more minor than that? Jurisdictional questions ought not turn on how many angels dance on the head of a pin. "[W]hen judges must decide jurisdictional matters, simplicity is a virtue." *Standard Fire Ins. Co. v. Knowles*, 568 U.S. 558, 595 (2013). "[P]redictability and uniform application" form the foundation of any "good jurisdictional rule." *Exch. Nat'l Bank of Chicago v. Daniels,* 763 F.2d 286, 292 (7th Cir. 1985) (Easterbrook, J.).

Even if the Third Circuit's new rule is workable, it makes for poor policy. "The time-of-filing rule is what it is precisely because the facts determining jurisdiction are subject to change, and because constant litigation in response to that change would be wasteful." *Grupo Dataflux v. Atlas Glob. Grp., L.P.*, 541 U.S. 567, 580 (2004). "[W]hether destruction or perfection of jurisdiction is at issue, the policy goal of minimizing litigation over jurisdiction is thwarted whenever a new exception to the time-of-filing rule is announced, arousing hopes of further new exceptions in the future." *Id. at* 580–81.

The Third Circuit's rule turns Rule 15(d) into a trap for the unwary. Its approach diverges from this Court's admonition that the Federal Rules' "simplified pleading system . . . was adopted to focus litigation on the merits of a claim." *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514 (2002). Pleading ought not devolve into "game of skill in which one misstep by counsel may be decisive to the outcome." *Foman v. Davis*, 371 U.S. 178, 181–82 (1962) (internal quotation omitted). Rather, pleading standards should "facilitate a proper decision on the merits." *Id.* at 182 (internal quotation omitted).

If litigants respond to the Third Circuit's rule by simply abandoning the procedural device of supplemental pleading, that would be as unfortunate. Litigants would lose a valuable tool "to achieve an orderly and fair administration of justice." *Griffin v. County Sch. Bd. of Prince Edward Cty.*, 377 U.S. 218, 227 (1964). The judicial system would lose a tool to "promote as complete an adjudication of the dispute between the parties as is possible."

LaSalvia v. United Dairymen of Ariz., 804 F.2d 1113, 1119 (9th Cir. 1986) (internal quotations omitted).

Policy changes raising questions of mootness do not become matters of standing simply because the plaintiff revises his complaint to cover the new policy. There is no qualitative difference between a plaintiff who amends his complaint to acknowledge the changed state of the facts, and one who instead waits to introduce evidence during dispositive motion practice. But there is a practical difference: the Third Circuit's rule discourages plaintiffs from maintaining an accurate public record on the federal docket. And that undermines the "structural interest" in "opening the judicial system to public inspection" of an accurate, up-to-date, and comprehensive record of judicial proceedings. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 592 (1980) (plurality op.). Stale pleadings would impede the public's right of access. *Cf. Courthouse News Serv. v. Planet*, 947 F.3d 581, 594 (9th Cir. 2020) ("a necessary corollary of the right to access is a right to timely access"). Thus, the decision below harms not only litigants and the judicial process, but also any citizen bystanders who seek to access information in federal cases.

In this case, the Third Circuit's rule leads to a particularly pernicious outcome. Pennsylvania has hung a vague and viewpoint-discriminatory "Sword of Damocles" over all Pennsylvania attorneys. App. 147a. But all the attorneys can do is wait for case-by-case adjudication. App. 30a (Ambro, J., concurring). The rule's "chilling effect" on their protected speech "in the meantime" makes such "case-by-case adjudication intolerable." *Bd. of Airport*

Comm'rs of Los Angeles v. Jews for Jesus, 482 U.S. 569, 576 (1987).

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CONCLUSION

The Court should grant certiorari.

Respectfully submitted,

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January 31, 2024
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APPENDIX

TABLE OF APPENDICES

Appendix A

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 22-1733

ZACHARY GREENBERG

v.

JERRY M. LEHOCKY, in his official capacity as Board Chair of the Disciplinary Board of the Supreme Court of Pennsylvania; DION G. RASSIAS, in his official capacity as Board Vice-Chair of the Disciplinary Board of the Supreme Court of Pennsylvania; JOSHUA M. BLOOM, in his official capacity as Member of the Disciplinary Board of the Supreme Court of Pennsylvania; CELESTE L. DEE, in her official capacity as Member of the Disciplinary Board of the Supreme Court of Pennsylvania; LAURA E. ELLSWORTH, in her official capacity as Member of the Disciplinary Board of the Supreme Court of Pennsylvania; CHRISTOPHER M. MILLER, in his official capacity as Member of the Disciplinary Board of the Supreme Court of Pennsylvania; ROBERT J. MONGELUZZI, in his official capacity as Member of the Disciplinary Board of the Supreme Court

of Pennsylvania; GRETCHEN A. MUNDORFF, in her official capacity as Member of the Disciplinary Board of the Supreme Court of Pennsylvania; JOHN C. RAFFERTY, JR., in his official capacity as Member of the Disciplinary Board of the Supreme Court of Pennsylvania; HON. ROBERT L. REPARD, in his official capacity as Member of the Disciplinary Board of the Supreme Court of Pennsylvania; DAVID S. SENOFF, in his official capacity as Member of the Disciplinary Board of the Supreme Court of Pennsylvania; SHOHIN H. VANCE, in his official capacity as Member of the Disciplinary Board of the Supreme Court of Pennsylvania; THOMAS J. FARRELL, in his official capacity as Chief Disciplinary Counsel of the Office of Disciplinary Counsel; RAYMOND S. WIERCISZEWSKI, in his official capacity as Deputy Chief Disciplinary Counsel of the Office of Disciplinary Counsel, Appellants.

On Appeal from the United States District Court for the Eastern District of Pennsylvania
D.C. Criminal No. 2-20-cv-03822
(District Judge: Honorable Chad F. Kenney).

ARGUED: April 13, 2023.

Before: CHAGARES, *Chief* Judge, SCIRICA, and AMBRO, *Circuit Judges*.

(Filed: August 29, 2023)

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OPINION OF THE COURT

SCIRICA, *Circuit Judge*.

The Supreme Court of Pennsylvania amended Pennsylvania Rule of Professional Conduct 8.4 to prohibit harassment and discrimination in the practice of law. Plaintiff Zachary Greenberg is a Pennsylvania-licensed attorney who regularly gives continuing legal education presentations about First Amendment protections for offensive speech. His presentations involve quoting offensive language from judicial opinions and discussing arguably controversial topics. Greenberg fears his speech at these presentations will be interpreted as harassment or discrimination under the Rule. He alleges the Rule violates the First Amendment and is unconstitutionally vague. The District Court agreed with him and enjoined enforcement of the Rule.

We determine Greenberg lacks standing to bring his challenge. Rule 8.4(g) does not generally prohibit him from quoting offensive words or expressing controversial ideas, nor will Defendants impose discipline for his planned speech. Thus, any chill to his speech is not objectively reasonable or cannot be fairly traced to the Rule. We will reverse.

I.

The Pennsylvania Constitution vests the Pennsylvania Supreme Court with the power to regulate the practice of law in the Commonwealth. Pa. Const. art. V, § 10(c). To carry out this responsibility, the Pennsylvania Supreme Court enacts the Pennsylvania Rules of Professional Conduct for all attorneys licensed in the jurisdiction and empowers the Disciplinary Board of the Supreme Court of Pennsylvania to regulate the conduct of Pennsylvania attorneys according to those Rules.

Anyone may file a complaint against a Pennsylvania-licensed attorney for violating the Rules of Professional Conduct. Within the Disciplinary Board, the Office of Disciplinary Counsel investigates such complaints. If the Office of Disciplinary Counsel determines a complaint is frivolous or that policy or prosecutorial discretion warrants dismissal, it may dismiss the complaint without requesting a response from the attorney. From 2016-2018, the Office of Disciplinary Counsel dismissed 87% of complaints without requesting a response from an attorney. If an investigation finds that attorney discipline may be appropriate, the recommendation is reviewed by the Chief Disciplinary Counsel. The Chief Disciplinary Counsel directs the Office of Disciplinary Counsel's interpretation of the Rules of Professional Conduct and must grant express approval for any disciplinary recommendation. Depending on the disposition and severity of the reprimand, the Office of Disciplinary Counsel's disciplinary recommendations may proceed to a hearing, with de novo review by the Disciplinary Board and ultimately the Pennsylvania Supreme Court. Generally, investigations into attorney discipline are kept confidential and details are only made public after the Board pursues discipline.

Pa. Disciplinary Bd. R. 93.102 (2022); Pa. R. Disciplinary Enf't 402(a) (2022).

The regulation of harassment or discrimination by attorneys has evolved over the decades. In 1983, the American Bar Association (ABA) first adopted the Model Rules of Professional Conduct. These rules are not binding on attorneys but serve as a model for states to form their own rules of conduct.

Model Rule 8.4 specifies, among other things, that it is "professional misconduct for a lawyer to . . . engage in conduct that is prejudicial to the administration of justice." Model Rules of Pro. Conduct r. 8.4(d) (Am. Bar Ass'n 2016). In 1998, the ABA adopted a comment to Model Rule 8.4 clarifying that it was professional misconduct for an attorney to "knowingly manifest[] by words or conduct, bias or prejudice" based on certain protected characteristics.[1] Model Rules of Pro. Conduct r. 8.4 cmt. 2 (Am. Bar Ass'n 1998). But the scope of that comment was limited to words or conduct "in the course of representing a client" that "are prejudicial to the administration of justice." *Id.*

In 2014, to advance its goal of eliminating bias in the legal profession, the ABA began considering amending Model Rule 8.4 to "reflect the changes in law and practice since 1998." JA249. The result two years later was the adoption of Model Rule 8.4(g), which added specific antiharassment and antidiscrimination provisions within the black letter of the rule—not the commentary. Model Rule

[1] Those characteristics include "race, sex, religion, national origin, disability, age, sexual orientation, [and] socioeconomic status." Model Rules of Pro. Conduct r. 8.4 cmt. 2 (Am. Bar Ass'n 1998).

8.4(g) also expanded the scope of the 1998 comment from conduct "in the course of representing a client" to "conduct related to the practice of law." Model Rules of Pro. Conduct r. 8.4(g) (Am. Bar Ass'n 2016). The ABA reasoned the Model Rule should prohibit harassment and discrimination beyond the scope of representing a client— such as "bar association functions" or "law firm social events." ABA Comm. on Ethics & Pro. Resp., Formal Op. 493, at 4 (2020). Model Rule 8.4(g) currently prohibits "harassment or discrimination" based on certain protected characteristics[2] "related to the practice of law." Model Rules of Pro. Conduct r. 8.4(g) (Am. Bar Ass'n 2016).

Consistent with the ABA's goal of eliminating bias in the legal profession, many states have adopted their own provisions prohibiting some form of attorney bias, prejudice, harassment, or discrimination. Forty-four jurisdictions' rules of professional conduct, either directly or through commentary, regulate verbal manifestations of bias, prejudice, harassment, or discrimination. Thirteen jurisdictions (other than Pennsylvania) regulate verbal bias, prejudice, harassment, or discrimination by attorneys outside client representation or operation of a law practice.

Historically, Pennsylvania has supported adoption of the ABA Model Rules in its Rules of Professional Conduct to "promote consistency in application and interpretation of the rules from jurisdiction to jurisdiction." 46 Pa. Bull.

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[2] Those protected characteristics are race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status, and socioeconomic status. Model Rules of Pro. Conduct r. 8.4(g) (Am. Bar Ass'n 2016).

7519 (Dec. 3, 2016). Thus, Pennsylvania considered its own amendment conforming to Model Rule 8.4(g) in 2016. *Id.* That fall, the Pennsylvania Bar Association House of Delegates approved a recommendation that the Supreme Court of Pennsylvania adopt an antiharassment and anti-discrimination rule of professional conduct. After over two years of "deliberation, discussion, and extensive study," the Disciplinary Board recommended a proposed amendment to Pennsylvania Rule of Professional Conduct 8.4. 49 Pa. Bull. 4941 (Aug. 31, 2019). The Board emphasized that the "proposed rule promotes the profession's goal of eliminating intentional harassment and discrimination, assures that the legal profession functions for all participants, and affirms that no lawyer is immune from the reach of law and ethics." *Id.*

The Pennsylvania Supreme Court adopted the proposed recommendation in 2020. It enacted Pennsylvania Rule of Professional Conduct 8.4(g), which provided that it is professional misconduct for a lawyer to, "in the practice of law, by words or conduct, 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" eleven protected grounds.[3] 50 Pa. Bull. 3011 (June 20, 2020). The Pennsylvania Supreme Court also added two comments to the Rule. Comment 3 clarified that "the practice of law" includes "continuing legal education

[3] The protected grounds are "race, sex, gender identity or expression, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, [and] socioeconomic status." 50 Pa. Bull. 3011 (June 20, 2020).

seminars, bench bar conferences and bar association activities where legal education credits are offered." *Id.* Comment 4 explained that prohibited conduct would be defined by substantive antidiscrimination and antiharassment statutes and case law. *Id.*

Before the amendment was scheduled to take effect, Plaintiff Zachary Greenberg sued members of the Disciplinary Board of the Pennsylvania Supreme Court as well as the Board's Chief and Deputy Chief Disciplinary Counsel. Greenberg is a Pennsylvania-licensed attorney who regularly presents continuing legal education ("CLE") seminars about the First Amendment. He also speaks at non-CLE seminars about First Amendment rights related to university policies banning hate speech, due process protections for students accused of sexual misconduct, religious speech that espouses discriminatory views, and political speech through campaign contributions. Greenberg believes some audience members will find his presentations—which include quotations of racial epithets from judicial opinions and are inclined towards arguably controversial positions—to be "biased, prejudiced, offensive, and potentially hateful." Compl. ¶¶ 63-64, *Greenberg v. Haggerty*, No. 20-cv-3822 (E.D. Pa. Aug. 6, 2020), ECF No. 1. As a result, he fears they will file a bar disciplinary complaint against him. He plans to continue speaking at CLE events on these topics, but alleges "the existence of Rule 8.4(g) and the uncertainty surrounding the scope of Rule 8.4(g) [would] chill his speech" and cause him to alter his lectures. *Id.* ¶¶ 60, 65. He claimed Pennsylvania's Rule 8.4(g), as adopted in 2020, violated the First Amendment and was unconstitutionally vague.

Greenberg sought a declaratory judgment that the Rule was unconstitutional and an injunction prohibiting

its enforcement. He then moved to preliminarily enjoin Defendants from enforcing any part of Rule 8.4(g). Defendants moved to dismiss the suit, arguing that Greenberg lacked standing and that the Rule did not violate either the First or Fourteenth Amendment.

The District Court denied Defendants' motion to dismiss and preliminarily enjoined enforcement of Rule 8.4(g) in its entirety. It held that Greenberg had standing: His plan to "repeat[] slurs or epithets" or "engag[e] in discussion with his audience members about the constitutional rights of those who do and say offensive things" was "arguably proscribed by Rule 8.4(g)," and he faced a "credible threat of prosecution" because he "demonstrated that there is a substantial risk that [Rule 8.4(g)] will result in [his] being subjected to a disciplinary complaint or investigation." *Greenberg v. Haggerty*, 491 F. Supp. 3d 12, 24 (E.D. Pa. 2020). Thus, the District Court determined Greenberg's allegation that his speech was chilled was objectively reasonable. Ultimately, the trial court found it persuasive that Defendants offered no guarantee they would not "discipline his offensive speech even though they have given themselves the authority to do so." *Id.*

Defendants first sought interlocutory review but later voluntarily dismissed their appeal and instead amended Rule 8.4(g). That amendment produced the current form of Rule 8.4(g) and commentary, the relevant portions of which follow:

It is professional misconduct for a lawyer to . . .

> (g) in the practice of law, knowingly engage in conduct constituting harassment or discrimination based upon race, sex, gender

identity or expression, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, or socioeconomic status . . . .

Comment [3]: For the purposes of paragraph (g), conduct in the practice of law includes (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. The term "the practice of law" does not include speeches, communications, debates, presentations, or publications given or published outside the contexts described in (1)-(3).

Comment [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.

> Comment [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.

JA206-07 ¶¶ 57-60 (Pa. R. Pro. Conduct 8.4(g) & cmts. 3-5).

Defendants agreed not to enforce the Rule until the trial court decided Greenberg's challenge. Greenberg then filed an amended complaint challenging the amended Rule 8.4(g). In that complaint, he committed to continue speaking at CLE and non-CLE events. But he reaffirmed his belief "that every one of his speaking engagements on First Amendment issues carries the risk that an audience member will file a bar disciplinary complaint against him based on the content of his presentation under Rule 8.4(g)." JA162 ¶ 102. Thus, he explained his intention to "refrain from speaking engagements on controversial issues" and to alter his presentations to "reduce the risk of an audience member reporting his expression." *Id.* ¶¶ 103-04. He expressed ongoing concern that a "disciplinary investigation would harm [his] professional reputation, available job opportunities, and speaking opportunities." *Id.* ¶ 108.

Both sides moved for summary judgment. In support of their motion, Defendants submitted a declaration from

Defendant Thomas Farrell, Pennsylvania's Chief Disciplinary Counsel. In that role, Farrell has authority to direct and determine the Office of Disciplinary Counsel's policy on handling complaints raising First Amendment issues. Farrell stated that the Office of Disciplinary Counsel "interprets Rule 8.4(g) as encompassing only conduct which targets individuals by harassing or discriminating against an identifiable person," and "does not interpret Rule 8.4(g) as prohibiting general discussions of case law or 'controversial' positions or ideas." JA276 ¶ 7. Farrell stated that Greenberg's planned presentations, speeches, and writings do not violate Rule 8.4(g) and that the Office of Disciplinary Counsel would not pursue discipline because of them. JA276-78 ¶¶ 8-17; *see* JA287-88 (any complaint based on the conduct described in Greenberg's complaint would be "frivolous"). Defendants argued that Greenberg lacked standing to challenge the current form of Rule 8.4(g). In response, Greenberg argued that the recent amendments to the Rule and Farrell's declaration—which arose after the commencement of litigation —concerned mootness rather than standing.

The District Court granted Greenberg's motion for summary judgment and denied Defendants' motion for summary judgment. It held the recent amendments to the Rule and the Farrell Declaration did "not affect [its] prior decision on standing in the least" and found no "compelling reason to revoke its prior ruling on standing." *Greenberg v. Goodrich*, 593 F. Supp. 3d 174, 189 (E.D. Pa. 2022). It determined the amendments to the Rule and the Farrell Declaration were relevant only to mootness—not standing—because they arose after the commencement of litigation. It held the amendments and Farrell Declaration did not moot the case. On the merits,

the trial court determined Rule 8.4(g) violated the First Amendment on several bases and was unconstitutionally vague. *Id.* at 206-20, 222-25. Thus, it permanently enjoined enforcement of Rule 8.4(g) in its entirety. Defendants timely appealed.

II.

The District Court had original jurisdiction under 28 U.S.C. §§ 1331 and 1343(a). We have appellate jurisdiction under 28 U.S.C. § 1291. We review the District Court's summary judgment decisions de novo. *Sikkelee v. Precision Airmotive Corp.*, 907 F.3d 701, 708 (3d Cir. 2018). Summary judgment is appropriate where "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

III.

To have standing to sue, Greenberg must establish he suffers an actual or imminent injury that is fairly traceable to Rule 8.4(g).[4] He cannot. His planned speech does

[4] The amendment to Rule 8.4(g) raises an issue of standing and not mootness because Greenberg replaced his initial complaint with a subsequent pleading challenging the new Rule. *See Rockwell Int'l Corp. v. United States*, 549 U.S. 457, 473-74 (2007) ("[W]hen a plaintiff files a complaint in federal court and then voluntarily amends the complaint, courts look to the amended complaint to determine jurisdiction."); *Persinger v. Sw. Credit Sys. L.P.*, 20 F.4th 1184, 1190 (7th Cir. 2021) ("When reviewing potential injuries for standing purposes, we are constrained by the operative complaint."); *GAF Bldg. Materials Corp. v. Elk Corp. of Dallas*, 90 F.3d 479, 483 (Fed. Cir. 1996)

not arguably violate the Rule, and he faces no credible threat of enforcement. Thus, it is not objectively reasonable for Greenberg to alter his speech in response to the Rule. His arguments to the contrary are largely based on his perception of the social climate, which he sees as infested by "[w]idespread illiberal impulses for 'safetyism.'" Greenberg Br. 45 (quoting Greg Lukianoff & Jonathan Haidt, *The Coddling of the American Mind* 268-69 (2018)). But such impulses do not supply Greenberg with a concrete injury fairly traceable to the challenged Rule. A likelihood of offending audience members is not a likelihood of disciplinary investigation or enforcement under Rule 8.4(g).

Article III of the Constitution limits the jurisdiction of the federal courts to actual cases or controversies. U.S. Const., art. III, § 2, cl. 1. "One element of the case-or-controversy requirement is that plaintiffs must establish that they have standing to sue." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013) (internal quotation marks omitted). Standing is a "jurisdictional requirement" that "remains open to review at all stages of the litigation." *Nat'l Org. for Women, Inc. v. Scheidler*, 510 U.S. 249, 255 (1994). At summary judgment, a plaintiff "can no longer rest on . . . mere allegations, but must set forth by affidavit or other evidence specific facts" establishing standing. *Clapper*, 568 U.S. at 412 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (internal quotation marks omitted)). To establish standing, a plaintiff must show an injury in fact fairly traceable to the

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(recognizing that the proper focus in determining jurisdiction is on "the facts existing at the time the complaint under consideration was filed").

challenged action that a favorable ruling may redress. *Id.* at 409.

The injury-in-fact requirement ensures the plaintiff has a "personal stake in the outcome of the controversy." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). An injury in fact must be "concrete and particularized," not "conjectural or hypothetical." *Lujan*, 504 U.S. at 560 (internal quotation marks omitted). A plaintiff may challenge the constitutionality of a regulation before suffering an "actual" injury arising from enforcement so long as the threatened injury is "imminent." *Id.* Such a plaintiff satisfies the injury-in-fact requirement where he alleges he intends to do something arguably protected by the Constitution, but arguably barred by the regulation, and that he faces a credible threat of prosecution under the regulation. *Schrader v. Dist. Att'y of York Cnty.*, 74 F.4th 120, 124-25 (3d Cir. 2023) (citing *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158-59 (2014)).

We determine Greenberg lacks standing to maintain this pre-enforcement challenge of Rule 8.4(g). He fails to establish an imminent future injury because his planned course of conduct is not arguably proscribed by Rule 8.4(g) and he faces no credible threat of prosecution for engaging in such conduct. To the extent that he asserts standing based on an ongoing chill to his speech, he cannot show that this chill is objectively reasonable or fairly traceable to the challenged Rule.

A.

Rule 8.4(g) does not arguably prohibit anything Greenberg plans to do. The Rule covers only knowing or

intentional harassment or discrimination against a person. Nothing in Greenberg's planned speeches comes close to meeting this standard.

We must construe the Rule to determine what it arguably proscribes. We start, as a Pennsylvania court would, by examining its plain language in context. *See Marcellus Shale Coalition v. Dep't of Envt'l Prot.*, 292 A.3d 921, 937, 943 (Pa. 2023). Rule 8.4(g) provides it is professional misconduct to "knowingly engage in conduct constituting harassment or discrimination." Pa. R. Pro. Conduct 8.4(g). Thus, it is essential to understand the meanings of "harassment" and "discrimination" as well as the Rule's knowledge requirement.

Conduct constitutes harassment or discrimination only when targeted at a person. The Rule's commentary defines "harassment" as "conduct that is intended to intimidate, denigrate or show hostility or aversion toward a person." Pa. R. Pro. Conduct 8.4(g) cmt. 4. The ordinary meaning of "harassment" similarly encompasses only conduct "directed at a specific person" that "annoys, alarms, or causes substantial emotional distress to that person and serves no legitimate purpose." *Harassment, Black's Law Dictionary* (11th ed. 2019). The Rule's commentary also limits "discrimination"—ordinarily defined as "differential treatment," *Discrimination, Black's Law Dictionary* (11th ed. 2019)—to conduct that "treat[s] a person as inferior," or "disregard[s] individual characteristics." Pa. R. Pro. Conduct 8.4(g) cmt. 5.

Rule 8.4(g) is limited in another way—it prohibits only harassment and discrimination that is knowing or intentional. Under the Rule, it is professional misconduct to "knowingly engage" in harassment or discrimination. Pa.

R. Pro. Conduct 8.4(g). A lawyer violates this rule when he actually knows his conduct is harassing or discriminatory, or when he is practically certain that it will cause harassment or discrimination. Pa. R. Pro. Conduct 1.0(f) ("'Knowingly' . . . denotes actual knowledge of the fact in question."); *see* 18 Pa. Cons. Stat. § 302(b)(2) (in criminal context, a person acts "knowingly" when "he is aware that his conduct is of that nature," or when he is "practically certain that his conduct will cause such a result"); *Knowingly, Black's Law Dictionary* (11th ed. 2019) (defining acting "knowingly" as acting "deliberately" or "with the knowledge that the social harm that the law was designed to prevent was practically certain to result"). The commentary's definition of "discrimination" includes only "conduct that a lawyer knows manifests an intention" to treat a person as inferior based on a protected characteristic. Pa. R. Pro. Conduct 8.4(g) cmt. 5. And its definition of "harassment" is further limited to intentional conduct. *See id.* cmt. 4 (defining "harassment" as "conduct that is intended to intimidate, denigrate or show hostility or aversion").

The Rule does not arguably bar Greenberg's planned speech. Greenberg intends to discuss legal doctrine at CLE seminars where he will advocate "controversial legal positions" and "verbalize epithets" discussed in judicial opinions. Greenberg Br. 44. The presentations will "oppose[] hate speech bans," "advocat[e] for the right of people to express intolerant religious views," and "support[] Due Process protections for students accused of sexual misconduct." JA160-61. This speech does not arguably violate the Rule. None of Greenberg's planned speech could be interpreted as knowing harassment or discrimination directed at a person. Greenberg plans to

verbalize epithets found in judicial opinions within an academic discussion, not direct them at an audience member. Greenberg's general advocacy of potentially controversial positions does not denigrate any person or treat any person as inferior based on a protected characteristic. And the Rule reaches only lawyers who are practically certain their speech will cause harassment or discrimination, not those who inadvertently offend their audience.

This interpretation is buttressed by the interpretation of the Disciplinary Board and Office of Disciplinary Counsel. The Disciplinary Board recommended the use of the word "knowingly" because it "prevents unintentional violation of the [R]ule, and serves to exclude inadvertent or negligent conduct." 49 Pa. Bull. 4941 (Aug. 31, 2019). The Office of Disciplinary Counsel interprets the Rule as "encompassing only conduct which targets individuals by harassing or discriminating against an identifiable person." JA276 ¶ 7. It does not "prohibit[] general discussion of case law or 'controversial' positions or ideas." *Id.* The Chief Disciplinary Counsel further reviewed Greenberg's planned presentations, speeches, and writings and stated they do not violate the Rule.[5] This makes sense—Greenberg's planned presentations do not knowingly or intentionally harass or discriminate against a person. Because the Rule does not arguably prohibit his planned speech, Greenberg fails to establish an injury in fact.

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[5] Greenberg argues Farrell's interpretation of Rule 8.4(g) is not binding on the Office of Disciplinary Counsel, and the Disciplinary Board may later remove Farrell to change the Office of Disciplinary Counsel's interpretation of the Rule. "But it is up to [Greenberg] to show some objective reason to believe [Defendants] would change [their] position, and this [he has] not done." *Abbott v. Pastides*, 900 F.3d 160, 177 (4th Cir. 2018).

B.

Greenberg also fails to establish he faces a credible threat of prosecution for his planned speech because there is compelling contrary evidence that no threat exists. Defendants disavow enforcement for any of Greenberg's planned conduct. Courts often determine there is a credible threat of prosecution where the government refuses to make such a representation. *See*, *e.g.*, *Driehaus*, 573 U.S. at 165 ("[R]espondents have not disavowed enforcement if petitioners make similar statements in the future . . . ."); *Holder v. Humanitarian L. Proj.*, 561 U.S. 1, 16 (2010) ("The Government has not argued to this Court that plaintiffs will not be prosecuted . . . ."); *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 302 (1979) ("[T]he State has not disavowed any intention of invoking the criminal penalty provision . . . ."). On the other hand, a disavowal—like the one here—weighs against a credible threat of prosecution. *See Nat'l Shooting Sports Found. v. Att'y Gen. of N.J.*, --- F.4th ---, No. 23-1214, 2023 WL 5286171, at *4 (3d Cir. Aug. 17, 2023) (no standing where the attorney general disavowed prosecuting "participati[on] in 'lawful commerce,' which is all the [plaintiff] has said it wants to do"); *Abbott v. Pastides*, 900 F.3d 160, 177 (4th Cir. 2018) (no standing where plaintiffs received "written notice that neither investigation nor sanction was forthcoming"); *Wilson v. State Bar of Ga.*, 132 F.3d 1422, 1428-29 (11th Cir. 1998) (no standing where state bar had "repeatedly and consistently taken the position" that rule did not bar planned conduct).

Because the relevant standing inquiry ultimately focuses on the actual probability of an enforcement action, we note that Greenberg offers only one instance of an

attorney facing formal discipline for purportedly discriminatory speech.[6] There, a South Carolina attorney was disciplined for posting, the week after the death of George Floyd, that Floyd was a "shitstain[]." *In re Traywick*, 433 S.C. 484, 860 S.E.2d 358, 359 (2021). The attorney also directed profane remarks to women and "college educated, liberal suburbanites." *Id.* But the speech in *Traywick* is not remotely comparable to Greenberg's planned speech discussing First Amendment jurisprudence. Also, the attorney was not disciplined under a rule analogous to Rule 8.4(g), but for "conduct tending to bring the . . . legal system into disrepute" and for violating his oath to "maintain the dignity of the legal system." *Id.* at 485 (citing S.C. App. Ct. R. 402). When *Traywick*'s lone enforcement is viewed in light of the many state bar enactments paralleling Pennsylvania's Rule 8.4(g), "a history of past enforcement" is conspicuously lacking. *Driehaus*, 573 U.S. at 164; *see Blum v. Holder*, 744 F.3d 790, 798 (1st Cir. 2014) ("In assessing the risk of prosecution as to particular facts, weight must be given to the lack of a history of enforcement of the challenged statute to like facts . . . ."); *cf. Abbott*, 900 F.3d at 176 ("The most obvious way to demonstrate a credible threat of enforcement in the future, of course, is an enforcement action in the past."); *Schrader*, 74 F.4th at 125. Although not dispositive on a pre-enforcement challenge, *see Speech First, Inc. v. Fenves*, 979 F.3d 319, 336 (5th Cir. 2020), the lack of any relevant prior

[6] Greenberg also relies upon a judicial misconduct complaint and investigation involving controversial speech. This judicial misconduct proceeding—which turned on a question of proof and was ultimately dismissed—does not give rise to a credible threat of attorney discipline against him. *See In re Charges of Judicial Misconduct*, 769 F.3d 762, 775 (D.C. Cir. 2014).

enforcement combined with Defendants' disavowal of enforcement undercuts the threat of prosecution. *Nat'l Shooting Sports Found.*, 80 F.4h at 220-21.

Last, we observe that because the Office of Disciplinary Counsel weeds out meritless complaints on its own, Greenberg faces only a speculative risk of discipline. Based on only a single instance of an audience member considering his speech offensive at one of his CLE presentations, Greenberg speculates that his CLE attendees will inevitably file a disciplinary complaint against him, which might lead Defendants to "misconstrue" his conduct as violating the Rule—despite their assurance it does not—and pursue discipline against him. Greenberg Br. 44.

This "highly attenuated chain of possibilities" cannot support standing. *Clapper*, 568 U.S. at 401. The relevant analysis focuses on those responsible for enforcement, not those who make groundless complaints. Greenberg's audience members may find his speech offensive and may file disciplinary complaints. But there is little chance such complaints will result in an enforcement action. Pennsylvania's attorney-discipline process does not proceed directly from complaint to enforcement. *Cf. Driehaus*, 573 U.S. at 164 (recognizing standing where complaints automatically triggered an expedited hearing, and the commission had no system for weeding out frivolous complaints). The Office of Disciplinary Counsel routinely dismisses complaints without a response from the attorney and has multiple layers of review before pursuing discipline. As discussed, Greenberg cannot show any persuasive history of past enforcement in Pennsylvania or any other jurisdiction, and Defendants interpret Greenberg's planned conduct as not barred by the Rule. Thus, it is

speculative that a disciplinary complaint arising from his planned conduct would progress to the point of a formal response from him, much less disciplinary enforcement.

Greenberg relies on the Fifth Circuit's decision in *Speech First, Inc. v. Fenves*, 979 F.3d at 337, which found pre-enforcement standing where officials only disavowed "any future intention to enforce the policies contrary to the First Amendment" but impliedly planned to enforce them to the constitutional limit. Unlike *Fenves,* where the bounds of regulated speech were unclear, Defendants have informed Greenberg his planned speech is not barred. The Chief Disciplinary Counsel confirms Greenberg's planned speech does not violate the Rule and disavows any enforcement for his planned speech. Given this compelling contrary evidence, Greenberg cannot establish a credible threat of prosecution.

C.

Finally, Greenberg asserts he suffers an ongoing, actual injury in fact because the specter of disciplinary proceedings causes him to alter his presentations. Chilled speech or self-censorship is "a harm that can be realized even without an actual prosecution." *Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 393 (1988). But a plaintiff "cannot manufacture standing merely by inflicting harm on [himself] based on [his] fears of hypothetical future harm that is not certainly impending." *Clapper*, 568 U.S. at 416. A plaintiff cannot establish an injury merely through allegations of a "subjective chill." *Id.* at 418 (quoting *Laird v. Tatum*, 408 U.S. 1, 13-14 (1972) (internal quotation marks omitted)). Rather, a plaintiff's

self-censorship confers standing only where it is objectively reasonable and fairly traceable to the challenged regulation. *See id.*; *Wilson*, 132 F.3d at 1428-29.

Greenberg's speech is not reasonably chilled by Rule 8.4(g) because he faces no credible risk that the Rule will be enforced against him. Without a credible threat of enforcement, "a putative plaintiff can establish neither a realistic threat of legal sanction if he engages in the speech in question, nor an objectively good reason for refraining from speaking and 'self-censoring' instead." *Abbott*, 900 F.3d at 176. This analysis is similar to that in *Wilson*, where the state bar interpreted the challenged rule as having "no application to the types of scenarios the [plaintiffs] have posed" and informed individuals, upon their request, "about whether it will sanction them for engaging in certain practices." 132 F.3d at 1428-29. Just as in *Wilson*, Greenberg fails to establish an injury in fact because he has an assurance he will not face discipline under Rule 8.4(g).

Even without enforcement, Greenberg argues the possibility of a disciplinary investigation is enough to chill his speech. We may assume, without deciding, that "there are some forms of 'pre-enforcement' investigation that are so onerous that they become the functional equivalent of 'enforcement' for standing purposes." *Abbott*, 900 F.3d at 178; *see also Driehaus*, 573 U.S. at 165-66 ("[A]dministrative action, like arrest or prosecution, may give rise to harm sufficient to justify pre-enforcement review."). For example, the Fourth Circuit reasoned that an administrative inquiry could reasonably chill speech if the "process itself imposes some significant burden, independent of any ultimate sanction." *Abbott*, 900 F.3d at 179 (citing *Driehaus*, 573 U.S. at 165-66). But just as in *Abbott*, the

record shows that any burden from a speculative disciplinary investigation is insufficient to chill Greenberg's speech. As discussed, the Office of Disciplinary Counsel would determine any disciplinary complaint arising from Greenberg's planned speech to be frivolous, allowing the complaint to be dismissed without even a response from him. Thus, any subjective chill arising from a fear of lengthy or burdensome disciplinary proceedings is not objectively reasonable. *See id.* ("[B]ecause the plaintiffs can point to no reason to think they will be subjected to some different and more onerous process not yet experienced or threatened, their claim to injury . . . is purely speculative and thus insufficient to establish standing."). And because investigations into attorney discipline are confidential until the Board pursues discipline, there is little risk of adverse publicity associated with a disciplinary investigation.

Greenberg alleges his speech will be chilled. But his allegation is largely informed by his perception of the social climate, not Rule 8.4(g). Even if Greenberg feels uncomfortable speaking freely and fears professional liability, such chill must be fairly traceable to Rule 8.4(g). He cites studies on public attitudes toward protections for offensive speech; law professors facing informal complaints and, at times, academic sanctions based on their speech; and "dozens" of nonattorneys who "lost their jobs or suffered other negative repercussions for words or conduct perceived to manifest racial bias or prejudice." JA221 ¶ 64. But those situations do not give rise to a reasonable fear of attorney discipline against him. Those individuals suffered consequences outside the attorney discipline process. Greenberg may choose to alter his CLE presentations in concern for his "professional reputation,

available job opportunities, and speaking opportunities," JA216 ¶ 36, but such censorship cannot be fairly traced to discipline under Rule 8.4(g). Considering Greenberg faces no imminent injury from disciplinary proceedings under Rule 8.4(g), his self-censorship based on Rule 8.4(g) is not objectively reasonable. Any reasonable chill he suffers cannot be fairly traced to Rule 8.4(g). Thus, he lacks standing to maintain this suit.

We note that our determination that Greenberg has not shown a credible threat that Rule 8.4(g) will be enforced against him necessarily depends on our assessment of the present situation. The Rule was enacted only recently, and Defendants have not begun enforcing it, so there has been no opportunity to observe its effects. If facts develop that validate Greenberg's fears of enforcement, then he may bring a new suit to vindicate his constitutional rights. Our decision, as always, is limited to the record before us, and we express no opinion on the merits of his suit.

IV.

For these reasons, we will reverse the District Court's summary judgment orders. The District Court shall dismiss the case for lack of standing.

AMBRO, J., concurring

The majority opinion I join in full. I write separately only to note that someday an attorney with standing will challenge Pennsylvania Rule of Professional Responsibility 8.4(g). When that day comes, the existing Rule and its

commentary may be marching uphill needlessly. We cannot advise on whether it will pass constitutional muster. But if the Bar's actions during the pendency of this litigation are any indication, it has a card to play. It can amend the Rule preemptively to eliminate many of the constitutional infirmities alleged by Greenberg in this case. In doing so, it might look to Maine, New Hampshire, New York, and Connecticut for guidance. *See* Me. R.P.C. 8.4(g) (2019); N.H. R.P.C. 8.4(g) (2019); N.Y. R.P.C. 8.4(g) (2022); Conn. R.P.C. 8.4(7) (2022).

Those states' analogous enactments implement a comparatively robust safeguarding of attorneys' First Amendment rights. They direct regulatory reach away from the constitutionally protected speech Greenberg and his *amici* wish to espouse and narrowly steer it toward the overt and insidious evils that the Pennsylvania Bar and its *amici* wish to eradicate. Doubtless Pennsylvania is striving to do the same. But if it thinks it can do better, it need not start from scratch.

Appendix B

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 22-1733

Zachary Greenberg

v.

Jerry M. Lehocky, et al.

(E.D. Pa. No. 2-20-cv-03822)

Present: CHAGARES, Chief Judge, SCIRICA and AMBRO, Circuit Judges.

1. MOTION filed by Amicus Appellants Allegheny County Bar Association, Interbranch Commission for Racial Gender and Ethnic Fairness, Pennsylvania Bar Association, Philadelphia Bar Association and Appellant Jerry M. Lehocky to Amend Opinion,

Respectfully,
Clerk/amr

_____ORDER_____

The foregoing motion to amend the opinion is granted. The Clerk is directed to file the amended opinion to include the amicus parties and amicus counsel Thomas G. Wilkinson and re-file the opinion on the docket as of the original file date. As the change to the opinion is of clerical nature, the judgment is not affected and remains as originally filed.

By the Court,

s/Anthony J. Scirica
Circuit Judge

Dated: September 22, 2023
CJC/cc: All Counsel of Record

Appendix C

**IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA**

ZACHARY GREENBERG, ***Plaintiff,***	**CIVIL ACTION**
v.	**No. 20-03822**
JOHN P. GOODRICH, in his official capacity as Board Chair of The Disciplinary Board of the Supreme Court of Pennsylvania, *et al.*, ***Defendants.***	

OPINION

KENNEY, J. March 24, 2022

This Court fully commends and supports the aims and intentions of the American Bar Association ("ABA") in its creation of the ABA Model Rule 8.4(g) as a statement of an ideal and as a written conviction that we must be constantly vigilant and work towards eliminating discrimination and harassment in the practice of law. If the ABA were to apply the Model Rule as a standard to maintain good standing for its voluntary members, it would indeed be the gold standard. It is a measure that most members of the ABA would aspire to, as would the vast number of those in the profession not represented by the ABA.[1] When, however, the ABA standard is adopted by government regulators and applied to all Pennsylvania licensed lawyers, as in this instance by the Disciplinary Board of the Supreme Court of Pennsylvania (the "Board"), it must pass constitutional analysis and muster. The ABA's power over its voluntary membership is of an immensely different kind, quality, and force than that of the government over its constituents. The government cannot approach free speech in the same manner in which the ABA may choose to do so with its voluntary membership. Here, the Board adopted its own version of the ABA Model Rule and Plaintiff Zachary Greenberg challenges the Rule on the basis that it violates his individual right to free speech. Plaintiff argues that the Board should not have the power to investigate, interrogate, and discipline attorneys based on this Rule, and the regulation is otherwise too vague to equitably enforce.

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[1] The ABA is a nationwide professional legal association. Pennsylvania currently has nearly 70 independent, state and county bar associations.

Before the Court are Defendants' Motion for Summary Judgment (ECF No. 61) and Plaintiff's Motion for Summary Judgment (ECF No. 65).

I. BACKGROUND

Plaintiff Mr. Greenberg is a licensed attorney in Pennsylvania and was admitted to the Pennsylvania Bar in May 2019. ECF No. 53 ¶¶ 3-4.[2] Mr. Greenberg is employed as a Senior Program Officer at the Foundation for Individual Rights in Education and speaks and writes on several topics, including freedom of speech, freedom of association, due process, legal equality, and religious liberty. *Id.* ¶¶ 6-7. Mr. Greenberg is also National Secretary and a member of the First Amendment Lawyers Association, which conducts continuing legal education ("CLE") events for its members. *Id.* ¶¶ 8-9. For both affiliations, Plaintiff speaks at CLE and non-CLE events on a variety of "controversial" issues. *Id.* ¶¶ 10-18. Mr. Greenberg has written and spoken against banning hate speech on university campuses and campaign finance speech restrictions. *Id.* ¶ 10. For example, Mr. Greenberg spoke at a CLE in Pennsylvania on his interpretation of the legal limits of a university's power to punish students for online expression deemed offensive or prejudiced. *Id.* ¶ 14. Mr. Greenberg expects to continue speaking on issues such as Title IX's effect on due process rights of individuals accused of sexual assault, university policies on misconduct, professional

[2] The facts included here were all alleged in the Amended Complaint (ECF No. 49) and/or stipulated in the Stipulated List of Facts for Purposes of Summary Judgment Motions (ECF No. 53). While the Court considered all allegations in the Amended Complaint for purposes of both parties' Cross-Motions for Summary Judgment, the Court found these facts pertinent to its analysis and conclusion.

academic freedom, religious freedom on campuses, and others. *Id.* ¶ 18. Mr. Greenberg considers these topics to be "polarizing" and "fears that in today's climate he could be subject to professional disciplinary processes or sanction if his speech is perceived to violate the [Rule]." ECF No. 65-1 at 3.

Mr. Greenberg supports his concerns that his speech will be either chilled or subject to Rule 8.4(g)'s disciplinary process with numerous examples of public outcry and investigation after speakers in similar situations expressed information related to controversial topics. ECF No. 49 ¶¶ 113-114; ECF No. 54. For example, in 2013, Judge Edith Jones of the Fifth Circuit spoke at the University of Pennsylvania Law School and stated that members of certain racial groups commit crimes at rates disproportionate to their population, to which an attorney, among others, filed an ethics complaint alleging racial bias that resulted in a nearly two-year process of investigation. ECF No. 54 ¶¶ 44-45. In 2020, Professor Helen Alvare of George Mason University School of Law was accused of homophobic bias by Duke University School of Law students after supporting religious freedom accommodation laws and writing amicus briefs opposing gay marriage, in an effort by the law students to disinvite the speaker from coming to their university. *Id.* ¶ 50. Mr. Greenberg intends to continue speaking at CLE presentations and fears that his own discussion of "controversial" subjects will expose him to such investigation or discipline. ECF No. 53 ¶¶ 62-65.

The Board first considered adopting a version of the ABA Model Rule of Professional Conduct 8.4(g) in

Pennsylvania in 2016.[3] *Id.* ¶ 42; ECF No. 61 at 8. After an iterative process of notice and comment between December 2016 and June 2020, the Supreme Court of Pennsylvania approved the recommendation of the Board[4] and

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[3] The ABA Model Rule is available at https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_8_4_misconduct/ (accessed Feb. 2, 2022); see also ABA Comm. on Ethics & Pro. Resp., Formal Op. 493 (2020). ABA's Model Rule 8.4 states, in relevant part, "It is professional misconduct for a lawyer to: [. . .] (g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. 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 legitimate advice or advocacy consistent with these Rules." The Model Rule includes two relevant comments, as follows: "[3] Discrimination and harassment by lawyers in violation of paragraph (g) undermine confidence in the legal profession and the legal system. Such discrimination includes harmful verbal or physical conduct that manifests bias or prejudice towards others. Harassment includes sexual harassment and derogatory or demeaning verbal or physical conduct. Sexual harassment includes unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature. The substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (g). [4] [4] Conduct related to the practice of law includes representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business or social activities in connection with the practice of law. 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] Justice Mundy dissented. ECF No. 53 ¶ 48.

ordered that Pennsylvania Rule of Professional Conduct ("Pa.R.P.C") 8.4 be amended to include the below Rule 8.4(g) (the "Old Rule") along with two comments, (3) and (4), (together, the "Old Amendments"). ECF No. 53 ¶¶ 43-45, 47.

The Old Amendments state:

> It is professional misconduct for a lawyer to:
>
> * * *
>
> (g) in the practice of law, by words or conduct, knowingly manifest bias or prejudice, or engage in 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.
>
> Comment:
>
> * * *
>
> [3] For the purposes of paragraph (g), conduct in the practice of law includes participation in activities that are required for a

> lawyer to practice law, including but not limited to continuing legal education seminars, bench bar conferences and bar association activities where legal education credits are offered.
>
> [4] The substantive law of antidiscrimination and anti-harassment statutes and case law guide application of paragraph (g) and clarify the scope of the prohibited conduct.

ECF No. 1 ¶ 40 (quoting Pa.R.P.C. 8.4).

The Old Amendments were scheduled to take effect on December 8, 2020. ECF No. 53 ¶ 47. On August 6, 2020, Plaintiff filed a complaint in this Court alleging that the Old Amendments consist of content-based and viewpoint-based discrimination and are overbroad in violation of the First Amendment (Count 1) and that the Old Amendments are unconstitutionally vague in violation of the Fourteenth Amendment (Count 2). ECF No. 1. On October 16, 2020, Defendants filed a Motion to Dismiss (ECF No. 15), and Plaintiff filed a Motion for Preliminary Injunction (ECF No. 16). This Court held oral argument on November 13, 2020, addressing both parties' motions. ECF No. 26. On December 8, 2020, this Court entered an Order denying Defendants' Motion to Dismiss (ECF No. 30) and an Order granting Plaintiff's Motion for Preliminary Injunction (ECF No. 31). This Court found that Mr. Greenberg's allegation that the Old Amendments will have a chilling effect on his speech sufficient to satisfy the injury-in-fact requirement of standing because it was objectively reasonable that his speeches are considered

prejudiced or offensive by some members of the audience.[5] *Greenberg v. Haggerty*, 491 F. Supp. 3d 12, 18-23 (E.D. Pa. 2020); ECF No. 29 at 18-23 (hereinafter the "Dec. 2020 Opinion"). Plaintiff's claims were further supported by his examples of speakers who had disciplinary complaints filed against them when discussing similar topics. Dec. 2020 Opinion at 19. Such examples also supported Plaintiff's claim of a credible threat of prosecution because complaints have been filed against speakers under similar circumstances. *Id.* at 21. The Court ultimately held that the Old Amendments constitute viewpoint-based discrimination in violation of the First Amendment because it favored a subset of messages by permitting the government to determine what speech is biased or prejudiced based on whether the viewpoint is socially or politically acceptable at the time. *Id.* at 35.

Defendants filed an appeal of these Orders to the Third Circuit and the case was stayed pending resolution of the appeal. ECF Nos. 32-35. Defendants voluntarily dismissed without prejudice their appeal of the Orders on March 17, 2021 (ECF No. 37; ECF No. 53 ¶ 50) and the case was removed from stay on August 10, 2021 (ECF No. 48).

During this time, the Supreme Court of Pennsylvania revised the Old Amendments by Order on July 26, 2021.[6]

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[5] Plaintiff believed then, and continues to believe now, that any one of his speaking engagements related to First Amendment issues and jurisprudence carry the risk of an audience member filing a disciplinary complaint because the speech may be perceived as prejudiced or offensive. Dec. 2020 Opinion at 12.

[6] The parties stipulated facts state the date of the Order is July 26, 2021. ECF No. 53 ¶ 52. Defendants mistakenly identify July 25, 2021

See ECF No. 61 at 5; *see also* 51 Pa.B. 5190 (Aug. 21, 2021).[7] The Board did not follow the process of public notice and comment that it employed for the Old Amendments. ECF No. 53 ¶ 54. The revised Rule 8.4(g) (hereinafter the "Rule") and its revised Comments (together, "the Amendments") state:

> It is professional misconduct for a lawyer to:
>
> * * *
>
> (g) in the practice of law, knowingly engage in conduct constituting 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.

ECF No. 53 ¶ 57 (quoting Pa.R.P.C. 8.4). Comments Three through Five pertain to section (g):

> [3] For the purposes of paragraph (g), conduct in the practice of law includes (1)

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as the date of the Order in their Motion for Summary Judgment. ECF No. 61 at 9. A quick check revealed the correct date is July 26. https://www.padisciplinaryboard.org/news-media/news-article/1439/supreme-court-amends-harassment-provisions-of-rule-84.

[7] Again, Justice Mundy dissented to the adoption of the Amendments. ECF No. 53 ¶ 53.

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. The term "the practice of law" does not include speeches, communications, debates, presentations, or publications given or published outside the contexts described in (1)-(3).

[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.

ECF No. 53 ¶ 58 (quoting Pa.R.P.C. 8.4, cmts).[8]

Enforcement of the Amendments follows the same procedure as the Old Amendments. The Office of Disciplinary Counsel ("ODC") is charged with investigating complaints against Pennsylvania-licensed attorneys for violation of the Pennsylvania Rules of Professional Conduct and, if necessary, charging, and prosecuting attorneys under the Pennsylvania Rules of Disciplinary Enforcement. *See* Pa.R.D.E. 205-208; Pa.D.Bd.R. §§ 93.21, 93.61; ECF No. 53 ¶ 24. First, a complaint is submitted to ODC alleging an attorney violated the Pennsylvania Rules of Professional Conduct. ODC then investigates the complaint and decides whether to issue a DB-7 letter. ECF No. 53 ¶¶ 28-29. If ODC issues a DB-7 letter, the attorney has thirty days to respond to that letter. *Id.* ¶ 30. If, after investigation and a DB-7 letter response, ODC determines that a form of discipline is appropriate, ODC recommends either private discipline, public reprimand, or the filing of a petition for discipline to the Board. *Id.* ¶ 36. After further rounds of review and recommendation, along with additional steps, the case may proceed to a hearing before a hearing committee and *de novo* review by the Board and the Supreme Court of Pennsylvania. *Id.* ¶¶ 36, 38-41.

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[8] Rule 8.4(g) was set to take effect on August 25, 2021. ECF No. 53 ¶ 55. Defendants agreed to forebear enforcing Rule 8.4(g) pending this Court's disposition of cross-motions for summary judgment. ECF No. 46.

Following publication of the Amendments, on August 19, 2020, Plaintiff filed an Amended Complaint alleging that the Amendments consist of content-based and viewpoint-based discrimination and are overbroad in violation of the First Amendment (Count 1) and the Amendments are unconstitutionally vague in violation of the Fourteenth Amendment (Count 2).[9] ECF No. 49. On October 1, 2021, Thomas J. Farrell, the Chief Disciplinary Counsel of ODC, filed a declaration stating, among other things, that "ODC does not interpret Rule 8.4(g) as prohibiting general discussions of case law or 'controversial' positions or ideas" and that "ODC would not pursue discipline on this basis." ECF No. 56 ¶¶ 7, 10-14 (hereinafter the "Farrell Declaration").

On November 16, 2021, Defendants filed a Motion for Summary Judgment (ECF No. 61), and Plaintiff filed a response in opposition (ECF No. 70). On November 16, 2021, Plaintiff also filed a Motion for Summary Judgment (ECF No. 65), and Defendants filed a response in opposition (ECF No. 71).[10] The Court held oral argument on January

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[9] All Defendants are sued in their official capacities only. ECF No. 49 ¶ 3. "State officers sued for damages in their official capacity are not 'person' for purposes of the suit because they assume the identity of the government that employs them." *Hafer v. Melo*, 502 U.S. 21, 27 (1991). In this case, Defendants are members of either the Board or ODC.

[10] On November 16, 2021, the Court granted Motions for Leave to File Amicus Brief (ECF No. 63; ECF No. 66), which were filed on the same day by the National Legal Foundation, Pacific Justice Institute, and Justice & Freedom Law Center (ECF No. 64) and the Christian Legal Society (ECF No. 67), both in support of Plaintiff.

20, 2022, addressing both Plaintiff and Defendants' Motions for Summary Judgment. ECF No. 73.

Before the Court are Defendants' Motion for Summary Judgment (ECF No. 61) and Plaintiff's Motion for Summary Judgment (ECF No. 65).

II. STANDARD OF REVIEW

Summary judgment is granted where the moving party has established "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The "mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported summary judgment motion; the requirement is that there must be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). A material fact is one that "might affect the outcome of the suit under governing law[.]" *Id.* at 248.

When ruling on a summary judgment motion, the court will consider the facts in the light most favorable to the non-moving party and draw all reasonable inferences in the non-moving party's favor. *Scheidemantle v. Slippery Rock Univ. State Sys. of Higher Educ.*, 470 F.3d 535, 538 (3d Cir. 2006). The judge's role is not to weigh the disputed evidence and determine the truth of the matter, or to make credibility determinations; rather the court must determine whether there is a genuine issue for trial. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Anderson*, 477 U.S. at 249.

When both parties move for summary judgment, the standard of review is the same. *Green Party of Pennsylvania v. Aichele*, 103 F. Supp. 3d 681, 687 (E.D. Pa. 2015). "Cross-motions are no more than a claim by each side that it alone is entitled to summary judgment, and the making of such inherently contradictory claims does not constitute an agreement that if one is rejected the other is necessarily justified or that the losing party waives judicial consideration and determination whether genuine issues of material fact exist." *Rains v. Cascade Industries, Inc.*, 402 F.2d 241, 245 (3d Cir. 1968).

III. DISCUSSION

A. *Jurisdictional Issues*

The Court must first address the issues of standing and mootness. While Defendants attempt to conflate the issues, standing and mootness are two distinct justiciability doctrines. Standing ensures that each plaintiff has the "requisite personal interest [. . .] at the commencement of the litigation[.]" *Arizonans for Official English v. Arizona*, 520 U.S. 43, 68 n.22 (1997) (internal quotation marks omitted). Mootness "ensures that the litigant's interest in the outcome continues to exist throughout the life of the lawsuit." *Cook v. Colgate Univ.*, 992 F.2d 17, 19 (2d Cir. 1993). This Court will briefly address standing, an issue which was already adjudicated, and then will evaluate mootness, which is the justiciability doctrine applicable at this stage of the litigation.

1. Standing

This Court previously analyzed Defendants' allegations against standing and determined that Plaintiff has standing to bring this pre-enforcement challenge to the

constitutionality of Rule 8.4(g) and its Comments. Dec. 2020 Opinion at 18-25. This Court found that the Old Amendments will have a chilling effect on Mr. Greenberg's speech sufficient to satisfy the injury-in-fact requirement of standing because it was objectively reasonable that his speeches are considered prejudiced or offensive by some members of the audience.[11] *Id.* at 18-23. Plaintiff's claims were further supported by his examples of speakers who had disciplinary complaints filed against them when discussing similar topics. *Id.* at 19. Such examples also supported Plaintiff's claim of a credible threat of prosecution because complaints have been filed against speakers under similar circumstances. *Id.* at 21. Due to its own decision to appeal, voluntarily dismiss its appeal, revise the Amendments, and then continue with this proceeding, the Board now believes it can re-litigate the standing issue. ECF No. 61 at 17-26. The Court disagrees with Defendants and finds Plaintiff is correct that the relevant inquiry is mootness.

At the "commencement of the litigation," plaintiff has the burden of demonstrating that the standing requirements are met. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 170 (2000). The evaluation of standing remains squarely focused on the circumstances existing at the start of the litigation, not at any point in the future chosen self-servingly by the defendant. *See Davis v. Fed. Election Comm'n*, 554 U.S. 724, 734

[11] Plaintiff believed then, and continues to believe now, that any one of his speaking engagements related to First Amendment issues and jurisprudence carry the risk of an audience member filing a disciplinary complaint because the speech may be perceived as prejudiced or offensive. Dec. 2020 Opinion at 12.

(2008) ("While the proof required to establish standing increases as the suit proceeds [. . .] the standing inquiry remains focused on whether the party invoking jurisdiction had the requisite stake in the outcome when the suit was filed.") (internal citations omitted); *see also Freedom from Religion Found., Inc. v. New Kensington Arnold Sch. Dist.*, 832 F.3d 469, 481 (3d Cir. 2016) (remanding to district court to determine if plaintiff was a member of an organization "at the time the complaint was filed" to establish organizational standing); *Sims v. State of Fla., Dep't of Highway Safety & Motor Vehicles*, 862 F.2d 1449, 1458 (11th Cir. 1989) ("We must determine standing at the time a plaintiff files suit.") (internal citation omitted).

"[O]nce the plaintiff shows standing at the outset, []he need not keep doing so throughout the lawsuit." *Hartnett v. Pennsylvania State Educ. Ass'n*, 963 F.3d 301, 305 (3d Cir. 2020); *see also Am. Immigr. Laws. Ass'n v. Exec. Off. for Immigr. Rev.*, 2020 WL 6111020, at *5 (D.N.J. Oct. 16, 2020) (finding plaintiff had "an appropriate interest to initiate a case" and "had standing to assert their claims when the Complaint was filed." The fact that related hearings were adjourned since that time did not mean plaintiffs "lacked standing when the Complaint was first filed.").

Here, Defendants reiterate their prior assertion that Plaintiff's claimed risk is based on speculative guesses regarding "the unknowable actions of unknown parties." ECF No. 61 at 19; *see also* ECF No. 15 at 11. However, this Court found in favor of the Plaintiff on this issue. This Court found that "Defendants' contention that Plaintiff's injury 'depends on an indefinite risk of future harms inflicted by unknown third parties' is not persuasive." Dec. 2020 Opinion at 21 (internal citation omitted). Plaintiff

alleged specific examples of similarly situated individuals facing disciplinary and Title IX complaints for speeches on similar topics. *Id.* at 21. "It can hardly be doubted there will be those offended by the speech, or the written materials accompanying the speech[.]" *Id.* at 23. Plaintiff also sufficiently argued to the Court that, should the Rule remain in place, there would be a chilling effect on his speech and Mr. Greenberg would be forced to self-censor. *Id.* at 22. Defendants do not present any compelling reasons to reconsider our conclusion on this assertion.

Second, Defendants assert that Plaintiff cannot establish a credible threat of prosecution for four reasons: (1) there is no history of past enforcement as the Amendments have yet to go into effect (ECF No. 61 at 23); (2) Plaintiff's conduct falls out-side of the scope of the Amendments and, even if a complaint were filed, "there is no reason to believe" that Plaintiff would need to respond or that ODC would bring charges (ECF No. 61 at 23); (3) Plaintiff's speech is protected from prosecution under both the plain language of the Rule and "safe harbor" for advocacy (ECF No. 61 at 25); and (4) ODC has "disavowed any intention" of enforcing the Amendments against Plaintiff's described conduct through the Farrell Declaration and such complaints would be dismissed as "frivolous" (ECF No. 61 at 22).[12]

Most of those assertions were adequately addressed by Plaintiff in its prior Response in Opposition to the

[12] Defendants contend that Chief Counsel Farrell's Declaration is binding and estops ODC from arguing otherwise should an attorney rely on it. ECF No. 61 at 22. This contention is addressed in *supra* pp. 21-28.

Defendants' Motion to Dismiss (ECF No. 25 at 3-12) and again in his Response in Opposition to the Defendants' Motion for Summary Judgment (ECF No. 70). Plaintiff contended, and this Court agreed, that the "chilling effect" on Mr. Greenberg's speech was sufficient to show an injury in fact and justified a pre-enforcement challenge to the Amendments. ECF No. 70 at 2-3 (citing the Dec. 2020 Opinion at 23-25). This chilling effect shows a "threat of specific future harm." Dec. 2020 Opinion at 18 (quoting *Sherwin-Williams Co. v. Cty. of Delaware, Pennsylvania*, 968 F.3d 264, 269-70 (3d Cir. 2020), *cert. denied sub nom.* 141 S.Ct. 2565 (2021)). It continues to be evident to this Court that Plaintiff's alleged fear of disciplinary complaint and investigation is objectively reasonable based on the assertion that Plaintiff speaks on "controversial" issues that may be deemed offensive and hateful by others, as shown through the Plaintiff's lengthy list of similar presentations that faced significant public outcry. Dec. 2020 Opinion at 18; ECF No. 49 ¶ 113. "Even if the disciplinary process does not end in some form of discipline, the threat of a disruptive, intrusive, and expensive investigation and investigatory hearing [. . .] would cause Plaintiff and any attorney to be fearful of what he or she says and how he or she will say it in any forum, private or public, that directly or tangentially touches upon the practice of law[.]" Dec. 2020 Opinion at 23. "The government, as a result, de facto regulates speech by threat, thereby chilling speech." *Id.* at 23. Not only is there an objectively reasonable chilling effect on Plaintiff's speech, but Plaintiff has also shown he will self-censor in response. *Id.* at 19 (quoting *Speech First, Inc. v. Killeen,* 968 F.3d 628, 638 (7th Cir. 2020)).

According to Plaintiff, there are only two authorities cited in Defendants' Motion for Summary Judgment that were not cited in its previously-ruled-upon Motion to Dismiss on the issue of standing: *Republican Party of Minn v. Klobuchar*, 381 F.3d 785 (8th Cir. 2004), and *Abbott v. Pastides*, 900 F.3d 160 (4th Cir. 2018). ECF No. 70 at 3. Plaintiff points out that neither of these cases represent or consider Supreme Court or Third Circuit precedent. In fact, Plaintiff asserts that those cases ignore Third Circuit precedent to "freely grant standing to raise" First Amendment facial overbreadth claims. *Id.* at 3 (citing *McCauley v. Univ. of the Virgin Islands*, 618 F.3d 232, 238 (3d Cir. 2010)). Even so, Plaintiff contends that those cases differ because they found neither of the challenged statute/policy affected the plaintiff's anticipated conduct or speech, unlike in this case where the Court found Plaintiff's speech is chilled. *Id.* at 9.

Regardless of the two new cases cited, the Court previously analyzed the first three arguments presented by Defendants above and Plaintiff's response and found that Plaintiff had standing to bring this pre-enforcement challenge based on the facts as they existed at the commencement of the litigation. Defendants again attempt to "sidestep a direct constitutional challenge by claiming no final discipline will ever be rendered" but that argument continues to fail as it pertains to standing. Dec. 2020 Opinion at 23.

Ultimately, this Court does not find any compelling reason to revoke its prior ruling on standing at this stage of the litigation. After the Court made its ruling on standing in December of 2020, Defendants chose to appeal the ruling and then subsequently chose to voluntarily dismiss

that appeal. That chain of events does not affect the Court's prior decision on standing in the least. *See Am. Immigr. Laws. Ass'n*, 2020 WL 6111020, at *5 (concluding intervening events did not negate plaintiff's standing at the time complaint was filed). After dismissing its appeal, Defendants chose to proceed on the same docket, continuing the pre-existing proceeding. It would certainly not be equitable, nor efficient, for the Court to allow the Defendants to file an appeal, voluntarily dismiss it, and then turn back the clock to the commencement of the case. This Court's procedural posture does not revert back merely because the Defendants wish it.

On Defendants' final assertion against a credible threat of prosecution, the parties disagree as to whether the Defendants' alleged "disavowal" shows lack of standing or mootness at this point in the litigation. Plaintiff points out that since the Old Amendments were revised in 2021 and the Farrell Declaration was prepared and submitted to the Court in 2021 as well, they postdate the inception of this action and are an issue of mootness not standing. ECF No. 70 at 11. Defendants contend that Plaintiff's assertion is "unavailing" because courts "regularly hold that standing is lacking where, during litigation, a defendant disavows an intention to prosecute the plaintiff." ECF No. 71 at 5. Defendants cite to only one case within the Third Circuit purportedly standing for the proposition that the disavowal should be evaluated as to standing. In that case, the court dismissed a single defendant who guaranteed to refrain from enforcement "pending review of its constitutionality[.]" *Jamal v. Kane*, 96 F. Supp. 3d 447, 454 (M.D. Pa. 2015). The court did not find the plaintiffs lacked standing to bring suit entirely. Further, that court was

entertaining arguments of standing for the first time. This Court evaluated standing under similar procedural posture over a year ago and found Plaintiff has standing. Dec. 2020 Opinion at 23. A disavowal in the defendants first substantive response to the complaint is distinct from a disavowal here, years into the proceeding.

Defendants cite other authorities that can be similarly distinguished. In a Tenth Circuit case affirming no standing, the District Attorney filed an affidavit with the motion to dismiss stating that enforcement of the statute is doubtful against *anyone* due to a court opinion in another circuit and would not be enforced against any of the plaintiffs for any act that might violate it. *Winsness v. Yocom*, 433 F.3d 727, 733 (10th Cir. 2006). Here, the Defendants continue to assert that the Rule is constitutional and will be enforced, but potentially not in the narrow circumstances listed in the Farrell Declaration, including discussing and citing case law or controversial positions. ECF No. 56. The disavowal does not end the material dispute of whether Plaintiff's conduct could fall within the scope of the Amendments or whether the Declaration estops ODC and/or the Board from enforcing the Rule against such speech in the future. In a Sixth Circuit case, the court found that the defendants had no authority to enforce the challenged order, and in fact were instructed not to enforce it against *anyone. McKay v. Federspiel*, 823 F.3d 862, 870 (6th Cir. 2016). Again, in the Eighth Circuit case cited by Defendants, the defendant admitted that plaintiffs' conduct never fell within the scope of the regulation but standing likely would have been affirmed if the court found "continuing, present adverse effects," which we find here in the chilling effect of the complaint and

investigation process. *Harmon v. City of Kansas City*, 197 F.3d 321, 327 (8th Cir. 1999) (internal citations omitted).[13]

Therefore, the Court agrees with Plaintiff that any revisions to the Old Amendments in forming the current Rule and changes in posture due to the Farrell Declaration should be evaluated under the doctrine of mootness. Here, the "heavy burden of persua[ding] the court" shifts to the defendants to prove that such development has mooted the case. *Friends of the Earth*, 528 U.S. at 189 (quoting *United States v. Concentrated Phosphate Exp. Ass'n*, 393 U.S. 199, 203 (1968)).

2. Mootness

Under Article III's requirement for a case or controversy, a case is moot "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013) (internal citation and quotation marks omitted); *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 396 (1980). Throughout the life of a lawsuit, the parties must have a personal stake in the outcome of the litigation. *See Chafin v. Chafin*, 568 U.S. 165, 172 (2013); *Gayle v. Warden Monmouth Cty. Corr. Inst.*, 838 F.3d 297, 303 (3d Cir. 2016). "The central question of all mootness problems

[13] Finally, in the above case and all cases cited by Defendants in support of its proposition that there is no standing after a disavowal, the plaintiffs were promised that they would not be prosecuted under the entire statute, not a narrow carve out based on their past activity. Here, ODC is not saying they will never prosecute Plaintiff for any reason under the statute, and Defendants cannot prevent a complaint and investigation from occurring with their disavowal. Thus, Plaintiff is still at risk under the Amendments despite the narrowly tailored disavowal.

is whether changes in circumstances that prevailed at the beginning of the litigation have forestalled any occasion for meaningful relief." *Rendell v. Rumsfeld*, 484 F.3d 236, 240 (3d Cir. 2007) (internal citation and quotation omitted). 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[.]" *Chong v. Dist. Dir., I.N.S.*, 264 F.3d 378, 384 (3d Cir. 2001).[14]

Though Defendants state their arguments under the doctrine of standing, the Court will consider them as to mootness as this Court has concluded that mootness is the relevant inquiry at this stage in the litigation. According to Defendants, through the Farrell Declaration "ODC has declared that [Plaintiff's] conduct does not violate the Amendments." ECF No. 61 at 19. Mr. Farrell, the Chief Disciplinary Counsel of ODC since January 2020, submitted the Farrell Declaration to clarify ODC's position in this case. ECF No. 56. According to Mr. Farrell, all recommendations to ODC to pursue disciplinary charges under Rule 8.4(g) require his review and express approval. *Id.* ¶ 5. Mr. Farrell also claims to have "authority to direct how ODC interprets the Rules of Professional Conduct, as well as determining [] ODC's policy on handling complaints, including those raising First Amendment issues." *Id.* ¶ 6. Based on this authority, Mr. Farrell informed the Court that he does not interpret Rule 8.4(g) as "prohibiting general discussions of case law or 'controversial'

[14] *See also Cantrell v. City of Long Beach*, 241 F.3d 674, 678 (9th Cir. 2001) ("[T]he question is not whether the precise relief sought at the time the application for an injunction was filed is still available. The question is whether there can be any effective relief.") (internal citations omitted).

positions or ideas." *Id.* ¶7. The Farrell Declaration further lists the instances raised specifically by Plaintiff in which Plaintiff believes his speech may be chilled by the Amendments and Mr. Farrell states that "ODC would not pursue discipline on this basis." *Id.* ¶¶ 10-14. Defendants are emphatic that "ODC has disavowed any intention to [charge Plaintiff with violating the Amendments]." ECF No. 61 at 22. They claim this disavowal is "binding" and estops ODC from arguing otherwise should an attorney rely on it. *Id.* Defendants assert that, "[u]nder the principles of official estoppel, the Farrell Declaration is binding upon Respondent and his future official actions, other employees at ODC, and potential successors to his position as Chief Disciplinary Counsel." ECF No. 62 at 8.

Plaintiff counters that the Farrell Declaration does not "undermine the justiciability" of his claims. ECF No. 65-1 at 35. Plaintiff disagrees that the promises made in the Farrell Declaration are permanent and binding. ECF No. 70 at 11. Plaintiff points out Mr. Farrell's interrogatory response, which admits that there is "no set process for amending, revising, or withdrawing the positions taken in the Farrell Declaration." ECF No. 62 at 8. Yet Mr. Farrell could be replaced at his position at any time. ECF No. 65-1 at 37. In addition, Plaintiff contends that no form of estoppel prevents enforcement of Rule 8.4(g) against Mr. Greenberg as the Defendants provided "no legal support for this theory of so-called 'official estoppel' and they are not bound by views asserted in this litigation. ECF No. 70 at 11; ECF No. 65-1 at 37. Even if the Board could at some point develop an applicable estoppel theory against ODC, Plaintiff adds that this is too uncertain to render his Complaint moot. ECF No. 70 at 12; ECF No. 65-1 at 36.

Further, there is disagreement among the parties on whether this disavowal moots the case against all Defendants or only ODC. Plaintiff contends that even if the Court finds ODC is estopped from enforcing the Rule against Mr. Greenberg, "the case remains live with respect to the Board Defendants." ECF No. 70 at 6. The Farrell Declaration never asserts that the speech concerns raised by Plaintiff would be "outside the jurisdiction of the Board[.]" *Id.* at 13. The Defendants contend that ODC "is the only entity that can investigate and seek disciplinary action [and] has disavowed enforcement of the Amendments for Plaintiff's conduct." ECF No. 61 at 23; ECF No. 71 at 8. Defendants further assert that the Board is merely an adjudicatory body for disciplinary cases "that come before it" but "the Board does not enforce the Amendments, conduct investigations, or propose discipline." ECF No. 71 at 8. If ODC dismisses a complaint, according to Mr. Farrell, the Board cannot review it or otherwise adjudicate it. *Id.* at 9 (citing ECF No. 62, Exh. B). Defendants do admit that the Farrell Declaration is not binding on the Board or its members, "although the Board would have to consider the Declaration should an attorney rely on it and argue estoppel or detrimental reliance." ECF No. 62 at 8; *see also* ECF No. 70 at 12 (the Board is "admittedly not bound by it"). The Court will evaluate all of these arguments in turn.

As Defendants voluntarily declared through the Farrell Declaration that they would not enforce the Amendments against Plaintiff under the circumstances Mr. Greenberg described and also revised the Amendments to conform with this Court's previous ruling, the Court now considers whether an exception to mootness from the voluntary

cessation doctrine is applicable.[15] Voluntary cessation occurs when the defendant alleges mootness because of its own unilateral action taken after the litigation began. *See Hartnett v. Pennsylvania State Educ. Ass'n*, 963 F.3d 301, 306 (3d Cir. 2020). This situation "will moot a case only if it is 'absolutely clear that the allegedly wrongful behavior could not be reasonably expected to recur.'" *Fields v. Speaker of the Pa. House of Representatives*, 936 F.3d 142, 161 (3d Cir. 2019) (quoting *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 719 (2007)).[16] The voluntary cessation doctrine exemplifies "the principle that a party should not be able to evade judicial review, or to defeat a judgment, by temporarily altering questionable behavior." *City News & Novelty, Inc. v. City of Waukesha*, 531 U.S. 278, 284 n.1 (2001) (internal citation omitted).

"Voluntary cessation cases highlight the important difference between standing (at the start of a suit) and mootness (mid-suit)." *Hartnett*, 963 F.3d at 306. "[T]he

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[15] It is "well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." *Friends of the Earth,* 528 U.S. at 189 (quoting *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982)).

[16] "If it is absolutely clear that the allegedly wrongful behavior will not recur after the court dismisses the case, then a case can become moot notwithstanding a party's voluntary cessation of that unlawful behavior." *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S.Ct. 2012, 2019 n.1 (2017) (internal citation omitted). "Voluntary cessation of challenged conduct moots a case, however, only if it is absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 222 (2000) (internal citation and quotation marks omitted).

prospect that a defendant will engage in (or resume) harmful conduct may be too speculative to support standing, but not too speculative to overcome mootness." *Friends of the Earth*, 528 U.S. at 190. If the voluntary cessation doctrine applies, then a case is not moot.

"The burden always lies on the party claiming mootness[.]" *Hartnett*, 963 F.3d at 307 (internal citation omitted); *see also Friends of the Earth*, 528 U.S. at 189 (the defendant has the "heavy burden of persuading the court.") (internal citation and marks omitted); *Already, LLC*, 568 U.S. at 91 (explaining that a party's burden to avoid the voluntary cessation doctrine is formidable). "Nevertheless, voluntary cessation of illegal conduct does render a challenge to that conduct moot where (1) it can be said with assurance that there is no reasonable expectation that the alleged violation will recur, and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *Louisiana Counseling & Fam. Servs., Inc. v. Makrygialos, LLC,* 543 F. Supp. 2d 359, 366 (D.N.J. 2008) (citing *Friends of the Earth*, 528 U.S. at 189). To determine whether a defendant meets this heavy burden, courts analyze multiple factors including, timing of the voluntary cessation, defense of past policies, and permanence of the shift in policy. *See, e.g.*, *United States v. Gov't of Virgin Islands*, 363 F.3d 276, 285 (3d Cir. 2004); *Knights of Columbus Star of Sea Council 7297 v. City of Rehoboth Beach*, 506 F. Supp. 3d 229, 235 (D. Del. 2020).

The timing of the Farrell Declaration and the revised Rule certainly favor an exception to mootness under the voluntary cessation doctrine. Following the Court's ruling against Defendants on both standing and the merits of the

constitutionality challenge, Defendants submitted the Farrell Declaration to the Court. Defendants also bypassed the notice and comment period employed in the creation of the Old Amendments in its revisions of the Amendments likely to quickly remove problematic phrasing and submit its current version of the Amendments to the Court prior to summary judgment motions. *See, e.g.*, *Hartnett*, 963 F.3d at 306 ("A party's unilateral cessation in response to litigation will weigh against a finding of mootness."); *DeJohn v. Temple Univ.*, 537 F.3d 301, 311 (3d Cir. 2008) (finding that Temple's timing of the policy change was a factor against mootness and did not meet the "formidable" burden of proving there was "no reasonable expectation" it could reimplement its former policy); *Gov't of Virgin Islands*, 363 F.3d at 285 ("the timing of the contract termination . . . strongly suggests that the impending litigation was the cause of the termination" and such timing weighs against mootness); *Knights of Columbus*, 506 F. Supp. 3d at 235 (finding proposed policy change was on the city's agenda *before* plaintiff filed its motion, thus the policy was not adopted in response to litigation and can moot the case); *ACLU of Mass. v. U.S. Conf. Catholic Bishops*, 705 F.3d 44, 55 (1st Cir. 2013) ("[t]he voluntary cessation doctrine does not apply [as an exception to mootness] when the voluntary cessation of the challenged activity occurs because of reasons unrelated to the litigation.") (internal citation omitted).

The Third Circuit has found that a defendant's defense of past policy could suggest the possibility of reinstating the policy in the future. *See, e.g.*, *Hartnett*, 963 F.3d at 305-07 ("Under this well-recognized exception, courts are reluctant to declare a case moot when the defendant

voluntarily ceases the challenged conduct after litigation begins but still maintains the lawfulness of its past conduct.") (internal citation and quotation marks omitted); *Parents Involved in Cmty. Schs.*, 551 U.S. at 719 (finding voluntary cessation did not moot case where defendant "vigorously defend[ed] the constitutionality of its race-based program"). While Defendants have consistently asserted that Plaintiff's conduct falls outside the scope of the Amendments, they also defend the constitutionality of the Old Rule and the Rule and vigorously assert the compelling need to regulate attorneys in the practice of law, even if there are incidental impacts on speech. In their Motion for Summary Judgment, Defendants continue to assert that the Supreme Court of Pennsylvania has a compelling need to regulate the conduct of attorneys, ECF No. 61 at 6, and that the state has "broad powers to regulate attorneys[.]" *Id.* at 28; *see also id.* at 30 ("Pennsylvania's interest in regulating attorneys and the practice of law is compelling, and its power to do so is broad."). Specifically for the Amendments, Defendants continue to assert its unfocused "compelling interest in eradicating" discrimination and harassment. *Id.* at 30. Due to that alleged broad power and compelling need for regulation, the Defendants continue to assert that an "incidental[]" burden on speech is permissible because the Amendments regulate professional conduct. *Id.* at 31. This evidences at least some gap between Defendants position that they will not aggressively enforce the Amendments against purportedly offensive language and their stated aim and need to police all licensed attorneys in activities related to the practice of law. *See DeJohn*, 537 F.3d at 310 (finding voluntary cessation exception to mootness applied where defendant "defended and continue[d] to defend not only the

constitutionality of its prior sexual harassment policy, but also the *need* for the former policy") (emphasis added).

During oral argument on these cross-motions, Defendants reiterate that "Pennsylvania certainly has a compelling interest in eradicating harassment and discrimination from the practice of law" and the Rule need not be a "perfect fit" to serve this interest. ECF No. 74 at 13. Even though the Court concluded that Plaintiff's First Amendment protected speech at CLE presentations was likely to be impacted by the Old Rule (Dec. 2020 Opinion), Defendants continue to insist that "[e]ven under the [O]ld [R]ule, our position was that Mr. Greenberg's activities didn't come within the rule. And the fact that it's [sic] been changed, we haven't changed our position." *Id.* at 9. Defendants continue to assert that, despite the phrasing "manifesting bias and prejudice" from the Old Rule being deemed by the Court to include offensive language, "[t]hat's not what the rule is directed towards." *Id.* at 12. While Defendants acknowledge that the language which "troubled" the Court last year was not included in the revised Amendments, there was little to no appreciation shown of the unconstitutionality of the Old Rule. *Id.* at 6.

Making a concession to appease the Court in this litigation does not create confidence that Defendants truly understand the constitutional limitations of their allegedly broad power to regulate attorneys. *See Hartnett*, 963 F.3d at 306 ("[D]efendant's reason for changing its behavior is often probative of whether it is likely to change its behavior again. [The court will] understandably be skeptical of a claim of mootness when a defendant yields in the face of a court order and assures us that the case is moot because the injury will not recur, yet maintains that its conduct

was lawful all along."); *DeJohn*, 537 F.3d at 310 ("there have been no subsequent events that make it absolutely clear that Temple will not reinstate the allegedly wrongful policy in the absence of the injunction"); *Fields*, 936 F.3d at 161 (finding it was not "absolutely clear" the government would not revert to its prior policy when it only changed in response to the litigation and the claim is not moot); *but see Knights of Columbus*, 506 F. Supp. 3d at 235 (finding no credible suspicions that defendant would revert to challenged practice after defendants quickly revised no-religious-displays policy to address plaintiff's concerns).

Finally, courts are concerned with the permanence of the voluntary shift in policy in assessing mootness and the voluntary cessation exception. *See Hooker Chem. Co., Ruco Div. v. U.S. E.P.A., Region II*, 642 F.2d 48, 52 (3d Cir. 1981) ("A controversy still smoulders [sic] when the defendant has voluntarily, but not necessarily permanently, ceased to engage in the allegedly wrongful conduct."); *see also Cottrell v. Good Wheels*, 2009 WL 3208299, at *5 (D.N.J. Sept. 28, 2009) ("[V]oluntary cessation will only render a case non-justiciable where it can be said with assurance that there is no reasonable expectation that the alleged violation will recur, and interim relief or events have completely and irrevocably eradicated the effects of the alleged violation").

Defendants describe the Farrell Declaration as a "binding" disavowal that estops ODC, the disciplinary enforcement authority, from arguing otherwise should an attorney rely on it. ECF No. 61 at 22. Defendants are emphatic that "ODC has disavowed any intention to [charge Plaintiff with violating the Amendments]" under the

circumstances Mr. Greenberg outlined to the Court. *Id.* Defendants assert that, "[u]nder the principles of official estoppel, the Farrell Declaration is binding upon Respondent and his future official actions, other employees at ODC, and potential successors to his position as Chief Disciplinary Counsel." ECF No. 62 at 8. Plaintiff disagrees that the promises made in the Farrell Declaration are permanent and binding. ECF No. 70 at 11.

The idea of "official estoppel" as presented by Defendants is not supported by case law and, in fact, Plaintiff points out that Defendants did not provide any legal support for this theory. ECF No. 70 at 11; ECF No. 65-1 at 37. Defendants cite to only one case from Pennsylvania state court where it states that if a defendant detrimentally relies on a disavowal then it *can* preclude prosecution —not that the government is *estopped* from bringing prosecution. ECF No. 71 at 9 (citing *Commonwealth v. Cosby*, 252 A.3d 1092, 1135-44 (Pa. 2021)).[17] Defendants also concede that generally estoppel is applied differently to the government than private citizens but assert they cannot

[17] Defendants refer to *Commonwealth v. Cosby*, where the District Attorney made an individual evaluation not to prosecute in a criminal case. 252 A.3d 1092, 1135 (Pa. 2021), *cert. denied sub nom. Pennsylvania v. Cosby*, WL 660639 (U.S. Mar. 7, 2022). The Supreme Court of Pennsylvania determined that the decision not to prosecute was unconditional and presented as absolute and final and found the defendant's detrimental reliance on the government's assurances during the plea bargaining phase implicated due process rights. *Id.* However, the court added "[t]here is nothing from a reasonable observer's perspective to suggest that the decision was anything but permanent." *Id.* at 1137. That is not the case here. For a variety of reasons, the Court finds the promises made by one defendant in a civil rather than criminal case, who may or may not have the authority to make such promises binding, do not mirror the circumstances in *Cosby*.

ignore promises upon which citizens detrimentally rely. *Id.* at 9.

This Court found almost no federal case law addressing the term of art "official estoppel" presented by Defendants. Only in *Conforti v. United States* is it even mentioned, where the Eighth Circuit found no authority to support the idea of official estoppel. 74 F.3d 838, 841 (8th Cir. 1996). That court went as far as to say that "the Supreme Court has repeatedly indicated that an estoppel will rarely work against the government." *Id.*; *see generally*, *Office of Personnel Management v. Richmond*, 496 U.S. 414, 423 (1990); *Heckler v. Community Health Services*, 467 U.S. 51, 61 (1984). Even in the broader context of general estoppel, it is rare to apply equitable estoppel against state action as it is disfavored unless it is required by justice and fair play or to prevent manifest injustice. 31 C.J.S. Estoppel and Waiver § 256; *see Wayne Moving & Storage, Inc. v. Sch. Dist. of Phila.*, 625 F.3d 148 (3d Cir. 2010).

Regardless of the semantics over Defendants' seemingly novel use of the term official estoppel, there is reason to be skeptical that the promises made in the Farrell Declaration are indeed binding on Defendants and moot Plaintiff's First Amendment challenge. *See, e.g.*, *Cottrell*, 2009 WL 3208299, at *5 (finding defendant's promise on its own was not enough to show the clarity needed to render a claim moot because of its timing and that the defendant "could conceivably re-institute" the challenged policy). Similar to the current circumstances, in *Elim Romanian Pentecostal Church v. Pritzker*, the governor of Illinois placed an order restricting in-person religious services and later lifted the challenged parts of the restrictions

after the case was filed. 962 F.3d 341, 342 (7th Cir. 2020). The Seventh Circuit concluded that the question of whether the revoked order violated the First Amendment was not moot because the governor could change the policy at will. *Id.* at 344-45.[18] Defendants here admit that there is "no set process for amending, revising, or withdrawing the positions taken in the Farrell Declaration," which prevents clarity on whether the disavowal could be changed at will or with the appointment of a new Chief Counsel for ODC and leads this Court away from a finding that this disavowal is binding and permanent. ECF No. 62 at 8.

In the alternative, Plaintiff contends that even if the Court finds the claim against ODC is moot, "the case remains live with respect to the Board Defendants." ECF No. 70 at 6. Defendants do admit that the Farrell Declaration is not binding on the Board or its members, "although the Board would have to consider the Declaration should an attorney rely on it and argue estoppel or detrimental reliance." ECF No. 62 at 8; ECF No. 70 at 12 (the Board is "admittedly not bound by [the Farrell Declaration]"); *see also Hansen Found., Inc. v. City of Atl. City*, 504 F. Supp. 3d 327 (D.N.J. 2020) (finding "heavy burden" of mootness was not met where promise was made after litigation began and defendant made no claim that it was binding on the city). However, Defendants assert that

[18] The court notes that the new order specifically reserved the right to change the policy at will. Here, Mr. Farrell claims his interpretation is binding for the foreseeable future. While that is a small distinction between the two cases, it still serves as persuasive support for Plaintiff's assertion that such revisions and changes in position made during litigation is not binding against the government.

ODC is the only entity that can investigate and seek disciplinary action for Rule 8.4(g) and that the Board does not enforce the Amendments, conduct investigations, or propose disciplines. According to Mr. Farrell, if ODC dismisses a complaint, the Board cannot review it or otherwise adjudicate it. ECF No. 71 at 9, n.5 (citing ECF No. 62, Exhs. A & B). Plaintiff adds, though, that the Board has the authority to replace Mr. Farrell at any time, indicating some control or authority over the author of the Farrell Declaration. ECF No. 70 at 12.

Most important here is that Defendants admit the Farrell Declaration is not binding on the Board so if there is any indication that the Board could review ODC's decision to dismiss a complaint or otherwise be involved in the disciplinary process under Rule 8.4(g), the case cannot be moot against the Board. It is within the Board's authority and in fact is their obligation to appoint the Chief Disciplinary Counsel, though that alone is not sufficient to show they are involved in the disciplinary procedures run by ODC. Pa. Disc. Bd. Rules § 93.23 (a)(2). The Board also assigns its hearing committee members "to review and approve of or modify recommendations" by ODC, including dismissals and informal admonitions. Pa. Disc. Bd. Rules § 93.23 (a)(7)(i). The Board can also assemble a panel of three members to review and approve or modify a determination by that hearing committee, including dismissal or informal admonitions. Pa. Disc. Bd. Rules § 93.23 (a)(8). These Board Rules appear to give the Board discretion to make a determination on attorney misconduct even if ODC has dismissed the complaint following investigation. Finally, under Pa. Disc. Bd. Rules § 87.1 (a), the Board, with consensus from at least five of its members, may

direct ODC to undertake an investigation into attorney misconduct. Pa. Disc. Bd. Rules § 87.1 (a). It is unclear whether the Board can request this investigation after ODC has dismissed a complaint as frivolous, but, in any case, it does imply that ODC does not have sole authority over instigating investigations into attorney misconduct. While the Court finds the controversy remains live as to all Defendants, even if it were moot against ODC, there is sufficient evidence showing the Board has not met its heavy burden to show that the controversy between Plaintiff and the Board is moot.

Regardless, Plaintiff continues to assert that it is "the investigatory process itself that has a chilling effect." ECF No. 70 at 13. Both parties stipulate that each complaint that ODC receives triggers an investigatory process. ECF No. 53 ¶ 28. And Mr. Farrell stated in response to requested Interrogatories that "intake counsel may contact the respondent in an effort to resolve the matter quickly" during that investigation. ECF No. 70 at 13 (quoting Farrell Interrog. Answers ¶ 18). If in fact ODC is estopped from enforcing Rule 8.4(g) against Mr. Greenberg in the context of his CLE presentations, there remains First Amendment concerns regarding the initial complaint and investigation process that keep the case and controversy live. *Id.* at 13. Therefore, the Farrell Declaration does not moot Mr. Greenberg's claims.

While this Court does not find that the Farrell Declaration moots the case, Defendants also assert that even if the Old Amendments were applicable to Plaintiff's described speech and conduct, such circumstances do "not come within the Amendments" as written today and that the

case should be moot on that basis. ECF No. 61 at 24.[19] Defendants allege that the plain language of Rule 8.4(g) no longer includes the phrasing prohibiting "words . . . manifest[ing] bias or prejudice" that the Court found problematic in its prior decision. *Id.* at 34. Since the language the Court found "simply regulates speech" (Dec. 2020 Opinion at 32) is no longer included in the Rule, Defendants contend that the Rule is only directed towards conduct. Defendants further assert that "such conduct is not based on whether the listener perceives verbal conduct to be discriminatory or harassing, but whether the verbal conduct actually targets a person for discrimination or harassment." ECF No. 62, Exh. A at 6-7. Since the Amendments now only implicate conduct, according to Defendants, Plaintiff's described speech would not fall under the revised Rule and therefore there is no risk of injury, and no relief can be granted that has not already been achieved by changes from the Old Rule.

Plaintiff alleges that Rule 8.4(g) "threatens to harm" attorneys and himself in "the same way" as the Old Rule. ECF No. 70 at 11. Mr. Greenberg continues to assert that the fear of complaint and investigation under Rule 8.4(g) will chill his speech and cause him to self-censor. ECF No. 54 ¶¶ 31-42; ECF No. 65-1 at 35. Plaintiff points out that Comment [3] of the Amendments still includes CLE presentations, which is the primary forum in which his speech will be chilled by the Rule. ECF No. 65-1 at 34.

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[19] "[ODC, the Board, and the Supreme Court of Pennsylvania] stipulate that Plaintiff's speech, which the Court rightly aimed to protect, is protected from prosecution." ECF No. 61 at 25.

First, the revisions voluntarily taken to amend the Old Rule into the Rule now before the Court during the course of this litigation still fall prey to the analysis of the voluntary cessation doctrine. *See City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283 (1982); *but see Princeton Univ. v. Schmid*, 455 U.S. 100, 103 (1982) (per curiam) (finding case moot, where party substantially amended its regulations while the case was pending on appeal and without explicitly mentioning the voluntary cessation doctrine). In *City of Mesquite*, following the lower court's determination that the language was unconstitutionally vague and while the case was pending appeal, the city repealed the challenged provisions of a municipal ordinance and revised the ordinance to remove the vague language. 455 U.S. at 289. The Supreme Court found that the city's "repeal of the objectionable language would not preclude it from reenacting precisely the same provision" if the judgment were vacated for mootness and finding the uncertainty enough to move ahead to the merits of the appeal. *Id. City of Mesquite* is applicable here, in part due to the similarity of the circumstances, where the Board removed the offending language pending their own appeal and now offer revised Amendments created through an expedited process. Without judgment, there is no certainty that Defendants will not modify the Rule in a way that incorporates the Old Rule's unconstitutional language.

Further, the Supreme Court elaborated in a later case that it is not merely the possibility of reenactment that prevents mootness, it is also that the defendant may replace the challenged rule with a new one that "differs only in some insignificant respect." *Ne. Fla. Chapter of Assoc. Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S.

656, 662 (1993). The Third Circuit agrees that "an amendment does not moot the claim if the updated statute differs only insignificantly from the original." ECF No. 70 at 11 (quoting *Nextel W. Corp. v. Unity Twp.*, 282 F.3d 257, 262 (3d Cir. 2002)).

Without diving too deep into the merits at this threshold stage of our analysis, this Court finds the updated Amendments do not differ significantly enough from the Old Amendments to moot this case, particularly with respect to the likelihood for Mr. Greenberg's speech to be chilled under the Amendments as currently written. While ODC asserts that the Amendments only prohibit verbal conduct that *actually* targets an individual, not speech that is *perceived* to be discriminatory or harassing, this is nonsensical and subjective at best. 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. It is also nonsensical to consider anything under the umbrella of harassment to be devoid of perception. Whether an individual perceives another's conduct to be welcome or unwelcome is a basic premise for harassment. For example, if a person in a protected class hears an otherwise offensive joke from a friend at a Pennsylvania Bar event, it may not be considered by that person as discrimination or harassment, while the same exact joke made by a panelist at a CLE would more likely be deemed offensive. Plaintiff provides numerous examples of speakers in similar situations to Mr. Greenberg's being accused of this type of discrimination or harassment by simply endorsing certain views of case law or the Constitution. ECF No. 65-1 at 34. That individual's perception is exactly what compels them to file

a complaint under Rule 8.4(g). Outside of the third party's perception, it is also the subjective assessment of ODC as to whether the verbal conduct is actual or perceived. The standards for that assessment are, at best, subjective, and, at worst, completely unknown to both Pennsylvania licensed attorneys like Mr. Greenberg and even ODC itself. Therefore, speech that would have been chilled due to the Old Rule will continue to be so affected under the revised Rule.

The revisions also do not address many of the concerns raised by the Court under the Old Amendments. It is still true that Rule 8.4(g) is not limited to the legal process and instead extends to "participation in judicial boards, conferences, or committees; continuing legal education seminars; bench bar conferences; and bar association activities where legal credits are offered." ECF No. 61 at 10 (citing Pa.R.P.C. 8.4 cmt. 3).[20] The following sentence adds, "[t]he term 'the practice of law' does not include speeches, communications, debates, presentations, or publications given or published outside the contexts described in [Comments] (1)-(3)[,]" which indicates, and defense counsel confirmed during oral argument,[21] that any speeches, communications, debates, presentations, or publications given

[20] Mr. Daley, attorney for the Defendants, confirmed to the Court during oral argument that the Amendments extend beyond judicial proceedings and beyond representation of the client or anything that instructs their administration of law. ECF No. 74 at 30.

[21] Mr. Daley, attorney for the Defendants, confirmed to the Court during oral argument that "speeches, communications, debates, presentations, or publications" made within the context described in (1)-(3) of Comment [3] are included in the scope of Rule 8.4(g). ECF No. 74 at 37. ("they could be, yes [. . .] if they're, again, harassing and discriminatory.").

within the context defined above falls under the scope of the Rule. *See* Pa.R.P.C. 8.4 cmt. 3; *see also* ECF No. 74 at 30-37. This assures that attorney's speech is targeted by the Rule and will continue to be broadly monitored and subject to government censure under this Rule. The Rule limits what a lawyer may say and it serves as a warning to Pennsylvania lawyers to self-censor during the course of their interactions that fall within the Board's broad interpretation of the practice of law. There are other insignificant revisions made by Defendants that compel this Court to deny their claims of mootness— *e.g.* changing "manifest bias or prejudice" in the Rule to "manifests an intention: to treat a person as inferior [. . .]; to disregard relevant considerations [. . .]" in Comment [5]. ECF No. 61 at 10; Dec. 2020 Opinion at 38. The immediately apparent similarities between the Old Rule and the revised Rule evidences the need for an evaluation on the merits.

Based on the foregoing, the Court does not find that Defendants have met their formidable burden to prove that it is absolutely clear that there is no reasonable expectation Plaintiff could be affected by the Amendments and thus this Court continues to the merits of the constitutional challenge.

B. *First Amendment Violation*

Plaintiff's Motion for Summary Judgment

In Plaintiff's Motion for Summary Judgment, Mr. Greenberg contends that verbal or written communicative "conduct" constitutes pure expression, wholly apart from conduct involving incidental speech, and is fully protected by the First Amendment. ECF No. 65-1 at 21; *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 202-03 (3d Cir.

2001) (holding unconstitutional an anti-harassment policy that prohibited "any unwelcome verbal, written or physical conduct."); *DeJohn v. Temple Univ.*, 537 F.3d 301, 305 (3d Cir. 2008) (holding unconstitutional an anti-harassment policy that prohibited "expressive, visual, or physical conduct of a sexual or gender-motivated nature"). Even so, Plaintiff asserts that the Third Circuit has consistently supported the principle that regulations of communicative conduct are indistinguishable from regulations of speech. ECF No. 65-1 at 23 (citing *McCauley v. Univ. of the Virgin Islands*, 618 F.3d 232 (3d Cir. 2010)). Plaintiff relies heavily on the analysis found in *Saxe*, *DeJohn*, and *McCauley.*

Furthermore, the plain language of the regulation, according to Plaintiff, places restrictions on speech. Plaintiff contends that the First Amendment protects "statements that impugn another's race or national origin or that denigrate religious beliefs." *Id.* at 18 (quoting *Saxe,* 240 F.3d at 206). Clauses such as prohibiting denigration, showing hostility or aversion, and manifesting an intent to disregard relevant characteristics of merit "directly regulate communication, expression and even an attorney's unpalatable thoughts." *Id.* at 24. The Comment listing "speeches, communications, debates, presentations or publications" inside the contexts described in (1)-(3) (e.g., at CLEs, bench bar conferences, or bar association events offering legal education credits) do fall within the ambit of the Rule. *Id.* at 23. Plaintiff points out that due to the structure of Rule 8.4(g), "there can be no doubt" that speeches similar to those given by Mr. Greenberg at CLEs fall within the scope of the Amendments. *Id.* at 24.

Plaintiff then describes how the Amendments constitute content-based and viewpoint-based discrimination in violation of the First Amendment. *Id.* at 13. Plaintiff contends that the Amendments are a form of impermissible viewpoint discrimination, and that viewpoint discrimination should be considered "in a broad sense." *Id.* at 13 (quoting *Matal v. Tam*, 137 S.Ct. 1744, 1763 (2017)). Plaintiff contends that Rule 8.4(g) prohibits preaching hate and denigration, which is protected expression under the First Amendment, even if the expression offends or angers listeners. *Id.* at 15, 19 (citing *Bible Believers v. Wayne County,* 805 F.3d 228, 234 (6th Cir. 2015) (en banc); *Ison v. Madison Local Sch. Dist. Bd. of Educ.*, 3 F.4th 887, 895 (6th Cir. 2021) (holding that restrictions on "antagonistic," "abusive" and "personally directed' speech" are unconstitutionally viewpoint-based); *Saxe*, 240 F.3d at 206 ("[A] disparaging comment directed at an individual's sex, race, or some other personal characteristic [. . .] and thus come within the ambit of anti-discrimination laws—precisely because of its sensitive subject matter and because of the odious viewpoint it expresses.")). Despite Defendants assertion that discrimination and harassment statutes should be treated differently than other rules, Plaintiff asserts that "[t]here is no categorical 'harassment exception' to the First Amendment's free speech clause." *Id.* at 25 (citing *Saxe*, 240 F.3d at 204; *DeJohn*, 537 F.3d at 316; *Rodriguez v. Maricopa Community College District*, 605 F.3d 703 (9th Cir. 2010)).

Plaintiff cites to *Matal v. Tam* where the Supreme Court assessed the constitutionality of a federal statute that prohibited the registration of trademarks that may "disparage or bring into contempt or disrepute" any

"persons, living or dead" and found that the disparagement clause discriminates on the basis of viewpoint. *Id.* at 13 (quoting *Matal*, 137 S.Ct. at 1751, 1763). In that case, the Supreme Court stated that "[g]iving offense is a viewpoint." *Id.* (quoting *Matal*, 137 S.Ct. at 1751). Plaintiff adds that the targeting requirement does not prevent viewpoint discrimination because "[a] mark that disparages a substantial percentage of the members of a racial or ethnic group, necessarily disparages many 'persons,' namely, members of that group." *Id.* (quoting *Matal*, 137 S.Ct. at 1756).

In this case specifically, Plaintiff shares his concerns that the "unfortunate modern reality" is that people consider defense of incendiary speakers to be "as incendiary as the underlying speech itself." *Id.* at 15. Rule 8.4(g) could cause an attorney to be "embedded in an inquisition" and "an exploration of the attorney's character and previously expressed viewpoints" before any misunderstanding could even begin to be cleared up. *Id.* at 16 (quoting Dec. 2020 Opinion at 28).

Furthermore, Plaintiff contends that Defendants' declarations in this case are insufficient to avoid constitutional violation. *Id.* at 16 ("the litigation position of a single defendant, departing from the text of the Rule, offers [Mr.] Greenberg and other Pennsylvania attorneys little solace."); *see also id.* (citing *Pa. Family Inst., Inc. v. Celluci*, 521 F. Supp. 2d 351, 365 & n.7 (E.D. Pa. 2007)). According to Plaintiff, "a promise by the government that it will interpret statutory language in a narrow, constitutional manner cannot, without more, save a potentially unconstitutionally overbroad statute." *Id.* at 16 (quoting *Free Speech Coal., Inc. v. AG United States*, 787 F.3d 142,

164 (3d Cir. 2015) (internal quotation omitted)). Plaintiff contends that regardless of whether Defendants intend to use Rule 8.4(g) "responsibly," the Court still may not uphold an unconstitutional rule. *Id.* (citing *United States v. Stevens*, 559 U.S. 460, 480 (2010)). Even if the Court wants to adopt a narrowing construction for the regulation, Plaintiff urges that it must be "reasonable and readily apparent." *Id.* at 17 (quoting *Stenberg v. Carhart*, 530 U.S. 914, 944 (2000) (internal citation omitted)).

Finally, Plaintiff's Motion for Summary Judgment contends that the Amendments are overbroad because the restrictions apply outside the context of a legal representation or legal proceeding and extend to situations where there can be no prejudice to the administration of justice. *Id.* at 18. "[O]verbroad harassment policies can suppress or even chill core protected speech." *Id.* at 25 (quoting *DeJohn*, 537 F.3d at 314). Plaintiff also asserts that the emphasized targeting requirement does not sufficiently remedy the overbreadth issue. *Id.* at 18.

In Defendants' Opposition to Plaintiff's Motion for Summary Judgment, they contend that the Amendments are directed towards discriminatory and harassing professional conduct that has detrimental effects on the judicial system. ECF No. 71 at 15. Thus, the Amendments may incidentally burden speech. *Id.* at 15 n. 11 (citing *Nat'l Inst. of Fam. & Life Advocs. v. Becerra,* 138 S.Ct. 2361, 2373 (2018) (hereinafter "*NIFLA*") ("the First Amendment does not prevent restrictions directed at . . . conduct from imposing incidental burdens on speech," and "professionals are no exception to this rule")). Defendants also assert that Plaintiff's references to *Saxe*, *DeJohn*, and *McCauley* are not persuasive because those cases involve

much broader educational institution policies that included "offensive" speech, which is irrelevant under the Amendments. *Id.* at 17. The language in the Amendments is much narrower than in those cases, according to Defendants, and does not prohibit a "substantial amount of protected expression." *Id.* at 18 (quoting *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 244 (2002)).

In response to Plaintiff's claim of viewpoint discrimination, Defendants assert that the Amendments do not distinguish between which views one may take on a particular subject. *Id.* at 11. The Amendments merely ask whether an attorney engaged in harassing or discriminatory conduct directed toward a specific individual. *Id.*

Defendants contend that *Matal v. Tam* does not compare to this case and that the examples provided by Plaintiff are too hypothetical for the Court to consider. *Id.* Defendants assert that *Matal* was an as-applied case that did not involve the state's compelling interest of addressing discrimination and harassment in the practice of law. *Id.* In *Matal*, according to Defendants, the court held that "[s]peech may not be banned on the ground that it expresses *ideas that offend*." *Id.* at 12 (quoting *Matal*, 137 S.Ct. at 1755) (emphasis added). Defendants also assert that the government's rejection of the trademark at issue in *Matal* relied on the "reaction of the applicant's audience." *Id.* (quoting *Matal*, 137 S.Ct. at 1766-67). Defendants insist that that case does not apply because the Amendments prohibit conduct and include no prohibition against offensive language, nor do the Amendments take into account the listener's subjective views. *Id.* Defendants also promise, through the Farrell Declaration, not to consider whether one is offended in investigating

complaints under Rule 8.4(g). *Id.* (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 796, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989) (court "must . . . consider any limiting construction that a state court or enforcement agency has proffered")). Defendants assert that this case also differs from *Matal* because the Amendments have an explicit targeting requirement in Comment Three requiring harassment "toward a person" and Comment Four requiring discrimination in how one "treat[s] a person." *Id.* at 13.

Finally, Defendants contend that the regulation is not overbroad because attorneys must obtain CLE credits to be in good standing and, therefore, rules of professional conduct may apply to functions where CLE credits are offered. *Id.* at 14. Defendants contend that Plaintiff fails to show the Amendments were enacted to oppress speech as opposed to harmful conduct. *Id.* at 14.

Defendants' Motion for Summary Judgment

In Defendants' Motion for Summary Judgment, they contend that a facial challenge to the constitutionality of a rule is "strong medicine" that must be used "sparingly and only as a last resort." ECF No. 61 at 27 (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973)). Defendants assert that since Pennsylvania's "disciplinary system has not yet applied the Amendments to 'actual disputes,' judicial restraint is called for." *Id.* (quoting *United States v. Salerno*, 481 U.S. 739, 750 (1987)). Defendants also assert that this Court must consider the limiting instructions "provided here through the ODC Declaration and discovery responses." *Id.* at 27-28. Defendants offer the "elementary rule" that "every reasonable construction" must be considered to "save a statute from unconstitutionality."

Id. at 28 (quoting *Stretton v. Disciplinary Bd. of Supreme Ct. of Pa.*, 944 F.2d 137, 144 (3d Cir. 1991)).

Further, they contend that the Amendments regulate conduct and only incidentally affect speech. *Id.* at 31-32.[22] Antidiscrimination laws like Rule 8.4(g), which aim to ensure equal access to society's benefits serve goals "unrelated to the suppression of expression" and are neutral as to both content and viewpoint. *Id.* at 29 (quoting *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623-24 (1984)). Therefore, it is permissible if such a rule may incidentally burden speech. *Id.* at 31 (citing *NIFLA*, 138 S.Ct. at 2373). Since this regulation addresses the conduct of a particular profession, Defendants assert incidental burdens on speech are treated differently by the Supreme Court than restrictions on speech. *Id.* (citing *Capital Associated Indus., Inc. v. Stein*, 922 F.3d 198, 207-08 (4th Cir. 2019), *cert. denied*, 140 S.Ct. 666 (2019)). Finally, Defendants contend that this regulation should be evaluated under intermediate scrutiny, which Rule 8.4(g) satisfies because the Amendments serve a compelling state interest, and the regulation is a reasonable fit to serve that need. *Id.*at 31-32.

Even if the Amendments do regulate speech, Defendants emphasize that a state's "broad power to regulate the practice of professions within their boundaries" is "especially great" in "regulating lawyers" because "lawyers are essential to the primary governmental function of administering justice, [sic] and have historically been officers of

[22] Defendants' Reply in Opposition to Plaintiff's Motion for Summary Judgment instructs the Court that their arguments are "detailed in Defendants' Summary Judgment Brief." ECF No. 71 at 15.

the courts." *Id.* at 28 (quoting *In re Primus*, 436 U.S. 412, 422 (1978)). Defendants espouse Pennsylvania's noble effort to ensure the efficient and law-based resolution of disputes and guarantee that its judicial system is equally accessible to all by regulating the conduct of its attorneys through Rule 8.4(g). *Id.* at 28-29. Defendants emphasize the need to protect the integrity and fairness of Pennsylvania's judicial system and protect the reputations of lawyers by preventing attorneys from engaging in anything "regarded as deplorable and beneath common decency." *Id.* at 28-29 (citing *Fl. Bar v. Went For It*, 515 U.S. 618, 625 (1995) (quotations omitted); *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1075 (1991)). Defendants also refer to Colorado's Rule 8.4(g), where the court stated "[t]here is no question that a lawyer's use of derogatory or discriminatory language that singles out individuals involved in the legal process damages the legal profession and erodes confidence in the justice system." *Id.* at 30 (quoting *Matter of Abrams*, 488 P.3d 1043, 1053 (Colo. 2021)) (rejecting a First Amendment challenge to Colorado's Rule 8.4(g)).

Furthermore, Defendants assert that it is not viewpoint-based or content-based because the regulation asks whether an attorney engaged in harassing or discriminatory conduct, not what viewpoint the attorney takes on a particular issue, and the Amendments do not distinguish between favored or disfavored speech. *Id.* at 33, 35 (quoting *Christian Legal Society Chapter of the Univ. of California, Hastings College of the Law v. Martinez*, 561 U.S. 661, 695 (2010) ("A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others."). Defendants also assert that the

regulation applies equally to all attorneys, regardless of their views. *Id.* at 33 (citing *Barr v. Lafon*, 538 F.3d 554, 572 (6th Cir. 2008)).

The targeting requirement in Rule 8.4(g), according to Defendants, additionally prevents any viewpoint discrimination. Defendants assert that the Amendments are not grounded on whether words may offend someone. *Id.* at 33. Defendants further provide limiting instructions within which ODC states it does not consider the Amendments to cover being offended or offensive language. *Id.* at 33-34; ECF No. 56 ¶ 16. Thus, this Court's concern related to the Old Rule, that it was intended to regulate offensive speech based on "words manifesting bias or prejudice," is absent in the Amendments. ECF No. 61 at 33-34 (quoting Dec. 2020 Opinion at 32).

Defendants also distinguish *Matal* from Rule 8.4(g) for a few reasons. First, Defendants assert that the government in *Matal* denied trademark protections to allegedly offensive terms based on whether the speech offended the listener. *Id.* at 34 (citing *Matal*, 137 S.Ct. at 1766). Here, according to Defendants, whether a listener is offended is irrelevant. *Id.* Second, Defendants reiterate that the Amendments regulate attorney conduct, specifically discrimination and harassment, while the activity in *Matal* involved pure speech. *Id.* (citing *Wandering Dago, Inc. v. Destito*, 879 F.3d 20, 32 (2d Cir. 2018) (recognizing that *Matal* does not affect the government's ability to target ethnic slurs through anti-discriminatory regulations)).

Finally, Defendants assert that the Amendments are not overbroad and, even so, any concern regarding overbreadth should be evaluated on a case-by-case basis. *Id.* at

37-40. Defendants assert again that the Amendments apply only to conduct even if speech is involved in that conduct. They cite to the Supreme Court stating that "it has never been deemed an abridgment of freedom of speech" to make a "course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Id.* at 37 (quoting *Rumsfeld v. F. for Acad. & Inst. Rights, Inc.*, 547 U.S. 47, 62 (2006)). Defendants emphasize that Plaintiff bears a "heavy burden" to establish that the Amendments are facially overbroad. *Id.* at 38 (quoting *Free Speech Coal., Inc. v. United States*, 974 F.3d 408, 429 (3d Cir. 2020)). Defendants assert that Plaintiff must show from "the text of [the Amendments] and from actual fact, that substantial overbreadth exists" yet Plaintiff fails to do so. *Id.* at 38 (quoting *Virginia v. Hicks*, 539 U.S. 113, 122 (2003)).

In Plaintiff's Response in Opposition to the Defendants' Motion for Summary Judgment, Plaintiff asserts that the regulation directly restricts speech and is not merely an incidental burden on speech. Plaintiff cites frequently to *Saxe v. State Coll. Area Sch. Dist.*, where the Third Circuit found a First Amendment violation from a harassment policy that covered "unwelcome verbal, written, or physical conduct directed at the characteristics of a person's [race/religion/national origin/sexual orientation/etc]." ECF No. 70 at 26 (citing 240 F.3d 200, 220 (3d Cir. 2001)). Plaintiffs urge that in cases like *Saxe*, *DeJohn*, and *McCauley*, where the threat of chilled speech was real, the Third Circuit entertained and credited facial overbreadth challenges, and this Court should follow suit. *Id.* at 27.

Plaintiff frequently cites to *NIFLA,* which this Court stated previously does not countenance such an unlimited scope of professional speech regulation. *Id.* at 27 (citing Dec. 2020 Opinion at 27) (discussing how, with two exceptions, *NIFLA* contemplates full First Amendment rights for professional speech). Plaintiff contends that state bar authority generally ends where speech does not prejudice a legal proceeding or the administration of justice. *Id.* at 26 (citing *NIFLA*, 138 S.Ct. at 2372). Plaintiff further contends that if the Court were to allow the state to possess so much power over professional speech, there would be no limit to the control regulatory authorities would have over professionals' lives. *Id.* at 22.

Plaintiff also contends that the general interest of the government in maintaining the "reputation of lawyers" and judicial integrity through Rule 8.4(g) "exceeds the scope" of *NIFLA. Id.* Plaintiff asserts that, for example, an attorney's hostile remark at a bar association event or a denigrating CLE presentation bears no relationship to judicial integrity as it takes place well outside the context of the courtroom or representing a client. *Id.* Plaintiff cites to the Third Circuit, contending that the interest in "public confidence in the judiciary" is the sort of underdeveloped post-hoc government rationale rejected by the Third Circuit in the First Amendment context. *Id.* at 23.

In addition, Plaintiff contends that Rule 8.4(g) unconstitutionally discriminates against opposing viewpoints by prohibiting Pennsylvania attorneys from "denigrat[ing] or show[ing] hostility or aversion toward a person" on selected disfavored bases. *Id.* at 16 (quoting Comment [4] to Rule 8.4(g)). Plaintiff cites to this Court's previous opinion to counter Defendants' argument that Rule 8.4(g) applies

equally to all attorneys and thus cannot be viewpoint discriminatory. *Id.* at 17 (quoting Dec. 2020 Opinion at 31 ("To prohibit all sides from criticizing their opponents makes a law more viewpoint based, not less so.")).

Plaintiff again compares this case to *Matal*, asserting that "disparage," a term used in the unconstitutional rule in that case, is a synonym of "denigrate," a term used here in Rule 8.4(g). *Id.* at 16. Plaintiff also disagrees with Defendants' reasoning to distinguish the two cases, contending that the statutory standard in *Matal* did not proscribe "offensive" terms; it proscribed "disparag[ing]" ones, just as Rule 8.4(g) proscribes "denigrat[ing]" ones. *Id.* at 16. In practice that reduces to "a subset of messages that [the Government] finds offensive." *Id.* at 16 (quoting *Matal*, 137 S.Ct. at 1766). Plaintiff identifies the problem that 8.4(g) has defined "harass" in a manner that includes pure expression and turns on viewpoint, rather than simply on "non-expressive, physically harassing conduct." *Id.* at 18 (quoting *Saxe*, 240 F.3d at 206). By distinguishing between speech that is denigrating and speech that is not; speech that displays aversion and hostility and speech that does not, Plaintiff contends that Rule 8.4(g) engages in viewpoint discrimination, under the guise of regulating harassment. *Id.* Plaintiff refers to its Motion for Summary Judgment and claims that *Saxe* and *DeJohn* do not allow this. *Id.*; ECF No. 65-1 at 17.

Plaintiff refers to examples of laws in its Motion for Summary Judgment that prohibit actual harassment and discrimination but look nothing like Rule 8.4(g). ECF No. 70 at 18; ECF No. 65-1 at 19-20 (citing examples). Plaintiff also refutes the comparison of many of the cases cited by Defendants because those laws involved membership in an

organization, employment, or public access regulations that did not on their face "target speech or discriminate on the basis of its content." ECF No. 70 at 19 (quoting *Alpha Delta Chi-Delta Chapter v. Reed*, 648 F.3d 790, 801 (9th Cir. 2011)). Plaintiff asserts that these comparisons do not apply here because those laws do not discriminate based on speech, they are policies to monitor rejecting would-be group members. *Id.* (citing *Christian Legal Soc'y*, 561 U.S. at 696). Plaintiff points out another case Defendants cite, where the court found no unconstitutional viewpoint discrimination because the policy affected only government speech, which is not the case with Rule 8.4(g). *Id.* at 19 n.8 (citing *Make the Rd. by Walking, Inc. v. Turner*, 378 F.3d 133, 151 (2nd Cir. 2004)). Rule 8.4(g) differs significantly from the cases Defendants cite, according to Plaintiff, because the Amendments discriminate based on speech—speech that denigrates, speech that shows hostility or aversion, and speech that disregards considerations of relevant individual characteristics or merit. *Id.* at 19.

Finally, because Rule 8.4(g) is content-based regulation, Plaintiff urges that it must be subject to strict scrutiny, not intermediate scrutiny as Defendants propose. *Id.* at 25. Plaintiff reiterates that Rule 8.4(g) is not narrowly tailored to prevent discrimination and harassment in the administration of justice. *Id.* at 24. Plaintiff contends that if the Amendments solely limited speech in the course of client representations and directed towards a specific person in the legal process, "we wouldn't be here today." *Id.* Plaintiff also points to Pennsylvania Rule of Professional Conduct 8.4(d), which already prohibits conduct prejudicial to the administration of justice, and Plaintiff asserts

that harassment and discrimination in legal proceedings are currently sanctionable under this rule. *Id.* at 25 (citing Pa.R.P.C. 8.4(d)). Plaintiff contends that many of the cases cited by the Defendants in support of Rule 8.4(g) are in fact much more limited in scope than the proposed Rule. *Id.* at 24. Plaintiff also emphasizes that the Amendments fail to meet the "least restrictive alternative" requirement in "the third prong of the three-prong strict scrutiny test." *Id.* at 25 (quoting *ACLU v. Mukasey*, 534 F.3d 181, 198 (3d Cir. 2008)). Even if this Court adopts the standard of intermediate scrutiny, Plaintiff contends that the Amendments still fail to pass the test. *Id.*

1. Amendments Regulate Speech Versus Conduct

The first point of contention between the parties is whether the Amendments regulate speech, as Plaintiff asserts, or conduct and potentially incidentally burden speech, as Defendants claim. The Court finds that the Amendments regulate speech, not merely conduct, and therefore the burden placed on freedom of expression is not incidental to the enforcement of Rule 8.4(g). Unfortunately for Defendants, "[t]he government cannot regulate speech by relabeling it as conduct." *Otto v. City of Boca Raton*, 981 F.3d 854, 865 (11th Cir. 2020). Furthermore, "a State may not, under the guise of prohibiting professional misconduct, ignore constitutional rights." *NAACP v. Button*, 371 U.S. 415, 439 (1963).

Defendants list numerous cases for the proposition that anti-discrimination laws or regulations of attorney conduct are unrelated to the suppression of expression or place permissible incidental burdens on speech. ECF No.

61 at 29-32. None of these cases offer a direct comparison to the Amendments at issue here. *See, e.g.*, *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623-24 (1984) (evaluating a rule prohibiting women from membership in a local civic organization and stating that ensuring equal access is unrelated to suppression of expression); *NIFLA*, 138 S.Ct. 2361, 2373-74 (2018) (citing cases where burden on speech was incidental in the context of informed consent and notice laws in the medical profession and finding that the notice at issue, which applied to all interactions between a covered facility and its clients, with no tie to a medical procedure, "regulates speech as speech"); *Cap. Associated Indus., Inc. v. Stein*, 922 F.3d 198 (4th Cir. 2019) (finding state's ban on practice of law by corporations, which was part of a licensing regime that restricted practice of law only to bar members, affected primarily who could conduct themselves as lawyers and did not focus on the communicative aspects of practicing law).

Plaintiff points the Court in the right direction by repeatedly referencing the Third Circuit decision in *Saxe*.[23] "When laws against harassment attempt to regulate oral or written expression on such topics, however detestable the views expressed may be, we cannot turn a blind eye to

[23] The Third Circuit in *Saxe* evaluated an anti-harassment policy in a school, which defined harassment, in part, as "verbal or physical conduct based on one's actual or perceived race, religion, color, national origin, gender, sexual orientation, disability, or other personal characteristics, and which has the purpose or effect of substantially interfering with a student's educational performance or creating an intimidating, hostile or offensive environment." 240 F.3d at 202. The policy goes on to state examples of harassment, including conduct that "offends, denigrates or belittles an individual because of any of the characteristics described above." *Id.* at 203.

the First Amendment implications." 240 F.3d at 206. The anti-harassment policy in *Saxe* and the Amendments here both use versions of the same terms, "intimidate," "denigrate," and "hostile" in similar contexts, all of which necessitate the policing of expression. *Id.* at 202-03. The Third Circuit explicitly rejected the argument that anti-harassment statutes are categorically not subject to the First Amendment protections on free speech and further decided that the policy "prohibits a substantial amount of speech that would not constitute actionable harassment under either federal or state law." *Id.* at 204. The Court adopts similar reasoning here. Rule 8.4(g)'s prohibition on denigrating another a person, like the *Saxe* policy's prohibition on disparaging speech directed at a person, causes this Court First Amendment concern. *Id.* at 210. The Amendments also lack the necessary protection of free speech identified by the Third Circuit in *DeJohn.* Absent any requirement akin to a showing of severity or pervasiveness—that is, a requirement that the conduct objectively and subjectively creates a hostile environment or substantially interferes with an individual's work—the policy provides no shelter for core protected speech." *DeJohn v. Temple Univ.*, 537 F.3d 301, 317-18 (3d Cir. 2008).

Furthermore, both the plain language of the Amendments and the statements made by Defendants during oral argument prove there is no genuine dispute that the regulation restricts speech on its face and not incidentally. Comment Three to Rule 8.4(g) states that "the practice of law does not include speeches, communications, debates, presentations, or publications given or published outside the contexts described" earlier in the Comment. Pa.R.P.C.

8.4 cmt. 3. The Court interprets that plain language to mean all of those *are included* within the scope of Rule 8.4(g) if they occur within the listed contexts of a legal proceeding, representation of a client, operating or managing a law firm or practice, and various activities and conferences where CLE credits are offered. Thus, a plain reading of the Amendments restricts speeches, communications, debates and presentations—all of which obviously involve speech—at conferences, seminars, and other activities. Defendants, through counsel, confirmed to the Court during oral argument that "speeches, communications, debates, presentations, or publications" made within the contexts described in (1)-(3) of Comment Three are included in the scope of Rule 8.4(g). ECF No. 74 at 37-38. ("they could be, yes [. . .] if they're, again, harassing and discriminatory."). This language and counsel's statements convince the Court that attorneys' speech is not incidentally burdened here, it is targeted by Rule 8.4(g) and will continue to be broadly monitored and subject to government censure under this Rule. *See* Pa.R.P.C. 8.4 cmt. 3; *see also* ECF No. 74 at 30-37. Comment Three to the ABA Model Rule 8.4(g) confirms the Court's understanding, stating in relevant part that "[s]uch discrimination includes harmful verbal or physical conduct that manifests bias or prejudice towards others." Model Rules of Pro. Conduct r. 8.4(g) (Am. Bar Ass'n). And even though the ABA in its Formal Opinion 493 on the Model Rule 8.4(g) describes the regulation as prohibiting conduct, it also concedes that speech is restricted by stating, "a lawyer would clearly violate Rule 8.4(g) by directing a hostile racial, ethnic, or gender-based epithet toward another individual, in circumstances related to the practice of law." ABA Comm. on Ethics & Pro. Resp., Formal Op. 493

(2020). Therefore, there is no genuine dispute as to any material fact that the Rule limits what a lawyer may say and it serves as a warning to Pennsylvania lawyers to self-censor during the course of their interactions that fall within the Board's broad interpretation of the practice of law.

2. Regulating Professional Speech

Even if the Amendments target speech directly, Defendants assert that the state has broad authority to regulate professional speech and thus Rule 8.4(g) should not be subject to strict constitutional evaluation. The Court disagrees yet again and finds no genuine dispute on this issue either. The Court noted when it granted the preliminary injunction against Old Rule 8.4(g) that Pennsylvania has an important interest in regulating licensed attorneys and their conduct related to the fair administration of justice. Dec. 2020 Opinion at 27. That interest, however, does not give the government the authority to regulate attorneys' speech without limits.

The Supreme Court "has not recognized 'professional speech' as a separate category of speech." *NIFLA*, 138 S.Ct. at 2371 (finding petitioners were likely to succeed on merits of claim that act requiring clinics that primarily serve pregnant women to provide certain notices violated the First Amendment). While the Supreme Court has recognized that an attorney's speech while representing a client or appearing in the courtroom could be limited, Pennsylvania's Rule 8.4(g) expands far beyond regulation of speech within a judicial proceeding or representing a client. *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1071-72 (1991). It is by no means limited to the legal process, as

the Amendments explicitly apply to activities such as seminars or conferences where legal education credits are offered. Pa.R.P.C. 8.4(g). Rule 8.4(g) seeks to limit attorney speech much more broadly than inside the courtroom or related to a pending case.

The Court stated previously, and repeats once again, that "[s]peech is not unprotected merely because it is uttered by 'professionals.'" *NIFLA*, 138 S.Ct. at 2371-72. There are only two circumstances in which professional speech is "afforded less protection" and the Amendments do not fit into either category. *Id.* at 2372. First, courts may apply "more deferential review to some laws that require professionals to disclose factual, noncontroversial information in their 'commercial speech.'" *Id.* This does not apply here as Rule 8.4(g) is not a regulation of commercial speech. Second, "[s]tates may regulate professional conduct, even though that conduct incidentally involves speech." *Id.*; ECF No. 65-1 at 26. The Court determined above there is no genuine dispute that the Amendments do not merely regulate conduct, the Amendments directly restrict speech. While the drafters of Rule 8.4(g) attempted to remedy the apparent speech regulation by eliminating the offending language of "words . . . manifest[ing] bias or prejudice" from Old Rule 8.4(g), 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. It is a stretch to consider statements made by attorneys outside of those situations to be considered professional speech merely because it is uttered by an attorney.

Even so, when considering such speech to constitute professional speech, it is still deserving of full First Amendment protection since the Amendments regulate speech directly. As detailed above, the Amendments do not restrict conduct that is merely carried out by means of language, despite Defendants' contention that it is an incidental burden. The plain language of "speeches, communications, debates, [and] presentations," which are all restricted within the contexts where the Rule applies, and the definition of harassment including the terms "denigrate or show hostility or aversion" all expressly restrict speech. Though other aspects of Rule 8.4(g) address conduct, the Rule on its face restricts speech. "Outside of the two contexts discussed above—disclosures under [attorney advertising] and professional conduct—[the Supreme] Court's precedents have long protected the First Amendment rights of professionals." *NIFLA*, 138 S.Ct. at 2374. "States cannot choose the protection that speech receives under the First Amendment, as that would give them a powerful tool to impose 'invidious discrimination of disfavored subjects.'" *Id.* at 2374. (quoting *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 423-424 (1993)) (additional citations omitted). "Because of the danger of censorship through selective enforcement of broad prohibitions, and '[b]ecause First Amendment freedoms need breathing space to survive, government may regulate in [this] area only with narrow specificity.'" *In re Primus*, 436 U.S. 412, 432-433 (1978) (quoting *Button*, 371 U.S. at 433) (alteration in original).

Furthermore, while the Court admires the ideal of high standards of professionalism and benevolence which the Rule would have Pennsylvania lawyers aspire to, the state

simply does not have the authority to police professionals in their daily lives to root out speech the state deems to be below "common decency." ECF No. 61 at 29. That nebulous notion of decency, combined with the exceptional authority the state would have if allowed to monitor attorneys outside of judicial proceedings and representation of a client and determine whether they are "decent" enough causes this Court grave concern. Even the ABA disagrees with such overzealous policing of attorneys. In Comment Two to its Model Rule 8.4, the ABA states in part that "a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category." Model Rules of Pro. Conduct r. 8.4 cmt. 2 (Am. Bar Ass'n,). Therefore, Rule 8.4(g) prohibits attorneys' speech too broadly to fall within the acceptable circumstances of professional speech regulation and the Court will not provide the deferential review sought by Defendants. Instead, attorney speech under Rule 8.4(g) will be given the full protection of the First Amendment.

3. Viewpoint-Based Discrimination

"Viewpoint discrimination is an 'egregious form of content discrimination.'" *Ne. Pennsylvania Freethought Soc'y v. Lackawanna Transit Sys.*, 938 F.3d 424, 432 (3d Cir. 2019) (quoting *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995)). "[L]aws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based." *Startzell v. City of Phila.*, 533 F.3d 183, 193 (3d Cir. 2008) (quoting *Turner Broadcasting,* 512 U.S.

at 643) (alteration in original). It "targets . . . particular views taken by speakers[,]" which "violates the First Amendment's most basic promise." *Freethought Soc'y*, 938 F.3d at 432 (internal citations omitted). It is a "core postulate of free speech law: The government may not discriminate against speech based on the ideas or opinions it conveys." *Iancu v. Brunetti*, 139 S.Ct. 2294, 2299 (2019) (internal citation omitted).

"The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Freethought Soc'y*, 938 F.3d at 432 (quoting *Rosenberger,* 515 U.S. at 829); *see also Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001). According to Justice Kennedy, the essence of viewpoint discrimination is when the law "reflects the [g]overnment's disapproval of a subset of messages it finds offensive." *Matal v. Tam*, 137 S.Ct. 1744, 1766 (2017). "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989); *see also Matal*, 137 S.Ct. at 1763. "At its most basic, the test for viewpoint discrimination is whether—within the relevant subject category—the government has singled out a subset of messages for disfavor based on the views expressed." *Matal*, 137 S.Ct. at 1766. Such restrictions on speech "are subject to the 'most exacting scrutiny,' . . . because they 'pose the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion.'" *Startzell*,

533 F.3d at 193 (quoting *Turner Broadcasting*, 512 U.S. at 641-642); *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 207 (3d Cir. 2001) ("[C]ontent- or viewpoint-based restriction is ordinarily subject to the most exacting First Amendment scrutiny.").

Plaintiff relies on *Matal v. Tam*, in which the Supreme Court considered the constitutionality of a prohibition on the registration of trademarks that may "disparage" or bring "contemp[t] or disrepute any persons, living or dead." 137 S.Ct. at 1751 (internal quotation marks omitted). The Court found that the provision violated the First Amendment because "[s]peech may not be banned on the ground that it expresses ideas that offend." *Id.* The Supreme Court encouraged that viewpoint discrimination be considered in a broad sense and even if the provision "prohibits disparagement of all group[s]," it should still be seen as viewpoint discrimination because "[g]iving offense is a viewpoint." *Id.* at 1763. Defendants assert that all attorneys are equally affected by Rule 8.4(g) thus it cannot be viewpoint discrimination, but Justice Kennedy specifically addresses this argument in *Matal*. Justice Kennedy adds, "[t]o prohibit all sides from criticizing their opponents makes a law more viewpoint based, not less so." *Id.* at 1766 (Kennedy, J., concurring) (internal citation omitted).

Similarly, the Amendments state that it is professional misconduct for an attorney to "knowingly engage in [. . .] harassment" that is "intended to denigrate or show hostility or aversion toward a person[.]" Just as the provision in *Matal* prohibited trademarks that disparage, or show contempt or disrepute towards a person, Rule 8.4(g) prohibits the denigration of or hostility or aversion to a person

based on the provided list of categories: race, sex, gender identity or expression, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, or socio-economic status. Defendants have "singled out a subset of message," namely language that knowingly engages in denigration or hostility or aversion of a person, "for disfavor based on the views expressed." *Id.* at 1766 (Kennedy, J. concurring) (internal citation omitted).

Again here, *Saxe* is on point regarding whether Rule 8.4(g) prohibits offensive language. The Third Circuit found that the anti-harassment policy in *Saxe* focused too heavily on the purpose of the speech or conduct and ignored federal harassment law, which imposes liability when harassment has a profound effect on the institution. 240 F.3d at 210. Here, both the definitions of harassment and discrimination begin with the speaker's intentions—intended to intimidate and manifests an intention—thereby extending the regulation "to speech that merely has purpose of" harassing another. *Id.* By focusing on the speaker's intention, the regulation extends to simple offensive acts that are generally insufficient for federal anti-harassment liability. *Id.* at 211.

Defendants insist that the listener's subjective feelings of offense are irrelevant to Rule 8.4(g) but that seems impossible from both the plain language of the regulation and its administrative process. By using the terms "denigrate," "hostility," and "aversion," as well as questioning when an attorney "manifests an intention: to treat a person as inferior," the Amendments prohibit offensive language. The listener, regardless of whether that person is the person targeted by the derogatory remarks, subjectively determines if they are offended enough to file a

complaint. It is nonsensical for Defendants to assert that an individual's perception is irrelevant where the Rule relies on complaints filed by the public and whether an individual perceives another's expression to be welcome or unwelcome is a basic premise of harassment. An individual's perception is exactly what compels them to file a complaint. Then it is the reviewing employee at ODC who determines whether the language is offensive enough to proceed towards discipline. Defendants promise, through the Farrell Declaration, not to consider whether one is offended in investigating complaints. ECF No. 71 at 12. That promise, however, is completely untenable. If the Amendments were tied to judicial proceedings or the representation of a client, then ODC could evaluate more objectively the impact of an attorney's conduct on the proceeding or representation and whether it prevented equal access or the fair administration of justice. But without that sort of tethering, the Rule floats in the sea of whatever the majority finds offensive at the time. The standards for ODC's assessment are, at best, subjective, and, at worst, completely unknown to both Pennsylvania attorneys like Mr. Greenberg and even ODC itself. Mr. Greenberg cites to numerous instances where speakers or panelists at legal conferences and seminars made objectively benign, yet subjectively offensive to some, statements and the uproar against the speaker was significant. Indeed before its promulgation, Rule 8.4(g)'s stated government purposes included to "affirm[ ] that no lawyer is immune from the reach of law and ethics." ECF No. 61 at 23 (quoting 49 Pa.B. 4941). The inclusion of ethics in the public introduction of the Rule is very telling in how the Board imagined the regulation would be implemented and applied. This Court finds no genuine dispute that Rule 8.4(g)

invites disciplinary action on the occasions where listeners are offended and appears to be a thinly veiled effort to police attorneys for having undesirable views and bad thoughts.

"[T]here is also no question that the free speech clause protects a wide variety of speech that listeners may consider deeply offensive, including statements that impugn another's race or national origin or that denigrate religious beliefs." *Saxe*, 240 F.3d at 206 (internal citation omitted). Here, the Court agrees with Mr. Greenberg that Rule 8.4(g) ultimately turns on the perceptions of the public to Plaintiff's speech and then the judgment of the government agents to investigate the incident or administer some form of discipline. Therefore, the Court finds that the Amendments, including Rule 8.4(g) and Comments [3] and [4], constitute viewpoint-based discrimination in violation of the First Amendment.

4. Content-Based Discrimination

Now that the Court has determined that the Amendments constitute viewpoint-based discrimination, there is no need to analyze the Amendments under either strict scrutiny or intermediate scrutiny. The Amendments are unconstitutional under the First Amendment as viewpoint-based discrimination. However, in the alternative, the Court elects to determine whether the Amendments constitute content-based discrimination, which is subject to strict scrutiny analysis.

There is a distinction "between content-based and content-neutral regulations of speech." *NIFLA v. Becerra*, 138 S.Ct. 2361, 2371 (2018). "Content-based laws—those that target speech based on its communicative content—

are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). "Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Id.* Laws are also considered content-based if they were adopted by the government "because of disagreement with the message convey[ed]." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). Such content-based regulations are subject to strict scrutiny. The Supreme Court has a long history of applying strict scrutiny to content-based laws that regulate the noncommercial speech of lawyers. *See e.g.*, *Reed*, 576 U.S. at 2228; *In re Primus*, 436 U.S. 412, 432 (1978); *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 798 (1988).

"Because strict scrutiny applies either when a law is content based on its face or when the purpose and justification for the law are content based, a court must evaluate each question before it concludes that the law is content neutral[.]" *Reed*, 576 U.S. at 166. The Court finds the Amendments are both content based on their face and that the purpose for the law is content based (though the Court need not find both to be content based), requiring the Court to evaluate Rule 8.4(g) under strict scrutiny.

First, the restrictions in Rule 8.4(g) apply to any attorney at any event even tangentially related to the practice of law and thus depend entirely on the communicative content of the attorney's speech. While Defendants espouse admirable views justifying the enactment of Rule 8.4(g), "an innocuous justification cannot transform a facially content-based law into one that is content neutral." *Reed*,

576 U.S. at 166. It is easy to consider, for example, that an ODC official who disliked religious teachings against abortion would investigate a CLE presenter advocating for restrictive abortion laws on those grounds because ODC official perceives that such teachings intend to treat women as inferior based on their sex. Any listener at the CLE presentation could feel targeted by this presentation and thus it is up to ODC to determine if the content of that presentation is discriminatory or not.

At its foundation, Rule 8.4(g) was adopted by the government for the Board to express disapproval with the message an attorney conveys in their speech. Defendants also offer limiting instructions through the Farrell Declaration in an effort to promise that the Rule will not be used in the manner Mr. Greenberg fears. The Court determined already that this promise is not binding on the Board or ODC. *See supra* pp. 193-98. Further, "future government officials may one day wield such statutes to suppress disfavored speech" even if the Defendants in power today do not plan to do so. *Reed*, 576 U.S. at 167, 135 S.Ct. 2218. It is not enough for the Defendants to claim the regulation intends to "insure high professional standards and not to curtail free expression." *NAACP v. Button*, 371 U.S. 415, 439 (1963).

Defendants concerns for the reputation of lawyers focuses the Amendments not on how the attorney's speech affects the practice of law but how it affects the perception of lawyers by the public, which is content-based discrimination. *See e.g.*, *United States v. Playboy Ent. Grp.*, 529 U.S. 803, 811 (2000) ("The overriding justification for the regulation is concern for the effect of the subject matter on [listeners] . . . . This is the essence of content-based

regulation."). Defendants even justify the existence of Rule 8.4(g) for "maintaining the public confidence in legal system's impartiality, and its trust in the legal profession as a whole," making it apparent that public perception is a critical motivation in enacting this regulation. ECF No. 61 at 36.

The Court finds that Rule 8.4(g) regulates speech based on the message a speaker conveys and is, therefore, subject to strict scrutiny. "To survive strict scrutiny analysis, a statute must: (1) serve a compelling governmental interest; (2) be narrowly tailored to achieve that interest; and (3) be the least restrictive means of advancing that interest." *ACLU v. Mukasey*, 534 F.3d 181, 190 (3d Cir. 2008).

i. Compelling Interest

According to Defendants, Pennsylvania has a compelling interest in "eradicating discrimination and harassment, ensuring that the legal profession functions for all participants, maintaining the public confidence in the legal system's impartiality, and its trust in the legal profession as a whole." ECF No. 61 at 36.[24] Rule 8.4(g) was thus created to allow Pennsylvania to regulate the attorneys it licenses to ensure "the efficient and law-based resolution of disputes and guaranteeing that its judicial system is equally accessible to all." *Id.* at 2. Defendants also aim to "protect the integrity and fairness of [Pennsylvania's]

[24] Before its promulgation, Rule 8.4(g)'s stated government purpose was to "promote[ ] the profession's goal of eliminating intentional harassment and discrimination, assure[ ] that the legal profession functions for all participants, and affirm[ ] that no lawyer is immune from the reach of law and ethics." ECF No. 61 at 9 (quoting 49 Pa.B. 4941).

judicial system[.]" *Id.* at 29 (quoting *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1075 (1991)). Defendants go further to state Pennsylvania must protect the reputations of its lawyers by preventing them from engaging in something "deplorable and beneath common decency[.]" ECF No. 61 at 29 (quoting *Fl. Bar v. Went For It*, 515 U.S. 618, 625 (1995) (internal quotations omitted)).

While Defendants justifications are aspirational, they are also largely unfocused. Within one regulation, the Board would like to improve the reputation of all Pennsylvania licensed attorneys, confirm the impartiality of the legal system, promote efficiency in dispute resolution, guarantee equal access to the judicial system, and so on. It is difficult for the Court to credit Defendants for presenting a compelling government interest when they have instead provided amorphous justifications untethered to attorneys or Pennsylvania or any of the contexts listed in the Amendments. There may also be a concern regarding public distrust and unequal access in the medical profession, but surely that is not a compelling reason to regulate doctors to never make offensive statements in a forum tangentially related to the practice of medicine just so public perception of doctors will improve. There is public distrust in large banks but surely that is not a compelling reason to regulate bankers to never make offensive statements. This notion of public distrust used as an anchor for government regulation could conceivably extend to every industry in which the state has licensing authority and serve as an invitation to those regulatory agencies to engage in censoring unfavorable speech, deemed subjectively unworthy of those in their industry. Such broad strokes have a corrosive effect on the ability of the

Constitution to protect individual rights and hold back the of-the-moment popular movements that seek to limit those rights. It is a concerning slippery slope for government to involve itself in the manner and direction of public discourse that cannot be overstated.

The main issue here is that Pennsylvania has espoused this global need to make lawyers better people and improve public confidence in the judicial system without really presenting a compelling interest specifically related to Pennsylvania-licensed attorneys or discrimination and harassment's effect on the practice of law in Pennsylvania. Aside from stating these lofty goals, Defendants provide no evidence whatsoever that harassment and discrimination among attorneys in Pennsylvania is a rampant issue requiring government interference. While the Court does not doubt that such problems exist, Defendants make no attempt to prove that harassment or discrimination is in any way related to public trust in the legal system or efficiency in dispute resolution or access to justice, etcetera. Indeed, the instances of harassment and discrimination that have been cited by the government occurred nationwide and were handled swiftly and with alacrity by the judges managing those cases using the procedural and disciplinary rules already at their disposal. Those judges should be examples for others to follow in managing attorneys and encouraging quick and decisive responses to any kind of abusive, demeaning, or belittling treatment affecting the administration of justice. However, the government cannot make general pronouncements and use those aspirations to restrict free speech without any evidence

that the proposed regulation serves a particular compelling interest.[25]

The Board's regulations are not the type to come under close public scrutiny, particularly here where there was no public process of notice and comment. Such regulations, largely operating without public oversight, advancing into this area of individual rights is something protectors of the Constitution must be mindful of. Ironically here, it is the protectors themselves that have introduced this corrosive catalyst, albeit for a good cause. Yet when protected individual rights are in play, the government's adopting of a good cause with the ends justifying the means is not the test.

In addition, Rule 8.4(g) is remarkably both over-inclusive and under-inclusive in achieving those lofty goals. It is over-inclusive, as this Court has explained on multiple occasions, by reaching beyond the bounds of the administration of justice to any activity in which CLE credits are offered. It strains the Court to figure out how a participant at a bench bar conference showing aversion to a fundamentalist religious advocate would prevent the fundamentalist religious individual from accessing the judicial system because Defendants do not elaborate on how the

[25] Defendants were given ample opportunity to provide examples or data related to their compelling interests both in their briefing and at oral argument and they could not come up with any specific support for Pennsylvania's need being addressed by this Rule. ECF No. 74 at 25-26. Counsel for Defendants stated, "I don't know that [Pennsylvania Supreme Court] need[s] to wait [. . .] we're not going to do anything until we have a specific incident. And I'm not saying there haven't been specific incidents, Your Honor. I mean certainly there's no evidence before the Court in this case of that." *Id.* at 27.

regulation affects the state's purported interests. Yet it is also under-inclusive to achieve many of those extensive interests. Impartiality and efficiency often rely on judges or mediators or arbitrators, who would only be covered under this Rule if they are in fact Pennsylvania-licensed attorneys, though many of those roles do not require an active license to practice law. It is entirely unclear what, if any, impact Rule 8.4(g) would have on the efficiency of the dispute resolution process.

Further, it is not the role of the government to ensure that all lawyers are noble guardians of the profession or well-liked by the public. That is equivalent to requiring that all public school teachers love children or insisting all doctors develop a good bedside manner. Would we prefer that in an ideal world? Sure. But it is not for the government to enact regulations that monitor the type of people who work in a particular profession. Ultimately, Defendants want the Court to blindly accept anti-harassment and anti-discrimination policy as an overwhelming good that is justified in and of itself, and the Court cannot do so without more focus in the state's interests for enacting this particular rule. This nebulous good is insufficient to serve as a compelling interest to restrict freedom of speech and expression.

Even so, for the sake of the government at this procedural stage in summary judgment, the Court will evaluate the rest of the test assuming the government has a compelling interest in regulating attorneys through Rule 8.4(g).

ii. Narrowly Tailored

As discussed at length throughout this opinion, the Amendments are not narrowly tailored.[26] Defendants assert that the Amendments are narrowly tailored because they only apply to activities that are required to practice law, but the Court disagrees with this conclusion. ECF No. 61 at 36-37. The regulation must be narrowly tailored to the compelling interest stated by the government. However, Rule 8.4(g) permits the government to restrict speech outside of the courtroom, outside of the context of a pending case, and outside of the administration of justice. The government does not provide any indication or evidence that individuals are being harassed, discriminated against, or excluded specifically at events offering CLE credits. Defendants never make the contention that there is a problem in Pennsylvania where attorneys in the listed protected categories are unable to access bench bar conferences or bar association activities due to attorney misconduct of this nature. Defendants do not provide a single example of a panelist at a CLE seminar harassing or discriminating against an individual in a manner that impeded that individual's ability to maintain good

[26] Even under intermediate scrutiny, the Amendments would not survive as they are not "narrowly tailored to serve a significant governmental interest" for much of the same reasons. *Barr v. Am. Ass'n of Political Consultants, Inc.*, 140 S.Ct. 2335, 2356 (2020) (Sotomayor, J. concurring) (internal citation omitted). Defendants have failed to prove that Rule 8.4(g) does not "burden substantially more speech than necessary." *Turco v. City of Englewood*, 935 F.3d 155, 162 (3d Cir. 2019). Defendants have also failed to show that "more targeted tools" for achieving their compelling interest were "seriously considered" in the process of creating Rule 8.4(g). *Drummond v. Robinson Twp.*, 9 F.4th 217, 232 (3d Cir. 2021). Thus, for many of the same reasons why Rule 8.4(g) is nor narrowly tailored in a strict scrutiny analysis, the regulation also does not pass intermediate scrutiny.

standing as an attorney or otherwise participate in the practice of law. These examples, or lack thereof, illustrate how broadly Rule 8.4(g) applies in response to the government's provided compelling interest, which generically emphasizes the need for judicial integrity and fair and equal administration of justice.

While Pennsylvania should be commended for its attempts to eradicate harassment and discrimination in the practice of law, the broad-reaching and generic interests justifying Rule 8.4(g) do not comport with the actual applications of the Amendments. Even the compelling interest identified by Defendants, to eliminate harassment and discrimination in the judicial system, is rooted in either judicial proceedings or representation of a client, which is much more limited than the overarching scope of Rule 8.4(g). Defendants themselves refer to attorneys as "officer[s] of the court" who must "conduct themselves in a manner compatible with the role of courts in the administration of justice." ECF No. 61 at 29 (quoting *In re Snyder*, 472 U.S. 634, 644-45 (1985)). Yet they propose Amendments that reach well beyond the scope of the administration of justice or anything remotely involving the courts.

Defendants themselves cite to cases limited in scope to judicial proceedings or representation of a client. Defendants assert "[m]any courts have spoken to the corrosive and negative effect that discrimination and harassment cause to the legal system" and list cases well within the acceptable scope of attorney regulation. ECF No. 61 at 7 n.3. In *Principe v. Assay Partners*, an attorney was sanctioned for making abusive and offensive comments *during a deposition.* 586 N.Y.S.2d 182, 185 (N.Y. Sup. Ct. 1992)

(emphasis added). Again, in *Cruz-Aponte v. Caribbean Petroleum Corp.*, a female attorney sought sanctions against a male opposing counsel for joking that she had menopause *during a deposition.* 123 F. Supp. 3d 276, 280 (D.P.R. 2015) (emphasis added). Defendants also cite to two state court cases where an attorney was punished for using race to either imply a person of color was dangerous or to exclude that person from participating in a legal proceeding—both involved race-based comments made in petitions filed in court. *See In re Charges of Unprofessional Conduct*, 597 N.W.2d 563, 568 (Minn. 1999); *see also In re Thomsen*, 837 N.E.2d 1011, 1012 (Ind. 2005). With the abundance of case law cited by Defendants involving attorney discipline during legal proceedings, it is incredible for the Court to be expected to find these as persuasive examples to prove that Rule 8.4(g)'s much broader scope is narrowly tailored to serve the government's interest.

iii. Least Restrictive Means of Advancing the Interest

The Court employs similar reasoning for why there exists no genuine dispute that the Amendments are not the least restrictive means of advancing the government's interest. There is no doubt that the government is acting with admirable intentions to root out bias in practicing attorneys. But that lofty goal has enabled the government to create a rule that promotes a government-favored method of controlling disfavored speech and is so broad as to be able to police attorneys whenever the government deems their speech to be offensive. Constitutional limitations on government regulation were created for this exact purpose, to protect an individual's right to speak

freely, even when that individual expresses ideas or statements that society detests.

Plaintiff points out numerous examples of other regulations focused on attorneys that prove that Rule 8.4(g) has not been drafted in the least restrictive means of advancing the government's interest in maintaining equal access to and the fair administration of justice. *See e.g.*, Code. Jud. Cond. 2.3(C) (tasking judges with "requir[ing] lawyers in proceedings before the court to refrain from manifesting bias or prejudice, or engaging in harassment"); 204 Pa. Code § 99.3(7) (exhorting attorneys to, among other things, "refrain from acting upon or manifesting racial, gender or other bias or prejudice toward any participant in the legal process."); Pa.R.P.C. 4.4(a) (prohibiting lawyers "in representing a client" from mistreating third parties or violating their legal rights); Pa.R.P.C. 8.4(d) (proscribing conduct prejudicial to the administration of justice); ECF No. 65-1 at 28.

Tellingly, Plaintiff highlights an existing Pennsylvania Rule of Professional Conduct, which already prohibits conduct prejudicial to the administration of justice, and harassment and discrimination in legal proceedings are both sanctionable under the current rule. ECF No. 70 at 25; Pa. R.P.C. 8.4(d). That would seem to encompass the least restrictive means of advancing the government interest of preventing harassment and discrimination in the practice of law. Defendants would need to adequately argue that there is a compelling need not being addressed by the current rules, necessitating regulation of attorney speech outside of the administration of justice, and that Rule 8.4(g) is the least restrictive method of addressing

that need. The Court does not find such assertions anywhere in Defendants' arguments.

For all these reasons, the Court finds that Rule 8.4(g) does not pass the strict scrutiny test for constitutionality.

5. Overbroad

While the Court's determination that the Amendments constitute content-based and viewpoint-based discrimination in violation of the First Amendment could end the discussion, the Court is concerned with the Defendants' potential to partially modify and attempt to re-implement the regulation as it did with Old Rule 8.4(g). Since Rule 8.4(g) presents the Court with significant concerns regarding the overreach of state authority on speech that happens to be expressed by professionals, the Court will also undertake an analysis of whether the Amendments are facially overbroad.

"The First Amendment overbreadth doctrine states that: A regulation of speech may be struck down on its face if its prohibitions are sufficiently overbroad—that is, if it reaches too much expression that is protected by the Constitution. [A] policy can be found unconstitutionally overbroad if there is a likelihood that the statute's very existence will inhibit free expression to a substantial extent." *McCauley v. Univ. of the Virgin Islands*, 618 F.3d 232, 241 (3d Cir. 2010) (quoting *Sypniewski v. Warren Hills Reg'l Bd. of Educ.*, 307 F.3d 243, 258 (3d Cir. 2002)) (internal quotation marks omitted); *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 214 (3d Cir. 2001) ("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.") (internal citation and quotation marks omitted). "To render a law unconstitutional, the overbreadth must be 'not only real but substantial in relation to the statute's plainly legitimate sweep.'" *Saxe*, 240 F.3d at 214 (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973)).

The Court indeed recognizes that the "overbreadth doctrine is not casually employed." *Los Angeles Police Dep't v. United Reporting Publ'g Corp.*, 528 U.S. 32, 39 (1999). In addition, the Court must consider whether the Amendments are amenable to a reasonable limiting construction. "[T]he elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." *Stretton v. Disciplinary Bd. of the Supreme Court of Pennsylvania*, 944 F.2d 137, 144 (3d Cir. 1991) (internal citations omitted); *Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 494 n. 4 (1982) ("In evaluating a facial challenge to a state law, a federal court must, of course, consider any limiting construction."). Here, the Court agrees with Plaintiff that the Amendments extend far beyond situations that would necessarily affect the administration of justice and that the targeting requirement does not remedy the prohibitions on protected speech. The Defendants' proffered limitations on the enforcement of Rule 8.4(g) do not prevent the overbreadth of its construction.

First, the Amendments are allegedly confined to harassment or discrimination that prevents the administration of justice. Yet the plain language of the regulation applies to any speech that is intended to or manifests an intention to behave in a laundry list of offensive ways. These phrases necessarily require an inquiry into the motivation

of the speaker. *DeJohn v. Temple Univ.*, 537 F.3d 301, 318 (3d Cir. 2008). The Court finds no provision in the plain language of the Amendments that limits the regulation only to speech that actually causes disruption to the administration of justice. *Id.* at 319. Instead, it covers speech where an attorney intends to or manifests an intention to harass or discriminate even without any impact on the administration of justice or access to the judicial system.

In addition, the protected categories include marital status or socioeconomic status; categories not often included in federal anti-harassment or anti-discrimination laws of this type. This means an attorney could show aversion to their colleagues' marriage at a bench bar conference or a partner could exclude a single associate from an invitation for couples to participate in a bar association activity and, incredibly, Rule 8.4(g) would allow for discipline against those attorneys. Even more ridiculous, an attorney showing aversion to another person wearing cheap suits or worn-out shoes at a bench bar conference could be subject to discipline by the Board under Rule 8.4(g). The scope here is quite broad and could easily prohibit speech that is, at best, tangentially related to the administration of justice and, at worse, completely irrelevant to it.

Second, the Amendments do not contain reasonable contextual limitations. Rule 8.4(g) applies to "participation in judicial boards, conferences, or committees; continuing legal education seminars; bench bar conferences; and bar association activities where legal credits are offered." Pa. R.P.C. 8.4 cmt. 3. While Defendants believe that anything where CLE credits are offered are related to the administration of justice and practice of law because CLE credits are required to be an attorney of good standing in

Pennsylvania, this justification strains credulity. Permitting the Board to hold panelists and audience members alike accountable under Rule 8.4(g) at any event that offers CLE credits would greatly inhibit freedom of expression. That means an audience member at a conference or seminar where legal credits are offered can face discipline under Rule 8.4(g) for making statements towards a person under an extensive number of categories. While these comments may be denigrating, deplorable and offensive, such statements made outside of the workplace and outside of the administration of justice are protected speech.[27]

Even narrowly read to apply only to an attorney specifically targeting a person in a flagrant manner, the Amendments still prohibit a substantial amount of protected speech. Defendants do not describe with certainty to the Court how this targeting requirement operates except that the speech must be directed towards a person, per the language of the Amendments. There is some direction provided by the ABA on what is considered targeting under the ABA Model Rule 8.4(g). In a hypothetical situation where a partner at a firm remarks in a meeting to "never trust a Muslim lawyer" and "never represent a Muslim client[,]" the ABA would find that Model Rule 8.4(g) applies even if the associate hearing those remarks was not Muslim because the offense is "targeted towards someone who falls within a protected category." ABA Comm. on Ethics & Pro. Resp., Formal Op. 493 (2020). That guidance from the ABA does not solve the problem of overbreadth. Thus, the targeting requirement does not remedy the

[27] Comments made in the work environment certainly form a foundation for office discipline and a federal employment action.

overbreadth issue wherein Rule 8.4(g) applies outside the context of legal representation or proceedings.

Finally, considering limiting constructions offered by ODC does not solve the problem of overbreadth. ODC may promise not to enforce Rule 8.4(g) in the way its plain language suggests, yet the investigatory process itself has a chilling effect on Mr. Greenberg's speech and will cause him, and likely other attorneys, to self-censor. There is no dispute that each complaint ODC receives triggers an investigatory process and that ODC may contact an attorney during that investigation. ECF No. 53 ¶ 28; ECF No. 70 at 13. Even if ODC promises not to enforce the Rule against attorneys in situations like Mr. Greenberg's, there are still First Amendment concerns regarding the initial complaint and investigation process that ODC's promises do not resolve. Therefore, even after considering a limiting construction, the Amendments still prohibit a substantial amount of protected speech and are unconstitutionally overbroad.

C. *Fourteenth Amendment Void-for-Vagueness*

Plaintiff's Motion for Summary Judgment

In their Motion for Summary Judgment, Plaintiff claims certain terminology in the Amendments should be void for vagueness under the Fourteenth Amendment because there is insufficient fair notice and guidance as to what the regulation prohibits. ECF No. 65-1 at 27, 30-31. Plaintiff contends that if a rule either fails to provide fair notice to "people of ordinary intelligence" or "authorizes or even encourages arbitrary and discriminatory enforcement," it is void for vagueness. ECF No. 65-1 at 30-31 (citing

United States v. Stevens, 533 F.3d 218, 249 (3d Cir. 2008); *FCC v. Fox TV Stations, Inc.*, 567 U.S. 239, 253 (2012); *Gentile v. State Bar Nev.*, 501 U.S. 1030, 1051 (1991)).

Specifically looking at the Amendments, Plaintiff contends that nothing in the "sea of case law, statutes, regulations and other provisions that utilize [the terms 'harassment' and 'discrimination']" uses that terminology in a way that is remotely similar to Comments [4] and [5] to Rule 8.4(g). ECF No. 65-1 at 27 (citing Pa.R.P.C. 8.4(g) cmts. 4, 5). In addition, Plaintiff points out differences in the definition of harassment in the Amendments and Pennsylvania's criminal code. In the criminal code, the law prohibits the offense of "harassment" but, unlike in Rule 8.4(g), the criminal code delineates specific acts that constitute the offense. *Id.* at 26; 18 Pa. C. S. § 2709. Plaintiff adds that the criminal statute requires repeated communications before it applies to expression. ECF No. 65-1 at 27. By contrast, Rule 8.4(g) does not require repetition or severity, and, on its face, it arrests core protected speech. *Id.*

Plaintiff identifies two phrases that are too vague to satisfy the Fourteenth Amendment. First, Rule 8.4(g)'s "conduct that is intended to intimidate, denigrate, or show hostility or aversion" standard is vague. *Id.* at 31. Plaintiff likens this rule prohibiting denigrating or hostility or aversion to the "hopelessly ambiguous and subjective" ban on "offensive" signs in *McCauley. Id.* (citing *McCauley*, 618 F.3d at 250; *Dambrot, v. Cent. Michigan Univ.*, 55 F.3d 1177, 1184 (6th Cir. 1995) (policy unconstitutionally vague where it turned on the "subjective reference" whether speech was "negative" or "offensive"); *Monroe v. Houston Indep. Sch. Dist.*, 419 F. Supp. 3d 1000, 1008 (S.D. Tex.

2019) (restriction on "name-calling" and "offensive or derogatory remarks" is unconstitutionally vague)).

Second, Rule 8.4(g)'s "conduct" that "manifests an intention" "to treat a person as inferior" or "to disregard relevant considerations of individual characteristics or merit" standard is vague. *Id.* In the Amendments, discrimination is defined to include manifestations of an intent to treat a person as "inferior" or an intent "to disregard relevant considerations of individual characteristics or merit." *Id.* Plaintiff interprets this definition as vague "free floating intentions to treat someone as 'inferior' and free-floating intentions to 'disregard relevant considerations of individual characteristics or merit.'" *Id.* Plaintiff contends that what constitutes "inferior" treatment or "relevant considerations" is so imprecise that their application to an attorney will necessarily be left to those enforcing the rule. *Id.* Plaintiff is concerned that "arbitrary and discriminatory enforcement 'is a real possibility' because inferiority and relevant considerations are 'both classic terms of degree.'" *Id.* (quoting *Gentile*, 501 U.S. at 1048-49, 1051). Plaintiffs further assert that terms of degree "vest[ ] virtually complete discretion in the hands of the [enforcement official]." *Id.* (quoting *Kolender v. Lawson*, 461 U.S. 352, 358 (1983)). For all these reasons, Plaintiff urges the Court to find the Amendments unconstitutionally vague under the Fourteenth Amendment.

In Defendants Response in Opposition to Plaintiff's Motion for Summary Judgment, Defendants contend that the Amendments use familiar, well-known terms that an objective attorney would understand and thus provide fair warning of prohibited conduct. ECF No. 71 at 18. These terms meet the standard that "the ordinary person

exercising ordinary common sense can sufficiently understand and comply with[.]" *Id.* at 19 (quoting *San Filippo v. Bongiovanni*, 961 F.2d 1125, 1136 (3d Cir. 1992); *In re Snyder*, 472 U.S. at 645 ("case law, applicable court rules, and 'the lore of the profession,' as embodied in codes of professional conduct[,]" guide attorneys)).

First, Defendants refute Plaintiff's claim that "conduct that is intended to intimidate, denigrate, or show hostility or aversion" is vague. *Id.* Defendants instruct the Court that "perfect clarity and precise guidance have never been required[.]" *Id.* (quoting *Ward Ward v. Rock Against Racism*, 491 U.S. 781, 794 (1989)). And that the Amendments must be read as a whole, not as terms out of context. *Id.* at 20 (citing *Shell Oil Co. v. Iowa Dep't of Revenue*, 488 U.S. 19, 25 (1988) (stating that the meaning of words depends on their statutory context). Since harassment is a familiar term, the other terms must be taken in the context of an objective attorney's knowledge of what constitutes harassment).

Second, Defendants refute Plaintiff's claim that the definition of discrimination in the Amendments is vague. *Id.* at 21. Defendants reiterate that advocating for ideas or expressing opinions does not fall within the Amendments. *Id.* at 22. Defendants ask the Court not to consider speculation about possible vagueness in hypothetical situations, which cannot support a facial challenge to the Amendments. *Id.* (citing *Hill v. Colorado*, 530 U.S. 703, 733 (2000)).

Defendants' Motion for Summary Judgment

In their Motion for Summary Judgment, Defendants contend that this Court must decide if they are "set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest." ECF No. 61 at 41 (citing *San Filippo*, 961 F.2d at 1136).[28] Defendants also claim that imprecision should be tolerated under these circumstances because no criminal punishment can be applied under the regulation. *Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 497 (1982); ECF No. 61 at 41. Further, Defendants assert that "harassment" and "discrimination" are well-known terms to attorneys. ECF No. 61 at 43. Finally, Defendants conclude that the Amendments provide sufficient notice to attorneys, and that they also guide ODC in deciding whether to enforce the Amendments, thereby ensuring that ODC is aware of the Amendments' boundaries. ECF No. 61 at 44.

Plaintiff responds by reiterating the ways in which Rule 8.4(g) is unduly vague as outlined in Plaintiff's Motion for Summary Judgment, particularly the definitions of harassment and discrimination. ECF No. 70 at 29. In contrast to Defendants' suggested tolerance of imprecision, Plaintiff contends that any law that interferes with the right of free speech should be evaluated under a "more stringent vagueness test." ECF No. 70 at 30 (quoting *Hoffman Estates*, 455 U.S. at 499).

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[28] Defendants list a number of cases supporting the same premise. *See, e.g.*, *Villeneuve v. Connecticut*, 2010 WL 4976001, at *3 (D. Conn. Dec. 2, 2010) (provisions addressing conduct involving "dishonesty, fraud, deceit or misrepresentation," and conduct "prejudicial to the administration of justice" not vague); *Howell*, 843 F.2d at 206 ("prejudicial to the administration of justice" not vague).

Discussion

The Fourteenth Amendment's Due Process clause allows courts to find regulations unconstitutional due to vagueness. *See J.S. v. Blue Mt. Sch. Dist.*, 650 F.3d 915, 935 (3d Cir. 2011); *see also Marshall v. Amuso*, 571 F.Supp.3d 412, 422-24 (E.D. Pa. 2021). The Supreme Court has explained that the "void for vagueness doctrine [is] applicable to civil as well as criminal actions." *Mateo v. Att'y Gen. U.S.*, 870 F.3d 228, 232 (3d Cir. 2017) (quoting *Boutilier v. INS*, 387 U.S. 118, 123 (1967)). However, Defendants are correct that civil rules need not be as precise as criminal statutes. *Borden v. Sch. Dist. of Twp. of E. Brunswick*, 523 F.3d 153, 167 (3d Cir. 2008). A facial challenge to vagueness will be upheld if "the enactment is impermissibly vague in all of its applications." *Hoffman Estates*, 455 U.S. at 495. "If, for example, the law interferes with the right of free speech or of association, a more stringent vagueness test should apply." *Id.* at 499. "When speech is involved, rigorous adherence to those requirements is necessary to ensure that ambiguity does not chill protected speech." *F.C.C. v. Fox Television Stations, Inc.*, 567 U.S. 239, 253-54 (2012).

There are two concerns related to vague laws: (1) fair notice and (2) arbitrary enforcement. First, the Court must ensure that those affected, i.e., Pennsylvania attorneys, are provided "fair warning of prohibited conduct" under Rule 8.4(g). *San Filippo*, 961 F.2d at 1135 (internal citation omitted). "Thus, a statute is unconstitutionally vague when [persons] of common intelligence must necessarily guess at its meaning." *Borden*, 523 F.3d at 167

(internal citations and quotation marks omitted). The ABA noted in its Formal Opinion 493 regarding Model Rule 8.4(g) that an important constitutional principle that guides and constrains its application is "an ethical duty that can result in discipline must be sufficiently clear to give notice of the conduct that is required or forbidden." ABA Comm. on Ethics & Pro. Resp., Formal Op. 493 (2020). The Court finds that the Amendments fail on both counts—they do not provide fair notice of the prohibited conduct to Pennsylvania attorneys, and they invite imprecise enforcement from ODC and the Board.

On the first ground for vagueness, the Amendments include made-up definitions that do not comport with the definitions of similar terms in similar contexts.[29] That is to say—ODC makes up its own definitions for the purpose of this rule alone. Starting with harassment, Comment Four to Rule 8.4(g) defines it broadly as "conduct that is intended to intimidate, denigrate or show hostility or aversion toward a person on any of the bases listed in paragraph (g)." Pa.R.P.C. 8.4(g) cmt. 4. This definition is unlike other definitions of harassment in similar contexts. For example, the Pennsylvania criminal statute defines

[29] Aside from the definitions crafted for the purpose of this regulation, the ABA confirmed that its Model Rule 8.4(g) was fashioned to capture incidents that federal law normally does not find objectively hostile or abusive enough to include. For example, Model Rule 8.4(g) was in fact designed to capture isolated circumstances not severe or pervasive enough to create a hostile environment or cause liability under Title VII of the Civil Rights Act of 1964. Pennsylvania's Rule 8.4(g) suffers from the same design wherein incidents that would normally be insufficient to cause liability under federal law may be subject to discipline under this regulation. ABA Comm. on Ethics & Pro. Resp., Formal Op. 493 (2020).

harassment with very specific conduct, including kicking, stalking, or severe communications, including threatening or lewd communications to or about such other person, and repeated communications in an anonymous manner or at extremely inconvenient hours. 18 Pa.C.S. § 2709(a). That criminal statute "specifically defines and limits the offense of harassment in a manner to protect free speech." *Haagensen v. Pa. State Police*, 2009 WL 3834007, at *9 (W.D. Pa. Oct. 22, 2009), *aff'd*, 490 F. App'x 447 (3d Cir. 2012). The Amendments' definition of harassment bears little to no similarity to the criminal statute's definition. While an ordinary attorney may understand the general notion of harassment, it is entirely unclear from the novel definition created by ODC what the scope of this regulation would be and whether there is any limitation based on repetition or severity or other factors. The ABA Formal Opinion 493 on their Model Rule 8.4(g) states that "it is not restricted to conduct that is severe or pervasive[,]" unlike the criminal statute. ABA Comm. on Ethics & Pro. Resp., Formal Op. 493 (2020). The terms "denigrate," and "aversion" also leave the Court wondering what an attorney would consider as violating behavior or expression. What may be considered denigrating or showing aversion likely varies from speaker to speaker, and listener to listener. While Comment Four does list a few broad examples of sexual harassment under the Rule, there are no examples given of what constitutes other types of harassment within this definition.

The definition of discrimination provided in Comment Five is hardly an improvement. It is unclear to the Court how an attorney "manifests an intention" or "disregard[s] relevant characteristics" in violation of this Rule. The

Amendments offer no clarification as to what those relevant characteristics may be and that prevents ordinary attorneys from understanding what they must take into account in order to avoid any manifestation of discrimination. Both definitions, critical to the application of Rule 8.4(g) to attorneys, are unfamiliar and untenable. Since there is a significant risk that Rule 8.4(g) will inhibit free speech, its boundaries must be well-defined, yet there is minimal, if any, connection to the substantive law of discrimination and harassment statutes. There is additional reason to consider the "reputational injury" that may occur if an attorney is accused of discrimination or harassment under Rule 8.4(g), which the Court takes seriously when considering if fair notice is provided. *F.C.C.*, 567 U.S. at 255 (finding the standards unconstitutionally vague). An investigation into an attorney's alleged discrimination or harassment could inhibit their ability to obtain clients, retain employment, be admitted in other jurisdictions, and the list goes on of potential reputational harm that this attorney could incur. While the Court takes any harassment or discrimination in the practice of law seriously, this does not excuse the Board from drafting such regulations that provide attorneys with fair notice.

Second, Supreme Court Justice Thomas explained in a concurring opinion that the Supreme Court has "become accustomed to using the Due Process Clauses to invalidate laws on the ground of 'vagueness,'" because the vagueness doctrine "is quite sweeping" when a regulation "'authorizes or even encourages arbitrary and discriminatory enforcement.'" *Johnson v. United States*, 576 U.S. 591 (2015) (Thomas, J., concurring in judgment) (quoting *Hill v. Colorado*, 530 U.S. 703, 732 (2000)). There is no genuine

dispute that the Amendments as written invite arbitrary or discriminatory enforcement of Rule 8.4(g). The Court need not find that arbitrary enforcement will necessarily occur, "but whether the Rule is so imprecise that discriminatory enforcement is a real possibility." *Gentile*, 501 U.S. at 1051.

In the plain language of the Amendments, harassment is defined as "conduct that is intended to intimidate, denigrate, or show hostility or aversion" and by using the terms "denigrate" or "aversion," among others, the Board is encouraging subjective interpretation and enforcement. What is considered to denigrate a person will necessarily vary depending on the member of ODC reviewing the complaint.[30] *See e.g.*, *McCauley v. Univ. of the Virgin Islands*, 618 F.3d 232, 250 (3d Cir. 2010) (finding the ban on offensive signs "hopelessly ambiguous and subjective"); *Dambrot, v. Cent. Michigan Univ.*, 55 F.3d 1177, 1184 (6th Cir. 1995) (holding policy unconstitutionally vague where it turned on the "subjective reference" whether speech was "negative" or "offensive"). The definition of discrimination has similarly vague terms to require the attorney "manifest an intention" and "to disregard relevant considerations of individual characteristics or merit," which will give ODC complete discretion to determine whether an attorney has manifested anything under the regulation or to

[30] During oral argument, counsel for Defendants himself seemed unclear on the scope of the Amendments. He stated, "you could technically under the rule you could harass somebody without using offensive language. [. . .] it's vexing annoying conduct, you know, that doesn't [sic] necessarily offensive but maybe, you know, if it's repeated to the person could be something that could constitute harassment[.]" ECF No. 74 at 12 ¶¶ 21-25.

determine what relevant characteristics should have been considered.

Furthermore, the Supreme Court has recognized that "the more important aspect of vagueness doctrine is not actual notice, but the other principal element of the doctrine—the requirement that a legislature establish minimal guidelines to govern law enforcement." *Kolender v. Lawson*, 461 U.S. 352, 358 (1983).[31] While the context in *Kolender* was a criminal statute, the Court agrees that there must be some guidance to ensure consistent application of the regulation, even in the civil context. Plaintiff is correct in pointing out that Defendants' discovery responses highlight the likely imprecision in choosing in which cases and what manner discipline will be applied under Rule 8.4(g). ECF No. 70 at 29; Farrell Interrog. Answers ¶¶ 2-6 (answering that ODC has never promulgated internal written policy guidance or training for 8.4(g), that the only verbal guidance or training was an instruction to report up any complaints alleging a violation of 8.4(g), and the only external policy guidance was a brief monthly newsletter in July 2020 describing Old 8.4(g)). The policy must be guided by "objective, workable standards" to prevent ODC from subjectively determining "what counts" as a violation. *Marshall v. Amuso*, 571 F.Supp.3d 412, 424 (E.D. Pa. 2021) (quoting *Minnesota Voters All. v.*

[31] The Third Circuit has recognized that the "need for specificity is especially important where, as here, the regulation at issue is a content-based regulation of speech. The vagueness of such a regulation raises special First Amendment concerns because of its obvious chilling effect on free speech." *Sypniewski v. Warren Hills Reg'l Bd. of Educ.*, 307 F.3d 243, 266 (3d Cir. 2002) (internal citation and quotation marks omitted).

Mansky, 138 S.Ct. 1876, 1891 (2018)). When asked outright during oral argument what the objective reasonable standard is in determining misconduct under Rule 8.4(g), counsel for Defendants stated that "it would be the plain meaning of the words [. . .] as set forth in the comments to the rule[.]" ECF No. 74 at 22 ¶ 19-21. The Court finds there is insufficient guidance to implement Rule 8.4(g) in a precise, consistent manner. Therefore, the Amendments are void-for-vagueness under the Fourteenth Amendment.

IV. CONCLUSION

In conclusion, the Court finds that Rule 8.4(g) is an unconstitutional infringement of free speech according to the protections provided by the First Amendment. The Court also finds that Rule 8.4(g) is unconstitutionally vague under the Fourteenth Amendment. Therefore, the Court grants Plaintiff's Motion for Summary Judgement and denies Defendants' Motion for Summary Judgment.

BY THE COURT:

/s/ Chad F. Kenney

CHAD F. KENNEY, JUDGE

Appendix D

**IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA**

ZACHARY GREENBERG, ***Plaintiff,*** **v.** **JAMES C. HAGGERTY,** *in his official capacity as Board Chair of The Disciplinary Board of the Supreme Court of Pennsylvania*, **et al.,** ***Defendants.***	**CIVIL ACTION** **No. 20-03822**

MEMORANDUM

This case concerns the constitutionality of the amendments to Pennsylvania Rule of Professional Conduct 8.4, which were approved by the Supreme Court of

Pennsylvania[1] and are set to take effect on December 8, 2020. The amendments added paragraph (g) to Rule 8.4 along with two new comments, (3) and (4). Plaintiff, Zachary Greenberg, Esquire, a Pennsylvania attorney who gives presentations on a variety of controversial legal issues, brings this pre-enforcement challenge alleging that these amendments violate the First Amendment because they are unconstitutionally vague, overbroad, and consist of viewpoint-based and content-based discrimination.

Before the Court are Defendants' Motion to Dismiss Plaintiff's Complaint (ECF No. 15) and Plaintiff's Motion for Preliminary Injunction (ECF No. 16).

A. BACKGROUND

Plaintiff Zachary Greenberg graduated from law school in 2016 and was admitted to the Pennsylvania Bar in May 2019. ECF No. 1 at ¶ 10, 11; ECF No. 21 at ¶¶ 2-4.[2] Plaintiff currently works as a Program Officer at the Foundation for Individual Rights in Education. ECF No. 1 at ¶ 13; ECF No. 21 at ¶ 6. In this position, Plaintiff speaks and writes on a number of topics, including freedom of speech, freedom of association, due process, legal equality, and religious liberty. ECF No. 1 at ¶ 14; ECF No. 21 at ¶ 7. Plaintiff is also a member of the First Amendment Lawyers

[1] Justice Mundy dissented.

[2] The facts included here were alleged in the Complaint (ECF No. 1) and also stipulated in the Stipulated List of Facts for Purposes of Preliminary Injunction Motion (ECF No. 21). Although the Court considered all allegations in the Complaint for purposes of Defendants' Motion to Dismiss and all stipulated facts for purposes of Plaintiff's Motion for Preliminary Injunction, the Court found these facts pertinent to its analysis and conclusion.

Association, which regularly conducts continuing legal education ("CLE") events for its members. ECF No. 1 at ¶ 15; ECF No. 21 at ¶¶ 8-9. As a part of his association with the Foundation for Individual Rights in Education and the First Amendment Lawyers Association, Plaintiff speaks at a number of CLE and non-CLE events on a variety of controversial issues. ECF No. 1 at ¶ 16-19; ECF No. 21 at ¶ 10. Specifically, Plaintiff has written and spoken against banning hate speech on university campuses and university regulation of hateful online expression as protected by the First Amendment. ECF No. 1 at ¶¶ 19-20; ECF No. 21 at ¶¶ 14-15.

In 2016, the Disciplinary Board of the Supreme Court of Pennsylvania considered adopting a version of the American Bar Association Model Rule of Professional Conduct 8.4(g) in Pennsylvania. ECF No. 1 at ¶¶ 38-39; ECF No. 21 at ¶ 56. After an iterative process of notice and comment between December 2016 and June 2020, the Supreme Court of Pennsylvania approved the recommendation of the Board[3] and ordered that Pennsylvania Rule of Professional Conduct ("Pa.R.P.C.") 8.4 be amended to include the new Rule 8.4(g) (the "Rule") along with two new comments, (3) and (4), (together, the "Amendments"). ECF No. 1 at ¶ 40; ECF No. 21 at ¶ 61.

The Amendments state:

> It is professional misconduct for a lawyer to:
> * * *

[3] Justice Mundy dissented. ECF No. 1 at ¶ 40.

(g) in the practice of law, by words or conduct, 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.

Comment:

* * *

[3] For the purposes of paragraph (g), conduct in the practice of law includes participation in activities that are required for a lawyer to practice law, including but not limited to continuing legal education seminars, bench bar conferences and bar association activities where legal education credits are offered.

[4] The substantive law of antidiscrimination and anti-harassment statutes and case law guide application of paragraph (g) and clarify the scope of the prohibited conduct.

ECF No. 1 at ¶ 40 (quoting Pa.R.P.C. 8.4); ECF No. 21 at ¶¶ 62-64 (quoting Pa.R.P.C. 8.4).

The Amendments take effect on December 8, 2020. ECF No. 1 at ¶ 41; ECF No. 21 at ¶ 61.

In terms of enforcement, the Office of Disciplinary Counsel ("ODC") is charged with investigating complaints against Pennsylvania-licensed attorneys for violation of the Pennsylvania Rules of Professional Conduct and, if necessary, charging and prosecuting attorneys under the Pennsylvania Rules of Disciplinary Enforcement. ECF No. 1 at ¶ 45; ECF No. 21 at ¶ 32. First, a complaint is submitted to the ODC alleging an attorney violated the Pennsylvania Rules of Professional Conduct. ECF No. 1 at ¶¶ 46-47; ECF No. 21 at ¶ 36. The ODC then conducts an investigation into the complaint and decides whether to issue a DB-7 letter. ECF No. 1 at ¶¶ 51-52; ECF No. 21 at ¶¶ 36-38. If the ODC issues a DB-7 letter, the attorney has thirty days to respond to that letter. *Id.* If, after investigation and a DB-7 letter response, the ODC determines that a form of discipline is appropriate, the ODC recommends either private discipline, public reprimand, or the filing of a petition for discipline to the Board. ECF No. 1 at ¶¶ 55-57; ECF No. 21 at ¶¶ 44-45. After further rounds of review and recommendation, along with additional steps, the case may proceed to a hearing before a hearing committee and de novo review by the Disciplinary Board and the Supreme Court of Pennsylvania. ECF No. 1 at ¶¶ 54-59; ECF No. 21 at ¶¶ 46-50.[4]

[4] The Complaint (ECF No. 1) and the Stipulated List of Facts for Purposes of Preliminary Injunction Motion (ECF No. 21) contain

Plaintiff filed a complaint in this Court alleging the Amendments consist of content-based and viewpoint-based discrimination and are overbroad in violation of the First Amendment (Count 1) and the Amendments are unconstitutionally vague in violation of the Fourteenth Amendment (Count 2). ECF No. 1.[5] Defendants filed a Motion to Dismiss (ECF No. 15), and Plaintiff filed a response in opposition (ECF No. 25). Plaintiff filed a Motion for Preliminary Injunction (ECF No. 16), and Defendants filed a response in opposition (ECF No. 24). The Court held oral argument on November 13, 2020, addressing both Defendants' Motion to Dismiss and Plaintiff's Motion for Preliminary Injunction. ECF No. 26.

B. STANDARD OF REVIEW

Before the Court are Defendants' Motion to Dismiss the Complaint (ECF No. 15) and Plaintiff's Motion for Preliminary Injunction (ECF No. 16).

I. Standard of Review for Motion to Dismiss

When reviewing a motion to dismiss, the Court "accept[s] as true all allegations in plaintiff's complaint as well as all reasonable inferences that can be drawn from

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different information regarding the process for a disciplinary action, but the discrepant facts are irrelevant to the Court's analysis of both Defendants' Motion to Dismiss and Plaintiff's Motion for Preliminary Injunction.

[5] All Defendants are sued in their official capacities only. ECF No. 1 at 3. "State officers sued for damages in their official capacity are not 'persons' for purposes of the suit because they assume the identity of the government that employs them." *Hafer v. Melo*, 502 U.S. 21, 27 (1991). In this case, Defendants are members of either the Disciplinary Board of the Supreme Court of Pennsylvania or the Office of Disciplinary Counsel. ECF No. 1 at 3.

them, and [the court] construes them in a light most favorable to the non-movant." *Tatis v. Allied Interstate, LLC*, 882 F.3d 422, 426 (3d Cir. 2018) (quoting *Sheridan v. NGK Metals Corp.*, 609 F.3d 239, 262 n.27 (3d Cir. 2010)). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (quoting *Twombly*, 550 U.S. at 557). "The plausibility determination is 'a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.'" *Connelly v. Lane Const. Corp.*, 809 F.3d 780, 786-87 (3d Cir. 2016) (quoting *Iqbal*, 556 U.S. at 679).

Finally, courts reviewing the sufficiency of a complaint must engage in a three-step process. First, the court "must 'take note of the elements [the] plaintiff must plead to state a claim.'" *Id.* at 787 (alterations in original) (quoting *Iqbal*, 556 U.S. at 675). "Second, [the court] should identify allegations that, 'because they are no more than conclusions, are not entitled to the assumption of truth.'" *Id.* (quoting *Iqbal*, 556 U.S. at 679). Third, "'[w]hen there are well-pleaded factual allegations, [the] court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.'" *Id.* (alterations in original) (quoting *Iqbal*, 556 U.S. at 679).

II. Standard of Review for Preliminary Injunction

"A preliminary injunction is an extraordinary remedy never awarded as of right." *Groupe SEB USA, Inc. v. Euro-Pro Operating LLC*, 774 F.3d 192, 197 (3d Cir. 2014) (quoting *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008)). "Awarding preliminary relief, therefore, is only appropriate 'upon a clear showing that the plaintiff is entitled to such relief.'" *Id.* (quoting *Winter*, 555 U.S. at 22).

In order to "obtain a preliminary injunction the moving party must show as a prerequisite (1) a reasonable probability of eventual success in the litigation, and (2) that it will be irreparably injured . . . if relief is not granted . . . . [In addition,] the district court, in considering whether to grant a preliminary injunction, should take into account, when they are relevant, (3) the possibility of harm to other interested persons from the grant or denial of the injunction, and (4) the public interest." *Reilly v. City of Harrisburg*, 858 F.3d 173, 176 (3d Cir. 2017), *as amended* (June 26, 2017) (quoting *Del. River Port Auth. v. Transamerican Trailer Transport, Inc.*, 501 F.2d 917, 919–20 (3d Cir. 1974)) (alteration in original).

The Third Circuit has held that the first two factors act as "gateway factors," and that a "court must first determine whether the movant has met these two gateway factors before considering the remaining two factors—balance of harms, and public interest." *Fulton v. City of Philadelphia*, 320 F. Supp. 3d 661, 675 (E.D. Pa. 2018), *aff'd*, 922 F.3d 140 (3d Cir. 2019) (citing *Reilly*, 858 F.3d at 180). However, "[b]ecause this action involves the alleged suppression of speech in violation of the First Amendment, we

focus our attention on the first factor, i.e., whether [Plaintiff] is likely to succeed on the merits of his constitutional claim." *Stilp v. Contino*, 613 F.3d 405, 409 (3d Cir. 2010) (citing *Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.")).

C. DISCUSSION

I. Standing

Defendants move to dismiss the Complaint contending that Plaintiff lacks standing to bring this pre-enforcement challenge to the Amendments. ECF No. 15 at 10-16.

"To establish Article III standing, a plaintiff must show (1) an 'injury in fact,' (2) a sufficient "causal connection between the injury and the conduct complained of," and (3) a 'likel[ihood]' that the injury 'will be redressed by a favorable decision.'" *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 157–58 (2014) [hereinafter *SBA List*] (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). "An injury sufficient to satisfy Article III must be 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Id.* at 158 (quoting *Lujan*, 504 U.S. at 560) (internal citations omitted).

"An allegation of future injury may suffice if the threatened injury is 'certainly impending,' or there is a 'substantial risk that the harm will occur.'" *Id.* (quoting *Clapper v. Amnesty Intern. USA*, 568 U.S. 398, 437 (2013)) (internal quotation marks omitted). "The party invoking federal jurisdiction bears the burden of establishing standing." *Id.* (quoting *Clapper*, 568 U.S. at 411) (internal quotation marks omitted). "[E]ach element must be supported in the same way as any other matter on which the plaintiff bears

the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation." *Id.* (quoting *Lujan*, 504 U.S. at 561) (alteration in original).

Here, the Court must determine if "the threatened enforcement of" the Amendments "creates an Article III injury." *Id.* "When an individual is subject to such a threat, an actual arrest, prosecution, or other enforcement action is not a prerequisite to challenging the law." *Id.* (citing *Steffel v. Thompson*, 415 U.S. 452, 459 (1974)) (additional citations omitted). The Supreme Court has "permitted pre-enforcement review under circumstances that render the threatened enforcement sufficiently imminent." *Id.* "Specifically, [the Supreme Court] ha[s] held that a plaintiff satisfies the injury-in-fact requirement where he alleges 'an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder.'" *Id.* at 159 (quoting *Babbitt v. Farm Workers*, 442 U.S. 289, 298 (1979)).

Many circuit courts have found a plaintiff's allegation that the law has or will have a chilling effect on the plaintiff's speech is sufficient to satisfy the injury-in-fact requirement. The Third Circuit held that "an allegation that certain conduct has (or will have) a chilling effect on one's speech must claim a 'specific present objective harm or a threat of specific future harm.'" *Sherwin-Williams Co. v. Cty. of Delaware, Pennsylvania*, 968 F.3d 264, 269–70 (3d Cir. 2020) (quoting *Laird v. Tatum*, 408 U.S. 1, 13–14 (1972)). The Fifth Circuit "has repeatedly held, in the pre-enforcement context, that '[c]hilling a plaintiff's speech is a constitutional harm adequate to satisfy the injury-in-fact

requirement.'" *Speech First, Inc. v. Fenves*, 979 F.3d 319, 330-331 (5th Cir. 2020), as revised (Oct. 30, 2020) (quoting *Houston Chronicle v. City of League City*, 488 F.3d 613, 618 (5th Cir. 2007)) (alteration in original) (additional citations omitted). Similarly, the Ninth Circuit has held that "[a] chilling of First Amendment rights can constitute a cognizable injury, so long as the chilling effect is not 'based on a fear of future injury that itself [is] too speculative to confer standing.'" *Index Newspapers LLC v. United States Marshals Serv.*, 977 F.3d 817, 826 (9th Cir. 2020) (quoting *Munns v. Kerry*, 782 F.3d 402, 410 (9th Cir. 2015)) (additional citations omitted). The Seventh Circuit has held "a plaintiff may show a chilling effect on his speech that is objectively reasonable, and that he self-censors as a result." *Speech First, Inc. v. Killeen*, 968 F.3d 628, 638 (7th Cir. 2020), as amended on denial of reh'g and reh'g en banc (Sept. 4, 2020) [hereinafter *Killeen*] (citations omitted).

In terms of Plaintiff's injury-in-fact, Plaintiff alleges in the Complaint that the "vast majority of topics" discussed at Plaintiff's speaking events "are considered biased, prejudiced, offensive, and hateful by some members of his audience, and some members of society at large." ECF No. 1 at ¶ 61.[6] Plaintiff further alleges that "during his presentations," Plaintiff's "discussion of hateful speech protected by the First Amendment involves a detailed summation of the law in this area, which includes a walkthrough of

[6] As the Court is determining whether to grant or deny Defendants' Motion to Dismiss the Complaint for lack of standing, the Court considers those allegations related to standing in the Complaint (ECF No. 1).

prominent, precedential First Amendment cases addressing incendiary speech." *Id.* at ¶ 62.

Plaintiff alleges that "it would be nearly impossible to illustrate United States First Amendment jurisprudence, such as by accurately citing and quoting precedent First Amendment cases, without engaging in speech that at least some members of his audience will perceive as biased, prejudiced, offensive, and potentially hateful." *Id.* at ¶ 63. Plaintiff alleges that he believes that "every one of his speaking engagements on First Amendment issues carries the risk that an audience member will file a bar disciplinary complaint against him based on the content of his presentation under rule 8.4(g)." *Id.* at ¶ 64. Plaintiff alleges that he fears "his writings and speeches could be misconstrued by readers and listeners, and state officials within the Board or Office, as violating Rule 8.4(g)." *Id.* at ¶ 72. Plaintiff alleges that he does not want to be subjected to disciplinary sanctions by the ODC or the Disciplinary Board and that a disciplinary investigation would harm his "professional reputation, available job opportunities, and speaking opportunities." *Id.* at ¶ 69. Plaintiff alleges that he will be "forced to censor himself to steer clear of an ultimately unknown line so that his speech is not at risk of being incorrectly perceived as manifesting bias or prejudice." *Id.* at ¶ 75.

Defendants contend that Plaintiff lacks standing because Plaintiff's injury "depends on an 'indefinite risk of future harms inflicted by unknown third parties.'" ECF No. 15 at 11-12 (quoting *Reilly v. Ceridian Corp.*, 664 F.3d 38, 42 (3d Cir. 2011)) (citing *Clapper*, 568 U.S. at 414 ("We decline to abandon our usual reluctance to endorse standing theories that rest on speculation about the decisions of

independent actors.")). Defendants contend that Plaintiff speculates an audience member will be offended by his presentation, then further speculates that that audience member will file a disciplinary complaint against Plaintiff, and then finally speculates that the ODC will not dismiss the complaint as frivolous but will require Plaintiff to file an official response and thereafter move to bring charges. *Id.* at 12.

Defendants further contend that Plaintiff lacks standing because there is no credible threat of enforcement. *Id.* First, Defendants note that there is no history of past enforcement, as the Amendments have not yet gone into effect, and Plaintiff failed to point to any attorneys anywhere who were charged with violating a similar provision. *Id.* at 13.

Next, Defendants note that the ODC has not "issued warning letters, opinions, or provided any other reason to believe that Plaintiff would be charged with violating the Amendments based on the conduct he wants to engage in." *Id.* Finally, Defendants contend that even if the ODC received a complaint, it is speculative whether Plaintiff would ever be notified, and further speculative whether Plaintiff would be required to respond or be charged with a violation. *Id.* at 14. Defendants reiterate that even if an audience member is offended by Plaintiff's presentation and makes a complaint to the ODC, "complainants do not institute disciplinary charges against an attorney: only ODC has that power—and only after approval by a Disciplinary Board hearing committee member." *Id.*

Finally, Defendants contend that the conduct in which Plaintiff wants to engage, providing a detailed summation

of the law regarding hateful speech, is not proscribed by the plain language of the Amendments. *Id.* at 15. As the Amendments require that the Plaintiff *knowingly* manifest bias or prejudice or *knowingly* engage in discrimination or harassment, Defendants contend that it "strains credulity" to believe that citing and quoting cases could lead to disciplinary action. *Id.* Furthermore, if Plaintiff intends to advocate that certain cases were wrongly decided or advance a different interpretation of the law, Defendants note that Rule 8.4(g) provides a safe harbor for advocacy and advice. *Id.*

Plaintiff responds that the Amendments arguably proscribe Plaintiff's alleged speech and that there is a credible threat of enforcement. ECF No. 25 at 11. Plaintiff also contends that the Amendments would create an "*objectively reasonable* chill to [Plaintiff's] protected speech." *Id.* at 12.

First, Plaintiff contends that he plans to continue speaking at CLE events on controversial and polarizing issues such as hate speech, regulation on college campuses or online, due process requirements for students accused of sexual misconduct, and campaign finance restrictions on monetary political contributions. *Id.* Plaintiff notes that his presentations include summarizing and using language from a number of cases that has in the past offended, and will continue to offend, audience members. *Id.* at 12. Plaintiff notes that Rule 8.4(g) proscribes words or conduct manifesting bias or prejudice at CLE seminars and that the Complaint contains many examples of people labeling speakers as biased and prejudiced "for taking policy positions, for discussing statistics or academic

theories, for espousing legal views, or mentioning certain epithets as part of an academic discussion." *Id.*

Plaintiff further contends that although Rule 8.4(g) requires the manifestation of bias or prejudice to be "knowing[ ]," the ultimate decision of whether to file and bring a disciplinary action against Plaintiff "turn[s] on the reaction of the listener and judgment of those who administer the Rule." *Id.* at 13. Therefore, Plaintiff contends his lack of intention to manifest bias or prejudice does not undercut his standing to challenge Rule 8.4(g). *Id.*

Additionally, although Rule 8.4(g) "does not preclude advice or advocacy consistent with these Rules," Plaintiff contends that "'advocacy' in this context refers to the only sort of advocacy contemplated by rules of professional conduct: the zealous advocacy in support of a client's interest." *Id.* (citing Pa.R.P.C. Preamble ("As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system"); Pa.R.P.C. 1.3, cmt. 1 ("A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf")). Therefore, Plaintiff contends that "[a]cademic advocacy" at CLE events is not covered within the advocacy or advice safe harbor. *Id.* at 14.

Furthermore, Plaintiff contends that his intention to mention epithets, slurs, and demeaning nicknames during his presentations and in the question-and-answer portion of his presentation is arguably proscribed under Rule 8.4(g). *Id*. Although Rule 8.4(g) does not provide examples of "manifestations of bias or prejudice," Plaintiff notes that the language of Rule 8.4(g) regarding "manifest[ing] bias or prejudice" was borrowed from Rule 2.3 of the

Pennsylvania Code of Judicial Conduct. *Id.* Comment 2 to Rule 2.3 of the Pennsylvania Code of Judicial Conduct states that examples of manifestations of bias and prejudice "include but are not limited to epithets; slurs; demeaning nicknames; negative stereotyping; attempted humor based upon stereotypes; threatening, intimidating, or hostile acts; suggestions of connections between race, ethnicity, or nationality and crime; and irrelevant references to personal characteristics." *Id.* (quoting Pa.C.J.C. Rule 2.3, cmt. 2). Plaintiff reiterates that he alleged in the Complaint that he mentions slurs, epithets, and demeaning nicknames during his presentations. *Id.* Plaintiff contends that he also exchanges ideas with audience members about the importance of affording Due Process and First Amendment rights to people who do and say "odious" things. *Id.* Plaintiff is concerned that people might construe his theories as manifesting bias or prejudice against those protected classes, akin to "suggestions of connections between race, ethnicity, or nationality and crime." *Id.* (quoting Pa.C.J.C. Rule 2.3).

Next, Plaintiff contends that there is a credible threat of enforcement. *Id.* Although Defendants point out that no one has filed a disciplinary complaint against Plaintiff based on his past presentations, Plaintiff retorts that such a showing is not required for standing and Rule 8.4(g) is not yet in effect. *Id.* "When dealing with pre-enforcement challenges to recently enacted (or, at least, non-moribund) statutes that facially restrict expressive activity by the class to which the plaintiff belongs, courts will assume a credible threat of prosecution in the absence of compelling contrary evidence." *Id.* (quoting *ACLU v. Reno*, 31 F. Supp. 2d 473, 479 (E.D. Pa. 1999), eventually rev'd on

other grounds sub. nom. *Ashcroft v. ACLU*, 535 U.S. 564 (2002)).

Plaintiff further contends that no Defendants have "declare[d] or present[d] other evidence that they would find this type of 8.4(g) complaint to be frivolous, let alone disavow[ed] their authority to take any enforcement steps in response to such complaints." *Id.* at 18 (collecting cases). Even if Defendants were to submit such evidence, Plaintiff maintains that the Complaint contains numerous examples of individuals who have imputed bias and bigotry to speakers advancing legal views or mentioning incendiary words, which shows that a disciplinary complaint for this reason would not be considered "frivolous." *Id.*

The Court finds that Plaintiff has standing to bring this pre-enforcement challenge to the Amendments. First, the Court finds Plaintiff's allegation that his speech will be chilled by the Amendments shows a "threat of specific future harm." *Sherwin-Williams*, 968 F.3d at 269–70 (quoting *Laird*, 408 U.S. at 13–14); *see also Speech First*, 979 F.3d 319, 330-331. Plaintiff's alleged fear of a disciplinary complaint and investigation is objectively reasonable based on Plaintiff's allegation that the "vast majority of topics" discussed at Plaintiff's speaking events "are considered biased, prejudiced, offensive, and hateful by some members of his audience, and some members of society at large." ECF No. 1 at ¶ 61.

Furthermore, Plaintiff alleged specific examples of individuals filing disciplinary and Title IX complaints against speakers who were presenting on similar topics as those discussed by Plaintiff, which he alleges will "force [him] to censor himself to steer clear of an ultimately unknown line

so that his speech is not at risk of being incorrectly perceived as manifesting bias or prejudice." ECF No. 1 at ¶ 75. Therefore, in addition to showing that the "chilling effect on his speech . . . is objectively reasonable," Plaintiff has shown that he will "self-censor[ ] as a result." *Killeen*, 968 F.3d at 638.

The Court concludes that Plaintiff's alleged chilling effect constitutes an injury in fact that is concrete, particularized, and imminent. *SBA List*, 573 U.S. at 158. Plaintiff's allegations of future injury suffice because Plaintiff has shown that "the threatened injury is 'certainly impending,' "and that "there is a 'substantial risk' that the harm will occur.'" *Id.* (quoting *Clapper*, 568 U.S. at 437) (internal citations omitted).

Plaintiff has further shown that he has "an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder." *SBA List*, 573 U.S. at 157–58 (quoting *Babbitt* , 442 U.S. at 298, 99 S.Ct. 2301). First, neither party challenges that the speech in which Plaintiff intends to engage is affected with a constitutional interest. *See generally* ECF No. 15; ECF No. 25 at 11.

Second, Plaintiff has also clearly shown a likelihood that the activity in which he intends to engage is "arguably proscribed" by the Amendments. *Speech First, Inc.*, 979 F.3d at 332. Plaintiff has alleged that he intends to mention epithets, slurs, and demeaning nicknames as part of his presentation on First Amendment and Due Process rights. ECF No. 1 at ¶¶ 62-63. Rule 8.4(g) explicitly states that it is attorney misconduct to, "by **words** or conduct,

knowingly manifest bias or prejudice." Pa.R.P.C. 8.4(g) (emphasis added). Both parties agree that the language used in Rule 8.4(g) mirrors Pennsylvania Code of Judicial Conduct Rule 2.3, which provides, in Comment 2, that "manifestations of bias include . . . epithets; slurs; demeaning nicknames; negative stereotyping . . . ." Plaintiff has shown that by repeating slurs or epithets, or by engaging in discussion with his audience members about the constitutional rights of those who do and say offensive things, he will need to repeat slurs, epithets, and demeaning nicknames. This is arguably proscribed by Rule 8.4(g).

Defendants contend that because Rule 8.4(g) requires an attorney to "*knowingly* manifest bias or prejudice," it "strains credulity" to believe that citing and quoting cases could lead to disciplinary action. ECF No. 15 at 15 (emphasis added). However, since the Court has found that repeating slurs or epithets is arguably proscribed by the statute based on the plain language, whether Plaintiff "knowingly" repeated slurs or epithets is immaterial.

Defendants further contend that, "to the extent that Plaintiff intends to advocate that certain cases were wrongly decided or advanced a different interpretation of relevant law," Rule 8.4(g)'s "clear safe harbor for advocacy" would protect Plaintiff. *Id.* at 16. However, the "advice or advocacy" safe harbor was plainly intended to protect those giving advice or advocacy in the context of representing a client, and not in the context of Plaintiff's intended activity. Therefore, Plaintiff has shown that his intended conduct is arguably proscribed by the Amendments.

Third, Plaintiff has shown that there exists a credible threat of prosecution. Defendants' contention that Plaintiff's injury "depends on an 'indefinite risk of future harms inflicted by unknown third parties'" is not persuasive. *Id.* at 11-12 (quoting *Ceridian*, 664 F.3d at 42) (additional citations omitted). Plaintiff alleged specific examples of individuals filing disciplinary and Title IX complaints against speakers who were presenting on similar topics as those discussed by Plaintiff. ECF No. 1 at ¶¶ 73, 74. Not every complaint filed with the ODC results in a letter to the accused attorney, nor every letter to the accused attorney results in any formal sanction. However, Plaintiff has demonstrated that there is a substantial risk that the Amendments will result in Plaintiff being subjected to a disciplinary complaint or investigation.

Ultimately, the Court is swayed by the chilling effect that the Amendments will have on Plaintiff, and other Pennsylvania attorneys, if they go into effect. Rule 8.4(g)'s language, "by words . . . manifest bias or prejudice," are a palpable presence in the Amendments and will hang over Pennsylvania attorneys like the sword of Damocles. This language will continuously threaten the speaker to self-censor and constantly mind what the speaker says and how the speaker says it or the full apparatus and resources of the Commonwealth may be engaged to come swooping in to conduct an investigation. Defendants dismiss these concerns with a paternal pat on the head and suggest that the genesis of the disciplinary process is benign and mostly dismissive. Defendants further argue that, under the language of Rule 8.4(g) targeting "words," even if a complaint develops past the initial disciplinary complaint stage, actual discipline will not occur given the

conduct targeted, good intentions of the Rule and those trusted arbiters that will sit in judgment and apply it as such. But Defendants do not guarantee that, nor did they remove the language specifically targeting attorneys' "words." Defendants effectively ask Plaintiff to trust them not to regulate and discipline his offensive speech even though they have given themselves the authority to do so. So, despite asking Plaintiff to trust them, there remains the constant threat that the Rule will be engaged as the plain language of it says it will be engaged.

It can hardly be doubted there will be those offended by the speech, or the written materials accompanying the speech, that manifests bias or prejudice who will, quite reasonably, insist that the Disciplinary Board perform its sworn duty and apply Rule 8.4(g) in just the way the clear language of the Rule permits. Even if the disciplinary process does not end in some form of discipline, the threat of a disruptive, intrusive, and expensive investigation and investigatory hearing into the Plaintiff's words, speeches, notes, written materials, videos, mannerisms, and practice of law would cause Plaintiff and any attorney to be fearful of what he or she says and how he or she will say it in any forum, private or public, that directly or tangentially touches upon the practice of law, including at speaking engagements given during CLEs, bench-bar conferences, or indeed at any of the social gatherings forming around these activities. The government, as a result, de facto regulates speech by threat, thereby chilling speech. Defendants' attempt to sidestep a direct constitutional challenge by claiming no final discipline will ever be rendered under Rule 8.4(g) fails. The clear threat to Plaintiff's First Amendment rights and the chilling effect that results is

the harm that gives Plaintiff standing. Defendant's Motion to Dismiss the Complaint for lack of standing is denied.

II. First Amendment Violation

In their Motion to Dismiss, Defendants contend that Plaintiff's claim that the Amendments constitute either content-based or viewpoint-based discrimination fails to state a claim because the Amendments regulate conduct, not speech. ECF No. 15 at 30. Even if the Amendments regulate speech, Defendants contend, the Amendments are narrowly tailored to achieve Pennsylvania's compelling interest in regulating the practice of law and ensuring that the judicial system is free from discriminatory and harassing conduct. *Id.*

Defendants further contend that the Amendments are not viewpoint-based since they were not enacted based on particular views but rather to prohibit discrimination and harassment. *Id.* at 30 (citing *Wandering Dago, Inc. v. Destito*, 879 F.3d 20, 32 (2d Cir. 2018)). Furthermore, Defendants note that the Amendments apply to all attorneys. *Id.* (citing *Barr v. Lafon*, 538 F.3d 554, 572 (6th Cir. 2008)).

Finally, Defendants contend that the Supreme Court has held that states have a "compelling interest" in regulating professions, and that "broad power" is "especially great" in "regulating lawyers[.]" *Id.* (quoting *In re Primus*, 436 U.S. 412, 422 (1978)) (additional citations omitted). Defendants further contend that states have a substantial interest both in "protect[ing] the integrity and fairness of a State's judicial system," *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1031 (1991), and in preventing attorneys from engaging in conduct that "is universally regarded as deplorable and beneath common decency," *Fla.*

Bar v. Went For It, Inc., 515 U.S. 618, 625 (1995) (internal citations omitted). ECF No. 15 at 31.

Plaintiff, on the other hand, contends that Rule 8.4(g) 's prohibition on using words to "manifest bias or prejudice, or engage in harassment or discrimination" is unconstitutional viewpoint discrimination. ECF No. 25 at 19. Plaintiff contends that the Amendments allow for "tolerant, benign, and respectful speech" while disallowing "biased, prejudiced, discriminatory, critical, and derogatory speech." *Id.* Plaintiff highlights *Matal v. Tam*, where the Supreme Court found that a federal statute prohibiting the registration of trademarks that may "disparage or bring into contempt or disrepute" any "persons, living or dead" was a viewpoint-based restriction. *Id.* (citing *Matal v. Tam*, 137 S.Ct. 1744, 1751 (2017)). The Court stated that this "law thus reflects the Government's disapproval of a subset of messages it finds offensive, the essence of viewpoint discrimination." *Matal*, 137 S.Ct. at 1750.

Plaintiff further disputes that Rule 8.4(g) regulates discriminatory and harassing *conduct* and not speech, since the plain language of Rule 8.4(g) restricts "words" in addition to "conduct" and "manifest[ing] bias or prejudice" in addition to "engag[ing] in harassment or discrimination." ECF No. 25 at 20. Plaintiff notes that Rule 8.4(g) mirrors Rule 2.3 of the Pennsylvania Judicial Code of Conduct, which states that "[e]xamples of manifestations of bias and prejudice include . . . epithets; slurs; demeaning nicknames," and this further underscores that Rule 8.4(g) prohibits the expression of certain words alone, apart from any conduct. *Id.*

Plaintiff further disputes Defendants' claim that because 8.4(g) applies to all attorneys it cannot be viewpoint discrimination. *Id.* at 21. Plaintiff contends that this is not the test for viewpoint discrimination and that the Supreme Court rejected the same argument. *Id.* Plaintiff contends that if the Court finds that the Amendments consist of viewpoint bias, that "end[s] the matter." *Id.* (quoting *Iancu v. Brunetti*, 139 S.Ct. 2294 (2019)).

Plaintiff further contends that even though Rule 8.4(g) is a regulation of "professional speech," it is still unconstitutional viewpoint-based discrimination under the Supreme Court's ruling in *Nat'l Inst. of Family & Life Advocates v. Becerra. Id.* at 22 (citing *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S.Ct. 2361, 2375 (2018) [hereinafter *NIFLA*]). Plaintiff contends that Rule 8.4(g) does not fit within either of the two areas that the Court in *NIFLA* recognized justified regulation of professional speech. *Id.* Plaintiff contends that Rule 8.4(g) is not a law that "require[s] professionals to disclose factual, noncontroversial information in their 'commercial speech," nor does it merely "regulate professional conduct, . . . [that] incidentally involves speech." *Id.* (quoting *NIFLA*, 138 S.Ct. at 2372).

Plaintiff further contends that the Court in *Gentile* and *Sawyer* recognized that when an attorney's speech occurs as part of pending litigation or a client representation, it is "more censurable" because it can "obstruct the administration of justice." *Id.* at 23 (quoting *In re Sawyer*, 360 U.S. 622, 636 (1959)) (citing *Gentile*, 501 U.S. at 1074 ("[O]ur opinions . . . indicate that the speech of lawyers representing clients in pending cases may be regulated under a less demanding standard than that established for

regulation of the press.")). Rule 8.4(g), however, contains no similar limitation, as it applies to any words or conduct uttered "in the practice of law," which includes participating in events where CLE credits are issued. *Id.* (quoting Pa.R.P.C. 8.4(g)).

1. Attorney Speech and Professional Speech

The Court recognizes that Pennsylvania has an interest in licensing attorneys and the administration of justice. However, contrary to Defendants' contention, speech by an attorney or by a professional is only subject to greater regulation than speech by others in certain circumstances, none of which are present here. The Supreme Court in *Gentile v. State Bar of Nevada* found that, "in the courtroom itself, during a judicial proceeding, whatever right to 'free speech' an attorney has is extremely circumscribed." 501 U.S. at 1071. Furthermore, "[e]ven outside the courtroom . . . lawyers in pending cases [are] subject to ethical restrictions on speech to which an ordinary citizen would not be." *Id.* (citing *In re Sawyer*, 360 U.S. 622 (1959)). The Supreme Court has "expressly contemplated that the speech of *those participating before the courts* could be limited." *Id.* at 1072. Additionally, in the commercial context, the Supreme Court's "decisions dealing with a lawyer's right under the First Amendment to solicit business and advertise . . . have not suggested that lawyers are protected by the First Amendment to the same extent as those engaged in other business." *Id.* at 1073 (collecting cases).

In contrast, Rule 8.4(g) does not limit its prohibition of "words . . . [that] manifest bias or prejudice" to the legal process, since it also prohibits these words or conduct

"during activities that are required for a lawyer to practice law," including seminars or activities where legal education credits are offered. Pa.R.P.C. 8.4(g). Rule 8.4(g) does not seek to limit attorneys' speech only when that attorney is in court, nor when that attorney has a pending case, nor even when that attorney seeks to solicit business and advertise. Rule 8.4(g) much more broadly prohibits attorneys' speech.

This Court also finds that Rule 8.4(g) does not cover "professional speech" that is entitled to less protection. The Supreme Court "has not recognized 'professional speech' as a separate category of speech." *NIFLA*, 138 S.Ct. at 2371 (finding petitioners were likely to succeed on merits of claim that act requiring clinics that primarily serve pregnant women to provide certain notices violated the First Amendment). "Speech is not unprotected merely because it is uttered by 'professionals.'" *Id.* at 2371-2372.

However, the Supreme Court "has afforded less protection for professional speech in two circumstances." *Id.* at 2372. "First, [Supreme Court] precedents have applied more deferential review to some laws that require professionals to disclose factual, noncontroversial information in their 'commercial speech.'" *Id.* (collecting cases). "Second, under [Supreme Court] precedents, States may regulate professional conduct, even though that conduct incidentally involves speech." *Id.* (collecting cases).

Rule 8.4(g) does not fall into either of these categories. First, Rule 8.4(g) does not relate specifically to commercial speech, nor does it require that professionals "disclose factual, noncontroversial information." *Id.*

Second, Rule 8.4(g) does not regulate professional conduct that incidentally involves speech. The plain language of Rule 8.4(g) explicitly prohibits "words" that manifest bias or prejudice. Furthermore, a comment included in a May 2018 proposal of Rule 8.4(g) "explains and illustrates" that Rule 8.4(g) was intended to regulate speech. Pa.R.P.C., Preamble and Scope ("The Comment accompanying each Rule explains and illustrates the meaning and purpose of the Rule.") This comment stated, "[e]xamples of manifestations of bias or prejudice include but are not limited to epithets; slurs; demeaning nicknames; negative stereotyping; attempted humor based upon stereotypes; threatening, intimidating, or hostile acts; suggestions of connections between race, ethnicity, or nationality and crime; and irrelevant references to personal characteristics."[7] 48 Pa.B. 2936. This proposed comment reveals that the drafters of Rule 8.4(g) intended to explicitly restrict offensive words in prohibiting an attorney from "manifest[ing] bias or prejudice."

Although the final version of Rule 8.4(g) does not include this comment, the fatal language, "by words . . . manifest bias or prejudice," remains. Removing this candid comment about the intent of the Rule does not also remove the intent of those words. That this language, "by words . . . manifest bias or prejudice," remained in the final version of Rule 8.4(g) illustrates the Rule's broad and chilling implications. If the drafters wished to reform the Rule, they

[7] This exact language also appears in Comment 2 to Rule 2.3 of Pennsylvania Code of Judicial Conduct. Pa.C.J.C. Rule 2.3. Both parties agree Pennsylvania Code of Judicial Conduct Rule 2.3 mirrors Pennsylvania Rule of Professional Conduct Rule 8.4(g). See ECF No. 15 at 28; ECF No. 25 at 7.

could have easily removed the offending language from the Rule as well the proposed comment. Removing the comment alone did not rid Rule 4.8(g) of its language specifically targeting speech.

Despite this, Defendants tell us to look away from the clearly drafted language of the Rule and focus rather on the conduct component. Plaintiff agrees that if we were looking at conduct, the government has a right to regulate conduct of its licensed attorneys. *See* ECF No. 25 at 21. Defendants try to deflect our attention away from the clear speech regulation in the Rule because they themselves had to know in drafting the Rule they were venturing into the narrowest of channels that permit government to regulate speech. They merge "words" into "conduct" by blithely arguing that the shoal that confronts us is a mere illusion to be ignored and is simply nothing but part of the deep, blue channel. Yet, when the reality of the shoal hits the ship, it will not be the government left ensnared and churning in the sand, it will be the individual attorney and the attorney's practice embedded in an inquisition regarding the manifestation of bias and prejudice, and an exploration of the attorney's character and previously expressed viewpoints, to determine if such manifestation was "knowing."

Defendants cite *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, to support their contention that Rule 8.4(g) is intended to prohibit "conduct carried out by words," and not speech. Transcript of Oral Argument at 25; ECF No. 15 at 17 (citing *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 62 (2006)). In *Rumsfeld*, the Supreme Court held that speech was incidental to the challenged law's requirement that law

schools afford equal access to military recruiters. 547 U.S. at 62. The challenged law denied federal funding to an institution of higher education that prohibited the military from recruiting on its campus. *Id.* at 47. The plaintiffs brought suit, seeking to deny the military from recruiting on their campuses because of "disagreement with the Government's policy on homosexuals in the military," and arguing that the law violated law schools' freedom of speech. *Id.* at 51, 60. The Supreme Court held that the law did not regulate speech, nor did the expressive nature of the conduct regulated bring it under the First Amendment's protection. *Id.* at 65. The Court held, "it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Id.* at 62 (quoting *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949)).

The Supreme Court's holding in *Rumsfeld* is inapplicable to the case before this Court. Whereas the challenged law in *Rumsfeld* required the plaintiffs to provide equal campus access to military recruiters, a law that clearly regulates conduct, the Amendments explicitly limit what Pennsylvania attorneys may say in the practice of law. Rule 8.4(g) 's prohibition against using "words" to "manifest bias or prejudice" does not regulate conduct "carried out by means of language." *Rumsfeld*, 547 U.S. at 62, 126 S.Ct. 1297. It simply regulates speech. Even if the Rule was *intended* to prohibit "harassment and discrimination . . . carried out by words," Transcript of Oral Argument at 25, Rule 8.4(g) plainly prohibits "words . . . manifest[ing]

bias or prejudice," which regulates a much broader category of speech than supposedly intended.

"Outside of the two contexts discussed above—disclosures under [attorney advertising] and professional conduct—[the Supreme] Court's precedents have long protected the First Amendment rights of professionals." *NIFLA*, 138 S.Ct. at 2374. "The dangers associated with content-based regulations of speech are also present in the context of professional speech." *Id.* "As with other kinds of speech, regulating the content of professionals' speech 'pose[s] the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information.'" *Id.* (quoting *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 641 497 (1994)). "States cannot choose the protection that speech receives under the First Amendment [by imposing a licensing requirement], as that would give them a powerful tool to impose 'invidious discrimination of disfavored subjects.'" *Id.* (quoting *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 423-424 (1993)) (additional citations omitted). Defendants may not impinge upon Pennsylvania attorneys' First Amendment rights simply because Rule 8.4(g) regulates speech by professionals.

Furthermore, in *In re Primus*, quoted by Defendants to establish that states have "broad power" to regulate attorneys, the Court ultimately concluded that the state's application of the disciplinary rules violated the First and Fourteenth Amendments, showing the limits to that "broad" regulation power. 436 U.S. 412, 438 (1978). In *In re Primus*, a lawyer informed a prospective client via letter that free legal assistance was available from a nonprofit organization with which this lawyer worked. *Id.* at

414. Based on this activity, the state disciplinary board charged the lawyer with soliciting a client in violation of the disciplinary rules and administered a private reprimand. *Id.* at 421. The state supreme court then adopted the board's findings and increased the sanction to a public reprimand. *Id.* The Supreme Court found that the "State's special interest in regulating members whose profession it licenses, and who serve as officers of its courts, amply justifies the application of *narrowly drawn* rules to proscribe solicitation that in fact is misleading, overbearing, or involves other features of deception or improper influence." *Id.* at 438 (emphasis added). Even though the state had argued that the regulatory program was aimed at preventing undue influence "and other evils that are thought to inhere generally in solicitation by lawyers of prospective clients," the Court found that "that '[b]road prophylactic rules in the area of free expression are suspect,' and that '[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms.'" *Id.* at 432 (quoting *National Ass'n for Advancement of Colored People v. Button*, 371 U.S. 415, 438 (1963)). "Because of the danger of censorship through selective enforcement of broad prohibitions, and '[b]ecause First Amendment freedoms need breathing space to survive, government may regulate in [this] area only with narrow specificity.'" *Id.* at 432-433 (quoting *Button*, 371 U.S. at 433) (alteration in original). This case does not, therefore, ultimately support Defendants' conclusion nor indicate that Defendants have broad power in this context to regulate attorneys' words.

Rule 8.4(g) does not regulate the specific types of attorney speech or professional speech that the Supreme Court

has identified as warranting a deferential review. The speech that Rule 8.4(g) regulates is entitled to the full protection of the First Amendment.

2. Viewpoint-Based Discrimination

The Court finds that the Amendments, Rule 8.4(g) and Comments 3 and 4, are viewpoint-based discrimination in violation of the First Amendment.

"[L]aws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based." *Startzell v. City of Philadelphia, Pennsylvania*, 533 F.3d 183, 193 (3d Cir. 2008) (quoting *Turner Broadcasting*, 512 U.S. at 643) (alteration in original). Content-based restrictions "are subject to the 'most exacting scrutiny,' . . . because they 'pose the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion.'" *Id.* (quoting *Turner Broadcasting*, 512 U.S. at 641-642).

Viewpoint discrimination is "[w]hen the government targets not subject matter, but particular views taken by speakers on a subject." *Id.* (quoting *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995)). "Viewpoint discrimination is thus an egregious form of content discrimination." *Id.* (quoting *Rosenberger*, 515 U.S. at 829). "The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Id.* (quoting *Rosenberger*, 515 U.S. at 829).

"If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit

the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989). "[T]hat is viewpoint discrimination: Giving offense is a viewpoint." *Matal*, 137 S.Ct. at 1763. The Supreme Court has "said time and again that 'the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.'" *Id.* (quoting *Street v. New York*, 394 U.S. 576, 592 (1969)) (additional citations omitted).

In *Matal v. Tam*, the Supreme Court considered the constitutionality of "a provision of federal law prohibiting the registration of trademarks that may 'disparage . . . or bring . . . into contemp[t] or disrepute' any 'persons, living or dead.'" 137 S.Ct. at 1751. The Court concluded that the provision violated the Free Speech Clause of the First Amendment because "[s]peech may not be banned on the ground that it expresses ideas that offend." *Id.* The Court noted that when the government creates a limited public forum for private speech "some content- and speaker-based restrictions may be allowed," but, "even in such cases . . . 'viewpoint discrimination' is forbidden." *Id.* (citing *Rosenberger*, 515 U.S. at 830-831). The Court clarified that the term "viewpoint" discrimination is to be used in a broad sense and, even if the provision at issue "evenhandedly prohibits disparagement of all group," it is still viewpoint discrimination because "[g]iving offense is a viewpoint." *Id.* at 1763.

In a concurring opinion, Justice Kennedy stated that "[t]he First Amendment guards against laws 'targeted at specific subject matter,' [a] form of speech suppression known as content based discrimination." *Id.* at 1765-1766 (Kennedy, J., concurring) (quoting *Reed v. Town of*

Gilbert, 576 U.S. 155, 169 (2015)). "This category includes a subtype of laws that go further, aimed at the suppression of 'particular views . . . on a subject.'" *Id.* (Kennedy, J., concurring) (quoting *Rosenberger*, 515 U.S. at 829) (alteration in original). "A law found to discriminate based on viewpoint is an 'egregious form of content discrimination,' which is 'presumptively unconstitutional.'" *Id.* (Kennedy, J., concurring) (quoting *Rosenberger*, 515 U.S. at 829–830).

"At its most basic, the test for viewpoint discrimination is whether—within the relevant subject category—the government has singled out a subset of messages for disfavor based on the views expressed." *Id.* at 1766 (Kennedy, J., concurring) (citation omitted). Justice Kennedy further stated that even though the provision at issue applied in "equal measure to any trademark that demeans or offends," it was not viewpoint neutral: "To prohibit all sides from criticizing their opponents makes a law more viewpoint based, not less so." *Id.* at 1766 (Kennedy, J., concurring) (citation omitted).

Similarly, Rule 8.4(g) states that it is professional misconduct for a lawyer, "in the practice of law, by **words** or conduct, to knowingly **manifest bias** or **prejudice** . . . ." Pa.R.P.C. 8.4(g) (emphasis added). While Rule 8.4(g) restricts Pennsylvania attorneys' ability to express bias or prejudice "based upon race, sex, gender identity or expression, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, or socioeconomic status," it allows Pennsylvania attorneys to express tolerance or respect based on these same statuses. *Id.* Defendants have "singled out a subset of message," those words that manifest bias or prejudice, "for disfavor based on the

views expressed." *Matal*, 137 S.Ct. at 1766 (Kennedy, J., concurring) (citation omitted).

As in *Matal*, Defendants seek to remove certain ideas or perspectives from the broader debate by prohibiting *words* that manifest bias or prejudice. The American Civil Liberties Union defines censorship as "the suppression of words, images, or ideas that are 'offensive,' [which] happens whenever some people succeed in imposing their personal political or moral values on others." *What is censorship?*, ACLU, https://www.aclu.org/other/what-censorship (last visited December 7, 2020). This is exactly what Defendants attempt to do with Rule 8.4(g). Although Defendants contend that Rule 8.4(g) "was enacted to address discrimination, equal access to justice, [and] the fairness of the judicial system," the plain language of Rule 8.4(g) does not reflect this intention. Transcript of Oral Argument at 3. Rule 8.4(g) explicitly prohibits words manifesting bias or prejudice, i.e., "offensive" words. In short, Defendants seek to impose their personal moral values on others by censoring all opposing viewpoints.

"A law found to discriminate based on viewpoint is an 'egregious form of content discrimination,' which is 'presumptively unconstitutional.'" *Id.* at 1766 (Kennedy, J., concurring) (quoting *Rosenberger*, 515 U.S. at 829-830). Therefore, "[t]he Court's finding of viewpoint bias end[s] the matter." *Iancu v. Brunetti*, 139 S.Ct. 2294, 2302 (2019).[8]

[8] Even if the Court were to weigh the competing interests involved, Rule 8.4(g) would not pass either strict scrutiny or intermediate scrutiny. "To survive strict scrutiny analysis, a statute must: (1) serve a compelling governmental interest; (2) be narrowly tailored to achieve

The irony cannot be missed that attorneys, those who are most educated and encouraged to engage in dialogues about our freedoms, are the very ones here who are forced to limit their words to those that do not "manifest bias or prejudice." Pa.R.P.C. 8.4(g). This Rule represents the government restricting 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." Even if Plaintiff makes a good faith attempt to restrict and self-censor, the Rule leaves Plaintiff with no guidance as to what is in bounds, and what is out, other than to advise Plaintiff to scour every nook and cranny of each ordinance, rule, and law in the Nation. Furthermore, the influence and insight of the May 2018 comments on this self-censorship will loom large as guidance as to the intent of the Rule. *See supra* p. 27.

There is no doubt that the government is acting with beneficent intentions. However, in doing so, the government

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that interest; and (3) be the least restrictive means of advancing that interest." *ACLU v. Mukasey*, 534 F.3d 181, 190 (3d Cir. 2008). The compelling interest provided by Defendants is "ensuring that those who engage in the practice of law do not knowingly discriminate or harass someone so that the legal profession 'functions for all participants,' ensures justice and fairness, and maintains the public's confidence in the judicial system." ECF No. 15 at 22-23. However, as addressed at length in this Memorandum, by also prohibiting "words . . . [that] manifest bias or prejudice," the Amendments are neither narrowly tailored nor the least restrictive means of advancing that interest. Pa.R.P.C. 8.4(g). In the same way, the Amendments would not survive intermediate scrutiny as they are not "narrowly tailored to serve a significant governmental interest." *Barr v. Am. Ass'n of Political Consultants, Inc.*, 140 S.Ct. 2335, 2356 (2020) (Sotomayor, J., concurring) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).

has created a rule that promotes a government-favored, viewpoint monologue and creates a pathway for its hand-picked arbiters to determine, without any concrete standards, who and what offends. This leaves the door wide open for them to determine what is bias and prejudice based on whether the viewpoint expressed is socially and politically acceptable and within the bounds of permissible cultural parlance. Yet the government cannot set its standard by legislating diplomatic speech because although it embarks upon a friendly, favorable tide, this tide sweeps us all along with the admonished, minority viewpoint into the massive currents of suppression and repression. Our limited constitutional Government was designed to protect the individual's right to speak freely, including those individuals expressing words or ideas we abhor.

Therefore, the Court holds that the Amendments, Rule 8.4(g) and Comments 3 and 4, consist of unconstitutional viewpoint discrimination in violation of the First Amendment. Because the Court finds that Plaintiff has standing and that the Amendments constitute unconstitutional viewpoint discrimination, Defendants' Motion to Dismiss is denied.[9]

As for Plaintiff's Motion for a Preliminary Injunction, for the foregoing reasons, the Court finds Plaintiff has shown that the likelihood of success on the merits of his constitutional claim is "significantly better than negligible." *Reilly*, 858 F.3d at 179.

Second, "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes

[9] The Court also denies Defendant's Motion to Dismiss as to Count II, alleging unconstitutional vagueness.

irreparable injury." *Stilp*, 613 F.3d at 409 (citing *Elrod*, 427 U.S. at 373). Plaintiff alleged that he will be chilled in the exercise of his First Amendment rights at CLE presentations and other speaking events if the Amendments go into effect as planned on December 8, 2020. ECF No. 16-1 at 28 (citing ECF No. 1 at ¶ 60). As the Court has found the Amendments constitute unconstitutional viewpoint discrimination and Plaintiff has alleged a chilling effect that is objectively reasonable in light of the plain language in Rule 8.4(g), Plaintiff has shown he is more likely than not to suffer irreparable harm in the absence of preliminary relief. Plaintiff has thus met the threshold for the "first two 'most critical' factors" in determining whether to grant a preliminary injunction. *Reilly*, 858 F.3d at 179.

As the Court has found that the Amendments violate the First Amendment, the last two factors, (3) the possibility of harm to other interested persons from the grant or denial of the injunction, and (4) the public interest, also favor preliminary relief. On balance, and because Plaintiff has satisfied the first two factors, the factors favor granting the preliminary injunction.[10] Therefore, the Court grants Plaintiff's Motion for Preliminary Injunction.

D. CONCLUSION

For the foregoing reasons, the Court denies Defendants' Motion to Dismiss and grants Plaintiff's Motion for Preliminary Injunction.

An appropriate order will follow.

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[10] The parties agree that there should be no bond. Transcript of Oral Argument at 50-51; ECF No. 21 at ¶ 50 ("The Defendants bear no risk of financial loss if they are wrongfully enjoined in this case.").

DATE: December 7, 2020 BY THE COURT:

/s/ Chad F. Kenney

CHAD F. KENNEY, JUDGE

Appendix E

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 22-1733

ZACHARY GREENBERG

v.

JERRY M. LEHOCKY, in his official capacity as Board Chair of the Disciplinary Board of the Supreme Court of Pennsylvania; DION G. RASSIAS, in his official capacity as Board Vice-Chair of the Disciplinary Board of the Supreme Court of Pennsylvania; JOSHUA M. BLOOM, in his official capacity as Member of the Disciplinary Board of the Supreme Court of Pennsylvania; CELESTE L. DEE, in her official capacity as Member of the Disciplinary Board of the Supreme Court of Pennsylvania; LAURA E. ELLSWORTH, in her official capacity as Member of the Disciplinary Board of the Supreme Court of Pennsylvania; CHRISTOPHER M. MILLER, in his official capacity as Member of the Disciplinary Board of the Supreme Court of Pennsylvania; ROBERT J. MONGELUZZI, in his official capacity as Member of the Disciplinary Board of the Supreme Court of Pennsylvania; GRETCHEN A. MUNDORFF, in her official capacity as Member of the Disciplinary Board of the Supreme Court of Pennsylvania; JOHN C. RAFFERTY, JR., in his official capacity as Member of the Disciplinary Board of the Supreme Court of Pennsylvania; HON. ROBERT L. REPARD, in his official capacity as Member of the

Disciplinary Board of the Supreme Court of Pennsylvania; DAVID S. SENOFF, in his official capacity as Member of the Disciplinary Board of the Supreme Court of Pennsylvania; SHOHIN H. VANCE, in his official capacity as Member of the Disciplinary Board of the Supreme Court of Pennsylvania; THOMAS J. FARRELL, in his official capacity as Chief Disciplinary Counsel of the Office of Disciplinary Counsel; RAYMOND S. WIERCISZEWSKI, in his official capacity as Deputy Chief Disciplinary Counsel of the Office of Disciplinary Counsel,

Appellants

(D.C. Civ. No. 2-20-cv-03822)

SUR PETITION FOR REHEARING

Present: CHAGARES, Chief Judge, JORDAN, HARDIMAN, SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, MATEY, PHIPPS, FREEMAN, MONTGOMERYREEVES, CHUNG, SCIRICA*, and AMBRO*, Circuit Judges

The petition for rehearing filed by Appellee in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,

s/Anthony J. Scirica
Circuit Judge

Dated: October 3, 2023
Amr/cc: All counsel of record

*As to panel rehearing only.

Appendix F

1. The original version of Pennsylvania Rule of Professional Conduct 8.4(g) provided:

Rule 8.4 Misconduct

It is professional misconduct for a lawyer to:

* * *

(g) in the practice of law, by words or conduct, knowingly manifest bias or prejudice, or engage in 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.

Comment:

* * *

[3] For the purposes of paragraph (g), conduct in the practice of law includes participation in activities that are required for a lawyer to practice law, including but not limited to continuing legal education seminars, bench bar conferences and bar association activities where legal education credits are offered.

[4] The substantive law of antidiscrimination and anti-harassment statutes and case law guide application of paragraph (g) and clarify the scope of the prohibited conduct.

2. The current, amended version of Pennsylvania Rule of Professional Conduct 8.4(g) provides:

Rule 8.4 Misconduct

It is professional misconduct for a lawyer to:

* * *

(g) in the practice of law, knowingly engage in conduct constituting 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.

Comment:

* * *

(3) For the purposes of paragraph (g), conduct in the practice of law includes: (i) 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; (ii) operating or managing a law firm or law practice; or (iii) participation in judicial boards, conferences, or committees; continuing legal education seminars; bench bar conferences; and bar association activities where legal education credits are offered.

The term "the practice of law" does not include speeches, communications, debates, presentations, or publications given or published outside the contexts described in (i)—(iii).

(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.

* * *

3. Federal Rule of Civil Procedure 15 provides:

Rule 15. Amended and Supplemental Pleadings

(a) Amendments Before Trial.

(1) *Amending as a Matter of Course.* A party may amend its pleading once as a matter of course no later than:

(A) 21 days after serving it, or

(B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier.

(2) *Other Amendments.* In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires.

* * *

(d) Supplemental Pleadings. On motion and reasonable notice, the court may, on just terms, permit a party to serve a supplemental pleading setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented. The court may permit supplementation even though the original pleading is defective in stating a claim or defense. The court may order that the opposing party plead to the supplemental pleading within a specified time.

Appendix G

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ZACHARY GREENBERG, *Plaintiff*, v. JAMES C. HAGGERTY, in his official capacity as Board Chair of The Disciplinary Board of the Supreme Court of Pennsylvania; JOHN F. CORDISCO, in his official capacity as Board Vice-Chair of The Disciplinary Board of the Supreme Court of Pennsylvania; CELESTE L. DEE, in her official capacity as Member of The Disciplinary Board of the Supreme Court of Pennsylvania; JOHN P. GOODRICH, in his official capacity as Member of The Disciplinary Board of the Supreme Court of Pennsylvania; JERRY	Civil Action No. 2:20-cv-03822

M. LEHOCKY, in his official capacity as Member of The Disciplinary Board of the Supreme Court of Pennsylvania; CHRISTOPHER M. MILLER, in his official capacity as Member of The Disciplinary Board of the Supreme Court of Pennsylvania; GRETCHEN A. MUNDORFF, in her official capacity as Member of The Disciplinary Board of the Supreme Court of Pennsylvania; JOHN C. RAFFERTY, in his official capacity as Member of The Disciplinary Board of the Supreme Court of Pennsylvania; DION G. RASSIAS, in his official capacity as Member of The Disciplinary Board of the Supreme Court of Pennsylvania; ROBERT L. REPARD, in his official capacity as Member of The Disciplinary Board of the Supreme Court of Pennsylvania; EUGENE F. SCANLON, JR., in his official capacity as Member of The Disciplinary Board of the Supreme Court of Pennsylvania; DAVID S. SENOFF, in his official capacity as Member of The Disciplinary Board of the

Supreme Court of Pennsylvania; THOMAS J. FARRELL, in his official capacity as Chief Disciplinary Counsel of the Office of Disciplinary Counsel; RAYMOND S. WIERCISZEWSKI, in his official capacity as Deputy Chief Disciplinary Counsel of the Office of Disciplinary Counsel

Defendants.

VERIFIED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

1. More than a half-century ago, our Supreme Court warned that "vague qualification[s]" "easily adapted to fit personal views and predilections, can be a dangerous instrument for discriminatory denial of the right to practice law." *Konigsberg v. State Bar of Cal.*, 353 U.S. 252, 263 (1957). Lawyers must remain "unintimidated—free to think, speak, and act as members of an Independent Bar." *Id.* at 273. Through ratification of Pennsylvania Rule of Professional Conduct 8.4(g) in June, the state of Pennsylvania seeks to dictate what views members of its bar may hold and express, and what views are too offensive to share. As did the State of California in *Konigsberg*, Pennsylvania has "sacrificed vital freedoms" in hopes of

molding a bar that will reflect the State's views. *Id.* at 273. The Constitution does not allow that.

2. Zachary Greenberg, a Pennsylvania-licensed attorney working for a non-profit organization that advocates on behalf of students' constitutional rights, regularly speaks at Continuing Legal Education ("CLE") and non-CLE events on a variety of hot-button legal issues including the constitutionality of hate speech regulation, Title IX's effect on the Due Process rights of individuals accused of sexual assault and misconduct, campaign finance speech restrictions, university policies on fraternity and sorority misconduct, professorial academic freedom, university regulation of hateful expression online, attorney free speech rights, and abusive public records requests. Rule 8.4(g) threatens to impose civil sanction on Plaintiff if an audience member misconstrues his speech as a manifestation of bias or prejudice and registers a complaint with the Office of Disciplinary Counsel.

3. This civil rights action seeks a declaration that Rule 8.4(g) on its face violates the First Amendment (as incorporated through the Fourteenth Amendment) and an injunction preventing Defendants, in their official capacities, from enforcing the rule.

JURISDICTION AND VENUE

4. Plaintiff brings this action pursuant to Section 1 of the Civil Rights Act of 1871, 42 U.S.C. § 1983, and the Declaratory Judgment Act, 28 U.S.C. §§2201–02, for violations of the First and Fourteenth Amendments to the United States Constitution.

5. This Court has subject-matter jurisdiction under 28 U.S.C. §§ 1331 and 1343(a).

6. Venue is proper in this district under 28 U.S.C. § 1391(b).

PARTIES

7. Plaintiff Zachary Greenberg is a Pennsylvania-licensed attorney who is employed by the non-profit Foundation for Individual Rights in Education ("FIRE"). He is a citizen of Pennsylvania who both works and resides in the City and County of Philadelphia.

8. Defendants James C. Haggerty, John F. Cordisco, Celeste L. Dee, John P. Goodrich, Jerry M. Lehocky, Christopher M. Miller, Gretchen A. Mundorff, John C. Rafferty, Dion G. Rassias, Robert L. Repard, Eugene F. Scanlon, Jr., and David S. Senoff, are the members of The Disciplinary Board of the Supreme Court of Pennsylvania (the "Board"), each of whom is being sued in his or her official capacity. Mr. Haggerty is Board Chair; Mr. Cordisco is Board Vice-Chair. The Pennsylvania Constitution, Article V, §10(c), vests authority in the Pennsylvania Supreme Court to prescribe general rules for practice and procedures of law within the State. Pursuant to this authority, the Pennsylvania Supreme Court established the Board in 1972 to regulate attorney conduct. Sitting in panels, the Board adjudicates actions prosecuted by the Office of Disciplinary Counsel (the "Office") that seek to enforce the Pennsylvania Rules of Professional Conduct against Pennsylvania-licensed respondent-attorneys.

9. Defendant Thomas J. Farrell is Chief Disciplinary Counsel of the Office of Disciplinary Counsel. Defendant Raymond S. Wierciszewski is Deputy Chief Disciplinary Counsel of the Office of Disciplinary Counsel. Each is being sued in his official capacity. The Office receives complaints of unethical conduct, investigates such complaints, and initiates and prosecutes disciplinary proceedings against respondent-attorneys. The Chief Disciplinary Counsel and the Deputy Chief Disciplinary Counsel supervise the Office.

FACTS

The plaintiff

10. Plaintiff Zachary Greenberg graduated with a Juris Doctor degree from Syracuse University College of Law in 2016.

11. Greenberg sat for and passed the Pennsylvania Bar Exam in February 2019 and was admitted to the Pennsylvania Bar in May 2019.

12. Greenberg is currently a member of the Pennsylvania Bar in good standing and of active status.

13. Greenberg works as a Program Officer for FIRE.

14. Greenberg's job responsibilities include speaking, writing, publishing, and educating about a variety of topics relevant to FIRE's mission defending and sustaining the individual rights of students and faculty members at America's colleges and universities. These rights include freedom of speech, freedom of association, due process, legal equality, religious liberty, and sanctity of conscience—

essential liberties guaranteed by the United States Constitution at public universities and by contract at private universities.

15. Greenberg is currently a member of the First Amendment Lawyers Association ("FALA"), a not-for-profit, nationwide association of hundreds of attorneys devoted to the protection of Free Expression under the First Amendment. FALA regularly conducts CLE events for its members.

16. Greenberg regularly speaks at both CLE and non-CLE events as a Program Officer for FIRE and a member of FALA. He has spoken to attorneys, university legal counsels, college administrators, students, parents, and alumni on legal topics related to FIRE work and the First Amendment.

17. Greenberg has presented CLE seminars to attorneys on the First Amendment's limits on rules of professional conduct and legal ethics related to the practice of law.

18. Greenberg has presented educational seminars to college administrators and legal counsels on reforming university policies that violate student free speech rights, and the legal ramifications on failing to do so.

19. Greenberg has written and spoken against banning hate speech on university campuses, a controversial position that some people would view as manifesting bias against minority groups that advocate for hate speech regulation.

20. Greenberg has written and spoken against university regulation of hateful online expression protected by

First Amendment standards, and has defended the right of professors, students, and student groups to engage in hateful expression protected by First Amendment standards—a controversial position that some people would view as manifesting bias against minority groups that advocate for hate speech regulation.

21. Greenberg has written and spoken in favor of plenary Due Process protections for college students accused of sexual misconduct, a controversial position that some people would view as manifesting bias against women.

22. Greenberg has written and spoken in favor of the First Amendment right to participate in political speech through making monetary contributions to political organizations and candidates, a controversial position that some people would view as manifesting bias on the basis of socioeconomic status.

23. Greenberg has written and spoken in favor of allowing religious speech on college campus even when that speech espouses discriminatory views, a controversial position that some people would view as manifesting bias on the basis of gender identity, gender expression, sexual orientation and marital status.

24. Since he has been at FIRE, Greenberg has participated in numerous speaking engagements, many of which are addressed to students, student groups, and fellow attorneys.

25. Additionally, Greenberg has also presented at formally-accredited CLE and non-CLE seminars.

26. For example, in 2017, at a CLE at a FALA conference in San Diego, California, Greenberg spoke to dozens

of attorneys about *Citizens United v. FEC*, 558 U.S. 310 (2010), a controversial decision that some view as sustaining race and class-based bias in the election system.

27. For example, in 2018, Greenberg spoke to dozens of attorneys about the First Amendment limitations on rules of professional conduct and legal ethics related to the practice of law at a CLE at a FALA conference in Denver, Colorado.

28. For example, in 2018, at a CLE in Villanova, Pennsylvania, Greenberg spoke to attorneys, parents, and students on the legal limits of a university's power to punish student online expression deemed offensive, prejudiced and hateful.

29. For example, in 2019, Greenberg spoke to the American Association of University Professors chapter at La Salle University in Philadelphia, Pennsylvania, on the legal limits of a university's power to punish professors for expression, teaching, and research deemed offensive, prejudiced and hateful.

30. For example, in a virtual educational seminar in 2019, Greenberg spoke to university administrations and legal counsels on the legal limits of a university's power to punish students and student groups for expression deemed offensive, prejudiced and hateful.

31. In 2020 Greenberg was scheduled to speak at an accredited CLE hosted by FIRE again on the topic of the Citizens United v. FEC, 558 U.S. 310 (2010). This event will likely be rescheduled after Rule 8.4(g)'s effective date in December 2020.

32. Greenberg intends and expects to continue speaking at similar events on similar topics for the foreseeable future.

Pennsylvania Rule of Prof. Conduct 8.4(g)

33. Since the late 1990s, the American Bar Association's Model Rules of Professional Responsibility have included a comment explaining that "A lawyer who, in the course of representing a client, knowingly manifests, by words or conduct, bias or prejudice based on race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status violates paragraph [8.4](d) when such actions are prejudicial to the administration of justice."

34. In August 2016, the ABA promulgated Model Rule of Professional Conduct 8.4(g), which prohibits "engag[ing] in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law."

35. A comment to M.R.P.C 8.4(g) explains that "[s]uch discrimination includes harmful verbal or physical conduct that manifests bias or prejudice towards others."

36. Subsequently, numerous states including Arizona, Idaho, Illinois, Louisiana, Minnesota, Montana, Nevada, South Carolina, Tennessee, and Texas have all rejected proposals to adopt forms of M.R.P.C. 8.4(g).

37. Many of those states explicitly recognized that the rule would violate the First Amendment. *See, e.g.*, Tex. Att'y Gen. Op. KP-0123 (Dec. 20, 2016).

38. In October 2016, the Pennsylvania Bar Association's Commission on Women in the Profession proposed adopting Rule 8.4(g) in Pennsylvania.

39. The Disciplinary Board of the Supreme Court of Pennsylvania declined to adopt the ABA Model Rule, noting in 2018 that as drafted, Model Rule 8.4(g) is "susceptible to challenges related to constitutional rights of lawyers, such as freedom of speech, association and religion."

40. After an iterative process of notice and comment, on June 8, 2020, Pennsylvania became one of the first states to adopt a variation of M.R.P.C. 8.4(g) when, over Justice Mundy's dissent, the Supreme Court of Pennsylvania approved the recommendation of the Board and ordered that Pennsylvania Rule of Professional Conduct 8.4 would be amended to include the new Rule 8.4(g), which reads as follows:

> It is professional misconduct for a lawyer to:
>
> * * *
>
> (g) in the practice of law, by words or conduct, knowingly manifest bias or prejudice, or engage in 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.

Comment:

* * *

[3] For the purposes of paragraph (g), conduct in the practice of law includes participation in activities that are required for a lawyer to practice law, including but not limited to continuing legal education seminars, bench bar conferences and bar association activities where legal education credits are offered.

[4] The substantive law of antidiscrimination and anti-harassment statutes and case law guide application of paragraph (g) and clarify the scope of the prohibited conduct.

41. Under the Pennsylvania Supreme Court's order, Rule 8.4(g) becomes effective on December 8, 2020. Unfortunately, the modifications of Rule 8.4(g) that Pennsylvania imposed do not cure the First Amendment problems created by the Model Rule.

42. Rule 8.4(g) is not limited to manifestations that occur "in the course of representing a client" and "when such actions are prejudicial to the administration of justice."

43. Rule 8.4(g) Pennsylvania's proposed rule does not define the terms bias, prejudice, or harassment, and states that bias or harassment entails conduct "including but not limited to" a variety of categories.

44. Rule 8.4(g) is not restricted to conduct, but expressly regulates "words."

45. As with all Pennsylvania Rules of Professional Conduct, the Office will have authority to investigate putative violations of Rule 8.4(g) and the authority to prosecute enforcement actions against Pennsylvania-licensed attorneys who the Office believes to be in violation of the rule.

46. In furthering its functions of investigating alleged disciplinary rules violations and enforcing the rules, the Office receives and investigates complaints lodged by any member of the public.

47. Submitting a complaint requires only filling out a simple 2-page form and submitting it on the Board's website (padisciplinaryboard.org) or in paper form.

48. The Office will assist the complainant in reducing the grievance to writing if necessary.

49. The online complaint form promises that the Office and the Board are bound by a promise of confidentiality to complainants.

50. The online complaint form promises that under Enforcement Rule 209(a), complainants will be immune from

civil suit based upon their communications with Disciplinary Counsel or the Board.

51. Upon receiving a complaint, the Office sends notice to the attorney accused of misconduct.

52. Within 30 days, or a shorter time if fixed by Disciplinary Counsel in the notice, the respondent-attorney must respond by filing a statement of position in writing detailing his defense.

53. Failing to respond is itself grounds for discipline.

54. As part of its initial notification process, Disciplinary Counsel may obtain a subpoena to compel the respondent-attorney to produce records and documents.

55. If the Office and Disciplinary Counsel decline to dismiss a complaint, they may recommend a variety of sanctions: informal admonition, private reprimand, public reprimand or the prosecution of formal charges before a hearing committee. A respondent-attorney may object to the recommended disposition.

56. In the event that formal charges are pursued, the Office acts as prosecutor in a formal proceeding in front of a hearing committee or special master, who will issue a report and recommended disposition.

57. Sitting in panels of three, the Board then reviews objections to the report and recommendation of the hearing committee or special master.

58. If the Board declines to dismiss the proceeding, it has the authority to sanction attorneys through informal admonition, private reprimand, public reprimand as well

as the authority to tax the expenses of the investigation and prosecution to the respondent-attorney.

59. The Board may also recommend dispositions of probation, censure, suspension or disbarment, which will be determined by the Pennsylvania Supreme Court upon the record of the Board and sometimes oral argument with the participation of Disciplinary Counsel and/or the Board.

Injury

60. Greenberg plans to continue to speaking at CLE and non-CLE events like those discussed above in ¶¶14-32, pursuant to the expectations of his employer, his professional organization memberships, and his personal interests, but the existence of Rule 8.4(g) and the uncertainty surrounding the scope of Rule 8.4(g) will chill his speech.

61. The vast majority of topics covered by Greenberg's speaking engagements, and virtually all the examples used by Greenberg in his speaking engagements to illustrate his points, are considered biased, prejudiced offensive, and hateful by some members of his audience, and some members of society at large.

62. For example, during his presentations, Greenberg's discussion of hateful speech protected by the First Amendment involves a detailed summation of the law in this area, which includes a walkthrough of prominent, precedential First Amendment cases addressing incendiary speech. This summation covers, among other cases: *Metal v. Tam*, 137 S.Ct. 1744 (2017) (addressing

trademark protection for the band called the "Slants"—a common racial epithet for persons of Asian descent); *Snyder v. Phelps*, 562 U.S. 443 (2011) (considering the right of picketers carrying such signs as "God Hates Fags" and "Priests Rape Boys"); *Papish v. Board of Curators of the University of Missouri*, 410 U.S. 667, 667-68 (1973) (upholding as protected speech a student newspaper's front-page use of the vulgar headline "Motherfucker Acquitted" and a "political cartoon . . . depicting policemen raping the Statue of Liberty and the Goddess of Justice.").

63. Greenberg believes it would be nearly impossible to illustrate United States First Amendment jurisprudence, such as by accurately citing and quoting precedent First Amendment cases, without engaging in speech that at least some members of his audience will perceive as biased, prejudiced, offensive, and potentially hateful.

64. Greenberg believes that every one of his speaking engagements on First Amendment issues carries the risk that an audience member will file a bar disciplinary complaint against him based on the content of his presentation under rule 8.4(g).

65. Considering the large amount of time and money Greenberg devoted to attaining his Pennsylvania license to practice law, Greenberg is justifiability unwilling to take this risk, and will refrain from conduct speaking engagement on controversial issues as a result. Greenberg's self-censorship will extend to excluding, limiting, and sanitizing the examples used in his speaking engagements to illustrate his points, in order to reduce the risk of an audience member reporting his expression to the Office.

66. Greenberg does not wish to be subjected to a disciplinary investigation by the Office.

67. Greenberg does not wish to be subjected to disciplinary proceedings in front of the Board.

68. Greenberg does not wish to be subjected to disciplinary sanctions by the Office or the Board.

69. A disciplinary investigation would harm Greenberg's professional reputation, available job opportunities, and speaking opportunities.

70. Disciplinary proceedings would harm Greenberg's professional reputation, available job opportunities, and speaking opportunities.

71. Disciplinary sanctions would harm Greenberg's professional reputation, available job opportunities, and speaking opportunities.

72. Greenberg reasonably fears that his writings and speeches could be misconstrued by readers and listeners, and state officials within the Board or Office, as violating Rule 8.4(g).

73. This fear of misuse of Rule 8.4(g) is far from hypothetical. Activists have frequently used anti-discrimination rules and accusations of bigotry to harass speakers for political reasons.

a. For example, in 2012, Judge Edith Jones gave a speech about the death penalty at the University of Pennsylvania Law School Federalist Society where she made the empirical observation that members of some racial groups commit

crime at rates disproportionate to their population. In 2013, activists mischaracterized Judge Jones's remarks for political purposes to file an ethics complaint against her for "racial bias." *In re Charges of Judicial Misconduct*, No. DC-13-90021 at Appx. 23-28 (Jud. Council D.C. Cir. 2014).

b. In 2015, Northwestern University professor Laura Kipnis wrote an essay in the *Chronicle of Higher Education* critical of the use of Title IX policies on sexual misconduct. In retaliation, two graduate students filed a Title IX complaint against Professor Kipnis claiming that her essay created a "hostile environment," and then filed a second Title IX complaint against her when she wrote about the first Title IX complaint. Jeannie Suk Gerson, *Laura Kipnis's Endless Trial by Title IX*, NEW YORKER (Sep. 20, 2017).

c. While Judge Jones and Professor Kipnis were eventually cleared of wrongdoing, they faced years of investigation and harassment at non-trivial costs to themselves and their reputations. Moreover, Rule 8.4(g) is amorphous enough to include their "words" as potentially sanctionable if Greenberg were to repeat their arguments.

d. An evolutionary biologist postdoctoral student at Penn State, Colin Wright, was labeled a transphobe after he published on social media in support of an established theory that societal factors are causally responsible for recent rises in gender dysphoria. Wright became subject to a coordinated effort that attempted to inflict reputational and vocational harm on him. Colin Wright (@swipewright), TWITTER (Jul 10, 2020, 11:30 PM), https://twitter.com/SwipeWright/status/1281793005968437248 [https://web.archive.org/web/20200711130230/https://twitter.com/SwipeWright/status/1281793005968437248]; Colin Wright, *Think Cancel Culture Doesn't Exist? My Own 'Lived Experience Says Otherwise*, QUILLETTE (Jul. 30, 2020), https://quillette.com/2020/07/30/think-cancel-culture-doesnt-exist-my-own-lived-experience-says-otherwise/ [https://web.archive.org/web/20200731131527/https://quillette.com/2020/07/30/think-cancel-culture-doesnt-exist-my-own-lived-experience-says-otherwise/].

e. Mere mention of certain hateful epithets, even when quoting text from legal opinions in a purely academic and pedagogical context, has been met with

accusations of prejudice and bias, and has even resulted in university discipline. Adam Steinbaugh, *Emory Law Professor faces termination hearing for using 'n-word' in discussion of civil rights case, discussion with student*, FIRE NEWSDESK (Aug. 30, 2019), https://www.thefire.org/emory-law-professor-faces-termination-hearing-for-using-n-word-in-discussion-of-civil-rights-case-discussion-with-student/ [https://web.archive.org/web/20200608173249/https://www.thefire.org/emory-law-professor-faces-termination-hearing-for-using-n-word-in-discussion-of-civil-rights-case-discussion-with-student/]; Colleen Flaherty, *Too Taboo for Class*, INSIDE HIGHER ED, (Feb. 1, 2019), https://www.insidehighered.com/news/2019/02/01/professor-suspended-using-n-word-class-discussion-language-james-baldwin-essay [https://web.archive.org/web/20200726223221/https://www.insidehighered.com/news/2019/02/01/professor-suspended-using-n-word-class-discussion-language-james-baldwin-essay]; Eugene Volokh, *UCLA Law Dean Apologizes for My Having Accurately Quoted the Word "Nigger" in Discussing a Case*, THE VOLOKH CONSPIRACY

(Apr. 14, 2020, 5:14 PM), https://reason.com/2020/04/14/ucla-law-dean-apologizes-for-my-having-accurately-quoted-the-word-nigger-in-discussing-a-case/ [https://web.archive.org/web/20200717062702/https://reason.com/2020/04/14/ucla-law-dean-apologizes-for-my-having-accurately-quoted-the-word-nigger-in-discussing-a-case/].

f. In the wake of the killing of George Floyd, dozens of people lost their jobs or suffered other negative repercussions for words or conduct perceived to manifest racial bias or prejudice. *List of People Canceled in Post-George-Floyd Antiracism Purges*, FUTURE OF CAPITALISM, (Jun. 11, 2020, 10:46 PM) (chronicling accounts of more than thirty individuals by the time this complaint was filed), https://www.futureofcapitalism.com/2020/06/list-of-people-canceled-in-post-george-floyd [https://web.archive.org/web/20200804095555/https://www.futureofcapitalism.com/2020/06/list-of-people-canceled-in-post-george-floyd].

g. For example, a progressive data analyst, David Shor, was labeled as a racist and fired after sharing a study which argued that violent protests are not as effective as non-violent ones. Jonathan Chait, *An*

Elite Progressive LISTSERV Melts Down Over a Bogus Racism Charge, NEW YORK INTELLIGENCER (Jun. 23, 2020), https://nymag.com/intelligencer/2020/06/white-fragility-racism-racism-progressive-progressphiles-david-shor.html [https://web.archive.org/web/20200724164256/https://nymag.com/intelligencer/2020/06/white-fragility-racism-racism-progressive-progressphiles-david-shor.html].

h. A longtime museum curator at the San Francisco Museum of Modern Act was labeled a racist and ousted because he had said that shunning white artists would be impermissible "reverse discrimination." Robby Soave, *Museum Curator Resigns After He is Accused of Racism for Saying He Would Still Collect Art From White Men*, REASON (Jul. 14, 2020, 1:35 PM), https://reason.com/2020/07/14/gary-garrels-san-francisco-museum-modern-art-racism/ [https://web.archive.org/web/20200724171511/https://reason.com/2020/07/14/gary-garrels-san-francisco-museum-modern-art-racism/].

74. Even Supreme Court Justices are now routinely accused of manifesting prejudice or bias on bases that would subject them to Rule 8.4(g) liability.

a. Justice Scalia's discussion of "mismatch" theory during oral argument in *Fisher v. Univ. of Texas*, 136 S.Ct. 2198 (2016) led numerous commentators to accuse him of racism. *See, e.g.*, Stephen Dinan, *Scalia Accused of Embracing 'Racist' Ideas for Suggesting 'Lesser' Schools for Blacks*, WASH. TIMES (Dec. 10, 2015), http://www.washingtontimes.com/news/2015/dec/10/antonin-scaliaaccused-of-embracing-racist-ideas-f/ [https://perma.cc/V6CX-DWHY]; Lauren French, Pelosi: *Scalia Should Recuse Himself from Discrimination Cases*, POLITICO (Dec. 11, 2015, 12:56 PM), http://www.politico.com/story/2015/12/nancy-pelosi-antonin-scalia-216680 [https://perma.cc/BCL5-VGWY]; Joe Patrice, *Scientists Agree: Justice Scalia Is a Racist Idiot*, ABOVE THE LAW (Dec. 14, 2015, 9:58 AM), http://abovethelaw.com/2015/12/scientists-agree-justice-scalia-is-a-racist-idiot/ [https://perma.cc/9GA8-2NGT]; David Savage, *Justice Scalia Under Fire for Race Comments During Affirmative Action Argument*, L.A. TIMES (Dec. 10, 2015, 2:40 PM), http://www.latimes.com/nation/la-na-scalia-race-20151210-story.html [https://perma.cc/U3T2-CBAE]; Debra Cassens Weiss, *Was Scalia's Comment*

Racist?, A.B.A. J. (Dec. 10, 2015, 7:32 AM), http://www.abajournal.com/news/article/was_scalias_comment_racist_some_contend_blacks_may_do_better_at_slower_trac/ [https://perma.cc/G7DH-U5H3].

b. Justice Thomas has been characterized as "homophobic" based upon opinions and dissents that he has penned. *See* Trudy Ring, *Homophobic Justice Clarence Thomas Ill, May Miss LGBTQ Rights Cases*, ADVOCATE, (Oct. 7, 2019, 1:02 PM), https://www.advocate.com/news/2019/10/07/homophobic-justice-clarence-thomas-ill-may-miss-lgbtq-rights-cases [https://web.archive.org/web/20191208082732/https://www.advocate.com/news/2019/10/07/homophobic-justice-clarence-thomas-ill-may-miss-lgbtq-rights-cases].

c. Justice Alito has been maligned as having manifested a "jurisprudence of white racial innocence." *See* Ian Millhiser, *Justice Alito's Jurisprudence of White Racial Innocence*, VOX, (Jun. 23, 2020, 9:26 AM), https://www.vox.com/2020/4/23/21228636/alito-racism-ramos-louisiana-unanimous-jury [https://web.archive.org/web/20200702011327/https://www.vox.com/2020/4/23/21228636/alito-

racism-ramos-louisiana-unanimous-jury].

d. Justice Gorsuch was alleged to have "affirmed a chauvinistic view of women" through "sexist" comments he made while teaching at the University of Colorado Law School. *See* Mark Joseph Stern, *Why Gorsuch's Alleged Sexist Classroom Comments Are So Troubling—And Revealing*, SLATE, (Mar. 20, 2017, 3:07 PM), https://slate.com/human-interest/2017/03/gorsuchs-sexist-classroom-comments-are-troubling-and-revealing.html [https://web.archive.org/web/20190510052004/https://slate.com/human-interest/2017/03/gorsuchs-sexist-classroom-comments-are-troubling-and-revealing.html].

e. Justice Kavanaugh has been accused of authoring an opinion that peddles "class prejudice." Andrew Strom, *Brett Kavanaugh, "Common Sense," and Class Prejudice,* ONLABOR, (Jul. 12, 2018), https://www.onlabor.org/brett-kavanaugh-common-sense-and-class-prejudice/ [https://web.archive.org/web/20190807113628/https://www.onlabor.org/brett-kavanaugh-common-sense-and-class-prejudice/].

f. Justice Roberts has not escaped criticism either. The Chief Justice has been

denounced for manifesting "gendered and ideological" biases in his superintendent role at Supreme Court oral arguments. Leah Litman & Tonja Jacobi, *Does John Roberts Need to Check His Own Biases?*, N.Y. TIMES, (Jun. 2, 2020), https://www.nytimes.com/2020/06/02/opinion/john-roberts-supreme-court.html [https://web.archive.org/web/20200603105342/https://www.nytimes.com/2020/06/02/opinion/john-roberts-supreme-court.html]. In a less diplomatic piece, one commentator opined that "Roberts has consistently shown himself to be a deep racist—albeit one who draws less attention than his cross-burning brethren." Elie Mystal, *The Racism of Chief Justice John Roberts Is About To Be Fully Unleashed*, ABOVE THE LAW, (Jun. 28, 2018, 2:01 PM), https://abovethelaw.com/2018/06/the-racism-of-chief-justice-john-roberts-is-about-to-be-fully-unleashed/ [https://perma.cc/5VH4-CEWF].

g. After Justice Kennedy's retirement, one academic commentator derided the entire body of his jurisprudence as having "privileged the interests and perspectives of white, heterosexual Christians and ultimately harmed a wide swath of

sexual, racial, and religious minorities." Russell K. Robinson, *Justice Kennedy's White Nationalism*, 53 U.C. DAVIS L. REV. 1027, 1028 (2019). The same article called on its readers "to probe judicial claims of neutrality—such as Chief Justice Roberts' claim that 'we do not have Obama or Trump judges,' because they may cloak unseemly power dynamics, including a white nationalist agenda." *Id.* at 1037.

h. Justices Alito, Gorsuch, Kavanaugh, Roberts and Thomas together were condemned by some commentators as harboring anti-Muslim prejudice when they denied, in *Dunn v. Ray*, 139 S.Ct. 661 (2019), a stay of execution to a prisoner who had made a last-minute request for an imam in the execution chamber. *See, e.g.*, Robert Barnes, *Supreme Court's Execution Decision Animates Critics on the Left and Right*, WASHINGTON POST, (Feb. 11, 2019, 5:08 PM), https://www.washingtonpost.com/world/national-security/supreme-courts-execution-decision-animates-critics-on-the-left-and-right/2019/02/11/72da5ed8-2e3a-11e9-813a-0ab2f17e305b_story.html [https://web.archive.org/web/20190226103751/https://www.washingtonpost.com/world/national-

security/supreme-courts-execution-decision-animates-critics-on-the-left-and-right/2019/02/11/72da5ed8-2e3a-11e9-813a-0ab2f17e305b_story.html]; Luke Goodrich, *No Anti-Muslim Bias at Supreme Court: Constitution, Argued Properly, Protects All Religions*, THE HILL, (Apr. 5, 2019, 2:30 PM), https://thehill.com/opinion/judiciary/437575-no-anti-muslim-bias-at-supreme-court-constitution-argued-properly-protects [https://web.archive.org/web/20190712165937/https://thehill.com/opinion/judiciary/437575-no-anti-muslim-bias-at-supreme-court-constitution-argued-properly-protects].

i. When Justice Ginsburg referred to Colin Kaepernick's National Anthem protests as "dumb and disrespectful," many media outlets criticized her view as borderline prejudiced if not explicitly manifesting racial bias. *See* Dave Zirin, *Ruth Bader Ginsburg Could Not Be More Wrong About Colin Kaepernick*, THE NATION, (Oct. 12, 2016), https://www.thenation.com/article/archive/ruth-bader-ginsburg-could-not-be-more-wrong-about-colin-kaepernick/ [https://web.archive.org/web/20200731232043/https://www.thenation.com/article/archive/ruth-bader-ginsburg-could-not-be-more-

wrong-about-colin-kaepernick/]; Sam Fulwood III, *Say It Ain't So, Ruth Bader Ginsburg*, CENTER FOR AMERICAN PROGRESS, (Oct. 14, 2016, 11:56 AM), https://www.americanprogress.org/issues/race/news/2016/10/14/146171/say-it-aint-so-ruth-bader-ginsburg/ [https://web.archive.org/web/20200716164625/https://www.americanprogress.org/issues/race/news/2016/10/14/146171/say-it-aint-so-ruth-bader-ginsburg/].

75. Greenberg will be forced to censor himself to steer clear of an ultimately unknown line so that his speech is not at risk of being incorrectly perceived as manifesting bias or prejudice.

76. But for Rule 8.4(g), Greenberg would be able to speak and write freely without the fear of the risk of professional liability for offending the wrong observer.

77. Even if the Defendants were to attempt to assure Greenberg that his speeches and writings were permitted under Rule 8.4(g), given the open-ended language of Rule 8.4(g) and its accompanying comments, Greenberg would not feel comfortable speaking freely and would still reasonably fear professional liability.

CAUSES OF ACTION

Claim I: Unconstitutional infringement of free speech

78. Greenberg reasserts and realleges paragraph 1 through 77 as if fully set forth therein.

79. According to the First Amendment to the United States Constitution, "Congress shall make no law . . . abridging the freedom of speech."

80. The First Amendment has been incorporated to apply to the states through the Fourteenth Amendment.

81. Greenberg's speech, as described above in ¶¶14-32, 60-65, is fully protected by the First Amendment.

82. Rule 8.4(g) chills such speech and, on the basis of content and viewpoint of the speech, imposes professional liability in contravention of the First Amendment.

83. Rule 8.4(g) is overly extensive and unduly burdensome.

84. Rule 8.4(g) does not serve a compelling interest.

85. Rule 8.4(g) is not appropriately tailored to any government interest.

86. Rule 8.4(g) invites arbitrary, subjective, and viewpoint discriminatory enforcement.

87. To the extent that Rule 8.4(g) is constitutional in any of its applications, it is nonetheless substantially overbroad in relation to any legitimate sweep and is facially unconstitutional for that reason.

88. Rule 8.4(g) is even more broad than Pennsylvania's non-binding Code of Civility which advises lawyers to "refrain from acting upon or manifesting racial, gender or other bias or prejudice toward any participant in the legal process."

89. On its face and as applied to speech like Greenberg's, Rule 8.4(g) violates the right to free speech guaranteed by the First Amendment.

90. Unless Defendants are enjoined from enforcing and adjudicating Rule 8.4(g), Greenberg will suffer irreparable harm.

91. Claim II: Unconstitutional vagueness

92. Greenberg reasserts and realleges paragraph 1 through 90 as if fully set forth therein.

93. The Fourteenth Amendment provides in relevant part that ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law."

94. Disciplinary enforcement proceedings deprive respondent-attorneys of liberty and property.

95. Due Process requires that people of ordinary intelligence be able to understand what conduct a given rule prohibits.

96. Rules, statutes or laws that fail to provide this fair notice are void for vagueness.

97. Rules, statutes or laws that authorize or even encourage discriminatory enforcement are void for vagueness.

98. Laws implicating and jeopardizing First Amendment rights are required to be especially precise.

99. People of ordinary intelligence cannot understand what Rule 8.4(g) prohibits.

100. Greenberg cannot understand what Rule 8.4(g) prohibits.

101. Rule 8.4(g) does not provide fair notice of what it prohibits.

102. Rule 8.4(g) authorizes and encourages discriminatory enforcement.

103. Rule 8.4(g) chills First Amendment protected speech and thus requires a more stringent review for vagueness.

104. Rule 8.4(g)'s use of the phrase "knowingly manifest bias or prejudice" is unconstitutionally vague.

105. Rule 8.4(g)'s use of the phrase "engage in harassment or discrimination" is unconstitutionally vague.

106. Rule 8.4(g)'s use of the phrase "in the practice of law" is unconstitutionally vague.

107. Rule 8.4(g)'s use of the phrase "as those terms are defined in applicable federal, state or local statutes or ordinances" is unconstitutionally vague.

108. Rule 8.4(g)'s use of the phrase "including but not limited to bias, prejudice, harassment, or discrimination based upon race, sex, gender identity or express, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, or socioeconomic status" is unconstitutionally vague.

109. Rule 8.4(g)'s use of the phrase "advice or advocacy consistent with these Rules" is unconstitutionally vague.

110. Comment 3 to Rule 8.4(g) is unconstitutionally vague.

111. Comment 4 to Rule 8.4(g) is unconstitutionally vague.

112. Rule 8.4(g) violates the Due Process Clause of the Fourteenth Amendment and so is void for vagueness.

113. The vagueness of Rule 8.4(g) chills protected speech and thereby also violates the First Amendment.

114. Unless Defendants are enjoined from enforcing and adjudicating Rule 8.4(g), Greenberg will suffer irreparable harm.

REQUEST FOR RELIEF

Therefore, Greenberg respectfully requests the following relief:

A. A declaratory judgment that Rule 8.4(g) facially violates the First and Fourteenth Amendments to the United States Constitution.

B. A permanent injunction prohibiting Defendants and their agents from enforcing Rule 8.4(g) en toto.

C. An award of attorneys' fees, costs, and expenses in this action; and

D. Any other legal or equitable relief to which Greenberg may show himself to be justly entitled.

Dated: August 6, 2020

Respectfully submitted,

/s/ Adam E. Schulman

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Attorney for Plaintiff Zachary Greenberg

VERIFICATION

Pursuant to 28 U.S.C. § 1746, I, Zachary Greenberg have personal knowledge of the matters alleged in the foregoing Verified Complaint concerning myself, my activities and my intentions. I verify under the penalty of perjury that the statements made therein are true and correct.

Executed on August 3, 2020

/s/Zachary Greenberg
Zachary Greenberg

Appendix H

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ZACHARY GREENBERG, *Plaintiff*, v. JOHN P. GOODRICH, in his official capacity as Board Chair of The Disciplinary Board of the Supreme Court of Pennsylvania; *et al.* *Defendants*.	No. 2:20-cv-03822

VERIFIED AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

1. "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Greenberg v. Haggerty*, 491 F. Supp. 3d 12, 30 (E.D. Pa. 2020) (internal quotation omitted). For "[t]hat is viewpoint discrimination: Giving offense is a viewpoint." *Id.* (internal quotation omitted). Revised Pennsylvania Rule of Professional Conduct 8.4(g) restricts viewpoints by prohibiting expression that denigrates, expressions of aversion or hostility, and expressions of disregard for what the Rule deems relevant individual characteristics. Though nominally a civil rights measure, the Rule redefines "harassment" and "discrimination" to censor protected expression, not simply prevent tortious behavior. The First Amendment does not permit this redefinition. *Saxe v. State College Area Sch. Dist.*, 240 F.3d 200 (3d Cir. 2001) (Alito, J.). Federal, state, and local anti-discrimination and anti-harassment laws promote the high-minded aim of equal access. But once again, "the plain language of Rule 8.4(g) does not reflect this intention." *Greenberg*, 491 F. Supp. 3d at 31. Indeed, the 2021 revisions explicitly decouple Rule 8.4(g) from existing civil rights law, again in favor of "creat[ing] a pathway for its handpicked arbiters to determine, without any concrete standards, who and what offends." *Id.* at 32. And again, that will leave Defendants free to determine which language denigrates, which shows aversion or hostility, and which manifests disregard for relevant individual characteristics all "based upon whether the viewpoint expressed is socially and politically acceptable." *Id.*

2. Zachary Greenberg, a Pennsylvania-licensed attorney working for a non-profit organization that advocates on behalf of students' constitutional rights, regularly speaks at Continuing Legal Education ("CLE") and non-CLE events on a variety of hot-button legal issues including the constitutionality of hate speech regulation, Title IX's effect on the Due Process rights of individuals accused of sexual assault and misconduct, campaign finance speech restrictions, university policies on fraternity and sorority misconduct, professorial academic freedom, university regulation of hateful expression online, attorney free speech rights, and abusive public records requests. Rule 8.4(g) threatens to impose civil sanction on Plaintiff if an audience member misconstrues his speech as denigrating, or showing hostility or aversion and registers a complaint with the Office of Disciplinary Counsel.

3. This civil rights action seeks a declaration that Rule 8.4(g) on its face violates the First Amendment (as incorporated through the Fourteenth Amendment) and an injunction preventing Defendants, in their official capacities, from enforcing the rule.

JURISDICTION AND VENUE

4. Plaintiff brings this action pursuant to Section 1 of the Civil Rights Act of 1871, 42 U.S.C. § 1983, and the Declaratory Judgment Act, 28 U.S.C. §§2201–02, for violations of the First and Fourteenth Amendments to the United States Constitution.

5. This Court has subject-matter jurisdiction under 28 U.S.C. §§ 1331 and 1343(a).

6. Venue is proper in this district under 28 U.S.C. § 1391(b).

PARTIES

7. Plaintiff Zachary Greenberg is a Pennsylvania-licensed attorney who is employed by the non-profit Foundation for Individual Rights in Education ("FIRE"). He is a citizen of Pennsylvania who both works and resides in the City and County of Philadelphia.

8. Defendants John P. Goodrich, Jerry M. Lehocky, Celeste L. Dee, Christopher M. Miller, Gretchen A. Mundorff, John C. Rafferty, Dion G. Rassias, Robert L. Repard, Eugene F. Scanlon, Jr., David S. Senoff, Robert J. Mongeluzzi, and Shohin H. Vance are the members of The Disciplinary Board of the Supreme Court of Pennsylvania (the "Board"), each of whom is being sued in his or her official capacity. Mr. Goodrich is Board Chair; Mr. Lehocky is Board Vice-Chair.

9. Defendant Thomas J. Farrell is Chief Disciplinary Counsel of the Office of Disciplinary Counsel ("ODC"). Defendant Raymond S. Wierciszewski is Deputy Chief Disciplinary Counsel of ODC. Each is being sued in his official capacity. ODC receives complaints of unethical conduct, investigates such complaints, and initiates and prosecutes disciplinary proceedings against respondent-attorneys. The Chief Disciplinary Counsel and the Deputy Chief Disciplinary Counsel supervise ODC.

FACTS

The plaintiff

10. Plaintiff Zachary Greenberg graduated with a Juris Doctor degree from Syracuse University College of Law in 2016.

11. Greenberg sat for and passed the Pennsylvania Bar Exam in February 2019 and was admitted to the Pennsylvania Bar in May 2019.

12. Greenberg is currently a member of the Pennsylvania Bar in good standing and of active status.

13. Greenberg works as a Program Officer for FIRE.

14. Greenberg's job responsibilities include speaking, writing, publishing, and educating about a variety of topics relevant to FIRE's mission defending and sustaining the individual rights of students and faculty members at America's colleges and universities. These rights include freedom of speech, freedom of association, due process, legal equality, religious liberty, and sanctity of conscience—essential liberties guaranteed by the United States Constitution at public universities and by contract at private universities.

15. Greenberg is currently a member of the First Amendment Lawyers Association ("FALA"), a not-for-profit, nationwide association of hundreds of attorneys devoted to the protection of Free Expression under the First Amendment. FALA regularly conducts CLE events for its members.

16. Greenberg, at least every other month, speaks at both CLE and non-CLE events as a Program Officer for FIRE and a member of FALA. He has spoken to attorneys, university legal counsels, college administrators, students, parents, and alumni on legal topics related to FIRE work and the First Amendment.

17. Greenberg has presented CLE seminars to attorneys on the First Amendment's limits on rules of

professional conduct and legal ethics related to the practice of law.

18. Greenberg has presented educational seminars to college administrators and legal counsels on reforming university policies that violate student free speech rights, and the legal ramifications on failing to do so.

19. Greenberg has written and spoken against banning "hate speech" on university campuses, a controversial position that some people would view as denigrating, or showing hostility or aversion toward minority groups that advocate for hate speech regulation.

20. Greenberg has written and spoken against university regulation of hateful online expression protected by First Amendment standards, and has defended the right of professors, students, and student groups to engage in hateful expression protected by First Amendment standards—a controversial position that some people would view as denigrating, or showing hostility or aversion toward minority groups that advocate for hate speech regulation.

21. Greenberg has written and spoken in favor of plenary Due Process protections for college students accused of sexual misconduct, a controversial position that some people would view as denigrating, or showing hostility or aversion toward women.

22. Greenberg has written and spoken in favor of the First Amendment right to participate in political speech through making monetary contributions to political organizations and candidates, a controversial position that some people would view as denigrating, or showing hostility or aversion on the basis of socioeconomic status.

23. Greenberg has written and spoken in favor of allowing religious speech on college campus even when that speech espouses discriminatory views, a controversial position that some people would view as denigrating, or showing hostility or aversion on the basis of gender identity, gender expression, sexual orientation and marital status.

24. Since he has been at FIRE, Greenberg has participated in numerous speaking engagements, many of which are addressed to students, student groups, and fellow attorneys.

25. Additionally, Greenberg has also presented at formally-accredited CLE and non-CLE seminars.

26. For example, in 2017, at a CLE at a FALA conference in San Diego, California, Greenberg spoke to dozens of attorneys about *Citizens United v. FEC*, 558 U.S. 310 (2010), a controversial decision that some view as sustaining race and class-based hostility in the election system.

27. For example, in 2018, Greenberg spoke to dozens of attorneys about the First Amendment limitations on rules of professional conduct and legal ethics related to the practice of law at a CLE at a FALA conference in Denver, Colorado.

28. For example, in 2018, at a CLE in Villanova, Pennsylvania, Greenberg spoke to attorneys, parents, and students on the legal limits of a university's power to punish student online expression deemed offensive, prejudiced and hateful.

29. For example, in 2019, Greenberg spoke to the American Association of University Professors chapter at

La Salle University in Philadelphia, Pennsylvania, on the legal limits of a university's power to punish professors for expression, teaching, and research deemed offensive, prejudiced and hateful.

30. For example, in 2019, Greenberg spoke to university administrations and legal counsels on the legal limits of a university's power to punish students and student groups for expression deemed offensive, prejudiced and hateful.

31. For example, in 2021, Greenberg spoke to FALA in a virtual CLE on government rules and ethical limitations on attorneys' First Amendment rights.

32. For example, in 2021, for a Good Citizen Day civics education event for the Union League, Greenberg spoke, discussing the effects of banning hateful expression.

33. Greenberg is scheduled to speak to student groups at numerous universities over the next several months as the fall 2021 semester begins.

34. Greenberg intends and expects to continue speaking at similar events on similar topics for the foreseeable future.

Pennsylvania Rule of Prof. Conduct 8.4(g)

35. Since the late 1990s, the American Bar Association's Model Rules of Professional Responsibility have included a comment explaining that "A lawyer who, in the course of representing a client, knowingly manifests, by words or conduct, bias or prejudice based on race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status violates paragraph [8.4](d) when

such actions are prejudicial to the administration of justice."

36. In August 2016, the ABA promulgated Model Rule of Professional Conduct 8.4(g), which prohibits "engag[ing] in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law."

37. A comment to M.R.P.C 8.4(g) explains that "[s]uch discrimination includes harmful verbal or physical conduct that manifests bias or prejudice towards others."

38. Subsequently, numerous states including Arizona, Idaho, Illinois, Louisiana, Minnesota, Montana, Nevada, South Carolina, Tennessee, and Texas have all rejected proposals to adopt forms of M.R.P.C. 8.4(g).

39. Many state authorities have explicitly recognized that the rule would violate the First Amendment. *See* Ark. Att'y Gen. Op. No. 2020-055 (Jul. 14, 2021); Letter from Robert Cook, S.C. Solicitor Gen., to State Rep. John R. McCravy, III (May 1, 2017); La. Atty. Gen. Op. 17-0114 (Sep. 8, 2017); Tenn. Atty. Gen. Op. 18-11 (March 16, 2018); Tex. Att'y Gen. Op. KP-0123 (Dec. 20, 2016); Letter from Kevin Clarkson, Alaska Atty. Gen., to Alaska Bar Ass'n (Aug. 9, 2019); Sen. J. Res. No. 15 (Mont. 2017), *available at* https://leg.mt.gov/bills/2017/billhtml/SJ0015.htm; Letter from Roger S. Burdick, Chief Justice of the Idaho Supreme Court, to Diane Minnich, Executive Director of the Idaho State Bar (Sept. 6, 2018), *available at*

https://www.clsreligiousfreedom.org/sites/default/files/site_files/ISC%20Letter%20-%20IRPC%208.4(g).pdf.

40. In October 2016, the Pennsylvania Bar Association's Commission on Women in the Profession proposed adopting Rule 8.4(g) in Pennsylvania.

41. The Board declined to adopt the ABA Model Rule, noting in 2018 that as drafted, Model Rule 8.4(g) is "susceptible to challenges related to constitutional rights of lawyers, such as freedom of speech, association and religion."

42. After an iterative process of notice and comment, on June 8, 2020, Pennsylvania became one of the first states to adopt a variation of M.R.P.C. 8.4(g) when, over Justice Mundy's dissent, the Supreme Court of Pennsylvania approved the recommendation of the Board and ordered that Pennsylvania Rule of Professional Conduct 8.4 would be amended to include Rule 8.4(g) ("Old 8.4(g)"), which read as follows:

> It is professional misconduct for a lawyer to:
>
> * * *
>
> (g) in the practice of law, by words or conduct, knowingly manifest bias or prejudice, or engage in 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.

Comment:

* * *

[3] For the purposes of paragraph (g), conduct in the practice of law includes participation in activities that are required for a lawyer to practice law, including but not limited to continuing legal education seminars, bench bar conferences and bar association activities where legal education credits are offered.

[4] The substantive law of antidiscrimination and anti-harassment statutes and case law guide application of paragraph (g) and clarify the scope of the prohibited conduct.

43. Under the Pennsylvania Supreme Court's order, Old 8.4(g) was scheduled to become effective on December 8, 2020.

44. Greenberg filed his initial complaint in this action on August 6, 2020, seeking an injunction against enforcement of Old 8.4(g), and a declaration of its unconstitutionality. Dkt. 1.

45. On December 8, 2020, the Eastern District of Pennsylvania issued a preliminary injunction enjoining enforcement of Old 8.4(g). Dkts. 29, 31.

46. Defendants appealed the preliminary injunction order to the Third Circuit, but subsequently voluntarily dismissed their appeal in March 2021.

47. At their April 13, 2021 meeting, Defendants forwarded to the Pennsylvania Supreme Court recommendations regarding amendments to Old 8.4(g).

48. On July 26, 2021, the Pennsylvania Supreme Court adopted the Board's recommended amendments and approved New Rule 8.4(g) ("New 8.4(g)" or just "8.4(g)"). See Dkt. 45-1.

49. Justice Mundy again dissented from the adoption, reasoning that the amendments failed to cure the unconstitutionality recognized in this Court's December 2020 decision.

50. New 8.4(g) did not go through any public notice and comment procedure.

51. New 8.4(g) is set to take effect on August 25, 2021.

52. Pursuant to stipulation of the parties, Defendants have agreed to forebear from enforcement of New 8.4(g) until this Court has rendered a decision on the cross-motions for summary judgment and to not retroactively enforce Rule 8.4(g) against alleged violations during that forbearance period. Dkt. 46 at 2.

53. As Justice Mundy's dissent recognizes, the modifications of New 8.4(g) do not cure the First Amendment infirmities of Old 8.4(g).

54. New 8.4(g) reads as follows:

It is professional misconduct for a lawyer to:

* * *

(g) in the practice of law, knowingly engage in conduct constituting 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.

Comment:

* * *

[3] For the purposes of paragraph (g), conduct in the practice of law includes (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. The term "the practice of law" does not include speeches, communications, debates, presentations, or publications given or published outside the contexts described in (1)-(3).

[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 inference with the fair administration of justice based on one or more of the listed characteristics.

55. New 8.4(g) is not limited to denigration, hostility, or aversion displayed "in the course of representing a client" and "when such actions are prejudicial to the administration of justice."

56. New 8.4(g), unlike Old 8.4(g), is not tethered to standard legal definitions of harassment and discrimination in federal or state law.

57. New 8.4(g) instead promulgates novel, expansive, and vague definitions for "harassment" and "discrimination."

58. New 8.4(g) restricts First Amendment protected expression, including speeches, communications, debates, and presentations at CLE seminars and bar association events.

The Disciplinary Process

59. The Pennsylvania Constitution, Article V, §10(c), vests authority in the Pennsylvania Supreme Court to prescribe general rules for practice and procedures of law within the State.

60. The Pennsylvania Supreme Court established the Board in 1972 to regulate attorney conduct.

61. One of the Board's functions is to adjudicate actions prosecuted by ODC, which is charged with investigating complaints against Pennsylvania-licensed attorneys for violating the Pennsylvania Rules of Professional Conduct and, if necessary, charging and prosecuting attorneys under the Pennsylvania Rules of Disciplinary Enforcement. See Pa.R.D.E. 205-08; Pa.D.Bd.R. §§ 93.21, 93.61.

62. As with all Pennsylvania Rules of Professional Conduct, ODC will have authority to investigate putative violations of Rule 8.4(g) and the authority to prosecute enforcement actions against Pennsylvania-licensed attorneys who ODC believes to be in violation of the rule.

63. In its capacity to investigate alleged disciplinary rules violations and enforce the rules, ODC receives and investigates complaints lodged by any member of the public.

64. Submitting a complaint requires only filling out a simple 2-page form and submitting it on the Board's website (padisciplinaryboard.org) or in paper form.

65. ODC will assist the complainant in reducing the grievance to writing if necessary.

66. The online complaint form promises that ODC and the Board are bound by a promise of confidentiality to complainants.

67. The online complaint form promises that under Enforcement Rule 209(a), complainants will be immune from civil suit based upon their communications with Disciplinary Counsel or the Board.

68. Upon receipt of a complaint involving an attorney, ODC conducts an investigation. The complaint is not a charging document, but a request to investigate an attorney.

69. Unless ODC determines that a complaint is frivolous or that policy or prosecutorial discretion warrant dismissal, it issues a DB-7 letter to the attorney, which is a Request for Statement of Respondent's Position.

70. Within 30 days, or a shorter time if fixed by Disciplinary Counsel in the notice, the respondent-attorney must respond by filing a statement of position in writing detailing his defense. See Pa.D.B.R. 87.7(b)(2).

71. Failing to respond is itself grounds for discipline. See Pa.R.D.E. 203(a)(7).

72. As part of its investigation of a complaint, Disciplinary Counsel may obtain a subpoena to compel the respondent-attorney to produce records and documents. See Pa.R.D.E. 213.

73. If, after an investigation and serving a DB-7 letter, ODC determines that some form of discipline is appropriate, they may recommend a variety of sanctions: informal admonition, private reprimand, public reprimand or the prosecution of formal charges before a hearing committee. A respondent-attorney may object to the recommended disposition.

74. ODC then drafts a form DB-3, a "Referral of Complaint to Reviewing Hearing Committee Member."

75. The DB-3 summarizes the results of the investigation and describes the respondent attorney's response to the charges in the DB-7. It cites the applicable rules of professional conduct and how the investigation demonstrates that the respondent violated specific rules. After considering the severity of the misconduct as compared to precedent, the respondent's history of prior discipline, and any other aggravating or mitigating circumstances, the DB-3 concludes with a recommendation of private discipline or a public reprimand or the filing of a petition for discipline (which is used only for seeking suspension or disbarment).

76. The Counsel in Charge of the District reviews the recommendation and, if they concur, drafts a recommendation to accompany the DB-3, which is reviewed by

ODC's Chief Disciplinary Counsel, Thomas Farrell, Esquire, prior to seeking discipline.

77. Unless an attorney consents to discipline or resigns, if the DB-3 is approved, a hearing committee member reviews and approves or disapproves of the proposed disposition. See Pa.R.D.E. 208(a)(3). A three-member panel of the Board reviews recommendations for private and public reprimands. See Pa.R.D.E. 208(a)(5); Pa.D.B.R. § 87.34.

78. If the matter is approved for informal admonition, private or public reprimand, the attorney is notified. If the attorney does not consent to the disposition, they have the right to insist on the filing of a petition for discipline, which then proceeds to a hearing before a hearing committee and review by the Board and possibly the Supreme Court of Pennsylvania. See Pa.R.D.E. 208(a)(6). ODC acts as prosecutor in a formal proceeding.

79. If the reviewing Hearing Committee member approves the filing of a petition for discipline, ODC Disciplinary Counsel drafts it and, after review and approval by the District's Counsel in Charge and Deputy Chief Disciplinary Counsel, serves it on the attorney. The case proceeds to a hearing before a Hearing Committee and then de novo review by the Board and the Supreme Court of Pennsylvania. See Pa.R.D.E. 208(b). The Board has the authority to sanction attorneys through informal admonition, private reprimand, public reprimand as well as the authority to tax the expenses of the investigation and prosecution to the respondent-attorney.

80. The Board may also recommend dispositions of probation, censure, suspension or disbarment, which will

be determined by the Pennsylvania Supreme Court upon the record of the Board and sometimes oral argument with the participation of Disciplinary Counsel and/or the Board.

Injury

81. Greenberg plans to continue to speaking at CLE and non-CLE events like those discussed above in ¶¶14-34, pursuant to the expectations of his employer, his professional organization memberships, and his personal interests. But the existence of 8.4(g) and the uncertainty surrounding the scope of 8.4(g) will chill his speech.

82. During his presentations, Greenberg's discussion of hateful speech protected by the First Amendment involves a detailed summation of the law in this area, which includes a walkthrough of prominent, precedential First Amendment cases addressing incendiary speech.

83. This summation covers, among other cases: *Matal v. Tam*, 137 S.Ct. 1744 (2017) (addressing trademark protection for the band called the "Slants"—a common racial epithet for persons of Asian descent); *Snyder v. Phelps*, 562 U.S. 443 (2011) (considering the right of picketers carrying such signs as "God Hates Fags" and "Priests Rape Boys"); *Papish v. Board of Curators of the University of Missouri*, 410 U.S. 667, 667-68 (1973) (upholding as protected speech a student newspaper's front-page use of the vulgar headline "Motherfucker Acquitted" and a "political cartoon . . . depicting policemen raping the Statue of Liberty and the Goddess of Justice."); *Dambrot v. Central Michigan University*, 55 F.3d 1177 (6th Cir. 1995) (invalidating campus speech code in a case involving the coach's utterance of a racial epithet in a college basketball locker

room). The *Dambrot* opinion uses the racial epithet nineteen times.

84. The vast majority of topics covered by Greenberg's speaking engagements, and virtually all the examples used by Greenberg in his speaking engagements to illustrate his points, are considered offensive, denigrating, hostile and hateful by some members of his audience, and some members of society at large.

85. After a May 2018 CLE presentation by Greenberg in Villanova, Pennsylvania, attorneys told him his presentation on his interpretation of the legal limits of a university's power to punish student online expression deemed offensive, prejudiced, and hateful was in and of itself offensive.

86. After a September 2018 presentation by Greenberg at the University of New Hampshire on free speech on campus, students approached Greenberg and told him that the content of his presentation and the ideas he expressed were offensive.

87. After a June 2019 virtual presentation by Greenberg with college administrators on fraternity and sorority student group rights, attendees provided feedback to Greenberg that the content of his presentation and the ideas he expressed were offensive.

88. A 2017 study from the Cato Institute on Free Speech and Tolerance in America, which surveyed 2300 members of the public of majority age, found that 43% agreed with the statement: "Supporting someone's right to say racist things is as bad as holding racist views yourself."

89. According to findings from Cato's 2017 Free Speech and Tolerance Survey, 48% of Democratic respondents and 36% of all respondents said that they would favor "a law that would make it illegal to say offensive or insulting things in public about . . . Gays, lesbians, and transgender people."

90. According to Cato's 2017 Free Speech and Tolerance Survey and FIRE's 2017 Student Attitudes Free Speech Survey, many people believe that the First Amendment should not protect hate speech. *See* Student Attitudes Free Speech Survey, FIRE, https://www.thefire.org/research/publications/student-surveys/student-attitudes-free-speech-survey/student-attitudes-free-speech-survey-full-text/ [https://web.archive.org/web/20200919100210/https://www.thefire.org/research/publications/student-surveys/student-attitudes-free-speech-survey/student-attitudes-free-speech-survey-full-text/].

91. A true and correct copy of the report of this Cato survey is found at Dkt. 23-1.

92. Greenberg believes it would be nearly impossible to illustrate United States First Amendment jurisprudence, such as by accurately citing and quoting precedent First Amendment cases, without engaging in speech that at least some members of his audience will perceive as denigrating, offensive, hostile, aversive, and potentially hateful.

93. Greenberg believes that opposing hate speech bans and regulation is a controversial position that some people view as manifesting the same hostility and aversion against minority groups as hate speech itself.

94. Greenberg believes that advocating for the right of people to express intolerant religious views is a controversial position that some people would view as denigrating individuals on the basis of gender identity, gender expression, sexual orientation and marital status.

95. FIRE's 2018 Student Attitudes Due Process Survey, which surveyed 2,225 undergraduate students who attended a two- or four-year education institution in the United States, showed that a smaller percentage of respondents supported due process protections for those of accused of "sexual misconduct" offenses rather than for those who are accused of "underage drinking" or generally accused of "breaking a campus rule." *Student Attitudes Due Process Survey*, FIRE, https://www.thefire.org/research/publications/student-surveys/student-attitudes-due-process-survey/student-attitudes-due-process-survey-full-text/ [https://web.archive.org/web/20200921042004/https://www.thefire.org/research/publications/student-surveys/student-attitudes-due-process-survey/student-attitudes-due-process-survey-full-text/].

96. When the U.S. Department of Education proposed reforms to Title IX guidance to provide the sort of due process protections Greenberg has supported, the National Women's Law Center sued to stop the Final Rule, and, in a June 2020 statement, said that the decision on the guidance was "another attempt to deliberately silence survivors based on the sexist myth that they are liars." NWLC's June 2020 federal complaint in the District of Massachusetts, *Victim Rights Law Center v. DeVos*, No. 1:20-cv-1104, called the procedural rules and standards "biased" and "motivated by discriminatory sex-based

stereotypes." Arpan Lobo, *Another group sues DeVos, DOE, over Title IX rules*, HOLLAND SENTINEL (JUN. 13, 2020, 12:01 PM), https://www.hollandsentinel.com/news/20200613/another-group-sues-devos-doe-over-title-ix-rules [https://web.archive.org/web/20200922211217/https://www.hollandsentinel.com/news/20200613/another-group-sues-devos-doe-over-title-ix-rules]; Complaint at 11, 13, *Victim Rights Law Center v. DeVos*, No. 1:20-cv-1104 (D. Mass. Jun. 10, 2020).

97. Greenberg believes that supporting Due Process protections for students accused of sexual misconduct is a controversial position that some people view as denigrating women and showing hostility and aversion toward women.

98. According to 2015 Stacked Deck Report by the think tank Demos, led by law professors and attorneys, our political system supporting the First Amendment right to participate in political speech through making monetary contributions to political organizations and candidates contains an "economic bias" that "creates and sustains similar racial bias because the donor class as a whole and campaign contributors are overwhelmingly white; and because the policy preferences of people of color are much more similar to those of the rest of the general public than to those of the rich." Adam Lioz, *Stacked Deck: How the Racial Bias in Our Big Money Political System Undermines Our Democracy and Our Economy*, DEMOS (Dec. 14, 2015), https://www.demos.org/sites/default/files/publications/StackedDeck2_1.pdf

[https://web.archive.org/web/20200810050042/https://www.demos.org/sites/default/files/publications/StackedDeck2_1.pdf].

99. Greenberg believes that supporting the First Amendment right to participate in political speech through making monetary contributions to political organizations and candidates is a controversial position that some people view as displaying race and class-based hostility and perpetuating race and class-based discrimination in the political system.

100. According to a 2019 Brennan Center for Justice explainer, "the most troubling result of Citizens United" is that "the decision has helped reinforce the growing sense that our democracy primarily serves the interests of the wealthy few, and that democratic participation for the vast majority of citizens is of relatively little value." The explainer also states that "an election system that is skewed heavily toward wealthy donors also sustains racial bias and reinforces the racial wealth gap." Tim Lau, *Citizens United Explained*, BRENNAN CENTER FOR JUSTICE (Dec. 12, 2019), https://www.brennancenter.org/our-work/research-reports/citizens-united-explained [https://web.archive.org/web/20201008123523/https://www.brennancenter.org/our-work/research-reports/citizens-united-explained].

101. Greenberg believes that *Citizens United* is a controversial decision that some view as displaying race and class-based hostility and perpetuating race and class-based discrimination in the political system.

102. Greenberg believes that every one of his speaking engagements on First Amendment issues carries the risk that an audience member will file a bar disciplinary complaint against him based on the content of his presentation under Rule 8.4(g).

103. Considering the large amount of time and money Greenberg devoted to attaining his Pennsylvania license to practice law, Greenberg is justifiability unwilling to take this risk, and will refrain from conducting speaking engagements on controversial issues as a result.

104. Greenberg's self-censorship will extend to excluding, limiting, and sanitizing the examples used in his speaking engagements to illustrate his points, in order to reduce the risk of an audience member reporting his expression to ODC.

105. Greenberg does not wish to be subjected to a disciplinary investigation by ODC.

106. Greenberg does not wish to be subjected to disciplinary proceedings in front of the Board.

107. Greenberg does not wish to be subjected to disciplinary sanctions by ODC or the Board.

108. A disciplinary investigation would harm Greenberg's professional reputation, available job opportunities, and speaking opportunities.

109. Disciplinary proceedings would harm Greenberg's professional reputation, available job opportunities, and speaking opportunities.

110. Disciplinary sanctions would harm Greenberg's professional reputation, available job opportunities, and speaking opportunities.

111. Greenberg reasonably fears that his written and oral CLE presentations could be misconstrued by readers and listeners, and state officials within the Board or ODC, as violating Rule 8.4(g).

112. Greenberg reasonably fears that activists will attempt to use Rule 8.4(g) and the disciplinary complaint process to punish him for his speech in support of political positions they disagree with in the hopes of chilling other opponents from participating in the political debate.

113. This fear of misuse of Rule 8.4(g) is far from hypothetical. Activists have frequently used anti-discrimination rules and accusations of bigotry to hector speakers for political reasons.

a. For example, in 2013 Judge Edith Jones gave a speech about the death penalty at the University of Pennsylvania Law School Federalist Society where she made the empirical observation that members of some racial groups commit crime at rates disproportionate to their population. Organizations, activists, and law professors, supported by the affidavits of five University of Pennsylvania Law students and one attorney who attended the lecture and by the affidavits of two attorneys who had not attended the lecture, filed an ethics complaint against Judge Jones for "racial bias" on the basis of her speech and its "hostile rhetoric." When, after appointing a law professor

to investigate, a three-judge Special Committee of the D.C. Circuit rejected the complaint in a 71-page single-spaced report, the complainants filed a Petition for Review to the Judicial Conference of the United States, which affirmed. The entire process subjected Judge Jones to extensive adverse publicity and investigation for nearly two years. *See In re Complaint of Judicial Misconduct*, C.C.D. No. 14-01 (Committee on Judicial Conduct and Disability of the Judicial Conference of the United States Feb. 19, 2015), *opinion available at* http://www.ca5.uscourts.gov/docs/default-source/judicial-council-orders/resolution-of-judicial-misconduct-complaint-against-circuit-judge-edith-h-jones.pdf [https://web.archive.org/web/20200524121449/http://www.ca5.uscourts.gov/docs/default-source/judicial-council-orders/resolution-of-judicial-misconduct-complaint-against-circuit-judge-edith-h-jones.pdf].

b. In 2018, professor Amy Wax of University of Pennsylvania Law School made an empirical claim that black students scored lower than their counterparts in her first-year lecture class. Law student alumni created a petition condemning her "racial hostility and intimidation." Wax agreed to be barred from teaching first-year courses. Derek Hawkins, *Penn Law professor who said black students are 'rarely' in top half of class loses teaching*

duties, WASH. POST (Mar. 15, 2018, 8:49 AM), https://www.washingtonpost.com/news/morning-mix/wp/2018/03/15/penn-law-professor-who-said-black-students-rarely-perform-well-loses-teaching-duties [https://web.archive.org/web/20200525000401/https://www.washingtonpost.com/news/morning-mix/wp/2018/03/15/penn-law-professor-who-said-black-students-rarely-perform-well-loses-teaching-duties/]; Paul S. Levy, *University Boardrooms Need Reform*, WALL. ST. J. (Jun. 10, 2018, 1:36 PM), https://www.wsj.com/articles/university-boardrooms-need-reform-1528652211 [https://web.archive.org/web/20180718124838/https://www.wsj.com/articles/university-boardrooms-need-reform-1528652211].

c. In 2015, Northwestern University professor Laura Kipnis wrote an essay in the *Chronicle of Higher Education* critical of the use of Title IX policies on sexual misconduct. In retaliation, two graduate students filed a Title IX complaint against Professor Kipnis claiming that her essay created a "hostile environment," and then filed a second Title IX complaint against her when she wrote about the first Title IX complaint. Jeannie Suk Gerson, *Laura Kipnis's Endless Trial by Title IX*, NEW YORKER (Sep. 20, 2017).

d. While Judge Jones and Professor Kipnis were eventually cleared of wrongdoing, they faced years of investigation and harassment at non-trivial costs to themselves and their reputations. Moreover, Rule 8.4(g) is amorphous enough to include their words as potentially sanctionable if Greenberg were to repeat their arguments in CLE presentations.

e. In October of 2020, a group of students at Duke University School of Law authored an open letter requesting that their school disinvite a speaker, professor Helen Alvare, because Alvare's support for religious freedom accommodation laws and opposition to gay marriage reflected in amicus briefs she wrote reflected homophobic aversion to LGBTQ students. A true and correct copy of this letter is found at Dkt. 23-2.

f. An evolutionary biologist postdoctoral student at Penn State, Colin Wright, was labeled a transphobe after he published on social media in support of an established theory that societal factors are causally responsible for recent rises in gender dysphoria. Wright became subject to a coordinated effort that attempted to inflict reputational and vocational harm on him. Colin Wright (@swipewright), TWITTER (Jul 10, 2020, 11:30 PM), https://twitter.com/SwipeWright/status/1281793005968437248

[https://web.archive.org/web/20200711130230/https://twitter.com/SwipeWright/status/1281793005968437248]; Colin Wright, *Think Cancel Culture Doesn't Exist? My Own 'Lived Experience Says Otherwise*, QUILLETTE (Jul. 30, 2020), https://quillette.com/2020/07/30/think-cancel-culture-doesnt-exist-my-own-lived-experience-says-otherwise/ [https://web.archive.org/web/20200731131527/https://quillette.com/2020/07/30/think-cancel-culture-doesnt-exist-my-own-lived-experience-says-otherwise/].

g. In 2021, student groups at University of San Diego School of Law called for the termination of a professor, Tom Smith, who had authored a blog post critical of China's handling of Covid-19. The Dean responded by condemning the denigrating language and instituting an investigation as to whether Smith violated the school's anti-harassment policies. Eugene Volokh, *Univ. of San Diego Law School Investigating Professor for Post Critical of China*, THE VOLOKH CONSPIRACY (Mar. 20, 2021, 2:50 PM), https://reason.com/volokh/2021/03/20/univ-of-san-diego-law-school-investigating-professor-for-post-critical-of-china/ [https://web.archive.org/web/20210402013433/https://reason.com/volokh/2021/03/20/univ-of-san-diego-

law-school-investigating-professor-for-post-critical-of-china/].

h. Students, student groups, and faculty members have leveled accusations of harassment and discrimination against professors who mention certain hateful epithets, even when quoting text from legal opinions in a purely academic and pedagogical context, and such accusations have in some instances resulted in university discipline. *See* Randall Kennedy & Eugene Volokh, *The New Taboo: Quoting Epithets in the Classroom and Beyond*, 49 CAPITAL UNIV. L. REV. 1 (2021).

i. During the 2018-19 school year, Augsburg University suspended professor of history Phillip Adamo for using the n-word during a class discussion about a James Baldwin book in which the word appeared. Colleen Flaherty, *Too Taboo for Class*, INSIDE HIGHER ED, (Feb. 1, 2019), https://www.insidehighered.com/news/2019/02/01/professor-suspended-using-n-word-class-discussion-language-james-baldwin-essay [https://web.archive.org/web/20200726223221/https://www.insidehighered.com/news/2019/02/01/professor-suspended-using-n-word-class-discussion-language-james-baldwin-essay].

j. In 2019, Emory Law professor Paul Zwier faced a termination hearing after repeating the n-word in academic and germane classroom discussion of a civil rights case. Adam

Steinbaugh, *Emory Law Professor faces termination hearing for using 'n-word' in discussion of civil rights case, discussion with student*, FIRE NEWSDESK (Aug. 30, 2019), https://www.thefire.org/emory-law-professor-faces-termination-hearing-for-using-n-word-in-discussion-of-civil-rights-case-discussion-with-student/ [https://web.archive.org/web/20200608173249/https://www.thefire.org/emory-law-professor-faces-termination-hearing-for-using-n-word-in-discussion-of-civil-rights-case-discussion-with-student/].

k. In 2020, the UCLA law school dean apologized for the offense caused when law professor Eugene Volokh quoted the n-word in discussing a case. Eugene Volokh, *UCLA Law Dean Apologizes for My Having Accurately Quoted the Word "Nigger" in Discussing a Case*, THE VOLOKH CONSPIRACY (Apr. 14, 2020, 5:14 PM), https://reason.com/2020/04/14/ucla-law-dean-apologizes-for-my-having-accurately-quoted-the-word-nigger-in-discussing-a-case/ [https://web.archive.org/web/20200717062702/https://reason.com/2020/04/14/ucla-law-dean-apologizes-for-my-having-accurately-quoted-the-word-nigger-in-discussing-a-case/].

l. In 2020, the University of California at Irvine Law School barred professor Carrie Menkel-Meadow from teaching first-year 1L classes

"for the foreseeable future" after she used the n-word pedagogically in class; several law professors and deans at the school criticized her for "harm . . . to black students" and "condemn[ed]" her. Kathryn Rubino, *Professor At Top Law School Uses N-Word And Won't Apologize For It*, ABOVE THE LAW (Aug. 28, 2020, 1:44 PM) https://abovethelaw.com/2020/08/professor-at-top-law-school-uses-n-word-and-wont-apologize-for-it/ [https://webcache.googleusercontent.com/search?q=cache:em0ntAL9aBEJ:https://abovethelaw.com/2020/08/professor-at-top-law-school-uses-n-word-and-wont-apologize-for-it/+&cd=1&hl=en&ct=clnk&gl=us]. The UCI Black Law Students Association, in a June 3, 2020, letter, said that professor Menkel-Meadow's use of the n-word "harms our Black colleagues and upholds white supremacy and institutionalized racism." *Reprinted at UCI Professor Criticized for Saying the N Word*, REDDIT (Aug. 26, 2020, 7:58 PM), https://www.reddit.com/r/LawSchool/comments/ihahfj/uci_law_professor_criticized_for_saying_the_n_word/ [https://web.archive.org/web/20200829233034/https://www.reddit.com/r/LawSchool/comments/ihahfj/uci_law_professor_criticized_for_saying_the_n_word/].

m. In 2020, law students, law student associations, and faculty at Stanford Law School condemned professor Michael McConnell for quoting Patrick Henry's use of the n-word during a classroom lecture. Nick Anderson, *A Stanford law professor read a quote with the n-word to his class, stirring outrage at the school*, WASH. POST (Jun. 3, 2020, 7:24 PM) https://www.washingtonpost.com/education/2020/06/03/stanford-law-professor-read-quote-with-n-word-his-class-stirring-outrage-school [https://web.archive.org/web/20201004232656/https://www.washingtonpost.com/education/2020/06/03/stanford-law-professor-read-quote-with-n-word-his-class-stirring-outrage-school/]; Joe Patrice, *Stanford Joins List of Law Schools With White Professors Using the N-Word In Class*, ABOVE THE LAW (Jun. 1, 2020, 1:43 PM), https://abovethelaw.com/2020/06/stanford-joins-list-of-law-schools-with-white-professors-using-the-n-word-in-class/ [https://webcache.googleusercontent.com/search?q=cache:Yn0RYgO685sJ:https://abovethelaw.com/2020/06/stanford-joins-list-of-law-schools-with-white-professors-using-the-n-word-in-class/+&cd=1&hl=en&ct=clnk&gl=us].

n. In 2020, Tim Boudeau, a tenured professor at Central Michigan University and chair of the CMU journalism department, lost his job for

vocalizing the n-word while, as part of a media law class, accurately quoting from a leading Sixth Circuit decision invalidating college speech codes, *Dambrot v. Central Michigan University*, 55 F.3d 1177 (6th Cir. 1995). Eugene Volokh, *Tenured Professor Fired for Accurately Quoting Leading Campus Speech Code Case*, THE VOLOKH CONSPIRACY (Sept. 3, 2020, 11:37 AM), https://reason.com/2020/09/03/tenured-professor-fired-for-accurately-quoting-leading-campus-speech-code-case/ [https://web.archive.org/web/20200918022914/https://reason.com/2020/09/03/tenured-professor-fired-for-accurately-quoting-leading-campus-speech-code-case/].

o. A group of students reported another professor to his superiors for "assigning a book with a gay slur in the title." John McWhorter, *Academics Are Really, Really Worried About Their Freedom*, THE ATLANTIC, (Sept. 1, 2020), https://www.theatlantic.com/ideas/archive/2020/09/academics-are-really-really-worried-about-their-freedom/615724/ [https://web.archive.org/web/20200904032437/https://www.theatlantic.com/ideas/archive/2020/09/academics-are-really-really-worried-about-their-freedom/615724/].

p. Even the expurgated use of the "n-word" can be construed as demonstrating racial hostility and denigrating on the basis of race. In 2021,

the Dean of the Illinois Chicago John Marshall Law School condemned a civil procedure professor who used that expurgation on his final exam, and ordered an investigation based on the exam question. Eugene Volokh, *The Law School Acknowledges That the Racial and Gender References on the Examination Were Deeply Offensive*, THE VOLOKH CONSPIRACY (Jan. 15, 2021, 7:05 PM), https://reason.com/volokh/2021/01/15/tenured-law-prof-apparently-suspended-for-racial-harassment-lawsuit-problem-on-a-civil-procedure-exam/ [https://web.archive.org/web/20210727075401/https://reason.com/volokh/2021/01/15/tenured-law-prof-apparently-suspended-for-racial-harassment-lawsuit-problem-on-a-civil-procedure-exam/].

q. In the wake of the killing of George Floyd, dozens of people lost their jobs or suffered other negative repercussions for words or conduct perceived to display racial hostility or aversion. *List of People Canceled in Post-George-Floyd Antiracism Purges*, FUTURE OF CAPITALISM, (Jun. 11, 2020, 10:46 PM) (chronicling accounts of more than thirty individuals by the time this complaint was filed), https://www.futureofcapitalism.com/2020/06/list-of-people-canceled-in-post-george-floyd [https://web.archive.org/web/20200804095555/https://www.f

utureofcapitalism.com/2020/06/list-of-people-canceled-in-post-george-floyd].

r. For example, members of a data analysts' listserv labeled David Shor, a progressive data analyst, a racist and expelled him after he shared a study which argued that violent protests are not as effective as non-violent ones. He subsequently lost his job. Jonathan Chait, *An Elite Progressive LISTSERV Melts Down Over a Bogus Racism Charge*, NEW YORK INTELLIGENCER (Jun. 23, 2020), https://nymag.com/intelligencer/2020/06/white-fragility-racism-racism-progressive-progressphiles-david-shor.html [https://web.archive.org/web/20200724164256/https://nymag.com/intelligencer/2020/06/white-fragility-racism-racism-progressive-progressphiles-david-shor.html].

s. Employees at the San Francisco Museum of Modern Act labeled as a racist and ousted a longtime museum curator because he had said that shunning white artists would be impermissible "reverse discrimination." Robby Soave, *Museum Curator Resigns After He is Accused of Racism for Saying He Would Still Collect Art From White Men*, REASON (Jul. 14, 2020, 1:35 PM), https://reason.com/2020/07/14/gary-garrels-san-francisco-museum-modern-art-racism/

[https://web.archive.org/web/20200724171511/https://reason.com/2020/07/14/gary-garrels-san-francisco-museum-modern-art-racism/].

114. Attorney commentators, academics, and members of the public routinely accuse Supreme Court Justices and sitting judges of manifesting hostility or aversion on the bases listed in 8.4(g).

a. Justice Scalia's discussion of "mismatch" theory during oral argument in *Fisher v. Univ. of Texas*, 136 S.Ct. 2198 (2016) led numerous commentators, including the current New York Attorney General, to accuse him of racism. *See, e.g.*, Stephen Dinan, *Scalia Accused of Embracing 'Racist' Ideas for Suggesting 'Lesser' Schools for Blacks*, WASH. TIMES (Dec. 10, 2015), http://www.washingtontimes.com/news/2015/dec/10/antonin-scaliaaccused-of-embracing-racist-ideas-f/ [https://perma.cc/V6CX-DWHY]; Lauren French, Pelosi: *Scalia Should Recuse Himself from Discrimination Cases*, POLITICO (Dec. 11, 2015, 12:56 PM), http://www.politico.com/story/2015/12/nancy-pelosi-antonin-scalia-216680 [https://perma.cc/BCL5-VGWY]; Joe Patrice, *Scientists Agree: Justice Scalia Is a Racist Idiot*, ABOVE THE LAW (Dec. 14, 2015, 9:58 AM),

http://abovethelaw.com/2015/12/scientists-agree-justice-scalia-is-a-racist-idiot/ [https://perma.cc/9GA8-2NGT]; David Savage, *Justice Scalia Under Fire for Race Comments During Affirmative Action Argument*, L.A. TIMES (Dec. 10, 2015, 2:40 PM), http://www.latimes.com/nation/la-na-scalia-race-20151210-story.html [https://perma.cc/U3T2-CBAE]; Debra Cassens Weiss, *Was Scalia's Comment Racist?*, A.B.A. J. (Dec. 10, 2015, 7:32 AM), http://www.abajournal.com/news/article/was_scalias_comment_racist_some_contend_blacks_may_do_better_at_slower_trac/ [https://perma.cc/G7DH-U5H3]. A true and correct copy of Public Advocate Letitia James, Facebook (Dec. 11, 2015), https://www.facebook.com/PALetitiaJames/posts/the-racist-remarks-made-by-supreme-court-justice-antonin-scalia-are-unacceptable/1630528300533740/, is found at Dkt. 23-3.

b. A writer for Advocate magazine characterized Justice Clarence Thomas as "homophobic" based upon opinions and dissents that he has penned. *See* Trudy Ring, *Homophobic Justice Clarence Thomas Ill, May Miss LGBTQ Rights*

Cases, ADVOCATE, (Oct. 7, 2019, 1:02 PM), https://www.advocate.com/news/2019/10/07/homophobic-justice-clarence-thomas-ill-may-miss-lgbtq-rights-cases [https://web.archive.org/web/20191208082732/https://www.advocate.com/news/2019/10/07/homophobic-justice-clarence-thomas-ill-may-miss-lgbtq-rights-cases].

c. Attorney and senior legal correspondent at Vox, Ian Millhiser, maligned Justice Samuel Alito as having manifested a "jurisprudence of white racial innocence." *See* Ian Millhiser, *Justice Alito's Jurisprudence of White Racial Innocence*, VOX, (Jun. 23, 2020, 9:26 AM), https://www.vox.com/2020/4/23/21228636/alito-racism-ramos-louisiana-unanimous-jury [https://web.archive.org/web/20200702011327/https://www.vox.com/2020/4/23/21228636/alito-racism-ramos-louisiana-unanimous-jury].

d. Attorney and legal correspondent for Slate, Mark Joseph Stern alleged that Justice Neil Gorsuch "affirmed a chauvinistic view of women" through "sexist" comments he made while teaching at the University of Colorado Law School. *See* Mark Joseph Stern, *Why Gorsuch's Alleged Sexist Classroom Comments Are So Troubling—And Revealing*, SLATE,

(Mar. 20, 2017, 3:07 PM), https://slate.com/human-interest/2017/03/gorsuchs-sexist-classroom-comments-are-troubling-and-revealing.html [https://web.archive.org/web/20190510052004/https://slate.com/human-interest/2017/03/gorsuchs-sexist-classroom-comments-are-troubling-and-revealing.html].

e. Attorney and longtime union lawyer Andrew Strom accused Justice Brett Kavanaugh of authoring an opinion that peddles "class prejudice." Andrew Strom, *Brett Kavanaugh, "Common Sense," and Class Prejudice,* ONLABOR, (Jul. 12, 2018), https://www.onlabor.org/brett-kavanaugh-common-sense-and-class-prejudice/ [https://web.archive.org/web/20190807113628/https://www.onlabor.org/brett-kavanaugh-common-sense-and-class-prejudice/].

f. Justice Roberts has not escaped criticism either. A professor of law at the University of Michigan, Leah Litman, writing together with a professor of law at Northwestern University, Tonya Jacobi, denounced the Chief Justice for manifesting "gendered and ideological" discrimination in his superintendent role at Supreme Court oral arguments. Leah Litman & Tonja Jacobi, *Does John*

Roberts Need to Check His Own Biases?, N.Y. TIMES, (Jun. 2, 2020), https://www.nytimes.com/2020/06/02/opinion/john-roberts-supreme-court.html [https://web.archive.org/web/20200603105342/https://www.nytimes.com/2020/06/02/opinion/john-roberts-supreme-court.html]. Attorney and commentator at Above the Law, Elie Mystal, opined that "Roberts has consistently shown himself to be a deep racist—albeit one who draws less attention than his cross-burning brethren." Elie Mystal, *The Racism of Chief Justice John Roberts Is About To Be Fully Unleashed*, ABOVE THE LAW, (Jun. 28, 2018, 2:01 PM), https://abovethelaw.com/2018/06/the-racism-of-chief-justice-john-roberts-is-about-to-be-fully-unleashed/ [https://perma.cc/5VH4-CEWF].

g. After Justice Kennedy's retirement, a professor of law at UC Berkeley, Russell Robinson derided the entire body of his jurisprudence as having "privileged the interests and perspectives of white, heterosexual Christians and ultimately harmed a wide swath of sexual, racial, and religious minorities." Russell K. Robinson, *Justice Kennedy's White Nationalism*, 53 U.C. DAVIS L. REV. 1027,

1028 (2019). The same article called on its readers "to probe judicial claims of neutrality—such as Chief Justice Roberts' claim that 'we do not have Obama or Trump judges,' because they may cloak unseemly power dynamics, including a white nationalist agenda." *Id.* at 1037.

h. When Justices Alito, Gorsuch, Kavanaugh, Roberts and Thomas together denied, in *Dunn v. Ray*, 139 S.Ct. 661 (2019), a stay of execution to a prisoner who had made a last-minute request for an imam in the execution chamber, some commentators condemned them as harboring anti-Muslim hostility. *See, e.g.*, Robert Barnes, *Supreme Court's Execution Decision Animates Critics on the Left and Right*, WASHINGTON POST, (Feb. 11, 2019, 5:08 PM), https://www.washingtonpost.com/world/national-security/supreme-courts-execution-decision-animates-critics-on-the-left-and-right/2019/02/11/72da5ed8-2e3a-11e9-813a-0ab2f17e305b_story.html [https://web.archive.org/web/20190226103751/https://www.washingtonpost.com/world/national-security/supreme-courts-execution-decision-animates-critics-on-the-left-and-right/2019/02/11/72da5ed8-2e3a-11e9-

813a-0ab2f17e305b_story.html]; Luke Goodrich, *No Anti-Muslim Bias at Supreme Court: Constitution, Argued Properly, Protects All Religions*, THE HILL, (Apr. 5, 2019, 2:30 PM), https://thehill.com/opinion/judiciary/437575-no-anti-muslim-bias-at-supreme-court-constitution-argued-properly-protects [https://web.archive.org/web/20190712165937/https://thehill.com/opinion/judiciary/437575-no-anti-muslim-bias-at-supreme-court-constitution-argued-properly-protects].

i. When Justice Ginsburg referred to Colin Kaepernick's National Anthem protests as "dumb and disrespectful," many media outlets criticized her view as borderline prejudiced if not explicitly manifesting racial hostility. *See* Dave Zirin, *Ruth Bader Ginsburg Could Not Be More Wrong About Colin Kaepernick*, THE NATION, (Oct. 12, 2016), https://www.thenation.com/article/archive/ruth-bader-ginsburg-could-not-be-more-wrong-about-colin-kaepernick/ [https://web.archive.org/web/20200731232043/https://www.thenation.com/article/archive/ruth-bader-ginsburg-could-not-be-more-wrong-about-colin-kaepernick/]; Sam Fulwood III, *Say It Ain't So, Ruth Bader Ginsburg*, CENTER FOR AMERICAN

PROGRESS, (Oct. 14, 2016, 11:56 AM), https://www.americanprogress.org/issues/race/news/2016/10/14/146171/say-it-aint-so-ruth-bader-ginsburg/ [https://web.archive.org/web/20200716164625/https://www.americanprogress.org/issues/race/news/2016/10/14/146171/say-it-aint-so-ruth-bader-ginsburg/].

j. When Justice Amy Coney Barrett used the term "sexual preference" at her confirmation hearing, several commentators, including Hawaii Senator Mazie Hirono (a law graduate of Georgetown University Law Center) and Lambda Legal, accused her of making a homophobic slur. Justice Ginsburg used identical language. John Riley, *Senator Mazie Hirono: Amy Coney Barrett is a "danger to us on so many fronts*," METRO WEEKLY (Oct. 14, 2020), https://www.metroweekly.com/2020/10/senator-mazie-hirono-amy-coney-barrett-is-a-danger-to-us-on-so-many-fronts/ [https://web.archive.org/web/20201018032014/https://www.metroweekly.com/2020/10/senator-mazie-hirono-amy-coney-barrett-is-a-danger-to-us-on-so-many-fronts/]; Aldous J. Pennyfarthing, *Pete Buttigieg Slaps Back at Amy Coney Barrett's Not-so-subtle Homophobic Slur*, DAILY KOS

(Oct. 13, 2020, 5:20 PM), https://www.dailykos.com/stories/2020/10/13/1986241/-Pete-Buttigieg-slaps-back-at-Amy-Coney-Barrett-s-not-so-subtle-homophobic-slur [https://web.archive.org/web/20201014184710/https://www.dailykos.com/stories/2020/10/13/1986241/-Pete-Buttigieg-slaps-back-at-Amy-Coney-Barrett-s-not-so-subtle-homophobic-slur]; Li Zhou, *Amy Coney Barrett used an offensive term while talking about LGBTQ rights. Her apology was telling.*, VOX (Oct. 13, 2020, 9:10 PM), https://www.vox.com/2020/10/13/21515169/amy-coney-barrett-supreme-court-confirmation [https://web.archive.org/web/20201014030222/https://www.vox.com/2020/10/13/21515169/amy-coney-barrett-supreme-court-confirmation]; Hank Berrien, *Dems Attack Coney Barrett For Saying 'Sexual Preference.' Look At All The Dems, Plus Bader Ginsburg, Who Said 'Sexual Preference'*, DAILY WIRE (Oct. 14, 2020), https://editorial.dailywire.com/news/dems-attack-coney-barrett-for-saying-sexual-preference-look-at-all-the-dems-plus-bader-ginsburg-who-said-sexual-preference/ [https://web.archive.org/web/20201021133748/https://e

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115. A leading LGBTQ+ advocacy group issued a report accusing "nearly 40 percent of federal judges that Trump has appointed to the courts of appeals" of having "a demonstrated history of hostility towards the LGBTQ+ community," often on the basis of advocacy for free expression, free association, or free exercise rights. Lambda Legal, COURTS, CONFIRMATIONS, & CONSEQUENCES: HOW TRUMP RESTRUCTURED THE FEDERAL JUDICIARY AND USHERED IN A CLIMATE OF UNPRECEDENTED HOSTILITY TOWARD LGBTQ+ PEOPLE AND CIVIL RIGHTS 1 (Jan. 2021), *available at* https://www.lambdalegal.org/sites/default/files/judicial_report_2020.pdf [https://web.archive.org/web/20210128091708/https://www.lambdalegal.org/sites/default/files/judicial_report_2020.pdf].

116. On Twitter, Senator Ed Markey stated on October 26, 2020, "Originalism is racist. Originalism is sexist. Originalism is homophobic. Originalism is just a fancy word for discrimination." Markey's tweet received more than 20,000 "likes." Ed Markey (@SenMarkey), TWITTER (Oct 26, 2020, 3:22 PM), https://twitter.com/SenMarkey/status/1320808025393868800 [https://web.archive.org/web/20201030165054/https://twitter.com/SenMarkey/status/1320808025393868800]; Thomas Barrabi, *Markey blasts Barrett's judicial philosophy: 'Originalism is just a fancy word for discrimination'*, FOX NEWS (Oct. 26, 2020) https://www.foxnews.com/politics/markey-

amy-coney-barrett-originalism-supreme-court [https://web.archive.org/web/20201027110546/https://www.foxnews.com/politics/markey-amy-coney-barrett-originalism-supreme-court].

117. Similarly, on Twitter, in early 2021, social media users commonly referred to the U.S. Senate's 60-vote filibuster procedure as a racist relic of the Jim Crow era. Sahil Kapur, (@sahilkapur), TWITTER (Jan. 21, 9:04 PM), https://twitter.com/sahilkapur/status/1352436928843558918 [https://web.archive.org/web/20210202170625/https://twitter.com/sahilkapur/status/1352436928843558918].

118. In July 2020, former Pennsylvania Supreme Court Justice Cynthia Baldwin accused current Pennsylvania Supreme Court Chief Justice Thomas Saylor of bias for allegedly referring to her "minority agenda" during a 2012 conversation with another judge. *Ex-justice levels bias accusation at state's chief justice*, AP NEWS (Jul. 24, 2020), https://apnews.com/article/pennsylvania-race-and-ethnicity-courts-0257a5d4e7e98fffd90c433d0bc3cbd5 [https://web.archive.org/web/20201031000836/https://apnews.com/article/pennsylvania-race-and-ethnicity-courts-0257a5d4e7e98fffd90c433d0bc3cbd5]; Craig R. McCoy, *Pa. Supreme Court chief justice complained about a Black justice and her 'minority agenda,' former judge says*, THE PHILADELPHIA INQUIRER (Jul. 23, 2020) https://www.inquirer.com/news/pa-chief-justice-thomas-saylor-cynthia-baldwin-minority-agenda-reprimand-20200723.html

[https://web.archive.org/web/20200724011049/https://www.inquirer.com/news/pa-chief-justice-thomas-saylor-cynthia-baldwin-minority-agenda-reprimand-20200723.html].

119. In June 2021, the Supreme Court of South Carolina upheld professional discipline for an attorney who had made Facebook posts denigrating George Floyd in the wake of his murder and denigrating "college educated, liberal suburbanite" women who get tattoos. *In re Traywick*, 2021 WL 2492772, 2021 S.C. LEXIS 72, at *3-*4 (S.C. Jun. 18, 2021). South Carolina's Office of Disciplinary Counsel received 46 complaints about twelve postings in total. The South Carolina Supreme Court held that a six-month suspension from practice was warranted because the statements "were intended to incite, and had the effect of inciting, gender and race-based conflict." *Id.* at *4.

120. Greenberg will be forced to censor himself to steer clear of an ultimately unknown line so that his speech is not at risk of being incorrectly perceived as denigrating others or displaying hostility or aversion on the bases listed in 8.4(g).

121. Absent Rule 8.4(g), Greenberg would be able to speak and write freely without the fear of the risk of professional liability for offending the wrong observer.

122. Even if the Defendants were to attempt to assure Greenberg that his speeches and writings were permitted under 8.4(g), given the open-ended language of the Rule and its comments, Greenberg would not feel comfortable speaking freely and would still reasonably fear professional liability.

CAUSES OF ACTION

Claim I: Unconstitutional infringement of free speech

123. Greenberg reasserts and realleges paragraphs 1 through 122 as if fully set forth therein.

124. According to the First Amendment to the United States Constitution, "Congress shall make no law . . . abridging the freedom of speech."

125. The First Amendment has been incorporated to apply to the states through the Fourteenth Amendment.

126. Greenberg's speech, as described above in paragraphs 14-34, 81-104 is fully protected by the First Amendment.

127. Rule 8.4(g) chills such speech and, on the basis of content and viewpoint of the speech, imposes professional liability in contravention of the First Amendment.

128. Rule 8.4(g) is overly extensive and unduly burdensome.

129. Rule 8.4(g) does not serve a compelling interest.

130. Rule 8.4(g) is not appropriately tailored to any government interest.

131. Rule 8.4(g) invites arbitrary, subjective, and viewpoint discriminatory enforcement.

132. To the extent that Rule 8.4(g) is constitutional in any of its applications, it is nonetheless substantially overbroad in relation to any legitimate sweep and is facially unconstitutional for that reason.

133. Rule 8.4(g) is even more broad than Pennsylvania's non-binding Code of Civility which advises lawyers to "refrain from acting upon or manifesting racial, gender or

other bias or prejudice toward any participant in the legal process."

134. On its face and as applied to speech like Greenberg's, Rule 8.4(g) violates the right to free speech guaranteed by the First Amendment.

135. Unless Defendants are enjoined from enforcing and adjudicating Rule 8.4(g), Greenberg will suffer irreparable harm.

Claim II: Unconstitutional vagueness

136. Greenberg reasserts and realleges paragraphs 1 through 135 as if fully set forth therein.

137. The Fourteenth Amendment provides in relevant part that ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law."

138. Disciplinary enforcement proceedings deprive respondent-attorneys of liberty and property.

139. Due Process requires that people of ordinary intelligence be able to understand what conduct a given rule prohibits.

140. Rules, statutes, or laws that fail to provide this fair notice are void for vagueness.

141. Rules, statutes, or laws that authorize or even encourage discriminatory enforcement are void for vagueness.

142. Laws implicating and jeopardizing First Amendment rights are required to be especially precise.

143. People of ordinary intelligence cannot understand what Rule 8.4(g) prohibits.

144. Greenberg cannot understand what Rule 8.4(g) prohibits.

145. Rule 8.4(g) does not provide fair notice of what it prohibits.

146. Rule 8.4(g) authorizes and encourages discriminatory enforcement.

147. Rule 8.4(g) chills First Amendment protected speech and thus requires a more stringent review for vagueness.

148. Rule 8.4(g)'s use of the phrase "engage in conduct constituting harassment or discrimination" is unconstitutionally vague.

149. Rule 8.4(g)'s use of the phrase "conduct that is intended to intimidate, denigrate or show hostility or aversion toward a person on any of the bases listed in paragraph (g)" is unconstitutionally vague.

150. Rule 8.4(g)'s use of the phrase "manifests an intention…to treat a person as inferior" is unconstitutionally vague.

151. Rule 8.4(g)'s use of the phrase "manifests an intention . . . to disregard relevant considerations of individual characteristics or merit because of one or more of the listed characteristics" is unconstitutionally vague.

152. Rule 8.4(g)'s use of the phrase "advice or advocacy consistent with these Rules" is unconstitutionally vague.

153. Comment 4 to Rule 8.4(g) is unconstitutionally vague.

154. Comment 5 to Rule 8.4(g) is unconstitutionally vague.

155. Rule 8.4(g) violates the Due Process Clause of the Fourteenth Amendment and so is void for vagueness.

156. The vagueness of Rule 8.4(g) chills protected speech and thereby also violates the First Amendment.

157. Unless Defendants are enjoined from enforcing and adjudicating Rule 8.4(g), Greenberg will suffer irreparable harm.

REQUEST FOR RELIEF

Therefore, Greenberg respectfully requests the following relief:

A. A declaratory judgment that Rule 8.4(g) facially violates the First and Fourteenth Amendments to the United States Constitution.

B. A permanent injunction prohibiting Defendants and their agents from enforcing Rule 8.4(g) en toto.

C. An award of attorneys' fees, costs, and expenses in this action; and

D. Any other legal or equitable relief to which Greenberg may show himself to be justly entitled.

Dated: August 19, 2021 Respectfully submitted,

/s/ Adam E. Schulman
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Attorney for Plaintiff Zachary Greenberg

VERIFICATION

Pursuant to 28 U.S.C. § 1746, I, Zachary Greenberg have personal knowledge of the matters alleged in the foregoing Verified Complaint concerning myself, my activities and my intentions. I verify under the penalty of perjury that the statements made therein are true and correct.

Executed on August 18, 2021

/s/Zachary Greenberg
Zachary Greenberg

CERTIFICATE OF SERVICE

I hereby certify that on this day I filed the foregoing with the Clerk of the Court via ECF thus effectuating service on all counsel who are registered as electronic filers in this case.

DATED: August 19, 2021

/s/Adam Schulman
Adam Schulman

Appendix I

Commentary on the Unconstitutionality of Rule 8.4(g)

Law Review Articles

Bradley S. Abramson,
ABA Model Rule 8.4(g): Constitutional and Other Concerns for Matrimonial Lawyers,
31 J. AM. ACAD. MATRIMONIAL LAW 283 (2018)

Josh Blackman,
ABA Model Rule 8.4(g) in the States,
68 CATH. U. L. REV. 629 (2019)

Josh Blackman,
Reply: A Pause for State Courts Considering Model Rule 8.4(g),
30 GEO. J. LEGAL ETHICS 241 (2017)

George W. Dent, Jr.,
Model Rule 8.4(g): Blatantly Unconstitutional and Blatantly Political,
32 NOTRE DAME J. L. ETHICS & PUB. POL'Y 135 (2018)

Bruce A. Green & Rebecca Roiphe,
ABA Model Rule 8.4(g), Discriminatory Speech, and the First Amendment,
50 HOFSTRA L. REV. 543 (2022)

Andrew F. Halaby & Brianna L. Long,
New Model Rule of Professional Conduct 8.4(g): Legislative History, Enforceability Questions, and a Call for Scholarship,
41 J. LEGAL PRO. 201 (2017)

William Hodes,
See Something; Say Something: Model Rule 8.4(g) is Not OK,
50 HOFSTRA L. REV. 579 (2022)

Lindsey Keiser,
Lawyers Lack Liberty: State Codifications of Comment 3 of Rule 8.4 Impinge on Lawyers' First Amendment Rights,
28 GEO. J. LEGAL ETHICS 629 (2015)

Jon J. Lee,
Catching Unfitness,
34 GEO. J. LEGAL ETHICS 355 (2021)

Jack Park,
ABA Model Rule 8.4(g): An Exercise in Coercing Virtue?,
22 CHAP. L. REV. 267 (2019)

Margaret Tarkington,
"Breathing Space to Survive"—the Missing Component of Model Rule 8.4(g),
50 HOFSTRA L. REV. 597 (2022)

Margaret Tarkington,
Reckless Abandon: The Shadow of Model Rule 8.4(g) and a Path Forward,
95 ST. JOHN'S L. REV. 121 (2022)

Margaret Tarkington,
Throwing Out the Baby: The ABA's Subversion of Lawyer First Amendment Rights,
24 TEXAS REV. L. & POL. 41 (2019)

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Matthew Perlman,
Mont. Lawmakers Say ABA Anti-Bias Rule Is Unconstitutional, Law360 (Aug. 14, 2017), available at https://www.law360.com/articles/913579.

C. Thea Pitzen,
First Amendment Ruling May Affect Model Rules of Professional Conduct: Is Model Rule 8.4(g) Constitutional? ABA Section of Litig. (Apr. 3, 2019).

Ronald Rotunda,
The ABA Decision to Control What Lawyers Say: Supporting "Diversity" But Not Diversity of Thought, The Heritage Foundation Legal Memorandum, available at http://thf-reports.s3.amazonaws.com/2016/LM-191.pdf.

Andrew Strickler,
Vermont's Anti-Bias Rule Vote an Outlier, Law360 (Aug. 14, 2017), available at https://www.law360.com/articles/953530/vermont-s-anti-bias-rule-vote-an-outlier-in-heated-debate.

Keith Swisher & Eugene Volokh,
Point-Counterpoint: A Speech Code for Lawyers?, 101 JUDICATURE 70 (2017) (statement of Eugene Volokh) available at https://judicature.duke.edu/articles/a-speech-code-for-lawyers/.

State Authorities on the Unconstitutionality of Rule 8.4(g)

Letter from Kevin Clarkson, Alaska Atty. Gen., to Alaska Bar Ass'n (Aug. 9, 2019), available at

https://law.alaska.gov/pdf/press/190809-Letter.pdf.

Ark. Att'y Gen. Op. No. 2020-055 (Jul. 14, 2021), available at https://ag-opinions.s3.amazonaws.com/uploads/2020-055.pdf.

Letter from Roger S. Burdick, Chief Justice of the Idaho Supreme Court, to Diane Minnich, Executive Director of the Idaho State Bar (Sept. 6, 2018), available at https://www.clsreligiousfreedom.org/sites/default/files/site_files/ISC%20Letter%20-%20IRPC%208.4(g).pdf.

La. Atty. Gen. Op. 17-0114 (Sept. 8, 2017), available at https://www.clsreligiousfreedom.org/sites/default/files/site_files/Center%20Briefs/Louisiana%20AG%20Op.%2017-0114.pdf.

Sen. J. Res. No. 15 (Mont. 2017), available at https://leg.mt.gov/bills/2017/billhtml/SJ0015.htm.

Letter from Dann E. Greenwood, Chair of the North Dakota Joint Committee on Attorney Standards (Dec. 14, 2017) available at https://www.clsnet.org/document.doc?id=1193.

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