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-CFK

RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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On November 16, 2021, the parties cross moved for summary judgment. Dkts. 61, 65.[1] In accordance with the Court's order extending the time to file cross oppositions (Dkt. 69), Greenberg submits the following response in opposition to the Defendants' motion for summary judgment.

INTRODUCTION

Much of Defendants' brief replicates arguments that this Court rejected last year based on binding Supreme Court and Third Circuit authority. *Greenberg v. Haggerty*, 491 F. Supp. 3d 12 (E.D. Pa. 2020). Yet Defendants do not meaningfully engage with the underpinnings of that decision. For example, despite this Court's conclusion that "Rule 8.4(g) does not regulate professional conduct that incidentally involves speech," the Defendants only twice cursorily mention *National Institute of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018), in asking the Court to reconsider its holding. *Compare Greenberg*, 491 F. Supp. 3d at 27, *with* DSJ 27, 34. Defendants do not even once mention the Third Circuit's three leading cases in the area of facial First Amendment challenges to anti-harassment rules: *Saxe v. State College Area Sch. Dist*., 240 F.3d 200 (3d Cir. 2001) (Alito, J.); *DeJohn v. Temple Univ.*, 537 F.3d 301 (3d Cir. 2008); and *McCauley v. University of the Virgin Islands*, 618 F.3d 232 (3d Cir. 2010). And they devote only two unavailing paragraphs to *Matal v. Tam*, 137 S. Ct. 1744 (2017). DSJ 30. In reality, the case for declaring 8.4(g) unconstitutional has only strengthened since this Court's

[1] For purposes of this opposition, Greenberg will refer to the Defendants' Brief in Support of Defendants' Motion for Summary Judgment (Dkt. 61 at 5) as "DSJ"; Greenberg's Memorandum in Support of Motion for Summary Judgment (Dkt. 65-1) as "PSJ"; the Stipulated List of Facts for Purposes of Summary Judgment Motions (Dkt. 53) as "Stip."; the Supplemental Declaration of Zachary Greenberg in Support of Plaintiff's Motion for Summary Judgment (Dkt. 54) as "Greenberg Supp. Decl."; the Declaration of Thomas J. Farrell, Esquire (Dkt. 56) as "Farrell Decl."; Defendant Thomas J. Farrell's Answers to Plaintiff's Requests for Admissions (Dkt. 65-3) as "Farrell RFA Answers"; and Defendant Thomas J. Farrell's Answers to Plaintiff's Interrogatories (Dkt. 65-4) as "Farrell Interrog. Answers."

decision. Judge Pratter's recent decision in *Marshall v. Amuso* reinforces this Court's conclusion that 8.4(g) is viewpoint discriminatory and unconstitutionally vague. No. 21-cv-4336, 2021 WL 5359020, 2021 U.S. Dist. LEXIS 222210 (E.D. Pa. Nov. 17, 2021).

The Defendants provide no persuasive reason for revisiting this Court's standing analysis. *See Greenberg*, 491 F. Supp. 3d at 19–25. Rule 8.4(g) facially applies to the CLE presentations that Greenberg regularly gives, and the threat of complaint, investigation, and discipline still "will hang over Pennsylvania attorneys like the sword of Damocles." *Id.* at 24; *see also* PSJ 26–27. The litigation position of one of the fourteen defendants, Mr. Farrell, does not alter the calculus. PSJ 27–29. Defendants profess that ODC would be estopped, bound, and "obligated to dismiss" such complaints. DSJ 11, 18–19, 21 n.19. But as Greenberg explains, as a matter of law, the Farrell Declaration does not bind nor estop ODC (let alone the Board) from pursuing enforcement of the sort Greenberg fears. PSJ 28. Defendants' *ipse dixit* assertions to the contrary are nothing more than "effectively ask[ing] Plaintiff to trust them not to regulate and discipline his offensive speech even though they have given themselves the authority to do so." *Greenberg*, 491 F. Supp. 3d at 24. Even if ODC ultimately dismisses complaints founded on offensive speech, "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 . . . ." *Id.* at 25. That amounts to a "de facto regulat[ion] [of] speech by threat." *Id.*

ARGUMENT

I. Greenberg's claims have not been mooted by either the revised rule or the Farrell Declaration; in any event he has standing to bring the case today.

Greenberg's pre-enforcement claims remain justiciable. PSJ 26–29. Following *Susan B. Anthony List v. Driehaus*, 573 U.S. 149 (2014), this Court previously determined that the "chilling effect" to Greenberg constituted an injury in fact sufficient to justify a pre-enforcement challenge to 8.4(g). *Greenberg*, 491 F. Supp. 3d at 23–25. Defendants, however, reprise the same

arguments the Court found "not persuasive." *Compare* DSJ 13–18, 20–22, *with Greenberg*, 491 F. Supp. 3d at 24. Greenberg will not burden the Court with rehashing the precise responses that he has already submitted, but will incorporate those by reference here. *See* Response in Opposition to Motion to Dismiss (Dkt. 25) at 3–12.

Defendants (DSJ 15) do offer two new authorities for these arguments, *Republican Party of Minn v. Klobuchar*, 381 F.3d 785 (8th Cir. 2004), and *Abbott v. Pastides*, 900 F.3d 160 (4th Cir. 2018). But, as with *Pipito*[2] and *SEIU*,[3] in *Republican Party* there was "nothing in the [challenged] statute which prevent[ed]" the plaintiff from doing what it wished. 381 F.3d at 792–93. *Abbott* too depended on the conclusion that the policy at issue did not "'appear[] by its terms to apply' to the plaintiffs' anticipated speech" because it was "on its face limited to conduct 'sufficiently severe, pervasive or persistent to deprive its targets of equal educational opportunity." 900 F.3d at 178 n.9. Moreover, Abbott's restrictive view of a cognizable chilling effect is difficult to reconcile with the Third Circuit's oft-expressed concerns with the deterrent effect of vague and overbroad speech restrictions. *See McCauley*, 618 F.3d at 238, 252; *DeJohn*, 537 F.3d at 313–14; PSJ 27 (citing *McGee v. Township of Conyngham*'s recognition of chill from a governmental investigation); *see also Speech First v. Fenves*, 979 F.3d 319, 335–37 (5th Cir. 2020) (reversing district court's *Abbott*-based determination that plaintiff did not show credible threat of enforcement).

In First Amendment cases, the Third Circuit has instructed district courts to "freely grant standing to raise overbreadth claims." *McCauley*, 618 F.3d at 238 (3d Cir. 2010) (internal quotation and alteration omitted). Although Defendants do not once cite *McCauley*, they do acknowledge the "relaxed approach" to First Amendment facial overbreadth standing. DSJ 14 n.15; *but see SEIU*, 446 F.3d at 424–25 (no standing where plaintiff was "completely unaffected"

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[2] *Pipito v. Lower Bucks Cty. Joint Mun. Auth.*, 822 Fed. Appx. 161 (3d Cir. 2020).

[3] *SEIU v. Municipality of Mt. Lebanon*, 446 F.3d 419 (3d Cir. 2006).

by the "wholly inapplicable" ordinance it wished to challenge"). This Court's previous conclusion that "there is a substantial risk that the Amendments will result in Plaintiff being subjected to a disciplinary complaint or investigation" accords with Third Circuit jurisprudence. *Greenberg*, 491 F. Supp. 3d at 24. It is also in line with Supreme Court jurisprudence. *See SBA List*, 573 U.S. at 164. "Because the universe of potential complainants is not restricted to state officials who are constrained by explicit guidelines or ethical obligations, there is a real risk of complaints from, for example, political opponents." *Id.*

Greenberg's empirical and anecdotal account of this risk (that certain audience members will consider his presentations hateful and hostile and will lodge a disciplinary complaint against him) grows with time. *See* Greenberg Supp. Decl. ¶¶ 52, 61, 82, 83, 85, 87 (discussing several incidents and a report, each from this calendar year); Br. of *Amici Curiae* The National Legal Foundation, *et. al.* (Dkt. 64) 4–7 (discussing other incidents). Speakers who touch upon contentious social and cultural issues continue to reasonably fear reprisal from "universit[ies], activists, and the political climate." Joe Kinsey, *Outkick Exclusive: Second Female Penn Swimmer Steps Forward, Describes Teammates in Tears*, OUTKICK (Dec. 10, 2021, 8:00 AM), https://www.outkick.com/outkick-exclusive-second-female-penn-swimmer-steps-forward/. Defendants complain that none of these public accusations of hostility and harassment involve disciplinary actions against attorneys. DSJ 16, 35. That is mistaken; at least one did involve a bar disciplinary action against an attorney based on social media content. Greenberg Supp. Decl. ¶ 87 (citing *In re Traywick*, 860 S.E.2d 358 (S.C. 2021)). Others involved disciplinary action taken against judges, professors, or other employees. *Id.* at ¶¶ 45, 47, 52, 54, 57, 67, 83, 86. The examples recounted in the Amended Complaint and Greenberg Declaration could as easily have transpired at a CLE presentation or at a bench bar conference or bar association event. And importantly, it is not just random people leveling these accusations of discrimination and harassment; it is university administrators, reputable advocacy groups, established institutions, notable and popular legal commentors, official law student groups, law professors, members of Congress, even the Attorney General of New York. A sitting senator from Massachusetts posted

on social media that "Originalism is just a fancy word for discrimination" and the post garnered more than 20,000 "likes." *Id.* at ¶ 84. That's not just "someone" spouting off on Twitter (DSJ 17); it's evidence that Pennsylvania attorneys like Greenberg have a reasonable concern about the malleable liability standards of 8.4(g).

This leaves just Defendants' contention that after the 2021 revisions to 8.4(g) and the stated position of ODC Chief Disciplinary Counsel Thomas Farrell, Greenberg no longer faces a credible threat from 8.4(g). DSJ 17–19. The contention is unpersuasive for several reasons.

First, because the 2021 revisions and Farrell Declaration postdate the inception of this action, the justiciability question "is assessed through the prism of mootness," not as a matter of standing. *Goodwin v. C.N.J., Inc.*, 436 F.3d 44, 48 (1st Cir. 2006); *accord* PSJ 27–28. On this question, it is the Defendants who bear a "heavy burden" of proving mootness. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC)*, 528 U.S. 167, 189 (2000); *DeJohn*, 537 F.3d at 309 ("heavy, even formidable" burden). Defendants cannot satisfy this burden for two basic reasons. One, New 8.4(g) threatens to harm Greenberg and other Pennsylvania attorneys in the same way as Old 8.4(g). *Ne. Fla. Chapter of Associated Gen. Contractors v. City of Jacksonville*, 508 U.S. 656, 662 (1993). "[A]n amendment does not moot the claim if the updated statute differs only insignificantly from the original." *Nextel W. Corp. v. Unity Twp.*, 282 F.3d 257, 262 (3d Cir. 2002). Two, ODC's new-found litigation position, espoused in the Farrell Declaration, is the "ad hoc, discretionary, and easily reversible" product of "one agency or individual." *Speech First, Inc. v. Schlissel*, 939 F.3d 756, 768 (6th Cir. 2019). Mr. Farrell himself concedes that "[t]here is no set process for amending, revising, or withdrawing the positions taken in the Farrell Declaration." Farrell Interog. Answers ¶ 13.

Second, no form of estoppel prevents the ODC from enforcing New 8.4(g) against Greenberg or others. Defendants are adamant that that the Farrell Declaration is "binding on ODC and estops it" from bringing enforcement actions of the type Greenberg fears and "would be obligated to dismiss [complaints] of such conduct." DSJ 11, 18–19, 21 n.19. But Defendants adduce no legal support for this theory of so-called "official estoppel." Farrell Interog. Answers

¶ 12. That's because it does not exist; the law of estoppel does not operate against state enforcement agencies in that manner. PSJ 28. And even if the Board *could* conceivably apply some estoppel-like theory against ODC in the future, that is not the certainty of which mootness is made.

Third, the Farrell Declaration cannot moot Greenberg's claims: the Board and its twelve official defendants here had no role in drafting the declaration, are admittedly not bound by it, have not endorsed it to anyone's knowledge, and have the power to replace Mr. Farrell from his post at any time. Farrell RFA Answers ¶¶ 6, 9, 10, 11.[4] "A case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Knox v. SEIU*, 567 U.S. 298 (2012) (internal quotations omitted). So, even if the Court agrees with Defendants that the Farrell Declaration is irrevocably binding on ODC, Mr. Farrell, and his successors, the case remains live with respect to the Board Defendants. (Declaratory relief would also benefit Greenberg because individual judges of the Commonwealth's court system are also admittedly not bound by the Farrell Declaration. Farrell RFA Answers ¶ 8).

Defendants resist this conclusion, reasoning that "[i]f ODC does not file a petition for discipline for a complaint, the Board cannot review or otherwise adjudicate the complaint." DSJ 9. That view is legally mistaken. Both ODC and the Board possess the authority to initiate disciplinary investigations at their own discretion. Pa. Disp. Bd. R. 87.1(a)-(b). And the Board also has the power to "review" "approve" or "modify" (or assign to hearing committee members for review) recommended dismissals by ODC. PSJ 9 n.2 (citing Pa. R. D. E. 205(c)(7)(i), (c)(8); Disp. Bd. R. 93.23(a)(7)(i), (a)(8)). The only contrary legal authority pointed to by Defendants is Board Rule 89.32. *See* Farrell RFA Answers ¶ 7. But that section simply mandates Board review

[4] Defendants' cursory suggestion that "reviewing hearing committee members" would also be obligated to dismiss such complaints (DSJ 21 n.19) cannot be correct. Hearing committee members are appointees and agents of the Board, not of ODC. Disp. Bd. R. 93.81(a). Again, Mr. Farrell has correctly admitted that the Farrell Declaration is not binding on the Board or its members. Farrell RFA Answers ¶ 6.

of any dismissals post-petition, it says nothing about the Board's discretionary power to review pre-petition dismissals. The Board's powers are delineated in Section 93.23, eponymously entitled "Powers and duties." Board Rule 93.23(a) bestows broad-reaching powers upon the Board to act independently of ODC and to review or modify ODC's recommended dismissals. Additionally, a hearing committee member, once assigned by the Board, may also review and modify ODC's recommended dismissals except where the dismissal is because the "complaint is frivolous or falls outside the jurisdiction of the Board." Disp. Bd. R. 87.32. Conspicuously, the Farrell Declaration does not assert that accusations of the sort Greenberg fears would be "frivolous" or "outside the jurisdiction of the Board," only that "ODC would not pursue discipline on that basis." *See* Farrell Decl. ¶¶ 9–17.

Fourth, the investigatory process itself has a chilling effect. Even if Defendants were correct that ODC is estopped from enforcing 8.4(g) against such complaints, and that the Board can take no independent enforcement action, there is nevertheless an additional reason why the Defendants have not demonstrated mootness. Each complaint that ODC receives triggers an investigatory process. Stip. ¶ 28. And that investigatory process itself can burden subject attorneys even if the disciplinary complaint is dismissed before requiring a formal DB-7 response. *See* Farrell Interrog. Answers ¶ 18 ("intake counsel may contact the respondent in an effort to resolve the matter quickly" before the DB-7 is issued). Plaintiff has averred, without factual dispute, that he does not wish to be subjected to a complaint and disciplinary investigation, the publication of which would potentially harm his professional reputation, available job opportunities, and speaking opportunities. Greenberg Supp. Decl. ¶¶ 33, 36. And this Court's decision credited the risk that a disciplinary complaint and investigation could chill a reasonable speaker. *Greenberg*, 491 F. Supp. 3d at 24–25.

In the alternative, if this Court chooses to view the 2021 Amendment to 8.4(g) and the Farrell Declaration through the prism of standing rather than mootness, the conclusion remains the same. The current "litigation position" of the Defendants cannot override the plain scope of the Rule and thereby negate the credible threat of enforcement. PSJ 28–29 (quoting *EQT Prod.*

Comp. v. Wender, 870 F.3d 322, 331 (4th Cir. 2017), and citing cases from the First, Second, Seventh, Ninth and DC Circuits as well as the Eastern District). The government's "in-court assurances do not rule out the possibility that it will change its mind and enforce the law more aggressively in the future." *Rodgers v. Bryant*, 942 F.3d 451, 455 (8th Cir. 2019). Defendants' contrary authorities involved more categorical disavowals than the Farrell Declaration. DSJ 18–19. *Abu-Jamal v. Kane*, 96 F. Supp. 3d 447 (M.D. Pa. 2015), and *Winsness v. Yocom*, 433 F.3d 727 (10th Cir. 2006), are of this sort. In *Abu-Jamal*, the District Attorney foreswore "any enforcement of the Act whatsoever pending a determination of its constitutionality in a court of competent jurisdiction." 96 F. Supp. 3d at 454. Similarly, in *Winsness*, a district attorney and the attorney general had offered unequivocal assurances that a constitutionally-dubious statute would "not be enforced against [plaintiff] or anyone else." 433 F.3d at 733. By contrast, Mr. Farrell does not disavow 8.4(g) enforcement on a categorical basis. He only states that he would not apply 8.4(g) in certain circumstances, circumstances that themselves are unclear. Those circumstances will depend on a "reasonable and measured deliberation" of the content of CLE speaker/audience interactions, and perhaps also considering whether CLE panels balance "two sides of a 'controversial issue.'" Farrell Interrog. Answers ¶¶ 15–16; Farrell Decl. ¶ 14.

Further, *Abu-Jamal* held that the plaintiffs *did* have standing to bring their pre-enforcement action against the Attorney General who had offered "no such assurance." 96 F. Supp. 3d at 455. *Winsness* responded to similar concerns about a residual threat of enforcement from other officials by noting that the plaintiff did not seek "relief against these defendants." 433 F.3d at 733. But Greenberg does seek relief against the Board's members, none of whom have endorsed Mr. Farrell's disavowal. Thus, at the very least, Greenberg's official capacity claims against those Board members survive.

Defendants' other authority, *Lopez v. Candaele*, states that a defendant's disavowal "of course" "must be more than a mere litigation position." 630 F.3d 775, 788 (9th Cir. 2010). In *Lopez*, the Defendants' disavowing letter, sent to plaintiff two months before the plaintiff had filed suit, satisfied that standard. It was no "mere litigation position." The Farrell Declaration, by

contrast, is a conscious litigation position, submitted only after this Court had preliminarily enjoined Old 8.4(g). *See Schlissel*, 939 F.3d at 769–70 (factoring in the "expedient timing" of the defendant's change of policy); *DeJohn*, 537 F.3d at 309 (similar).

More significant to *Lopez*'s standing holding, the plaintiff could not show "that the sexual harassment policy [at issue there] even arguably applie[d] to his past or intended future speech." 630 F.3d at 790. Religious speech conveying views on marriage or other moral, political, or social issues, the type of speech Plaintiff Lopez wished to engage in, simply did not "constitute verbal conduct of a sexual nature." *Id.* (internal alteration omitted). And thus, the plaintiff could not "say when, to whom, where, or under what circumstances he [would] actually give a speech that would violate the sexual harassment policy." *Id.* at 791.[5]

Here, Greenberg has described the specific speech he plans to engage in at CLEs,[6] and has averred that notwithstanding Defendants' assurances, he would "still not feel comfortable speaking freely and would still fear professional liability because of the language of the Rule and its accompanying comments." Greenberg Supp. Decl. ¶ 43. Again, these averments are uncontroverted. Unlike in *Lopez*, and several other of Defendants' authorities, Greenberg can "clearly show[]" that his intended speech is "arguably proscribed by the Amendments." *Greenberg*, 491 F. Supp. 3d at 23.

At the end of the day, the Farrell Declaration at most papers over the sword of Damocles. And even that is an overstatement, because the vast majority of the thousands of Pennsylvania attorneys will not even be aware of the declaration. When they open their copy of the Disciplinary Rules, they'll see the text of 8.4(g), not Mr. Farrell's atextual interpretative gloss. While that gloss is likely a well-intentioned and admirable effort to save the untenable rule, it

[5] *Lopez* also applied a narrow conception of the injury of chilled speech, and expressly criticized *McCauley*, a decision that binds this Court. 630 F.3d at 793.

[6] Stip. ¶¶ 61–65.

cannot deprive the Court of jurisdiction to decide the constitutionality of a rule that threatens to impair the rights of thousands of Pennsylvanians.

II. Rule 8.4(g) still discriminates on the basis of viewpoint expressed.

Following *Matal v. Tam*, 137 S. Ct. 1744 (2017), this Court held that Old 8.4(g) unconstitutionally discriminated against "opposing viewpoints" by prohibiting Pennsylvania attorneys' from expressing bias or prejudice on twelve disfavored bases. 491 F. Supp. 3d at 31–32. New 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 twelve disfavored bases. Comment [4] to Rule 8.4(g). If anything, the viewpoint discriminatory language of New 8.4(g) hues closer to that disapproved by the Court in *Matal*, which prohibited trademarks that may "disparage or bring into contempt or disrepute" any "persons, living or dead." 137 S. Ct. at 1751 (alterations omitted). Disparage and denigrate are synonyms.

Defendants attempt to distinguish *Matal*, claiming it "did not involve conduct, anti-discriminatory or antiharassment regulations." DSJ 30. But in *Matal*, the government offered the exact same argument that the Defendants do here. The Supreme Court simply rejected it, finding that the non-disparagement clause "is not an anti-discrimination clause; it is a happy talk clause" that "goes much further than is necessary to serve the interest asserted" in combating invidious discrimination. 137 S. Ct. at 1765. Nor are Defendants correct that the statutory standard in *Matal* proscribed "offensive" terms; it proscribed "disparag[ing]" ones. Just as 8.4 proscribes "denigrat[ing]" ones. In practice, that reduces to "a subset of messages that [the Government] finds offensive." 137 S. Ct. at 1766. But it did not specifically turn on the listener's offense. *Contra* DSJ 30. And that framework is exactly analogous to 8.4(g)'s. Defendants also err in suggesting that *Matal* unambiguously "involved pure speech." DSJ 30. The *Matal* parties disputed that issue, with the government alleging trademark usage is simply commercial non-expressive activity. 137 S. Ct. at 1764. The Supreme Court declined to "resolve this debate . . .

because the disparagement clause [could not] withstand even Central Hudson [intermediate] review." *Id.* There is no meaningful daylight between *Matal* and 8.4(g).

Again, Defendants reason that 8.4(g) cannot be based upon viewpoint because it "appl[ies] equally to all attorneys." DSJ 29. That "misses the point." *Matal*, 137 S. Ct. at 1766 (Kennedy, J., concurring). "To prohibit all sides from criticizing their opponents makes a law more viewpoint based, not less so." *Greenberg*, 491 F. Supp. 3d at 31 (quoting *Matal*, 137 S.Ct. at 1766 (Kennedy, J., concurring)).

The Defendants have offered no good reason to reconsider this Court's earlier interpretation of *Matal.* In fact, Judge Pratter's recent decision in *Marshall v. Amuso* echoes *Greenberg*'s analysis. No. 21-cv-4336, 2021 WL 5359020, 2021 U.S. Dist. LEXIS 222210 (E.D. Pa. Nov. 17, 2021). *Marshall* confronted a school board policy that restricted members of the public from commenting at school board meetings. Among other things, the policy allowed the Board's presiding officer to terminate speech that was "personally directed" or "abusive." Applying the "personally directed" standard, the school board allowed "positive and complimentary personally-directed comments supportive of Board and school employees" but prohibited "negative, challenging, or critical personally-directed comments." 2021 U.S. Dist. LEXIS 222210, at *14. Applying the "abusive" standard, the school board "censored and terminated comments deemed offensive racial stereotypes." *Id.* The Court found both of these applications to be "impermissible viewpoint discrimination." *Id.* at *15.

Significantly, *Marshall* condemned viewpoint discrimination within a universe of "personally directed" speech. This shows why even if Mr. Farrell's interpretation of 8.4(g) is reasonable and the Rule incorporates an implicit "targeting" requirement, that cannot by itself avoid the problem of viewpoint discrimination. *See also* PSJ 10–11 (citing other cases).

Defendants continue the same line of defense for New 8.4(g) that they staked out for Old 8.4(g): they say it regulates discriminatory and harassing conduct, not speech. *E.g.*, DSJ 25–26. Again, the problem is 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."

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, 8.4(g) engages in viewpoint discrimination, under the guise of regulating harassment. *Saxe* and *DeJohn* do not allow this. PSJ 17.

Yet Defendants do not cite *Saxe* or *DeJohn* even once in asking for summary judgment. Notwithstanding *Saxe* disclaiming a "harassment exception" to the First Amendment's free speech clause (240 F.3d at 204), Defendants rely on dicta from *Wandering Dago, Inc. v. Destito*, to argue that anti-harassment laws regulate conduct rather than the viewpoint of speech. DSJ 30 (citing 879 F.3d 20, 32 (2d Cir. 2018)). *Wandering Dago*'s actual holding invalidated—as viewpoint-discriminatory—a municipality's decision to deny a plaintiff's vendor application permit because it named its food truck for a well-known ethnic slur. 879 F.3d at 41. More importantly, however, the *Wandering Dago* dicta does not even support Defendants' position here. It is irrelevant whether "most antidiscrimination laws regulate membership and employment policies, not as expression." *Id.* at 32. Rule 8.4(g) does not do this. It regulates expression that denigrates, shows hostility or aversion, or manifests an intent to treat a person as inferior or to disregard relevant considerations of individual characteristics or merit.[7] Defendants can regulate harassment and discrimination, but Greenberg brings a complaint about their regulation of speech *qua* speech.

Laws that prohibit actual harassment and discrimination look nothing like 8.4(g). *See* PSJ 19–20 (citing examples). Defendants' brief cites numerous other examples of cases addressing anti-discrimination policies narrowly tailored to the aim of ensuring equal access, laws and policies that regulate discriminatory acts as such. DSJ 25–26 (citing *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984); *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557

[7] Greenberg does not take issue with 8.4(g)'s prohibition on conduct that is intended to intimidate, as that prohibition, given the ordinary meaning of "intimidate," regulates conduct rather than expression. *See United States v. Osinger,* 753 F.3d 939, 944 (9th Cir. 2015).

(1995); *Alpha Delta Chi-Delta Chapter v. Reed*, 648 F.3d 790 (9th Cir. 2011)); DSJ 28 (citing *Boy Scouts of Am. v. Wyman*, 335 F.3d 80 (2d Cir. 2003)); DSJ 31 (citing *Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings College of Law v. Martinez*, 561 U.S. 661 (2010)). Each of these laws involved membership, employment, or public access regulations that did not on their face "target speech or discriminate on the basis of its content." *Alpha Delta Chi-Delta*, 648 F.3d at 801. These policies "aim[] at the *act* of rejecting would-be group members." *Christian Legal Soc'y*, 561 U.S. at 696 (emphasis in original). These laws are not viewpoint discriminatory on their face, because to discriminate based on the viewpoint of speech, a law must first discriminate based on speech.[8]

8.4(g) differs because it does discriminate based on speech: it prohibits speech that denigrates, or shows hostility or aversion, and speech that manifests an intention to disregard considerations of relevant individual characteristics or merit.[9] And that speech-centered focus amounts to viewpoint discrimination under *Matal* and related cases.

The Commonwealth's admittedly compelling interest in combating real harassment or invidious discrimination is not *carte blanche* immunity for any law that invokes those terms. "Loosely worded anti-harassment laws may pose the same problems as the St. Paul hate speech ordinance: they may regulate deeply offensive and potentially disruptive categories of speech based, at least in part, on subject matter and viewpoint." *Saxe*, 240 F.3d at 207. "[A] disparaging comment directed at an individual's sex, race, or some other personal characteristic" can be

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[8] Indeed, it must first discriminate against *private* speech. In *Make the Rd. by Walking, Inc. v. Turner*, (cited by DSJ 31), the Second Circuit held that there was no unconstitutional viewpoint discrimination because the policy at issue only affected government speech. 378 F.3d 133, 151 (2004). Surely the Defendants are not taking the position that the speech of all Pennsylvania licensed attorneys is merely government speech.

[9] Relatedly, *Capital Associated Indus. v. Stein*. cited by DSJ 27, involved an unauthorized practice of law statute. 922 F.3d 198 (4th Cir. 2019). The Fourth Circuit held that conduct, not speech was at issue because the statute did not directly "target the communicative aspects of the practicing law," rather, its effect on speech is "merely incidental." *Id.* at 208.

captured under certain anti-discrimination laws "precisely because of its sensitive subject matter and because of the odious viewpoint it expresses." *Id.* at 206. When "anti-harassment" regulations are written in this way, they cannot be justified as regulations of speech incidental to conduct, or as regulations of the secondary effects of the speech or as a content-neutral time, place, or manner regulation. *Saxe*, 240 F.3d at 208 n.8, 209; *contra* DSJ 27–28 (seeking to apply intermediate scrutiny); DSJ 32 (same).

Ultimately, Defendants ignore the Rule's unorthodox definitions of harassment and discrimination, both of which incorporate content- and viewpoint-based inquiries. But a reasonable interpretation cannot ignore the Rule's definitional comments. *See Greenberg*, 491 F. Supp. 3d at 27 (quoting the Pa. R. Prof. Cond. Preamble and Scope). To avoid discriminating against speech on the basis of viewpoint, the Commonwealth should heed then-Professor Kagan's warning: "regulate not speech, but conduct" without "meld[ing] these two together." Elena Kagan, *Regulation of Hate Speech and Pornography After R.A.V.*, 60 U. CHI. L. REV. 873, 884 (1993). Conduct is those "acts that, in purpose and function, are not primarily expressive." *Id.* This is the same line then-Judge Alito draws in *Saxe*. 240 F.3d at 208. It is the same line Justice Roberts draws in *Rumsfeld v. FAIR*, 547 U.S. 47, 62 (2006). It is the same line Justice Thomas draws in *NIFLA*, 138 S. Ct. at 2373. It is the same line Justice Scalia drew in *R.A.V. v. St. Paul*, 505 U.S. 377, 389 (1992). But the line continues to elude the Commonwealth, and thus its rule continues to be viewpoint discriminatory in violation of the First Amendment.

III. Rule 8.4(g) substantially exceeds the scope of the Defendants' regulatory authority over attorney speech.

Because the Rule is viewpoint discriminatory on its face, that "ends the matter" and "renders unnecessary any extended treatment of other questions." *Greenberg*, 491 F. Supp. 3d at 32 (quoting *Iancu v. Brunetti*, 139 S. Ct. 2294, 2302 (2019); alteration omitted); *Matal*, 137 S. Ct. at 1765 (Kennedy, J., concurring). But if the Court goes further to assess the Defendants' stated justifications for the 8.4(g), it will find an unconstitutionally "broad prophylactic rule[]"

that lacks the "touchstone" "[p]recision of regulation." *NAACP v. Button*, 371 U.S. 415, 438 (1963); *see also Saxe*, 240 F.3d at 214–17; PSJ 18–20.

Defendants assert two main purposes of 8.4(g): (1) regulating the practice of law and (2) eradicating discrimination and harassment. DSJ 28; *see also* DSJ 5 ("purpose is 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.'") (quoting 49 Pa.B. 4941). But the former of these interests is too undifferentiated to constitute a compelling interest under *NIFLA*. And, the latter, while compelling, lacks a close nexus to 8.4(g). When assessed as a means of combatting discrimination and harassment in the legal arena, 8.4(g) is wildly overinclusive.

Defendants again begin by citing, *In re Primus*, 436 U.S. 412 (1978), *Middlesex v. Garden State Bar Ass'n*, 457 U.S. 423 (1982), and *Florida Bar v. Went for It, Inc*., 515 U.S. 618 (1995), in support of their free-floating, yet "compelling" interest in regulating the practice of the profession. DSJ 24. *NIFLA* does not countenance such an unlimited scope of professional speech regulation. *See Greenberg*, 491 F. Supp. 3d at 27 (discussing how, with two exceptions, *NIFLA* contemplates full First Amendment rights for professional speech). The actual scope of state authority under *NIFLA* is far narrower, and many cases Defendants rely on demonstrate that such regulations must often yield to the First Amendment. In *Primus* and *Gentile*, the Court found disciplinary rules facially violative of the First Amendment, albeit on vagueness rather than overbreadth ground in *Gentile*. In *In re Snyder* (DSJ 25), the Court held that disciplinary rules could not be applied to an attorney's intemperate, targeted, and highly critical letter. The outcome in those cases "show[s] the limits" to the breadth of state regulatory power. *Greenberg*, 491 F. Supp. 3d at 29.[10]

[10] Applying *Younger* abstention, *Middlesex* declined to decide the First Amendment merits question. 457 U.S. at 437. *Younger* does not apply here.

Went For It called a variation on that interest "substantial" for the purpose of analyzing the Florida rule under *Central Hudson*'s intermediate scrutiny standard. 515 U.S. 618, 625 (1995). And, as a commercial speech regulation, that Florida rule, unlike 8.4(g), may survive under *NIFLA*'s first exception. But a general interest in protecting the reputation of lawyers by sheltering them from engaging in "deplorable" and indecent conduct exceeds the scope of anything sustainable under *NIFLA*. If states possessed such a power, there would be no limit to the control regulatory authorities would have over professionals' lives. It's not even clear that such a nakedly paternalistic justification would be considered "substantial" today, even in the context of commercial speech and significant privacy concerns like those at stake in *Went For It*. *Cf. Sorrell v. IMS Health Inc*., 564 U.S. 552, 577 (2011) ("The First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good.") (internal quotation omitted).

Greenberg readily concedes that the interest in "protecting the integrity and fairness of a state's judicial system" is compelling. But 8.4(g), "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'", is not narrowly tailored to that interest. *See Greenberg*, 491 F. Supp. 3d at 32. Just compare the kind of law found to narrowly serve that interest. In *Williams-Yulee v. Florida Bar* (DSJ 32), the Supreme Court held that a state may, through a narrowly tailored statute, prohibit candidates for elected judicial office from personally soliciting campaign funds, to guard against the loss of "public confidence in judicial integrity." 575 U.S. 433, 470 (2015). But an attorney's hostile remark at a bar association event and a denigrating CLE presentation bear no relationship to judicial integrity. In fact, on their own terms, violations of 8.4(g) go beyond conduct that is "prejudicial to the administration of justice." Comments [4], [5] to Rule

8.4(g). It is entirely inappropriate to even attempt to cultivate the perception that Pennsylvania attorneys are organs, or mouthpieces, of the Commonwealth judicial system.[11]

NIFLA reserves space for states to regulate professional conduct that incidentally burdens speech, but 8.4(g) doesn't fit the mold of "longstanding torts for professional malpractice" that "fall within the traditional purview of state regulation of professional conduct." *NIFLA*, 138 S. Ct. at 2373 (quoting *Button*, 371 U.S. at 438). By contrast, the standards narrowly upheld in *Gentile* ("substantial likelihood of material prejudice" to the administration of justice) and that discussed in *Snyder* ("conduct unbecoming of a member of the bar" or "conduct inimical to the administration of justice") are rooted in tradition and the "lore of the profession." 472 U.S at 645.[12]

Defendants' second asserted interest—curbing "targeted discrimination and harassment against others in the legal profession," "ensuring the efficient and law-based resolution of disputes," and "guaranteeing that its judicial system is equally accessible to all" (DSJ 2)—qualifies as compelling. But 8.4(g) is not narrowly tailored to it.

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[11] Moreover, 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. *Pittsburgh League of Young Voters Educ. Fund v. Port Auth.*, 653 F.3d 290, 296–97 (3d. Cir. 2011). Before its promulgation, 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." DSJ 5 (quoting 49 Pa.B. 4941).

[12] Pa. R. Prof. Cond. 8.4(c) (DSJ 25 n.21) which prohibits "engag[ing] in conduct involving dishonesty, fraud, deceit, or misrepresentation" is one example in this category of rules justified by the tradition and lore of the profession. As Daniel Webster said, "Tell me a man is dishonest, and I will answer he is no lawyer . . . the law is not in his heart, is not the standard and rule of his conduct." Speech to the Charleston, South Carolina Bar, May 10, 1847. An offense of dishonesty is "in its nature crimen falsi." *In re Gottesfeld*, 91 A. 494, 495 (Pa. 1914). Although some false speech is constitutionally protected, when speech "is tied to defamation, fraud or some other legally cognizable harm" like, for example, dishonesty that breaches an attorney's fiduciary duty to his client or duty of candor to a court, it is unprotected by the First Amendment. *United States v. Alvarez*, 567 U.S. 709, 723 (2012).

Many cases that Defendants rely on reveal 8.4(g)'s overreach. The most recent example, *In re Abrams* (DSJ 26), involved disciplinary proceedings against an attorney who, in an email to a client, referred to the judge presiding over their case as a "gay, fat, fag." 488 P.3d 1043, 1049 (Colo. 2021). Over a facial challenge, the Colorado Supreme Court upheld Colorado's anti-bias ethics rule because it operates only "in the course of representing a client" and when the biased remark is "directed to a specific person involved in the legal process." *Id.* at 1053. "In his private life, a lawyer is free to speak in whatever manner he chooses. When representing clients, however, a lawyer must put aside the schoolyard code of conduct and adhere to professional standards." *Id.* at 1055. This rule fits comfortably within authority granted state bars under *NIFLA*. But, as *Abrams* notes, Model Rule 8.4(g) "does not contain the limiting factors that narrow the reach of Colorado's Rule 8.4(g) to a permissible scope." *Id.* at 1053 n.3. Neither does Pennsylvania's version. If the Pennsylvania Rule were limited to speech uttered in the course of client representations and directed to specific person in the legal process, we wouldn't be here today. *Compare also* Pa. R. Prof. Cond. 4.4 (also operating only "in representing a client").

Defendants also cite (DSJ 3 n.3) several older cases that are of a piece with *Abrams*. *Principe v. Assay Partners* found that harassing comments at a deposition were sanctionable under a New York Court rule (22 NYCRR § 130-1.1) analogous to Fed. R. Civ. P. 11. 586 N.Y.S.2d 182, 185 (N.Y. Sup. Ct. 1992). *Cruz-Aponte v. Caribbean Petroleum Corp.* found harassing comments at a deposition to constitute a "clear violation of Model Rule [of Professional Conduct] 4.4." 123 F. Supp. 3d 276, 280 (D.P.R. 2015). *In re Thomsen* reprimanded an attorney who had filed court papers in a custody dispute extraneously and repeatedly referencing the wife's association with a black man. 837 N.E.2d 1011 (Ind. 2005). *In re Charges of Unprofessional Conduct* found a violation of 8.4(d)—prohibiting conduct prejudicial to the administration of justice—when a prosecutor filed a motion to prohibit an attorney from participating in a case based solely on the color of his skin. 597 N.W.2d 563, 568 (Minn. 1999). If this is the type of unprofessional behavior Pennsylvania wishes to combat, there is no need to

have a rule that goes beyond the representation of a client or that goes beyond incidents that prejudice the administration of justice.

Pa. R. of Prof. Cond. 8.4(d) already prohibits conduct prejudicial to the administration of justice. Harassment and discrimination in legal proceedings is sanctionable under this rule. Like other states, Pennsylvania does "not need an anti-discrimination ethics rule to discipline lawyers who engage in discriminatory conduct while in certain professional environments." Brenda J. Quick, *Ethical Rules Prohibiting Discrimination by Lawyers: The Legal Profession's Response to Discrimination on the Rise*, 7 NOTRE DAME J. L. ETHICS & PUB. POL'Y 5, 54 (1993).
The very cases that the Defendants cite prove that 8.4(g) is not necessary to punish corrosive harassment and discrimination.

Defendants make no attempt to show that these less-speech restrictive alternatives are inadequate to serve the Commonwealth's interest in stemming harassment and discrimination. Rather, they simply argue that under intermediate scrutiny, 8.4(g) need not be the least restrictive alternative. DSJ 27, 32. Legally, they are mistaken because 8.4(g) is content-based, and thus must be subjected to no less than strict scrutiny. And the "least restrictive alternative" requirement is "the third prong of the three-prong strict scrutiny test." *ACLU v. Mukasey*, 534 F.3d 181, 198 (3d Cir. 2008). But even if Defendants were correct to apply intermediate scrutiny, less restrictive alternative are still an important factor under the test. *McCullen v. Coakley*, 573 U.S. 464, 490 (2014). "[T]he government, not the plaintiff, must prove that a challenged law satisfies intermediate scrutiny." *Drummond v. Robinson Township*, 9 F.4th 217, 231 (3d Cir. 2021). It must "show it 'seriously considered' more targeted tools for achieving its ends." *Id.* at 232. "If [the legislature] could immunize its own rules from review merely by mentioning [a valid interest], heightened scrutiny would be heightened in name only." *Id.* at 233; *cf. also Pittsburgh League of Young Voters Educ. Fund*, 653 F.3d at 297 ("[T]he recitation of a nondiscriminatory rationale is not sufficient standing alone because it could be a cover-up for unlawful discrimination." (citation omitted)).

It bears repeating that the Defendants do not once mention the Third Circuit's leading cases in this area: *Saxe*, *DeJohn*, or *McCauley*. Do Defendants believe they have more regulatory authority to restrict the speech of adults at a CLE or bar conference than secondary schools do to restrict the speech of students? Given that Defendants do not serve as attorneys' guardians *in loco parentis*, that proposition seems doubtful. Both regulatory limits are circumscribed. School authority generally ends where speech does not substantially risk disrupting the educational process. *Saxe*, 240 F.3d at 211–13. And state bar authority generally ends where speech does not prejudice a legal proceeding or the administration of justice. *NIFLA*, 138 S. Ct. at 2372. That is the "line" "long familiar to the bar." *Id.* at 2373 (internal quotation omitted). 8.4(g) oversteps it.

The Farrell Declaration tries its best to rein in 8.4(g), by reading an implicit "targeting" requirement into the Rule. Farrell Decl. ¶7. But Defendants are really asking this Court to "write nonbinding limits into a silent state [rule]"—something that is not permissible. *Lakewood v. Plain Dealer Pub. Co*., 486 U.S. 750, 770 (1988). "Spotting a constitutional issue does not give a court the authority to rewrite a statute as it pleases." *Jennings v. Rodriguez*, 138 S. Ct. 830, 843 (2018). Or to truncate the rule "to fashion a new one." *Iancu v. Brunetti*, 139 S. Ct. 2294, 2302 (2019). Or to "add[] a requirement not found anywhere in the text of the [rule]." *Sypniewski v. Warren Hills Reg'l Bd. of Educ*., 307 F.3d 243, 263 (3d Cir. 2002). Just as in *Matal*, 8.4(g) is not readily susceptible to Mr. Farrell's interpretative gloss. *See* PSJ 9–10.

But even reading a "targeting" element into 8.4(g) cannot save it. PSJ 10–11 (citing cases). For example, in *Saxe*, the harassment policy covered "unwelcome verbal, written, or physical conduct **directed at** the characteristics of a person's [race/religion/national origin/sexual orientation/etc]." 240 F.3d at 220 (emphasis added). Yet, it was nonetheless overbroad, because it exceeded the school district's authority under *Tinker*. Likewise, *Marshall v. Amuso* invalidated as overbroad a school board's prohibition on "personally directed" or "abusive" comments at meetings. 2021 U.S. Dist. LEXIS 222210, at *22–*24. Speech is not unprotected just because it's targeted at someone, even when that speech is critical or denigrating.

For example, just recently, California sought to prohibit staff members in long-term care facilities from willfully and repeatedly failing to use a resident's preferred name or pronouns after having been clearly informed of the name and pronoun. *Taking Offense v. State of California*, 66 Cal. App. 5th 696, 705 (Cal. Ct. App. 2021). Although that provision regulated speech targeted at an identifiable individual, it was nonetheless overbroad vis-à-vis the legislature's "legitimate and laudable goal of rooting out discrimination against LGBT residents." *Id.* at 720. "Rather than prohibiting conduct and speech amounting to actionable harassment or discrimination as those terms are legally defined, the law criminalizes even occasional, isolated, off-hand instances of willful misgendering . . . without requiring that such occasional instances of misgendering amount to harassing or discriminatory conduct." *Id.* "As the Third Circuit Court of Appeals has recognized, 'where pure expression is involved,' anti-discrimination law 'steers into the territory of the First Amendment.'" *Id.* at 708 (quoting *Saxe*, 240 F.3d at 206).

Quoting *United States v. Salerno*, the Defendants invoke the demanding test under which a plaintiff bringing a facial challenge must show that the statute is invalid in all its applications. DSJ 23. But this standard doesn't apply in the First Amendment context, where a "second type of facial challenge governs": overbreadth. *Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2387 (2021). This is a "more forgiving" standard. *Bruni v. City of Pittsburgh*, 941 F.3d 73, 83 (3d Cir. 2019). In cases like *Saxe*, *Dejohn*, and *McCauley*, where the threat of chilled speech was real, the Third Circuit entertained and credited facial overbreadth challenges. This Court should follow suit.

The chilling effect of 8.4(g) is also why Defendants' preferred remedy (DSJ 36)—a series of as-applied post-enforcement challenges as necessary—is unacceptable. "[T]he chilling effect of the [rule] on protected speech in the meantime would make such a case-by-case adjudication intolerable." *Bd. of Airport Commrs v. Jews for Jesus*, 482 U.S. 569, 575–76 (1987).

Lack of chilling effect also explains the result in *Washington State Grange v. Wash. State Republican Party*, 552 U.S. 442 (2008) (cited at DSJ 23). In *Washington State Grange*, a

political party was challenging an electoral regulation that allowed candidates for office to designate their preferred political party on the ballot even without the consent of that party. A major party argued that the regulation would create voter confusion and a false and forced association with the party. But "[t]hat factual determination" needed to "await an as-applied challenge." *Id.* at 458. The party would not be chilled in the meantime. However, when the text of a rule, policy, or statute deters speech, an immediate facial overbreadth challenge is appropriate. *Id.* at 449 n.6; *McCauley*, 618 F.3d at 238–39.[13]

Defendants would prefer that this were not a case about offensive language. DSJ 2, 29–30, 36. But a rule that prohibits denigrating, hostile, or averse expression is functionally a bar on offensive language. Just as a rule that prohibits "disparaging" expression is. *Matal*, 137 S. Ct. at 1763. Or a rule that prohibits "scandalous" expression. *Iancu*, 139 S. Ct. at 2299. Or a rule that classifies "unwelcome" expression as "harassment." *Saxe*, 240 F.3d at 214-25. 8.4(g), in its current form, "strikes at the heart of the First Amendment." *Matal*, 137 S. Ct. at 1749.

Justice Mundy is right: "the proposed amendments fail to cure the Rule's unconstitutional nature as articulated [in *Greenberg*]." Dkt. 45-1 at 2. Pennsylvania has not "heeded this Court's opinion." *Contra* DSJ 21. It has introduced novel and unconstitutional redefinitions of "harassment" and "discrimination" to substitute for its previously unconstitutional prohibition on manifesting bias or prejudice. *Saxe* and other Third Circuit decisions instruct that 8.4(g) is unconstitutionally overbroad.

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[13] Conversely, *United States v. Ackell* (DSJ 41) involved a federal statute that did not "on its face, regulate protected speech, or conduct that is necessarily intertwined with speech or expression." 907 F.3d 67, 77 (1st Cir. 2018). That statute did not supply a speech-directed definition of "harassment", so the First Circuit read "intent to . . . harass" "as referring to criminal harassment" "which is unprotected because it constitutes true threats or speech that is integral to proscribable criminal conduct." *Id.* at 76. In that situation, a facial challenge is unwarranted.

IV. Rule 8.4(g) is void for vagueness.

"Vagueness and overbreadth are logically related and similar doctrines." *Marshall*, 2021 U.S. Dist. LEXIS 222210, at *21 (quoting with alterations *Kolender v. Lawson*, 461 U.S. 352, 358 n.8 (1983)). 8.4(g) is unduly vague in at least two respects: (1) its definition of harassment as "conduct that is intended to intimidate, denigrate, or show hostility or aversion"; (2) its definition of discrimination as "conduct" that "manifests an intention" "to treat a person as inferior" or "to disregard relevant considerations of individual characteristics or merit." *See respectively* PSJ 23–24, *and* PSJ 24–26.

Again, *Marshall* bolsters Greenberg's position. As with the school board meeting policy there, 8.4(g) is vague because it is "irreparably clothed in subjectivity." 2021 U.S. Dist. LEXIS 222210, at *18. "What may be considered ['relevant considerations', 'inferior' treatment, 'denigration', 'hostility', or 'aversion'] varies from speaker to speaker, and listener to listener." *Id.* at *18–*19. Farrell's narrow reading "only further confirms the vagueness of the [rule]. Even if a reasonable reading did require a personally directed "plus" comment (which it does not), the adjacent terms such as "[denigrate]" and "[relevant]" are also vague." *Id.* at *19.

As in *Marshall*, Defendants offer "no examples of guidance or other interpretative tools to assist in properly applying the rule." *Id.* at *19–*20; *see* Farrell RFA Answers ¶15 (admitting that ODC has no mechanism for Pennsylvania-licensed attorneys to seek advisory guidance from ODC); 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)). Ultimately, "[a]llowing little more than the presiding officer's own views to shape 'what counts' as ['relevant considerations', 'inferior' treatment', 'denigration', 'hostility', or 'aversion'] under the [rule] openly invites viewpoint discrimination." *Id.* at *20 (citing *Ctr. for Investigative Reporting v. SEPTA*, 975 F.3d 300, 316 (3d Cir. 2020)); *accord* PSJ 25–26 (providing a few hypothetical examples).

Defendants' respond that "the Amendments set forth well-known terms and phrases" and that there "[t]here is a sea of case law, statutes, regulations, and other provisions that utilize these terms." DSJ 37–38. But New 8.4(g) intentionally dispensed with Old 8.4(g)'s clause tying the Rule to existing anti-discrimination and anti-harassment laws. PSJ 19–20. Defendants acknowledge this much. DSJ 7. Instead, New 8.4(g) generates its own novel and overreaching definitions of "harassment" and "discrimination." In *Jaycees*, by contrast, the Minnesota anti-discrimination law employed "commonly used and sufficiently precise standards" and had been subject to a limiting construction by the Minnesota Supreme Court to withdrawal private organizations from the scope of the law. 468 U.S. 630–31.

Defendants assert that "because the Amendments do not involve criminal sanctions, a 'greater tolerance' of imprecision is allowed." DSJ 37 (quoting *Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc*., 455 U.S. 489, 497 (1982)). Not so; that more lenient standard does not apply where the law "threatens to inhibit the exercise of constitutionally protected rights. If, for example, the law interferes with the right of free speech or of association, a more stringent vagueness test should apply." *Village of Hoffman*, 455 U.S. at 499.

Defendants point to several out-of-circuit decisions rejecting vagueness challenges to disciplinary rules. DSJ 38. Those cases upheld well-established standards like conduct "prejudicial to the administration of justice"; conduct "involving dishonesty, fraud, deceit or misrepresentation"; or "professionalism and ethics in the practice of law" because attorneys could rely on "guidance provided by case law, court rules, and the lore of profession." *E.g.*, *Howell v. State Bar of Texas*, 843 F.2d 205, 208 (5th Cir. 1988) (internal quotation omitted). But as in *Gentile*, 8.4(g)'s terminology—"denigrate, show aversion or hostility" and "relevant considerations"—has "no settled usage or tradition of interpretation in law." 501 U.S. at 1049.

There is no dispute that the Rules of Professional Conduct use "harass" in multiple places. DSJ 39. But those usages employ the ordinary meaning of the word, not the definition that 8.4(g) cuts from whole cloth. *See also* PSJ 20 (juxtaposing 8.4(g)'s redefinition of harassment with the well-cabined criminal offense of harassment under PA law). Redefining

denigrating and showing hostility or aversion as "harassment" constitutes a direct assault on expression. *See Saxe*, 240 F.3d at 214-26. To denigrate—that is, "to attack the reputation of" or "to deny the importance or validity of"[14]— is inherently expressive. To show—that is to exhibit or display—hostility or aversion is inherently expressive.

8.4(g)'s definition of "discrimination" is equally unfamiliar. Black's Law Dictionary provides the standard definition: a law or practice that "confers" or "denies privileges to a certain class" based on a protected category. DSJ 40 (quoting that definition). But 8.4(g) doesn't operate based on conferral or denial of privileges or benefits. It operates on expressing intentions to "disregard relevant considerations of individual characteristics or merit" or to "treat a person as inferior." That fails to sufficiently "define [the] universe of application, to provide fair notice of which adverse actions constitute violations." PSJ 24.

As currently written, the language of the Rule is not capable of reasoned, consistent, and neutral application. Its failure to provide to clear standards will chill speech by Pennsylvania attorneys on matters of public and private concern. For that reason, it violates the Fourteenth Amendment and should be declared unconstitutionally void for vagueness.

CONCLUSION

For the foregoing reasons, the Court should deny Defendants' motion for summary judgment.

[14] *Denigrate*. Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/denigrate (last visited December 8, 2021).

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Respectfully submitted,

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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: December 14, 2021

(s) Adam Schulman
Adam Schulman