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.

No. 2:20-cv-03822-CFK

RESPONSE IN OPPOSITION TO MOTION TO DISMISS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes and Rules

Other Authorities

On September 16, Defendants moved to dismiss the complaint (Dkt. 15, "Mot.") and Greenberg moved for a preliminary injunction (Dkt. 16-1, "PI Mot."). In accordance with the Court's Scheduling Order (Dkt. 11), Greenberg submits the following response in opposition to the motion to dismiss.

INTRODUCTION

Pennsylvania Rule of Professional Conduct 8.4(g) ("the Rule" or "8.4(g)") restricts the viewpoints that tens of thousands of Pennsylvania-licensed attorneys may publicly voice. Whether or not the rulemakers intended to narrowly regulate only professional conduct and discriminatory behavior, the text and comments of the Rule, as promulgated, go much farther. Especially for attorneys like Zachary Greenberg, whose practice depends on freely expressing polemical views, the Rule impermissibly erodes First Amendment liberties and overwrites viewpoints.

As a Pennsylvania-licensed attorney who regularly speaks at CLE and law school events on controversial and polarizing topics such as hate speech on campus, and who intends to continue to do so in the future, Greenberg risks discipline and disciplinary proceedings under the Rule. He therefore has standing to pursue a pre-enforcement challenge to the newly promulgated rule. *See* Section I, *infra*.

On the merits, Greenberg states a claim for three reasons.

First and most fundamentally, the Rule's prohibition on "manifest[ing] bias or prejudice" is unconstitutional viewpoint discrimination. Permitting positive, benign, and tolerant speech while outlawing negative, derogatory, and intolerant speech is viewpoint discrimination. *E.g. Matal v. Tam*, 137 S. Ct. 1744, 1766 (2017) (Kennedy, J.). "Giving offense is a viewpoint." *Id.* at 1763 (Alito, J.). 8.4(g) upends the very "bedrock principle underlying the First Amendment"—"that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*,

138 S. Ct. 1719, 1746 (2018) (Thomas, J., concurring in part and in the judgment) (quoting *Texas v. Johnson*, 491 U.S. 397, 414 (1989)). *See* Section II, *infra*.

Second, even if the Rule could be interpreted to be merely content-based, as opposed to also viewpoint-based, it far exceeds the limited scope of regulatory authority over professionals' speech under *Nat'l Institute of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018) ("*NIFLA*"). Because it so encroaches on the First Amendment rights of those who are being regulated, the Rule is facially overbroad and thus unconstitutional. *E.g. Saxe v. State College Area Sch. Dist.,* 240 F.3d 200 (3d Cir. 2001) (Alito, J.). *See* Section III, *infra*.

Finally, the Rule does not admit of any objective and determinative standard. It neither "provides fair notice to those to whom it is directed" nor forestalls the "real possibility" of "discriminatory enforcement." *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1048, 1051 (1991) (cleaned up). At its core, the Rule employs vague language ("manifest bias or prejudice") and compounds that vagueness with open-ended qualifiers ("including, but not limited to"). This is not the "narrow specificity" required to give First Amendment freedoms their "breathing space." *NAACP v. Button*, 371 U.S. 415, 433 (1963). In other words, because 8.4(g) is not "capable of reasoned application," it poses "twin problems"—a "serious risk of chilling protected speech" and "the risk of discriminatory and arbitrary enforcement." *Ctr. for Investigative Reporting v. SEPTA*, 975 F.3d 300, 2020 U.S. App. LEXIS 29034, at *18 & n.4 (3d Cir. 2020) (internal quotation and citation omitted). It is void for vagueness. *See* Section IV, *infra*.

LEGAL STANDARD FOR MOTION TO DISMISS

Defendants bring their motion to dismiss under Rule 12(b)(1) and (b)(6). Under 12(b)(1), they dispute Greenberg's standing to bring his pre-enforcement challenge. Mot. 7–13. When, as here, the Commonwealth raises a standing challenge "before it file[s] any answer to the Complaint or otherwise present[s] competing facts," that is "by definition, a facial attack." *Constitution Party v. Aichele*, 757 F.3d 347, 358 (3d Cir. 2014). "In reviewing a facial attack, the

court must only consider the allegations of the complaint and documents referenced therein and attached thereto, in the light most favorable to the plaintiff." *Id*. (internal quotation omitted).

Under 12(b)(6), Defendants assert that Greenberg's claims fail on the merits because Rule 8.4(g) is not overbroad, vague or viewpoint-based, and it is narrowly tailored to serve a compelling interest. Mot. 13–28. Again, the Court "must accept all factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief." *Bruni v. City of Pittsburgh*, 824 F.3d 353, 360 (3d Cir. 2016) (internal quotation omitted). The "facts alleged in the Complaint and the documents on which the claims made therein are based" circumscribe the Court's scope of review. *Id.* (cleaned up).

In assessing a facial challenge in the First Amendment context, the Court should "apply[] the relevant constitutional test to the challenged statute, without trying to dream up whether or not there exists some hypothetical situation in which application of the statute might be valid." *Id.* at 363. "Where a statute fails the relevant constitutional test [(if for example it discriminates based on viewpoint)], it can no longer be constitutionally applied to anyone—and thus there is 'no set of circumstances' in which the statute would be valid." *Id.*

ARGUMENT

I. Greenberg has standing to challenge Rule 8.4(g).

Greenberg demonstrates Article III standing to proceed: he imminently faces (1) an injury in fact, (2) caused by the conduct complained of that (3) can be redressed by a favorable decision. *Susan B. Anthony List v. Driehaus*, 579 U.S. 149, 157–58 (2014) ("*SBA List*"). That standard does not require waiting for "an actual arrest, prosecution, or other enforcement action." *Id.* at 158. Rather, when the First Amendment is implicated, the "alleged danger of the statute is, in large measure, one of self-censorship; a harm that can be realized without an actual prosecution." *Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 393 (1988). Deterring or chilling a reasonable plaintiff's speech itself amounts a harm for standing purposes. *See*

McCauley v. University of the Virgin Islands, 618 F.3d 232, 238 & n.5 (3d Cir. 2010) (permitting plaintiff standing to challenge restrictions that had not been applied to him based on harm of chilled speech).

SBA List delineates three factors to determine whether a plaintiff has standing to make bring such a challenge before the government seeks to enforce the statute: (1) whether plaintiff declares "an intention to engage in a course of conduct arguably affected with a constitutional interest"; (2) whether plaintiff's "intended future conduct is arguably proscribed by the statute they wish to challenge"; and (3) whether there is a credible threat of future enforcement. 579 U.S. at 161–65. Under this standing test, "[i]t is not hard to sustain standing for a pre-enforcement challenge in the highly sensitive area of public regulations governing bedrock political speech." *Speech First, Inc. v. Fenves*,__F.3d__, 2020 WL 6305819, 2020 U.S. App. LEXIS 34087, at *24 (5th Cir. Oct. 28, 2020). For example, in *Saxe v. State College Area School District*, the Third Circuit entertained a pre-enforcement challenge brought by a Christian student and parent who "feared that they were likely to be punished" under an anti-harassment policy. 240 F.3d 200, 203 (3d Cir. 2001). Likewise, in *DeJohn v. Temple University*, the Third Circuit entertained a pre-enforcement challenge brought by a student who "felt inhibited in expressing his opinions in class concerning women in combat and women in the military" under an anti-harassment policy. 537 F.3d 301, 305 (3d Cir. 2008).

Greenberg satisfies each prong of the test. Defendants do not challenge the fact that Greenberg's intended course of conduct is affected with a constitutional interest. Instead, they argue that Greenberg's injury is the product of "prolific speculation" and no there is no credible threat of enforcement. Mot. 8–13 Defendants implicitly ask the Court to adopt the view that Rule 8.4(g) does not arguably proscribe Greenberg's speech. That position contravenes both the text, language, and breadth of Rule 8.4(g), and the record in front the Court (*i.e.,* Greenberg's complaint ("Complaint," Dkt. 1) and his declarations in support of a preliminary injunction

(Dkts. 16-2, 23)).[1] At base, the Defendants underestimate the harm of an *objectively reasonable* chill to Greenberg's protected speech. In turn, they also underestimate his ability to challenge the law that arguably proscribes that speech.

A. Rule 8.4(g) "arguably proscribes" Greenberg's speech.

Greenberg, a Pennsylvania-licensed attorney, wishes to continue to speak at Continuing Legal Education ("CLE") seminars 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. Complaint ¶¶17–32. (Rule 8.4(g) includes CLE seminars as part of its definition of practice of law. Pa. R. Prof. Cond. 8.4(g), *cmt.* 3.) As part of his presentations, Greenberg details an assortment of leading cases and uses language in the cases that has offended, and will continue to offend, certain audience members. *Id.* at ¶¶62–63; Dkt. 16-2 ¶¶8–10; Dkt. 21 ¶¶74–77. Rule 8.4(g) proscribes speech manifesting bias or prejudice at CLE seminars. *See* Rule 8.4(g) & cmt. 3. And Greenberg's complaint and declarations provide scores of examples of persons and institutions 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. Complaint ¶¶73–74; Dkt. 16-2 ¶¶6–7; Dkt. 23 ¶¶33–70. Defendants do not grapple with this reality, nor with the fact that "nearly half (49%) of current college and graduate students believe that 'supporting someone's right to say racist things is as bad as holding racist views yourself.'" Emily Ekins, *Is Supporting Racists' Free Speech Rights the Same as Being a Racist?*, CATO AT LIBERTY (Nov. 1, 2017, 5:40 PM), https://www.cato.org/blog/supporting-racists-free-speech-rights-same-being-racist; *see also* Dkt.

[1] For purposes of the deciding the motion to dismiss, the Court is limited to the facts alleged in the operative complaint. *Hart v. Elec. Arts, Inc.*, 740 F. Supp. 2d 658, 663 (D.N.J. 2010). This opposition's references to the preliminary injunction stipulation and to Greenberg's preliminary injunction declarations simply reveal what Greenberg would be able to aver in an amended complaint.

23 ¶5 (43% of all adults surveyed stated the same). Nor do Defendants acknowledge the undisputed fact that many Americans believe that the First Amendment should not protect hate speech at all. Dkt. 23 ¶49 (citing sources).[2]

Defendants suggest two reasons to think that Greenberg's speech is not arguably proscribed. First, the Rule contains a scienter requirement that the manifestation of bias or prejudice must be "knowing[]." Mot. 12. But this provides little comfort where the imposition of liability will ultimately turn on the reaction of the listener and judgment of those who administer the Rule. That Greenberg has no intention to manifest bias (on any of the twelve enumerated bases at least) does not undercut his standing to challenge the Rule. *See SBA List*, 573 U.S. at 163 (repudiating the notion that plaintiff could feel secure merely because the statute required "knowing" falsehood and plaintiff had no "plans to lie or recklessly disregard the veracity of its speech."); *Woodhull Freedom Found. v. United States*, 948 F.3d 363, 373 (D.C. Cir. 2020) (concluding plaintiff had standing despite the statute's "intent" requirement).[3]

Second, Defendants suggest that Greenberg can avail himself of the Rule's safe harbor for "advice or advocacy consistent with these rules." Mot. 12–13. But "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. *See* Pa. R. Prof. Cond. Preamble ("As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system); Pa. R. Prof. Cond. 1.3, *cmt.* 1 ("A lawyer must also act with commitment and dedication to the interests

---

[2] Defendants assert that Greenberg had not alleged that anyone has been offended in the past by his presentations on these topics. Mot. 9. Audience members have informed him that his presentations have offended them, however, and that fact is now explicitly in the record, though it could already be fairly inferred from the Complaint. *See* Stipulation, Dkt. 21 at ¶¶75–77; Complaint ¶¶63–64.

[3] *American Library Association v. Barr* (cited by Mot. 13) is inconsistent with *SBA List* because it relied on "plaintiffs' unwavering claim that the statutes in no wise [sic] apply to their activities" to find that they failed to demonstrate pre-enforcement standing. 956 F.2d 1178, 1196 (D.C. Cir. 1992).

of the client and with zeal in advocacy upon the client's behalf"). Academic advocacy at a CLE simply does not fall within the exception for "advocacy [otherwise] consistent with these rules." Indeed, the only time that the rules allude to an academic event like participation at a CLE seminar is in comment 3 to Rule 8.4(g) itself. At the least, it is not *inarguable* that the safe harbor protects Greenberg's intended speech.

While the text and contours of 8.4(g) are vague—indeed, unconstitutionally so, *see* Section IV, *infra*—there are indications in the language of the Rule that Greenberg's speech could be disciplined, beyond just the expansive societal understanding of "bias" and "prejudice" described in Greenberg's complaint.

The Rule declares that "bias" and "prejudice" should be understood "as those terms are defined in applicable federal, state or local statutes or ordinances." That "bias" and "prejudice" language was borrowed from Rule 2.3 of the Pennsylvania Code of Judicial Conduct. 49 Pa. B. 4941 (A copy of the complete text of CJC Rule 2.3 is attached as Exhibit A and is available at http://judicialconductboardofpa.org/code-of-judicial-conduct/#2.3.). In turn, Comment 2 to Rule 2.3 provides examples of manifestations of bias and prejudice. They "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." Again, as Greenberg has averred in his complaint and declarations, his presentations require mentioning epithets, slurs, and demeaning nicknames. In the question-and-answer portion of his presentations, Greenberg exchanges ideas with audience members about the importance *vel non* of affording Due Process and First Amendment rights to unpopular persons who do and say odious things. Attorneys—or even just activists seeking advantage against a political opponent—could construe advancing such theories as manifesting bias or prejudice against those classes of persons protected by Title IX or hate speech regulation or campaign finance regulation—akin to "suggestions of connections between race, ethnicity, or nationality and crime." *See* Dkt. 23 ¶¶5–19.

Because Greenberg's intended speech arguably falls within the Rule's ambit, this case differs from both *Pipito v. Lower Bucks Cty. Joint Mun. Auth.* and *SEIU v. Municipality of Mt. Lebanon*, cited by Mot. 8 & n.4. In *Pipito*, the plaintiff alleged a desire to speak freely outside work, but "any reasonable reading of the [challenged] Memorandum's plain language…[was] constrained to the workplace. This eliminate[d] any 'credible threat of prosecution' for protected speech that t[ook] place outside of the workplace." 2020 WL 4717933, 2020 U.S. App. LEXIS 25723, at *9 (3d Cir. Aug. 13, 2020) (unpublished). *In SEIU*, the plaintiff failed to even allege "that it desires or intends to solicit in [the jurisdiction of the anti-solicitation ordinance]" and so was "completely unaffected by the permitting requirement applicable to solicitors." 446 F.3d 419, 424 (3d Cir. 2006).

All in all, Greenberg has shown that the speech he wishes to engage in is arguably proscribed by the Rule. And that is enough; he need not show that the Rule definitively prohibits his intended speech.

B. There is a credible threat of enforcement.

The bulk of Defendants' standing attacks go to whether Greenberg faces a credible threat of enforcement. Relying on *Clapper v. Amnesty Int'l USA*[4] and *Reilly v. Ceridian Corp.*,[5] Defendants contend that Greenberg's injury depends on "prolific speculation." Mot. 8–10. By this, they mean "a supposed chain of contingencies—three links long." *Constitution Party v. Aichele*, 757 F.3d 347, 364 n.21 (3d Cir. 2014). Someone must perceive Greenberg's speech as manifesting "bias" or "prejudice," they must then register a complaint with the Office of Disciplinary Counsel ("ODC"), and then ODC must then not dismiss the complaint. Mot. 9.[6] In

[4] 568 U.S. 398 (2013).

[5] 664 F.3d 38 (3d Cir. 2011), *cert den'd* 566 U.S. 989 (2012).

[6] Although this is the most likely path for injury to Greenberg, the first and second links are not even necessary because the Office and Board both possess the authority to initiate disciplinary investigations at their own discretion. Pa. Disp. Bd. R. 87.1(a)-(b). Of course, the private citizen complaint process "bolster[s]" the credibility of the threat of harm. *SBA List*, 573

Constitution Party, political groups challenged a provision that required them to pay costs if an opposing party successfully challenged the nomination papers of the political groups' candidates. Relying on *Clapper*, the Commonwealth argued that plaintiffs' injury was too speculative because it required a third-party to challenge their papers, that challenge to succeed in disqualifying the nomination papers, and a court to impose costs on plaintiffs after a case specific inquiry. *Constitution Party* repudiates the Commonwealth's argument, laying out three reasons why *Clapper* does not control in circumstances like this case: (1) *Clapper* "addresses the unique realm of national security"; (2) *Clapper's* "holding… was based on a detailed review of the particular statutory scheme at issue in that case, which by the Court's count included five levels of safeguards and contingencies"; and (3) "most importantly the law at issue in *Clapper* did not regulate the [plaintiffs]." 757 F.3d at 364 n.21. Indeed, *Clapper* involved a challenge to the NSA's bulk data collection and surveillance practices, a theory that depended on the assertion that the plaintiffs would be affected by the government's targeting of "*other* individuals—namely, their foreign contacts." 568 U.S. at 411. Thus, the *Clapper* plaintiffs failed to demonstrate the basic factual predicate that their communications would fall within the scope of the challenged statute. *Id*.[7]

Defendants' reliance (Mot. 8) on *Laird v. Tatum* is misplaced for similar reasons. That case involved an ordinary citizen's generalized challenge to the existence of the Army's data gathering system. 408 U.S. 1 (1972). As in *Clapper*, subjective chill of the plaintiffs was insufficient to confer Article III standing because the allegations assailed a system that did not directly regulate the plaintiffs. Also, as in *Clapper*, *Laird* implicated the unique realm of national

---

U.S. at 164. The fact (Mot. 11) that complainants do not institute disciplinary charges themselves fails to meaningfully distinguish the Pennsylvania bar disciplinary system from the Ohio procedure in *SBA List*. *See* Ohio Rev. Code Ann. §3517.156(C) (mandating that the Ohio Elections Commission dismiss complaints in the absence of probable cause).

[7] *Clapper* also involved the summary judgment stage where "a party can no longer rest on mere allegations." 568 U.S. at 412.

security. *See also Speech First*, 2020 WL 6305819 (distinguishing the holdings of both *Clapper* and *Laird*).[8]

Defendants point out that there is no claim that anyone has ever filed a disciplinary complaint against Greenberg based on his past presentations. But of course, such a showing is not required for standing and, as a practical matter, 8.4(g) did not even exist at that time.[9] Within the last few years, a handful of other jurisdictions have passed a version of model rule 8.4, but Pennsylvania is one of only two jurisdictions that has adopted a version that prohibits using "words" to manifest "bias" and "prejudice" outside the representation of a client. *Compare* Ind. R. Prof. Cond. 8.4(g) (prohibiting such manifestations when attorney acts "in a professional capacity").[10] "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." *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); *accord Speech First*, 2020 WL

---

[8] As a non-constitutional data breach case, *Reilly* is even less relevant than *Clapper* or *Laird.*

[9] *Contrast Ness v. City of Bloomington*, 2020 WL 4227156, 2020 U.S. Dist. LEXIS 130395, at *19 (D. Minn. Jul. 23, 2020) (no standing where city had previously declined to prosecute plaintiff for certain conduct in the past and plaintiff did "not allege that she intends to engage in activities that materially differ from that past conduct") (cited by Mot. 12).

[10] *Fieger v. Michigan Supreme Court* (Mot. 10) does not support the proposition that Greenberg needs to point to specify attorneys subject to the rule for similar speech. In that case plaintiffs did not "allege any intended speech" at all and the Michigan Supreme Court had adopting a narrowing construction of the rule at issue, making the chilling effect "objectively unsubstantiated." 553 F.3d 955, 965 (6th Cir. 2009). *Contrast also Empower Texans, Inc. v. Nodolf,* 306 F. Supp. 3d 961, 966–67 (W.D. Tex. 2018) (no standing where plaintiff failed to show that anyone other than a single aberrational complainant believed plaintiff's intended future conduct was proscribed by the challenged law).

6305819 (same); *see also Am. Booksellers Ass'n*, 484 U.S. at 392 (allowing challenge before the effective date of statute).

Significantly, though Defendants' motion argues that ODC might dismiss complaints against Greenberg as frivolous, none of the defendants declare or present other evidence that they would find this type of 8.4(g) complaint to be frivolous, let alone disavow their authority to take any enforcement steps in response to such complaints. *See Surrick v. Killion*, 449 F.3d 520, 528 (3d Cir. 2006) (finding "significant" ODC's refusal to assure non-enforcement); *Pic-A-State Pa., Inc. v. Reno*, 76 F.3d 1294, 1299 (3d Cir. 1996) ("We also note that the Government, although it has stated that a federal prosecution is unlikely, has not expressly disavowed an intent to prosecute."); *Presbytery of the Orthodox Presbyterian Church v. Florio*, 40 F.3d 1454, 1464–1465, (3d Cir. 1994) (finding standing where "state concludes that [plaintiff] does not face any imminent threat of enforcement, but yet refuses to guarantee [non-prosecution]"). "[I]n cases involving fundamental rights, even the remotest threat of prosecution, such as the absence of a promise not to prosecute, has supported a holding of ripeness where the issues in the case were predominantly legal and did not require additional factual development." *Peachlum v. City of York*, 333 F.3d 429, 435 (3d Cir. 2003) (internal quotation omitted).

Of course, even if Defendants were to submit such evidence, their litigation position would not suffice to undercut Greenberg's standing, because Greenberg's complaint contains numerous examples of imputing bias and bigotry to speakers simply advancing legal views or mentioning incendiary words. These examples suffice to show that such a disciplinary complaint would not be considered "frivolous" notwithstanding any in-court litigation position.[11]

[11] *See, e.g., Woodhull Freedom Found.*, 948 F.3d at 373; *Rodgers v. Bryant*, 942 F.3d 451, 455 (8th Cir. 2019); *EQT Prod. Comp. v. Wender*, 870 F.3d 322, 331 (4th Cir. 2017); *Lopez v. Candaele*, 630 F.3d 775, 788 (9th Cir. 2010); *Vt. Right to Life Comm. v. Sorrell*, 221 F.3d 376, 383 (2d Cir. 2000); *N.H. Right to Life PAC v. Gardner*, 99 F.3d 8, 15 (1st Cir. 1996).

Greenberg need not wait and provide the Defendants the opportunity to refrain from enforcing the Rule. *Six Star Holdings, LLC v. City of Milwaukee*, 821 F.3d 795, 803 (7th Cir. 2016).

Simply, there are no preconditional "ifs" (Mot. 10) to the well-founded chill Greenberg and other Pennsylvania attorneys will incur when 8.4(g) takes effect next month.

II. Rule 8.4(g) is a viewpoint-based prohibition on speech in violation of the First Amendment.

Greenberg's complaint states a valid claim that Rule 8.4(g) constitutes a viewpoint-based restriction of speech in violation of the First Amendment. 8.4(g)'s prohibition on using words to "manifest bias or prejudice, or engage in harassment or discrimination" suppresses certain viewpoints on certain topics. Tolerant, benign, and respectful speech is allowed; while biased, prejudiced, discriminatory, critical, and derogatory speech is not. *Matal v. Tam* explains why this is viewpoint suppression. *Matal* 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." 137 S. Ct. at 1751 (alterations omitted). In two opinions, the Supreme Court unanimously determined that this statute constituted a viewpoint-based restriction. Writing for half the eight-member Court, Justice Alito explained: "Our cases use the term 'viewpoint' discrimination in a broad sense." *Id.* at 1763. The anti-disparagement clause refuses "speech that is offensive to a substantial percentage of the members of any group," and "that is viewpoint discrimination: Giving offense is a viewpoint." *Id.*

Justice Kennedy, writing for the other half of the Court, echoed this reasoning. "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. On any particular subject, the anti-disparagement clause permitted registration of "a positive or benign mark but not a derogatory one." *Id.* "The law thus reflects the Government's disapproval of a subset of messages it finds offensive. This is the essence of viewpoint discrimination." *Id*. Under *Matal*, 8.4(g) cannot survive. *Accord Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 593 (1998) (Scalia, J., concurring in the judgment) (a solicitude

for decency and respectful speech "unquestionably constitutes viewpoint discrimination"); *Kalman v. Cortes*, 723 F. Supp. 2d 766, 802 (E.D. Pa. 2010) (holding unconstitutional as viewpoint-based a statute that permitted corporate names that were respectful and reverent to religion while prohibiting names that were disrespectful and irreverent to religion). "[V]iewpoint discrimination is inherent in the design and structure of this Act. This law is a paradigmatic example of the serious threat presented when government seeks to impose its own message in the place of individual speech, thought, and expression." *NIFLA*, 138 S. Ct. at 2379 (Kennedy, J, concurring). "[A] disparaging comment directed at an individual's sex, race, or some other personal characteristic" is captured (unconstitutionally) by anti-discrimination laws "precisely because of its sensitive subject matter and because of the odious viewpoint it expresses." *Saxe*, 240 F.3d at 206.

Defendants dispute this, arguing that 8.4(g) regulates discriminatory and harassing conduct, not speech. Mot. 27. Regardless of the rulemakers' intentions however, 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." As Rule 2.3 of the Pennsylvania Judicial Code of Conduct underscores, manifestations of bias or prejudice include the expression of certain words and ideas by themselves, apart from any non-expressive conduct. Defendants are simply "wrong that the only thing actually at issue in this litigation is conduct." *Pac. Coast Horseshoeing Sch., Inc. v. Kirchmeyer*, 961 F.3d 1062, 1069 (9th Cir. 2020) (quoting *Holder v. Humanitarian Law Project*, 561 U.S. 1, 27 (2010)); *accord Billups v. City of Charleston*, 961 F.3d 673, 682–83 (4th Cir. 2020) (concluding that municipal licensing of tour guides is a regulation of speech not merely conduct). The First Amendment fully applies here, just as it did in *Saxe* where the anti-harassment policy prohibits "any unwelcome verbal, written or physical conduct" 240 F.3d at 202–03. "[W]hen anti-discrimination laws are 'applied to harassment claims found solely on verbal insults, pictorial, or literary matter, the statutes impose content-based viewpoint-discriminatory restrictions on speech.'" *Id.* at 206 (quoting *DeAngelis v.*

El Paso Mun. Police Officers Ass'n, 51 F.3d 591, 596–97 (5th Cir. 1995) (internal alterations omitted)).

Notwithstanding Saxe, Defendants rely on dicta from *Wandering Dago, Inc. v. Destito* to argue that anti-harassment laws regulate conduct rather than the viewpoint of speech. Mot. 27 (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) is not of this sort. By its express terms it regulates "words" in addition to "conduct", and manifestations of "bias or prejudice" in addition to "harassment" and "discrimination." *Contrast* Mot. 19 n.9 (citing two federal and one state statute that prohibit "discrimination"). Defendants can regulate discrimination, but this is a complaint about their regulation of speech.

Next, Defendants argue that because 8.4(g) applies to all attorneys, it cannot be viewpoint discriminatory. That, however, is not the test for viewpoint discrimination. In fact, it is the very same "logic—that a ban on 'disparaging' speech [is acceptable because it] neutrally applied to each side on any given topic—that all of the Justices rejected in *Matal*." *American Freedom Defense Initiative v. Suburban Mobility Auth. for Regional Transp*., __ F.3d __ , 2020 WL 6255360, 2020 U.S. App. LEXIS 33518, at *38 (6th Cir. Oct. 23, 2020). As discussed above, under either opinion in *Matal*, 8.4(g) discriminates on the basis of viewpoint.

Because 8.4(g) is viewpoint discriminatory, that "end[s] the matter"; "it must be invalidated." *Iancu v. Brunetti*, 139 S. Ct. 2294, 2302 (2019). While "restrictions based on content must satisfy strict scrutiny,…those based on viewpoint are prohibited." *Minnesota Voters Alliance v. Mansky*, 138 S. Ct. 1876, 1885 (2018); *Iancu*, 139 S. Ct. at 2299 ("unconstitutional"); *Matal*, 137 S. Ct. at 1763 ("forbidden"); *Northeastern Pa. Freethought Soc'y v. Cty. of Lackawanna Transit Sys.*, 938 F.3d 424, 436 (3d Cir. 2019) ("impermissible"); *Porter v. City of*

Philadelphia, 975 F.3d 374, 2020 U.S. App. LEXIS 29800, at *14 (3d Cir. 2020) ("[A]ny content-based restrictions will receive strict scrutiny. While the government may impose reasonable time, place, and manner restrictions on speech, viewpoint-based restrictions are prohibited.").

Defendants advance no alternative argument that the law is somehow only content-based, rather than viewpoint-based. They nonetheless maintain that 8.4(g) is narrowly tailored to the Commonwealth's compelling interest in regulating the legal profession. Mot. 28. Stated that way, the Commonwealth's interest is overbroad and undifferentiated. *See Button*, 371 U.S. at 438–39 ("it is no answer . . . to say . . . that the purpose of these regulations was merely to insure high professional standards and not to curtail free expression."). Defendants' argument simply cannot be reconciled with the Supreme Court's decision in *NIFLA*. If states had free rein to define any speech they wanted as proscribable "professional speech" then there would be no breathing space for professionals' First Amendment rights. *See NIFLA*, 138 S. Ct. at 2375. States do not have the power to declare by fiat that speech outside the courtroom, outside a case, and outside a representation, implicates professional conduct. "State labels cannot be dispositive of the degree of First Amendment protection." *Id.* at 2375 (cleaned up).

Rule 8.4 does not fit within either of the two areas that *NIFLA* recognizes that justifies professional regulation of speech. First, it is not a law "that require[s] professionals to disclose factual, noncontroversial information in their 'commercial speech.'" *Id.* at 2372. Second, it does not merely "regulate professional conduct, … [that] incidentally involves speech." *Id.* Defendants' asserted broad-brush interest in regulating the profession or lawyers more generally (Mot. 15, 21–22, 28) therefore cannot justify the encroachment on First Amendment rights.

In addition to *Button* and *NIFLA*, the very cases Defendants rely on also demonstrate that merely invoking a state's interest in regulating the profession is no magic bullet; the First Amendment demands a narrowly tailored approach. So, for example, the Nevada disciplinary rule at issue in *Gentile* prohibited lawyers from making extrajudicial statements to the press that would "have a substantial likelihood of materially prejudicing an adjudicative proceeding." 501

U.S. 1030, 1033 (1991). A slim majority of the Court held that the "substantial likelihood of material prejudice" standard employed by Nevada was narrowly tailored to target "two principal evils: (1) comments that are likely to influence the actual outcome of the trial, and (2) comments that are likely to prejudice the jury venire," interests that implicated other persons' constitutional right to a fair trial by jury. *Id.* at 1074–75. (A different majority concluded that a safe harbor that allowed lawyers to "state without elaboration…the general nature of the claim or defense" rendered the rule void for vagueness. *Id.* at 1048–51.) Here, there is no countervailing constitutional right to be balanced.

In line with *NIFLA*'s second exception, *Gentile* follows *Sawyer* in recognizing that when an attorney's speech occurs as part and parcel of pending litigation or a client representation, such remarks become "more censurable" because they can "obstruct the administration of justice." *In re Sawyer*, 360 U.S. 622, 636 (1959); *Gentile*, 501 U.S. at 1074 (Rehnquist, J., opinion of the Court) ("our 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"); *Gentile*, 501 U.S. at 1081 (O'Connor, J., concurring) (similar).

Rule 8.4(g) contains no limitation to speech uttered in the course of representing a client, in a pending litigation, or speech prejudicial to the administration of justice. Rather, it applies to words uttered "in the practice of law" but goes on to redefine "practice of law" to include activities outside the practice of law but which are necessary to it, such as participating in events where CLE credits are issued. Pa. R. Prof. Cond. 8.4(g), *cmt.* 3.[12] There is no reason to believe that *Gentile* would have upheld the disciplinary rule at issue there if it had prohibited extrajudicial statements made "in the practice of law" rather than those "substantially likely to materially prejudice" a pending proceeding.

[12] Defendants concede this reading of the Rule. Mot. 26.

Another case cited by Defendants (Mot. 15, 28), *In re Primus*, vindicated a First Amendment challenge to South Carolina's anti-solicitation disciplinary rule. 436 U.S. 412 (1978). "Where political expression or association is at issue, the Supreme Court will not tolerate the degree of imprecision that often characterizes government regulation of the conduct of commercial affairs." *Id.* at 434. When regulating non-commercial speech at least, a state may not "regulate in a prophylactic fashion" because of the possibility of a narrower kind of harm; "a State must regulate with significantly greater precision." *Id.* at 437–38. Defendants contend that the actual evil that 8.4(g) seeks to prevent is harassing and discriminatory conduct in the legal system and in legal proceedings, yet the Rule prohibits all manifestations of bias and prejudice where there's a nexus to the practice of law. That is overinclusive, not narrowly tailored.

In yet another case cited by Defendants to support their view of the Commonwealth's expansive authority (Mot. 15), *In re Synder*, the Supreme Court reversed the discipline imposed upon an attorney who had submitted a harsh, ill-mannered, and rude letter to a court criticizing administration of the Criminal Justice Act. 472 U.S 634 (1985). That is not "cause for discipline" as it did not impede the state's interest in ensuring lawyers "discharge continuing obligations to clients or courts" or sanctioning "conduct inimical to the administration of justice" *Id.* at 645–47. Other cases the Defendants cite do not even address the First Amendment, let alone support the notion that an undifferentiated interest in the regulation of the profession can satisfy strict scrutiny. Mot. 15, 28; *see Middlesex v. Garden State Bar Ass'n*, 457 U.S. 423 (1982) (*Younger* abstention); *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975) (antitrust claims).

Contrary to Defendants' assertion, "protecting the flagging reputations of lawyers by preventing them from engaging in conduct that is universally regarded as deplorable and beneath common decency" is not a "compelling interest." Mot. 15 (alterations omitted). *Florida Bar v. Went For It, Inc.*, called 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 indecent conduct exceeds the scope of anything sustainable under *NIFLA*. If states possessed such a power, there would 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).

Defendants posit a second interest served by Rule 8.4(g) that fares no better: the interest in combating harassment and discriminatory conduct in the legal system. Mot. 3, 17, 18, 19, 27. In the abstract that is likely a compelling interest. *See* Mot. 21 (citing *Saxe* for proposition that preventing workplace discrimination is a compelling interest); *see also Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984) (crediting "compelling interest in eradicating discrimination"). But 8.4(g) is in no way narrowly tailored to serve that interest. Rather, it is wildly overinclusive. It prohibits not only engaging in harassing or discriminatory conduct but also using "words" to "manifest bias or prejudice." Defendants claim (Mot. 19) that the Rule "refer[s] to 'words' to the extent that words are used in the conduct of discrimination or harassment," but that is simply inconsistent with the plain text of Rule, not to mention the interpretative gloss of Rule 2.3 of the Pennsylvania Judicial Code of Conduct. "By words or conduct" qualifies how attorneys can "manifest bias or prejudice." The notion that the adverbial qualifier should be read to skip the nearest verb phrase (manifest bias or prejudice) and only modify the distant verb phrase (engage in harassment or discrimination) contradicts the rules of standard grammar. *Richards v. PAR, Inc.*, 954 F.3d 965, 968 (7th Cir. 2020) (rejecting a statutory interpretation argument that skipped over the nearest referent). Perhaps "by words or conduct" modifies both "manifest bias or prejudice" **and** "engage in harassment or discrimination" under the series qualifier canon. Antonin Scalia & Bryan A. Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 147 (2012). Otherwise, the modifier phrase "normally applies only to the nearest reasonable

referent." *Id.* at 153. That Comment 2 to CJC Rule 2.3 lists almost exclusively verbal examples of manifesting bias or prejudice confirms this reading.

Thus interpreted, 8.4(g) combats discrimination and harassment by preventing speech expressing ideas that offend. This "strikes at the heart of the First Amendment." *Matal*, 137 S. Ct. at 1764. Regulating speech "to produce a society free of biases" is unacceptable "for it amounts to nothing less than a proposal to limit speech in the service of orthodox expression." *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1746 (2018) (Thomas, J., concurring in part and in the judgment) (cleaned up). To the extent that Defendants insinuate that the Commonwealth can redefine protected communications that manifest bias as "the conduct of discrimination or harassment," they are mistaken. *Saxe*; Eugene Volokh, *One-to-One Speech vs. One-to-Many Speech, Criminal Harassment Laws, and "Cyberstalking*," 107 NW. U. L. REV. 731, 771 (2013).

Nor have Defendants shown (or even asserted) that Rule 8.4 is the least restrictive alternative way of pursuing the Commonwealth's interest in stemming harassment and discrimination. *ACLU v. Mukasey*, 534 F.3d 181, 198 (3d Cir. 2008) ("least restrictive alternative" is "the third prong of the three-prong strict scrutiny test."). 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. *See* Mot. 18 ("sexual harassment and discrimination…harms the legal system and the administration of justice"); *In re Charges of Unprofessional Conduct in Panel File 98-26*, 597 N.W.2d 563 (Minn. 1999) (attorney's motion asking the court to prohibit defense counsel from enlisting a person of color as co-counsel was a "serious" violation of analogous rule); *In re Brown*, 703 N.E.2d 1041, 1044 (Ind. 1998) (attorney's "creation and perpetuation of a work environment infected with inappropriate and unwelcome sexual advances violated Prof. Cond. R. 8.4(d)."); *In re Vicenti*, 554 A.2d 470, 474 (N.J. 1989) ("prejudice…to…the administration of justice will be virtually conclusive if intimidation, abuse, harassment, or threats focus or dwell on invidious discriminatory distinctions."). Thus, "courts do 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).

Federal and state laws prohibit discrimination in employment and in access to public accommodations. The Commonwealth proscribes the offense of criminal harassment. 18 Pa. Cons. Stat. § 2709. Even more closely related, the CJC addresses this concern by tasking judges with "requir[ing] lawyers in proceedings before the court to refrain from manifesting bias or prejudice, or engaging in harassment…" Rule 2.3(C). And the Commonwealth's Code of Civility exhorts 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." 204 Pa. Code § 99.3(7).

The Defendants must offer something beyond *ipse dixit* contention to demonstrate that "measures that burden substantially less speech would fail to achieve the government's interests, not simply that the chosen route is easier." *McCullen v. Coakley*, 573 U.S. 464, 467 (2014); *see also Adams Outdoor Adver. Ltd. P'ship v. Pa. Dep't of Trans.*, 930 F.3d 199, 207–08 (3d Cir. 2019) (reversing summary judgment because of lack of record evidence of narrow tailoring). Indeed, the Commonwealth has not shown that there is any harassment and discrimination in the Pennsylvania legal system that existing laws and rules cannot already combat without infringing protected speech.

III. Rule 8.4(g) is substantially overbroad in violation of the First Amendment.

Because the Rule is viewpoint-based, that "end[s] the matter"; "it must be invalidated" even without considering the Rule's "permissible applications" and its overbreadth. *Iancu*, 139 S. Ct. at 2302. Assuming *arguendo*, however, that the Rule is not viewpoint-based, but is merely content-based, it is substantially overbroad in light of the Commonwealth's regulatory authority under *NIFLA*. Although Defendants repeatedly exalt the Commonwealth's broad interest in regulating the practice of law, 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 *Snyder*, the Court held that disciplinary rules could not be applied to an attorney's intemperate, highly critical letter.

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.[13]

The similarities between Rule 8.4(g) and the school policy in *Saxe* demonstrate why the Rule is overbroad. PI Mot. 11–12. Both 8.4(g) and the *Saxe* policy include broad catch-all language. 240 F.3d at 206. Both 8.4(g) and the *Saxe* policy extend beyond the scope of their ultimate aims (ensuring fair administration of justice or ensuring fair educational opportunity respectively). *Id.* And both 8.4(g) and the *Saxe* policy failed to confine themselves to the area

[13] Pa. R. Prof. Cond. 8.4(c), 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).

where attorney or student speech respectively is regulable under operative First Amendment jurisprudence. *Id*. at 216–17.

Defendants purport to distinguish the Third Circuit's decisions in *Saxe* and *DeJohn*—which, like *Saxe*, also struck down an anti-harassment policy as facially overbroad—because Rule 8.4(g) is purportedly "tied to standards—statutes, case law, regulations, and so forth—that provide a well-known structure for assessing complaints." Mot. 19. But the statutes cited by Defendants (Mot. 19 n.9) all use the language of actual "discrimination" not "manifesting" "bias" or "prejudice." The *Saxe* and *DeJohn* policies used the language of "harassment" and "hostile environment"—terms with a stronger and more developed legal pedigree than "manifesting bias or prejudice."[14] Yet even that was not enough to save those policies from unconstitutional overbreadth, because courts must assess the speech regulation vis-à-vis the limits of the government authority. In the grade school context, that is the school's authority under *Tinker* and its progeny. In the professional context, that is the Commonwealth's authority under *NIFLA*.

Defendants take pains to emphasize the more modest aspects of 8.4(g) and point out (Mot. 2 n.2) that 39 other jurisdictions have similar anti-harassment provisions in their rules, but the bulk of those states have not adopted Model Rule 8.4(g) or a variation of it. Instead, many states have adopted an earlier comment to Model Rule 8.4(d), promulgated by the ABA in 1998, which only prohibits manifesting bias or prejudice "in the course of representing a client" as that constitutes "conduct that is prejudicial to the administration of justice." *See Ellis v. Harrison*, 947 F.3d 555, 563 n.9 (9th Cir. 2020) (*en banc*) (Nguyen, J., concurring) (citing examples); *see also* Complaint ¶33.

---

[14] *Marshall v. Ohio University* (Mot. 19) is even further afield. There, the policy "not only provide[d] significantly more detail and notice than the policies reviewed by the *Dambrot* and *DeJohn* courts, [it] specifically track[ed] Title VII's definition of 'sexual harassment'" and case law. 2015 WL 1179955, 2015 U.S. Dist. LEXIS 31272, at *15-*16 (S.D. Ohio Mar. 13, 2015).

Defendants wave away the Complaint's countless examples of protected speech met with accusations of "bias" or "prejudice" because they "do not involve [8.4(g)] or other similar provisions" and only "involve[] university employees, other non-attorneys, and judges who were criticized by private individuals." Mot. 20–21. Hardly relevant, but even if it were, some of persons doing the accusing are state actors, not merely private individuals, and the law professors accused are attorneys. *See, e.g.*, Complaint ¶74.f-g. Of course, the Rule itself is not yet in effect. Among the handful of jurisdictions (Dkt. 21 ¶54) that have recently adopted a version of the model rule, perhaps only Indiana's (adopted last year) stretches as far as 8.4(g). Thus, the lack of such actions to date is not so surprising, especially because "the lack [thereof] could just as well indicate that speech as already been chilled." *Speech First, Inc v. Schlissel*, 939 F.3d 756, 766 (6th Cir. 2019).

But more importantly, the bar disciplinary process is not a bubble isolated from the real world and the public's rendition of "bias" and "prejudice." Indeed, many persons leveling accusations of "bias" or "prejudice" from the examples in Greenberg's complaint are themselves attorneys or law professors and so part of the same community that will be enforcing and adjudicating the Rule. The effect of public perception is especially great given the readily available avenues for members of the public to lodge a complaint.

It would be one thing if the Rule clearly defined "bias" and "prejudice" to avoid impermissible applications of the type described in the complaint. But just the opposite. The best delineation offered for "manifesting bias or prejudice," Comment 2 to CJC Rule 2.3, affirmatively conveys that, for example, the allegation of bias arising from Judge Edith Jones's public speech at University of Pennsylvania (Complaint ¶73.a) would be actionable and meritorious. It also indicates that mentioning slurs or hateful epithets in a purely pedagogical context (Complaint ¶73.e) would also be an actionable manifestation of bias. And perhaps most revealing of its overbreadth, many of its examples do not even require that the speech be directed at anyone. In effect, that list could only be justified if there were a First Amendment exception for free-floating offensive speech. Because there is not, Comment 2 to Rule 2.3 demonstrates the

overbreadth of Rule 8.4(g). *Accord Volokh*, *supra*, 107 NW. U. L. REV. 731, 767 ("Once we get outside the First Amendment exceptions, harassment laws that cover one-to-many speech should not be constitutional.").

Defendants suggest that courts need not adjudicate any overbreadth on a facial basis, and can instead handle it in case-by-case adjudication. This underappreciates the fact that the Rule's existence causes constitutional harm in the form of chilled speech. More importantly, that approach is inconsistent with the Third Circuit's decisions in *Saxe*, *DeJohn*, or *McCauley*.

Nor does the Defendants' "acute awareness" of the First Amendment issues save the Rule. *See Speech First*, 2020 WL 6305819 ("speech-protecting language of the policies" and declarations of a First-Amendment friendly intentions are "not compelling"). The revisions to the ABA Model Rule do not do enough to bring the Rule into compliance with the First Amendment. "[T]he First Amendment protects against the Government; it does not leave us at the mercy of noblesse oblige." *United States v. Stevens*, 559 U.S. 460, 480 (2010). Courts may not uphold an unconstitutional rule just because defendants "promise[] to use it responsibly." *Id*.

Defendants invoke the interpretative canon of constitutional avoidance, but they do not suggest a plausible reading that avoids the Rule's overbreadth,[15] let alone one that is "reasonable and readily apparent." *Compare* Mot. 16–17 *with* PI Mot. 13 (citing authorities). They cannot change the fact that the Rule proscribes "words" that "manifest bias or prejudice"; that it defines "practice of law" more broadly than the actual practice of law; or that the definitional template for "bias" and "prejudice" in CJC Rule 2.3 explicitly captures academic speech. It is not limited to discriminatory conduct and harassment; it is not limited to the representations of clients or pending litigation; it is not limited to actions that prejudice the administration of justice. It is unconstitutionally overbroad.

[15] Any reading that eliminates core language of the Rule (that is, using "words" to "manifest bias or prejudice") is not plausible.

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

"The void for vagueness doctrine addresses at least two connected but discrete due process concerns: first, that regulated parties should know what is required of them so they may act accordingly; second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way." *FCC v. Fox TV Stations*, *Inc.*, 567 U.S. 239, 253 (2012). 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. *United States v. Stevens*, 533 F.3d 218, 249 (3d Cir. 2008). "When speech is involved, rigorous adherence to those requirements is necessary to ensure that ambiguity does not chill protected speech." *Fox TV*, 567 U.S. at 253–54; *accord Reno v. ACLU*, 521 U.S. 844, 871–72 (1997). This standard applies to professional rules regulating attorney speech. *Gentile*, 501 U.S. at 1051; *Button*, 371 U.S. at 433 (1963); *Konigsberg v. State Bar of Cal.*, 353 U.S. 252, 263 (1957) ("vague qualification[s],…easily adapted to fit personal views and predilections, can be a dangerous instrument for arbitrary and discriminatory denial of the right to practice law.") The question is not whether selective enforcement will necessarily occur, "but whether the Rule is so imprecise that discriminatory enforcement is a real possibility." *Gentile*, 501 U.S. at 1051.

The motion to dismiss misstates two fundamental precepts. First, Defendants assert that because the Rule does not carry criminal penalties, a "greater tolerance" of imprecision is allowed. Mot. 23 (quoting *Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc*., 455 U.S. 489, 497 (1982)). Not so. *Hoffman Estates* itself explains that more lenient standard does not apply when the law "threatens to inhibit the exercise of constitutionally protected rights. If…the law interferes with the right of free speech…a more stringent vagueness test should apply." *Id*. at 499. Second, Defendants incorrectly assert that Greenberg must show that Rule 8.4(g) is "impermissibly vague in all of [its] applications." Mot. 23 (quoting *Hoffman Estates*, 455 U.S. at 497). But again, that is not the test where state action implicates the chilling of First Amendment rights. When constitutional rights hang in the balance, courts review vagueness challenges under a "relaxed" standard. *United States v. Williams*, 553 U.S. 285, 304 (2008).

One cannot reconcile a "vague in all applications" standard with, for example, *Gentile*'s holding. There, a Nevada disciplinary rule prohibited extrajudicial statements substantially likely to materially prejudice an adjudicative proceeding. 530 U.S. at 1061. *Gentile* determined that the Rule's exemption for statements that declared "the general nature of the claim or defense" "without elaboration" rendered the Rule unconstitutionally vague. *Id.* at 1048–51. Obviously, that exemption is not "vague in all its applications"; if an attorney held a five-hour press conference spelling out every detail of his client's case, the rule would proscribe such speech notwithstanding the exemption. Yet the rule could not survive because it failed to provide fair notice, used "terms that have no settled usage or tradition of interpretation in law," and required attorneys to "guess at its contours." *Id.* at 1048–49. 8.4(g) is unconstitutionally vague for the same reasons.

A. Rule 8.4(g)'s "manifest bias or prejudice, or engage in harassment or discrimination" standard is vague.

Vagueness lies at the very heart of 8.4(g): what speech, what words, what ideas are enough to "manifest bias or prejudice, or engage in harassment or discrimination"? In common parlance of today's society, lawyers, academics, law students, and activists accuse speakers of bias, prejudice, and bigotry for taking policy positions, for discussing statistics or academic theories, for espousing legal views, or for just mentioning loaded words. Complaint ¶¶73–74; *see also* Dkt. 16-2 at ¶¶ 6–7; Dkt. 23 at 33–70.

In particular, "bias" and "prejudice" are not capable of neutral reasoned application. Just as a "ban on 'offensive' signs is hopelessly ambiguous and subjective," so too is a ban on manifestations of bias or prejudice. *McCauley*, 618 F.3d at 250. Just as "what is contemptuous to one man may be a work of art to another," what one person perceives as a manifestation of bias or prejudice another perceives as a religious or moral tenet, and yet another perceives as an intellectual curiosity or theory. *Smith v. Goguen*, 415 U.S. 566, 573 (1974). Similarly, a metric of "general standards of decency and respect," if it "appeared in a criminal or regulatory statute,"

"could raise substantial vagueness concerns." *Finley*, 524 U.S. at 588. Rule 8.4(g) "fails to draw reasonably clear lines" between what is prohibited and what is not. *Smith*, 415 U.S. at 574.

Defendants focus their attention on disputing whether "harassment" and "discrimination" are vague. Mot. 24–26. But the core malleability of the Rule, as shown by the examples of Greenberg's complaint, centers on the vagueness of "manifest bias and prejudice." Contrary to Defendants' unsupported assertion (Mot. 25), "bias or prejudice" are not "common legal terms that any objective attorney would understand"—at least in the sense 8.4(g) employs them.

The only analogous rule that uses the language of "manifest[ing] bias or prejudice]," Pa. CJC Rule 2.3, does not remedy the vagueness. It does not explain what stereotyping is "negative" and unacceptable and what stereotyping is positive and acceptable*? See Dambrot v. Central Michigan Univ.*, 55 F.3d 1177, 1184 (6th Cir. 1995) (finding policy unconstitutionally vague where it turned on the "subjective reference" whether speech was "negative" or "offensive"). Or what references to personal characteristics are "irrelevant?" *Cf. Gentile* 501 U.S. at 1048–49 (finding vagueness where Rule used "classic terms of degree."). Or what "facial expressions" and "body language" qualify as manifestations of bias or prejudice? The Comment lists "slurs" and "epithets" but doesn't distinguish between *using* such language and merely *quoting* or *mentioning* other persons or courts that used such language or supporting other persons' right to use such language. The unbound list of examples provided in Comment 2 to Rule 2.3 does not provide clear notice of what is prohibited nor does it cabin the potential for arbitrary and discriminatory enforcement of 8.4(g).

8.4(g)'s other attempt to provide guidance only muddies the water further. The Rule enumerates twelve topics within its ambit, from race to socioeconomic status. But the upshot of this clause only introduces more fuzziness because the Rule "includ[es], but [is] not limited to" those twelve categories of bias. Readers can only guess at the scope of the Rule. Is manifesting bias on the basis of political affiliation permissible? What about on the basis of ideological commitments? What about on the basis of intelligence? What about on the basis of personal

values? *See Saxe*, 240 F.3d at 210 (finding policy's prohibition on the disparagement of "values" to be particularly pernicious). No answer is provided.

Such unbound "including, but not limited to" language *itself* creates vagueness problems; "[r]ather than narrow the scope of the forbidden speech" it "blurs it." *United States v. Bolin*, __F.3d__, 2020 U.S. App. LEXIS 30465 (2d Cir. Sept. 24, 2020); PI Mot. 16–17 (citing additional cases). In its "effort to be all-inclusive" this clause "raises serious problems of vagueness." *Buckley v. Valeo*, 424 U.S. 1, 76 (1976).

Defendants point to several non-binding[16] decisions rejecting vagueness challenges to disciplinary rules. Mot. 24. 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*, "manifest bias or prejudice" has "no settled usage or tradition of interpretation in law." 501 U.S. at 1049. And the usage of "harassment" and "discrimination" varies from context to context, without the Rule deciding which legal framework controls. For example, before hostile environment liability attaches under Title IX, the harassment must be "severe, pervasive **and** objectively offensive." *Davis v. Monroe County Board of Education*, 526 U.S. 629, 633 (1999) (emphasis added). Under Title VII or 42 U.S.C. § 1981 however, the standard is "severe **or** pervasive." *Castleberry v. STI Grp.*, 863 F.3d 259, 264 (3d Cir. 2017) (emphasis added). Thus, under Title VII, a single incident of a hateful slur may amount to a hostile environment, where in the Title IX context it would not. *Contrast Castleberry*, 863 F.3d at 265–66 (enough)

[16] Defendants also cite *In re Snyder*, 472 U.S. at 645, but that decision did not address a First Amendment vagueness challenge at all. Again, on the merits, it sustained the petitioner's free speech defense to the application of discipline imposed under a rule prohibiting "conduct unbecoming a member of the bar."

with Doe v. Princeton Univ., 790 Fed. Appx. 379, 384 (3d Cir. 2019) (not enough). Pennsylvania's criminal harassment statute requires still more: specific intent to harass, annoy or alarm and repeated acts or a course of conduct that is "non-legitimate" (*i.e.*, not constitutionally protected). *Commonwealth v. Duncan*, 363 A.2d 803, 808 (Pa. Super. 1976). In sum, rule 8.4(g)'s reference to a general body of state, federal, and local anti-discrimination law does not ameliorate the Rule's vagueness.

Finally, Defendants argue that the *mens rea* requirement can save the Rule from vagueness. Mot. 24. It cannot. *Baggett v. Bullitt*, 377 U.S. 360, 369 (1964) ("knowing" *mens rea* qualification did not save statute from vagueness challenge); *Cramp v. Bd. of Pub. Instruction*, 368 U.S. 278, 286–87 (1961) (same).

B. Rule 8.4(g)'s application of "in the practice of law" is vague.

The Rule is not merely vague about *what* is prohibited, it is vague about *when* and *where* it is prohibited. Under the Rule, manifestations of bias or prejudice are sanctionable whenever made "in the practice of law." Had the Rule borrowed the usual definition of "practice of law,"[17] lore of the profession and extant case law may have been able to provide sufficient guidance. Instead, Rule 8.4(g) broadens that definition "to include 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." Rule 8.4(g), *cmt.* 3. Again, the clarity of this definition suffers from the open-ended "including, but not limited to" language. What events, beyond the listed CLE seminars, bench-bar conferences and bar association events have a "sufficient and obvious nexus"[18] to the practice of law so that for purposes of the Rule, they constitute the "practice of law?" The Rule does not say.

---

[17] *See* PI Mot. 19 (quoting *Practice of Law*, BLACK'S LAW DICTIONARY (10th ed. 2014)).

[18] Mot. 26 (quoting 49 Pa. B. 4941).

Any event on a law school campus or lecture in a law school classroom fits the bill. Going to law school is a prerequisite to taking the bar exam and practicing law in Pennsylvania. For a nonprofit lawyer like Greenberg, his practice requires public speeches, networking events, and attending rallies. Law practices, and what is required of them, differ by attorney in Pennsylvania, from the criminal defense lawyer who spends his days in jail visiting detained clients, to the big firm relationship partner who spends his days schmoozing clients in swanky restaurants and golf courses.

Nor does the Rule even attempt to clarify which professional activities at the margins of the actual practice of law are covered. Does discussing or providing print, social media, or other public commentary on a pending case or legal decision fall under the Rule? How about offering legal or policy opinions before a public meeting of a state or local, executive or legislative, committee? How about attending a legal recruitment fair? Under Pennsylvania law, "what constitutes the practice of law" "is not capable of a comprehensive definition." *Harkness v. Unemployment Comp. Bd. of Review*, 920 A.2d 162, 166 (Pa. 2007). While fuzziness may be acceptable when regulating conduct, it is not when directly regulating speech or "words" as the Rule does.

CONCLUSION

For all these reasons, the Court should deny Defendants' motion to dismiss. If the Court identifies pleading deficiencies that Greenberg might cure with amendment, Greenberg requests the opportunity to do that. *See Fletcher-Harlee Corp. v. Pote Concrete Contractors, Inc*., 482 F.3d 247, 251 (3d Cir. 2007) ("[I]n civil rights cases district courts must offer amendment—irrespective of whether it is requested—when dismissing a case for failure to state a claim unless doing so would be inequitable or futile.").

Dated: November 6, 2020

Respectfully submitted,

/s/ Adam E. Schulman

Adam E. Schulman
HAMILTON LINCOLN LAW INSTITUTE
1629 K Street NW, Suite 300
Washington, DC 20006
adam.schulman@hlli.org
(610) 457-0856

Attorney for Plaintiff 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: November 6, 2020

(s) Adam Schulman
Adam Schulman