No. 22-1733

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

ZACHARY GREENBERG,
Plaintiff-Appellee,

v.

JEREMY M. LEHOCKY, in his official capacity as Board Chair of the Disciplinary Board of the Supreme Court of Pennsylvania, *et al.*,
Defendants-Appellants.

On Appeal from the United States District Court
for the Eastern District of Pennsylvania,
No. 2-20-cv-03822-CFK (Hon. Chad F. Kenney)

AMICUS CURIAE BRIEF OF NEW CIVIL LIBERTIES ALLIANCE IN SUPPORT OF APPELLEE, URGING AFFIRMANCE

Richard A. Samp
NEW CIVIL LIBERTIES ALLIANCE
1225 19th Street NW, Suite 450
Washington, DC 20036
202-869-5210
rich.samp@ncla.legal

Counsel for *Amicus Curiae*

October 27, 2022

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 and Third Circuit LAR 26.1, the New Civil Liberties Alliance (NCLA) makes the following disclosures:

(1) For non-governmental corporate parties, please list all parent corporations:

NCLA is a nonprofit corporation organized under § 501(c)(3) of the Internal Revenue Code. NCLA has no parent corporation.

(2) For non-governmental corporate parties, please list all publicly held companies that hold 10% or more of the party's stock.

NCLA has issued no stock.

(3) If there is a publicly held corporation which is not a party to the proceeding before this Court but which has a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests.

NCLA is unaware of any such corporation, apart from those identified by the parties.

(4) In all bankruptcy appeals counsel for the debtor or trustee must list: (1) the debtor, if not identified in the case caption; (2) the members of the creditors' committee or the top 20 unsecured debtors; and (3) any entity not named in the caption which is an active participant in the bankruptcy proceeding. If the debtor or trustee is not participating in the appeal, this information must be provided by appellant.

Not applicable.

Dated: October 27, 2022

/s/ Richard A. Samp
Richard A. Samp

Attorney for New Civil Liberties Alliance

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases:

Page(s)

Constitutional Provisions and Rules:

Miscellaneous:

INTERESTS OF *AMICUS CURIAE*

The New Civil Liberties Alliance (NCLA) is a nonpartisan, nonprofit civil-rights organization devoted to defending constitutional freedoms from violations by the administrative state.[1] The "civil liberties" of the organization's name include rights at least as old as the U.S. Constitution itself, such as jury trial, due process of law, the right to be tried in front of an impartial and independent judge, freedom of speech, and the right to live under laws made by the nation's elected lawmakers through constitutionally prescribed channels. Yet these self-same rights are also very contemporary—and in dire need of renewed vindication—precisely because legislators, executive branch officials, administrative agencies, and even sometimes the courts have neglected them for so long.

NCLA aims to defend civil liberties—primarily by asserting constitutional constraints on the administrative state. Although Americans still enjoy the shell of their Republic, there has developed within it a very different sort of government—a type, in fact, that the U.S. Constitution was designed to prevent. This unconstitutional administrative state within federal and state governments is the focus of NCLA's concern.

---

[1] NCLA states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than NCLA and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief. All parties have consented to the filing of the brief.

NCLA is particularly concerned by the open defiance of First Amendment norms displayed in this case by Pennsylvania officials. Both the Supreme Court and this Court have repeatedly stated that speech restrictions that discriminate on the basis of the viewpoint expressed are constitutionally impermissible. *See, e.g., Iancu v. Brunetti*, 139 S. Ct. 2294, 2299 (2019); *Northeastern Pa. Freethought Society v. County of Lackawanna Transit System*, 938 F.3d 424, 432 (3d Cir. 2019) ("*Freethought Society*") (characterizing government-imposed viewpoint discrimination as "egregious" and "out of bounds"). But rather than attempting to explain why the speech restrictions challenged here should be deemed viewpoint-neutral (the defense they adopted in the district court), Appellants now boldly assert that their regulation of lawyers is not subject to normal First Amendment constraints. Opening Brief of Appellants (OB) at 15 (stating that "[o]rdinary First Amendment rules against viewpoint and content discrimination do not apply when the government regulates the practice of law.") NCLA urges the Court to resist Appellants' efforts to create a Constitution-free zone in Pennsylvania—a zone that, per Rule of Professional Conduct 8.4(g), encompasses not only courthouses, law offices, and client communications but even continuing legal education seminars and bar association activities.

NCLA represents two Connecticut attorneys who have filed a First Amendment challenge to a Connecticut rule of professional conduct that is very similar to Pennsylvania's Rule 8.4(g). *Cerame v. Bowler*, No. 21-01502 (D. Conn.).

STATEMENT OF THE CASE

Pennsylvania has a long history of regulating both the conduct and speech of attorneys, where necessary to maintain the integrity of the judicial system. But before Pennsylvania adopted Rule 8.4(g) of the Rules of Professional Conduct in 2020, it did not engage in viewpoint discrimination when regulating attorney speech.

Consider, for example, Rule 8.4(d), which for decades has stated, "It is professional misconduct for a lawyer to ... engage in conduct that is prejudicial to the administration of justice." Attorneys have on many occasions been subject to disciplinary proceedings under Rule 8.4(d) based on statements they have made in connection with the practice of law. But those disciplinary proceedings have focused exclusively on whether the statements were prejudicial to the administration of justice, not on the particular viewpoint expressed by the speaker. For example, *Office of Disciplinary Counsel v. Diangelus*, 589 Pa. 1 (2006), involved a defense attorney who induced prosecutors to agree to a lenient plea disposition of motor vehicle infractions by falsely telling them in private that the police officer who filed the charges had agreed to the disposition. In finding that the attorney's statements

violated Rule 8.4(d) (and ordering his suspension from the practice of law), the Pennsylvania Supreme Court focused solely on the effects of those false statements on the administration of justice and not at all on any viewpoint expressed by the attorney. *Id.* at 10-12.

The Court of Judicial Discipline of Pennsylvania adopted a similar viewpoint-neutral approach when considering charges that a judge had engaged in "conduct which prejudices the proper administration of justice" when he made allegedly racist statements at a continuing legal education program attended by 47 other judges. *In re Nakoski*, 742 A.2d 260 (Ct. Jud. Disc. of Penn., 1999).[2] In holding that the statements were not sanctionable, the court noted that the judge was not speaking at a judicial proceeding and found that "[t]here has been no showing that Respondent's conduct was committed with the intent to obstruct proceedings or that it did obstruct the administration of justice." *Id.* at 269. The court majority made clear that they personally disapproved of the viewpoint expressed by the Respondent, *ibid.* (stating that "this court is deeply troubled by the Respondent's obvious lack of judgment in this matter"); but they nonetheless held that their disapproval of Respondent's

[2] Because the respondent was a judge, not a practicing attorney, the conduct-prejudicial-to-the-administration-of-justice charge was filed under the Rules Governing Standards of Conduct of District Justices rather than under Rule 8.4(d) of the Rules of Professional Conduct.

viewpoint should play no role in determining whether he was subject to discipline. *Ibid.*

That viewpoint-neutral approach changed with the adoption of Rule 8.4(g) in 2020. Both the 2020 and 2021 versions of Rule 8.4(g) stated that if an attorney, while in the practice of law, knowingly communicates in a manner "constituting harassment or discrimination," the attorney is guilty of misconduct if, but only if, the harassment or discrimination is based on one of 11 specified topics.[3] Harassing or discriminatory speech is covered; laudatory speech is not. Speech about sexual preference is covered; speech about personal appearance is not. Thus, for example, speech highly critical of gay marriage constitutes "misconduct" under Rule 8.4(g) if deemed to have been expressed in an harassing or discriminatory manner; but harassing or discriminatory speech that criticizes the personal appearance of an obese or ugly person is not covered, nor is harassing or discriminatory speech supportive of gay marriage.

[3] Pennsylvania revised Rule 8.4(g) slightly in 2021 after the district court issued a preliminary injunction against enforcement of the 2020 version of the Rule. For purposes of the constitutional issues raised in this case, NCLA does not believe that the two versions of Rule 8.4(g) are materially different. The two versions specified the same 11 speech topics made subject to discipline: race, sex, gender identity or expression, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, and socioeconomic status.

Rule 8.4(g) also broadened the scope of attorney speech potentially subject to discipline; it now covers any communications "in the practice of law." Comment 3 to the 2021 version of Rule 8.4(g) broadly defines "practice of law" to include "interacting with witnesses, coworkers, court personnel, lawyers, or others, while appearing in proceedings before a tribunal or in connection with representation of a client"; "operating or managing a law firm or law practice"; and "participating in judicial boards, conferences, or committees; continuing legal education seminars; bench bar conferences; and bar association activities where legal education credits are offered."

Appellee Zachary Greenberg filed suit shortly before Rule 8.4(g) was scheduled to take effect in December 2020, alleging that the new rule violated the First and Fourteenth Amendments because it imposed content- and viewpoint-based speech restrictions and was void for vagueness. On December 7, 2020, the district court preliminarily enjoined enforcement of the rule. JA1-45. Pennsylvania thereafter revised Rule 8.4(g) (and its accompanying comments) slightly, and Greenberg filed an amended complaint raising the same constitutional objections.

In March 2022, the district court granted Greenberg's motion for summary judgment and permanently enjoined the revised Rule 8.4(g). JA45-127. The court held that Greenberg demonstrated injury-in-fact sufficient to satisfy Article III

standing requirements by demonstrating a chilling effect on his speech—in the absence of an injunction, he would have been forced to censor his speech based on an objectively reasonable fear that he might otherwise be subject to disciplinary proceedings under Rule 8.4(g). JA56-63.[4]

On the merits, the court held that Rule 8.4(g) and its accompanying comments "constitute viewpoint-based discrimination in violation of the First Amendment." JA100. The court explained that "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." JA97 (quoting *Matal v. Tam*, 137 S. Ct. 1744, 1766 (2017)). Because Rule 8.4(g) bars speech that expresses disparaging views of another on the basis of any of the 11 listed characteristics[5] but permits laudatory comments on the same subjects, the court held that Rule 8.4(g) qualifies as a viewpoint-based speech restriction. JA98 (noting that

[4] The court noted that it had previously upheld Greenberg's Article III standing in connection with the order granting a preliminary injunction. JA56. In addition to finding that Greenberg had again demonstrated standing, the court held that its finding of standing at the outset of the suit entitled Greenberg to a presumption that he still possessed standing despite Pennsylvania's decision to amend Rule 8.4(g), and that Appellants failed to present evidence sufficient to overcome that presumption. JA63-78.

[5] *See, e.g.,* Rule 8.4(g), Comment 4 (defining "harassment" as "conduct that is intended to intimidate, denigrate or show hostility or aversion toward a person on any of the bases listed in paragraph (g)").

"even if the provision 'prohibits disparagement of all group[s],' it should still be seen as viewpoint discrimination because '[g]iving offense is a viewpoint.'") (quoting *Matal*, 173 S. Ct. at 1763).

Alternatively, the district court held that Rule 8.4(g) was at the very least a content-based regulation of speech and failed to pass First Amendment muster under the standards imposed on speech regulation of that nature. JA101-110. The court also held that Rule 8.4(g) was subject to facial invalidation under the overbreadth doctrine because "there is a likelihood that the statute's very existence will inhibit free expression to a substantial extent" by inhibiting the speech of third parties not before the court. JA111 (quoting *McCauley v. University of the Virgin Islands*, 618 F.3d 232, 241 (3d Cir. 2010)).

The court also held that Rule 8.4(g) was unconstitutionally vague because it failed to provide sufficient notice of what speech is prohibited. JA114-123. The court faulted the rule's use of the words "harassment" and "discrimination," asserting that their "novel" definitions leave the scope of those terms "entirely unclear." JA120.

SUMMARY OF ARGUMENT

As Appellants readily concede (OB15), Rule 8.4(g) imposes viewpoint-based restrictions on speech: it prohibits speech that expresses disparaging views of another

on the basis of any of the rule's 11 listed characteristics but permits laudatory comments on the same subjects. Appellants assert that such restrictions on attorney speech are constitutionally permissible. They argue that "First Amendment rules against viewpoint and content discrimination do not apply when the government regulates the practice of law," *ibid*., and that Rule 8.4(g)'s viewpoint discrimination is permissible because it "combat[s] harassment and discrimination" and thereby "advances States' compelling interest in protecting confidence in the legal system and the legal profession's integrity." OB16.

But the First Amendment analysis does not change simply because the speech restriction is imposed on a lawyer. Nor is "denigrat[ing]" speech subject to decreased constitutional protection simply because it is spoken by a lawyer "in the practice of law"—a term broadly defined under Comment 3 to Rule 8.4(g). The Supreme Court held in *Nat'l Inst. of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018) ("*NIFLA*"), that—apart from limited exceptions inapplicable here—the First Amendment protects "professional speech" just as fully as speech by nonprofessionals. And the federal courts have never wavered in their condemnation of speech restrictions that discriminate based on the viewpoint expressed by the speaker. *Iancu*, 139 S. Ct. at 2299; *Freethought Society*, 938 F.3d at 432.

Pennsylvania has a substantial interest in regulating the conduct of lawyers during the course of judicial proceedings, to ensure the integrity of those proceedings. Such regulation is unobjectionable "even though that conduct incidentally involve[s] speech." *NIFLA*, 138 S. Ct. at 2372. But before it adopted Rule 8.4(g), Pennsylvania had no discernible difficulty maintaining the integrity of judicial proceedings without resorting to viewpoint-discriminatory speech restrictions, and without attempting to regulate speech at activities unrelated to court proceedings, such as continuing legal education. The First Amendment prohibits Pennsylvania from attempting to begin doing so now.

Appellee Greenberg has adequately demonstrated the injury-in-fact necessary to establish his Article III standing to raise his constitutional challenge to Rule 8.4(g). Appellants challenge Greenberg's standing, alleging that there is insufficient evidence that he might actually be the target of a Rule 8.4(g) misconduct complaint. OB17-18. But the district court thoroughly reviewed the evidence and reached the opposite conclusion. The evidence established, among other things, that: (1) lawyers attending several continuing legal education events at which Greenberg spoke told him they deemed his speech offensive toward those protected by Rule 8.4(g); (2) similarly situated individuals have faced disciplinary proceedings for giving speeches similar to those Greenberg has given; and (3) although Appellant Farrell told the

court that he does not believe that Greenberg's contemplated speech violates Rule 8.4(d), nothing prevents other enforcement officials from disagreeing with Farrell. JA 9-23, 56-63.

A plaintiff bringing a pre-enforcement First Amendment challenge against an enactment need not demonstrate to a certainty that he will be prosecuted in order to establish the requisite injury-in-fact, but need only demonstrate that he has "an actual and well-founded fear that the law will be enforced against [him]." *Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 393 (1988). In light of the evidence presented to the district court, Plaintiffs' fear of a Rule 8.4(g) enforcement action is "actual and well-founded."

ARGUMENT

I. APPELLEE GREENBERG POSSESSES ARTICLE III STANDING

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

Appellants argue that Greenberg lacks Article III standing because, they contend, adoption of Rule 8.4(g) has not injured him. That argument is based on a misunderstanding of what a First Amendment claimant must show to demonstrate injury.

The three elements that constitute the "irreducible constitutional minimum of standing," *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992), are well established. The plaintiff must demonstrate: (1) "an injury in fact—a harm suffered by the plaintiff that is concrete and actual or imminent, not conjectural or hypothetical"; (2) "causation—a fairly traceable connection between the plaintiff's injury and the complained of conduct"; and (3) "redressability—a likelihood that the requested relief will redress the alleged injury." *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 103 (1998) (citations omitted).

First Amendment case law recognizes the special nature of injuries inflicted by statutes and regulations that restrict speech. A First Amendment plaintiff's injury is not confined to the effects of actual or certainly impending enforcement actions but may also consist of a *present-day* chill on free-expression rights. If an individual voluntarily refrains from speaking because he reasonably fears that his speech might lead to imposition of sanctions against him, he has suffered a First Amendment injury—even if no one has directly threatened to impose sanctions.

In light of the well-recognized chilling effect that government-imposed speech restriction can have on free speech, this Court and other federal appeals courts have adopted a more relaxed injury-in-fact standard in First Amendment cases. *McCauley*, 618 F.3d at 859; *Nat'l Org. for Marriage*, *Inc. v. Walsh*, 714 F.3d 682, 689 (2d Cir.

2013) (stating that "we assess pre-enforcement First Amendment claims, such as the ones [plaintiff] brings, under somewhat relaxed standing and ripeness rules"); *Speech First, Inc. v. Fenves*, 979 F.3d 319, 330-31 (5th Cir. 2020); *Harrell v. Florida Bar*, 608 F.3d 1241, 1254 (11th Cir. 2010) (stating that "we apply the injury-in-fact requirement most loosely where First Amendment rights are involved, lest free speech be chilled even before the law or regulation is enforced").

In upholding a plaintiff's standing to challenge a statute facially on First Amendment grounds, the Second Circuit explained that the plaintiff "need not demonstrate to a certainty that it will be prosecuted under the statute to show injury." *Vermont Right to Life Committee, Inc. v. Sorrell*, 221 F.3d 376, 382 (2d Cir. 2000). Rather, it need only demonstrate "an actual and well-founded fear that the law will be enforced against" it. *Ibid*. (quoting *Virginia v. American Booksellers Ass'n*, 484 U.S. at 393). The Supreme Court recently reaffirmed and elaborated upon its *American Booksellers* "well-founded fear" standard in *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 160 (2014). The Court explained that although the plaintiff, in order to establish standing in such cases, may not rely solely on a "fear of prosecution" that is "imaginary and wholly speculative," it need not demonstrate an *actual* threat of enforcement. *Ibid*. (quoting *Babbitt v. Farm Workers*, 442 U.S. 289, 302 (1979)).

B. Greenberg Adequately Demonstrated an "Actual and Well-Founded Fear" that He Could Be the Target of a Rule 8.4(g) Enforcement Action

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

NCLA will not repeat here all the evidence already thoroughly catalogued by Greenberg. We nonetheless wish to recount two additional pieces of evidence that may help explain why many lawyers, both in Pennsylvania and throughout the country, are fearful of expressing dissenting views on issues relating to any of Rule 8.4(g)'s 11 categories.

First, events surrounding adoption of Connecticut's Rule of Professional Conduct 8.4(7) are instructive. Connecticut adopted the rule, which is virtually identical to Pennsylvania's Rule 8.4(g), in June 2021. The two Connecticut attorneys who were the principal sponsors of Rule 8.4(7), Megan Waide and Aigne Goldsby, testified in support of their proposed rule at a hearing conducted in May 2021 by the Rules Committee of the Connecticut Superior Court.

In support of her argument that the proposed rule should be adopted, Goldsby recounted a heated conversation she had with a white male lawyer at a recent bar-related event. According to Goldsby (who is African-American), she spoke in favor of "racial justice" measures in the wake of the murder of George Floyd by a police officer. The other attorney responded by calling her a "race pandering nitwit" who was "suffering from black entitlement." Goldsby testified that the other attorney's speech constituted improper racial discrimination and that "this conduct should never be okay."[6]

Goldsby's testimony is illuminating; it demonstrates the sorts of speech that leading sponsors of Rule 8.4(g) are targeting for sanction. The words Goldsby attributed to the unnamed white male attorney are both provocative and critical of orthodox views held by many civil-rights supporters—precisely the sort of language that Greenberg seeks to employ. Goldsby's testimony makes plain that supporters of nationwide adoption of Rule 8.4(g) wish to silence such speech, and the language adopted by Pennsylvania strongly suggests that the words uttered to Goldsby would

[6] A video of her testimony and that of other witnesses at the May 10, 2021 hearing is available online at https://www.jud.ct.gov/committees/rules/. Goldsby's testimony runs from the 14:34-mark to 16:48 on the video.

run afoul of Pennsylvania's version of the rule if spoken by a Pennsylvania attorney.[7] Those words are unquestionably fully protected by the First Amendment (at least in the absence of a commercial relationship between the two participants, such as employer-employee), yet the overt threat to seek sanctions under Rule 8.4(g) against anyone using such language renders Greenberg's fear of speaking in that manner "well-founded."

The saga of Ilya Shapiro, a prominent conservative legal scholar, is equally illuminating. Earlier this year, Shapiro was suspended from his position at Georgetown University Law School (and effectively forced to resign) after he tweeted criticism of President Biden for considering only African-American women to fill an existing Supreme Court vacancy and said that a male appeals court judge of South Asian ancestry was superior to all available female African-American candidates. Neil Vigdor, *Georgetown Suspends Lecturer Who Criticized Vow to Put Black Woman on Court*, NEW YORK TIMES (Jan. 31, 2022). Shapiro's statement was condemned by Georgetown officials as "antithetical to the work that we do at Georgetown Law to build inclusion, belonging, and respect for diversity. They have

[7] *See* Comment 3 (defining prohibited "harassment" as "conduct intended to intimidate, denigrate or show hostility or aversion toward a person on any of the bases set forth in this rule"). Calling someone a "race pandering nitwit" who is "suffering from black entitlement" at a bar event would seem to fit that definition.

been harmful to many in the Georgetown Law community and beyond." Statement of Georgetown Dean William M. Treanor (June 2, 2022). If even a prominent scholar like Shapiro can suffer severe sanctions for expressing dissenting opinions on racial issues because they allegedly inflict "harm" on members of protected groups, Greenberg's fear that he might be sanctioned under Rule 8.4(g) for expressing similar views is fully justified.

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

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

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

Greenberg alleges, and the district court agreed, that Rule 8.4(g) is unconstitutionally overbroad. This Court has explained the overbreadth doctrine as follows: "A regulation is unconstitutional on its face on overbreadth grounds where there is 'a likelihood that the statute's very existence will inhibit free expression' by 'inhibiting the speech of third parties who are not before the Court.'" *Saxe v. State College Area School District*, 240 F.3d 200, 214 (3d Cir. 2001) (quoting *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 799 (1984)). "To render a law unconstitutional, the overbreadth must be 'not only real but substantial in relation to

the statute's plainly legitimate reach.'" *Ibid.* (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973)).

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

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

Given the especially relaxed standing requirement that the Court applies to overbreadth claims, the Court should reject Appellants' challenge to Greenberg's Article III standing. Greenberg has supplied more than sufficient evidence to demonstrate, under that relaxed standard, that his fear of a misconduct prosecution is "actual and well-founded."

II. RULE 8.4(g) IS A VIEWPOINT-BASED SPEECH RESTRICTION THAT IS INVALID IN *ALL* ITS APPLICATIONS

Appellants do not contest that Rule 8.4(g) is content-based (because it limits its speech restrictions to speech concerning 11 listed characteristics) and is viewpoint-based (because it prohibits speech that expresses disparaging views of another on the basis of any of the rule's 11 listed characteristics but permits laudatory comments on the same subjects). Although in the district court Appellants denied engaging in viewpoint- and content-based discrimination, they now boldly assert that they are not bound by normal First Amendment constraints when restricting attorney speech. They argue that "First Amendment rules against viewpoint and content discrimination do not apply when the government regulates the practice of law," OB15, and that Rule 8.4(g)'s viewpoint discrimination is permissible because it "combat[s] harassment and discrimination" and thereby "advances States' compelling

interest in protecting confidence in the legal system and the legal profession's integrity." OB16.

Although Appellants argue that attorney speech has been closely regulated throughout our Nation's history, absent from their brief is any Supreme Court or Third Circuit case law upholding viewpoint-based speech restrictions of the sort embodied in Rule 8.4(g). There is no such case law. The federal courts have consistently condemned viewpoint-based speech restrictions as "egregious" and "out of bounds." *Freethought Society*, 938 F.3d at 432. *See, e.g., Iancu*, 139 S. Ct. at 2299 (where rule "is viewpoint-based, it is unconstitutional"); *Matal v. Tam*, 137 S. Ct. 1744, 1765 (2017) (Kennedy, J., concurring in part and concurring in the judgment) ("[I]t is a fundamental principle of the First Amendment that the government may not punish or suppress speech based on disapproval of the ideas or perspectives the speech conveys."); *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819, 829-30 (1995) (law found to discriminate based on viewpoint is an "egregious form of content discrimination," which is "presumptively unconstitutional").

In *NIFLA*, the Supreme Court explicitly rejected arguments that "professional speech" is a "separate category of speech" entitled to reduced First Amendment protections. *NIFLA*, 138 S. Ct. at 2371-72 (stating that "[s]peech is not unprotected

merely because it is uttered by 'professionals'"). *NIFLA* recognized two limited circumstances under which the government may regulate professional speech, but neither circumstance is relevant here.[8] "Outside of th[ose] two contexts ... this Court's precedents have long protected the First Amendment rights of professionals." *Id.* at 2374. *NIFLA* refutes any suggestion that States are free to impose viewpoint-based restrictions on attorney speech.

Pennsylvania is entitled to regulate the *conduct* of attorneys while they are engaged in legal proceedings, for purposes of maintaining the integrity of the legal system, even if the conduct being regulated incidentally involves speech. So, for example, if an attorney prevents courts from functioning properly by declining to cease speaking when ordered to do so by a presiding judge, he is properly subject to sanction, even though his misconduct incidentally involves speech.

Indeed, Pennsylvania has a long history of regulating such conduct. In recent decades, its principal vehicle for ensuring that attorneys do not undermine the integrity of the legal system has been Rule 8.4(d), which states that it is professional misconduct for a lawyer to "engage in conduct that is prejudicial to the administration

---

[8] First, *NIFLA* recognized that the First Amendment does not bar "some laws that require professionals to disclose factual, noncontroversial information in their 'commercial speech.'" 138 S. Ct. at 2372 (citing *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985)). Second, "States may regulate professional conduct, even though that conduct incidentally involves speech." *Ibid*.

of justice." Nothing prevents Pennsylvania from continuing to enforce Rule 8.4(d) for that purpose.[9]

But while Pennsylvania has a strong interest in maintaining the integrity of the legal system, it may *not* pursue that goal by seeking to enforce a rule (Rule 8.4(g)) that is facially unconstitutional because it is not viewpoint-neutral. Because Rule 8.4(g) discriminates on the basis of viewpoint, it may not be enforced *at all*, even for otherwise benign purposes.

The Supreme Court explained that principle in *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992). *R.A.V.* struck down (on First Amendment grounds) a city ordinance that prohibited the display of a symbol which one knows or has reason to know "arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender." The Court explained that speech generally viewed as entitled to little or no First Amendment protection (*e.g.*, obscenity or "fighting words") may be broadly proscribed by the government without reference to its content, but the government nonetheless may not proscribe only those obscenities that address particular subjects or that express particular viewpoints. *Id*. at 382-85. It may not,

[9] But, as Pennsylvania recognized in *In re Nakoski*, 742 A.2d at 269, statements made by attorneys or judges outside of legal proceedings, such as statements made at continuing legal education seminars, would not normally be deemed to prejudice the administration of justice.

for example, "enact an ordinance prohibiting only those legally obscene works that contain criticism of the city government." *Id*. at 384. Rule 8.4(g) seeks to proscribe speech based on its content (the Rule only applies to speech relating to 11 listed characteristics) and its viewpoint (the Rule only applies to speech "constituting harassment or discrimination" based on one or more of those 11 characteristics). Rule 8.4(g) thus cannot constitutionally be applied to *any* attorney speech, even if some of the speech subject to the Rule could have been proscribed under a content- and viewpoint-neutral statute.

Because Rule 8.4(g) is invalid under the First Amendment as to all its applications, it is substantially overbroad. That conclusion in turn strengthens Greenberg's claim to Article III standing, given the Court's significantly relaxed standards for establishing standing to raise overbreadth claims.

CONCLUSION

The Court should affirm the judgment below.

Respectfully submitted,

/s/ Richard A. Samp
Richard A. Samp
NEW CIVIL LIBERTIES ALLIANCE
1225 19th Street NW, Suite 450
Washington, DC 20036
202-869-5210
rich.samp@ncla.legal

Counsel for *Amicus Curiae*

October 27, 2022

CERTIFICATE OF COMPLIANCE

I am an attorney for *amicus curiae* New Civil Liberties Alliance. Pursuant to Fed.R.App.P. 32(a)(7)(C), I hereby certify that the foregoing brief is in 14-point, proportionately spaced Times New Roman type. According to the word processing system used to prepare this brief (WordPerfect X8), the word count of the brief is 5,242, not including the Rule 26.1 disclosure statement, table of contents, table of authorities, signature block, certificate of service, and this certificate of compliance.

/s/ Richard A. Samp
Richard A. Samp

Dated: October 27, 2022

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of October, 2022, I electronically filed the amicus brief of NCLA with the Clerk of the Court for the U.S. Court of Appeals for the Third Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/CF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Richard A. Samp
Richard A. Samp