No. 22-3106

In the United States Court of Appeals for the Second Circuit

MARIO CERAME and
TIMOTHY MOYNAHAN,
Plaintiffs-Appellants,

v.

MICHAEL P. BOWLER, in his official capacity as Connecticut Statewide Bar Counsel; and MATTHEW G. BERGER, in his official capacity as Chair of the Statewide Grievance Committee,
Defendants-Appellees.

On Appeal from the United States District Court
for the District of Connecticut
No. 3:21cv-01502-AWT; Hon. Alvin Thompson

APPELLANTS' REPLY BRIEF

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INTRODUCTION

Appellees' brief does not seriously challenge the Complaint's allegation that Rule 8.4(7), a recently adopted provision of the Connecticut Rules of Professional Conduct, imposes content- and viewpoint-based speech restrictions. And in the absence of any effort by Appellees to assert that those speech restrictions serve some compelling state interest, they are blatantly unconstitutional.

Appellees nonetheless contend that the district court properly determined that it lacked subject-matter jurisdiction over Appellants' constitutional challenge. That contention is based almost entirely on the official commentary to Rule 8.4(7), which states that attorneys may not be sanctioned for engaging in speech protected by the First Amendment. Appellees assert that the commentary: (1) deprives Appellants Mario Cerame and Timothy Moynahan of standing, because "it unambiguously shows that the Rule does not proscribe protected speech" and thus prevents them from being disciplined for engaging in such speech, Bowler Br. 14; and (2) deprives Connecticut officials of any power to violate constitutional rights and thereby immunizes them under the Eleventh Amendment from being sued in federal court. *Id.* at 32-35.

But Appellees' argument fails to come to grips with the facial invalidity of Rule 8.4(7). Because the Rule imposes content- and viewpoint-based speech restrictions, it is unconstitutional in *all* its potential applications, without regard to whether the speech to which it is applied is generally viewed as entitled to little or no

First Amendment protection (*e.g.*, obscenity or "fighting words"). *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382-85 (1992). This Court presumes that a State intends to enforce recently enacted laws, and Connecticut has never suggested that it does not intend to enforce Rule 8.4(7). In other words, despite Appellees' repeated citation to the commentary's boilerplate acknowledgment that the State is bound by the First Amendment, Appellees plan to enforce a rule that violates the First Amendment *in all its applications*.

Under those circumstances, Cerame's and Moynahan's fears of a Rule 8.4(7) enforcement action are not rendered unreasonable simply because Appellees promise to comply with the First Amendment. Making a "we will comply" promise while simultaneously enforcing a rule that violates the First Amendment suggests that Appellees do not fully appreciate the free-speech protections afforded by the Constitution. As a direct result of Appellees' willingness to police attorney speech by means of an unconstitutional rule, substantial numbers of Connecticut attorneys likely share Appellants' fears and are declining to express views that they think might offend others. The reasonableness of that self-censorship is heightened by Rule 8.4(7)'s vagueness regarding what attorney speech can trigger disciplinary proceedings; indeed *Appellees themselves concede* that the Rule's "three major terms ... are not clearly defined." JA39.

ARGUMENT

I. APPELLEES' STANDING ARGUMENT FAILS TO ADDRESS THE RELAXED STANDARDS APPLICABLE AT THE PLEADINGS STAGE AND IN FIRST AMENDMENT CASES

In their opening brief, Appellants Cerame and Moynahan explain at length the district court's many legal and factual errors in connection with its no-standing decision. Appellees make no effort to defend the district court with respect to many of those errors. For example, Appellees concede that the district court erred in concluding that Appellants did not adequately allege that their injuries are "real." Bowler Br. 30. They concede that the proper test in the Second Circuit is whether Appellants have alleged an "actual and well-founded fear" of an enforcement action, *id*. at 13, not (as the district court held) whether "Rule 8.4(7) creates a real and imminent fear that his rights are chilled." JA62, 64.

Nor do Appellees contest Cerame's and Moynahan's contention that at the pleadings stage the district court should have resolved the standing issue based on *Appellants'* reasonable interpretation of Rule 8.4(7), not its own interpretation. Cerame Br. 44-45. Instead of accepting Appellants' reasonable interpretation of the Rule (including Appellants' assertion that the Rule's operative terms are not clearly defined), the district court adopted its own definitions of "harassment" and

"discrimination" and held that the harsh statements that Appellants wish to express could not possibly satisfy its definitions of those terms. JA 62, 64.

In nonetheless urging affirmance of the district court's no-standing decision, Appellees state that Cerame and Moynahan have failed to allege a "specific present objective harm or a threat of specific future harm." Bowler Br. 13. But as our opening brief makes clear, the Complaint does indeed claim a "specific present objective harm" directly traceable to Rule 8.4(7). Appellants claim that ever since the Rule went into effect on January 1, 2022, they have been censoring their speech based on an "actual and well-founded fear that the [Rule] will be enforced against [them]" if they speak more openly. *Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 393 (1988).

Appellees argue that those claims are too "conclusory" and "far too abstract to support any inference that Plaintiffs' fear of enforcement is well-founded." Bowler Br. 11. That argument ignores Appellants' many factual allegations that explain why they reasonably fear an enforcement action unless they censor their speech. At least as importantly, Appellees' brief fails to address a principal argument in the opening brief: at the pleadings stage, a plaintiff faces a "low threshold" for establishing the requisite injury-in-fact, a threshold that is particularly "forgiving" to plaintiffs

seeking preenforcement review of statutes imposing restrictions on speech. *Cayuga Nation v. Tanner*, 824 F.3d 321, 331 (2d Cir. 2016).

A. The District Court and Appellees Fail to Acknowledge Appellants' Relatively Light Burden to Establish Standing at the Pleadings Stage

The Supreme Court has repeatedly held that the burden on a plaintiff to establish standing is far lighter at the pleadings stage than at later stages of the litigation. "At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presum[e] that general allegations embrace those specific facts that are necessary to support the claim." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992).

As Appellants explain in their opening brief (at 28-41), the Complaint contains considerable detail explaining why Cerame's and Moynahan's fear of a Rule 8.4(7) complaint is well-founded. But even if Appellees were correct that the Complaint did little more than make a "general factual allegation" that they harbor a well-founded fear of a Rule 8.4(7) complaint, that allegation would suffice to satisfy the pleading standard established by *Lujan*. Federal courts "presume" that general factual allegations of a well-founded fear "embrace those specific facts that are necessary to support the claim." *Ibid.*

Indeed, it is improper for a plaintiff to stuff into his complaint every fact that conceivably supports his "well-founded fear" claim; Fed.R.Civ.P. 8(a) provides that a complaint should set out only "a short and plain statement of the grounds for the court's jurisdiction." A complaint is not subject to dismissal at the pleadings stage so long as it contains enough factual allegations to make the claim "plausible on its face." *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 570 (2007).

Appellees assert that Cerame's and Moynahan's fears are "unreasonable." Bowler Br. 13. But Appellants' opening brief and their supporting *amici* cite numerous examples of individuals—lawyers and non-lawyers alike—who have been severely disciplined because they made statements similar to those Cerame and Moynahan wish to make and whose statements were later found to constitute "harassment" or "discrimination" against individuals within the groups protected by Rule 8.4(7). Cerame Br. 33-38. Appellees do not dispute any of the facts we allege regarding those individuals, nor do they attempt to explain why those facts should not cause Cerame and Moynahan to reasonably fear disciplinary proceedings. Rather, they argue that it is somehow improper for the Court to consider these "unpled allegations." Bowler Br. 31. But they fail to explain why the examples cited in the opening brief are not "specific facts" of the sort *Lujan* had in mind when it held that federal courts presume "general factual allegations" in a complaint embrace the

"specific facts" that a plaintiff will need to prove at later stages of the proceedings. Appellees seek to support their not-well-founded argument by inserting "unpled allegations" that they "neither intend nor are willing to apply the Rule" to speech protected by the First Amendment. *Id.* at 44. Cerame and Moynahan should have the same right to attempt to explain why, on the contrary, the fears of enforcement action they allege in the Complaint are extremely well-founded.

B. The District Court and Appellees Fail to Acknowledge Appellants' Relatively Light Burden to Establish Standing in First Amendment Cases

Appellees' assertion that the Complaint inadequately alleges that Appellants' fears are "well-founded" also fails to acknowledge the relaxed pleading burden that the Second Circuit and other appellate courts impose on plaintiffs raising pre-enforcement First Amendment claims. *See, e.g., 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"). The Court explained:

> [W]ithout the possibility of pre-enforcement challenges, plaintiffs contesting statutes or regulations on First Amendment grounds "face an unattractive set of options if they are barred from bringing a facial challenge": refraining from activity they believe the First Amendment protects, or risk civil or criminal penalties for violating the challenged law.

Ibid.

As the Ninth Circuit has held, "The 'unique standing considerations' in the First Amendment context 'tilt dramatically toward a finding of standing when a plaintiff brings a pre-enforcement challenge.'" *Tingley v. Ferguson*, 47 F.4th 1055, 1066-67 (9th Cir. 2022). Appellees fail to explain how their contention that Cerame and Moynahan have inadequately alleged a "well-founded fear" can be squared with the courts' "dramatic[] ... tilt" in favor of finding that Appellants and other First Amendment claimants possess standing to raise pre-enforcement challenges.

Appellees' reliance on *Clapper v. Amnesty Int'l USA*, 568 U.S. 398 (2013), is misplaced. *Clapper* did not address the standing issues presented here. The *Clapper* plaintiffs were not subject to any sort of enforcement action under the challenged statute, and the case did not involve the First Amendment in any meaningful way.

Clapper was a Fourth Amendment facial challenge to a provision of the Foreign Intelligence Surveillance Act (FISA) that allows the federal government (subject to court approval) to engage in surveillance of noncitizens while they are located outside the United States, to acquire "foreign intelligence information." 50 U.S.C. § 1881. The plaintiffs were U.S.-based lawyers and human rights organizations who were not themselves permissible targets of § 1881 surveillance but who nonetheless feared that their telephone calls with noncitizens located overseas might be intercepted if those noncitizens were targeted under § 1881. The plaintiffs

alleged that those fears led them to incur expenses to reduce the possibility that their conversations would be intercepted. The Court held that the plaintiffs lacked standing in the absence of evidence that their alleged injury was "actual or imminent." 568 U.S. at 409. It concluded that the plaintiffs' fear of future injury was based on a "speculative chain of possibilities" that involved too many steps and the independent actions of too many third parties to establish "a substantial risk" that the plaintiffs would suffer the injury-in-fact necessary to establish Article III standing. *Id.* at 414 & n.5.

Clapper is wholly inapposite. The only government action that the plaintiffs feared was that the federal government might inadvertently intercept some of their phone conversations while engaged in § 1881 national-security surveillance of overseas noncitizens—an intercept that the plaintiffs alleged would violate their Fourth Amendment rights. Section 1881 is inapplicable to U.S. citizens such as the *Clapper* plaintiffs, and it does not provide for criminal or civil enforcement actions against anyone.

In sharp contrast, Cerame and Moynahan's challenge to Rule 8.4(7) involves an enactment which, if invoked against them, could result in the loss of their licenses to practice law. More importantly, they allege that the challenged enactment is injuring them right now by chilling their freedom of expression. Indeed, this Court

strongly reaffirmed its position (that standing is subject to a relaxed standard in First Amendment cases) in *Nat'l Org. for Marriage*, 714 F.3d at 689, which was decided after the Supreme Court handed down *Clapper*. The Supreme Court's post-*Clapper* decision in *Susan B. Anthony List v. Driehaus*, 573 U.S. 149 (2014), which unanimously upheld plaintiffs' standing to raise a pre-enforcement First Amendment challenge to an Ohio criminal statute, includes no suggestion that *Clapper* tightened the standing requirements for First Amendment claimants.

II. APPELLANTS HAVE ADEQUATELY ALLEGED THAT THEIR FEARS OF A RULE 8.4(7) ENFORCEMENT ACTION ARE WELL-FOUNDED

The Complaint includes many factual allegations regarding Appellants' fear of enforcement action, why that fear is reasonable, and why that fear has caused them to refrain from certain types of speech related to their practice of law—in an effort to reduce the likelihood that they will be the targets of a Rule 8.4(7) enforcement action. Complaint ¶¶ 11-19, 50-63, JA 7-10, 14-18. Those factual allegations must be accepted as true for purposes of this motion to dismiss. Considering those allegations in the light most favorable to Appellants, they suffice to meet Appellants' minimal pleadings-stage burden of demonstrating an "actual and well-founded fear" of an enforcement action.

Among the evidence cited by Appellants was the testimony of "AG," one of the two Connecticut attorneys who were the principal sponsors of Rule 8.4(7). AG

testified in support of the rule at a hearing conducted in May 2021 by the Rules Committee of the Connecticut Superior Court. As more fully explained in the Complaint (JA18-19) and the opening brief (at 31-33), a white male lawyer at a recent bar-related event called her a "race pandering nitwit" who was "suffering from black entitlement." AG testified that speech of that nature "should never be okay" and that Rule 8.4(7) should be adopted so that lawyers could be sanctioned for speaking in that manner. Testimony by one of Rule 8.4(7)'s sponsors that provocative, harsh words spoken at a bar-related event—precisely the sort of language that Appellants seek to employ—can violate the Rule is strong evidence that Appellants' fear of an enforcement action is well-founded.

Appellees respond that AG's comments are "irrelevant" because AG "do[es] not interpret or enforce the Rule and ha[s] no say over whether a Rule 8.4(7) grievance can proceed." Bowler Br. 30. But tellingly, Appellees neither disavow AG's interpretation of the Rule nor state that the conversation described by AG—which is entitled to full First Amendment protection when spoken at a bar-related event—would not subject an attorney to discipline under Rule 8.4(7). A video of AG's testimony remains posted on the web site of the Rules Committee of the

Connecticut Superior Court,[1] a stark reminder to all Connecticut attorneys of the sorts of speech that the sponsors of Rule 8.4(7) seek to suppress.

It is of no moment that Connecticut bar officials might eventually recognize Appellants' First Amendment defense and impose no sanctions at the conclusion of misconduct proceedings initiated by the sponsors of Rule 8.4(7) or like-minded attorneys. As a federal district judge explained, in upholding standing to mount a facial, pre-enforcement challenge to Pennsylvania Rule of Professional Conduct 8.4(g):

> Even if the disciplinary process did not end in some form of discipline, the threat of a disruptive, intrusive, and expensive investigation and investigative hearing into the Plaintiff's words, speeches, notes, written materials, videos, mannerisms, and practice of law would cause Plaintiff and any attorney to be fearful of what he or she says and how he or she says it in any forum, private or public, that directly or tangentially touches upon the practice of law, including any speaking engagements given during CLEs, bench-bar conferences, or indeed any of the social gatherings forming around these activities.

[1] *See* https://www.jud.ct.gov/committees/rules/. AG's testimony runs from the 14:34-mark to 16:48 on the video of May11, 2021.

Greenberg v. Haggerty, 491 F. Supp. 3d 12, 25 (E.D. Pa. 2020).[2] In addition, merely airing charges publicly of bar-rule violations can inflict enduring and irremediable reputational damage.

Moreover, even if the current leadership of the State Grievance Committee would not pursue Rule 8.4(7) enforcement actions for the types of statements that Cerame and Moynahan wish to make, they have no assurance that a future leadership team would not use Rule 8.4(7)'s extremely broad scope to more closely police attorney speech. As this Court stated in the course of upholding a plaintiff's standing to assert a pre-enforcement First Amendment claim:

> The State also argues that VRLC's fear of suit could not possibly be well-founded because the State has no intention of suing VRLC for its activities. While that may be so, there is nothing that prevents the State from changing its mind. It is not forever bound, by estoppel or

[2] The judge later permanently enjoined enforcement of Pennsylvania Rule 8.4(g), finding that it is a viewpoint-based speech restriction that violates the First Amendment and is unconstitutionally vague. *Greenberg v. Goodrich*, 593 F. Supp. 3d 174 (E.D. Pa. 2022). Appellees seek to distinguish *Greenberg*, asserting that the Pennsylvania rule is "far broader than Connecticut's rule" and had previously been "enforced against protected speech." Bowler Br. 22. Those assertions are demonstrably incorrect. *Greenberg* involved a pre-enforcement challenge to Pennsylvania Rule 8.4(g); it was never enforced against anyone. Rule 8.4(7) is at least as broad as its Pennsylvania counterpart; it applies to attorney speech that constitutes "harassment or discrimination on the basis of" any one of 15 listed characteristics, and broadly defines both "harassment" and "discrimination." Indeed, Rule 8.4(7) restricts speech more broadly; the Pennsylvania rule only applies to attorneys who "knowingly" engage in harassment or discrimination, while Rule 8.4(7) also applies to speech that the attorney "reasonably should know" is harassment or discrimination.

> otherwise, to the view of the law it asserts in this litigation. ... In light of this uncertainty, the State's representation cannot remove VRLC's reasonable fear that it will be subjected to penalties for its planned expressive activities.

Vermont Right to Life Committee, Inc. v. Sorrell, 221 F.3d 376, 383 (2d Cir. 2000).

The reasonableness of Appellants' fears of an enforcement action is heightened by the significant expansion of the Rules of Professional Conduct effected by Rule 8.4(7)'s adoption. The pre-2022 Commentary accompanying Rule 8.4(4) indicated that a lawyer violated the Rule (which prohibits "[e]ngaging in conduct that is prejudicial to the administration of justice") if "*in the course of representing a client*, [he or she] *knowingly* manifests by word or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status." (Emphasis added.) As expanded by Rule 8.4(7), the speech restriction is no longer limited to "knowing" violations and also now covers any statements made "in the practice of law."[3] Cerame and Moynahan previously censored their speech when appearing in court; they now must do so in connection with virtually any public event.

Appellees assert that Cerame's and Moynahan's fears of enforcement should be "allayed" by "the complete lack of enforcement against protected speech." Bowler

[3] The Commentary accompanying Rule 8.4(7) broadly defines "the practice of law" to include many activities unrelated to representing a client, including "participating in bar association, business or professional activities or events."

Br. 16. That assertion makes little sense in connection with a pre-enforcement challenge filed one month before Rule 8.4(7) was scheduled to take effect. There generally will be no enforcement history in connection with a pre-enforcement challenge to a speech restriction, yet courts have had little difficulty concluding that "[t]he unique standing considerations in the First Amendment context tilt dramatically toward a finding of standing when a plaintiff brings a pre-enforcement challenge." *Tingley*, 47 F.4th at 1066-67. Appellants have no idea how many complaints have been filed against Connecticut attorneys under Rule 8.4(7) in the 16 months since the Rule took effect. Appellants intend to seek that information if and when this case returns to district court and discovery opens.

III. APPELLANTS REASONABLY CONSTRUE "HARASSMENT" AND "DISCRIMINATION" UNDER RULE 8.4(7) AS ENCOMPASSING THE SPEECH IN WHICH THEY SEEK TO ENGAGE

Appellees contend that Cerame's and Moynahan's fears of a Rule 8.4(7) enforcement action are "unfounded" for the additional reason that "Plaintiffs have not alleged a desire to speak in a way that might rise to the level of harassment or discrimination under the Rule." Bowler Br. 23. That contention mirrors those of the district court, which held that the various harsh, unorthodox statements that Cerame and Moynahan wish to express "do not fall within the explanation of what constitutes

discrimination or harassment for purposes of Rule 8.4," JA64—and thus that their fears of enforcement actions are not well-founded. JA62, 64.

But as Appellants explain in their opening brief, this approach to determining a plaintiff's standing is impermissible. Cerame Br. 44-45. The district court began by determining what speech could be sanctioned under Rule 8.4(7); it then held that Appellants lacked standing because the speech they wish to utter does not come within the scope of the Rule (as determined by the district court), and thus they have no reason to fear an enforcement action. JA61-68. The district court inappropriately addressed merits issues (determining that Rule 8.4(7) is not as broad as Appellants contend) as its basis for concluding that Appellants have not suffered any injury and thus lack standing to sue. Appellees' "they fail to allege harassment or discrimination" argument suffers from the same legal error.

As this Court has explained:

> If a plaintiff's interpretation of a statute is "reasonable enough and under that interpretation the plaintiff may "legitimately fear that it will face enforcement of the statute," then the plaintiff has standing to challenge the statute.

Pacific Capital Bank, N.A. v. Connecticut, 542 F.3d 241, 350 (2d Cir. 2008) (quoting *Vermont Right to Life*, 221 F.3d at 383). Appellants have reasonably interpreted Rule 8.4(7)'s speech restrictions more broadly than either the district court or Appellees. The district court improperly failed to accept Appellants' reasonable interpretation

when determining whether Appellants have alleged a well-founded fear of a Rule 8.4(7) enforcement action.

Appellees defend the district court's approach, asserting:

> If Plaintiffs instead mean the district court considered the merits of whether Plaintiffs' intended speech arguably violates the Rule, ... then of course it did, and that was entirely appropriate. The whole point of the "somewhat relaxed" pre-enforcement standing standard is to discern whether a plaintiff's subjective fear of future enforcement is "well-founded."

Bowler Br. 28. That assertion simply ignores *Pacific Capital Bank* and *Vermont Right to Life*. Those decisions require that standing be determined based on whether Appellants' intended speech arguably violates the Rule *as reasonably interpreted by Appellants*, not (as Appellees would have it) on whether Appellants' speech arguably violates the Rule as construed by the district court.

Rule 8.4(7) can reasonably be interpreted as applying to the harsh statements that Appellants wish to make at bar-related functions. Appellants interpret the Rule in that manner, and AG (the Rule's co-sponsor) apparently does so as well. The Rule states that it is "misconduct" for a lawyer to "[e]ngage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of" any one of 15 listed characteristics. The Commentary to the Rule states that the "conduct" prohibited by the Rule can be either speech or physical conduct. The Commentary defines "discrimination" as including "harmful verbal or physical

conduct directed at an individual or individuals that manifests bias or prejudice on the basis of one or more of the protected categories." The Commentary defines "harassment" as including "severe or pervasive derogatory or demeaning verbal or physical conduct."

Cerame and Moynahan allege that they regularly speak out on issues affecting one or more of the 15 protected groups. They allege that they often speak forcefully and harshly when criticizing opposing points of view on those issues. JA84, ¶52. They further allege that "[t]hose expressing opposing points of view may well on occasion construe Cerame's and Moynahan's criticisms as personally 'derogatory' or 'demeaning.'" *Ibid.* In other words, if those listeners also deem Appellants' "derogatory or demeaning" speech to be either "severe" or "pervasive," Appellants reasonably fear that they will find themselves facing a misconduct complaint alleging harassment in violation of Rule 8.4(7).

The district court rejected this broad interpretation of the Rule, narrowly defining what constitutes "severe or pervasive derogatory or demeaning" speech and "harmful [speech] … that manifests bias or prejudice," and ruling that the harsh speech Appellants wish to utter does not satisfy those narrowed definitions. JA62-68. But it is hardly *unreasonable* for Appellants to define "discrimination" and "harassment" broadly if one of the Rule's sponsors also defines those terms broadly.

AG testified that "discrimination" and "harassment" in violation of the Rule include telling an African-American at a bar-related event that she is a "race pandering nitwit" who is "suffering from black entitlement." JA18-19, ¶ 54. Appellants have spoken equally harshly in the past in connection with "the practice of law."

Appellants' fear of an enforcement action is particularly well-founded given the Rule's lack of clarity regarding the meaning of "discrimination" and "harassment." Indeed, Appellants allege that Rule 8.4(7) is sufficiently vague that it cannot withstand due-process challenge. Complaint ¶¶ 61-63, 78-80, JA21-22, 24. Appellants' allegation regarding the Rule's vagueness is eminently reasonable, given that both Appellee Bowler and Appellee Berger have expressed "concerns over the clarity … of the rule" and have opined that the terms "discrimination" and "harassment" "are not clearly defined" by either the Rule or its Commentary. JA39.

Yet despite the reasonableness of Appellants' assertion that the Rule is overly vague, the district court did not take Appellants' vagueness claims into account when evaluating whether Appellants' fears of an enforcement action were well-founded. Appellees make no effort to defend the district court's failure to address the vagueness claims. They simply assert in conclusory fashion that "there is nothing ambiguous about the commentary's categorical exclusion of all protected speech" from the scope of the rule. Bowler Br. 32. Their brief has nothing to say about

whether "discrimination" and "harassment" are well-defined, and whether any lack of clarity in those terms increases the likelihood that reasonable attorneys would refrain from employing the harsh language that Cerame and Bowler would like to use.

IV. APPELLANTS' FEARS OF ENFORCEMENT ARE NO LESS WELL-FOUNDED SIMPLY BECAUSE THE COMMENTARY STATES THAT RULE 8.4(7) WILL NOT BE APPLIED TO SPEECH PROTECTED BY THE FIRST AMENDMENT

The centerpiece of Appellees' no-standing argument is a single sentence in the Commentary to Rule 8.4(7), which reads: "A lawyer's conduct does not violate paragraph (7) when the conduct in question is protected under the first amendment to the United States constitution or article first, § 4 of the Connecticut constitution." Appellees repeatedly argue the sentence renders Cerame's and Moynahan's fears of prosecution unfounded "because the Rule does not apply to protected speech." Bowler Br. 14.

Appellees' reliance on this sentence is misplaced. It might be relevant if some potential applications of Rule 8.4(7) raised First Amendment concerns while other applications did not. Under those circumstances, the sentence might provide Connecticut attorneys with some degree of assurance that bar authorities would consider First Amendment constraints before filing misconduct charges under Rule 8.4(7). But because Rule 8.4(7) is a content- and viewpoint-based speech restriction, it is facially unconstitutional in *all* its applications. Cerame's and Moynahan's fears

of a Rule 8.4(7) enforcement action certainly are not rendered any less reasonable by Appellees' promise to comply with the First Amendment, given that Appellees are simultaneously enforcing a rule that has no constitutional applications. Appellees' continued enforcement of the rule suggests that Appellees do not fully appreciate the free-speech protections afforded by the Constitution.[4]

Rule 8.4(7) is content-based because it regulates speech based on its content—it limits its restrictions to speech concerning 15 characteristics. It is viewpoint-based because it regulates speech based on the viewpoint being expressed—it prohibits speech that expresses disparaging views of another on the basis of any of the Rule's 15 listed characteristics but permits laudatory comments on those same bases. The Supreme Court has consistently condemned viewpoint-based speech restrictions. *See, e.g., Iancu v. Brunetti*, 139 S. Ct. 2294, 2299 (2019) (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

[4] Moreover, the Commentary's boilerplate language is largely meaningless. It provides Cerame and Moynahan with no constitutional protections that they would not otherwise possess. They would be entitled to raise a First Amendment defense to any Rule 8.4(7) charges filed against them, irrespective of whether the Commentary included the language quoted above.

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").

Appellees do not seriously challenge Cerame's and Moynahan's claim that Rule 8.4(7) is a viewpoint-based speech restriction. Their response is limited to the following sentence: "the Rule is not a content- or viewpoint-based regulation of speech because on its face *it does not apply* to protected speech." Bowler Br. 28 (emphasis in original).[5] That sentence is a complete *non-sequitur*. A statute that regulates speech based on the subject matter of the speech or the viewpoint expressed is no less constitutionally problematic simply because the statute focuses on categories of speech that are generally deemed less worthy of constitutional protection. Because Rule 8.4(7) 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

[5] Appellees also assert that our discussion of the viewpoint-based nature of Rule 8.4(7)'s speech restrictions is "improper" and has "no place in the standing analysis." *Ibid.* That assertion is incorrect. The standing analysis turns on whether the Complaint adequately alleges that Cerame and Moynahan have a "well-founded fear" of a Rule 8.4(7) enforcement action. That Appellees are poised to enforce a rule lacking any constitutional applications considerably heightens their fears that they could be subjected to enforcement action without regard to First Amendment limitations.

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, for example, "enact an ordinance prohibiting only those legally obscene works that contain criticism of the city government." *Id*. at 384. Rule 8.4(7) seeks to proscribe speech based on its content and its viewpoint. Rule 8.4(7) 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—such as Rule 8.4(4), which proscribes "conduct that is prejudicial to the administration of justice."

V. APPELLEES ARE NOT ENTITLED TO ELEVENTH AMENDMENT IMMUNITY

Appellees seek affirmance on the alternative ground that the Eleventh Amendment provides them immunity from suit in federal court. Appellees raised that issue in the district court, but the court dismissed the case for lack of standing without reaching the Eleventh Amendment issue. This Court should similarly decline to

address the Eleventh Amendment issue. If the Court reverses the district court's no-standing holding, it should remand the case to provide the district court an opportunity to address the Eleventh Amendment issue in the first instance.[6]

Alternatively, the Court should reject Appellees' Eleventh Amendment defense. The Eleventh Amendment imposes limits on suits against *States* in federal court; it is inapplicable where, as here, the suit seeks injunctive relief against *state officials* alleged to be acting in violation of federal constitutional rights. *Ex parte Young*, 209 U.S. 123, 159-160 (1908).

A. Appellants Allege an Ongoing Violation of the U.S. Constitution

Appellees' argument misconstrues Eleventh Amendment case law. While that amendment bars suit against a State in federal court without its consent, a suit to enjoin a state official from enforcing an unconstitutional state enactment is not barred. *Papasan v. Allain*, 478 U.S. 265, 276 (1986). If the enactment is unconstitutional and thus void, "any action by a state official that is purportedly authorized by that enactment cannot be taken in an official capacity since the state

[6] As the Court has repeatedly explained, "Although we are empowered to affirm a district court's decision on a theory not considered below, it is our distinctly preferred practice to remand such issues for consideration by the district court in the first instance." *Schonfeld v. Hilliard*, 218 F.3d 164, 184 (2d Cir. 2000); accord, *Fulton v. Goord*, 591 F.3d 37, 45 (2d Cir. 2009); *Melendez v. City of New York*, 16 F.4th 992, 1047 (2d Cir. 2021).

authorization for such action is a nullity"—and thus may be enjoined by a federal court. *Ibid.* As *Ex parte Young* explained:

> If the act which the state Attorney General seeks to enforce be a violation of the Federal Constitution, the officer proceeding under such enactment comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. The State has no power to impart to him any immunity from responsibility to the Supreme Authority of the United States.

209 U.S. at 159-160.

Appellees' contention that they are entitled to Eleventh Amendment immunity because they allegedly have not initiated disciplinary proceedings under Rule 8.4(7) against an attorney for engaging in First Amendment-protected speech, Bowler Br. 35, is without merit. Rule 8.4(7) took effect in January 2022 and is certainly not a moribund enactment. "Courts are generally willing to presume that the government will enforce the law as long as the relevant statute is recent and not moribund." *Cayuga Nation v. Tanner*, 824 F.3d at 331. Indeed, Appellees do not dispute that they intend to enforce Rule 8.4(7). Under those circumstances, the Eleventh Amendment does not bar Appellants' efforts to enjoin enforcement of what they allege is an unconstitutional rule.

Appellees argue that the Eleventh Amendment bars this suit because they do not plan to apply Rule 8.4(7) unless and until they determine that a lawyer's speech

both violates the Rule and is not entitled to First Amendment protection. Bowler Br. 35-36. But Appellees' alleged good faith is irrelevant. As explained above, Cerame and Moynahan are not challenging the manner in which Appellees might apply Rule 8.4(7); they are challenging the Rule as facially unconstitutional—it violates the First and Fourteenth Amendments because it is neither content- nor viewpoint-neutral, and is overly vague. In other words, *any* effort by Appellees to apply Rule 8.4(7) violates the Constitution; it cannot constitutionally be applied to sanction any sort of attorney speech. To the extent that Appellees are alleging that the Eleventh Amendment bars suit because Appellants (allegedly) have not suffered an injury, that is simply a rehash of their standing argument, which Appellants address fully *supra.*

B. Appellants Have Sued Proper Parties for Purposes of *Ex parte Young*

Appellees also assert that they are entitled to Eleventh Amendment immunity because they are part of the judicial branch of Connecticut government. They argue that *Ex parte Young* is inapplicable to the judicial branch. Bowler Br. 39-41.

That argument is unpersuasive. The *Ex parte Young* doctrine "allows a suit for injunctive [or declaratory] relief challenging the constitutionality of a state official's actions in enforcing state law." *Western Mohegan Tribe and Nation v. Orange County*, 395 F.3d 18, 21 (2d Cir. 2004). In other words, state *enforcement* officials are proper defendants in an *Ex parte Young* proceeding, regardless of the branch of

state government into which a State has chosen to place them. Appellees' contention that they are officials within Connecticut's judicial branch does not provide them with Eleventh Amendment immunity for their enforcement activity. *Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719, 737 (1980).

Appellees' immunity claim, which is unsupported by any case law, would provide States with a straightforward means of avoiding federal-court review of all unconstitutional enforcement activity: simply place the relevant enforcement officials under the direct control of their courts. Particularly in light of Appellees' declaration in their brief that they do not consent to having the alleged violations of the state constitution adjudicated in federal court, and the fact that any state-court action would come before the very court (Connecticut's Superior Court) that adopted Rule 8.4(7), Appellees' assertion would render Cerame's and Moynahan's constitutional claims effectively unreviewable by *any* court.

Defendants' reliance on *Whole Woman's Health v. Jackson*, 142 S. Ct. 522 (2021), is misplaced. That decision held that the plaintiffs' challenge to a Texas law imposing abortion restrictions could be maintained against Texas officials charged with enforcing the law, 142 S. Ct. at 535-37, but that other defendants, including state-court judges, were entitled to Eleventh Amendment immunity because the law did not impose any enforcement responsibilities on them. *Id.* at 531-35. In

explaining why the Eleventh Amendment barred a suit to enjoin Texas judges and court clerks from issuing judgments under the abortion statute, the Court stated that *Ex parte Young* "does not normally permit federal courts to issue injunctions against state-court judges or clerks. *Usually*, those individuals do not enforce state laws as executive officials might; instead, they work to resolve disputes between parties." *Id.* at 532 (emphasis added). In contrast, Appellees *do* "enforce state laws as executive officials might" and thus *are* subject to suit in federal court under *Ex parte Young*.

Appellees also assert that they are improper defendants because they lack authority to impose discipline under the Rule; they allege that "it is only through [the collective action of all members of the Connecticut Statewide Grievance Committee] that the Rule can be applied or enjoined." Bowler Br. 43. Appellees did not raise that argument below and thus have forfeited it. *United States v. Rivera*, 546 F.3d 245, 254 (2d Cir. 2008).

In any event, Appellees' claim is insubstantial; the Complaint provides a detailed explanation of Appellees' central role in enforcing Connecticut's Rules of Professional Conduct. As Statewide Bar Counsel, Defendant Bowler is charged with reviewing all complaints alleging misconduct by Connecticut-licensed attorneys and with making the initial decision regarding whether *any* investigation of incoming

complaints is warranted. JA10, Complaint ¶¶ 21-22. Defendant Berger is Chair of the Statewide Grievance Committee (SGC), which: (1) oversees the Statewide Bar Counsel's initial screening of misconduct complaints; (2) in appropriate cases, refers those complaints to a local grievance panel for further investigation; (3) arranges for hearings in cases in which local grievance panels have found probable cause that an attorney is guilty of misconduct (and arranges for a subordinate official to prosecute the charges); and (4) if an attorney contests the sanctions the SGC determines to be appropriate, directs one of its subordinates, the Disciplinary Counsel, to prosecute a presentment proceeding against the attorney in Superior Court. JA10-11, Complaint ¶¶ 23-25. For *Ex parte Young* to apply, the defendant state officer "must have some connection with enforcement of the [challenged] act." *Ex parte Young*, 209 U.S. at 157. Appellees easily satisfy the "some connection" standard.

Appellees assert that it would be "an affront to the sovereignty, dignity and respect to which both the State and its judges are entitled" to permit Cerame's and Moynahan's First and Fourteenth Amendment claims to be adjudicated in federal court rather than granting state courts sole authority to determine whether discipline imposed under Rule 8.4(7) violates the federal Constitution. Bowler Br. 37. Appellees cite no case law for this remarkable proposition. A federal statute, 28 U.S.C. § 1331, grants federal courts jurisdiction over "all civil actions" arising under

the Constitution or laws of the United States, and federal courts have a "virtually unflagging obligation ... to exercise the jurisdiction given them." *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 817 (1976). The *Ex parte Young* doctrine has been accepted for more than a century as "necessary to permit the federal courts to vindicate federal rights." *Virginia Office for Protection and Advocacy v. Stewart*, 563 U.S. 247, 255 (2011). Both this Court and the Supreme Court have regularly invoked *Ex parte Young* to authorize federal courts to hear suits against state officials to obtain a pre-enforcement injunction against state laws alleged to violate federal law. *See, e.g., Air Transport Ass'n of America, Inc. v. Cuomo*, 520 F.3d 218, 222 (2d Cir. 2008); *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 381 (1992).

Finally, Appellees allege that they are immune from suit because "there is no indication of a threatened enforcement action—imminent or otherwise—based on any protected speech that Plaintiffs purportedly wish to pursue." Bowler Br. 43-44. But, as noted above, *any* enforcement of facially unconstitutional enactments such as Rule 8.4(7) is improper, and Appellees do not assert that Rule 8.4(7) will not be enforced. Under those circumstances, *Ex parte Young* authorizes Appellants to seek injunctive relief against state officials charged with its enforcement.

CONCLUSION

Appellants respectfully request that the Court reverse the district court's dismissal of their Complaint for lack of subject matter jurisdiction and remand this case to the district court for further proceedings.

Respectfully submitted,

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Dated: April 12, 2023

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of April, 2023, I electronically filed the reply brief of Appellants with the Clerk of the Court for the U.S. Court of Appeals for the Second 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

CERTIFICATE OF COMPLIANCE

I am an attorney for Appellants Mario Cerame and Timothy Moynahan. Pursuant to Fed.R.App.P. 32(a)(7), I hereby certify that the foregoing reply brief of Appellants 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 6,997, not including the table of contents, table of authorities, certificate of service, and this certificate of compliance.

/s/ Richard A. Samp
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