APPEAL NO. 22-1733

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

ZACHARY GREENBERG,

Plaintiff-Appellee,

v.

JERRY 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
Case No. 2:20-cv-03822

BRIEF OF ALLIANCE DEFENDING FREEDOM AS *AMICUS CURIAE* IN SUPPORT OF APPELLEE

JACOB P. WARNER
ALLIANCE DEFENDING FREEDOM
15100 N. 90th Street
Scottsdale, AZ 85260
(480) 444-0020
jwarner@ADFlegal.org

JOHN J. BURSCH
ALLIANCE DEFENDING FREEDOM
440 First Street, NW, Suite 600
Washington, DC 20001
(616) 450-4235
jbursch@ADFlegal.org

Attorneys for Amicus Curiae

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IDENTITY AND INTEREST OF AMICUS CURIAE[1]

Alliance Defending Freedom is the world's largest law firm dedicated to protecting religious freedom, free speech, the sanctity of life, parental rights, and marriage and family. Because free speech is for everyone, ADF advocates for the right of *all* Americans to say what they believe without fear of government punishment. ADF wins nearly 80% of its cases, and since 2011, it has won 14 cases at the U.S. Supreme Court, including many for free speech. *E.g.*, *Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361 (2018) (*NIFLA*); *Uzuegbunam v. Preczewski*, 141 S. Ct. 792 (2021); *Reed v. Town of Gilbert*, 576 U.S. 155 (2015).

ADF employs nearly 100 staff attorneys who share the organization's faith and mission. These attorneys work alongside a network of over 4,000 other attorneys—some barred in Pennsylvania—who are likewise committed to protecting free speech and other fundamental rights. Here, ADF seeks to protect the right of all attorneys to say what they believe without fear of government punishment. While government may regulate what attorneys say in the courtroom, express in briefs, and disclose about their clients, it cannot mute their voice on matters of public concern—especially in fora far removed from the practice law.

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[1] No counsel for a party authored this brief in whole or in part, and no person other than amicus and its counsel made any monetary contribution intended to fund the preparation or submission of this brief. Counsel were timely notified of this brief as required by Fed. R. App. P. 29, and all parties consented to its filing.

SUMMARY OF ARGUMENT

Pennsylvania seeks to regulate attorney speech—not just in court, with clients, and across party lines, but anywhere "in the practice of law," broadly defined to include even mere social encounters. That is unprecedented. While States have long applied character-and-fitness rules and regulated conduct affecting the administration of justice, Pennsylvania Rule of Professional Conduct 8.4(g) goes much farther. It restricts speech that someone subjectively perceives to denigrate or show aversion to people based on protected traits like race, sex, sexual orientation, and gender identity. To illustrate, this Rule could punish lawyers who in a debate argue that *Obergefell v. Hodges* was wrongly decided—because that may offend someone who supports same-sex marriage. The Rule could be used to punish lawyers who advocate publicly for legislation that prevents biological males from competing against females in women's sports—because that may offend someone who identifies with a gender different than their sex. The Rule could even be used to punish the attorney in a public debate about the proper level of funding for legal aid: whichever attorney happens to pick the lower level of funding could be accused of discrimination based on socioeconomic status. It is precisely these kinds of content- and viewpoint-based distinctions—as well as substantial criticism by legal scholars—that have caused nearly every state that has considered ABA Model Rule 8.4(g) to reject it.

The First Amendment forbids this massive overreach. Indeed, Rule 8.4(g) is an invalid speech rule because it restricts speech based on content and viewpoint. It singles out undesired messages based on race, sex, gender identity or expression, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, or socioeconomic status. Yet it allows discriminatory messages *of any other kind*. And evidence suggests the State even allows discriminatory speech on protected traits to promote diversity. This reflects official disapproval of a subset of messages—the essence of viewpoint discrimination. But the State has no legitimate interest in selectively punishing offensive speech—even when attorneys are speaking. No professional speech exception exists.

Alternatively, Rule 8.4(g) is facially overbroad because a substantial number of its applications are unconstitutional. For example, Rule 8.4(g) plainly regulates CLE presentations. And it's not hard to imagine how certain topics may be subjectively thought to denigrate a person based on protected traits. For example, if a lawyer argues that women should not be eligible for combat duty in the military and should continue to be exempt from selective service requirements, he could be punished if someone takes offense. The traps are endless. What's more, Rule 8.4(g) regulates speech on matters of public concern, such as pronoun use, which forces attorneys to take one side of a public debate—the bar's side. These applications violate free speech. And there are many more.

Because Rule 8.4(g) is an invalid speech restriction or facially overbroad, this Court should affirm the judgment below.

ARGUMENT

There are two types of facial challenges: (1) a valid-rule challenge and (2) an overbreadth challenge. *See* Marc E. Isserles, *Overcoming Overbreadth: Facial Challenges and the Valid Rule Requirement*, 48 Am. U. L. Rev. 359, 390–91 (1998); *e.g.*, *Doe v. City of Albuquerque*, 667 F.3d 1111, 1122-28 (10th Cir. 2012) (explaining valid-rule challenge); *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177, 1182-85 (6th Cir. 1995) (analyzing overbreadth and valid-rule challenge); *Sypniewski v. Warren Hills Reg'l Bd. of Educ.*, 307 F.3d 243, 252-68 (3d Cir. 2002) (same). Greenberg presents both. Rule 8.4(g) violates is facially invalid and overbroad.

I. Pennsylvania Rule of Professional Conduct 8.4(g) is a facially invalid speech rule.

Rule 8.4(g) is not a valid speech rule. Valid-rule claims challenge "the terms of the [law], not hypothetical applications." *United States v. Sup. Ct. of N.M.*, 839 F.3d 888, 917 (10th Cir. 2016) (quoting *Doe*, 667 F.3d at 1127). Courts resolve such claims "by applying the relevant constitutional test to the challenged [law] without" asking whether "there is a hypothetical situation in which application of the [law] might be valid." *Id.* (cleaned up); *accord City of Los Angeles v. Patel*, 576 U.S. 409, 418 (2015). When the law "fails the relevant constitutional test," "it can no longer be constitutionally applied to anyone." *Sup. Ct. of N.M.*, 839 F.3d

at 917 (quoting *Doe*, 667 F.3d at 1127). Here, Rule 8.4(g) facially and unconstitutionally bans speech based on content and viewpoint.

A. Pennsylvania Rule of Professional Conduct 8.4(g) regulates speech, not conduct.

Rule 8.4(g) regulates speech, not conduct. It forbids attorneys from, "in the practice of law," "engag[ing] in conduct constituting harassment or discrimination based upon race, sex, gender identity or expression, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, or socioeconomic status." 204 Pa. Code Rule 8.4(g).

But the comments show that the targeted "conduct" is really speech. The "practice of law" includes not only in-court advocacy and client interactions, but also "speeches, communications, debates, presentations, or publications" while "managing a law firm" and at "conferences[,] continuing legal education seminars[,] and bar association activities where [CLE] credits are offered." Comment 3, 204 Pa. Code Rule 8.4.

Rule 8.4(g) also broadly defines harassment as conduct "intended to intimidate, denigrate[,] or show hostility or aversion toward a person on any of the [protected] bases." Comment 4, 204 Pa. Code Rule 8.4.

Likewise, Rule 8.4(g) defines discrimination as "conduct that a lawyer knows manifests an intention" (1) "to treat a person as inferior based on" a protected trait, (2) "to disregard relevant considerations of individual characteristics or merit because of" a protected trait, or (3) "to cause

or attempt to cause interference with the fair administration of justice based on" a protected trait. Comment 5, 204 Pa. Code Rule 8.4.

On its face, Rule 8.4(g) regulates "speeches, communications, debates, presentations, or publications." Comment 3, 204 Pa. Code Rule 8.4. This is speech, not conduct—no matter the label. *Otto v. City of Boca Raton*, 981 F.3d 854, 865 (11th Cir. 2020) ("The government cannot regulate speech by relabeling it as conduct."). *See also NAACP v. Button*, 371 U.S. 415, 429 (1963) ("[A] State cannot foreclose the exercise of constitutional rights by mere labels."); *King v. Governor of N.J.*, 767 F.3d 216, 228 (3d Cir. 2014) (Labeling some "communications 'speech' and others 'conduct' is . . . susceptible to manipulation.").

B. Pennsylvania Rule of Professional Conduct 8.4(g) regulates speech based on content and viewpoint.

Rule 8.4(g) regulates speech based on content and viewpoint. Laws that distinguish "favored speech from disfavored speech on the basis of the ideas or views expressed are content based." *Startzell v. City of Philadelphia*, 533 F.3d 183, 193 (3d Cir. 2008); *accord Reed*, 576 U.S. at 163 (law content-based if it "applies to particular speech because of the . . . message expressed."). And "[v]iewpoint discrimination is an 'egregious form of content discrimination.'" *Ne. Pa. Freethought Soc'y v. Lackawanna Transit Sys.*, 938 F.3d 424, 432 (3d Cir. 2019) (quoting *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995)). By

playing favorites, Rule 8.4(g) violates a "most basic promise" of the First Amendment—viewpoint neutrality. *Id.*

Rule 8.4 forbids discriminatory or harassing speech. But this rule is much different from traditional harassment protections like Title VII—targeting even speech that "disregard[s] relevant considerations of individual characteristics" in certain conversations. Comment 5, 204 Pa. Code Rule 8.4. While such speech may be offensive, "[g]iving offense is a viewpoint." *Matal v. Tam*, 137 S. Ct. 1744, 1763 (2017). And offensive viewpoints are constitutionally protected. Take *Matal*, where the Court struck down a trademark law allowing officials to deny marks that disparaged members or a racial or ethnic group, holding:

> [T]hat idea strikes at the heart of the First Amendment. Speech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express "the thought that we hate." [*Matal*, 137 S. Ct. at 1764 (cleaned up).]

This bright line rule prohibiting viewpoint discrimination protects speakers even when speech would otherwise not be protected. For example, in *R.A.V. v. City of St. Paul*, the Supreme Court struck down a city law criminalizing the use of an object or symbol if the speaker knows, or reasonably should know, that it would anger or alarm others based on protected traits such as "race, color, creed, religion or gender." 505 U.S.

377, 380, 391 (1992). The Court held that, while the ban applied only to "fighting words"—a category of speech typically exempt from First Amendment protection—the government still could not discriminate against certain viewpoints. *Id.* at 392-94. In other words, the government could not pick and choose which fighting words it would ban based on viewpoint, no matter whether government found targeted messages the most offensive. *Id.*

So too here. Rule 8.4(g) singles out undesired messages based on "race, sex, gender identity or expression, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, or socioeconomic status." 204 Pa. Code Rule 8.4(g). Yet it allows discriminatory messages *of any other kind*. As the Court said in *Matal*, "[t]he law . . . reflects the Government's disapproval of a subset of messages," which is "the essence of viewpoint discrimination." 137 S. Ct. at 1750.

C. Pennsylvania Rule of Professional Conduct 8.4(g) triggers at least strict scrutiny.

Typically, content- and viewpoint-based laws trigger scrutiny. *See Reed*, 576 U.S. at 163–64. But Appellants say "[o]rdinary First Amendment standards do not apply" here. Br. of Appellants 26. Not so.

1. Nothing in the First Amendment's history or tradition justifies Rule 8.4(g)'s speech ban.

Appellants first say history shows that government has broad "leeway to regulate" attorney speech—citing "character-and-fitness

requirements" in effect at our nation's founding. *Id.* at 27, 29. But while states have long had "moral character requirements," *id.* at 29 (citing Deborah L. Rhode, *Moral Character as a Professional Credential*, 94 Yale L. J. 491, 496 (1985)), those requirements do not remotely resemble Rule 8.4(g)'s speech restriction. Indeed, they're not even close. Answering Br. 28–32.

2. There is no professional-speech exception to normal First Amendment rules.

Appellants then say because Rule 8.4(g) regulates only "professional conduct," strict scrutiny does not apply. Br. of Appellants 27. But Rule 8.4(g) regulates speech, not conduct. Section I.A. *supra*. And the Supreme Court "has not recognized 'professional speech' as a separate category of speech" that deserves less protection. *NIFLA*, 138 S. Ct. at 2371. "Speech is not unprotected merely because it is uttered by 'professionals.'" *Id.* at 2371-72. While the Court "has afforded less protection for professional speech" in two situations, neither have "turned on [whether] professionals were speaking." *Id.* at 2372. And neither apply here.

First, the Court has "applied more deferential review to some laws that require professionals to disclose factual, noncontroversial information in their 'commercial speech.'" *Id.* (citing *Zauderer v. Off. of Disciplinary Couns. of Sup. Ct. of Ohio*, 471 U.S. 626, 651 (1985); *Milavetz, Gallop, & Milavetz, P.A. v. United States*, 559 U.S. 229, 250 (2010); and *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 455-56 (1978)). Such

deferential review does not apply here. Rule 8.4(g) bans highly controversial and fully protected noncommercial speech. Section II, *infra*.

Second, the Court has held that "States may regulate professional conduct, even though that conduct incidentally involves speech." *NIFLA*, 138 S. Ct. at 2372 (citing *Ohralik*, 436 U.S. at 456 and *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 884 (1992) (Opinion of O'Connor, Kennedy, and Souter, JJ.)). That rule also does not apply here. While content-neutral laws targeting conduct may "incidentally affect[ ]" speech and trigger less scrutiny, *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 659 (2000); *e.g. United States v. O'Brien*, 391 U.S. 367 (1968) (applying intermediate scrutiny to ban on burning draft cards), Rule 8.4(g) "regulates speech as speech," *NIFLA*, 138 S. Ct. at 2374, and does so based on its content and viewpoint, Section I.A-B *supra*.

For example, in *Billups v. City of Charleston*, the government argued that its law prohibiting unlicensed tour guides from leading visitors on paid tours was a valid conduct restriction that only incidentally burdened speech. 961 F.3d 673, 683 (4th Cir. 2020). But the Fourth Circuit rejected that logic because the law banned "an activity which, by its very nature, depends upon speech." *Id.* Likewise, while Appellants say Rule 8.4(g) regulates "the legal profession," Br. of Appellants 37, it facially regulates "speeches, communications, debates, presentations, or publications"—activities that are doubtless *speech*. Comment 3, 204 Pa. Code Rule 8.4. Rule 8.4(g) directly regulates protected speech.

Outside these two contexts, the Supreme Court has "long protected the First Amendment rights of professionals." *NIFLA*, 138 S. Ct. at 2374. Indeed, the Court has even struck down a content-based law regulating "noncommercial speech of lawyers"—despite the government saying the law was necessary to ensure high professional standards. *Id.*; *see Reed*, 576 U.S. at 167 (discussing *Button*). As with other speech, regulating professional speech "pose[s] the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas." *NIFLA*, 138 S. Ct. at 2374. Rule 8.4(g) does exactly that, so it must pass strict scrutiny. *Id.* at 2371. No exception applies.

D. Pennsylvania Rule of Professional Conduct 8.4(g) fails strict scrutiny.

To satisfy strict scrutiny, Appellants must prove that Rule 8.4(g) is narrowly tailored to serve a compelling state interest. *Id*. This is "the most demanding test known to constitutional law." *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997). And Rule 8.4(g) fails it. Badly.

1. Rule 8.4(g) serves no compelling interest.

First, Rule 8.4(g) serves no compelling interest. Appellants say the rule promotes "the integrity of the [legal] profession." Br. of Appellants 49. But "broadly formulated interests" do not suffice. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 431 (2006). The question is whether the State has a compelling interest to protect only

certain groups from offensive speech in the legal profession. It does not, and Rule 8.4(g) is underinclusive to serve a broader end anyway.

Take *R.A.V.* There, the Supreme Court applied strict scrutiny to strike down a law that targeted unprotected speech based on content and viewpoint, 505 U.S. at 380, 391—even though protecting the "basic human rights of . . . groups that have historically been" discriminated against is doubtless a compelling interest, *id.* at 395. This interest was defined too broadly: "The dispositive question [was] whether content discrimination is reasonably necessary to achieve [the government's] compelling interests," and "it plainly [was] not. An ordinance not limited to the favored topics, for example, would have precisely the same beneficial effect." *Id.* at 395-96. Put simply, the law was underinclusive.

So too here. If regulating offensive speech is necessary to ensure "the integrity of the [legal] profession," Br. of Appellants 49, why stop with banning speech targeting favored groups? Presumably, Pennsylvania lawyers may harass or discriminate against people on any basis not listed in Rule 8.4(g)—*e.g.* weight, body shape, personal appearance, political affiliation, intelligence, family size, Flyers fandom, and more. This offensive speech, too, undermines the integrity of the legal profession. And this gap leaves "appreciable damage to [the State's] interest unprohibited"—making the rule woefully underinclusive. *Reed*, 576 U.S. at 172.

What's more, the State has no legitimate interest in protecting individuals from offensive speech. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 574, 578-79 (1995) (protecting speech that others may consider "misguided, or even hurtful"); *Snyder v. Phelps*, 562 U.S. 443, 456 (2011) (protecting signs at funeral that were "particularly hurtful to many"). Who knows? Maybe the public would trust lawyers *more* knowing they were equally committed to protecting speech as the First Amendment. With no "proof," Appellants fail to show a compelling interest. *Brown v. Ent. Merchants Ass'n*, 564 U.S. 786, 800 (2011).

2. Rule 8.4(g) lacks narrow tailoring.

Rule 8.4(g) also lacks narrow tailoring. It regulates speech outside the practice of law. And it broadly defines "harassment" to unnecessarily cover protected speech. Neither is "the least restrictive means among available, effective alternatives" to protect the legal profession's integrity. *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004). A narrower rule would better serve the State's interest while also protecting free speech.

First, Rule 8.4(g) could target only speech in the traditional practice of law. Before adopting Rule 8.4(g), Pennsylvania targeted three types of conduct: (1) conduct during the practice of law or representing a client; (2) conduct that reflects on a lawyer's fitness to practice law; and (3) conduct prejudicing the administration of justice. And while the rule says it applies only "in the practice of law," it defines practice far too broadly—

covering conduct only *related* to the practice of law, such as conversations in even social settings. That sweep is much too broad. The less that speech is connected to the legal profession, the less the State has an interest in restricting it to preserve the profession's integrity.

Second, Rule 8.4(g) could have far narrower definitions. Pennsylvania's Rule 8.4(g) is based on the ABA model rule. That rule was "crafted to allow disciplinary boards to punish lawyers who engage in sexual harassment at social activities that are not strictly connected" with the practice of law. Josh Blackman, *Reply: A Pause for State Courts Considering Model Rule 8.4(g)*, 30 Geo. J. Legal Ethics 241, 244 (2017). But it accomplishes far more than that. If sexual harassment were the focus, Rule 8.4(g) could be tethered to Title VII definitions and caselaw. Yet the rule punishes speech that even "show[s] hostility or aversion toward a person" based on protected traits. Comment 4, 204 Pa. Code Rule 8.4. There is no "categorical harassment exception" to the First Amendment. *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 204 (3d Cir. 2001) (cleaned up). Better tailoring would prevent sexual harassment and protect free speech.

As it stands, Rule 8.4(g) works to erase certain views from the legal profession. Suppose its premise was "that lawyers who express inappropriate bias related to law practice presumptively have a biased character that will" affect their legal work, just as "other rules presuppose that a lawyer's dishonest act may reflect a general lack of integrity or a lawyer's

criminal act may reflect general lawlessness." Bruce Green & Rebecca Roiphe, *ABA Model Rule 8.4(G), Discriminatory Speech, and the First Amendment*, 50 Hofstra L. Rev. 543, 568 (2022). This hardly persuades. If Rule 8.4(g) were "designed to weed out lawyers with a bad character . . . , the rule would apply to *all* expressions of objectionable bias," not just to some. *Id.* Given this feature, "it is hard to defend" the rule as one "targeting bad character." *Id.*

II. Alternatively, Pennsylvania Rule of Professional Conduct 8.4(g) is facially overbroad.

Alternatively, Rule 8.4(g) is overbroad because a "substantial number of its applications are unconstitutional, judged in relation to [the Rule's] plainly legitimate sweep." *United States v. Stevens*, 559 U.S. 460, 473 (2010) (cleaned up); *accord McCauley v. Univ. of the Virgin Islands*, 618 F.3d 232, 241 (3d Cir. 2010); *Saxe*, 240 F.3d at 214. Take two examples of this—regulating educational content and speech on a matter of concern, forcing attorneys to take one side. Neither is allowed.

A. Rule 8.4(g) restricts protected speech at continuing legal education courses based on viewpoint.

Consider continuing education content first. Rule 8.4(g) plainly regulates bar-sponsored debates and lectures or those where CLE credit is given. Section I.A *supra*. And it's not hard to imagine how certain topics may be thought to "denigrate" or "show hostility" to a person based on

protected traits. Comment 4, 204 Pa. Code Rule 8.4. Take these examples plucked from Professor Josh Blackman's recent scholarship:

- *Race* – A speaker discusses "mismatch theory," and contends that race-based affirmative action should be banned because it hurts minority students by placing them in education settings where they have a lower chance of success.

- [*Sex*] – A speaker argues that women should not be eligible for combat duty in the military, and should continue to be excluded from the selective service requirements.

- *Religion* – A speaker states that the owners of a for-profit corporation who request a religious exemption from the contraceptive mandate are bigoted and misogynistic.

- *National Origin* – A speaker contends that the plenary power doctrine permits the government to exclude aliens from certain countries that are deemed dangerous.

- *Ethnicity* – A speaker states that *Korematsu v. United States* was correctly decided, and that during times of war, the President should be able to exclude individuals based on their ethnicity.

- *Disability* – A speaker explains that people with mental handicaps should be eligible for the death penalty.

- *Age* – A speaker argues that minors convicted of murder can constitutionally be sentenced to life without parole.

- *Sexual Orientation* – A speaker contends that *Obergefell v. Hodges* was incorrectly decided, and that the Fourteenth Amendment does not prohibit classifications on the basis of sexual orientation.

- *Gender Identity* – A speaker states that Title IX cannot be read to prohibit discrimination on the basis of gender

identity, and that students should be assigned to bathrooms based on their biological sex.

- *Marital Status* – A speaker remarks over dinner that unmarried attorneys are better candidates for law firms because they will be able to dedicate more time to the practice.

- *Socioeconomic Status* – A speaker posits that low-income individuals who receive public assistance should be subject to mandatory drug testing.

Blackman, *supra* at 246. For each topic—chosen for its provocativeness—the speaker would necessarily "manifest[ ] an intention" to "disregard" and "show hostility . . . toward" certain attendees because of their protected traits. Comments 4 & 5, 204 Pa. Code Rule 8.4. Suppose a "person whose marriage was legalized by *Obergefell*, or who gained access to a bathroom . . . under [a new take on] Title IX, or who immigrated from a country subject to an immigration ban, or who was admitted to college under an affirmative action plan" attended the lectures above. Blackman, *supra* at 247. That person may feel denigrated by the presentation.

These scenarios are not far-fetched. CLEs often include debates on sensitive legal topics. For example, the Federalist Society recently held its Third Circuit Chapters Conference in Philadelphia, where panelists debated "Racial Preferences in Higher Education" and "Critical Race Theory in Schools." Federalist Society, *Third Circuit Chapters Conference*, https://bit.ly/3f3tL3I (last visited Oct. 25, 2022). These debates risked denigrating attendees who take offense at critical theory critiques

or have benefitted from affirmative action programs. And such a response was highly likely. Consider that Justice Scalia received a "tempestuous reaction" to his discussion of mismatch theory *during oral argument* in *Fisher v. University of Texas at Austin*.[2] Blackman, *supra* at 247.

Meanwhile, Pennsylvania promotes over 300 diversity trainings, some of which appear to promote critical race theory. For example, Pennsylvania sponsors courses titled "Race Conscious Measures to Advance Diversity at Work and in Unions" and "Settler Colonialism, Race, and the Law: Why Structural Racism Persists." PACLE, https://bit.ly/3Fd4779 (last visited Oct. 24, 2022). Elsewhere the State sponsors a course titled, "The Journey of Race Literacy: Engaging with Antiracism in the Practice of Law." PACLE, https://bit.ly/3CXHjpc (last visited Oct. 24, 2022). Presumably, these courses suggest white people are inherently racist and exploit their privilege to hurt people of color. And while the State may say this content is critical "to advancing diversity and eliminating bias,"

[2] *See, e.g.*, Stephen Dinan, *Scalia Accused of Embracing 'Racist' Ideas for Suggesting 'Lesser' Schools for Blacks*, Wash. Times (Dec. 10, 2015), https://perma.cc/V6cX-DWHY; Lauren French, *Pelosi: Scalia Should Recuse Himself from Discrimination Cases*, Politico (Dec. 11, 2015), https://perma.cc/BCL5-VGWY; Joe Patrice, *Scientists Agree: Justice Scalia Is a Racist Idiot*, Above The Law (Dec. 14, 2015), https://perma.cc/9GA8-2NGT; David Savage, *Justice Scalia Under Fire for Race Comments During Affirmative Action Argument*, L.A. Times (Dec. 10, 2015), https://perma.cc/U3T2-CBAE; Debra Cassens Weiss, *Was Scalia's Comment Racist?*, ABA J. (Dec. 10, 2015), https://perma.cc/G7DH-U5H3.

PACLE, https://bit.ly/3stkaGr (last visited Oct. 25, 2022), this shows Rule 8.4(g) unconstitutionally plays favorites.

But no matter whether Pennsylvania allows discriminatory speech to promote diversity, equity, and inclusion, Rule 8.4(g) still unconstitutionally restricts many educational courses based on viewpoint. This feature alone shows that the rule is facially overbroad.

B. Rule 8.4(g) restricts protected speech on matters of public concern.

Rule 8.4(g) also regulates speech on matters of public concern. Take preferred pronouns. Rule 8.4(g) requires attorneys to address others by their preferred pronouns—no matter whether they match the person's biological sex—or at minimum restricts attorneys from using other pronouns while practicing law. People who identify as transgender may feel "denigrate[d]" if an attorney speaks otherwise. Comment 4, 204 Pa. Code Rule 8.4. This application compels or restricts protected speech.

To determine whether speech touches a matter of public concern, courts look to the "content, form, and context of a given statement." *Connick v. Myers*, 461 U.S. 138, 147-48 (1983). When speech relates "to any matter of political, social, or other concern to the community," it addresses a matter of public concern. *Id.* at 146. "The linchpin" then is "the extent to which the speech advances an idea transcending personal interest or opinion which impacts our social [or] political lives." *Meriwether*

v. Hartop, 992 F.3d 492, 508 (6th Cir. 2021). Attorneys who decline to use preferred pronouns take a side in an important public debate.

"Never before have titles and pronouns been scrutinized as closely as they are today for their power to validate—or invalidate—someone's perceived sex or gender identity." *Id.* at 509. When attorneys decline to use preferred pronouns, they "advance[ ] a viewpoint" in that debate. *Id.* Among other things, it may manifest a belief that "sex is fixed in each person from the moment of conception, and that it cannot be changed," no matter a person's feelings. *Id.* So "[t]he 'focus,' 'point,' 'intent,' and 'communicative purpose' of the speech . . . [is] a matter of public concern." *Id.* (quoting *Farhat v. Jopke*, 370 F.3d 580, 592 (6th Cir. 2004)).

Yet Rule 8.4(g) requires attorneys to take one side in that debate. It cannot do that—even when attorneys are in court. As the Fifth Circuit has said, "no authority supports the proposition that [courts] may require litigants, judges, court personnel, or anyone else to refer to" litigants with "pronouns matching their . . . gender identity." *United States v. Varner*, 948 F.3d 250, 254-55 (5th Cir. 2020). And courts refuse to tip the scale—sometimes using preferred pronouns, *e.g.*, *Rush v. Parham*, 625 F.2d 1150, 1153 n.2 (5th Cir. 1980), sometimes using those that match biological sex, *e.g.*, *Gibson v. Collier*, 920 F.3d 212, 217 n.2 (5th Cir. 2019), and sometimes using no pronouns at all, *e.g.*, *Farmer v. Brennan*, 511 U.S. 825 (1994). No court "has adopted the practice" of addressing litigants only with gender-specific titles and pronouns that match their gender

identity "as a matter of binding precedent." *Varner*, 948 F.3d at 255; *see also United States v. Thomason*, 991 F.3d 910, 915 (8th Cir. 2021).

The Constitution prohibits Rule 8.4(g) from forcing attorneys to take one side of a public debate. Indeed, lawyers are free to address "controversial subjects" like "sexual orientation[,] . . . gender identity, . . . and minority religions." *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2476 (2018). While "[t]hese are sensitive political topics, . . . they are [doubtless] matters of profound" public concern. *Id.* (quoting *Snyder,* 562 U.S. at 453). Such speech merits the "highest . . . First Amendment . . . protection. *Id.* And Rule 8.4(g) may not restrict it.

CONCLUSION

When attorneys enter the legal profession, they do not forfeit their right to free speech—especially against rules that regulate even their social interactions based on viewpoint. This Court should affirm.

Respectfully submitted,

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By: */s/ Jacob P. Warner*

JACOB P. WARNER
ALLIANCE DEFENDING FREEDOM
15100 N. 90th Street
Scottsdale, AZ 85260
(480) 444-0030
jwarner@ADFlegal.org

JOHN J. BURSCH
ALLIANCE DEFENDING FREEDOM
440 First Street, NW, Suite 600
Washington, DC 20001
(616) 450-4235
jbursch@ADFlegal.org

Attorneys for Amicus Curiae

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1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 4,897 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), as determined by the word counting feature of Microsoft Office 365.

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3. Jacob P. Warner and John J. Bursch are both members in good standing of the bar of the United States Court of Appeals for the Third Circuit.

4. In accordance with L.A.R. 31.1(c), this brief has been scanned for viruses with the most recent version of a commercial virus scanning program, Cortex XDR, Agent version 7.8.1, and is free of viruses according to this program.

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Jacob P. Warner

October 27, 2022

CERTIFICATE OF SERVICE

I certify that on October 27, 2022, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the CM/ECF system, which will accomplish service on counsel for all parties through the Court's electronic filing system.

/s/ Jacob P. Warner
Jacob P. Warner