Nos. 23-833

IN THE

Supreme Court of the United States

ZACHARY GREENBERG,

PETITIONER,

V.

JERRY M. LEHOCKY, IN HIS OFFICIAL CAPACITY AS BOARD CHAIR OF THE DISCIPLINARY BOARD OF THE SUPREME COURT OF PENNSYLVANIA, *et al.*,

RESPONDENTS.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

AMICUS CURIAE BRIEF OF THE LIBERTY JUSTICE CENTER IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

Does amending or supplementing a complaint to include new factual developments absolve the government of its burden to prove mootness?

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INTEREST OF THE AMICUS CURIAE[1]

The Liberty Justice Center is a nonprofit, nonpartisan, public-interest litigation firm that seeks to protect economic liberty, private property rights, free speech, and other fundamental rights. The Liberty Justice Center pursues its goals through strategic, precedent-setting litigation to revitalize constitutional restraints on government power and protections for individual rights.

To advance these goals, the Liberty Justice Center regularly litigates cases challenging government abuses, and regularly encounters government efforts to avoid constitutional review via voluntary cessation. *See, e.g., Menders v. Loudoun Cty. Sch. Bd.*, No. 1:21-cv-669, 2023 U.S. Dist. LEXIS 195542 (E.D. Va. Oct. 31, 2023); *Etherton v. Biden*, No. 22-2085, 2023 U.S. App. LEXIS 25530 (4th Cir. Sep. 27, 2023); *Bishop of Charleston v. Adams*, No. 22-1175, 2023 U.S. App. LEXIS 17032 (4th Cir. July 6, 2023).

This case interests amicus because the constitutional rights of citizens deserve their day in court, and this Court should reject attempts to dodge meritorious claims via gamesmanship.

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[1] Rule 37 statement: No counsel for any party authored any part of this brief, and no person or entity other than amicus funded its preparation or submission. All counsel received timely notice and consented to amicus' filing.

SUMMARY OF ARGUMENT

When the government voluntarily ceases challenged conduct, the burden is rightfully on the government to show that it has, in fact, resolved a plaintiff's injury. That is the repeated holding of this Court, recognized by nearly every circuit around the country. But not so in the Third Circuit, where if the plaintiff does the responsible thing and updates their complaint to ensure their factual allegations reflect the present state of the world, the burden shifts to them to prove their standing anew. This is not simply a trap for the unwary—it is a license for government gamesmanship. It rewards recalcitrant officials for complicating challenges with elaborate adjustments of form but not of substance.

What's more, it punishes plaintiffs who responsibly update their pleadings to provide courts with accurate allegations—better to leave the old, outdated complaint as operative, and make sure you're grandfathered in, than jeopardize jurisdiction. This is terrible policy—and bad law, abandoning traditional jurisdictional standards, placing plaintiffs in an impossible position, and requiring courts to decide cases on outdated records.

Under the proper analysis—the one prescribed by this Court's mootness cases—Petitioner has easily shown that Pennsylvania's late in the day revision of its implementation of ABA Model Rule 8.4(g) provides no comfort to attorneys like Petitioner, who remain subject to content and viewpoint discrimination as a

condition of practicing their chosen profession—indeed, it makes the Rule even more offensive to the First Amendment in several ways.

This Court should grant the petition and hold that government officials cannot game their way out of First Amendment scrutiny, and that plaintiffs need not forgo amending their complaint to retain the jurisdiction this Court has held they are entitled to.

ARGUMENT

I. The Third Circuit's confusion of standing with mootness will be a disaster for civil rights plaintiffs challenging abuses of government power.

The "[g]overnment . . . bears the burden to establish that a once-live case has become moot." *West Virginia v. EPA*, 142 S. Ct. 2587, 2607 (2022). "That burden is 'heavy' where, as here, '[t]he only conceivable basis for a finding of mootness in th[e] case is [the government's] voluntary conduct.'" *Id.* (quoting *Friends of the Earth, Inc. v. Laidlaw*, 528 U.S. 167, 189 (2000)). In other words, "'voluntary cessation does not moot a case' unless it is 'absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'" *Id.* at 2607; *see also Roman Catholic Diocese*, 141 S. Ct. at 68; *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2017 (2017); *Tucker v. Gaddis*, 40 F.4th 289, 293 (5th Cir. 2022) (Ho, J., concurring).

The Third Circuit evaded this rule by pretending that voluntary cessation simply didn't apply—that

Petitioner's act of updating of his complaint changed the jurisdictional analysis. But the government rewrites regulations, changes policies, and promises to behave itself in the future all the time. This is an easy and natural reaction for a government official: if you've been challenged, simply tweak the language or promise that you won't misuse the power as claimed. The entire purpose of the voluntary cessation doctrine is to prevent these gimmicks and allow courts to subject recalcitrant officials to scrutiny.

Amicus is well acquainted with this sort of gamesmanship in its own work defending constitutional rights. These are the same tactics public-sector unions have successfully used to stymie public employees' attempts to assert the rights this Court recognized in *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018)—as soon as an employee challenges a union's defiance of *Janus*, the union decides the employee doesn't need to pay dues after all. *See, e.g., Grossman v. Haw. Gov't Emples. Ass'n*, 611 F. Supp. 3d 1033, 1047 (D. Haw. 2020). When a teacher challenged the Biden Administration's HeadStart vaccine mandate, all of a sudden it wasn't so important for that particular teacher to be vaccinated. *See Etherton v. Biden*, No. 22-2085, 2023 U.S. App. LEXIS 25530 (4th Cir. Sep. 27, 2023). When Virginia parents challenged their school district's attempts to police "microagressions" and "bias incidents," all of a sudden the particular bias reporting process was replaced with more obtuse policies not directly covered in the original complaint. *See Menders v. Loudoun Cnty. Sch. Bd.*, No. 1:21-cv-669, 2023 U.S. Dist. LEXIS 195542 (E.D. Va. Oct. 31, 2023).

Indeed, the Third Circuit's own follow-on precedent in *Lutter v. JNESO*, 86 F.4th 111 (3d Cir. 2023), which Petitioner discusses, Pet. 20, is consistent with amicus' experience in post-*Janus* cases like *Grossman*: as soon as the government and unions are challenged about their violation of *Janus* rights, they write a check—a year or two of union dues being not much to their budget as long as they can dodge court review of their policy more generally. It's much easier to write a check for ~$1000-2000 to every worker who takes the time to sue than to defend their unconstitutional policies before this Court. *Cf. Belgau v. Inslee*, 975 F.3d 940 (9th Cir. 2020); *Knox v. SEIU, Local 1000*, 567 U.S. 298 (2012).

These Whac-A-Mole tactics are a constant challenge in defending the rights this Court recognizes as fundamental. To be clear: it should be open to the government to admit when it was wrong and resolve a citizen's injury. But if the government is going to insist that it has resolved a plaintiffs' claims beyond this Court's power to adjudicate, it must provide more than the sort of conclusory declaration promising not to violate rights that the Third Circuit credited here. "The [government's] main response to these criticisms is, essentially, 'trust us.'" *Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll.*, 143 S. Ct. 2141, 2168 (2023). When free expression is at stake, this Court should require more than trust.

"When a defendant ceases challenged conduct because it has been sued, its mere assurance that it will not return to its old ways is insufficient to moot the case." *Iron Arrow Honor Soc'y v. Heckler*, 464 U.S. 67, 75-76 (1983) (citing *Quern v. Mandley*, 436 U.S. 725,

733, n.7 (1978); *United States v. W.T. Grant Co.*, 345 U.S. 629, 632-633 (1953)). This standard is rightfully a high bar. The Third Circuit dodged that standard, and allowed Respondents to dodge their burden, by claiming that Petitioner had voided his own jurisdiction by amending his complaint.

Consider how perverse these incentives are: under the Third Circuit's standard, district courts are expected to make decisions based on pleadings that no longer reflect external reality—all because any plaintiff would be a fool to amend and acknowledge the voluntary cessation, because the simple act of updating their complaint to acknowledge it shifts the burden to them. That is no way to run a railroad.

II. Even Pennsylvania's updated censorship policy will chill protected speech.

The Third Circuit held that, since the modified Rule "covers only knowing or intentional harassment or discrimination against a person," Greenberg could not show that the law chilled his speech because "[n]othing in Greenberg's planned speeches comes close to meeting this standard." Pet. App. 21a. But Pennsylvania's definitions of "harassment" and "discrimination" sweep in a great deal of protected speech, and simply including a "knowing" or "intent" element cannot absolve a content and viewpoint-based restriction from constitutional scrutiny. *United States v. Alvarez*, 567 U.S. 709, 736 (2012) (explaining that in broad statutes, "there remains a risk of chilling that is not completely eliminated by *mens rea* requirements").

Rule 8.4(g) is directed at the content of lawyers' speech, inviting courts to make a subjective determination of what constitutes "harmful," "derogatory," or "demeaning" words. A law targets the content of speech if it is directed at the idea or content of the message expressed. *Sorrel v. IMS Health Inc.*, 564 U.S. 552, 564-65 (2011). This is true even if the message is outrageous and offensive. *See, e.g., Brandenburg v. Ohio*, 395 U.S. 494 (1969). The First Amendment protects this sort of speech not because it has inherent value, but because determining what sort of language is offensive is far too subjective an enterprise to entrust to government officials. *Hustler Magazine v. Falwell*, 485 U.S. 46, 55 (1988) ("'Outrageousness' in the area of political and social discourse has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression."). "The point of the First Amendment is that majority preferences must be expressed in some fashion other than silencing speech on the basis of content." *R.A.V. v. St. Paul*, 505 U.S. 377, 392 (1992).

Pennsylvania's amendments to the Rule do not resolve these First Amendment concerns. True, the amendments changed "words or conduct" to "conduct." Yet in the process it unmoored the Rule from established standards of discrimination or harassment, which have been limited to the constitutional meaning of conduct as opposed to speech. Instead, it substituted the Commonwealth's own definitions of each concept, which use the term "conduct" but in fact cover speech. "Harassment" now means "conduct that is intended to intimidate, denigrate or show hostility or aversion toward a person" based on a protected characteristic,

while "Discrimination" covers anything that "manifests an intention" to either "treat a person as inferior," "disregard . . . individual characteristics or merit," or "cause interference with the fair administration of justice."

Of course, the government is allowed to regulate some forms of discrimination and harassment, and many federal and state anti-discrimination and harassment policies withstand challenges. *See, e.g., O'Rourke v. City of Providence*, 235 F.3d 713 (1st Cir. 2001); *Baty v. Willamette Indus., Inc.*, 172 F.3d 1232, 1246-47 (10th Cir. 1999). Title VII of the Civil Rights Act of 1964, for instance, protects against a "hostile work environment." *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 67 (1986). But to meet that standard, a plaintiff must demonstrate harassment so severe or pervasive as to "alter the conditions of the victim's employment and create an abusive working environment." *Id*. As Justice Scalia explained, "words can in some circumstances violate laws directed not against speech but against conduct," *R.A.V.*, 505 U.S. at 389, and "[w]here the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea." *Id*. at 390. As a result, "sexually derogatory 'fighting words,' among other words, may produce a violation of Title VII's general prohibition against sexual discrimination in employment practices." *Id*. at 389.

The "knowing" the Third Circuit relied on can only take the Commonwealth so far, as a lawyer may know his actions will manifest discriminatory intent in the eyes of many without possessing that intent himself—

and in those cases where he does in fact possess it, the law restricts him on the basis of his viewpoint. Any number of statements that could be made in the practice of law might "show hostility or aversion" or manifest an intent in the eyes of *someone*.

For instance, an attorney might espouse the view that the Supreme Court was incorrect to find that the federal constitution guarantees a right for same-sex couples to marry—a view endorsed by four justices of the Supreme Court, *see Obergefell v. Hodges*, 576 U.S. 644 (2015). The attorney might have taken this position as a matter of legal principle at odds with his own policy views, or in representing his client's interests, or because he personally objects to same-sex marriage. But it does not matter because all the lawyer need do in Pennsylvania is "manifest the intention" to discriminate. As the district court pointed out, the complaint process is open to the public, which means attorneys are potentially subject to disciplinary proceedings under the Rule if any member of the public interprets his or her speech uncharitably. *Greenberg*, 2022 U.S. Dist. LEXIS 52881 at *45 ("It is nonsensical to say that an individual's perception is irrelevant where the Rule relies on complaints filed by the public to start an investigation into the attorney's conduct.").

In *Tam v. Matal*, 137 S. Ct. 1744 (2017), this Court invalidated a trademark law provision that denied approval to any mark that disparaged members of a racial or ethnic group. The Court held that the clause was an unconstitutional speech restriction, explaining, "that is viewpoint discrimination: Giving offense is a viewpoint." 137 S. Ct. at 1763. Because it singled out a particular viewpoint, the restriction was not

justified by the need to protect members of minority groups from being "bombarded with demeaning messages in commercial advertising." *Id.* at 1764.

In *R.A.V.*, the Court similarly struck down a city ordinance criminalizing the use of an object or symbol if the speaker knew it would arouse anger or alarm based on a protected class. 505 U.S. at 379. The Court reasoned that *even though* the ban applied only to "fighting words"—a category usually exempt from First Amendment protection—a state cannot pick and choose *which* fighting words it wants to ban based on the content of the words, even if it finds those particular messages to be the most offensive. *Id.* at 384. The Court held that the ordinance was facially invalid even though it applied to "fighting words" because it targeted only those words directed at "race, color, creed, religion, or gender." Abusive displays of any other sort were allowed, no matter how harmful or severe. *Id.* at 391.

Like the Minnesota ordinance in *R.A.V.*, Rule 8.4(g) singles out hateful messages based on race or other specified categories. And like both *R.A.V.* and *Tam*, the Rule addresses biased, prejudiced, demeaning, or derogatory statements only if they are aimed at a protected class. Abusive words of any other sort are allowed. Further, the comments to the Model Rule specify that it addresses only those biased words that demean a protected class, not those that are aimed at promoting diversity. Thus, under the Rule, a CLE program would not violate Rule 8.4(g) if it argued that white people are inherently racist and exploit their privilege to hurt people of color.

A law targets the content of speech if it is directed at the idea or content of the message expressed. Viewpoint discrimination is "an egregious form of content discrimination," *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 829 (1995), but even if there is no viewpoint discrimination, a law is presumed invalid if it targets the content of speech, even if the message is outrageous and offensive. *See Brandenburg*, 395 U.S. at 447. The First Amendment protects this sort of speech not because it has inherent value, but because determining what sort of language is offensive is too subjective an enterprise to entrust to government officials. *Hustler*, 485 U.S. at 55. Rule 8.4(g), like the Minnesota ordinance at issue in *R.A.V.*, invites courts to make a subjective determination of what constitutes "harmful," "derogatory," or "demeaning" words.

Nor can Pennsylvania rely on its authority to regulate the legal profession. This Court has repeatedly held that "disciplinary rules governing the legal profession cannot punish activity protected by the First Amendment, and that First Amendment protection survives even when the attorney violates a disciplinary rule he swore to obey when admitted to the practice of law." *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1054 (1991) (citing *In re Primus*, 436 U.S. 412 (1978); *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977)). "Speech is not unprotected merely because it is uttered by 'professionals.'" *Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2371–72 (2018) ("NIFLA"). "To the contrary, professional speech may be entitled to 'the strongest protection our Constitution has to offer.'" *Conant v. Walters*, 309 F.3d 629, 637 (9th Cir.

2002) (quoting *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 634 (1995)).

"As with other kinds of speech, regulating the content of professionals' speech poses the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information." *NIFLA*, 138 S. Ct. at 2374 (cleaned up). In short, "when the government polices the content of professional speech, it can fail to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail." *NIFLA*, 138 S. Ct. at 2374 (cleaned up). "Professionals might have a host of good-faith disagreements, both with each other and with the government, on many topics in their respective fields." *Id.* at 2374–75. The burden must therefore be on the state to explain why a particular regulation at issue is appropriately tailored to its interests in the regulation of the profession. And the state interests the Commonwealth can offer justify only a fraction of the speech covered by the Rule.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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