No. 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 A WRIT OF CERTIORARI TO THE U.S. COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF *AMICI CURIAE* FIRST LIBERTY INSTITUTE AND INDEPENDENCE LAW CENTER IN SUPPORT OF PETITIONER

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QUESTION 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 *AMICI CURIAE*[1]

First Liberty Institute is a nonprofit, public interest law firm dedicated to defending religious liberty for all Americans. First Liberty has won several religious freedom cases at this Court, including *Groff* v. *DeJoy*, 600 U.S. 447 (2023); *Kennedy* v. *Bremerton School District*, 597 U.S. 507 (2022); *Carson* v. *Makin*, 596 U.S. 767 (2022); and *American Legion* v. *American Humanist Association*, 139 S. Ct. 2067 (2019). First Liberty provides pro bono legal representation to individuals and institutions of all faiths and has represented people of the Catholic, Islamic, Jewish, Native American, Protestant, Muslim, Falun Gong, and other faiths. First Liberty attorneys are barred in many states including Pennsylvania. First Liberty attorneys desire freedom to represent clients and speak on matters of public concern without fear of bar discipline.

Independence Law Center is a Pennsylvania-based public interest civil rights law firm and nonprofit § 501(c)(3) organization that works to promote the family, improve education, protect human rights, and preserve religious liberty. Independence Law Center attorneys, who are primarily barred in Pennsylvania, advance this work through legal advocacy, the media, and state and local policy development. Independence Law Center provides pro bono services not only to

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[1] All parties were timely notified of the filing of this brief. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amici curiae* or their counsel made a monetary contribution to this brief's preparation or submission.

individuals but also to schools, businesses, churches, and nonprofits. Its attorneys often present testimony before legislative bodies and speak to groups on these topics. From time to time, Independence Law Center attorneys are also invited to provide their perspective on these issues for continuing education programs. Independence Law Center attorneys also serve on nonprofit boards.

SUMMARY OF ARGUMENT

The First Amendment protects unpopular viewpoints. But for its protections to carry real meaning for non-lawyers, those protections must extend to lawyers who represent unpopular clients. To protect his freedom of speech and the freedoms of thousands of other Pennsylvania-barred attorneys, Zachary Greenberg brought a pre-enforcement challenge to Pennsylvania's Rule 8.4(g). But after over a year of litigation, the Third Circuit held that one government declaration removed his standing, making the Rule nearly impossible to challenge. The Third Circuit's extreme justiciability rule shoehorns traditional mootness analysis into the doctrine of standing in a way that dramatically harms religious liberty claimants if left unchecked.

Here, not only did the Third Circuit's holding improperly erase Plaintiff's standing to challenge Rule 8.4(g), but it also left many attorneys, like *amici,* without any safeguard against the state's unconstitutional rule. Religious attorneys cannot rely on the declaration's passing acknowledgement that they may still have "the right to express intolerant religious views," because that subjective assessment could change at any time—and is itself discriminatory.

JA275 (C.A. Dkt. 23-2) at 148. Further, the declaration says nothing about client representation—the central work of most attorneys—which Rule 8.4(g) clearly governs. This broad-sweeping rule directly restricts speech and targets viewpoints on subjects which are often matters of public concern and must be open to free debate. Consequently, its chilling effect on attorneys who commonly represent clients in such matters is very significant.

ARGUMENT

I. The decision below unfairly shifted the burden to Petitioner by analyzing standing rather than mootness.

Procedural rules such as standing and mootness are foundational to constituional judicial review. Here, however, by ignoring this Court's pre-enforcement precedents and improperly applying standing instead of mootness, the lower court created a novel rule that empowers government defendants to ensure that religious plaintiffs can never have their rights secured until they have already been trampled upon.

A. Two circuits have now defied this Court's pre-enforcement precedent by removing standing because the plaintiffs have not yet experienced the harms they seek to avoid.

In another petition for certiorari currently pending before this Court, *John and Jane Parents 1* v. *Montgomery County Board of Education*,[2] the same question is at stake: in cases bringing pre-enforcement

[2] Petitioners in *John and Jane Parents 1* filed their petition for certiorari on Nov. 13, 2023. The Response is due March 18, 2024.

challenges based on constitutional rights, can an appellate court remove standing because the plaintiff has not yet experienced the harm he seeks to avoid? There, parents sued anonymously to protect their families' safety, challenging a school policy that requires school staff to conceal gender transitions from parents that they subjectively deem will not be "sufficiently supportive." 78 F.4th 622, 646 (4th Cir. 2023) (Niemeyer, J., dissenting), *cert. docketed*, No. 23-601. Although Montgomery County never questioned plaintiffs' standing, the Fourth Circuit found *sua sponte* that plaintiffs lacked standing because their children had not yet actually begun gender transitions—even though the policy at issue hid that information from parents. *Id.* at 626; see also *id.* at 642 (Niemeyer, J., dissenting) (300 secret transitions have taken place).

Here, Petitioner finds himself in a similar catch-22. Unless and until he is actually investigated for his CLE presentations, is the subject of a bar complaint for representing an unpopular client, or loses his bar license, he cannot challenge a Rule that imposes clear limitations on his constitutional rights. Therefore, this Court should intervene because both the Third and Fourth Circuits have wrongly removed standing from plaintiffs who brought pre-enforcement challenges, simply because they had not yet experienced the full extent of the harm they sued to avoid.

These outlier opinions ignore longstanding Supreme Court precedent recognizing pre-enforcement challenges as vehicles to challenge facially unconstitutional laws or policies. See, e.g., *TransUnion LLC* v. *Ramirez*, 141 S. Ct. 2190, 2204-

2205 (2021) (noting that intangible, constitutional harms are concrete and confer standing); *Spokeo, Inc.* v. *Robins*, 578 U.S. 330, 347 (2016) (Thomas, J., concurring) ("Our contemporary decisions have not required a Plaintiff to assert an actual injury beyond the violation of his personal legal rights to satisfy the 'injury-in-fact' requirement."); *Northeastern Fla. Chapter* v. *Jacksonville*, 508 U.S. 656, 665-666 (1993) (plaintiff had standing to challenge policy that would *potentially* deny him government benefit, even if he did not allege it would actually do so).

In *303 Creative* v. *Elenis*, this Court reaffirmed the longstanding doctrine that plaintiffs have standing to bring pre-enforcement challenges. Lorie Smith needed only to "show 'a credible threat' existed that Colorado would, in fact seek to compel speech from her that she did not wish to produce." 600 U.S. 570, 580 (2023). Likewise, here, Zachary Greenberg needed only to show a credible threat that Pennsylvania's Rule 8.4(g) would be enforced against him. His initial complaint clearly made that showing. App. 188a-202a. By the Third Circuit's logic, in *303 Creative*, the Colorado Civil Rights Commission could have devised a mid-litigation declaration and deprived Smith of standing two years into her lawsuit. But declarations do not eliminate the chill to constitutional speech, which *is* the injury at issue. *303 Creative*, 600 U.S. at 597 (reaffirming that "Ms. Smith faces a credible threat of sanctions *unless she conforms her views to the State's*") (emphasis added).

This Court has long recognized pre-enforcement challenges as an important safeguard to constitutional rights. "[W]hen there is a danger of chilling free

speech," "[l]itigants . . . are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Secretary of State of Md.* v. *Munson Co.*, 467 U.S. 947, 956-957 (1984) (quoting *Broadrick* v. *Oklahoma*, 413 U.S. 601, 612 (1973)); see also *Village of Schaumburg* v. *Citizens for a Better Environment*, 444 U.S. 620, 634 (1980) ("Given a case or controversy, a litigant whose own activities are unprotected may nevertheless challenge a statute by showing that it substantially abridges the First Amendment rights of other parties not before the court"). In *Munson*, the Court upheld a charity's facial challenge, even if the statute might not restrict its own First Amendment rights, because "[f]acial challenges to overly broad statutes are allowed not primarily for the benefit of the litigant, but for the benefit of society—to prevent the statute from chilling the First Amendment rights of other parties not before the court." 467 U.S. at 958.

In *Susan B. Anthony List* v. *Driehaus*, this Court held that petitioners, who "intend[ed] to criticize candidates for political office, [were] easy targets" of the challenged statute. 573 U.S. 149, 164 (2014). Because the statute subjected petitioners to a credible threat of enforcement, the Court ruled that pre-enforcement review was warranted. *Id.* at 167-168. See, e.g., *Babbit* v. *UFW Nat'l Union*, 442 U.S. 289, 301-302 (1979) (pre-enforcement review justified where statute could unconstitutionally penalize inadvertent erroneous statements made during free debate); *Virginia* v. *American Booksellers Ass'n, Inc.*,

484 U.S. 383, 393 (1988) (pre-enforcement review justified where facially over-broad law subjected booksellers to actual and well-founded fear the law would be used against them, thus risking self-censorship).

Here, anyone could file a complaint with the Disciplinary Board, instigating review and enforcement action against Greenberg and any other Pennsylvania-barred attorney. "Because the universe of potential complainants is not restricted to state officials who are constrained by explicit guidelines or ethical obligations," the "credibility of [the] threat is bolstered." *SBA List*, 573 U.S. at 164. Under *Munson* and *SBA List*, Greenberg has standing to bring his pre-enforcement challenge both to protect his own free speech from the chilling effect he has already experienced, and to protect others whose First Amendment rights are at stake.

B. By improperly applying standing doctrine instead of mootness, the court tipped the scales in favor of the government whose policy is at issue.

Government defendants are already at an advantage when courts apply the mootness doctrine, because the voluntary cessation exception tips the scales. See, e.g., Davis & Reaves, *The Point Isn't Moot: How Lower Courts Have Blessed Government Abuse of Voluntary-Cessation Doctrine*, 129 YALE L.J. FORUM 325, 329-331 (2019). But at least with mootness, it is the *defendant's* duty to prove that voluntary cessation has occurred. This is a "heavy burden" to satisfy. See *Friends of the Earth, Inc.* v. *Laidlaw Env't Serv., Inc.*, 528 U.S. 167, 170 (2000). Under this Court's

precedents, the *only* way a defendant can satisfy this burden is by repudiating the alleged conduct. Here, the Third Circuit shifted this burden onto Petitioner, forcing him to re-prove that he has standing at all, or as he describes, forcing him to "prove non-mootness." Pet. 30. That is not the law.

When the faulty application of justiciability rules shifts the burden to the plaintiff, this unfairly advantages the government. For example, in *U.S. Navy Seals 1-26* v. *Biden*, 72 F.4th 666, 671 (5th Cir. 2023), the Fifth Circuit mooted an interlocutory appeal challenging the Navy's vaccine mandate after Congress directed the Navy to rescind its policy. But despite this rescission, "[t]he Secretary of Defense maintained his fervent opposition to Congress's repeal of his mandate." *Id.* at 677 (Ho, J., dissenting). The Navy still sought to implement as much of the mandate as it could: (1) telling military commanders they could still consider vaccination status in making deployment decisions, (2) "refus[ing] to admit illegality or assure the SEALs that their religious convictions would be respected in the future," *id.* at 677 (Ho, J., dissenting), and (3) conceding that "it could implement a new vaccine mandate in the future." *Id.* at 674. Despite all this, the Fifth Circuit gave the government defendant a presumption that it was acting in good faith and that, absent any evidence to the contrary, it was not changing course as a mere litigation tactic. *Id.* at 675. The Fifth Circuit dismissed

the preliminary injunction appeal as moot, *id.* at 676, but the rest of the case is proceeding.[3]

The Fifth Circuit's approach in *U.S. Navy Seals 1-26* cannot be justified under this Court's precedents. Indeed, the party seeking to defeat the voluntary cessation doctrine "bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth*, 528 U.S. at 190. Under *Friends of the Earth*, the presumption is that the defendant will re-engage in the conduct in question unless it proves otherwise. Under this Court's precedents, the *defendant* must prove it will not reengage in that conduct.

Here, the district court correctly applied mootness doctrine rather than standing. It held that the Farrell Declaration and Pennsylvania's amendments to the Rule did not moot the case because Defendants continued to "defend the constitutionality" of the Rule and "vigorously assert the compelling need to regulate attorneys" and "eradicate[] discrimination and harassment," and to insist that "incidental" burdens in speech are permissible. App. 62a-63a. Further, "[d]efendants effectively ask Plaintiff *to trust them* not to regulate and discipline his offensive speech even though they have given themselves the authority to do so," and "there remains the constant threat that the

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[3] The district court allowed the SEALs' remaining claims to proceed, holding that "live harm remains due to allegations regarding the Navy's broader religious accommodations process," and that "Plaintiffs retain a concrete interest in the outome of this litigation." *U.S. Navy SEALs 1-26* v. *Biden*, No. 4:21-cv-01236-O (N.D. Tex. Feb. 14, 2024), at 5, 16 (cleaned up).

Rule will be engaged as the plain language of it" promises. App. 148a (emphasis added). The district court's analysis echoes *United States* v. *Stevens*, which held that "the First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*. We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly." 559 U.S. 460, 480 (2010).

In contrast, the Third Circuit got the analysis—and the timing—backwards. Instead of looking to the original complaint to analyze jurisdiction, the court looked only at the supplemental complaint, and used a mid-litigation declaration filed *after* the supplemental complaint to remove Petitioner's standing. App. 20a-24a. Because the lower court abdicated its constitutional gatekeeping role, Rule 8.4(g) is alive and well, and Petitioner is being told to risk his bar license, career, and livelihood on the government's say-so that it won't enforce the Rule against him. This outcome ignores the thousands of other Pennsylvania attorneys who face enforcement of a facially unconstitutional rule.[4]

[4] Granted, other Pennsylvania attorneys can sue to challenge Rule 8.4(g). But Respondents could file more declarations promising not to enforce the Rule against *those specific attorneys*. It is difficult to see how any attorney can have standing to challenge the Rule until they actually lose their bar license or face a career-destroying investigation—the exact harms that Greenberg's pre-enforcement challenge seeks to avoid.

II. Pennsylvania's modified Rule 8.4(g) disproportionately chills the constitutional rights of religious attorneys.

As the district court correctly held, Rule 8.4(g) is "an unconstitutional infringement of free speech" under the First Amendment. App. 127a. Patterned after ABA Model Rule 8.4(g), the Disciplinary Board of the Supreme Court of Pennsylvania (the "Board") adopted a modified version:

> It is professional misconduct for a lawyer to: . . . (g) in the practice of law, knowingly engage 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. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude advice or advocacy consistent with these Rules.

Rule 8.4(g) (App. 38a, n.3). Because the Rule expressly includes "sex, gender identity or expression . . . sexual orientation," and "marital status" as prohibited categories, it raises concerns for religious attorneys, as well as non-religious attorneys who represent religious clients. Dozens of faith groups believe that sex is biological and cannot or should not be changed to conform with gender identity, and that abortion is

morally wrong because human life is sacred. Given the diverse group of attorneys and clients that could be targeted by this Rule because of their religious beliefs about these sensitive topics, the vigorous protection of First Amendment rights plays an important role in preserving viewpoint diversity in the legal profession.

As the district court held and Respondents conceded below, Rule 8.4(g) constitutes viewpoint-based and content-based discrimination, App. 100a; Resp'ts Br. (C.A. Dkt. 22) at 2, 16, and such discrimination violates the Free Speech Clause. Its complaint-driven, case-by-case enforcement provides a vehicle for viewpoint discrimination by the Board. App. 95a-100a. The district court also correctly held that the Rule is unconstitutionally vague under the Fourteenth Amendment. App. 127a.

The Third Circuit acknowledged that Greenberg "asserts standing based on an ongoing chill to his speech." App. 20a. Yet it dismisses his concern as not "objectively reasonable or fairly traceable to the challenged Rule," ignoring that the injury here *is* the chilling effect on speech. *Id.* In *Elrod* v. *Burns*, where this Court held that "the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury," one of the plaintiffs had merely been *threatened* with discharge, and others had agreed to support the Democratic Party to avoid the threat of discharge. 427 U.S. 347, 373-374 (1976). Those plaintiffs still had standing and still deserved injunctive relief. So too here. It is enough that Greenberg's speech and First Amendment activities are threatened by the Rule, that multiple attorneys and students have told him

they took offense at his presentations, App. 228a, and that he has curtailed his talks to avoid investigation or discipline. App. 233a (Greenberg "will refrain from conducting speaking engagements on controversial issues as a result [of the Rule]" and "Greenberg's self-censorship will extend to excluding, limiting, and sanitizing the examples used in his speaking engagements to illustrate his points, in order to reduce the risk of an audience member reporting his expression to ODC."). That chilling effect violates the First Amendment.

This Court has consistently held that laws which have a chilling effect on speech—or pose a risk of chilling speech—violate the First Amendment. "Premised on mistrust of governmental power, the First Amendment stands against attempts to disfavor certain subjects or viewpoints." *Citizens United* v. *FEC*, 558 U.S. 310, 340 (2010) (finding that First Amendment prohibited law banning corporate expenditures for electioneering communications, because it chilled political speech). "The Government may not by these means deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration." *Id.* at 341. See also *Americans for Prosperity Found.* v. *Bonta*, 141 S. Ct. 2373, 2388 (2021) (law's donor requirement disclosure may deter association, thereby creating "a risk of a chilling effect" which was enough to violate the First Amendment because such "freedoms need breathing space to survive") (internal citations omitted). In *Reno* v. *ACLU*, the Court found that the Communications Decency Act was "a content-based regulation of speech" that was unconstitutionally vague and overbroad. 521 U.S. 844, 871 (1997). In

particular, "[t]he vagueness of such a regulation raises special First Amendment concerns because of its obvious chilling effect on free speech," and "this increased deterrent effect, coupled with the 'risk of discriminatory enforcement' of vague regulations, poses great[] First Amendment concerns." *Id.* at 871-872 (internal citations omitted). see also *Munson*, 467 U.S. at 957 (statute regulating fundraising activity "create[d] an unnecessary risk of chilling free speech" and was subject to facial attack due to imprecise and overbroad language).

A. Rule 8.4(g) violates the First Amendment by censoring the speech of religious attorneys.

Government officials may not prevent citizens from speaking religious messages or compel them to speak messages that violate their sincere religious beliefs. See *West Virginia Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."). Government officials may not condition a public benefit on affirming or abjuring a specific set of beliefs or policy statements. See *Agency for Int'l Dev.* v. *All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 218 (2013) ("By requiring recipients to profess a specific belief, the Policy Requirement goes beyond defining the limits of the federally funded program to defining the recipient."). Simply put, compelling individuals to mouth support for views they find objectionable violates the Free Speech Clause. See

Janus v. *American Fed'n of State, Cty., & Mun. Emp., Council 31*, 138 S. Ct. 2448, 2463-2464 (2018).

These protections are even more robust when religious speech is implicated. As this Court held in *Kennedy* v. *Bremerton School District*, the Free Exercise and Free Speech Clauses "work in tandem." 597 U.S. 507, 523 (2022). "Where the Free Exercise Clause protects religious exercises, whether communicative or not, the Free Speech Clause provides overlapping protection for expressive religious activities." *Id.* This double protection for religious speech is "no accident," because "'government suppression of speech has so commonly been directed *precisely* at religious speech that a free-speech clause without religion would be Hamlet without the prince.'" *Id.* at 523-524 (quoting *Capitol Square Review & Advisory Bd.* v. *Pinette*, 515 U.S. 753, 760 (1995) (emphasis in original)).

By participating in the legal profession, attorneys do not forfeit the First Amendment's protections. This Court has long held that "disciplinary rules governing the legal profession cannot punish activity protected by the First Amendment." *Gentile* v. *State Bar of Nev.*, 501 U.S. 1030, 1054 (1991). Respondents' assertion that "[o]rdinary First Amendment standards do not apply" to the regulation of attorneys is unfounded. Resp'ts Br. at 26-28. In *National Institute of Family & Life Advocates ("NIFLA")* v. *Becerra,* this Court held that "governments have no power to restrict expression because of its message, its ideas, its subject matter, or its content." 585 U.S. 755, 766 (2018) (internal citations omitted). The Court held that the First Amendment protects professional speech,

including attorney speech, when the government seeks to regulate its content. *Id.* at 771. The only instances when professional speech receives less protection are when laws require disclosure of "factual, noncontroversial information," or when laws seek to regulate professional conduct rather than speech. *Id.* at 768. The Court repeatedly mentioned lawyers as professionals deserving First Amendment protection, "appl[ying] strict scrutiny to content-based laws that regulate the noncommercial speech of lawyers." *Id.* at 771 (citing *Reed* v. *Town of Gilbert, Ariz.*, 576 U.S. 155, 167 (2015); *NAACP* v. *Button,* 371 U.S. 415, 438-439 (1963); and *In re Primus,* 436 U.S. 412, 432 (1978)). The Court acknowledged that professionals often disagree about important issues affecting their duties; for example, "lawyers and marriage counselors might disagree about the prudence of prenuptial agreements or the wisdom of divorce." *Id.* at 772. The Court concluded that "the people lose when the government is the one deciding which ideas should prevail." *Id.* Explicitly rejecting the notion that the professional-speech doctrine removes First Amendment protections from lawyers merely because States have imposed a licensing requirement, the Court held that "[s]tates cannot choose the protection that speech receives under the First Amendment, as that would give them a powerful tool to impose 'invidious discrimination of disfavored subjects.'" *Id.* at 773 (quoting *Cincinnati* v. *Discovery Network, Inc.,* 507 U.S. 410, 423-424, n.19 (1993)).

Here, Rule 8.4(g) triggers strict scrutiny under the Free Speech Clause because it regulates speech based on content and viewpoint, and the First Amendment protects attorneys in both instances. Neither of the

narrow exemptions the *NIFLA* Court identified applies here. Respondents freely admit that Rule 8.4(g) regulates "harassing and discriminatory speech," and the sweeping scope of the Rule goes far beyond factual disclosures. Resp'ts Br. at 57; see also Josh Blackman, *ABA Model Rule 8.4(g) in the States*, 68 CATH. U. L. REV. 629, 637 (2019). Furthermore, because many lawyers hold sincere religious beliefs that inform their viewpoints and client interactions, including beliefs about marriage, gender identity, and human life, the Rule also impinges on attorneys' free exercise rights. Given that the Free Speech Clause and Free Exercise Clause provide overlapping protection for religious speech, *Kennedy*, 509 U.S. at 523-524, the Rule violates both clauses by impermissibly discriminating against religious viewpoints on issues of public concern, such as marriage and gender identity. As this Court recognized in both *Barnette* and *NIFLA*, society benefits when diverse viewpoints are welcomed rather than stamped out by the government. Religious attorneys offer a particularly valuable perspective by drawing from the moral and ethical norms inherent in their own traditions. "It may be a theological teaching that convinces an attorney that a professional ethical standard is incomplete, and the attorney may be right." Leslie Griffin, *The Relevance of Religion to a Lawyer's Work: Legal Ethics*, 66 FORDHAM L. REV. 1253, 1261 (1998). Furthermore, "[t]he legal profession needs criticism to improve its own standards," and "from their own tradition, religious adherents may gain the insight and the wisdom to know that an ethical standard is deficient." *Id.* Instead of acknowledging the value that diverse religious viewpoints can bring to the legal profession,

Rule 8.4(g) short-circuits them by censoring religious speech on important matters of public concern.

B. Rule 8.4(g) deters lawyers from zealously representing faith-based and other pro bono clients.

If enforced, Rule 8.4(g) will curtail pro bono legal work. ABA Model Rule 6.1 requires lawyers to provide legal services to those unable to pay, suggesting that lawyers provide a "substantial majority" of their pro bono hours to "charitable" or "religious" organizations." ABA Model Rule 6.1(a)(2). Pennsylvania Rule 6.1 likewise encourages lawyers to provide pro bono services. Religious attorneys are often more inclined to engage in pro bono work because their faith motivates them to serve underprivileged communities free of charge. See, e.g., Griffin, *supra*, at 1257 ("[R]eligion will influence some to spend their legal careers in service of the poor and others to resist the material pressures of the profession[.]"). For example, a large network of Christian legal aid clinics provide pro bono legal services, prayer, and holistic support to those who cannot afford legal assistance. However, because Rule 8.4(g) applies to the "practice of law," which includes pro bono work, it would infringe on attorneys' ability to provide pro bono assistance that aligns with their religious and philanthropic missions. Many legal aid organizations focus on specific populations; for example, immigrants from certain regions facing violence or seeking asylum, children who are undocumented, and women and girls facing domestic violence. Under Rule 8.4(g), these clinics and the attorneys serving them could be charged with

"discriminating" on the basis of religion, sex, national origin, or age.

For the millions of Americans whose faith serves an important role in their daily lives,[5] Rule 8.4(g) would especially harm their religious communities by decreasing access to quality legal representation. Because this Rule expressly includes "sex, gender identity or expression . . . sexual orientation," and "marital status," it raises concerns for attorneys who represent religious clients or organizations. Regardless of the attorney's own religious affiliation (or lack thereof), the Rule would have a chilling effect on the attorney's ability to zealously represent a faith-based client because the attorney could be disciplined for "discrimination" in that client representation. In *Obergefell* v. *Hodges*, this Court emphasized that "religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned," and it encouraged "an open and searching debate" on the issue. 576 U.S. 644, 679-680 (2015).

At a cultural moment when controversy about abortion, gender identity, and marriage runs high, it is crucial to recognize how many diverse religious groups have long held sincere beliefs about these issues. At least 20 different faith groups believe that

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[5] According to the Pew Research Center, 53% of Americans reported that their religion is "very important in their daily life." Of this group, 73% believe that abortion should be illegal in all or most cases, and 76% oppose same-sex marriage. "Importance of religion in one's life," *Religious Landscape Study*, PEW RESEARCH CENTER (2014), https://perma.cc/BP9L-5NR9.

sex is biological and cannot or should not be changed to conform with a person's gender identity. These include Christian denominations such as the Amish community, Assemblies of God, and the Orthodox Church, but they also include minority faith groups such as Buddhism, Confucianism, the Falun Gong, Jehovah's Witnesses, and Shi'ah and Sunni Muslims.[6] These groups often face religious discrimination due to cultural prejudice or a lack of understanding by government officials, and thus it is especially important that they receive high quality, affordable legal counsel. Similarly, at least 13 different faith groups—including Hindus, Navajos, and Zoroastrians as well as Catholics and Protestants—believe that abortion is morally wrong because human life is sacred.[7]

Since religious clients and organizations act according to their sincerely held beliefs protected by the First Amendment, their attorneys must respect these beliefs in order to provide effective and zealous advocacy and representation under the Rules. For example, many faith-based homeless shelters such as the Downtown Hope Center in Anchorage, Alaska, have sex-segregated facilities or admit only biological females because they care for women who have

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[6] See, e.g., First Liberty Institute, *Public Comment on Section 1557 NPRM* (Oct. 3, 2022), at 4-9, https://perma.cc/97NU-VCMZ (detailing religious beliefs of 20 different faith groups on sex and gender).

[7] See, e.g., Kiarash Aramesh, *Perspectives of Hinduism and Zoroastrianism on abortion: a comparative study between two pro-life ancient sisters*, J. MED. ETHICS HIST. 12:9 (2019); *EXC, Inc.* v. *Kayenta District Court*, No. SC-CV-07-10 (Navajo Nation Supreme Court, Sept. 10, 2010).

experienced domestic violence. When the Hope Center was sued by a transgender plaintiff for allegedly violating a local nondiscrimination policy, Christian attorneys represented the Center in court. *Downtown Soup Kitchen* v. *Mun. of Anchorage*, 576 F. Supp. 3d 636 (D. Alaska 2021). When one of the attorneys zealously defended his client's religious liberty, the Anchorage Equal Rights Commission brought charges *against his firm*, in addition to his client, for violating local "non-discrimination" ordinances. *Pamela Basler* v. *Downtown Hope Center, and Brena, Bell & Clarkson, P.C.*, No. 18-167 (AERC filed May 15, 2018). This action violated the First Amendment rights of both attorney and client and unlawfully interfered with the attorney-client relationship.

As a nonprofit legal organization representing pro bono clients of all faiths, First Liberty Institute currently represents and has represented multiple clients who were wrongfully accused of discrimination because of their religious beliefs. Enforcing Rule 8.4(g) against First Liberty attorneys may compromise their representation, as they would be forced to choose between zealously advocating for their client's rights and facing bar discipline. Below are a few representative examples:

- Melissa and Aaron Klein, devout Christians, were accused of violating a local non-discrimination ordinance when they declined to create a custom cake for a same-sex wedding because it conveyed a message that would violate their Christian beliefs. State officials issued a devastating $135,000 fine that put them out of business. This Court granted,

vacated, and remanded the case in light of *303 Creative* v. *Elenis*. *Klein* v. *Or. Bureau of Lab. & Indus.*, 143 S. Ct. 2686 (2023). First Liberty continues representing the Kleins at the Oregon Court of Appeals.

- Robyn Strader is a Baptist nurse practitioner whose religious beliefs prevent her from prescribing contraceptives or abortifacient drugs. CVS refused to grant her a religious accommodation and fired her instead. First Liberty filed suit in January 2023. *Strader* v. *CVS Health Corporation*, No. 4:23-cv-00038-P (N.D. Tex. Jan. 11, 2023).
- Lacey Smith and Marli Brown are Christian flight attendants who were fired for asking respectful questions about Alaska Airlines' open support for the Equality Act. First Liberty filed suit in May 2022, and currently awaits a ruling on cross-motions for summary judgment. *Brown & Smith* v. *Alaska Airlines, Inc., et al.*, No. 2:22-cv-668 (W.D. Wash. filed May 17, 2022).
- Valerie Kloosterman is a Christian physician assistant whose religious beliefs prevent her from using biology-obscuring pronouns or participating in gender-transition drugs or procedures. University of Michigan Health refused to grant her a religious accommodation and fired her instead. First Liberty filed suit in October 2022, and the court allowed her Free Exercise, Equal Protection, Title VII, and Elliot-Larsen Civil Rights Act claims to

proceed. *Kloosterman* v. *Metropolitan Health*, No. 1:22-cv-00944 (W.D. Mich. Sept. 20, 2023).

- Dr. Johnson Varkey is a Christian biology professor who was fired because a few students complained when he taught that sex is determined by X and Y chromosomes. First Liberty reached a favorable settlement ensuring his reinstatement in February 2024.

- Dr. Eric Walsh is a devout Seventh-Day Adventist who is a public health expert and pastor. After Georgia hired him as district health director, they listened to his sermons and fired him because of their religious content. After litigation, Georgia agreed to pay Dr. Walsh $225,000 to remedy its religious discrimination. *Walsh* v. *Georgia Dep't of Public Health, et al.*, No. 1:16-cv-01278 (N.D. Ga. dismissed Feb. 15, 2017).

- U.S. Air Force Colonel Bohannon, despite twenty years of decorated military service, was accused of unlawful discrimination by Air Force investigators because he requested a religious accommodation from signing a same-sex spouse appreciation certificate due to his faith. First Liberty appealed to the Secretary of the Air Force, and his record was cleared.

In each of these cases, religious individuals were targeted because of their sincerely held beliefs regarding gender, sexuality, human life, and marriage, which came into perceived conflict with prevailing "non-discrimination" policies in their

localities or workplaces. Without zealous pro bono legal representation, these clients would have had no remedy for the discrimination they faced because of their beliefs.

In the same way, Independence Law Center has represented clients whose religious and moral beliefs have resulted in legal conflict and the need for legal representation. The ability to address such needs will be jeopardized under Rule 8.4(g). The Law Center has both represented and sued schools regarding such issues as locker room privacy and athletic opportunities for female athletes. See, e.g., *Doe* v. *Boyertown Area Sch. Dist*., 893 F.3d 179 (3d Cir. 2018) (regarding privacy facilities). Since these issues also involve beliefs about human sexuality and gender, representing clients in these matters has become controversial. Rule 8.4(g) strikes at the heart of this controversy by restricting viewpoint and content on these topics. Likewise, Independence Law Center's representation of clients' religious, pro-life beliefs concerning abortifacient drugs stirred criticism by those who had a different view of sex-based rights. See, e.g., *Burwell* v. *Hobby Lobby Stores, Inc.*, 573 U.S. 682, 691 (2014) (representing a Mennonite family and their business). If Rule 8.4(g) can be used as a weapon in such situations, the traditional role of attorneys in providing counsel to diverse clients will be undermined.

In sum, "[a]nti-discrimination laws and policies serve undeniably admirable goals, but when those goals collide with the protections of the Constitution, they must yield—no matter how well-intentioned. *Fellowship of Christian Athletes* v. *San Jose Unified*

Sch. Dist. Bd. of Educ., 82 F.4th 664, 695 (9th Cir. 2023) (en banc). "And 'religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.'" *Fulton* v. *City of Philadelphia*, 593 U.S. 522, 532 (2021) (quoting *Thomas* v. *Review Bd. of Ind. Employment Security Div.*, 450 U.S. 707, 714 (1981)). Not only has the First Amendment always protected unpopular viewpoints, it provides extra protection for religious viewpoints under both the Free Speech and Free Exercise Clauses. *Kennedy*, 509 U.S. at 523.

For these robust protections to have any meaning for the vast majority of Americans without a law degree, the same protections must extend to the attorneys who represent them, or else those clients cannot seek justice.

CONCLUSION

The Court should grant certiorari.

Respectfully submitted,

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