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

BRIEF OF *AMICI CURIAE* THE NATIONAL LEGAL FOUNDATION, PACIFIC JUSTICE INSTITUTE, AND JUSTICE & FREEDOM LAW CENTER *in Support of Petitioners*

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INTERESTS OF THE *AMICI CURIAE*[1]

The **National Legal Foundation** (NLF) is a public interest law firm dedicated to the defense of First Amendment liberties, including the freedoms of speech, assembly, and religion. The NLF and its donors and supporters, in particular those from Pennsylvania, are vitally concerned with the outcome of this case because of its effect on the free exercise, free speech, and peaceable ssembly rights of individuals. It previously filed comments concerning Pennsylvania's proposed adoption of Rule 8.4(g).

The **Pacific Justice Institute** (PJI) is a non-profit legal organization established under section 501(c)(3) of the Internal Revenue Code. Since its founding in 1997, PJI has advised and represented in court and administrative proceedings thousands of individuals, businesses, and religious institutions, particularly in the realm of First Amendment rights. As such, PJI has a strong interest in the development of the law in this area. PJI has an office near Philadelphia, Pennsylvania, and its counsel have and will continue to represent clients in matters that are similar to those identified by Mr. Greenberg.

The **Justice & Freedom Law Center** (JFLC) is a public interest law firm based in Illinois that exists to advance life, faith, family, and religious

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

freedom in public policy and culture from a Christian worldview. A core value of JFLC is to uphold religious freedom and conscience rights for all individuals and organizations. JFLC is vitally concerned with the outcome of this case because of its effect and implications on the free exercise of religion, freedom of speech, and freedom of assembly rights of individuals. The ABA has pushed for Illinois to adopt its model Rule 8.4(g), as Pennsylvania has done in modified form.

SUMMARY OF THE ARGUMENT

This Court exalts substance over form. The Third Circuit below did the opposite. As a result, it confused standing and mootness, flipping the burden of persuasion to Mr. Greenberg because he made a technical mistake of misnaming his revised complaint "amended," when it was really "supplemental." And there is no question that the harm occasioned by the Third Circuit in exalting form over substance was prejudicial, as the declaration on which that court relied to find no standing falls far short of establishing that the ethics rule Mr. Greenberg challenges will not be applied against him, or attempted to be. The upshot is that the Third Circuit improperly avoided resolution of this matter of critical importance both for Mr. Greenberg and the bar at large. This Court should grant the petition, reverse, and remand.

ARGUMENT

I. FRCP 15, and This Court, Prioritize Substance over Form; the Third Circuit, in Conflict with This Court's Precedent and That of Other Circuits, Did the Opposite and Improperly Considered the Issue as Standing, Rather Than Mootness

That this Court requires examination of the *substance* of affairs, rather than their form, is neither surprising nor a doctrine newly minted. The doctrine applies with respect to antitrust laws,[2] the retirement laws,[3] the tax laws,[4] and the securities laws.[5] *Papasan v. Allain*,[6] is particularly instructive, as it involved an issue of pleading. There, the issue was whether the Eleventh Amendment withheld jurisdiction from the federal courts due to the relief requested against the state. This Court held that "we look to the substance rather than to the form of the relief sought" when making a determination.[7]

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[2] *See, e.g.*, *Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183, 191 (2010) (eschewing "formalistic distinctions" for the substance of the relationship); *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 760-63 (1984) (ruling that the Court looks to the substance of transactions, not their form).

[3] *See, e.g.*, *Aetna Health Inc. v. Davila*, 542 U.S. 200, 214-15 (2004) (holding in issue of preemption under ERISA that form, not substance, controls).

[4] *See, e.g.*, *Frank Lyon Co. v. United States*, 435 U.S. 561, 572-73 (1978).

[5] *See, e.g.*, *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967).

[6] 478 U.S. 265 (1986).

[7] *Id.* at 279.

The Federal Rules of Civil Procedure are certainly animated by that very proposition, moving away, as they did, from form pleadings almost a century ago. Indeed, Rule 1 requires them to "be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding."[8] As this Court stated in *Conley v. Gibson*, "The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits."[9]

Rule 15, the center of controversy here, demands nothing less. By its very terms and in regard to a related matter, it provides that pleading technicalities are not determinative:

> When an issue not raised by the pleadings is tried by the parties' express or implied consent, it must be treated in all respects as if raised in the pleadings. A party may move—at any time, even after judgment—to amend the pleadings to conform them to the evidence and to raise an unpleaded issue. But failure to amend does not affect the result of the trial of that issue.[10]

To the particular point here, Rule 15 defines both an "amended" and a "supplemental" pleading and their treatment. A revision of a pleading relates

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[8] Fed. R. Civ. P. 1.
[9] 355 U.S. 41, 48 (1957); *accord Foman v. Davis*, 371 U.S. 178, 181-82 (1962).
[10] Fed. R. Civ. P. 15(b)(2).

back if "the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading."[11] A "supplemental" pleading, on the other hand, "set[s] out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented."[12]

The distinction between an "amended" and a "supplemental" pleading, as set out in Rule 15, dovetails with the difference between standing and mootness, as intervening circumstances during litigation bring mootness into play, not standing.[13] Here, Mr. Greenberg revised his pleading to include events that occurred *after* filing of his initial complaint. No matter the nomenclature he used in the revised pleading, it was a "supplemental" one, and the attempt of the State Bar to dispose of his case at that juncture involved mootness, not standing. The fact that he called his revised pleading "amended," rather than supplemental, did not make it relate back to the date of filing or cancel out Rule 15's substantive definition of what type of a pleading it was. The Ninth Circuit has it right: "The erroneous characterization of the corrected pleading as an 'amended complaint' rather than as a supplemental pleading is immaterial."[14]

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[11] *Id.* (c)(1)(B.
[12] *Id.* (d).
[13] *See W. Va. v. EPA*, 142 S. Ct. 2587, 2607 (2022).
[14] *United States ex rel. Wulff v. CMA, Inc.*, 890 F.2d 1070, 1073 (9th Cir. 1989).

As explained in the petition, the other circuits recognize and enforce the confluence of amended/supplementary pleading rules of Rule 15 and the standing/mootness doctrines. The Third Circuit has muddied the waters with its decision in this case.

II. This Appeal Involves an Important Issue That Is Recurring Repeatedly and Is Far from Moot

The Third Circuit held that Mr. Greenberg does not have standing because his fear of violation and challenge under new Rule 8.4(g) is too remote, largely based on a declaration submitted by the bar's general counsel. The district court properly held that he had standing and that the declaration did not moot his claims. (App. 47a-74a.) Indeed, his claims are ripe for resolution and cannot be defeated by a declaration that has no binding authority, cannot stop complaints being filed and investigated, can be withdrawn at any time, was written by someone who may be replaced at any time, and was drafted with the obvious purpose of trying to moot this litigation after the court had already found standing and issued a preliminary injunction.

This case presents a matter of critical importance to lawyers throughout the country. The conclusion of the Third Circuit that the threat to Mr. Greenberg is remote, and thus his case is moot, is unfounded, as recent examples amply demonstrate.

By any measure, Michael McConnell is a legal luminary. An honors graduate of Chicago Law School, he clerked for Chief Judge Skelly Wright of the D.C.

Circuit and Justice William Brennan. He served as a federal circuit court judge for seven years and is currently a chaired professor and the director of the Constitutional Law Center at Stanford Law School. He has previously held chaired professorships at Chicago and Utah Law Schools and has been a visiting professor at Harvard and NYU. He has published extensively, is a noted expert in religious liberty under our Constitution and has argued sixteen cases before this Court.[15] This Court has repeatedly cited his scholarship in its opinions.[16]

But he was on the hot seat after May 27, 2020, because, on that day, Professor McConnell offended. Here is his recounting of the incident shortly after it occurred:

> On Wednesday, in connection with the debates over ratification of the Constitution in Virginia, I quoted an ugly racial epithet used by Patrick Henry. I make it a priority in my class to emphasize issues of racism and slavery in the formation of the Constitution, and directly quote many statements by supporters and opponents of slavery. This was a particularly ugly incident, where the speaker sought to build opposition to the Constitution by stoking the racism of his

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[15] https://law.stanford.edu/directory/michael-w-mcconnell/ (last visited Feb. 27, 2024).

[16] *See, e.g.*, *Our Lady of Guadalupe Sch. v. Morrisey-Berru*, 140 S. Ct. 2049, 2060 n.9 (2020); *id.* at 2079 (Sotomayor, J., dissenting); *Espinoza v. Mont. Dep't of Rev.*, 140 S. Ct. 2246, 2258 (2020); *id.* at 2264, 2266 (Thomas, J., concurring); *id.* at 2276 (Gorsuch, J., concurring).

> Virginia audience. I presented the quotation in its historical context, emphasized that they were not my words, and condemned their use. It is vitally important to teach the history of the American Founding warts and all, and not to bowdlerize or sugar-coat it.[17]

Some in his class expressed outrage that he would speak out loud the n-word, even when quoting its use by another and in historical context, and they called for him to be disciplined by the school. Professor McConnell in his responsive statement pleaded his good intentions: "I hope everyone can understand that I made the pedagogical choice with good will—with the intention of teaching the history of our founding honestly."[18] Then, despite his declared belief that it is "vitally important . . . not to bowdlerize or sugar-coat" our nation's history, Professor McConnell concluded that he would self-censor forthwith: "in light of the pain and upset that this has caused many students, whom I care deeply about, I will not use the word again in the future."[19]

Let us use this incident involving Professor McConnell to analyze Pennsylvania's new Rule 8.4(g). Would he be subject to discipline under it for what he said in his classroom? Would his professed innocent

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[17] Michael W. McConnell, "Statement to Stanford Law School Community" (May 29, 2020), *found at* https://wustllawreview.org/2021/10/23/statement-by-michael-mcconnell-to-stanford-law-school-community/ (last visited Feb. 27, 2024).
[18] *Id.*
[19] *Id.*

intention be enough to insulate him? Whether found guilty or not of violating Rule 8.4(g), could he potentially be charged under it? Even framing these questions shows that Mr. Greenberg's complaint is ripe, as they are enough to show that his speech, like that of Professor McConnell, could be chilled.

> Rule 8.4 provides in part,
>
> 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 . . . .[20]

Was Judge McConnell's classroom speech "in the practice of law"? Comment 3, adopted along with the rule, doesn't mention classroom teaching expressly, but it does define the "practice of law" as including "bar association activities where legal education credits are offered," where Greenberg teaches.

Was Professor McConnell engaging in "conduct"? This seems clear, as his active voicing of a particular word caused the brouhaha. And Comment 3 includes "speeches," "communications," and "presentations" in its definition of "conduct in the practice of law."

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[20] Pa.R.P.C. 8.4.

Did Professor McConnell, by quoting that n-word, "knowingly" engage in "harassment or discrimination"? He certainly was accused of it. And he certainly intended to quote the n- word and had knowledge that it is considered offensive. But is that the type of general intent that is "knowing" under the rule, or must there be specific intent to harass or discriminate against a particular person? Although Mr. Farrell in his declaration says that the offending conduct must be directed at an individual, is it enough that Professor McConnell knew that African Americans were listening to his teaching that day, or did he have to know those students individually? Comment 5, defining "discrimination," certainly doesn't clearly answer this question.

Assuming Rule 8.4(g) applied in Professor McConnell's situation, this should be enough to show that he would have reason to fear that someone might complain to the bar about his quoting the n-word in a law school or CLE classroom. In this context, it is not sufficient to tell him that he should just "stay the course" and "fight for his convictions" about what he identifies as "vitally important" pedagogically for his students. He has already promised never to do it again due to the pushback he got, even without the threat of losing his license that Rule 8.4(g) adds to the mix. Similarly, even the threat of the initiation of disciplinary procedures—with their attendant time, trouble, and publicity—chills the speech and conduct of Pennsylvania lawyers, as Mr. Greenberg alleged.

What if Professor McConnell (or Mr. Greenberg) next wishes in one of his classes to criticize the majority opinion in *Obergefell v.*

Hodges?[21] Surely that would be beyond complaint, especially as the four justices in dissent roundly criticized it and the theory of judicial decision making it represented,[22] and Mr. Farrell seems to suggest that it would be okay. Think again. Justice Parker of the Alabama Supreme Court, while running for reelection, had the temerity to make just such criticisms in a radio interview. The Southern Poverty Law Center, even without a Rule 8.4(g) counterpart on the books in Alabama, filed an ethics complaint against him for his alleged "assault [on] the authority and integrity of the federal judiciary," which prompted an ethics investigation and ensuing litigation.[23]

Of course, in our current climate, it would be no defense for Judge McConnell to say that Frederick Douglass also quoted people who used the n-word—and that he spelled out the whole word in his autobiographies.[24] That was then, and this is now. An open letter signed by a diverse group of 150 scholars, writers, and artists and published in *Harpers*

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[21] 576 U.S. 644 (2015).

[22] *See id.* at 686-713 (Roberts, C.J., dissenting); *id.* at 713-20 (Scalia, J., dissenting); *id.* at 721-36 (Thomas, J., dissenting); *id.* at 736-42 (Alito, J., dissenting).

[23] *See Parker v. Judicial Inquiry Comm'n of Ala.*, 2017 WL 3820958 (M.D. Ala., Aug. 31, 2017), and 295 F. Supp. 3d 1292 (M.D. Ala. 2018) (enjoining enforcement of state's judicial code of ethics to the extent it chilled speech by judges about other than pending cases in the state). The quotation from SPLC's complaint is found at 2017 WL 3820958 at 3.

[24] *See, e.g.*, Frederick Douglass, *Autobiographies* 207 (Library of Am. 1994).

concluded, "[I]t is now all too common to hear calls for swift and severe retribution in response to perceived transgressions of speech and thought."[25] All this is to say, it is no idle imagination that believes that Rule 8.4(g) will be used to chill, repress, and punish unpopular speech, including Mr. Greenberg's.

Mr. Greenberg is a Program Officer at the Foundation for Individual Rights and Expression, whose mission is "to defend and sustain the individual rights of all Americans to free speech and free thought—the most essential qualities of liberty." App. 211a-212a; www.thefire.org. In this position, and as a member of the First Amendment Lawyers Association, Mr. Greenberg speaks, writes, and conducts continuing legal education on a number of topics, including freedom of speech, freedom of association, due process, legal equality, and religious liberty. Mr. Greenberg has written and spoken against banning hate speech on university campuses and university regulation of hateful online expression. Mr. Greenberg's presentations include summarizing and using language from a number of cases that have in the past offended listeners and will likely do so in the future. (App. 213a-216a.) His risk is greater, not less, than Professor McConnell and Justice Parker had before they were accused of discriminatory harassment.

Yet another fact confirms that Mr. Greenberg's case is not moot: a bar complaint under challenged Rule 8.4(g) may be filed by any person. Just as in

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[25] https://harpers.org/a-letter-on-justice-and-open-debate/ (last visited Feb. 27, 2024).

Susan B. Anthony List v. Driehaus,[26] this bolsters the credibility of that threat because "the universe of potential complainants is not restricted to state officials who are constrained by explicit guidelines or ethical obligations . . . ."[27] No letter from the State Bar's current general counsel about whether he would find a complaint worth pursuing is sufficient to eliminate the harm from a complaint being filed in the first place.

III. This Is Exactly the Type of Case, Involving an Issue of Both National and Personal Interest Where the Issues Are Well Joined, That the Constitution Instituted the Judiciary to Resolve

This case is about a speech code for attorneys promulgated by the ABA has both nationwide and intensely personal interests for both attorneys and the public at large. Because this case has not been previously addressed by this Court, has been well joined by parties representing both sides of the controversies occasioned by the ABA Model Rule 8.4(g), and deals with issues that have been carefully evaluated by lower courts and commentators, it is precisely the sort of "important question of federal law" that deserves this Court's review and decision. *See* S. Ct. R. 10(c).

Pennsylvania Rule 8.4(g) is patterned after ABA Model Rule 8.4(g), which was adopted in 2016.[28]

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[26] 573 U.S. 149 (2014).

[27] *Id.* at 164.

[28] Standing Comm. on Ethics & Prof'l Responsibility, et al., Report to the House of Delegates 1 (Aug. 8, 2016), *found at*

Since 2016, two states have adopted Model Rule 8.4(g) without change; nine states, including Pennsylvania, have adopted a close version of Model Rule 8.4(g); and at least eight states have rejected it outright.[29] Many of those states rejecting Model Rule 8.4(g) have cited to the religious freedom and free speech concerns at issue in this case,[30] echoing academic criticism.[31]

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http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/final_revised_resolution_and_report_109.authcheckdam.pdf [https://perma.cc/K2XB-T76E].

[29] Dennis Rendleman, *ABA Model Rule 8.4(g): Then and Now, found at* https://www.americanbar.org//groups/government_public/publications/public-lawyer/2023-winter/aba-model-rule-8-4-g-then-now/ (last visited Feb. 24, 2024).

[30] *See, e.g., In re Idaho State Bar Resolution 21-01*, at 12-16 (Idaho Jan. 20, 2023), *found at* https://isc.idaho.gov/opinions/50356.pdf (last visited Feb. 27, 2024); 17 La. Att'y Gen. Op. 0114 (Sept. 8, 2017), (*found at* https://lalegal-17ethics.org/wp-content/uploads/2017-09-08-LA-AG-Opinion-0114-re-Proposed-Rule-8.4f.pdf?x16384; *In the matter of the Amendment of Supreme Court Rule SCR 20:8.4*, No. 22-02 (Wis. S. Ct., July 11, 2023), *found at* https://www.wicourts.gov/supreme/docs/2202petition.pdf#:~:text=In%20the%20Matter%20of%20the%20Amendment%20of%20Supreme,SCR%2020%3A8.4%28i%29%20with%20ABA%20Rule%208.4%28g%29%2C%20a%20modification (last visited Feb. 27, 2024).

[31] *See, e.g.*, Michael McGinniss, *Expressing Conscience with Candor: Saint Thomas More and First Freedoms in the Legal Profession*, 42 Harv. J. L. & Pub. Pol'y 173 (2019); Ronald D. Rotunda, *The ABA Decision to Control What Lawyers Says: Supporting 'Diversity' But Not Diversity of Thought* (Oct. 6, 2016), *found at* https://www.heritage.org/report/the-aba-decision-control-what-lawyers-say-supporting-diversity-not-diversity-thought (last visited Feb. 24, 2024); Stephen Gillers, *A Rule to Forbid Bias and*

Far from presenting a moot case, Mr. Greenberg presents one of the type this Court has repeatedly held is appropriate for forward-looking, injunctive and declaratory relief. This Court considers such cases when there is a credible threat of future enforcement and so long as the threat is not "imaginary or wholly speculative," *Babbitt v. Farm Workers Nat'l Union*, 442 U.S. 289, 302 (1979), "chimerical," *Steffel v. Thompson*, 415 U.S. 452, 459 (1974), "wholly conjectural," *Golden v. Zwickler*, 394 U.S. 103, 109 (1969), or relying on "a highly attenuated chain of possibilities." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 410 (2014). But all forward-looking, injunctive, and declaratory cases, by definition, involve some chain of possibilities ending in the challenged provision "may be" applied against the plaintiff.

Babbitt and *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 718 (2007), provide apt analogies to this case. In *Babbitt*, this Court found standing by assuming that the plaintiff would (a) engage in publicity and (b) inadvertently state an untruth (c) that would be apprehended as such by state authorities (d) who would bring charges (even though they had never done so before). 442 U.S. at 301-02. This Court found the plaintiffs in that situation were "not without some reason" to fear application of the challenged statute,

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Harassment in Law Practice: A Guide for State Courts Considering Model Rule 8.4(g), 30 Geo. J. of Legal Ethics 195 (2017); *see generally* Symposium, *The Challenges of Constructing ABA Model Rule 8.4(g)*, 50 Hofstra L. Rev. 501 (2022).

such that the "positions of the parties [we]re sufficiently adverse . . . to present a case or controversy . . . ." *Id.* at 302. In *Parents Involved*, this Court entertained a suit for injunctive relief when the children were subject to the challenged school policy and, therefore, "*may be* 'denied admission to the high schools of their choice when they apply for those schools in the future.'" 551 U.S. at 718 (emphasis added). Mr. Greenberg's concerns are just as real as those involved in *Babbitt* and *Parents Involved*, and his case is not moot because he has not yet been charged and the current general counsel thinks he would win if he were.

For forward-looking cases like Mr. Greenberg's, this Court has summarized, "Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Md. Cas. Co. v. Pac. Coal & Oil Co.*, 312 U.S. 270, 273 (1941); *see also Babbitt*, 442 U.S. at 297-98. Mr. Greenberg amply meets that test.

Judge Niemeyer remarked in dissent in a recent Fourth Circuit case in which a panel used standing to avoid deciding a well-joined case that involves significant personal and national interests, "The majority's conclusion is, in the circumstances of this case, an unfortunate abdication of judicial duty with respect to a very important constitutional issue that is directly harming and will likely continue to harm the Parents in this case by usurping their constitutionally protected role." *John and Jane Parents 1 vs. Montgomery Cnty. Pub. Schs.*, 78 F.4th

622, 637 (4th Cir. 2023), *cert. pending* (No. 23-601). The Third Circuit's decision below deserves the same condemnation.

CONCLUSION

The petition presents an issue of national importance that is well joined. Mr. Greenberg has standing, and his claim is not moot. This Court should grant the petition, reverse, and remand for consideration of the merits.

Respectfully submitted this
4th day of March 2024,

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