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 UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Similar to the rules of professional conduct in 40 States, the District of Columbia, and three U.S. territories, and the judicial codes in 46 States and federal courts, Pennsylvania's Rule of Professional Conduct 8.4(g) prohibits harassment and discrimination in the practice of law by licensed Pennsylvania attorneys. Petitioner Zachary Greenberg brought a pre-enforcement constitutional challenge to that Rule. While the litigation was pending, the Pennsylvania Supreme Court promulgated a new version of Rule 8.4(g), and Greenberg revised his complaint. The new complaint challenged only the new Rule. The Third Circuit held that Greenberg lacks standing to challenge the new Rule because "[h]is planned speech does not arguably violate the Rule, and he faces no credible threat of enforcement." Pet.App.18a-19a.

The question presented is:

Whether the court of appeals correctly determined that Greenberg needed to establish standing to challenge the new Rule 8.4(g).

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INTRODUCTION

The Third Circuit's fact-bound application of settled standing principles does not warrant this Court's review. It is black-letter law that "plaintiffs must demonstrate standing for each claim that they press and for each form of relief that they seek." *TransUnion LLC v. Ramirez*, 594 U.S. 413, 431 (2021). When plaintiffs revise their complaints to add new claims, courts must assess whether plaintiffs have standing to bring those claims.

The Third Circuit correctly applied that principle here. Petitioner Zachary Greenberg brought a pre-enforcement First Amendment and vagueness challenge to Pennsylvania's Rule of Professional Conduct 8.4(g), which forbids attorneys from engaging in harassment and discrimination while practicing law. During the litigation, Pennsylvania amended the Rule. Greenberg then revised his complaint, abandoning his challenge to the original Rule and challenging the new Rule instead. Because Greenberg brought new claims challenging the new Rule, the Third Circuit correctly asked whether Greenberg had standing to challenge that new Rule.

Greenberg does not contest the Third Circuit's conclusion that he is not injured by the current version of Rule 8.4(g) and thus lacks standing to challenge that Rule. Rule 8.4(g) prohibits attorneys, "in the practice of law," from "knowingly engag[ing] in conduct constituting harassment or discrimination" against individuals. As the Third Circuit recognized, Greenberg's planned conduct—giving academic presentations on "hot-button free speech issues," Pet. 7—does not "come[] close" to violating that Rule. Pet.App.21a.

Instead, Greenberg's entire petition for certiorari focuses on a procedural issue addressed in a single footnote in the decision below. *See* Pet.App.18a n.4. Greenberg claims that the Third Circuit should have asked whether the amendments to the Rule mooted his challenge, not whether he had standing to bring that challenge in the first place. Greenberg asserts that standing is always assessed at the time of the original complaint and claims that the Third Circuit categorically required a new standing analysis whenever a plaintiff supplements his complaint.

But Greenberg ignores the distinguishing feature of this case: He revised his complaint to jettison his prior claims and to add new claims. It is axiomatic that plaintiffs bringing new claims need to show standing for those claims. The Third Circuit correctly applied that unexceptional principle. No circuit holds otherwise.

In any event, this case would be a singularly poor vehicle to resolve the question presented because Greenberg does not even attempt to show that resolution of that question makes any difference in this case. Greenberg lacks standing to challenge *both* versions of the Rule. Greenberg (at 9, 20) claims that the two versions of the Rule are materially "the same" and that the factual allegations in his two complaints are also "the same." Because Greenberg lacks standing to challenge the current Rule, as the Third Circuit held, he necessarily lacks standing to challenge the old Rule. This Court should not grant certiorari to unsettle basic Article III principles in a case where they did not affect the outcome.

STATEMENT

A. Pennsylvania's Original Rule 8.4(g)

The Pennsylvania Supreme Court regulates the practice of law in Pennsylvania. Pa. Const. art. V, § 10(c). The Court promulgates Pennsylvania's Rules of Professional Conduct and has empowered the Court's Disciplinary Board to enforce those rules. Pet.App.9a. The Board's Office of Disciplinary Counsel investigates complaints against Pennsylvania-licensed attorneys and dismisses 87% of such complaints without requesting a formal response. Pet.App.9a. Any disciplinary action requires the express approval of Pennsylvania's Chief Disciplinary

Counsel, respondent Thomas Farrell, with resulting discipline subject to de novo review by the Board and ultimately the Pennsylvania Supreme Court. Pet.App.9a.

This case involves Pennsylvania's Rule of Professional Conduct 8.4(g), which prohibits harassment and discrimination by licensed Pennsylvania attorneys while engaged in the practice of law. States began adding anti-harassment and/or antidiscrimination rules to their rules of professional conduct for attorneys in the 1990s. Andrew E. Taslitz & Sharon Styles-Anderson, *Still Officers of the Court*, 9 Geo. J. Legal Ethics 781, 836-39 (1996). In 1998, the American Bar Association (ABA) added an anti-discrimination comment to the Model Rules of Professional Conduct. That comment stated that lawyers commit misconduct by "knowingly manifest[ing] by words or conduct[] bias or prejudice" on various protected grounds "in the course of representing a client." 123 Ann. Rep. ABA, No. 2, at 46 (1998). In 2016, the ABA added Model Rule 8.4(g), prohibiting "harassment or discrimination" by lawyers "in conduct related to the practice of law." Model R. Prof'l Conduct 8.4(g).

Today, 30 States, the District of Columbia, and three U.S. territories have rules of professional conduct directly prohibiting attorney harassment and/or discrimination. Ten more States prohibit such behavior in comments to their rules. Forty-six States, the District of Columbia, three U.S. territories, and the Judicial Conference of the United States require judges to refrain from harassment and/or discrimination and to impose the same requirement on lawyers subject to those judges' control.[1] And

[1] These rules are collected in an addendum to respondents' brief below. Appellants' C.A. Br. Add.1-105, C.A. Dkt. 22.

this Court's Code of Conduct directs Justices not to "engage in behavior that is harassing, abusive, prejudiced, or biased." Code of Conduct for Justices of the Supreme Court of the United States Canon 3A (2023).

In June 2020, the Pennsylvania Supreme Court adopted a version of Model Rule 8.4(g). Pennsylvania prohibited lawyers from "knowingly manifest[ing] bias or prejudice, or engag[ing] in harassment or discrimination," while practicing law. Pet.App.12a. That formulation closely tracked Pennsylvania's existing ban on "manifest[ing] bias or prejudice, or engag[ing] in harassment," by Pennsylvania judges and "lawyers in proceedings before" them. Pa. Code of Judicial Conduct R. 2.3(B)-(C).

In August 2020, before Rule 8.4(g) took effect, Greenberg sued respondents—the Disciplinary Board's members and the Chief and Deputy Chief Disciplinary Counsel—in the U.S. District Court for the Eastern District of Pennsylvania. Pet.App.174a-207a. Greenberg alleged that the Rule was facially unconstitutional under the First Amendment and facially vague under the Fourteenth Amendment. Pet.App.202a-206a. In support of his standing to bring the pre-enforcement challenge, Greenberg alleged that he gives presentations on "controversial" topics like free-speech and due-process rights that might be viewed by some "as manifesting bias." Pet.App.180a-181a.

The day before Rule 8.4(g) was to take effect, the district court preliminarily enjoined the Rule, holding that Greenberg had standing and that the Rule violated the First Amendment. Pet.App.165a.

B. Pennsylvania's Current Rule 8.4(g)

1. Respondents withdrew an initial appeal to the Third Circuit to revise Rule 8.4(g). Pet.App.14a. In July

2021, the Pennsylvania Supreme Court promulgated a revised Rule 8.4(g), making it "professional misconduct for a lawyer to[,] … in the practice of law, knowingly engage in conduct constituting harassment or discrimination" on eleven protected grounds. Pet.App.14a-15a.

A comment to the Rule defined "the practice of law" to include "continuing legal education seminars" (CLEs). Pet.App.15a. Other comments defined "harassment" to require "inten[t] to intimidate, denigrate or show hostility or aversion" and "discrimination" to include "conduct that a lawyer knows manifests an intention[] to treat a person as inferior based on" a protected characteristic. Pet.App.15a-16a.

In August 2021, Greenberg informed the district court that he "intend[ed] to file an Amended Complaint challenging the amended Rule 8.4(g)." Joint Status Report 2, D. Ct. Dkt. 45. He then filed a revised complaint that challenged exclusively the new Rule. Pet.App.16a. That complaint sought declaratory and injunctive relief against "Rule 8.4(g)," which Greenberg defined to mean only the new, amended Rule. Pet.App.220a, 261a.[2]

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[2] Although Greenberg labeled the second complaint an "amended" complaint, he (at 20) now claims that it was a "supplemental" complaint because it recited facts arising after the original complaint's filing. *See* Fed. R. Civ. P. 15(d). Even if the second complaint was at least in part "supplemental," this distinction is "not of any significance," as Greenberg (at 20) concedes, and played no part in the proceedings below (citation omitted). Below, Greenberg said that he "amended" his complaint, Greenberg C.A. Br. 5, C.A. Dkt. 59, never called his second complaint "supplemental," and never cited Rule 15(d) governing "supplemental" complaints—despite amici's claim that this provision is "the center of controversy here," NLF Br. 4.

As before, Greenberg asserted standing on the theory that "some members of his audience" would allegedly consider his presentations about federal caselaw "offensive, denigrating, hostile and hateful" and file complaints on that basis. Pet.App.228a, 233a. For example, Greenberg alleged that he would like to voice racial epithets when summarizing cases like *Matal v. Tam*, 582 U.S. 218 (2017), involving the musical group "The Slants." Pet.App.227a. Greenberg also alleged that his CLE presentations cover *Citizens United v. FEC*, 558 U.S. 310 (2010)—a case Greenberg worries "that some view as sustaining race and class-based hostility in the election system." Pet.App.215a, 232a. Greenberg further sought to "oppos[e] hate speech bans"; "advocat[e] for the right of people to express intolerant religious views"; and "support[] Due Process protections for students accused of sexual misconduct." Pet.App.229a-231a.

The parties cross-moved for summary judgment. Respondents offered a declaration from Thomas Farrell, Pennsylvania's Chief Disciplinary Counsel, who personally approves every disciplinary complaint issued in the State. Pet.App.16a-17a. Farrell confirmed that the Office of Disciplinary Counsel interprets Rule 8.4(g) to cover only harassment and discrimination "target[ed] … against an identifiable person." Pet.App.17a. According to Farrell, Greenberg's planned presentations on "'controversial' positions or ideas" thus "do not violate Rule 8.4(g)," and any complaint so alleging would be dismissed as "frivolous." Pet.App.17a.

2. In March 2022, the district court granted summary judgment to Greenberg and permanently enjoined the new Rule 8.4(g). Pet.App.127a. The court concluded that Greenberg faced an "objectively reasonable" "chilling effect" on his speech and refused to "reconsider" its

determination that Greenberg had standing to challenge the old Rule. Pet.App.48a, 50a. Although no party argued that the case was moot, the court analyzed whether the amendments to the Rule or Farrell's interpretation mooted the case and concluded that they did not. Pet.App.56a. On the merits, the court held that Rule 8.4(g) facially violated the First Amendment and was facially vague under the Fourteenth Amendment. Pet.App.127a.

3. The court of appeals reversed with instructions to dismiss for lack of standing. Pet.App.30a. As the court explained, to invoke Article III jurisdiction, Greenberg needed to show "an actual or imminent injury that is fairly traceable to Rule 8.4(g)." Pet.App.18a. Because Greenberg filed a pre-enforcement challenge, he had to demonstrate that he (1) planned to engage in conduct "arguably proscribed by Rule 8.4(g)," and (2) faced a "credible threat of prosecution for engaging in such conduct." Pet.App.20a.

The court of appeals concluded that Greenberg made neither showing. Pet.App.20a. First, Greenberg's planned speeches did not "come[] close" to arguably violating Rule 8.4(g). Pet.App.21a. By its "plain language," Rule 8.4(g) prohibits "only knowing or intentional harassment or discrimination against a person." Pet.App.20a-21a. Greenberg's plan to "verbalize epithets found in judicial opinions within an academic discussion" and advocate "potentially controversial positions" did "not arguably violate the Rule." Pet.App.22a-23a. The court "buttressed" that conclusion with Chief Disciplinary Counsel Farrell's averment that Greenberg's planned conduct did not violate Rule 8.4(g)—an interpretation that "ma[de] sense" given the Rule's text. Pet.App.23a.

Second, Greenberg also could not establish "a credible threat of prosecution." Pet.App.24a. Respondents "disavow[ed] enforcement for any of Greenberg's planned conduct." Pet.App.24a. And, although "many state bar enactments parallel[] Pennsylvania's Rule 8.4(g)," none has ever led to discipline for anything "remotely comparable to Greenberg's planned speech discussing First Amendment jurisprudence." Pet.App.25a. Thus, virtually all of the examples in Greenberg's second complaint of sanctions against other speakers occurred "outside the attorney discipline process." Pet.App.29a. Ultimately, the alleged chilling of Greenberg's speech resulted from "his perception of the social climate, not Rule 8.4(g)." Pet.App.29a.

In a footnote, the court addressed Greenberg's argument that the court should have asked whether the amendments mooted Greenberg's claim, not whether Greenberg had standing to challenge the amended Rule. Pet.App.18a n.4. As the court explained, "Greenberg replaced his initial complaint with a subsequent pleading challenging the new Rule," so the court "look[s] to the amended complaint to determine jurisdiction." Pet.App.18a n.4 (citation omitted).

The court of appeals denied rehearing en banc without noted dissent. Pet.App.168a.

REASONS FOR DENYING THE PETITION

The Third Circuit's correct application of basic standing principles does not warrant certiorari. Consistent with this Court's and other circuits' precedent, the Third Circuit held that, because Greenberg brought new claims challenging the new Rule 8.4(g) in his second complaint, Greenberg needed to demonstrate standing for those claims.

Greenberg (at 3) attacks a caricature of the decision below in which the Third Circuit purportedly threw out two centuries of caselaw in a footnote to hold that supplemental complaints always "reset[] the standing clock." The Third Circuit did no such thing. The court analyzed the allegations in the new complaint because Greenberg brought new claims in that complaint. All agree that if Greenberg had continued challenging the *old* Rule, the Third Circuit would have needed to determine whether he had standing to challenge that Rule and whether the amendments to the Rule mooted his claim. But because Greenberg chose to challenge exclusively the *new* Rule, there was no mootness question before the Third Circuit. The only jurisdictional question was whether he had standing to bring that challenge. The Third Circuit's decision is correct, wholly consistent with Greenberg's cited cases, and does not "silently extinguish[]" mootness doctrine. Pet. 29.

Regardless, this case would be a uniquely poor vehicle because the petition for certiorari effectively concedes that the question presented is not outcome-determinative. Whether the amendments to Rule 8.4(g) go to mootness or standing, Greenberg needed to establish his standing to challenge some version of the Rule. And here, Greenberg (at 9, 20) says, nothing relevant changed between the two Rules and complaints. If he is right about that, then at whatever point the court of appeals analyzed standing, the answer would be the same: Greenberg cannot challenge any version of Rule 8.4(g) because he lacks an Article III injury.

I. The Decision Below Is Correct

The Third Circuit correctly required Greenberg to establish his standing to challenge the current Rule 8.4(g).

1. As this Court has often observed, "plaintiffs must demonstrate standing for each claim that they press and for each form of relief that they seek." *TransUnion LLC v. Ramirez*, 594 U.S. 413, 431 (2021); *accord Town of Chester v. Laroe Estates, Inc.*, 581 U.S. 433, 439 (2017) (collecting cases). "Standing is not dispensed in gross." *Davis v. FEC*, 554 U.S. 724, 734 (2008) (internal quotation marks and alteration omitted). Plaintiffs cannot bootstrap their standing to challenge one statutory provision to challenge another provision. *Id.* at 733-34.

A corollary to that basic rule is that when a plaintiff amends or supplements his complaint to "seek[] new relief, he must show … that he has standing to pursue" that relief. *Salazar v. Buono*, 559 U.S. 700, 731 (2010) (Scalia, J., concurring in the judgment); *accord id.* at 712 (plurality op.) ("Of course … it is still necessary to evaluate [the plaintiff's] standing … to seek [the new relief].").

This Court's decision in *United States v. Hays*, 515 U.S. 737 (1995), illustrates the point. There, the plaintiffs challenged Louisiana's congressional map as a racial gerrymander. *Id.* at 741. While the case was pending, Louisiana enacted a new map, and the plaintiffs amended their complaint to challenge that new map. *Id.* at 741-42. The district court "did not reconsider standing" and enjoined the new map. *Id.* at 742. This Court vacated that decision and ordered the case dismissed for lack of standing. *Id.* at 747. While the *old* map placed plaintiffs in the allegedly gerrymandered district, the *new* map placed them outside that district. *Id.* at 741-42. The plaintiffs therefore lacked "standing to challenge [the new map] as a racial classification" because they lacked an individualized injury. *Id.* at 746. Because the plaintiffs revised their complaint to challenge the new map, they needed to show standing to challenge that map.

Courts of appeals likewise recognize that when plaintiffs add new claims or forms of relief, they need to establish standing to pursue those claims or relief. For example, in *American Diabetes Ass'n v. U.S. Department of the Army*, the plaintiffs challenged certain Army healthcare regulations. 938 F.3d 1147, 1150-51 (9th Cir. 2019). The Army adopted new regulations mid-litigation, and the plaintiffs amended their complaint to challenge both the old and new regulations. *Id.* The Ninth Circuit considered the plaintiffs' challenge to the old regulations as a matter of mootness, concluding that the adoption of the new regulations mooted the challenge. *Id.* at 1151-54. The Ninth Circuit considered the plaintiffs' challenge to the new regulations as a matter of standing, concluding that they lacked standing to challenge the new regulations. *Id.* at 1154-57.

Similarly, in *Rosen v. Tennessee Commissioner of Finance & Administration*, the plaintiffs challenged aspects of Tennessee's Medicaid program. 288 F.3d 918, 921 (6th Cir. 2002). After Tennessee announced a new Medicaid rule, the plaintiffs amended their complaint to seek an injunction against the new rule. *Id.* at 922-23, 928. The Sixth Circuit analyzed the plaintiffs' standing to challenge the new rule, citing "black-letter law that standing is a claim-by-claim issue," and concluded that the plaintiffs lacked standing. *Id.* at 927-31.

Common Cause/Georgia v. Billups, 554 F.3d 1340 (11th Cir. 2009), applies that same principle. The plaintiffs challenged Georgia's voter-identification law. *Id.* at 1346. After Georgia revised its law mid-suit, the plaintiffs amended their complaint to challenge the old and new laws. *Id.* at 1346-47. The district court dismissed the challenge to the old law as moot, and rejected the challenge to the new law on standing grounds. *Id.* at 1347-48. The

plaintiffs appealed only the latter holding, and the Eleventh Circuit likewise considered the plaintiffs' challenge to the amended law as a question of standing (concluding that they had standing). *Id.* at 1350-52.

Greenberg (at 21 n.10) admits that this account of *Common Cause* is "technically true," but claims that "*Common Cause*'s standing analysis did not involve or address the later occurring facts." That description is puzzling. The Eleventh Circuit held that the plaintiffs had "standing to challenge the statute," *i.e.*, the amended statute. *Id.* at 1350. The only relevant "later occurring fact[]" was the enactment of the new law, and the court analyzed whether the plaintiffs had standing to challenge that law.

2. The Third Circuit correctly applied these basic principles below. Greenberg's initial complaint sought declaratory relief and a "permanent injunction prohibiting Defendants and their agents from enforcing Rule 8.4(g)"—meaning, the then-existing version of Rule 8.4(g). Pet.App.206a. After the Pennsylvania Supreme Court revised the Rule, Greenberg chose to file a new complaint that sought declaratory relief and an injunction against "enforcing Rule 8.4(g)." Pet.App.261a. But now "Rule 8.4(g)" meant the *new* Rule 8.4(g); Greenberg defined the new Rule in the new complaint as "'New 8.4(g)' or just '8.4(g)'" (in contrast to the old Rule, which he defined as "Old 8.4(g)"). Pet.App.218a, 220a. In his summary-judgment briefing, Greenberg confirmed that he wanted the district court to enjoin "New 8.4(g)." Greenberg Summ. J. Mem. 1, D. Ct. Dkt. 65-1. Greenberg's petition (at 23) likewise characterizes his second complaint as "challenging 8.4(g) as amended."

Thus, contrary to Greenberg's assertion (at 20), Greenberg's second complaint did not "bring[] the same causes of action … and seek[] the same remedies." Nor

did it merely "extend" his challenge to the new Rule, as he (at 21, 28) suggests. Greenberg *abandoned* his claim against the old Rule and exclusively pursued a claim against the new Rule, as the Federal Rules of Civil Procedure permit him to do. But having filed new claims, Greenberg needed to establish his standing to pursue those claims. Otherwise, the court of appeals would have been in the bizarre position of asking whether Greenberg had standing to challenge an old Rule that no longer exists in order to press his claims against the current Rule.[3]

In assessing Greenberg's standing, the Third Circuit properly considered Chief Disciplinary Counsel Farrell's declaration to "buttress[]" its understanding of the Rule's "plain language." Pet.App.21a, 23a. Farrell, who personally approves every disciplinary complaint in Pennsylvania, reviewed Greenberg's second complaint and opined that Greenberg's planned free-speech presentations were not harassment or discrimination under new Rule 8.4(g). Pet.App.23a. As the Third Circuit recognized, that interpretation "ma[de] sense" and further undercut Greenberg's claim that he was objectively likely to face discipline for violating Rule 8.4(g). Pet.App.23a-24a.

This Court and lower courts routinely consider such disavowals (or the lack thereof) in assessing standing. *E.g.*, *Wilson v. State Bar of Ga.*, 132 F.3d 1422, 1428-29

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[3] Greenberg (at 22) hints that his original complaint might "remain[] active" because his revised complaint was supplemental, not amended. That assertion is belied by Greenberg's briefing below and the lower courts' decisions, none of which treat Greenberg as challenging the old Rule. *See generally* Greenberg Summ. J. Mem., D. Ct. Dkt. 65-1; Greenberg C.A. Br., C.A. Dkt. 59; Pet.App.1a-31a, 34a-127a. Greenberg did not even argue below that his second complaint was "supplemental." Any challenge to the old Rule is long forfeited.

(11th Cir. 1998); *Abbott v. Pastides*, 900 F.3d 160, 177 (4th Cir. 2018); *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 165 (2014); *Holder v. Humanitarian L. Project*, 561 U.S. 1, 16 (2010); *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 302 (1979). Greenberg never addresses these cases, which the Third Circuit discussed at length. Pet.App.24a.

3. Greenberg's petition attacks a strawman version of the decision below. Greenberg (at 3) accuses the Third Circuit of adopting a categorical rule that "the standing clock" "reset[s]" whenever a plaintiff "supplements his complaint to reflect … changed circumstances." But the decision below merely held, in keeping with this Court's and other circuits' precedent, that Greenberg needed to demonstrate standing to challenge the new Rule because he "replaced his initial complaint with a subsequent pleading *challenging the new Rule*." Pet.App.18a n.4 (emphasis added). Greenberg identifies no error in that narrow holding.

Greenberg (at 3, 19-22, 28, 31) oddly spends much of his petition attacking a subsequent Third Circuit decision, *Lutter v. JNESO*, 86 F.4th 111 (3d Cir. 2023), from which no party sought certiorari. That opinion too does not adopt a categorical rule that supplemental pleadings always reset the standing clock as Greenberg (at 3) claims. Instead, as Greenberg (at 20, 31) elsewhere acknowledges, *Lutter* merely holds that plaintiffs filing supplemental complaints need to demonstrate standing when the amendments "substantively affect[]" "the claims and requested relief." *Id.* at 125-26. In other words, when plaintiffs change what they are asking for, plaintiffs need standing for that new ask.

None of Greenberg's authorities contradicts that rule. Greenberg (at 1, 13-15, 23-24) collects cases for the uncontroversial proposition that standing "must exist at the commencement of the litigation." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000) (citation omitted). Most of the cases Greenberg cites do not even involve amended or supplemental complaints and thus do not address what counts as "the commencement of the litigation" when plaintiffs add claims mid-suit.[4]

In the cited cases that do involve amended or supplemental complaints, the plaintiffs added new facts or parties, not claims. For example, in *Rockwell International Corp. v. United States* (cited at Pet. 2, 15, 17, 23 n.11), the plaintiffs amended their False Claims Act complaint to adjust their factual theory of how fraud was committed, not to change any claims. 549 U.S. 457, 464-65 (2007). This Court therefore analyzed jurisdiction at the time of the initial filing (albeit by reference to the allegations in the amended complaint). *Id.* at 473.

Similarly, in *Minneapolis & St. Louis Railroad Co. v. Peoria & Pekin Union Railway Co.* (cited at Pet. 22), this Court analyzed whether a district court had jurisdiction to enforce an order of the Interstate Commerce Commission, without considering later-occurring factual developments. 270 U.S. 580, 582, 586 (1926). And in *Anderson v. Watt* (cited at Pet. 22), this Court analyzed the

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[4] *E.g.*, *Davis*, 554 U.S. at 734; *Grupo Dataflux v. Atlas Glob. Grp., L.P.*, 541 U.S. 567, 569 (2004); *Keene Corp. v. United States*, 508 U.S. 200, 203-04 (1993); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559 (1992); *Mollan v. Torrance*, 22 U.S. 537, 539 (1824); *Walters v. Edgar*, 163 F.3d 430, 432 (7th Cir. 1998).

parties' diversity at the time the lawsuit was filed, rejecting the plaintiffs' effort to drop an essential nondiverse party. 138 U.S. 694, 708 (1891). In all of those cases, the question was whether the court had jurisdiction to hear the initial claim, so this Court looked to the state of the world when that claim was filed.[5] None of those cases contradicts the Third Circuit's recognition that when plaintiffs file new *claims*, plaintiffs need to establish standing for the new claims.

The Third Circuit's decision also is fully consistent with this Court's cases analyzing mid-litigation developments as questions of mootness. *Contra* Pet. 25-29. When government defendants amend a challenged policy, courts ask whether a challenge to the *original* policy is moot.[6] The Third Circuit had no reason to conduct that analysis because Greenberg dropped his challenge to the old Rule. But when plaintiffs challenge the *new* policy, the question is whether the plaintiffs have standing to do so. *Supra* pp. 11-13. The Third Circuit correctly conducted that analysis here.

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[5] *Accord, e.g.*, *Carney v. Adams*, 592 U.S. 53, 56 (2020) (cited at Pet. 1) (amended complaint added facts "in an attempt to rectify the [standing] problem"); *Freeport-McMoRan, Inc. v. K N Energy, Inc.*, 498 U.S. 426, 427 (1991) (per curiam) (cited at Pet. 13-14 & n.3) (amended complaint added new party); *cf. Conolly v. Taylor*, 27 U.S. 556, 565 (1829) (cited at Pet. i, 14) (plaintiffs could cure jurisdictional defect by amending complaint to delete unessential, nondiverse party).

[6] *E.g.*, *United States v. Washington*, 596 U.S. 832, 837 (2022); *N.Y. State Rifle & Pistol Ass'n v. City of New York*, 140 S. Ct. 1525, 1526 (2020); *Ne. Fla. Chapter of Assoc. Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 660-62 (1993); *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 288-89 (1982); *Speech First v. Schlissel*, 939 F.3d 756, 768 (6th Cir. 2019) (all cited at Pet. 25-28).

Likewise, when plaintiffs are subject to a policy that defendants make a mid-litigation promise not to enforce, courts ask whether that disavowal moots the existing controversy.[7] But when defendants explain why a rule does not apply to the plaintiff in the first place, courts analyze that disavowal as a question of standing to help determine whether the rule "arguably proscribes" the plaintiff's conduct and whether the plaintiff faces a "credible threat of prosecution." Pet.App.20a; *supra* pp. 14-15.

II. No Split in Authority Exists

No circuit would have permitted Greenberg to file a second complaint challenging the new Rule without establishing standing to challenge that Rule. *Supra* pp. 12-13. Greenberg (at 2-3, 15-19, 21-22) appears to claim the existence of a 6-1 split in authority. None of the cases he cites, however, creates a split.

1. Greenberg (at 15-19) identifies four circuits that he says "assess standing as of the time when [the] plaintiff commenced suit, relying on the allegations in the operative amended complaint" (citation omitted). But none of Greenberg's cases holds that plaintiffs are free to add *claims* without demonstrating standing to bring those claims. As above, most of Greenberg's cases involve other types of amendments, which add parties or facts supporting existing claims. The few cases that do involve new claims do not address the question presented.

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[7] *E.g.*, *West Virginia v. EPA*, 597 U.S. 697, 719 (2022); *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91-92 (2013); *Pool v. City of Houston*, 978 F.3d 307, 312-14 (5th Cir. 2020); *cf. FBI v. Fikre*, No. 22-1178, slip op. at 4 (U.S. Mar. 19, 2024) (government stopped applying policy to plaintiff); *White v. Lee*, 227 F.3d 1214, 1242-44 (9th Cir. 2000) (temporary disavowal became permanent mid-litigation) (all cited at Pet. 25-26, 28).

Start with Greenberg's Sixth Circuit cases (at 17). *Barber v. Charter Township of Springfield* at least involves added claims. 31 F.4th 382, 387 n.1 (6th Cir. 2022). But the plaintiff abandoned those claims on appeal, *id.*, so the court analyzed her standing to bring her original claims—the only ones at issue on appeal—at the time of the original complaint, *see id.* at 391 n.7. *Barber* does not address the proper time for analyzing new claims. In *Lynch v. Leis*, the plaintiffs amended their complaint to add an additional plaintiff, so the court looked to the date that plaintiff was added to the case to analyze his standing. 382 F.3d 642, 644, 647 (6th Cir. 2004). And *Fox v. Saginaw County* did not even involve an amended complaint. 67 F.4th 284, 294-95 (6th Cir. 2023). The court simply recited the rule that jurisdiction "turn[s] on the facts as they are when a plaintiff sues" in rejecting a class-action plaintiff's attempt to use absent class members' injuries to establish standing. *Id.* None of those cases addresses the new-claims question at issue here.

The Ninth Circuit likewise does not hold that plaintiffs can add claims without establishing standing for those claims; to the contrary, as discussed above, it has held the opposite. *Am. Diabetes Ass'n*, 938 F.3d at 1154-57; *supra* p. 12. In *Gonzalez v. ICE* (cited at Pet. 15-16), the plaintiff amended his complaint to add a new plaintiff. 975 F.3d 788, 800 (9th Cir. 2020). The amendment left the original plaintiff's claim unchanged, so the court analyzed the original plaintiff's standing as of the original complaint. *Id.* at 803.

The Tenth Circuit also does not embrace Greenberg's desired rule. In *Southern Utah Wilderness Alliance v. Palma* (cited at Pet. 16), an environmental group challenged the Bureau of Land Management's decision to extend various mineral leases. 707 F.3d 1143, 1151 (10th

Cir. 2013). While the case was pending, an agency appeal board extended related leases in the same area, and the group supplemented its complaint to cover those leases too. *Id.* at 1149, 1151. The court stated that standing is determined "when the complaint was first filed" without distinguishing between the two sets of leases. *Id.* at 1153 (citation omitted). But given that the plaintiffs alleged plans to use all of the at-issue lands, *id.* at 1156, the original and supplemental complaints raised identical standing questions. Which leases were covered by which agency action was irrelevant, so the court had no reason to treat the two sets of claims separately.

Finally, the Federal Circuit cases that Greenberg (at 18-19) cites do not advance his cause. In *GAF Building Materials Corp. v. Elk Corp. of Dallas*, the plaintiff attempted to supplement its complaint to allege new facts about a contested patent—namely, that the patent had issued. 90 F.3d 479, 480 (Fed. Cir. 1996). But the district court denied leave to supplement the complaint. *See id.* at 483. The Federal Circuit appropriately analyzed standing at the time of the initial complaint; the district court denied supplementation, and in any event the desired supplementation did not involve a change in claims or relief. *Id.*

Greenberg's other two Federal Circuit cases involve added claims, but both analyze the plaintiffs' standing generally without addressing whether the analysis might differ between the initial and later-added claims. *See Abraxis Bioscience, Inc. v. Navinta LLC*, 625 F.3d 1359, 1362-63, 1366 & n.3 (Fed. Cir. 2010); *Schreiber Foods, Inc. v. Beatrice Cheese, Inc.*, 402 F.3d 1198, 1200, 1202 & n.3 (Fed. Cir. 2005). No case adopts Greenberg's rule that plaintiffs can replace existing claims with new claims without establishing standing for the new claims.

2. Greenberg (at 21-22) identifies two cases that he claims have "even more similar postures," but neither contradicts the decision below. In both, governments amended a policy mid-litigation, and the plaintiffs revised their complaints to challenge *both* the old and the new policy. (Here, by contrast, Greenberg jettisoned his challenge to the old policy.) The courts therefore asked whether the amendments mooted the challenge to the old policy. Neither case suggests that the plaintiff could use his existing lawsuit to avoid showing standing to challenge the *new* policy.

In *Horton v. City of St. Augustine*, a street performer challenged a city anti-busking ordinance. 272 F.3d 1318, 1322 (11th Cir. 2001). While the case was pending, the city revised its ordinance, and the performer supplemented his complaint to challenge both the old and new ordinances. *Id.* at 1325; *see* Suppl. Compl. ¶¶ 38, 42-43, *Horton v. City of St. Augustine*, No. 3:00-cv-671 (M.D. Fla. Apr. 19, 2001), 2001 WL 34654968. Neither the city nor the court questioned the performer's standing to challenge a law that banned him from pursuing his livelihood. But the court analyzed whether the amendments "render[ed] the *original* controversy moot" and concluded that they did not because the core features of the challenged law remained intact. 272 F.3d at 1328 (emphasis added). The Eleventh Circuit's opinion nowhere suggests that the performer could have challenged the amended ordinance without Article III standing.

Similarly, in *Zukerman v. USPS*, a plaintiff whose custom postage designs were rejected challenged the Postal Service's custom postage policy as viewpoint discriminatory. 961 F.3d 431, 438-39 (D.C. Cir. 2020). While the case was pending, the Postal Service revised its policy and rejected the plaintiff's designs under that new policy,

so the plaintiff supplemented his complaint to challenge the new policy too. *Id.* at 437, 439-40. Given that the plaintiff had designs rejected under both policies, his standing as to both was obvious. But because the old policy was no longer on the books, the court considered whether the challenge to that policy was moot and concluded otherwise. *Id.* at 442-45.

The analogous fact pattern here would be if Greenberg had revised his complaint to challenge both the old and new Rule 8.4(g). While Greenberg still would need standing to challenge both Rules, the amendments would arguably moot Greenberg's challenge to the old Rule 8.4(g). Here though, Greenberg abandoned his challenge to the old Rule, pursuing only a challenge to the new Rule. In every circuit, Greenberg would need to establish standing to bring that new claim.

III. This Case Does Not Warrant This Court's Review

1. This case would be a manifestly poor vehicle to address Greenberg's question presented because he never argues that the timing of the standing inquiry made any difference. Greenberg (at 27) asserts without elaboration that "if the Third Circuit had applied a mootness test, there is little doubt Greenberg would have prevailed." But even if the promulgation of the new Rule did not moot a challenge to the old Rule, Greenberg still would need to establish *standing* to challenge the old Rule. He offers no reason to think that the Third Circuit's standing analysis would come out any differently as applied to the old Rule.

Greenberg takes as a given that he had standing to challenge the old Rule. He (at 18 n.9) claims that this case "involves whether a supplemental pleading can *oust* standing that existed at the time of the initial pleading." *Accord* Pet. 27 (asking whether amendments "continued

the controversy"). But the Third Circuit never held that Greenberg had standing to challenge the old Rule. And under the Third Circuit's analysis of Greenberg's standing to challenge the new Rule—which Greenberg does not substantively contest—Greenberg also lacked standing to challenge the old Rule.

Greenberg identifies no difference between the two Rules or his allegations that would have affected the Third Circuit's standing analysis. To the contrary, Greenberg repeatedly claims that the two Rules are materially identical. He (at 9) claims that "the new Rule 8.4(g) is the same as the old regulation" "[i]n material form and function." He (at 9-11, 29) calls "[t]he substantive difference" between the old and new Rules "slim," "insignificant," and "non-material" (citations omitted). He (at 26) claims that the new Rule injures him "just like the initial rule." And he (at 20) asserts that his revised complaint "allege[s] the same facts about the 2020 state of the world."

If Greenberg thinks the two rules are the same, then it necessarily follows that his lack of standing to challenge the new Rule means that he lacks standing to challenge the old Rule. Neither version of the Rule "arguably bar[s] Greenberg's planned speech … discuss[ing] legal doctrine at CLE seminars." *See* Pet.App.22a. And Greenberg has not established "a credible threat of prosecution" because he "cannot show any persuasive history of past enforcement in Pennsylvania or any other jurisdiction" for conduct remotely similar to his. Pet.App.24a, 26a.

As the court of appeals explained, Greenberg's asserted chill on his speech is ultimately rooted in "his perception of the social climate, not Rule 8.4(g)." Pet.App.29a. In this Court, Greenberg and his amici express concern about cancel culture in today's society, claiming (at 6) that "half of the citizenry today"—most of

whom are not lawyers barred in Pennsylvania—"is afraid 'to speak their minds'" (citation omitted); *accord, e.g.*, First Liberty Inst. Br. 19; Found. for Moral Law Br. 11-12; Inst. for Faith & Family Br. 2; NLF Br. 6-12.[8] But Greenberg's fear of social opprobrium is not "fairly traceable to Rule 8.4(g)," Pet.App.18a—old or new. Greenberg would therefore lack standing to challenge either version of the Rule under the Third Circuit's uncontested reasoning below.

2. Greenberg's importance arguments (at 29-34) rest on a mischaracterization of the decision below as silently working a sea change in mootness law in a footnote. In fact, this case involves a straightforward application of settled standing principles to the fact pattern where the plaintiff revises his complaint mid-litigation to ditch the original claims and bring new ones. *Supra* pp. 13-15.

Greenberg does not assert that this fact pattern is commonly recurring or independently worthy of certiorari. Instead, he (at 29-30) invokes broader concerns about "strategic mooting" and litigation "gamesmanship" far afield from this case (citation omitted). Greenberg (at 29), for example, cites a law-review article criticizing New York City's ultimately successful effort to moot *New York State Rifle & Pistol Ass'n v. City of New York*, 140 S. Ct. 1525 (2020), by repealing the challenged regulations. *See* Joseph C. Davis & Nicholas R. Reaves, *The Point* Isn't *Moot*, 129 Yale L.J.F. 325, 329 (2019); *accord Tucker v.*

[8] Notably, Greenberg's seven amicus briefs focus almost exclusively on the merits of Greenberg's constitutional challenge, which are not before the Court. Amici collectively devote barely 15 pages to the actual question presented, First Liberty Inst. Br. 3-10; Liberty Justice Ctr. Br. 3-6; NCLA Br. 6-7, 9-11; NLF Br. 3-6, with many of Greenberg's amici ignoring the question presented entirely.

Gaddis, 40 F.4th 289, 294 (5th Cir. 2022) (Ho, J., concurring) (cited at Pet. 29) (quoting Davis & Reaves).

But in cases like *New York State Rifle*, plaintiffs who undisputedly had standing to bring the initial lawsuit continued their challenge after a government repealed the regulation. The question in those cases was whether the plaintiffs' challenge to the "old rule is therefore moot." 140 S. Ct. at 1526; *see id.* at 1540 (Alito, J., dissenting) (noting that the plaintiffs' standing was "not disputed"). Here, Greenberg challenges only the *new* Rule 8.4(g), not the old one, and no one contends that his challenge is moot. The Third Circuit held simply that Greenberg lacked standing in the first place. Pet.App.19a.

Greenberg's workability concerns (at 30-31) rest on the same misunderstanding of the decision below. Greenberg asserts that the Third Circuit requires a "subjective evaluation of whether a supplemental complaint alleges post-suit developments that 'substantially affect' the plaintiffs' 'claims and requested relief.'" Pet. 31 (quoting *Lutter*, 86 F.4th at 126). That objection is oddly leveled not at the decision below, but at a later Third Circuit decision. Regardless, whether a complaint adds new claims for which the plaintiff must demonstrate standing is a task courts undertake routinely. *Supra* pp. 11-13. Greenberg never explains why he (at 31) finds that inquiry "opaque." And nothing about that inquiry was "opaque" on the facts of this case, where Greenberg unambiguously dropped his challenge to the old Rule and replaced it with a challenge to the new Rule.

Finally, Greenberg (at 29, 32-33) contends that the decision below will disincentivize plaintiffs from supplementing their complaints, thereby "impoverish[ing] the public record." But a plaintiff with standing has nothing to fear from supplementing or amending her complaint.

And Greenberg (at 32) identifies no reason to think that "unwary" plaintiffs with standing to challenge a rule will mistakenly abandon their original challenge in order to challenge a later-enacted rule for which they lack standing. Greenberg's problem is that he wants to litigate a constitutional challenge to a Rule that does not cover his planned conduct. Nothing in his petition calls into question the Third Circuit's holding that he lacks standing to do so.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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MARCH 20, 2024