No.

In the Supreme Court of the United States

REUBEN NEFF,
PETITIONER,
v.

IOWA SUPREME COURT ATTORNEY
DISCIPLINARY BOARD,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE IOWA SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Reuben Neff is a licensed attorney and a member of the State of Iowa bar. While he was the elected chief prosecuting attorney for Wapello County Iowa, he made statements—within in the confines of his office—that were deemed by the Iowa Supreme Court Attorney Disciplinary Board to be in violation of the Iowa Rules of Professional Conduct's prohibition of sexual harassment. Mr. Neff's statements included wishing violent acts and prison rape to criminal defendants he was prosecuting, occasionally referring to judges as "bitches" following unfavorable rulings, referring to another judge as a "limp dick" following an acquittal, referring to his predecessor as a gay slur on one occasion, retelling a college story where he stated that he observed another man's "penis," and on one instance, making a "That's what she said" joke in reference to a running joke from the television show "The Office." Each of these statements were only made to his attorney and administrative staff outside of a courthouse setting.

The Iowa Supreme Court found that Mr. Neff's speech was in violation of the Iowa Rules of Professional Conduct and determined that Mr. Neff's statements were not entitled to protections under the First Amendment.

The question presented is whether an attorney's out-of-court speech, which is deemed to be in violation of state attorney disciplinary rules, is entitled to protection under the First Amendment.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE

Petitioner is Reuben Neff, an individual and licensed attorney in the state of Iowa.

Respondent is the Iowa Supreme Court Attorney Disciplinary Board, which is created through the Iowa Supreme Court and is in charge of pursuing all disciplinary charges against attorneys licensed in the State of Iowa.

Neither party is a corporation.

LIST OF ALL PROCEEDINGS

This case originated from attorney disciplinary proceedings before the Iowa Supreme Court Grievance Commission. The Finding of Facts, Conclusions of Law and Recommendations from the Iowa Supreme Court Grievance Commission was entered on April 6, 2023. *Iowa Supreme Court Attorney Disciplinary Board v. Reuben Andrew Neff*, Docket No. GC-943. A copy of this Order is included in the Appendix. Pet.App. – 36a.

The Iowa Supreme Court filed its opinion following a timely appeal on April 12, 2024. *Iowa Sup. Ct. Att'y Disciplinary Bd. v. Neff*, No. 23-0572, 5 N.W.3d 296 (Iowa 2024). Pet.App. – 1a.

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INTRODUCTION

This case combines two unsettled areas of the law that question the boundaries of attorney rules of professional conduct, "sexual harassment" based upon speech alone, and the First Amendment of the Federal Constitution. Just as a student does not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," an attorney does not "shed their constitutional rights to freedom of speech or expression" when they obtain their license. *See, Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969) (holding students are entitled to First Amendment protections). As such, attorney disciplinary proceedings are "necessarily constrained by the First Amendment to the Federal Constitution." *Peel v. Att'y Registration & Disciplinary Comm'n of Illinois*, 496 U.S. 91, 108 (1990).

In a similar vein, cases of "sexual harassment" that involve hostile work environment claims "steers into the territory of the First Amendment." *DeAngelis v. El Paso Mun. Police Officers Ass'n* , 51 F.3d 591, 596-97 (5th Cir. 1995). Many legal scholars have recognized that an appropriate balance must be struck with Title VII's prohibition of sexual harassment and the First Amendments protections. *See* Eugene Volokh, *Freedom of Speech and Workplace Harassment*, 39 U.C.L.A.L.REV. 1791 (1992).

Despite the necessary constraints required by

the First Amendment, the Iowa Rules of Professional Conduct, as constructed by the Iowa Supreme Court violate Reuben Neff's ("Neff") First Amendment protections by prohibiting out-of-court speech made in his office, amongst staff members.

Neff is a licensed Iowa attorney, who was elected as the county attorney for Wapello County, Iowa. As the elected county attorney, Neff was in charge of overseeing all criminal prosecutions in the county. He also oversaw ten employees (five attorneys and five administrative staff). Within the confines of his office, Neff spoke colorfully about criminal defendants, spoke negatively about judges who provided unfavorable rulings against his office and told stories that included off putting statements. Mr. Neff's speech included wishing that criminal defendants would be "raped by antelopes and mauled by lions at the same time," occasionally referring to judges as "bitches" following a ruling against him and relaying a story about seeing a fellow student's "penis" while in a class in college. He also made one "that's what she said joke" from one of the most popular comedies in television history, "The Office." None of this speech was within an official court proceeding, or even within a courthouse, but instead was uttered in Neff's office amongst his staff. Nor was any of this speech made to further any sexual interests or desires.

Yet, Neff was disciplined pursuant to Iowa R. Prof'l Conduct 32:8.4(g) which states: "It is professional misconduct for a lawyer to…engage in sexual harassment or other unlawful discrimination

in the practice of law or knowingly permit staff or agents subject to the lawyer's direction and control to do so." Despite recognizing the constraints caused by the First Amendment, the Iowa Supreme Court found that Neff's speech was not protected by the First Amendment.

With this case, this Court can definitively recognize an attorney's First Amendment rights as it relates to speech made outside of the courtroom and within their offices. A ruling in this case will provide guidance to every attorney throughout the country regarding their First Amendment rights after they become bar members of their respective state. Because of the vastness of the issues presented in this case, this Court should grant this petition.

OPINIONS BELOW

The opinion of the Iowa Supreme Court is reported at 5 N.W.3d 296 (Iowa 2024)[1]. Pet.App. – 1a.

The opinion of the Grievance Commission of the Supreme Court of Iowa is unpublished but is reprinted and included in the attached appendix. Pet.App. – 36a.

[1] On June 18, 2024, the Iowa Supreme Court *sua sponte* entered an amended opinion to correct certain citations and grammatical corrections. This was not a petition for rehearing, and it made no substantive changes to the opinion.

JURISDICTION

The Iowa Supreme Court entered its judgment on April 12, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution states in relevant part: "Congress shall make no law … abridging the freedom of speech."

The Fourteenth Amendment to the United States Constitution states in relevant part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

Iowa Rule of Professional Conduct 32:8.4(g) and its comments are reproduced at Pet.App. – 52a.

STATEMENT OF THE CASE

The facts in this case were stipulated by the parties and the full stipulation is incorporated in the opinion of the Grievance Commission of the Supreme Court of Iowa. Pet.App. – 38a-44a. Neff is a licensed attorney in the State of Iowa. Pet.App. – 39a. In 2018, he was elected to serve as the chief prosecuting attorney for Wapello County, Iowa. Pet.App. – 39a. His role as county attorney for Wapello County

includes prosecuting criminal defendants and overseeing a staff of five attorneys and five administrative staff. Pet.App. – 39a, 43a. These proceedings pertain to approximately nine statements Neff made in his office to members of his staff. Pet.App. – 39a-41a

On one occasion, after losing a particularly difficult criminal sex abuse case, Neff told staff that he hoped the defendant would be "raped by antelopes and mauled by lions at the same time." Pet.App. – 40a. In another instance, he stated that a criminal defendant's "asshole" would be "this big" by the time he left prison and formed a circular shape with his hands. Pet.App. – 40a. On a final occasion, while preparation for a sexual exploitation of a minor case, Neff stated that the criminal defendant better "lube up" and "grab his ankles." Pet.App. – 40a. These are the only three statements that Neff made about criminal defendants that formed the parties' stipulation.

Occasionally, Neff referred to judges as "bitches" following unfavorable rulings or decisions. Pet.App. – 40a. Once, he also told his staff, while back in the office, that a district court judge was a "limp dick" after adverse rulings in a sexual assault trial resulted in an acquittal of the defendant. Pet.App. – 40a-41a. Besides this one instance, he never used this descriptor of the judge again.

There was also another time when Neff received a phone call from a member of the community who referred to his predecessor as a gay

slur. Pet.App. – 41a. Neff then relayed this information to a member of his staff who identified with the LGBTQ+ community. Pet.App. – 41a. This individual objected to Neff's use of the gay slur when he repeated what had occurred. Pet.App. – 41a. Neff responded by repeating the word and stating that he had the ability to call his predecessor that. Pet.App. – 41a. However, he never repeated the gay slur again.

At another time, Neff told his staff about a college memory in which another individual (not Neff) appeared in class wearing only pajama pants. Pet.App. – 40a. When the professor kicked the student out of the class for not being dressed appropriately, the student's penis fell out of the pants and the professor made the comment that he "[did] not care how proud he was of his size, get out." Pet.App. – 40a. Neff did make any of his own comments or observations, but instead merely relayed what was said by the college professor.

In another instance, Neff and his staff were discussing false accusations in a criminal proceeding. Pet.App. – 39a. During these discussions Neff recounted how he himself had been the subject of a false sexual assault claim while he was in college. Pet.App. – 39a. Neff relayed that he was alleged to have sexually assaulted an individual and that the accuser claimed that she had scratched and slapped Neff to the point that his stomach was bleeding through his shirt, yet, Neff had never met the accuser. Pet.App. – 39a. In this story, Neff did not discuss any other graphic details about the false accusation.

The last statement arose from Neff making a joke. Following a snowstorm, Neff returned to the office and told his staff he just spent the morning blowing five inches, but he did not believe his wife had minded. Pet.App. – 41a. One of the staff members slyly smiled and Neff responded with "that's what she said." Pet.App. – 41a. This statement was part of a running joke that was made from the television show "The Office" and was regularly used in the office by female staff. Pet.App. – 41a. This was Neff's only time ever using the joke. Pet.App. – 41a.

Two of Neff's staff members left his office, in part, because of these statements. Pet.App. – 42a. However, no individual ever filed any complaints against Neff. Pet.App. – 44a. In fact, the remaining employees recognized that the office dynamics were the best it has ever been and better than the prior two administrations. Pet.App. – 42a. Despite this, the Iowa Supreme Court Disciplinary Board brought charges against Neff accusing Neff of "engag[ing] in sexual harassment or other unlawful discrimination in the practice of law or knowingly permit staff or agents subject to the lawyer's direction and control to do so." Pet.App. – 36a.

Pursuant to the procedures of the Iowa Supreme Court Grievance Commission, the parties provided a stipulated set of facts in lieu of testimony. Pet.App. – 38a-39a. The facts became binding upon the parties, the Disciplinary Board, the Grievance Commission, and the Iowa Supreme Court. Pet.App. – 38a-39a. The parties were then allowed to argue if there was a violation of the Iowa Rules of Professional

Conduct and if there was what the appropriate punishment would be.

The parties submitted written arguments, which included Neff's arguments that his speech was protected by the First Amendment. Pet.App. – 37a-38a. The Grievance Commission determined that it lacked the authority to determine if the Disciplinary Board's prosecution of Neff violated the First Amendment and instead held that only the Iowa Supreme Court may make this determination. Pet.App. – 37a-38a. However, the Grievance Commission indicated that the issue was preserved for appellate review. Pet.App. – 37a-38a.

On April 6, 2023, the Grievance Commission determined that Neff's comments constituted "sexual harassment" under the Iowa Rules of Professional Conduct. Pet.App. – 48a. As a sanction, the Grievance Commission recommended that Neff's license to practice law be suspended for sixty-days. Pet.App. – 50a. The Grievance Commission also recommended that Neff and his staff be ordered to attend training on sexual harassment and hostile work environments. Pet.App. – 50a.

Neff filed a timely notice of appeal of the Grievance Commission's order to the Iowa Supreme Court. Before the Iowa Supreme Court, Neff argued that his statements were not "sexual harassment" under the Iowa Rules of Professional Conduct, and alternatively, that Neff's speech was protected under the First Amendment. Pet.App. – 3a.

On April 12, 2024, the Iowa Supreme Court entered its ruling. The Iowa Supreme Court first found that Neff violated Iowa Rule of Professional Conduct's prohibition of sexual harassment. The Iowa Supreme Court recognized that they "cannot say that any one of these statements, standing alone, would be sufficient evidence to violate rule 32:8.4(g), but Neff's conduct, when taken as a whole, objectively interfered with and caused harm in the workplace." Pet.App. – 14a.

Having found a violation, the Iowa Supreme Court then proceeded to Neff's arguments that his speech was protected by the First Amendment. After recognizing the tension between attorney disciplinary rules, Title VII, and the First Amendment, the Iowa Supreme Court found that Neff's speech was not protected by the First Amendment. Pet.App. – 16a-31a. Finding that Neff was in violation of the Iowa Rules of Professional Conduct and that he was not afforded any protections pursuant to the First Amendment, the Iowa Supreme Court then decided on the appropriate sanction. After reviewing several disciplinary proceedings, Neff's sanction was reduced from a sixty-day suspension to a public reprimand. The Iowa Supreme Court also removed the requirements that Neff and his office must complete training on sexual harassment in the workplace. Pet.App. – 32a-35a.

REASONS FOR GRANTING THE PETITION

I. This Court has not provided clear guidance between the interplay of attorney rules of professional conduct and the First Amendment for attorney speech in a non-courtroom setting.

This case presents the Court with its first opportunity to provide clarity and address unanswered questions regarding First Amendment protection for licensed attorneys. This Court has never discussed the limits of state rules of professional conduct and free speech in the context of attorney speech outside of the courtroom and within the confines of their office with office staff. This has led to uncertainty both within the courts and legal scholars as to the application of the First Amendment as it relates to licensed attorneys.

To date, this Court has discussed the interplay between the First Amendment and attorney rules of professional conduct in only limited areas. There are several decisions regarding attorney advertising. This Court recognized "that advertising by attorneys may not be subjected to blanket suppression," and such commercial speech is entitled to at least some First Amendment protections. *Bates v. State Bar of Arizona*, 433 U.S. 350, 383 (1977). "In later cases, the Court struck down a bar against the use of pictures in

a legal advertisement and a ban on soliciting legal business by mailing targeted advertisements." Kathleen M. Sullivan, *The Intersection of Free Speech and the Legal Profession: Constraints on Lawyers' First Amendment Rights*, 67 FORDHAM L. REV. 569, 578 (1998) (citing *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 627 (1985); *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 467 (1988)). There have also been cases decided by this Court in which prohibitions on certain forms of advertising are not protected by the First Amendment. *See Florida Bar v. Went For It., Inc.*, 515 U.S. 618 (1995) (holding that a prohibition on "targeted direct-mail solicitations to victims and their relatives for 30 days following an accident or disaster" did not violate the First Amendment).

Direct solicitations to clients and the protections of the First Amendment have also been discussed in detail. In *NAACP v. Button*, it was recognized that solicitations by attorneys seeking various plaintiffs for desegregation lawsuits were protected by the First Amendment. 371 U.S. 415, 428 (1963). Likewise, in *In re Primus*, an attorney's direct solicitation letter to a potential client on behalf of the ACLU was protected speech under the First Amendment. *But see*, *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978) (holding that there was no First Amendment protections when an attorney engaged in direct in person solicitation of a potential clients that were involved in motor vehicle accident.).

In *Gentile v. State Bar of Nevada*, the parameters of an attorney's speech to media during a

criminal proceeding were examined in the context of the First Amendment. 501 U.S. 1030 (1991). In *Gentile*, the plurality opinion recognized that an attorney has less First Amendment protections when speaking to the media if the speech would cause a "substantial likelihood of material prejudice" on the ongoing proceedings, but held that the punishment was unconstitutional based upon vagueness grounds. *Id.* at 1048, 1062-76.

In reviewing this Court's attorney disciplinary precedent two things become apparent. First, all attorneys are entitled to First Amendment protections in their speech. Second, this Court has never considered a case such as this. In particular, this Court has never considered attorney speech that did not directly impede any legal proceeding. This case presents an optimal vehicle to address these important concerns.

What is more, this case also implicates some of the constitutional bounds of sexual harassment in the context of Title VII and the First Amendment. As recognized by the Iowa Supreme Court in this case, "Title VII, prohibiting sexual harassment in the workplace, 'has always had an uneasy coexistence with the First Amendment.'" *Iowa Supreme Ct. Att'y Disciplinary Bd. v. Neff*, 5 N.W.3d 296, 308 (Iowa 2024) (quoting *Yelling v. St. Vincent's Health Sys.*, 82 F.4th 1329, 1344 (11th Cir. 2023) (Brasher, J., concurring)). "When laws against harassment attempt to regulate oral or written expression on such topics, however detestable the views expressed may be, we cannot turn a blind eye to the First

Amendment implications." *Id.* (quoting *Saxe v. State College Area School District*, 240 F.3d 200, 206 (3d Cir. 2001)). Recognizing the push and pull between Title VII harassment cases and the First Amendment has created a wide range of differing views from legal scholars. *Compare* Eugene Volokh, *How Harassment Law Restricts Free Speech*, 47 RUTGERS L. REV. 563 (1995) *with* Suzanne Sangree, *Title VII Prohibition Against Hostile Environment Sexual Harassment and The First Amendment: No Collision in Sight*, 47 RUTGERS L. REV. 461 (1995).

These tensions between attorney rules of professional conduct, sexual harassment, and the First Amendment can all be appropriately addressed by this Court in this case. Further, the principles at issue in this case are not unique to Iowa attorneys. Instead, these issues are applicable to all licensed attorneys throughout the nation. This Court should grant this petition and address these important issues that effect all members of the bar.

II. A jurisdictional split is occurring throughout the states regarding the applicability of the First Amendment to attorney rules of professional conduct.

The American Bar Association ("ABA") introduced widespread changes to the Model Rules of Professional Conduct, Rule 8.4(g) in 2016. Prior to 2016, ABA Model Rule 8.4 stated: "It is professional misconduct for a lawyer to:…(d) engage in conduct that is prejudicial to the administration of justice…" (Am. Bar Ass'n 1998). According to the comments of

these model rules this rules prohibition related to statements or actions done "in the course of representing a client." Model R.P.C. 8.4(d), cmt. 3 (Am. Bar Ass'n 1998).

In 2016, the ABA introduced a Model Rule 8.4(g), which opined that it is professional misconduct to:

> (g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. 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 legitimate advice or advocacy consistent with these Rules.

Model R.P.C. 8.4(g) (Am. Bar Ass'n 2016). Despite the ABA's introduction of this model rule in 2016, only two states—New Mexico and Vermont—adopted the rule in full. Other states, such as Pennsylvania, adopted variations of the rule.

However, legal commentators have strongly criticized the proposed rule on constitutional grounds. *See e.g.*, George W. Dent, Jr., *Model Rule 8.4(g): Blatantly Unconstitutional and Blatantly*

Political, 32 NOTRE DAME J. L. ETHICS & PUB. POL'Y 135, 136 (2018); Michael Ariens, *Model Rule 8.4(g) and the Profession's Core Values Problem*, 11 ST. MARY'S J. ON LEGAL MALPRACTICE & ETHICS 180 (2021); Josh Blackman, *Reply: A Pause for State Courts Considering Model Rule 8.4(g)*, 30 GEO. J. LEGAL ETHICS 241 (2017); Bruce A. Green & Rebecca Roiphe, *ABA Model Rule 8.4(g), Discriminatory Speech, and the First Amendment*, 50 HOFSTRA L. REV. 543 (2022); William Hodes, *See Something; Say Something: Model Rule 8.4(g) is Not OK*, 50 HOFSTRA L. REV. 579 (2022); Lindsey Keiser, *Lawyers Lack Liberty: State Codification of Comment 3 of Rule 8.4 Impinge on Lawyers' First Amendment Rights*, 28 GEO. J. LEGAL ETHICS 629 (2015), Margaret Tarkington, *Throwing Out the Baby: The ABA's Subversion of Lawyer First Amendment Rights*, 24 TEXAS REV. L. & POL. 41 (2019).

Similarly, many state officials have authored letters or opinions urging their respective states to not adopt ABA Model Rule 8.4(g), each asserting that Rule 8.4(g) would necessarily impinge upon the First Amendment rights of attorneys. *See e.g.,* Letter from Kevin Clarkson, Alaska Att'y. Gen., to Alaska Bar Ass'n (Aug. 9, 2019), available at https://law.alaska.gov/pdf/press/190809-Letter.pdf; Ark. Att'y Gen. Op. No. 2020-055 (Jul. 14, 2021), available at https://ag-opinions.s3.amazonaws.com/uploads/2020-055.pdf; La. Att'y. Gen. Op. 17-0114 (Sept. 8, 2017), available at https://lalegalethics.org/wp-content/uploads/2017-09-08-LA-AG-Opinion-17-0114-re-Proposed-Rule-8.4f.pdf?x16384; Tenn. Atty. Gen. Op. 18-11 (Mar. 16,

2018) available at https://www.tn.gov/content/dam/tn/attorneygeneral/documents/ops/2018/op18-11.pdf; Tex. Att'y Gen. Op. KP-0123 (Dec. 20, 2016), available at https://www.texasattorneygeneral.gov/sites/default/files/opinion-files/opinion/2016/kp0123.pdf.

The Idaho Supreme Court went one step further and issued an opinion rejecting the Idaho State Bar Commissioners requested proposal to adopt Model Rule 8.4(g). *In re Idaho State Bar Resolution 21-01* at 1-2 (Idaho Supreme Court decided January 20, 2023) (located at https://isc.idaho.gov/opinions/50356.pdf). In an attempt to address the critiques observed by legal scholars, the Idaho State Bar Commissioners made many significant changes to make the Model Rule more in line with Title VII to pass constitutional muster. *In re Idaho State Bar Resolution 21-01* at 1-3 (Idaho Supreme Court decided January 20, 2023). However, after a thorough analysis, the Idaho Supreme Court determined that the requested language must be subjected to strict scrutiny and in applying strict scrutiny, was in violation of the First Amendment. *Id.* at 13. The Idaho Supreme Court also determined that the proposed language was overly broad and unconstitutionally vague. *Id.* at 13-15. Of particular importance to the Idaho Supreme Court's analysis was this Court's rulings in *Nat'l Inst. Of Family and Life Advocates v. Becerra*, ("NIFLA") 585 U.S. 755 (2018) and *Matal v. Tam*, 583 U.S. 218 (2017).

In *NIFLA*, this Court recognized that laws

which are content based, i.e., "target speech based on its communicative content," generally "are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *NIFLA,* 585 U.S. at 766 (quoting *Reed v. Town of Gilbert,* 576 U.S. 155, 162 (2015)). Further, in *Matal*, this Court has "said time and time again that 'the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.'" *Matal*, 583 U.S. at 244 (quoting *Street v. New York*, 394 U.S. 576, 592 (1989)). Applying these principles, the Idaho Supreme Court refused to adopt even the modified version of ABA Model Rule 8.4(g). *In re Idaho State Bar Resolution 21-01* at 13 (Idaho Supreme Court decided January 20, 2023)

Similarly, a federal district court judge in the Eastern District of Pennsylvania also struck down Pennsylvania's modified version of ABA Model Rule 8.4(g). *Greenberg v. Haggerty*, 593 F.Supp.3d 174 (E.D. Pa. 2022) *rev'd sub nom*, *Greenberg v. Lehocky*, 81 F.4th 376 (3d Cir. 2023). In *Greenberg*, a licensed attorney filed a complaint alleging that Pennsylvania's modified adoption of ABA Model Rule 8.4(g) constituted an improper content-based and viewpoint discrimination and was overbroad in violation of the First Amendment. *Id.* at 186. The attorney also alleged that the rules were unconstitutionally vague in violation of the Fourteenth Amendment. *Id.* Relying on the same authority and legal analysis as the Idaho Supreme Court, the district court found that Pennsylvania

version of ABA Model Rule 8.4(g) was unconstitutional under the First Amendment and the Fourteenth Amendment. *Id.* at 203-221.

On appeal, the Third Circuit reversed the district court on standing grounds. *Greenberg v. Lehocky*, 81 F.4th 376 (3d Cir. 2023). The court determined that because the plaintiff had not had actually being charged with violating the rule nor did he present any credible threat that he would be charged with violating the rule, he lacked standing to pursue his claims. *Id.* at 389. However, in concurring in the judgment, Judge Ambro cautioned that at some point, an attorney will have standing to challenge the rule and "[w]hen that day comes, the existing Rule and its commentary may be marching uphill needlessly." *Id.* at 390 (*Ambro, J.* concurring). Judge Ambro recommended that Pennsylvania make modifications to correct any potential constitutional infirmities that exist in Pennsylvania's Rule 8.4(g).

In contrast to the rulings by the Idaho Supreme Court and the court in *Greenberg*, the Colorado Supreme Court has found that its enforcement of Colorado's Rule 8.4(g) was not in violation of the First Amendment. *Matter of Abrams*, 488 P.3d 1043 (Colo. 2021). Colorado's version of Rule 8.4(g) states that it is professional misconduct to:

> engage in conduct, in the representation of a client, that exhibits or is intended to appeal to or engender bias against a person on account of that person's race, gender, religion, national

> origin, disability, age, sexual orientation, or socioeconomic status, whether that conduct is directed to other counsel, court personnel, witnesses, parties, judges, judicial officers, or any persons involved in the legal process;

CO ST RPC Rule 8.4(g). In *Abrams*, an attorney sent an email to his clients where he referred to the judge as "Fatso" and then stated: "The judge is a gay, fat, fag, now it's out there." 488 P.3d at 1049. The Colorado Office of Attorney Regulation Counsel filed a complaint against the attorney alleging violations of Colorado's Rule 8.4(g). *Id.* In response, the attorney asserted that his speech was protected under the First Amendment. *Id.* at 1051.

In relying on this Court's precedent in *Gentile*, the Colorado Supreme Court first determined that "[w]hen a disciplinary rule implicates a lawyer's First Amendment Rights, we must balance those constitutional rights against the State's interest in regulating the activity in question." *Id.* (citing *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1075 (1991)). The Colorado Supreme Court then recognized that in certain areas, i.e., speech that "advances client interests, checks governmental power, or advocates on matters of public concern," attorneys have "the utmost protection under the First Amendment." *Id.* at 1051. Yet, the Colorado Supreme Court then went on to find that "this inquiry must be attuned to the vital role that the justice system plays in our society and the state's unique interests in regulating the

legal profession." *Id.* The court went on to opine that "[a] state's interest in regulating attorney speech is at its strongest when the regulation is necessary to preserve the integrity of the justice system or to protect clients." *Id.* With this analysis, the Colorado Supreme Court determined that the attorney was not afforded First Amendment protection for his email to his clients. *Id.* at 1054.

The Colorado Supreme Court first found that the prohibitions found in Colorado's Rule 8.4(g) were not "regulat[ing] bigotry. It regulates action." *Id.* at 1052 (quoting *People v. Abrams*, 459 P.3d 1228, 1244 (Colo. O.P.D.J. 2020)). Accordingly, in the view of the Colorado Supreme Court, Rule 8.4(g) only regulates "conduct" and as such, it is not overbroad. *Id.* at 1053. ("Although the Rule does prohibit some speech that would be constitutionally protected in other contexts, the Rule prohibits such speech in furtherance of several compelling state interests."). Ultimately, the Colorado Supreme Court held that "the state has a compelling interest in regulating the legal profession both to protect the public and to ensure public confidence in the integrity of the system" and "the state has a compelling interest in eliminating expressions of bias from the legal profession, to promote public confidence in the system, and to ensure effective administration of justice." *Id.* The state's interests to protect confidences in the legal system meant that it could prohibit "a lawyer's use of derogatory or discriminatory language that singles out individuals involved in the legal process." *Id.*

The Colorado Supreme Court also found that Colorado's Rule 8.4(g) was narrowly tailored because in order for an attorney to be found in violation the attorney's speech "must (1) occur in the course of representing a client, (2) 'exhibit[ ] or … intend[ ] to appeal to or engender bias' against a specific person on the basis of an identified classification, and (3) be directed to a specific person involved in the legal process." *Id.* (quoting CO ST RPC Rule 8.4(g)). Using these distinctions, the Colorado Supreme Court opined that Colorado's Rule 8.4(g) "is significantly narrower than the American Bar Association's Model Rule 8.4(g)…The Model Rule does not contain the limiting factors that narrow the reach of Colorado's Rule 8.4(g) to a permissible scope." *Id.* at note 3. 1053.

Ultimately, the Colorado Supreme Court found the attorney violated Rule 8.4(g) and found no violation of the First Amendment. *Id.* at 1054 ("It is a constitutionally permissible regulation of an attorney's conduct as an officer of the court in the representation of a client."). With the finding of a violation of Colorado Rule 8.4(g), the Colorado Supreme Court affirmed the discipline of a three-month suspension, stayed pending the completion of an eighteen-month probationary period and a requirement that the attorney attend "ethics school and eight hours of cultural awareness and sensitivity training." *Id.* at 1050.

Given the rulings in Idaho, Pennsylvania, and Colorado (and now this case from Iowa), all within the last four years, the scope of attorneys' First Amendment rights is starting to be fully discussed

and evaluated with inconsistent and conflicting results. It is also causing the States and legal commentators to struggle with the proper applications of the First Amendment and regulating attorney speech. This Court should take this opportunity to provide definitive clarity to resolve the conflicts that are developing between the States and provide a definitive ruling on an attorney's First Amendment protections.

III. The Iowa Supreme Court's ruling is incorrect and is in conflict with this Court's rulings.

Much like the ABA's Model Rule 8.4(g), Iowa's Rule of Professional Conduct 32:8.4(g), "was adopted in response to a recommendation made by the Equality in the Courts Task Force" which "was established by the Iowa Supreme Court to study race/ethnicity and gender bias in Iowa's court system." *Iowa Supreme Ct. Bd. of Pro. Ethics, Conduct v. Steffes*, 588 N.W.2d 121, 124 (Iowa 1999). Iowa's Rule 8.4(g) is significantly shorter than the ABA's Model Rule 8.4(g) and states: "It is professional misconduct for a lawyer to…engage in sexual harassment or other unlawful discrimination in the practice of law or knowingly permit staff or agents subject to the lawyer's direction and control to do so."

At first reading it would appear that Iowa's Rule 8.4(g) would merely encompass Title VII's prohibition on sexual harassment and "other unlawful discrimination." However, the Iowa Supreme Court has determined that Iowa Rule

8.4(g)'s language is "broader than the employment standard under Title VII." *Iowa Supreme Ct. Att'y Disciplinary Bd. v. Watkins*, 944 N.W.2d 881, 891 (Iowa 2020). As such, the Iowa Supreme Court has "not required that the harassment be ongoing or pervasive as has been required in some employment contexts." *Iowa Supreme Ct. Att'y Disciplinary Bd. v. Moothart*, 860 N.W.2d 598, 604 (Iowa 2015). Likewise, the Iowa Supreme Court has stated that the term "in the practice of law" is "comparatively broad" and "quite broad." *Id.* at 603 (quoting *Steffes*, 588 N.W.2d at 124). These "broad" interpretations and rulings have now placed Iowa's Rule 8.4(g) squarely in line with the broad language found in the ABA's Model Rule 8.4(g).

Indeed, in another recent ruling, the Iowa Supreme Court has interpreted "sexual harassment" under Iowa Rule 8.4(g) to "encompass[ ] what could be considered 'put downs,' in the form of gender harassment that is aimed at degrading or demeaning women, often to maintain gender hierarchy." *Watkins*, 944 N.W.2d 881, 887-88 (Iowa 2020) (citing Louise F. Fitzgerald & Lilia M. Cortina, *Sexual Harassment in Work Organizations: A View From the Twenty-First Century*, in 1 *APA Handbook of Psychology of Women* 6-7 (Cheryl B. Travis & Jacquelyn W. White, eds., 2018)). Using this definition of sexual harassment, the Iowa Supreme Court has said:

> The "'[g]arden variety' gender harassment…includes 'woman bashing' jokes, insults about [women's]

> incompetence, the irrelevance or sexual unattractiveness of older women, and comments that women have no place in certain kinds of jobs." Fitgerald & Cortina at 7. In a "more pernicious form," it includes "referring to women by degraded names for body parts, pornographic images, [and] crude comments about female sexuality or sexual activity." *Id.* This discrimination does not require an individual woman to serve as its target or unwanted sexual overtures, nor does it need to be explicitly linked to any job or consideration. *Id.* at 7-8, 26.

Watkins, 944 N.W.2d at 888. Applying this legal framework, the Iowa Supreme Court had "little trouble concluding the Board proved Neff violated rule 32:8.4(g)." *Iowa Supreme Ct. Att'y Disciplinary Bd. v. Neff*, 5 N.W.3d 296, 306 (Iowa 2024). Importantly, the Iowa Supreme Court did note that it "cannot say that any one of these statements, standing alone, would be sufficient evidence to violate Iowa Rule 32:8.4(g), but Neff's conduct, when taken as a whole, objectively interfered with and caused harm in the workplace." *Id.* at 307.

The Iowa Supreme Court then proceeded to provide both an as applied and facial analysis to Iowa's Rule 8.4(g). After recognizing the tension between the First Amendment and the rule, the court determined "that tension is not insoluble. We think the constitutional protection afforded speech can be

satisfied in the attorney disciplinary context by requiring the nonexpressive impact of the speech resulted in objective harm beyond mere 'adverse emotional impact on the audience.'" *Id.* at 309 (quoting *Boos v. Barry*, 485 U.S. 312, 322 (1988)). The Iowa Supreme Court then went on to hold that because one of his employees once complained about his speech, and two employees left "in part, due to his conduct and statements," the finding that Neff violated the Iowa's Rule 8.4(g) was justified "without running afoul of the Supreme Court's First Amendment jurisprudence." *Id.*

To reach this conclusion, the Iowa Supreme Court relied on authority from the Title VII context. In particular, this Court's decision in *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993). In *Harris*, this Court recognized that sexual harassment cases that involve hostile work claims are available only when the speech is "severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive." *Id.* at 21. Likewise, the Iowa Supreme Court even referenced a legal scholar for the idea "[b]y requiring severity or pervasiveness, Title VII is more about conduct than words." *Id.* (quoting Caleb C. Wolanek, *Discriminatory Lawyers in a Discriminatory Bar: Rule 8.4(g) of the Model Rules of Professional Responsibility*, 40 HARV. J.L. & PUB. POL'Y 773, 782 (2017)).

Despite the Iowa Supreme Court's reliance on these principles, the Court cannot make the rule constitutional by stating that Iowa's Rule 8.4(g)

requires objective harm, but also does not require the same constitutional requirements of pervasiveness and severity. Indeed, as even recognized by the scholarly authority cited by the Iowa Supreme Court, as "the lower the disciplinary bar, the closer the Constitution looms." Caleb C. Wolanek, *Discriminatory Lawyers in a Discriminatory Bar: Rule 8.4(g) of the Model Rules of Professional Responsibility*, 40 HARV. J.L. & PUB. POL'Y 773, 782 (2017). Iowa's Rule 8.4(g) becomes constitutionally infirm as the Iowa Supreme Court recognizes that Rule 8.4(g) does not require the same level of ongoing and pervasive harassment that is required in the Title VII context. *Neff*, 5 N.W.3d at 311 (citing *Moothart*, 860 N.W.2d at 604).

If Neff's case were a true Title VII case, it would almost certainly fail as a matter of law due to a lack of pervasiveness and severity. Neff's comments were never directed to any particular individual in the office. Nor were his statements directed towards any particular gender. In fact, the majority of his statements were expressions of opinion. Neff expressed an opinion that he wished violent harms and ill will to certain criminal defendants he was prosecuting. Neff expressed an opinion regarding his view of judges only after receiving unfavorable rulings. Neff expressed his opinion, one-time, regarding the former elected County Attorney in the context of him receiving a comment from a member of the community that made the same comment. Neff also made an off-color joke, which was not explicit but instead an innuendo, one-time in the office. Importantly, this joke was made repeatedly by the

individuals that eventually left, in part, because of Neff's comments and conduct. Finally, Neff, on one occasion, uttered the anatomically correct term of another male's genitalia when relaying a college story. None of these statements, individually or collectively, would be sufficient to find a violation of Title VII. Similarly, none of these statements, individually or collectively, should be sufficient to subject an attorney to disciplinary proceedings in any jurisdiction.

Similarly, the Iowa Supreme Court found that Iowa's Rule 8.4(g) was not overly broad. While it recognized that Iowa's Rule 8.4(g) "could also be applied to punish protected speech in violation of the First Amendment in some circumstances," it found that the circumstances were not "substantial…relative to its plainly legitimate sweep." *Id.* at 313 (quoting *U.S. v. Williams*, 553 U.S. 285, 292 (2008)). In reaching this holding, the Iowa Supreme Court significantly downplayed the breadth of its ruling.

The Iowa Supreme Court held that both "sexual harassment" and "in the practice of law" are interpreted extremely broad in Iowa's Rule 8.4(g). Broader than the context of Title VII and as stated previously, this is quite evident in this case. Indeed, the ruling in this case allows the Iowa Supreme Court Attorney Disciplinary Board to act as a kind of speech morality police to be enforced on unknowing attorneys. Based upon the Iowa Supreme Court's ruling in this case any vulgar word that has its root in describing anatomy or a sex act could be deemed

in violation of Iowa's Rule 8.4(g) as long as someone were to complain about the statement ever being uttered. Such a ruling and a holding runs directly afoul against the "bedrock principle underlying the First Amendment, … that the government may not prohibit the expression of an idea simply because society finds the idea offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989). As stated by then Judge Alito on the Third Circuit Court of Appeals:

> The Supreme Court has made it clear, however, that the government may not prohibit speech under a 'secondary effects' rationale based solely on the emotive impact that its offensive content may have on a listener: "Listeners' reactions to speech are not the type of 'secondary effects' we referred to in *Renton…*The emotive impact of speech on its audience is not a 'secondary effect.'"

Saxe v. State College Area School Dist. 240 F.3d 200, 209 (3d Cir. 2001) (quoting *Boos v. Barry*, 485 U.S. 312, 321 (1988)). Yet, that is exactly what Iowa's Rule 8.4(g) is being interpreted as doing. This undoubtedly runs afoul to this Court's precedent.

Further, the Iowa Supreme Court's ruling in this case, similar to the ruling by the Colorado Supreme Court in *Abrams*, appears to create a carve out exception for attorney "professional speech." "Speech is not unprotected merely because it is

uttered by 'professionals.' This Court has 'been reluctant to mark off new categories of speech for diminished constitutional protection.'" *NIFLA*, 585 U.S. 755, 767 (quoting *Denver Area Ed. Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727, 804 (1996) (Kennedy, J., concurring in part, concurring in judgment in part, and dissenting in part.")). Indeed, this Court has recognized lesser protections for "professional speech in two circumstances—neither of which turned on the fact that professionals were speaking." *Id.* 756. The first instance was when there are '"laws that require professionals to disclose factual, noncontroversial information in their 'commercial speech.'" *Id.* (citing *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651 (1985); *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 250 (2010); *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447, 455-456 (1978)). "Second, under our precedents, States may regulate professional conduct even though that conduct incidentally involves speech." *Id.* (citing *Ohralik*, 436 U.S. at 456; *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 884 (1992)). "Outside of the two contexts discussed above—disclosures under *Zauderer* and professional conduct—this Court's precedents have long protected the First Amendment rights of professionals." *Id.* at 771. This Court also recognized that even the speech at issue in *Zauderer*— speech in advertising—"would have been 'fully protected if they were made in a context other than advertising." *Id.* (citing *Zauderer*, 471 U.S. at 637, n. 7).

In this case, the Iowa Supreme Court, and the Colorado Supreme Court, have created another "professional speech" exception for attorneys. They have determined that attorneys' speech, outside of the courtroom and has no effect on legal proceedings is not entitled to the same First Amendment protections as "nonprofessional speech." A determination that has not been decided by this Court and runs afoul to this Court's prior precedents. As stated by distinguished First Amendment scholar, Rodney A. Smolla, "We, should, though, leave the advancement of our more idealistic values, values that I deeply embrace, to education and peer pressure toward professionalism, and avoid the serious tensions with First Amendment doctrine that occur when we attempt to ossify those values into hard law." Rodney A. Smolla, *Regulating the Speech of Judges and Lawyers: The First Amendment and the Soul of the Profession*, 66 FLA. L. REV. 961, 990 (2014).

CONCLUSION

The Court should grant the petition for a writ of certiorari.

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