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 OF THE MANHATTAN INSTITUTE, MOUNTAIN STATES LEGAL FOUNDATION, SOUTHEASTERN LEGAL FOUNDATION, BADER FAMILY FOUNDATION, AND HANS BADER AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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## QUESTION PRESENTED

Petitioner Zachary Greenberg, a Pennsylvania-licensed attorney, sued to enjoin enforcement of a speech-regulating ethics rule. After the district court preliminarily enjoined enforcement of the rule, the government revised it and Greenberg supplemented his complaint to reflect the new version of the rule.

The district court analyzed the mid-litigation developments under the longstanding "time-of-filing" rule and found that Greenberg's challenge was not moot. App. 47a-74a. The Third Circuit reversed, substituting a standing inquiry for a mootness one because Greenberg had amended his complaint. App. 18a n.4.

The question presented is:

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

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## INTEREST OF *AMICI CURIAE*[1]

The **Manhattan Institute** is a nonprofit public policy research foundation whose mission is to develop and disseminate new ideas that foster greater economic choice and individual responsibility. It has historically sponsored scholarship and filed briefs opposing regulations that either chill or compel speech.

**Mountain States Legal Foundation** (MSLF) is a nonprofit, public-interest law firm organized under the laws of Colorado. MSLF is dedicated to bringing before the courts issues vital to the defense and preservation of individual liberties, the right to own and use property, the free enterprise system, and limited and ethical government. *See*, *e.g.*, *Adarand Constr., Inc. v. Pena*, 515 U.S. 200 (1995) (MSLF as lead counsel).

**Southeastern Legal Foundation** (SLF) is a nonprofit legal organization that advocates for individual rights and the framework that protects such rights in the Constitution. For 48 years, SLF has advocated, both in and out of the courtroom, for the protection of First Amendment rights.

The **Bader Family Foundation** is a nonprofit 501(c)(3) foundation that seeks to advance civil liberties, and thus files *amicus* briefs in civil-liberties cases. *See, e.g., Meriwether v. Hartop*, 992 F.3d 492 (6th Cir. 2021). **Hans Bader** is an attorney and trustee of the Bader Family Foundation. He once handled sexual-harassment issues and discrimination complaints in the Department of Education Office for Civil Rights.

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[1] Rule 37 statement: All parties were timely notified of the filing of this brief. No part of this brief was authored by any party's counsel, and no person or entity other than *amici* funded its preparation or submission.

*Amici* believe that, even as harassment has no place in legal practice, the bar rule at issue goes far beyond that and enforces a rigid ideological orthodoxy. Indeed, this brief's counsel of record had a "lived experience" with free-ranging harassment and antidiscrimination policies that chill speech and embroil people in Kafkaesque inquisitions. *See* Eugene Volokh, *What Are Georgetown Professors Forbidden to Say?*, Volokh Conspiracy, June 7, 2022, https://bit.ly/3SqJtU5; Ilya Shapiro, *Why I Quit Georgetown*, Wall. St. J., June 6, 2022, https://on.wsj.com/3TMGKoO.

## SUMMARY OF ARGUMENT

In response to a constitutional challenge by petitioner Zachary Greenberg, Pennsylvania amended its Rule of Professional Conduct 8.4(g) to try to exclude the speech that petitioner regularly performs and plans on performing. The Court should grant the petition here because, despite the state's litigation tactics, Pennsylvania's amended rule remains unlawful.

Rule 8.4(g) punishes speech that does not meet the threshold of "severe or pervasive" harassment that is normally required by federal law to constitute a hostile work environment. Although the "severe or pervasive" standard is not a perfect mechanism for rooting out First Amendment violations, it's better as a floor than nothing at all—which is exactly the scope of the Pennsylvania rule's protection for speech. Other states, like Connecticut, have included this limiting language when adopting the same model rule proposed by the American Bar Association. Pennsylvania considered a qualifier like that but ultimately excised it.

Rule 8.4(g) is also impermissibly overbroad. Although it includes an intent requirement for both

harassment and discrimination, this Court has stated that intent tests do not provide the proper "breathing room" that the First Amendment requires to "survive." *Wisc. Right to Life v. FEC*, 551 U.S. 449, 468–69 (2007). *See also United States v. Alvarez*, 567 U.S. 709, 733 (2012) (Breyer J., concurring in the judgment) (noting that "mens rea requirements . . . provide 'breathing room' [for speech] . . . by reducing a[] . . . speaker's fear that he may accidentally incur liability for speaking"). Even with an intent test, Pennsylvania's rule will still chill speech and serve to inhibit the expression of certain viewpoints. It would also punish speech that lacks malicious intent, so a speaker could be subject to discipline for reading aloud racial epithets from a case decided by this Court. For these and other reasons, the rule is not narrowly tailored.

Rule 8.4(g) is also unconstitutionally vague because it fails to give fair warning to speakers and sets up a system of arbitrary enforcement. The rule contains several elements that constitute impermissible vagueness: it fails to instruct speakers on exactly what type of speech creates liability, it delegates enforcement authority to low-level officials on an ad-hoc basis, and it discourages the exercise of First Amendment freedoms. Without any guiding language like "severe or pervasive," speakers are left to guess what words or phrases will constitute harassment or discrimination. Instead, the State has suggested that "no reasonably intelligent attorney could fail to understand" what speech the rule covers. Brief of Appellants at 3, *Greenberg v. Lehocky*, 81 F.4th 376 (3d Cir. 2023).

But the same words, if spoken twice, could be deemed by state adjudicators to be permissible in one instance and impermissible in the next, depending on

how each official subjectively interprets the motives behind that speech.

## ARGUMENT

### I. PENNSYLVANIA'S AMENDED RULE IMPERMISSIBLY PUNISHES SPEECH THAT IS NOT SEVERE OR PERVASIVE ENOUGH TO CREATE A HOSTILE WORK ENVIRONMENT

Federal laws, such as Title VII of the Civil Rights Act, prohibit harassment that is "severe or pervasive" enough to create a "hostile or abusive work environment." *See, e.g., Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 633, 650, 651, 652, 654 (1999) (emphasizing five times that conduct must be "severe, pervasive, and objectively offensive" to constitute harassment in the educational setting); *Harris v. Forklift Systems*, 510 U.S. 17, 21-22 (1993) (conduct must be "severe or pervasive" to constitute workplace harassment under Title VII). That limiting language, although far from a clear instruction to employers about exactly what type of speech to prohibit in the workplace, at the very least narrows the law to prevent punishing constitutionally protected speech.

More importantly here, the "severe or pervasive" threshold can protect speech that Pennsylvania's Rule 8.4(g) would forbid. For example, courts have found that bigoted or sexist comments do not constitute "severe or pervasive" harassment that creates a hostile work environment. *See, e.g., Jordan v. Alternative Resources*, 467 F.3d 378 (4th Cir. 2006) (holding that single comment that "They should put those two black monkeys in a cage with a bunch of black apes and let the apes f—k them" was not severe or pervasive); *Morris v. Oldham County Fiscal Ct.*, 201 F.3d 784, 787 (6th

Cir. 2000) (no severity or pervasiveness where a supervisor repeatedly made sexual jokes and comments about plaintiff's "state of dress," once referred to her as "Hot Lips," and offering to improve her evaluation if she performed sexual favors); *Hartsell v. Duplex Products*, 123 F.3d 766, 773 (4th Cir. 1997) (comments including "fetch your husband's slippers like a good little wife" and "We've made every female in this office cry like a baby. We will do the same to you. Just give us time," and references to female employees as "slaves" were not "severe or pervasive"); *DeAngelis v. El Paso Municipal Police Officers Assoc.*, 51 F.3d 595 (5th Cir. 1995) (repeated public sexist jibes in union newspaper were not severe or pervasive); *Bolden v. PRC, Inc.*, 43 F.3d 545 (10th Cir. 1994) (no hostile environment where co-workers used N-word).

Rule 8.4(g), in contrast with the severe or pervasive standard, would ban even a single bigoted comment or "inappropriate advance." *See* Brief of Appellants at 43, *Greenberg v. Lehocky*, 81 F. 4th 376 (3rd Cir. 2023) ("The harm to the profession is similar whether an attorney calls Jewish lawyers 'bloodsucking shylocks' directed at opposing counsel during litigation or participants at a bench-bar conference. . . . And female attorneys can hardly build relationships with judges and colleagues when fending off 'inappropriate advances,' which occur with unfortunate regularity at bench-bar functions."); *id*. at 59 (rule violated by "lawyer who tells a Jewish colleague that she belongs to an 'inbreeding' 'race of idiots' at a bench-bar conference"). While such behavior can properly be subject to greater regulation in a courtroom setting, or punished by state tort law when it involves unwanted touching, it is not severe or pervasive per se, and thus does not ipso facto constitute "harassment or discrimination as those

terms are defined in applicable federal, state or local statutes or ordinances," as the limiting language removed by the Pennsylvania Supreme Court would have required.

And yet, Rule 8.4(g), and the ABA model rule on which it is based, attempt to capture and punish speech that does not meet that threshold of "severe or pervasive." And courts will not write in such limiting language when it's absent from a harassment rule, courts will not write it in. *See DeJohn v. Temple Univ.*, 537 F.3d 301, 318 (3d Cir. 2008) (invalidating harassment policy that lacked severity/pervasiveness language, rather than just adding in that requirement); *Saxe v. State College Area School Dist.*, 240 F.3d 200, 216-17 (3d Cir. 2001) (same). Here, such limiting language is not merely absent, but was specifically removed, clarifying that the targeted speech and conduct need not be pervasive to be prohibited. *Cf. Doe v. Chao*, 540 U.S. 614, 622 (2004) (presumed damages unavailable where "drafting history show[s] that Congress cut the very language in the bill that would have authorized any presumed damages").

Pennsylvania's lowered standard is especially troubling when one considers that some courts have found that the "severe and pervasive" standard may not go far enough to protect speech. *See, e.g.*, *Speech First, Inc. v. Cartwright*, 32 F.4th 1110 (11th Cir. 2022) (holding that a college discriminatory-harassment policy likely violates the First Amendment, despite containing a "severity or pervasiveness" clause). Although far from a perfect indicator of constitutionality, the "severe and pervasive" is a staple in federal law and other state rules governing attorney conduct. *See* Conn. R.P.C. 8.4(7) (2022) ("Harassment includes

severe or pervasive derogatory or demeaning verbal or physical conduct.").

## II. PENNSYLVANIA'S AMENDED RULE IS OVERBROAD, BECAUSE IT PUNISHES CONSTITUTIONALLY PROTECTED SPEECH

The fact that Rule 8.4(g) requires an intent to demean in some cases does not keep it from being overbroad or chilling speech. "'First Amendment freedoms need breathing space to survive.' An intent test provides none." *Wisc. Right to Life v. FEC*, 551 U.S. 449, 468–69 (2007). Nor does the fact that speech may have a hidden or perceived biased motive render it unprotected or keep a ban on such speech from inhibiting free expression, as the Third Circuit explained in striking down a harassment policy that reached speech having a "purpose" to harass, even if it was not "severe or pervasive" enough to cause harm. *Saxe*, 240 F.3d at 214, 216-17 ("A regulation is unconstitutional on its face on overbreadth grounds where there is "a likelihood that the statute's very existence will inhibit free expression" by "inhibiting the speech of third parties who are not before the Court."); *id.* (finding harassment policy overbroad for multiple other reasons, including that it "punishes not only speech that actually causes disruption, but also speech that merely intends to do so: by its terms, it covers speech 'which has the purpose or effect of' interfering with educational performance or creating a hostile environment").

Requiring a hostile or discriminatory intent for punishment does not protect the right to express competing viewpoints, as the Court made clear in a libel case that rejected liability based on a speaker's hostility:

> Debate on public issues will not be uninhibited if the speaker must run the risk that it will be proved in court that he spoke out of hatred . . . . Under a rule . . . permitting a finding of [liability] based on an intent merely to inflict harm . . . it becomes a hazardous matter to speak out against a popular politician, with the result that the dishonest and incompetent will be shielded.

*Garrison v. Louisiana*, 379 U.S. 64, 73 (1964).

Similarly, the Court ruled that a corporation's intent to influence elections did not strip otherwise protected speech of protection, reasoning that

> an intent-based test would chill core political speech by opening the door to a trial on every ad within the terms of § 203, on the theory that the speaker actually intended to affect an election, no matter how compelling the indications that the ad concerned a pending legislative or policy issue. No reasonable speaker would choose to run an ad covered by BCRA if its only defense to a criminal prosecution would be that its motives were pure. An intent-based standard "blankets with uncertainty whatever may be said," and "offers no security for free discussion." . . . "First Amendment freedoms need breathing space to survive." An intent test provides none.

*Wisc. Right to Life*, 551 U.S. at 468–69 (quoting *Buckley v. Valeo*, 424 U.S. 1, 43 (1976) and *NAACP v. Button*, 371 U.S. 415, 433 (1963)).

A speaker's motive has no relevance as to whether his speech is useful to listeners or the marketplace of

ideas. A bad motive cannot, alone, strip speech protections. See *Lamont v. Postmaster General*, 381 U.S. 301, 307-08 (1965) (Brennan, J., concurring) (even if the speaker has no First Amendment rights—such as a foreign speaker—a restriction on the speech may violate listeners' rights); *see also id.* at 305 (majority op.) (invalidating the law because it limits "the unfettered exercise of the addressee's First Amendment rights").

And given the need for robust debate, "the free speech clause protects a wide variety of speech that listeners may consider deeply offensive, including statements that impugn another's race or national origin or that denigrate religious beliefs," even in contexts where the government is seeking to eradicate harassment. *Saxe*, 240 F.3d at 206. Society has a "compelling interest in the unrestrained discussion of racial problems," *Belyeu v. Coosa County Bd. of Educ.*, 998 F.2d 925, 928 (11th Cir. 1993), that weighs against suppressing such speech unless it constitutes severe and pervasive harassment.

Moreover, there is no compelling interest in eliminating insults or hateful expression that are not severe or pervasive. *See generally* W.P. Marshall, *Discrimination and the Right of Association*, 81 N.W.U.L. Rev. 68, 97 (1986). "Speech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express 'the thought that we hate.'" *Matal v. Tam*, 137 S. Ct. 1744, 1764 (2017). "[T]he fact that a statement may victimize or stigmatize an individual does not, in and of itself, strip it of protection under the accepted First Amendment tests," so a harassment rule cannot "proscribe speech simply because it was

found to be offensive, even gravely so, by large numbers of people." *Doe v. Univ. of Michigan*, 721 F. Supp. 852, 863, 867 (E.D. Mich. 1991).

The Pennsylvania rule's knowledge requirement doesn't even require a malicious intent. Although the rule states that it is attorney misconduct to "knowingly engage in conduct constituting harassment or discrimination, including but not limited to bias," Pa. R.P.C. 8.4(g), terms like "bias" seem to have the same meaning as in Pennsylvania Code of Judicial Conduct Rule 2.3, which provides, in Comment 2, that "manifestations of bias include . . . epithets; slurs; demeaning nicknames . . . ." See J.A. at 20, *Greenberg v. Lehocky*, 81 F. 4th 376 (3rd Cir. 2023).

So if the petitioner knowingly uses an odious racial epithet like the N-word in presentations about the First Amendment, as he intends to do, J.A. at 16-17, petitioner might be presumed to harbor bias, even absent any intent to harm African- Americans—and even though the First Amendment protects such use of the N-word in presentations and other educational contexts. *See id.*; *Hardy v. Jefferson Community College*, 260 F.3d 671 (6th Cir. 2001) (holding that instructor's use of the N-word to describe how it has been used to degrade was protected by the First Amendment).

That and other ambiguities about the rule's reach chill speech and thus prevent it from being narrowly tailored. *See Reno v. ACLU*, 521 U.S. 844, 874 (1997) (holding that "vague contours of the coverage of the statute" keep it from being narrowly tailored, by chilling speech, "regardless of whether the" statute "is so vague" as to be void for vagueness); *see also Speech First*, 32 F.4th at 1125 (finding discriminatory harassment policy "staggeringly broad" and "almost certainly

unconstitutional[]" when it prohibited a wide range of speech, including "name-calling").

As content-based, viewpoint-discriminatory restrictions on speech, harassment rules must be narrowly tailored. See *Saxe*, 240 F.3d at 206 ("[W]hen anti-discrimination laws are 'applied to . . . harassment claims founded solely on verbal insults, pictorial or literary matter, the statute[s] impose content-based, viewpoint-discriminatory restrictions on speech.' Indeed, a disparaging comment directed at an individual's sex, race, or some other personal characteristic has the potential to create an "hostile environment"—and thus come within the ambit of anti-discrimination laws—precisely because of its sensitive subject matter and because of the odious viewpoint it expresses") (quoting *DeAngelis*, 51 F.3d at 596-97).

Rule 8.4(g) is not narrowly tailored, or anything close to it.

## III. PENNSYLVANIA'S AMENDED RULE IS UNCONSTITUTIONALLY VAGUE, BECAUSE IT DOESN'T GIVE FAIR WARNING AND SETS UP ARBITRARY ENFORCEMENT

The lack of a severe-or-pervasive element also renders the rule unconstitutionally vague, especially given its incorporation by reference of vague terms like "denigrate" and "aversion." *Compare Dambrot v. Central Michigan Univ.*, 55 F.3d 1177, 1182, 1184 (6th Cir. 1995) (harassment policy's ban on creating "hostile or offensive" environment by "using symbols, [epithets,] or slogans that infer negative connotations about the individual's racial or ethnic affiliation" was vague, where it relied on ambiguous terms such as "negative"; "In order to determine what conduct will be considered

"negative" or "offensive" by the university, one must make a subjective reference. Although some statements might be seen as universally offensive, different people find different things offensive.") with J.A. at 119-20 ("Comment Four to Rule 8.4(g) defines [harassment] broadly as 'conduct that is intended to intimidate, denigrate or show hostility or aversion toward a person on any of the bases listed in paragraph (g).' Pa.R.P.C. 8.4(g) cmt. 4.").

Respondents previously attempted to distinguish the old Rule 8.4(g) from the unconstitutional policies struck down in *DeJohn* and *Saxe* by saying that it incorporated the "well-known structure for assessing complaints" under the civil-rights laws, J.A. at 343, which require a showing of severe or pervasive harassment. But the severe-or-pervasive limit was removed from the revised rule, so regulated attorneys do not even have that structure to guide them in deciding what speech puts them in jeopardy. Investigated attorneys cannot avoid discipline by pointing to the body of law that has developed under Title VII of the Civil Rights Act to obtain the dismissal of the complaint against them based on the fact that such speech is not "objectively" harassing as this Court defines the term. *See Harris*, 510 U.S. at 21.

In the First Amendment context, there are three objections to vague policies. "First, they trap the innocent by not providing fair warning. Second, they impermissibly delegate basic policy matters to low level officials for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, a vague policy discourages the exercise of first amendment freedoms." *Cohen v. San Bernardino Valley College*, 92 F.3d 968, 972

(9th Cir. 1996) (overturning professor's discipline under "nebulous outer reaches" of harassment policy; lack of "authoritative interpretive guidelines" led to it being unconstitutionally vague as applied to instructor's longstanding teaching techniques). Rule 8.4(g) exhibits all three of these vices.

The inclusion of the word "knowingly" does not change the analysis. Some conduct may be deemed to be biased, regardless of the speaker's subjective motivation, as discussed above. Thus, the word "knowingly" may create a deceptive safe harbor. See *Gentile v. State Bar*, 501 U.S. 1030 (1991) (imprecise safe harbor provision rendered otherwise valid bar restriction on attorney speech unconstitutionally vague). *Cf. UWM Post v. Bd. of Regents*, 774 F. Supp. 1163, 1180 (E.D. Wis. 1991) (ambiguity about whether rule punished speech that merely intended to create hostile environment, or only speech that both intended to do so and actually did so, rendered harassment rule unconstitutionally vague).

It is all too easy to impute a bad motive to speakers with disfavored or biased viewpoints, and it is virtually impossible for them to disprove a bad motive, creating abundant opportunity for discriminatory enforcement. A rule is facially vague and unconstitutional if "the Rule is so imprecise that discriminatory enforcement is a real possibility." *Gentile*, 501 U.S. at 1051. Such is the case here.

Even a speech restriction that punishes only "knowingly" speaking with a forbidden objective is unconstitutionally vague if there is a risk that speakers will be deemed to harbor that objective just because of the content of their speech. See *Cramp v. Bd. of Public Instruction*, 368 U.S. 278, 285-87 (1961) (holding that

a state cannot "constitutionally compel those in its service to swear that they have never 'knowingly lent their aid, support, advice, counsel, or influence to the Communist Party,'" because that is unconstitutionally vague due to potential arbitrariness of enforcement); *id*. ("it would be blinking reality not to acknowledge that there are some among us always ready to affix a Communist label upon those whose ideas they violently oppose).

Given the impossibility of disproving a bad motive, lawyers are necessarily forced to guess at whether a comment about a controversial issue will later be found to be sanctionable under Rule 8.4(g), discouraging them from discussing these issues at all and thus chilling legal debate. That dynamic renders the rule so vague that its enforcement would violate due process. See *Cramp*, 368 U.S. at 285-88 (1961); *Cohen*, 92 F.3d at 972 (finding a policy vague where it "discourages the exercise of first amendment freedoms").

The possibility that adjudicators will selectively find a bad motive in harassment cases is not speculative. It is already the reality in cases where intent is like Schrödinger's cat, both alive and dead depending on the adjudicator's convenience. Courts do not apply the concept of discriminatory intent consistently in harassment cases, sometimes claiming it is inherent in harassment, and other times claiming it is not. Applying such scienter requirements accurately or consistently can be an elusive task, even for experienced judges. *See*, *e.g.*, Hans Bader, *Sexual Harassment Bait and Switch*, Comp. Enter. Inst., Feb. 27, 2008, http://tinyurl.com/2s4z3pke (discussing cases with inconsistent outcomes and rules of decision). State bar adjudicators can hardly be expected to do better.

Inconsistent intent findings may sometimes be tolerable, because a finding of sexual harassment under federal law requires that speech be "severe or pervasive" even if rooted in malice or a discriminatory intent. See *Saxe*, 240 F.3d at 216-17 (voiding "purpose" prong of harassment policy not mirrored in federal law). Imputing a bad motive does not automatically strip workplace speech of protection.

But no such safe harbor exists under Rule 8.4(g). Simply imputing a bad motive here can indeed strip protected speech of protection under the premise that the speech "knowingly" manifests "bias" and thus constitutes harassment. So the arbitrary and inconsistent way discriminatory intent is found in the real world is a further reason why Pennsylvania's rule is unconstitutionally vague under *Cramp* and overbroad under *Wisconsin Right to Life* and *Garrison*, which make clear that an intent requirement is not sufficient to provide "breathing space" for "First Amendment freedoms." *Wisc. Right to Life*, 551 U.S. at 468–69.

Intent requirements can sometimes be an important safeguard. But they are not a sufficient guardrail, by themselves, to prevent a chilling effect or remedy serious ambiguity. Under *Gentile*, Rule 8.4(g) is unconstitutionally vague because its intent requirement won't keep it from being applied inconsistently.

## CONCLUSION

This case presents an important free-speech issue, one that shouldn't evade review based on lawyerly gamesmanship. For the foregoing reasons, and those in the petition, the Court should grant certiorari.

Respectfully submitted,

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