

No. 26-336

**IN THE
Supreme Court of the United States**

JOHN C. EASTMAN,
Petitioner,

v.

STATE BAR OF CALIFORNIA,
Respondent.

*On Petition for a Writ of Certiorari to the Supreme
Court of California*

**BRIEF OF AMICI CURIAE JONATHAN S.
GOLDSTEIN AND BRITAIN R. HENRY IN
SUPPORT OF PETITIONER**

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INTEREST OF AMICI CURIAE¹

Amici are Pennsylvania election lawyers. Jonathan S. Goldstein and Britain R. Henry are partners at Goldstein Law Partners, LLC, in Montgomery County, Pennsylvania.

Mr. Goldstein has practiced law in Pennsylvania since 2005. His first client was Ralph Nader. In most cycles since, he has represented Republican candidates and committees in county canvasses and in the Commonwealth's courts, and he is a Lecturer in Law at the University of Pennsylvania Carey Law School. Mr. Henry represents candidates for local, state and federal office and has litigated election matters in the county courts of common pleas and in the Commonwealth Court.

On November 20, 2020, a Member of Congress asked the Disciplinary Board of the Supreme Court of Pennsylvania to revoke both amici's law licenses. The complaint identified no conduct beyond amici's representation of the presidential campaign, which consisted of mundane statutory disputes over which mail-in ballots county boards could lawfully count. The central requirement amici asked those boards to enforce — that the voter date the ballot declaration — was a legitimately contested question at the time and

¹No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici or their counsel made such a monetary contribution. Counsel of record for all parties received timely notice of amici's intent to file this brief. Sup. Ct. R. 37.2, 37.6.

became the holding of Pennsylvania's highest court two years later.

Amici do not share Petitioner's views about the 2020 election, and they do not defend what he did. They never argued that any State's results should be set aside. They never claimed the election was stolen. They never advised that the Vice President had authority to reject electoral votes or to delay their count. *See* Pet. App. 62a–63a. They take no position on whether the findings against Petitioner are correct. They only support the petition because the question it presents warrants review, not because they endorse Petitioner's theories or conduct. Petitioner was disbarred, in part, for speech that concerned his personal political views and the actions he undertook furtherance of those views. Petitioner advocated for these views inside the court system as a licensed attorney. According, this Petition raises questions about imposing constraints on novel, and often unpopular, legal advocacy.

Amici nonetheless have a direct interest in this case. The answer to the question it presents will govern every lawyer who litigates a contested election, and amici know firsthand what happens when bar discipline becomes a partisan weapon against lawyers for the other side. The petition does not address one dimension of that problem. Here the disciplinary complaint came not from an advocacy organization, but from a sitting federal elected official, who targeted the lawyers for the other party's presidential nominee. The standard applied below makes such complaints dangerous enough that this

Court must now set the limits on the discipline they seek.

SUMMARY OF ARGUMENT

Amici do not ask the Court to vindicate Petitioner. They do not adopt his views of the 2020 election, and they do not defend the conduct described below. They ask the Court to grant review because the question presented reaches far beyond him. The essential question this case presents is what a State must prove before it may discipline a lawyer for contested legal advocacy. Such discipline threatens to normalize content-based – and, perhaps, viewpoint-based – restrictions on professional speech. “[This Court’s] precedents have expressly rejected the ... notion that ‘professional speech’ represents some ‘separate category of speech’ subject to ‘diminished constitutional protection.’” *Chiles v. Salazar*, 607 U.S. 627, 647 (2026) (citations omitted).

Amici’s own experience shows why that question matters to lawyers who were never accused of conduct like Petitioner’s. The petition documents how partisan advocacy groups used the bar-complaint process to target lawyers who represented their political opponents – most prominently, President Trump. Pet. 3–5, 7–8. A sitting Member of Congress, Representative Bill Pascrell, Jr., of New Jersey, signing as “United States Congressman,” filed complaints in five States seeking the disbarment of twenty-three lawyers. In Pennsylvania, he charged nine of the attorneys with filing “frivolous lawsuits”

in their “capacity as attorneys representing the presidential campaign of Donald Trump.” He identified no frivolous filing. The twenty-three attorneys worked in different courts on different cases. In Pennsylvania, some had challenged ballots before county boards while others had litigated in federal court. What the nine Pennsylvania lawyers shared was the client named in the complaint.

Amici were two of the lawyers named in Congressman Pascrell’s complaint. Their supposedly frivolous lawsuits asked county boards to enforce the Election Code’s command that an absentee or mail-in voter “fill out, date and sign” the required declaration on the return envelope. Pennsylvania’s own Secretary of the Commonwealth provided county boards the same instruction in her September 28, 2020 guidance. Four Justices of the Pennsylvania Supreme Court agreed in November 2020 that the dating requirement is mandatory. By 2023 that court had so held. Congressman Pascrell did not accuse Amici of advancing false or fabricated ideas. Amici did not make claims that widespread fraud infected the 2020 election results. Rather, Amici presented a rather mundane election code argument, and they received an attack against their professional livelihood for doing so. Congressman Pascrell attempted to censor Amici for the content and viewpoint of their speech.

If that argument could cost a lawyer his license, no contested election argument is safe. While acknowledging that strict scrutiny governed, the decision below sustained Petitioner’s culpability by applying a less exacting standard. It subjected an attorney to discipline for making “knowingly” false

statements, or for advancing statements with “no reasonable factual or legal basis[.]” The second alternative threatens to punish legal advocacy that is merely deemed “unreasonable,” not limiting such punishment to the use and reliance upon false information. That is the standard a partisan complainant needs. “Unreasonable” is exactly what each side calls the other’s legal theories.

On the other hand, an unsubstantiated partisan complaint loses most of its force when the tribunal receiving it demands proof that the lawyer made the allegedly false statement “with knowledge that it was false or with reckless disregard of whether it was false or not[.]” See *New York Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964).

Amici do not contend that attorneys should be exempt from adhering to recognized professional and ethical standards. Petitioner, like all practicing attorneys, must be subject to appropriate discipline for violating these standards. Such violations would include advocacy in support of positions based on false statements, fabrications, innuendo and lies.

But such discipline should not impermissibly interfere with protected speech. Applying the appropriate standard is critical to ensuring that attorneys are not fearful of advancing novel arguments on behalf of unpopular clients and dissenting political positions.

This Court has long recognized that litigation can be political expression, and that bar rules reaching such litigation risk “discretionary enforcement against unpopular causes.” *In re Primus*, 436 U.S. 412, 433 (1978). When the complainant is an

officeholder and the targets are the opposing party's lawyers, that risk is no longer incidental. It is the point.

The Court can settle the governing standard without endorsing Petitioner's words or actions. Hard facts often present such questions. The petition should be granted.

ARGUMENT

I. A MEMBER OF CONGRESS ASKED PENNSYLVANIA TO DISBAR AMICI FOR REPRESENTING THE OTHER PARTY'S PRESIDENTIAL NOMINEE.

A. The work: counting ballots under the statute as written.

In the November 2020 general election, amici represented Republican candidates in the post-election canvasses of Montgomery and Bucks Counties. Their clients included Donald J. Trump for President, Inc., the Republican National Committee, the campaign committees of the Republican nominees for Attorney General and State Treasurer, and a Republican candidate for state representative. As in other cycles, the filings were captioned under the name at the top of the ticket. In 2020, that name was Trump.

Pennsylvania's Election Code directs that an absentee or mail-in elector "shall then fill out, date and sign the declaration printed on" the ballot's outer envelope. 25 P.S. §§ 3146.6(a), 3150.16(a). In Bucks

County, the campaign challenged the Board of Elections' acceptance of 2,177 ballots that, it argued, did not comply with the Code, and the largest category, 1,196 ballots, bore outer envelopes without a handwritten date or with only a partial one. *In re Canvass of Absentee and/or Mail-In Ballots of Nov. 3, 2020 Gen. Election*, No. 1191 C.D. 2020, slip op. at 1, 3 (Pa. Commw. Ct. Nov. 25, 2020) (*Bucks County Canvass*). In Montgomery County, the question was whether a voter who omits his address has “fill[ed] out” the declaration at all.

Amici never alleged fraud. When the first judge to hear the Montgomery County challenge asked that very question, Mr. Goldstein answered on the record that they did not. The complaint against amici itself acknowledged that there was “no evidence of systematic malfeasance or fraud” in Pennsylvania’s election. Pascrell Letter 2. Amici asked county boards to apply a statute as the legislature wrote it.

When the complaint against amici was written, Pennsylvania’s presidential margin stood at 81,487 votes, a figure the complaint itself recited, while the ballots amici challenged numbered in the low thousands and no statewide outcome turned on them. This was not an effort to “overturn” anything; it was the mundane, recurring work of an election lawyer — demanding that a county board follow the Pennsylvania Election Code.

Amici lost in 2020. The Pennsylvania Supreme Court rejected the argument that a missing name or address voids a ballot, and three Justices also concluded that the dating instruction was directory and that undated ballots should be counted. *In re*

Canvass of Absentee & Mail-in Ballots of Nov. 3, 2020 Gen. Election, 241 A.3d 1058 (Pa. 2020) (*In re 2020 Canvass*) (opinion announcing the judgment). The Commonwealth Court then affirmed Bucks County’s decision to count, explaining that it was “bound by the Supreme Court’s decision.” *Bucks County Canvass*, slip op. at 6.

But four Pennsylvania Justices disagreed with the lead opinion on the date requirement. Justice Wecht found it “stated in unambiguously mandatory terms.” 241 A.3d at 1079 (Wecht, J., concurring and dissenting). He would have enforced it prospectively. *Id.* Justice Dougherty, joined by Chief Justice Saylor and Justice Mundy, would have enforced it immediately; he did “not view the absence of a date as a mere technical insufficiency we may overlook.” *Id.* at 1090 (Dougherty, J., concurring and dissenting). Amici lost the 2020 ballots. On the date requirement, they did not lose the argument.

B. The complaint: a charge of frivolousness without a single filing.

On November 20, 2020, the late Representative Bill Pascrell, Jr., of New Jersey wrote to the Disciplinary Board of the Supreme Court of Pennsylvania. The Pennsylvania Supreme Court had not yet ruled on the ballots, and the challenges remained pending in the Commonwealth’s courts. Letter from Rep. Bill Pascrell, Jr., to the Disciplinary Board of the Supreme Court of Pennsylvania (Nov. 20, 2020) (“Pascrell Letter”). He signed it as “United States Congressman.” *Id.* at 2. The same day, he announced complaints in five States “against Rudy

Giuliani and 22 other lawyers,” seeking “their disbarments for filing frivolous lawsuits and trying to help Trump steal the election and dismantle democracy.” Bill Pascrell, Jr. (@PascrellforNJ), X (Nov. 20, 2020).

The letter named nine Pennsylvania lawyers, amici among them, by name, firm and bar number. It stated their offense in a single sentence: “In their capacity as attorneys representing the presidential campaign of Donald Trump, these individuals have filed frivolous lawsuits and used your state’s courts to assault public confidence in our nation’s electoral system, violating the Pennsylvania Rules of Professional Conduct.” Pascrell Letter 1. Both charges describe advocacy. It asked the Board to “consider sanctions for their conduct up to and including revocation of their licenses to practice law.” *Id.*

The letter did not identify a single filing by either amicus. It did not identify a single argument, a single false statement, or a single ruling. Its only explanation was a generic one: the lawyers had brought “absurd lawsuits seeking to overturn the will of Pennsylvania’s voters.” Pascrell Letter 2. The letter cited Rule of Professional Conduct 3.1 and Rule 8.4. *Id.* In one paragraph the lawyers “may have violated” both rules. *Id.* In the next they had “clearly violated” them. *Id.* What the letter never supplied was a single fact supporting Representative Pascrell’s assertions.

The lawyers’ work was part of a “pattern of behavior . . . to effectuate Mr. Trump’s sinister arson.” *Id.* The Board, it said, had “an opportunity here to make a powerful statement in support of our democracy.” *Id.* It could “deter future charlatans and

miscreants from warping our legal and political systems.” *Id.*

The relief sought was not the correction of any filing but deterrence — of lawyers who take legitimate, difficult cases for polarizing clients. Within a week, five Members of the House introduced a resolution to censure Representative Pascrell. H.R. Res. 1241, 116th Cong. (2020). The resolution was referred to committee and went no further.

C. The campaign around the complaint.

The congressional complaint arrived in the same ten days as a private campaign against the President’s lawyers. On November 10, the Lincoln Project, a political organization whose mission was to “defeat President Trump and Trumpism at the ballot box,” announced that it would target those aiding the campaign’s post-election litigation. It posted photographs and contact information for two Pennsylvania lawyers for the campaign with the instruction “Make them famous.” Jacob Jarvis, *After Encouraging Harassment, Lincoln Project Puts Trump Lawsuit Supporters on Notice*, Newsweek (Nov. 11, 2020). Twitter locked the organization’s account until the post came down. *Id.* Within days, the two lawyers’ firm moved to withdraw from the campaign’s federal case, citing a “mutual agreement” with its client. Audrey Conklin, *Trump’s Pennsylvania Law Firm Pulls Out of Campaign Case After Online Threats*, Fox News (Nov. 13, 2020). Both lawyers were later named in the same complaint as amici. Pascrell Letter 1. Amici’s own offices and cell phones received a distracting, nearly overwhelming

stream of hostile phone calls, voicemails and e-mails, some of them from members of the bar.

Neither amicus was ever contacted by disciplinary authorities, and neither has ever been disciplined. Pennsylvania keeps disciplinary investigations confidential. Pa.R.D.E. 402. The complainant's accusation, by contrast, was a press release. For lawyers whose practices depend on public trust, the accusation was the punishment. Six years later, it is still posted online.

II. THE DATE REQUIREMENT AMICI ASKED COUNTY BOARDS TO ENFORCE WAS A RESPECTABLE READING IN 2020 AND BECAME THE HOLDING OF PENNSYLVANIA'S HIGHEST COURT.

When amici filed, the statute said "shall." The Secretary of the Commonwealth's own September 28, 2020 guidance told county boards the same thing. It said that a ballot-return envelope "with a declaration that is not filled out, dated, and signed is not sufficient and must be set aside, declared void and may not be counted." *In re 2020 Canvass*, 241 A.3d at 1078 n.6 (opinion announcing the judgment) (quoting the guidance). The lead opinion declined to rely on that guidance, finding the Secretary's directives potentially contradictory and concluding that she lacked authority to definitively interpret the Code. *Id.* The same footnote said the Bucks and Montgomery County courts that ruled against amici "appropriately applied this Court's precedent." *Id.* That was the view of three Justices. On the date requirement, four

disagreed. But a reading the Commonwealth’s chief election official put in writing for every county board is not frivolous. Three days after the complaint, four Justices agreed with it. *See* Part I.A, *supra*.

The four-Justice view of 2020 became the holding of 2022. On November 1, 2022, the Pennsylvania Supreme Court ordered county boards “to refrain from counting any absentee and mail-in ballots” received for that year’s general election “that are contained in undated or incorrectly dated outer envelopes.” *Ball v. Chapman*, 284 A.3d 1189, 1192 (Pa. 2022) (per curiam). Its opinion followed. “[A]n undeniable majority already has determined that the Election Code’s command is unambiguous and mandatory,” the court explained. *Ball v. Chapman*, 289 A.3d 1, 21 (Pa. 2023). “Four Justices agreed that failure to comply with the date requirement would render a ballot invalid in any election after 2020.” *Id.* at 21–22. Even the author of the 2020 lead opinion acknowledged “that the law is settled to the contrary.” *Id.* at 29 (Donohue, J., concurring).

The federal Materiality Provision challenge fared no better. In 2022, a Third Circuit panel held that the Materiality Provision of the Civil Rights Act, 52 U.S.C. § 10101(a)(2)(B), required counting undated ballots. *Migliori v. Cohen*, 36 F.4th 153 (3d Cir. 2022). Three Members of this Court, dissenting from the denial of a stay, thought that interpretation “very likely wrong.” *Ritter v. Migliori*, 596 U.S. 999, 1000 (2022) (Alito, J., dissenting from denial of application for stay). The Court later vacated the judgment as moot. *Ritter v. Migliori*, 598 U.S. 970 (2022) (mem.).

In 2024 the Third Circuit rejected the *Migliori* theory outright. The Materiality Provision, it held, “does not apply to rules, like the date requirement, that govern how a qualified voter must cast his ballot for it to be counted.” *Pa. State Conf. of NAACP Branches v. Sec’y Commonwealth of Pa.*, 97 F.4th 120, 125 (3d Cir. 2024). This Court denied review. *Pa. State Conf. of NAACP v. Schmidt*, 604 U.S. 1098 (2025) (cert. denied).

A later Third Circuit panel held, under the *Anderson-Burdick* framework, that rejecting undated ballots violates the First and Fourteenth Amendments. *Eakin v. Adams Cnty. Bd. of Elections*, 149 F.4th 291 (3d Cir. 2025). It affirmed an injunction barring county boards from discarding ballots with missing or incorrect dates, and that injunction was in force when the petitions for certiorari were briefed. Six judges of that court would have reheard the case en banc. Pennsylvania’s Attorney General now asks this Court to reverse, though the Secretary of the Commonwealth takes the opposite view of the requirement’s value. *Pennsylvania v. Eakin*, No. 25-967; *Republican Nat’l Comm. v. Eakin*, No. 25-962 (U.S. June 29, 2026) (inviting the Solicitor General to express the views of the United States). The Commonwealth Court, sitting en banc, held that the requirement violates the Pennsylvania Constitution, but the Pennsylvania Supreme Court stayed that decision and granted review, and the appeal is pending. *Baxter v. Phila. Bd. of Elections*, 325 A.3d 645 (Pa. 2024) (per curiam) (granting stay); *Baxter v. Phila. Bd. of Elections*, 332 A.3d 1183 (Pa. 2025) (table) (granting allowance of appeal).

Was the date argument frivolous when the Secretary of the Commonwealth put it in writing for every county board? Was it frivolous when four Justices of Pennsylvania's highest court read the statute the same way that same fall? Of course not. Why, then, did a Member of Congress ask that two lawyers lose their licenses over litigation built on it? The letter answers the question itself: "[i]n their capacity as attorneys representing the presidential campaign of Donald Trump." Pascrell Letter 1.

The rules he invoked, read with Rule 1.2(b), forbid exactly that inference. "A lawyer's representation of a client . . . does not constitute an endorsement of the client's political, economic, social or moral views or activities." Pa. R. Prof'l Conduct 1.2(b). Rule 3.1 itself protects "a good faith argument for an extension, modification or reversal of existing law." Pa. R. Prof'l Conduct 3.1. The complaint inverted both rules: it treated representation as endorsement, and endorsement as misconduct.

None of this depends on amici having been right. They lost in 2020, as advocates with good arguments often do. They lost the address argument outright. A losing argument is not a frivolous one.

III. WHEN OFFICEHOLDERS FILE BAR COMPLAINTS AGAINST THE LAWYERS OF AN OPPOSING POLITICAL PARTY, THE DECISION BELOW SUPPLIES THE MISSING PIECE.

A. Complaints by elected officials present a distinct and graver danger.

The petition describes complaints filed by partisan advocacy organizations. Pet. 3–5, 7–8. It notes complaints filed *against* officials. Pet. 4. It does not address complaints filed *by* officials.

A complaint from an advocacy group is a private citizen’s petition, however partisan, but a complaint from a Member of Congress, signed in his official title and publicized in his own name, is different in kind. It is a federal officeholder asking a State’s licensing authority to strip a lawyer of his livelihood, and his clients of their chosen advocate.

Amici do not contend that filing a bar complaint is itself a constitutional violation. Officials who cannot punish disfavored advocacy directly will look for an institution that can, *cf. Nat’l Rifle Ass’n of Am. v. Vullo*, 602 U.S. 175, 190 (2024), and bar discipline is such an institution. Abuse of the state bar complaint infrastructure carries a risk of content-based (or viewpoint based) restrictions on speech. This threatens to chill many forms of protected speech. Partisan bar complaints recur, as the petition’s own examples show. Pet. 3–5. Amici’s experience shows that they can originate from officeholders too. The

First Amendment's protection then depends on the standard the disciplinary tribunal applies.

B. A partisan complaint becomes dangerous when the tribunal will judge contested advocacy by an objective-reasonableness yardstick. The decision below does exactly that.

Lawyers may be disciplined for advancing known falsehoods. A lawyer may not “knowingly . . . make a false statement of material fact or law to a tribunal.” Pa. R. Prof'l Conduct 3.3(a)(1). Amici do not defend advancing falsehoods that the lawyer knew, or recklessly disregarded, to be false, whether about the 2020 election or anything else. Nor would the rule amici propose disturb a court's power to sanction a frivolous filing made before it. That power polices a court's own proceedings, under standards the lawyer knows and accepts when he submits filings. A disciplinary tribunal judging a lawyer's public advocacy years later, by its own measure of what was reasonable, is a different issue. The question is what standard screens contested legal advocacy out of that category. “[T]he First Amendment's protections extend to licensed professionals much as they do to everyone else.” *Chiles v. Salazar*, 607 U.S. 627, 642–43 (2026).

California's Review Department agreed “that strict scrutiny is the applicable standard when examining core political speech.” Pet. App. 102a. It recognized that a lawyer's right does not extend to “knowing or reckless false statements of fact or law.” *Id.* But it endorsed cases assessing a lawyer's speech

“outside of the courtroom” under “an objective, reasonableness standard.” Pet. App. 103a. And it distinguished *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), in part because that case “was analyzed under a subjective standard.” *Id.* at 103a n.95. It then sustained culpability where the lawyer “knowingly made these false statements or had no reasonable factual or legal basis for making them.” Pet. App. 104a (emphasis added). The second limb requires no proof of what the lawyer actually knew or believed and asks only whether a tribunal, measuring objectively, finds that the lawyer lacked a reasonable basis. *See* Pet. 17–31. *Gentile v. State Bar of Nevada* does not supply that yardstick. It held that “the speech of lawyers representing clients in pending cases may be regulated under a less demanding standard” than the press — to protect the fairness of a pending trial. 501 U.S. 1030, 1074 (1991). The Review Department itself declined the State Bar’s invitation to apply *Gentile*’s intermediate scrutiny to Petitioner’s speech. Pet. App. 102a. *Gentile* also observed that “in the courtroom itself, during a judicial proceeding, whatever right to ‘free speech’ an attorney has is extremely circumscribed.” 501 U.S. at 1071. But the courtroom’s rules are enforced by the presiding judge, in the case, under standards the lawyer knows when he speaks. They do not license a tribunal, years later, to discipline the content of a legal position by its own measure of reasonableness.

In November 2020, a hostile tribunal could have pointed to the Pennsylvania Supreme Court’s lead opinion and called amici’s date argument unreasonable. By 2023 Pennsylvania’s highest court

had adopted Amici’s legal position as the governing law of the Commonwealth. In *Chiles v. Salazar*, 607 U.S. 627 (2026), this Court struck down a Colorado law proscribing licensed counselors from engaging in “conversion therapy” – a form of treatment assisting minor children with changing their sexual orientation or gender identity. This Court determined that the law impermissibly sought to dictate the viewpoint of licensed counselors. *Id.*, at 645 (explaining the Colorado law “prescrib[ed] what views [the petitioner may and may not express]”).

The Constitution does not protect the right of some to speak freely; it protects the right of all. It safeguards not only popular ideas; it secures, even and especially, the right to voice dissenting views. Consistent with these principles, our precedents have expressly rejected the State and dissent’s notion that “professional speech” represents some “separate category of speech” subject to “diminished constitutional protection.”

Id., at 646-647 (citing *Nat’l Inst. of Fam. & Life Advoc. v. Becerra*, 585 U.S. 755, 766 (2018)). For a licensed attorney, a standard keyed to a tribunal’s view of reasonableness gives a lawyer no fixed line when he speaks. Pet. 28–29. And it gives a partisan complainant a target: he need not identify a knowing falsehood, only persuade a tribunal that the other side’s legal theory was unreasonable — the very

charge partisans level at each other's theories every election season, often with great vigor.

Allowing unpopular legal arguments to be curtailed as “unreasonable” threatens to have a significant chilling effect on protected speech and novel legal advocacy. In *United States v. Alvarez*, 567 U.S. 709 (2012), this Court rejected an argument in favor of enforcing content-based restrictions on any “false statements.” *Id.*, at 718–722 (plurality opinion). “[C]ontent-based restrictions on speech have been permitted, as a general matter, only when confined to the few ‘historic and traditional categories [of expression] long familiar to the bar.’” *Id.*, at 717 (citations omitted). This includes categories like defamation and fraud.

A plurality of this Court was unwilling to extend content restriction on speech to “false statements” for fear that doing so would cause a chilling effect on other forms of protected speech. *Id.*, at 718–722. “The mere potential for the exercise of [a broad and unprecedented censorial] power casts a chill, a chill the First Amendment cannot permit if free speech, thought, and discourse are to remain a foundation of our freedom.” *Id.*, at 723.

Similarly, this Court has refused to accept an objective standard even for speech the First Amendment does not protect at all. In *Counterman v. Colorado*, a State prosecuted threatening messages under a reasonable-person test, and the Court required proof of the speaker’s own culpable state of mind — at least recklessness. A subjective element, it explained, “reduces the prospect of chilling fully protected expression.” 600 U.S. 66, 75 (2023).

Recklessness is subjective. It requires conscious disregard of a substantial risk. Negligence, which asks what a speaker “should be aware of,” is “an objective standard, of the kind we have just rejected.” *Id.* at 79 & n.5. The same reasoning underlies the actual-malice rule for false statements about public officials. *Id.* at 76 (citing *Sullivan*, 376 U.S. at 280). A lawyer’s contested argument about the meaning of a statute deserves at least that much protection.

The Review Department also found that Petitioner acted knowingly on several counts, including that he “knew that his advice lacked a reasonable basis in law.” Pet. App. 105a; *see* Pet. App. 83a. It relied in the alternative on the principle that speech integral to criminal conduct is unprotected. Pet. App. 104a. Amici take no position on those findings. But the tribunal announced its governing rule in objective terms: it examined Petitioner’s conduct “pursuant to an objective standard, not a subjective one.” Pet. App. 94a. And it summarized its culpability findings in the disjunctive: Petitioner “knowingly made these false statements or had no reasonable factual or legal basis for making them.” Pet. App. 104a. An objective rule announced in a disciplinary opinion reaches the next lawyer whether or not it was needed to decide this case. That is reason to decide whether the second limb is constitutional, not an obstacle to doing so. If it stands, the next complaint like Representative Pascrell’s will not have to supply what his lacked.

C. The chill falls on lawyers, and through them on candidates and voters.

In *Button*, this Court held that civil-rights litigation “is thus a form of political expression.” *NAACP v. Button*, 371 U.S. 415, 429 (1963). In *Primus*, it called such litigation “a vehicle for effective political expression and association.” *Primus*, 436 U.S. at 431. Election litigation fits that description better than almost any other kind. *Primus* also warned that overbroad bar rules reaching such advocacy carry “a distinct potential for . . . permitting discretionary enforcement against unpopular causes.” *Id.* at 433. And the Court has declined to treat professional speech as a separate, lesser category: “Speech is not unprotected merely because it is uttered by ‘professionals.’” *Nat’l Inst. of Family & Life Advocates v. Becerra*, 585 U.S. 755, 767 (2018). States may still regulate “professional conduct, even though that conduct incidentally involves speech,” and malpractice liability is the familiar example. *Id.* at 768–769. But a lawyer’s public argument about what a statute means is not conduct incidental to speech. It is the speech. And a State “may not, under the guise of prohibiting professional misconduct, ignore constitutional rights.” *Id.* at 769 (quoting *Button*, 371 U.S. at 439).

The chill does not require a single disbarment. “The threat of sanctions may deter [the] exercise [of these freedoms] almost as potently as the actual application of sanctions.” *Button*, 371 U.S. at 433. Amici’s own experience in 2020 illustrates how public pressure works on lawyers: a stream of hostile calls,

voicemails and e-mails, some of them from members of the bar, reached their offices and cell phones. *See* Part I.C, *supra*.

The consequences reach well beyond the lawyers. Pennsylvania's election bar is small. Under Pennsylvania law, an appeal from a county board's canvass decision must be filed within two days of the decision, and the court must fix a hearing within three days after that.² These disputes are decided in days, by lawyers who know one another and have represented candidates of both parties, and because of those deadlines the challenges are necessarily filed with good, but incomplete, information. Statutes like the date requirement are enforced only when someone asks a county board to enforce them. If representing the top of one party's ticket invites disbarment complaints from the other party's officeholders, that party's candidates will find fewer lawyers. The Election Code will be enforced selectively, by default. "An informed, independent judiciary presumes an informed, independent bar." *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 545 (2001).

Would anyone defend a Member of Congress asking a state bar to disbar a public defender because a suppression motion failed? Or the lawyer who

²25 P.S. § 3157(a) (appeal from a county board's order or decision on the canvass "within two days after such order or decision shall have been made"; hearing to be fixed "within three days thereafter"); 25 P.S. § 3146.8(g)(6) (appeal from a board's decision on a ballot challenge "within two (2) days after the decision was made"); *see also* 25 P.S. § 3146.8(g)(2) (canvass of mail ballots to begin "no later than the third day following the election").

argued, without success, that a zoning denial violated the Free Exercise Clause? Or the NAACP's lawyers in *Button*, whose litigation Virginia's legislators plainly despised? No one would. Why, then, are the lawyers for one party's political candidates fair game?

**D. A case with hard facts is a sound vehicle
for a rule that protects ordinary lawyers.**

This Court often settles First Amendment standards in cases with unsympathetic facts. *Counterman* involved a man who sent hundreds of messages to a stranger who repeatedly blocked him, some of them envisioning harm befalling her. 600 U.S. at 70. The rule the Court announced there applies to every speaker.

The question is not whether Petitioner was right, but under what circumstances may a State discipline a lawyer for legal advocacy. If the lawyer is accused of advancing falsehoods, discipline should require proof that he knew his statements were baseless or recklessly disregarded that risk. The Court can answer that question without adopting any of Petitioner's positions, or condoning any of his actions. The courts below can then decide whether his discipline survives under the correct standard. The principal beneficiaries will be lawyers like Amici, who presented legitimate arguments concerning the correct interpretation of a statute's plain text in a county courthouse.

Officeholders in both parties will draw the lesson this Court leaves in place. If a State may disbar a lawyer whenever a tribunal finds his contested constitutional advocacy objectively unreasonable,

then a complaint like Representative Pascrell's is a model, not an aberration. The next one will come from the other side of the aisle. The Court should resolve the question now, while it can still be decided as a matter of principle rather than partisanship.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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