United States Court of Appeals

for the

Third Circuit

Case No. 22-1733

ZACHARY GREENBERG,

Plaintiff-Appellee,

– v. –

JERRY M. LEHOCKY, in his official capacity as Board Chair of the Disciplinary Board of the Supreme Court of Pennsylvania, *et al.*,

Defendants-Appellants.

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA IN CASE NO. 2-20-CV-03822 HONORABLE CHAD F. KENNEY, DISTRICT JUDGE

AMICUS BRIEF OF LEGAL INSURRECTION FOUNDATION IN SUPPORT OF PLAINTIFF-APPELLEE

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CORPORATE DISCLOSURE STATEMENT

Legal Insurrection Foundation (LIF)[1] is a Rhode Island tax-exempt not-for-profit corporation. It has no parent corporation, shareholders, subsidiaries, or affiliates.

[1] https://legalinsurrectionfoundation.org/.

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STATEMENT OF INTEREST OF *AMICUS CURIAE*[2]

LIF is devoted, among other things, to advancing free expression. LIF publishes the Legal Insurrection website,[3] which provides news coverage and analysis, among other things, of the narrowing of viewpoint expression and the growth of 'cancel culture.' LIF has been increasingly concerned about the chilling of speech that disagrees with current ideological verities. It offers news coverage and analysis of same. Much of LIF's focus has been on the university campus, including law schools.[4]

LIF supports the arguments of Plaintiff-Appellee as to the unlawfulness of Pennsylvania Rule of Professional Conduct 8.4(g). LIF submits this Brief to share its expertise in the shutting down of debate in analogous settings, especially on campus. Our brief illustrates that the rule's overbreadth and vagueness are not just abstract legal concepts, but will almost certainly operate to chill lawyers' speech, just as speech codes have chilled the speech of faculty, students, and others.

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[2] All parties consented to the filing of this brief. No counsel for a party authored this brief in whole or in part; no party or counsel for a party made any monetary contribution intended to fund the preparation or submission of this brief; and no person or entity other than *Amicus Curiae* Legal Insurrection Foundation funded its preparation or submission.

[3] https://legalinsurrection.com/.

[4] LIF also publishes CriticalRace.org, https://criticalrace.org/, which documents the now-pervasive and expansive race-based educational and training mandates at colleges and universities, and how such mandates negatively impact campus free expression.

SUMMARY OF ARGUMENT

In 2022, speech is regularly policed and debate shut down, often in the name of preventing "discrimination" or "harassment". The problem of policing speech is growing, not shrinking.[5] Most importantly for the Court, Pennsylvania and other states recently imposed speech codes on lawyers. Pennsylvania Rule of Professional Conduct 8.4(g) is a speech code by another name. The rule is constitutionally infirm as both overbroad and vague. Like other such codes, it can reasonably be expected to chill speech touching upon anything remotely concerned with race, race relations,

[5] One growing rationale for suppressing speech is preventing the spread of "misinformation", in the name of which, California recently authorized its medical board to sanction doctors with whose medical judgment the state disagrees. Micky Wootten, *California Passes Bill to Punish Doctors Who 'Disseminate Misinformation' on COVID*, CNS NEWS (September 1, 2022), https://www.cnsnews.com/article/national/micky-wootten/california-passes-bill-punish-doctors-who-disseminate-misinformation; Editorial Board, *California to Doctors: Agree With Us or Shut Up*, WALL STREET JOURNAL (October 11, 2022), https://www.wsj.com/articles/california-to-doctors-agree-or-shut-up-medical-misinformation-covid-vaccines-gavin-newsom-joseph-ladapo-11665520691?mod=Searchresults_pos1&page=1; Physicians and Surgeons: Unprofessional Conduct Act, Cal. Assemb. B. 2098 (2021-2022), Chapter 938 (Cal. Stat. 2022), https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202120220AB2098. In private industry, PayPal threatened to fine users $2,500 if it judged their speech to be misinformation, although it has at least temporarily backed down from the idea. Stacey Matthews, *PayPal Updates User Policy to Include Possible $2,500 Fine For Speech It Doesn't Like*, LEGAL INSURRECTION (October 6, 2022), https://legalinsurrection.com/2022/10/paypal-updates-user-policy-to-include-possible-2500-fine-for-speech-it-doesnt-like/; Stacey Matthews, *PayPal Reverses Course on $2,500 'Misinformation' Fines After Massive Pushback*, LEGAL INSURRECTION (October 9, 2022), https://legalinsurrection.com/2022/10/paypal-reverses-course-on-2500-misinformation-fines-after-massive-pushback/.

"gender" relations, and how the Equal Protection Clause impacts race and gender relations. These are important subjects of public debate, and as such, core protected speech.

Although speech codes are new to attorney regulation, they have been around for a while, especially in the form of campus speech codes. College professors have been persecuted and fired, and students have been harassed. Surveys and anecdotes from the college campus support Plaintiff-Appellee's position that speech codes chill speech and are enforced arbitrarily. That's the danger, and that's why this Honorable Court needs to nip it in the bud by upholding the district court's judgment in this facial challenge.

ARGUMENT

I. Rule 8.4(g) is nothing less than a speech code for lawyers that is likely to inhibit free expression about important public policy matters and/or to be enforced in a discriminatory way.

A. The rule is overbroad in violation of the First Amendment and vague in violation of the Fourteenth Amendment Due Process Clause.

This Court has held, "[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.'" *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 214 (3d Cir. 2001). *Cf. Opinion No. KP-0123*, 5, ATTORNEY GENERAL OF TEXAS (December 20, 2016) (based on the original version of the American Bar Association's Model Rule 8.4(g)),[6] *Memorandum from Steve Smith to Jodi Nafzger Re: Idaho State Bar Professionalism and Ethics Section Subcommittee on the Proposed Idaho Rules of Professional Conduct, Rule 8.4(g)* (May 26, 2017), at 14-16.[7] An overbroad law or rule may not evade constitutional protection by being interpretated to remain within constitutional bounds. *United States v. Stevens*, 559 U.S. 460, 480 (2010) ("But the First Amendment protects against the Government; it does not leave us at the mercy

[6] https://www.texasattorneygeneral.gov/sites/default/files/opinion-files/opinion/2016/kp0123.pdf.
[7] https://isb.idaho.gov/wp-content/uploads/5-30-17-ABA-Model-Rule-8-4g-Dissenting-Opinion-in-Idaho-with-Memo.pdf.

of *noblesse oblige*. We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly."). Pennsylvania Rule of Professional Conduct 8.4(g) fails this overbreadth test.

A law or rule also violates the Fourteenth Amendment Due Process Clause if it is so vague that it (a) gives inadequate notice as to what is prohibited, or (b) is so imprecise that discriminatory enforcement is a real possibility. *F.C.C. v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012); *Kolender v. Lawson*, 461 U.S. 352, 358 (1983). *See also Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1051 (1991) (Kennedy, J., writing for the majority). That is the situation here. *Cf. Tex. A.G. Opinion No. KP-0123* at 5-6; *Smith Memorandum* at 8-14.

Pennsylvania Rule of Professional Conduct 8.4(g)[8] does not define either the "discrimination" or the "harassment" it purports to proscribe.[9] The revised version

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[8] The Pennsylvania rule is based on the American Bar Association's Model Rule 8.4(g). *See* Johanna Markind, *Look Who Is Gutting the First Amendment!* GATESTONE INSTITUTE (August 26, 2016), https://www.gatestoneinstitute.org/8753/aba-first-amendment.

[9] The current version of Pennsylvania Model Rule of Professional Conduct 8.4(g) states:

> It is professional misconduct for a lawyer to: …
>
> (g) in the practice of law, knowingly engage in conduct constituting harassment or discrimination based upon race, sex, gender identity or expression, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, or socioeconomic status. 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 advice or advocacy consistent with these Rules.

Brief of Defendant-Appellant at Add.1.

adopted by the Supreme Court of Pennsylvania in July 2021, which is the version invalidated by the district court's March 24, 2022, Opinion, eliminated a clause in the original rule interpreting both "as those terms are defined in applicable federal, state or local statutes or ordinances."[10] The revision thus made it *harder* to decide what conduct is and is not covered by the rule. The rule's current official comments define both terms very broadly.[11] Basically, any barb (humorously intended or not) potentially qualifies as discriminatory or harassing.

The rule's knowledge requirement is also vague. Does it require lawyers to know what they are doing when they speak certain words, or to know that those words qualify as discriminatory? *Cf. United States v. X-Citement Video, Inc.*, 513 U.S. 64, 72 (1994) ("*Morissette*, reinforced by *Staples*, instructs that the presumption in favor of a *scienter* requirement should apply to each of the statutory elements that

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[10] Brief of Defendant-Appellant at 10.

[11] The official comments explain the terms as follows:

> [4] "Harassment" means conduct that is intended to intimidate, denigrate or show hostility or aversion toward a person on any of the bases set forth in this rule. Sexual harassment includes but is not limited to sexual advances, requests for sexual favors, and other conduct of a sexual nature that is unwelcome.
>
> [5] "Discrimination" means conduct that a lawyer knows manifests an intention: to treat a person as inferior based on one or more of the characteristics listed in paragraph (g); to disregard relevant considerations of individual characteristics or merit because of one or more of the listed characteristics; or to cause or attempt to cause interference with the fair administration of justice based on one or more of the listed characteristics.

Brief of Defendant-Appellant at Add.1-2.

criminalizes otherwise innocent conduct"). Comment 5 to the rule seems to suggest the latter, at least in the case of discrimination. Even the latter standard would be of only limited help to lawyers trying to comply with the rule, because the content of speech considered offensively discriminatory changes so often.

Furthermore, the Defendant-Appellant has failed to justify the broad scope of the rule, which goes far beyond any legitimate sweep. *See* March 24, 2022, District Court Opinion at 65 (*citing Saxe*, 240 F.3d at 214). It relies on authority for regulating attorney conduct before the tribunal to impose an expansive new rule applicable far beyond the tribunal. Defendant-Appellant's unsubstantiated reference to "'numerous accounts' of racism in Pennsylvania courtrooms" – even if it could be said to justify imposing the rule on attorneys *before* the tribunal – offers no support for a regulation going *beyond* that forum. Defendant-Appellant's Brief at 51.

Defendant-Appellant also failed to provide survey evidence supporting its claim that sexual harassment is common. It certainly has not shown that the problem is so prevalent it's important enough to justify limiting attorney speech rights, both inside and outside of the tribunal. Its back-handed admission of this failure likewise shows the weakness of its argument. *See* Defendant-Appellant's Brief at 52 ("Pennsylvania *did not need to commission a survey* to prove that comments like 'We didn't let girls do it in the old days' harm public trust" (*emphasis added*)).

It is noteworthy that the ABA felt the need to issue a formal opinion arguing that its model rule wasn't constitutionally infirm for vagueness or overbreadth. American Bar Association Standing Committee on Ethics and Professional Responsibility, *Formal Opinion 493* (July 15, 2020).[12] That opinion expressly states, "*whether conduct violates Rule 8.4(g) must necessarily be judged, in context, from an objectively reasonable perspective*," *Id*. at 1 (*emphasis in original*). Later, it asserts, "The existence of the requisite harm is assessed using a standard of objective reasonableness." *Id*. at 6.

Pennsylvania's rule, as modified in July 2021, flunks the ABA's own standard. The rule appears to lack *any* objective standard. Rather, it is based *entirely* on what the lawyer *subjectively* knows. Slip op. at 54 ("The standards for ODC's assessment are, at best, subjective, and, at worst, completely unknown to both Pennsylvania attorneys like Mr. Greenberg and even ODC itself"). That makes enforcement an exercise in mind-reading, and threatens core protected speech. *DeJohn v. Temple Univ.*, 537 F.3d 301, 317-18 (3d Cir. 2008); *Saxe*, 240 F.3d at 210-11.

The rule's broad language leaves a dangerous amount of discretion to regulators to decide what constitutes a violation. "The best way to protect less

12 https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba-formal-opinion-493.pdf.

powerful lawyers is to avoid aggressive use of speech restrictions, not to broaden discretion in the area. Rule 8.4(g) does the latter." Bruce A. Green and Rebecca Roiphe, *ABA Model Rule 8.4(g), Discriminatory Speech, and the First Amendment*, 50 HOFSTRA LAW REVIEW 543, 566 (2022)[13] The affidavit of Defendant-Appellant's chief counsel promising to limit enforcement cannot save it. *Stevens* at 480.

In short, the rule is both vague and overbroad.

B. The impact of campus speech codes offers a model supporting the district court's holding that imposing the Rule 8.4(g) speech code will chill lawyers' speech.

1. Survey findings show that faculty and students are afraid to speak their minds.

Pennsylvania Rule of Professional Conduct 8.4(g), and the ABA model rule on which it is based, are civility codes, also known as speech codes.[14] Enforceable civility codes are new to attorney regulation,[15] but have been around for some time on the college campus.[16] The chilling effect of campus speech codes has been well-

[13] Available for download at https://ssrn.com/abstract=4009058.
[14] Green and Roiphe.
[15] Green and Roiphe, 50 HOFSTRA L.R. at 543.
[16] Through its Council of the Section of Legal Education and Admissions to the Bar, the ABA has been trying to impose revised standards requiring law schools to provide an "inclusive and equitable environment." The proposed changes appeared partly designed to limit free speech at law schools. *See Letter of William A. Jacobson Re: Response to ABA Standards – Matters for Notice and Comment – Definitions (7)-(8); Standards 206, 306, 311(c) and (e), and 405(b); and Rules 19 and 29* (January 21, 2022), at 6, https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/comments/2022/jan/22-

documented and provides a useful model for analyzing the likelihood that an overbroad and vague rule like Rule 8.4(g) would substantially inhibit attorneys' free expression.

Surveys conducted by reputable nonpartisan organizations paint a consistent portrait of students being afraid to share their opinions, both inside and outside of class. A 2021 survey put out jointly by the College Pulse, the Foundation for Individual Rights in Education ("FIRE"),[17] and RealClearEducation, found that most students self-censor at least some of the time; and that conservatives were more likely to self-censor than liberal students. After polling 37,104 students, FIRE *et al*. found:

> [M]ore than 80% of students reported some amount of self-censorship, with 21% of students reporting that they did so "fairly often" or "very often" and 62% saying that they censor themselves "rarely" or "occasionally." … Among students who identify as liberal or who identify as neither liberal nor conservative, the rate of reporting no self-censorship was the highest, at 19%. Just 12% of respondents who identify as middle of the road reported no self-censorship, and the proportion for conservatives was only 9%.

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jan-comment-william-jacobson.pdf. The comment letter is in response to the *Memorandum from Leo Martinez, Council Chair, and William Adams, Managing Director of Accreditation and Legal Education, Re: ABA Standards, Rules, and Definitions – Matters for Notice and Comment* (December 16, 2021), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/comments/2021/12-16-21-notice-comment.pdf.

[17] Although FIRE is non-partisan, Plaintiff-Appellee does work for the organization, https://www.thefire.org/author/zachgreenberg/.

2021 College Free Speech Rankings: What's the Climate for Free Speech on America's College Campuses? COLLEGE PULSE, FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION, AND REALCLEAREDUCATION, at 3, 10-11 (September 21, 2021).[18]

FIRE also publishes an annual survey of campus speech codes. On the theory of protecting campuses from harassment, bias or hate speech, obscenity, and incitement, and of promoting tolerance, respect, and civility, universities prohibit a great deal of speech. FIRE's 2022 report rated just 58 (12.1%) of 481 universities as having free speech, designated by a rating of "green". 327 (68%) received a yellow rating, while 89 (18.5%) received a red rating.[19] Spotlight on *SPEECH CODES 2022: The State of Free Speech on Our Nation's Campuses*, FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION at 6 (December 8, 2021).[20]

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[18] https://f.hubspotusercontent00.net/hubfs/5666503/2021_Campus%20Free%20Speech%20Report.pdf.

[19] A red rating indicates an institution has at least one policy that both clearly and substantially restricts freedom of speech, or that it bars public access to its speech policies. A yellow rating indicates an institution "maintains policies that could be interpreted to suppress protected speech or policies that, while clearly restricting freedom of speech, restrict relatively narrow categories of speech." A green rating indicates a university's policies do not seriously threaten campus expression. Spotlight on SPEECH CODES 2022: The State of Free Speech on Our Nation's Campuses, Foundation for Individual Rights in Education, at 4 (December 8, 2021), https://d28htnjz2elwuj.cloudfront.net/wp-content/uploads/2022/02/11105334/fire-spotlight-on-speech-codes-2022.pdf.

[20] https://d28htnjz2elwuj.cloudfront.net/wp-content/uploads/2022/02/11105334/fire-spotlight-on-speech-codes-2022.pdf.

A Knight Foundation-Ipsos study released in January 2022 showed that 65 percent of college students agreed today's "campus climate prevents people from saying what they believe for fear of offending someone, up from 54% in 2016." *College Student Views On Free Expression and Campus Speech: A Look at Key Trends in Student Speech Views Since 2016*, KNIGHT FOUNDATION-IPSOS at 20 (January 2022).[21] Just 48 percent of all college students said they were comfortable offering dissenting opinions to ideas shared by other students or the instructor in the classroom. *Id*. at 21. Of students who identified as Republican, 71 percent felt that the campus climate chilled free speech. *Id*. at 20.

A prior Knight Foundation study, released in 2018, found that 61 percent of students agreed that the climate on their campus prevented some students from expressing their views because others might take offense. That's an increase from the 54 percent who agreed with the statement in Knight's 2016 survey. Furthermore, college students believed political liberals were more able to express their views openly on campus than were political conservatives – 92 percent versus 69 percent. *Free Expression on Campus: What College Students Think About First Amendment Issues*, GALLUP/KNIGHT FOUNDATION at 2 and 15-16 (2018).[22] The same study

[21] https://knightfoundation.org/wp-content/uploads/2022/01/KFX_College_2022.pdf.
[22] https://knightfoundation.org/wp-content/uploads/2020/01/Knight_Foundation_Free_Expression_on_Campus_2017.pdf.

found, "Nearly two-thirds of students think hate speech should not be protected by the First Amendment." *Id*. at 10.

The non-profit Heterodox Academy conducts an annual survey of the free speech climate on campus. Its Fall 2021 report, published in March 2022, found that "Overall, 60% of college students expressed reluctance to discuss at least one controversial topic (*i.e.*, race, sexual orientation, gender, religion, and politics), similar to last year's numbers." S. Zhou, M. Stiksma, & S. C. Zhou, *Understanding the Campus Expression Climate: Fall 2021*, HETERODOX ACADEMY at 2 (2022).[23] According to its Fall 2020 report, "In 2020, 62% of sampled college students agreed the climate on their campus prevents students from saying things they believe, up from 55% in 2019." M. Stiksma, *Understanding the Campus Expression Climate: Fall 2020*, HETERODOX ACADEMY at 3 (2021).[24]

Heterodox Academy conducted an internal survey[25] of faculty members in 2020, with results similar to those of the above student surveys.

> This year, the Heterodox Academy conducted an internal member survey of 445 academics. "Imagine expressing your views about a controversial issue while at work, at a time when faculty, staff, and/or other colleagues were

[23] https://heterodoxacademy.org/wp-content/uploads/2022/02/CES-Report-2022-FINAL.pdf.
[24] https://heterodoxacademy.org/wp-content/uploads/2021/03/CES-Report-2020.pdf.
[25] The faculty survey itself is not publicly available, as Heterodox's press office clarified to *Amicus*. Email from HxA Communications (press@heterodoxacademy.org), Re: [PRESS@] Looking for faculty survey (April 27, 2022).

> present. To what extent would you worry about the following consequences?" To the hypothetical "My reputation would be tarnished," 32.68 percent answered "very concerned" and 27.27 percent answered "extremely concerned." To the hypothetical "My career would be hurt," 24.75 percent answered "very concerned" and 28.68 percent answered "extremely concerned." In other words, more than half the respondents consider expressing views beyond a certain consensus in an academic setting quite dangerous to their career trajectory.

John McWhorter,[26] *Academics Are Really, Really Worried About Their Freedom*, THE ATLANTIC (September 1, 2020).[27]

2. Anecdotal evidence shows that campus speech codes have effectively chilled speech.

There is no shortage of anecdotal evidence that faculty feel chilled in what they say, particularly on matters of race. Nadine Strossen[28] has written about the chilling effect speech codes have had on American colleges:

> Likewise, since the 1980s, many liberals have advocated campus "hate speech codes" that are invariably too broad, punishing and chilling all manner of expression about various categories of personal and group identity….
>
> In the 1980s, as I said, left-leaning professors and students on U.S. college campuses launched the movement for campus hate speech codes, which sought to punish individually targeted racist slurs. Similarly, in the same time period, "radical feminists" sought to legally equate the depiction of sexual violence—for example, in works of art and journalism—with real sexual violence in the physical world. In the intervening decades, these initiatives have expanded in both support and scope. Today, accusations of "hate speech"

[26] McWhorter is an associate professor of English and comparative literature at Columbia University.

[27] https://www.theatlantic.com/ideas/archive/2020/09/academics-are-really-really-worried-about-their-freedom/615724/.

[28] Former national president of the American Civil Liberties Union and professor *emerita* at New York Law School.

and "violent speech" shut down even good-faith discussions of public policy options that are deemed inconsistent with the perceived consensus at that moment, even if such "consensus" is neither broadly held nor static. Worse yet, individuals who are accused of engaging in such expression have been fired from positions in culturally influential fields such as academia, journalism, and publishing, suppressing their speech across the board with literally incalculable chilling impacts on the speech of countless others.

Even though courts have consistently enforced the cardinal "viewpoint neutrality principle" to bar official suppression of ideas solely on the ground that any listeners consider them hateful or violent, powerful private sector forces—including social media mobs—have been increasingly successful in suppressing disfavored ideas by invoking the false and dangerous equation between free expression and physical violence. This strategy has prevailed on many college campuses, where free speech is especially important, given the special truth-seeking and educational missions of universities. Surveys consistently show that substantial majorities of American college students and faculty members now engage in self-censorship across a spectrum of important political topics, both in the classroom and in social settings, to avoid the risk of retaliation.

Because many campus communities skew overwhelmingly liberal or progressive, and because progressive views tend to disproportionately dominate fields that favor workers with academic degrees, self-censorship is particularly acute among nonprogressives: conservatives, libertarians, moderates, the politically indifferent, and even "old-style" liberals. Empirical evidence confirms, moreover, that fears of retaliation are rational, given numerous documented instances of retaliatory measures ranging from social ostracism, to online and in-person bullying, to the denial of extracurricular leadership positions, recommendation letters, and career opportunities. Many left-leaning members of campus communities explicitly admit (or boast) that they would deny employment and other professional opportunities to academics with conservative views about public policy issues….

The Foundation for Individual Rights and Expression (FIRE), on whose Advisory Board I serve, recently published a compilation of reported campus cancellation incidents targeting faculty members between 2015 and 2021. FIRE documented a total of 563 attempts to sanction faculty members for expression that was constitutionally protected but controversial in the campus community. In a full two-thirds of these cases, the faculty member was subject

> to some form of punishment; in one-fifth of cases the faculty member was fired; and most alarmingly, 30 tenured professors were fired for constitutionally protected speech. Of the total number of documented incidents, FIRE reports that 345 (61%) involved the expression of views that were suppressed by individuals and groups to the left of the targeted faculty member. Notably, the evidence indicated that a significant number of these 345 incidents may well have targeted liberal views espoused by liberal professors, which were attacked by campus factions even further to the left.

Nadine Strossen, *Who Really Benefits From the First Amendment?* TABLET MAGAZINE (July 13, 2022).[29]

An article published earlier this year cited Strossen and other law school professors as recognizing the unlively, dispirited, non-robust condition of campus debate today:

> "I got into this job because I liked to play devil's advocate," said the tenured professor, who identifies as a liberal. "I can't do that anymore. I have a family."
>
> Other law professors – several of whom asked me not to identify their institution, their area of expertise, or even their state of residence – were similarly terrified.
>
> Nadine Strossen, the first woman to head the American Civil Liberties Union and a professor at New York Law School, told me: "I massively self-censor. I assume that every single thing that is said, every facial gesture, is going to be recorded and potentially disseminated to the entire world. I feel as if I am operating in a panopticon." …
>
> At a Heterodox Academy panel discussion in December 2020, Harvard Law School Professor Randall Kennedy said that, until recently, he'd thought that fears of law schools becoming illiberal – shutting down unpopular views or voices – had been overblown. "I've changed my mind," said Kennedy, who,

[29] https://www.tabletmag.com/sections/news/articles/who-really-benefits-from-the-first-amendment.

> in 2013, published a book called "For Discrimination: Race, Affirmative Action, and the Law." "I think that there really is a big problem."
>
> The problem has come not just from students, but from administrators, who often foment the forces they capitulate to.

Aaron Sibarium, *The Takeover of America's Legal System*, COMMON SENSE (March 21, 2022).[30]

In the name of "protecting" community members from so-called discrimination or harassment, universities have sanctioned faculty merely for discussing racial classifications and hate speech. For example:

- Princeton University castigated its now-former professor Joshua Katz as a "race-baiter" for publicly opposing a set of DEI demands that included race-conscious admissions and faculty hiring. *Faculty Letter* (July 4, 2020);[31] Joshua T. Katz, *A Declaration of Independence by a Princeton Professor*, QUILLETTE (July 8, 2020);[32] *Faculty and Free Speech Entry*, Race and Free Speech Chapter, TO BE KNOWN AND HEARD;[33] Sergiu Klainerman, *Princeton's Mixed-Up President Discards Free Speech and Demonizes Its Defenders*, TABLET MAGAZINE (April 11, 2022);[34] Sergiu Klainerman, *At Princeton, One Small Step for Free Speech, One Giant Leap for Censorship*, TABLET MAGAZINE (May 5, 2022).[35] Ultimately, Princeton fired Katz after resurrecting a misconduct matter for which he had already served a

[30] https://bariweiss.substack.com/p/the-takeover-of-americas-legal-system?s=r.
[31] https://docs.google.com/forms/d/e/1FAIpQLSfPmfeDKBi25_7rUTKkhZ3cyMICQicp05ReVaeBpEdYUCkyIA/viewform.
[32] https://quillette.com/2020/07/08/a-declaration-of-independence-by-a-princeton-professor/.
[33] http://knownandheard.princeton.edu/race-and-free-speech.
[34] https://www.tabletmag.com/sections/news/articles/princetons-president-discards-free-speech-demonizes-defenders.
[35] https://www.tabletmag.com/sections/news/articles/princeton-small-step-free-speech-giant-leap-censorship.

disciplinary sanction. Jonathan Turley, *Chasing Katz: Princeton Moves to Fire Classics Professor Who Criticized Anti-Racism Measures*, RES IPSA LOQUITUR – THE THING ITSELF SPEAKS (May 21, 2022);[36] Melissa Korn and Douglas Belkin, *Princeton Board Fires Tenured Professor Joshua Katz, Citing Sexual Misconduct Investigation*, WALL STREET JOURNAL (May 23, 2022);[37] Cathy Young, *Did a Princeton Professor Get Fired for Pissing Off Campus Activists?* DAILY BEAST (May 25, 2022).[38]

- Claremont McKenna College took adverse action against three different faculty members for quoting from, respectively, a Civil Rights Movement-era poem, *Huckleberry Finn*, and *The Color Purple*. That is, the school sanctioned educators for teaching historical texts containing racial slurs. Amanda Nordstrom, *Three Claremont McKenna professors sound alarm over school's treatment of historical texts with racial slurs*, FIRE (August 23, 2022);[39] *FIRE Letter to Claremont McKenna College* (August 22, 2022);[40] *Claremont McKenna College Response to FIRE* (September 6, 2022);[41] *FIRE Second Letter to Claremont McKenna College* (September 7, 2022);[42] Amanda Nordstrom and Alex Morey, *FIRE to Claremont McKenna College: No matter what you call it, intimidation chills*, FIRE (September 9, 2022).[43]

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[36] https://jonathanturley.org/2022/05/21/chasing-katz-princeton-moves-to-fire-classics-professor-who-criticized-anti-racism-measures/.
[37] https://www.wsj.com/articles/princeton-board-fires-tenured-professor-joshua-katz-backing-presidents-recommendation-11653342764?mod=hp_trending_now_article_pos5.
[38] https://www.thedailybeast.com/will-a-princeton-professor-be-fired-for-pissing-off-campus-activists?ref=scroll.
[39] https://www.thefire.org/three-claremont-mckenna-professors-sound-alarm-over-schools-treatment-of-historical-texts-with-racial-slurs/.
[40] https://www.thefire.org/fire-letter-to-claremont-mckenna-college-august-22-2022/.
[41] https://www.thefire.org/claremont-mckenna-college-response-to-fire-september-6-2022/.
[42] https://www.thefire.org/fire-second-letter-to-claremont-mckenna-college-september-7-2022/.
[43] https://www.thefire.org/fire-to-claremont-mckenna-college-no-matter-what-you-call-it-intimidation-chills/.

- University of Pennsylvania Law School Dean Theodore Ruger is trying to discipline, if not sack, Professor Amy Wax because of her public critique of what she characterizes as the contemporary "obsession with race, ethnicity, gender, and now sexual preference." Amy Wax & Larry Alexander, *Paying the price for breakdown of the country's bourgeois culture*, PHILADELPHIA INQUIRER (August 9, 2017).[44] *See also* Robert L. Woodson, *Black Americans Need Bourgeois Norms*, WALL STREET JOURNAL (October 11, 2017);[45] Karen Sloan, *Penn Law Disputes Prof's Claim She Was Asked to Take Leave Due to Op-Ed*, ALMLAW.COM (February 20, 2018);[46] Jared Mitovich, *Penn Law dean requests Faculty Senate impose 'major sanction' against Amy Wax*, DAILY PENNSYLVANIAN (July 14, 2022); Stephanie Francis Ward, *Citing statements Penn Law prof allegedly made while teaching and in interviews, dean asks for discipline against her*, ABA JOURNAL (July 21, 2022).[47] Ruger characterized Wax's statements as showing a:

> callous and flagrant disregard for our University community—including students, faculty, and staff—who have been repeatedly subjected to Wax's intentional and incessant racist, sexist, xenophobic, and homophobic actions and statements.

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[44] https://www.inquirer.com/philly/opinion/commentary/paying-the-price-for-breakdown-of-the-countrys-bourgeois-culture-20170809.html.

[45] https://www.wsj.com/articles/black-americans-need-bourgeois-norms-1507763403.

[46] https://www.law.com/thelegalintelligencer/2018/02/20/penn-law-disputes-profs-claim-she-was-asked-to-take-leave-due-to-oped/?kw=Penn%20Law%20Disputes%20Prof%27s%20Claim%20She%20Was%20Asked%20to%20Take%20Leave%20Due%20to%20Op-Ed%20%7C%20The%20Legal%20Intelligencer&et=editorial&bu=The%20Legal%20Intelligencer&cn=20180225&src=EMC-Email&pt=Most%20Viewed&kw=Penn%20Law%20Disputes%20Prof%27s%20Claim%20She%20Was%20Asked%20to%20Take%20Leave%20Due%20to%20Op-Ed&slreturn=20220912144944.

[47] https://www.abajournal.com/web/article/citing-statements-penn-law-prof-allegedly-made-while-teaching-in-interviews-dean-asks-for-discipline-against-her.

> *Letter from Penn Law Dean Theodore W. Ruger to Faculty Senate Chair Vivian L. Gadsden* (June 23, 2022).[48] Ruger also complained that:
>
> > Wax's conduct inflicts harm on them and the institution and undermines the University's core values. Wax has made these statements in the classroom and on campus, in other academic settings, and in public forums in which she was identified as a University of Pennsylvania professor.[49]

Katz and Wax were publicly branded as racists by their own universities for their public critiques of race-conscious policy. The Claremont McKenna professors were called on the carpet for teaching texts. That's how far contemporary norms about handling racial and other classifications have gone.

Assuming Rule 8.4(g) were to be applied in a manner similar to university speech codes, which is likely, an attorney could assume the following speech would risk sanction:

- During a bar conference or continuing legal education (CLE) event,[50] an attorney publicly takes a position opposing a set of diversity, equity,

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[48] https://www.abajournal.com/files/University-of-Pennsylvania-Law-Deans-Report-Regarding-Amy-Wax-June-23-2022.pdf.

[49] *Id*.

[50] Despite Defendant-Appellant's claim that its current Chief Disciplinary Counsel does not view discussion of hate speech at a CLE as within the ambit of Rule 8.4(g), the rule's plain language appears to include it and official Comment 3 specifically includes "participation in… continuing legal education seminars." According to comment 3, conduct prohibited by Rule 8.4(g) includes:

> [3] For the purposes of paragraph (g), conduct in the practice of law includes (i) interacting with witnesses, coworkers, court personnel, lawyers, or others, while appearing in proceedings before a tribunal or in connection with the representation of a client; (ii) operating or managing a law firm or law practice; or (iii) participation in judicial

and inclusion (DEI) demands, which include race-conscious admissions and faculty hiring.

- During a CLE event about the history of hate speech regulation, an attorney refers to (not "uses", just "refers to") words that have been used as racial slurs.

- An attorney publicly advocates against policies obsessing about race, ethnicity, gender, and gender preference during a CLE program, as well as in op-eds and other public and private contexts.

People *have* been threatened with sanctions – and actually sanctioned – for violating anti-hate speech codes analogous to Rule 8.4(g), just for teaching about the historical use of slur words, or for taking a principled position about the propriety of race-based policies. That may be absurd, but it's reality.

Should Rule 8.4(g) come into effect, any rational actor – which lawyers may be assumed to be – would draw the lesson: expressing politically incorrect facts or opinions about discriminatory policies is dangerous to your career. It's objectively reasonable to assume that the rule would chill lawyers from engaging in this type of discussion.[51]

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boards, conferences, or committees; continuing legal education seminars; bench bar conferences; and bar association activities where legal education credits are offered. The term "the practice of law" does not include speeches, communications, debates, presentations, or publications given or published outside the contexts described in (i)-(iii).

Brief of Defendant-Appellant at Add. 1.

[51] As noted above, Defendant-Appellant's claim (based on the non-binding affidavit of its chief counsel) that it would not sanction such conduct, even though it is covered by Rule 8.4(g) as written, cannot save the rule. *Stevens* at 480.

CONCLUSION

Rule 8.4(g) is unconstitutionally overbroad and vague as likely to chill free speech and to lead to discriminatory enforcement. As such, the district court's grant of summary judgment to Plaintiff-Appellee should be affirmed.

Respectfully submitted,

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CERTIFICATION OF ADMISSION TO BAR

I, Johanna E. Markind, certify as follows:

1. I am a member in good standing of the bar of the United States Court of Appeals for the Third Circuit.

2. Pursuant to 28 U.S.C. § 1746, I certify under penalty of perjury that the foregoing is true and correct.

Dated: October 27, 2022

By: /s/ Johanna E. Markind
Johanna E. Markind

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5). This brief contains 5,026 words, excluding the parts of the brief exempted by Rule 32(f) of the Federal Rules of Appellate Procedure.

This brief complies with the typeface requirements of Rule 32(a)(5) of the Federal Rules of Appellate Procedure and the type style requirements of Rule 32(a)(6) of the Federal Rules of Appellate Procedure because this brief has been prepared in a proportionally spaced typeface using the 2209 version of Microsoft Word in 14 point Times New Roman font.

This brief complies with the electronic filing requirements of Local Rule 31.1(c) because the text of this electronic brief is identical to the text of the paper copies, and the Vipre Virus Protection, version 3.1 has been run on the file containing the electronic version of this brief and no viruses have been detected.

Dated: October 27, 2022

By:/s/ Johanna E. Markind
Johanna E. Markind

CERTIFICATE OF FILING AND SERVICE

I certify that on this 27th day of October 2022, the foregoing Amicus Brief was filed through CM/ECF system and served on all parties or their counsel of record through the CM/ECF system.

Dated: October 27, 2022

By: /s/ Johanna E. Markind
Johanna E. Markind