Rule 8.4: Misconduct

Maintaining The Integrity Of The Profession

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law;

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law; or

(g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.

THE STATE OF IDAHO
SUPREME COURT

ROGER S. BURDICK
JUSTICE

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September 6, 2018

Diane Minnich
Executive Director, ISB
P.O. Box 895
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Dear Diane:

This is official notice that the Court voted not to adopt Resolution 17-01 proposing an amendment Idaho Rule of Professional Conduct 8.4.

The Court had studied and debated this Resolution for months and continued the matter so our new justices could be fully apprised. In addition to the Justices' own research the Court allowed input from supporters and objectors. The final vote mirrored the close division of the Bar and society. The final vote was 3-2.

Members of the Court encourage the Idaho State Bar to revisit this matter in hopes of narrowing the rule to comport with new United States Supreme Court cases.

I know the ISB and its representatives have labored intensively about this issue and we thank you for your diligence and commitment.

Sincerely,

Roger Burdick

Roger S. Burdick
Chief Justice

JRW/ss

Rule 8.4 Misconduct - Comment

Maintaining The Integrity of The Profession

[1] Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so or do so through the acts of another, as when they request or instruct an agent to do so on the lawyer's behalf. Paragraph (a), however, does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.

[2] Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

[3] Discrimination and harassment by lawyers in violation of paragraph (g) undermine confidence in the legal profession and the legal system. Such discrimination includes harmful verbal or physical conduct that manifests bias or prejudice towards others. Harassment includes sexual harassment and derogatory or demeaning verbal or physical conduct. Sexual harassment includes unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature. The substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (g).

[4] Conduct related to the practice of law includes representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business or social activities in connection with the practice of law. Lawyers may engage in conduct undertaken to promote

diversity and inclusion without violating this Rule by, for example, implementing initiatives aimed at recruiting, hiring, retaining and advancing diverse employees or sponsoring diverse law student organizations.

[5] A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (g). A lawyer does not violate paragraph (g) by limiting the scope or subject matter of the lawyer's practice or by limiting the lawyer's practice to members of underserved populations in accordance with these Rules and other law. A lawyer may charge and collect reasonable fees and expenses for a representation. Rule 1.5(a). Lawyers also should be mindful of their professional obligations under Rule 6.1 to provide legal services to those who are unable to pay, and their obligation under Rule 6.2 not to avoid appointments from a tribunal except for good cause. See Rule 6.2(a), (b) and (c). A lawyer's representation of a client does not constitute an endorsement by the lawyer of the client's views or activities. See Rule 1.2(b).

[6] A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of Rule 1.2(d) concerning a good faith challenge to the validity, scope, meaning or application of the law apply to challenges of legal regulation of the practice of law.

[7] Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ZACHARY GREENBERG, ***Plaintiff,***	:	**CIVIL ACTION**
v.	:	**No. 20-3822**
JAMES C. HAGGERTY, *in his official capacity as Board Chair of The Disciplinary Board of the Supreme Court of Pennsylvania,* **et al.,** ***Defendants.***	:	

MEMORANDUM

This case concerns the constitutionality of the amendments to Pennsylvania Rule of Professional Conduct 8.4, which were approved by the Supreme Court of Pennsylvania[1] and are set to take effect on December 8, 2020. The amendments added paragraph (g) to Rule 8.4 along with two new comments, (3) and (4). Plaintiff, Zachary Greenberg, Esquire, a Pennsylvania attorney who gives presentations on a variety of controversial legal issues, brings this pre-enforcement challenge alleging that these amendments violate the First Amendment because they are unconstitutionally vague, overbroad, and consist of viewpoint-based and content-based discrimination.

[1] Justice Mundy dissented.

Before the Court are Defendants' Motion to Dismiss Plaintiff's Complaint (ECF No. 15) and Plaintiff's Motion for Preliminary Injunction (ECF No. 16).

A. BACKGROUND

Plaintiff Zachary Greenberg graduated from law school in 2016 and was admitted to the Pennsylvania Bar in May 2019. ECF No. 1 at ¶ 10, 11; ECF No. 21 at ¶¶ 2-4.[2] Plaintiff currently works as a Program Officer at the Foundation for Individual Rights in Education. ECF No. 1 at ¶ 13; ECF No. 21 at ¶ 6. In this position, Plaintiff speaks and writes on a number of topics, including freedom of speech, freedom of association, due process, legal equality, and religious liberty. ECF No. 1 at ¶ 14; ECF No. 21 at ¶ 7. Plaintiff is also a member of the First Amendment Lawyers Association, which regularly conducts continuing legal education ("CLE") events for its members. ECF No. 1 at ¶ 15; ECF No. 21 at ¶¶ 8-9. As a part of his association with the Foundation for Individual Rights in Education and the First Amendment Lawyers Association, Plaintiff speaks at a number of CLE and non-CLE events on a variety of controversial issues. ECF No. 1 at ¶ 16-19; ECF No. 21 at ¶ 10. Specifically, Plaintiff has written and spoken against banning hate speech on university campuses and university regulation of

[2] The facts included here were alleged in the Complaint (ECF No. 1) and also stipulated in the Stipulated List of Facts for Purposes of Preliminary Injunction Motion (ECF No. 21). Although the Court considered all allegations in the Complaint for purposes of Defendants' Motion to Dismiss and all stipulated facts for purposes of Plaintiff's Motion for Preliminary Injunction, the Court found these facts pertinent to its analysis and conclusion.

hateful online expression as protected by the First Amendment. ECF No. 1 at ¶¶ 19-20; ECF No. 21 at ¶¶ 14-15.

In 2016, the Disciplinary Board of the Supreme Court of Pennsylvania considered adopting a version of the American Bar Association Model Rule of Professional Conduct 8.4(g) in Pennsylvania. ECF No. 1 at ¶¶ 38-39; ECF No. 21 at ¶ 56. After an iterative process of notice and comment between December 2016 and June 2020, the Supreme Court of Pennsylvania approved the recommendation of the Board[3] and ordered that Pennsylvania Rule of Professional Conduct ("Pa.R.P.C.") 8.4 be amended to include the new Rule 8.4(g) (the "Rule") along with two new comments, (3) and (4), (together, the "Amendments"). ECF No. 1 at ¶ 40; ECF No. 21 at ¶ 61.

The Amendments state:

> It is professional misconduct for a lawyer to:
> * * *
> (g) in the practice of law, by words or conduct, knowingly manifest bias or prejudice, or engage in harassment or discrimination, as those terms are defined in applicable federal, state or local statutes or ordinances, including but not limited to bias, prejudice, 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.

[3] Justice Mundy dissented. ECF No. 1 at ¶ 40.

> Comment:
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> * * *
>
> [3] For the purposes of paragraph (g), conduct in the practice of law includes participation in activities that are required for a lawyer to practice law, including but not limited to continuing legal education seminars, bench bar conferences and bar association activities where legal education credits are offered.
>
> [4] The substantive law of antidiscrimination and anti-harassment statutes and case law guide application of paragraph (g) and clarify the scope of the prohibited conduct.
>
> ECF No. 1 at ¶ 40 (quoting Pa.R.P.C. 8.4); ECF No. 21 at ¶¶ 62-64 (quoting Pa.R.P.C. 8.4).

The Amendments take effect on December 8, 2020. ECF No. 1 at ¶ 41; ECF No. 21 at ¶ 61.

In terms of enforcement, the Office of Disciplinary Counsel ("ODC") is charged with investigating complaints against Pennsylvania-licensed attorneys for violation of the Pennsylvania Rules of Professional Conduct and, if necessary, charging and prosecuting attorneys under the Pennsylvania Rules of Disciplinary Enforcement. ECF No. 1 at ¶ 45; ECF No. 21 at ¶ 32. First, a complaint is submitted to the ODC alleging an attorney violated the Pennsylvania Rules of Professional Conduct. ECF No. 1 at ¶¶ 46-47; ECF No. 21 at ¶ 36. The ODC then conducts an investigation into the complaint and decides whether to issue a DB-7 letter. ECF No. 1 at ¶¶ 51-52; ECF No. 21 at ¶¶ 36-38. If the ODC issues a DB-7

letter, the attorney has thirty days to respond to that letter. *Id*. If, after investigation and a DB-7 letter response, the ODC determines that a form of discipline is appropriate, the ODC recommends either private discipline, public reprimand, or the filing of a petition for discipline to the Board. ECF No. 1 at ¶¶ 55-57; ECF No. 21 at ¶¶ 44-45. After further rounds of review and recommendation, along with additional steps, the case may proceed to a hearing before a hearing committee and de novo review by the Disciplinary Board and the Supreme Court of Pennsylvania. ECF No. 1 at ¶¶ 54-59; ECF No. 21 at ¶¶ 46-50.[4]

Plaintiff filed a complaint in this Court alleging the Amendments consist of content-based and viewpoint-based discrimination and are overbroad in violation of the First Amendment (Count 1) and the Amendments are unconstitutionally vague in violation of the Fourteenth Amendment (Count 2). ECF No. 1.[5] Defendants filed a Motion to Dismiss (ECF No. 15), and Plaintiff filed a response in opposition (ECF No. 25). Plaintiff filed a Motion for Preliminary Injunction (ECF No. 16), and Defendants filed a response in opposition (ECF No. 24). The

[4] The Complaint (ECF No. 1) and the Stipulated List of Facts for Purposes of Preliminary Injunction Motion (ECF No. 21) contain different information regarding the process for a disciplinary action, but the discrepant facts are irrelevant to the Court's analysis of both Defendants' Motion to Dismiss and Plaintiff's Motion for Preliminary Injunction.

[5] All Defendants are sued in their official capacities only. ECF No. 1 at 3. "State officers sued for damages in their official capacity are not 'persons' for purposes of the suit because they assume the identity of the government that employs them." *Hafer v. Melo*, 502 U.S. 21, 27 (1991). In this case, Defendants are members of either the Disciplinary Board of the Supreme Court of Pennsylvania or the Office of Disciplinary Counsel. ECF No. 1 at 3.

Court held oral argument on November 13, 2020, addressing both Defendants' Motion to Dismiss and Plaintiff's Motion for Preliminary Injunction. ECF No. 26.

B. STANDARD OF REVIEW

Before the Court are Defendants' Motion to Dismiss the Complaint (ECF No. 15) and Plaintiff's Motion for Preliminary Injunction (ECF No. 16).

1. Standard of Review for Motion to Dismiss

When reviewing a motion to dismiss, the Court "accept[s] as true all allegations in plaintiff's complaint as well as all reasonable inferences that can be drawn from them, and [the court] construes them in a light most favorable to the non-movant." *Tatis v. Allied Interstate, LLC*, 882 F.3d 422, 426 (3d Cir. 2018) (quoting *Sheridan v. NGK Metals Corp.*, 609 F.3d 239, 262 n.27 (3d Cir. 2010)). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (quoting *Twombly*, 550 U.S. at 557)). "The plausibility determination is 'a context-specific task that requires the reviewing court to draw on its judicial experience and

common sense.'" *Connelly v. Lane Const. Corp.*, 809 F.3d 780, 786-87 (3d Cir. 2016) (quoting *Iqbal*, 556 U.S. at 679).

Finally, courts reviewing the sufficiency of a complaint must engage in a three-step process. First, the court "must 'take note of the elements [the] plaintiff must plead to state a claim.'" *Id.* at 787 (alterations in original) (quoting *Iqbal*, 556 U.S. at 675). "Second, [the court] should identify allegations that, 'because they are no more than conclusions, are not entitled to the assumption of truth.'" *Id.* (quoting *Iqbal*, 556 U.S. at 679). Third, "'[w]hen there are well-pleaded factual allegations, [the] court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.'" *Id.* (alterations in original) (quoting *Iqbal*, 556 U.S. at 679).

II. Standard of Review for Preliminary Injunction

"A preliminary injunction is an extraordinary remedy never awarded as of right." *Groupe SEB USA, Inc. v. Euro-Pro Operating LLC*, 774 F.3d 192, 197 (3d Cir. 2014) (quoting *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008)). "Awarding preliminary relief, therefore, is only appropriate 'upon a clear showing that the plaintiff is entitled to such relief.'" *Id.* (quoting *Winter*, 555 U.S. at 22).

In order to "obtain a preliminary injunction the moving party must show as a prerequisite (1) a reasonable probability of eventual success in the litigation, and (2) that it will be irreparably injured . . . if relief is not granted . . . . [In addition,] the district court, in considering whether to grant a preliminary injunction, should take into account, when they are relevant, (3) the possibility of harm to other interested persons from the grant or denial of the injunction, and (4) the public interest." *Reilly v. City of Harrisburg*, 858 F.3d 173, 176 (3d Cir. 2017), *as amended* (June 26, 2017) (quoting *Del. River Port Auth. v. Transamerican Trailer Transport, Inc.*, 501 F.2d 917, 919–20 (3d Cir. 1974)) (alteration in original).

The Third Circuit has held that the first two factors act as "gateway factors," and that a "court must first determine whether the movant has met these two gateway factors before considering the remaining two factors—balance of harms, and public interest." *Fulton v. City of Philadelphia*, 320 F. Supp. 3d 661, 675 (E.D. Pa. 2018), *aff'd*, 922 F.3d 140 (3d Cir. 2019) (citing *Reilly*, 858 F.3d at 180). However, "[b]ecause this action involves the alleged suppression of speech in violation of the First Amendment, we focus our attention on the first factor, i.e., whether [Plaintiff] is likely to succeed on the merits of his constitutional claim." *Stilp v. Contino*, 613 F.3d 405, 409 (3d Cir. 2010) (citing *Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.")).

C. DISCUSSION

1. Standing

Defendants move to dismiss the Complaint contending that Plaintiff lacks standing to bring this pre-enforcement challenge to the Amendments. ECF No. 15 at 10-16.

"To establish Article III standing, a plaintiff must show (1) an 'injury in fact,' (2) a sufficient "causal connection between the injury and the conduct complained of," and (3) a 'likel[ihood]' that the injury 'will be redressed by a favorable decision.'" *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 157–58 (2014) [hereinafter *SBA List*] (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). "An injury sufficient to satisfy Article III must be 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Id.* at 158 (quoting *Lujan*, 504 U.S. at 560) (internal citations omitted).

"An allegation of future injury may suffice if the threatened injury is 'certainly impending,' or there is a 'substantial risk that the harm will occur.'" *Id.* (quoting *Clapper v. Amnesty Intern. USA*, 568 U.S. 398, 437 (2014)) (internal quotation marks omitted). "The party invoking federal jurisdiction bears the burden of establishing standing." *Id.* (quoting *Clapper*, 568 U.S. at 411) (internal quotation marks omitted). "[E]ach element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the

manner and degree of evidence required at the successive stages of the litigation." *Id*. (quoting *Lujan*, 504 U.S. at 561) (alteration in original).

Here, the Court must determine if "the threatened enforcement of" the Amendments "creates an Article III injury." *Id*. "When an individual is subject to such a threat, an actual arrest, prosecution, or other enforcement action is not a prerequisite to challenging the law." *Id*. (citing *Steffel v. Thompson*, 415 U.S. 452, 459 (1974)) (additional citations omitted). The Supreme Court has "permitted pre-enforcement review under circumstances that render the threatened enforcement sufficiently imminent." *Id*. "Specifically, [the Supreme Court] ha[s] held that a plaintiff satisfies the injury-in-fact requirement where he alleges 'an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder.'" *Id*. at 159 (quoting *Babbitt v. Farm Workers*, 442 U.S. 289, 298 (1979)).

Many circuit courts have found a plaintiff's allegation that the law has or will have a chilling effect on the plaintiff's speech is sufficient to satisfy the injury-in-fact requirement. The Third Circuit held that "an allegation that certain conduct has (or will have) a chilling effect on one's speech must claim a 'specific present objective harm or a threat of specific future harm.'" *Sherwin-Williams Co. v. Cty. of Delaware, Pennsylvania*, 968 F.3d 264, 269–70 (3d Cir. 2020) (quoting *Laird v.*

Tatum, 408 U.S. 1, 13–14 (1972)). The Fifth Circuit "has repeatedly held, in the pre-enforcement context, that '[c]hilling a plaintiff's speech is a constitutional harm adequate to satisfy the injury-in-fact requirement.'" *Speech First, Inc. v. Fenves*, 979 F.3d 319, 330-331 (5th Cir. Oct. 28, 2020), as revised (Oct. 30, 2020) (quoting *Houston Chronicle v. City of League City*, 488 F.3d 613, 618 (5th Cir. 2007)) (alteration in original) (additional citations omitted). Similarly, the Ninth Circuit has held that "[a] chilling of First Amendment rights can constitute a cognizable injury, so long as the chilling effect is not 'based on a fear of future injury that itself [is] too speculative to confer standing.'" *Index Newspapers LLC v. United States Marshals Serv.*, 977 F.3d 817, 826 (9th Cir. 2020) (quoting *Munns v. Kerry*, 782 F.3d 402, 410 (9th Cir. 2015)) (additional citations omitted). The Seventh Circuit has held "a plaintiff may show a chilling effect on his speech that is objectively reasonable, and that he self-censors as a result." *Speech First, Inc. v. Killeen*, 968 F.3d 628, 638 (7th Cir. 2020), as amended on denial of reh'g and reh'g en banc (Sept. 4, 2020) [hereinafter *Killeen*] (citations omitted).

In terms of Plaintiff's injury-in-fact, Plaintiff alleges in the Complaint that the "vast majority of topics" discussed at Plaintiff's speaking events "are considered biased, prejudiced, offensive, and hateful by some members of his

audience, and some members of society at large." ECF No. 1 at ¶ 61.[6] Plaintiff further alleges that "during his presentations," Plaintiff's "discussion of hateful speech protected by the First Amendment involves a detailed summation of the law in this area, which includes a walkthrough of prominent, precedential First Amendment cases addressing incendiary speech." *Id*. at ¶ 62.

Plaintiff alleges that "it would be nearly impossible to illustrate United States First Amendment jurisprudence, such as by accurately citing and quoting precedent First Amendment cases, without engaging in speech that at least some members of his audience will perceive as biased, prejudiced, offensive, and potentially hateful." *Id*. at ¶ 63. Plaintiff alleges that he believes that "every one of his speaking engagements on First Amendment issues carries the risk that an audience member will file a bar disciplinary complaint against him based on the content of his presentation under rule 8.4(g)." *Id*. at ¶ 64. Plaintiff alleges that he fears "his writings and speeches could be misconstrued by readers and listeners, and state officials within the Board or Office, as violating Rule 8.4(g)." *Id*. at ¶ 72. Plaintiff alleges that he does not want to be subjected to disciplinary sanctions by the ODC or the Disciplinary Board and that a disciplinary investigation would harm his "professional reputation, available job opportunities, and speaking

[6] As the Court is determining whether to grant or deny Defendants' Motion to Dismiss the Complaint for lack of standing, the Court considers those allegations related to standing in the Complaint (ECF No. 1).

opportunities." *Id*. at ¶ 69. Plaintiff alleges that he will be "forced to censor himself to steer clear of an ultimately unknown line so that his speech is not at risk of being incorrectly perceived as manifesting bias or prejudice." *Id*. at ¶ 75.

Defendants contend that Plaintiff lacks standing because Plaintiff's injury "depends on an 'indefinite risk of future harms inflicted by unknown third parties.'" ECF No. 15 at 11-12 (quoting *Reilly v. Ceridian Corp*., 664 F.3d 38, 42 (3d Cir. 2011)) (citing *Clapper*, 568 U.S. at 414 ("We decline to abandon our usual reluctance to endorse standing theories that rest on speculation about the decisions of independent actors.")). Defendants contend that Plaintiff speculates an audience member will be offended by his presentation, then further speculates that that audience member will file a disciplinary complaint against Plaintiff, and then finally speculates that the ODC will not dismiss the complaint as frivolous but will require Plaintiff to file an official response and thereafter move to bring charges. *Id*. at 12.

Defendants further contend that Plaintiff lacks standing because there is no credible threat of enforcement. *Id*. First, Defendants note that there is no history of past enforcement, as the Amendments have not yet gone into effect, and Plaintiff failed to point to any attorneys anywhere who were charged with violating a similar provision. *Id*. at 13.

Next, Defendants note that the ODC has not "issued warning letters, opinions, or provided any other reason to believe that Plaintiff would be charged with violating the Amendments based on the conduct he wants to engage in." *Id.* Finally, Defendants contend that even if the ODC received a complaint, it is speculative whether Plaintiff would ever be notified, and further speculative whether Plaintiff would be required to respond or be charged with a violation. *Id.* at 14. Defendants reiterate that even if an audience member is offended by Plaintiff's presentation and makes a complaint to the ODC, "complainants do not institute disciplinary charges against an attorney: only ODC has that power – and only after approval by a Disciplinary Board hearing committee member." *Id.*

Finally, Defendants contend that the conduct in which Plaintiff wants to engage, providing a detailed summation of the law regarding hateful speech, is not proscribed by the plain language of the Amendments. *Id.* at 15. As the Amendments require that the Plaintiff *knowingly* manifest bias or prejudice or *knowingly* engage in discrimination or harassment, Defendants contend that it "strains credulity" to believe that citing and quoting cases could lead to disciplinary action. *Id.* Furthermore, if Plaintiff intends to advocate that certain cases were wrongly decided or advance a different interpretation of the law, Defendants note that Rule 8.4(g) provides a safe harbor for advocacy and advice. *Id.*

Plaintiff responds that the Amendments arguably proscribe Plaintiff's alleged speech and that there is a credible threat of enforcement. ECF No. 25 at 11. Plaintiff also contends that the Amendments would create an "*objectively reasonable* chill to [Plaintiff's] protected speech." *Id*. at 12.

First, Plaintiff contends that he plans to continue speaking at CLE events on controversial and polarizing issues such as hate speech, regulation on college campuses or online, due process requirements for students accused of sexual misconduct, and campaign finance restrictions on monetary political contributions. *Id*. Plaintiff notes that his presentations include summarizing and using language from a number of cases that has in the past offended, and will continue to offend, audience members. *Id*. at 12. Plaintiff notes that Rule 8.4(g) proscribes words or conduct manifesting bias or prejudice at CLE seminars and that the Complaint contains many examples of people labeling speakers as biased and prejudiced "for taking policy positions, for discussing statistics or academic theories, for espousing legal views, or mentioning certain epithets as part of an academic discussion." *Id*.

Plaintiff further contends that although Rule 8.4(g) requires the manifestation of bias or prejudice to be "knowing[]," the ultimate decision of whether to file and bring a disciplinary action against Plaintiff "turn[s] on the reaction of the listener and judgment of those who administer the Rule." *Id*. at 13.

Therefore, Plaintiff contends his lack of intention to manifest bias or prejudice does not undercut his standing to challenge Rule 8.4(g). *Id*.

Additionally, although Rule 8.4(g) "does not preclude advice or advocacy consistent with these Rules," Plaintiff contends that "'advocacy' in this context refers to the only sort of advocacy contemplated by rules of professional conduct: the zealous advocacy in support of a client's interest." *Id*. (citing Pa.R.P.C. Preamble ("As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system); Pa.R.P.C. 1.3, cmt. 1 ("A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf")). Therefore, Plaintiff contends that "[a]cademic advocacy" at CLE events is not covered within the advocacy or advice safe harbor. *Id*. at 14.

Furthermore, Plaintiff contends that his intention to mention epithets, slurs, and demeaning nicknames during his presentations and in the question-and-answer portion of his presentation is arguably proscribed under Rule 8.4(g). *Id*. Although Rule 8.4(g) does not provide examples of "manifestations of bias or prejudice," Plaintiff notes that the language of Rule 8.4(g) regarding "manifest[ing] bias or prejudice" was borrowed from Rule 2.3 of the Pennsylvania Code of Judicial Conduct. *Id*. Comment 2 to Rule 2.3 of the Pennsylvania Code of Judicial Conduct states that examples of manifestations of bias and prejudice "include but

are not limited to epithets; slurs; demeaning nicknames; negative stereotyping; attempted humor based upon stereotypes; threatening, intimidating, or hostile acts; suggestions of connections between race, ethnicity, or nationality and crime; and irrelevant references to personal characteristics." *Id*. (quoting Pa.C.J.C. Rule 2.3, cmt. 2). Plaintiff reiterates that he alleged in the Complaint that he mentions slurs, epithets, and demeaning nicknames during his presentations. *Id*. Plaintiff contends that he also exchanges ideas with audience members about the importance of affording Due Process and First Amendment rights to people who do and say "odious" things. *Id*. Plaintiff is concerned that people might construe his theories as manifesting bias or prejudice against those protected classes, akin to "suggestions of connections between race, ethnicity, or nationality and crime." *Id*. (quoting Pa.C.J.C. Rule 2.3).

Next, Plaintiff contends that there is a credible threat of enforcement. *Id*. Although Defendants point out that no one has filed a disciplinary complaint against Plaintiff based on his past presentations, Plaintiff retorts that such a showing is not required for standing and Rule 8.4(g) is not yet in effect. *Id*. "When dealing with pre-enforcement challenges to recently enacted (or, at least, non-moribund) statutes that facially restrict expressive activity by the class to which the plaintiff belongs, courts will assume a credible threat of prosecution in the absence of compelling contrary evidence." *Id*. (quoting *ACLU v. Reno*, 31 F.

Supp. 2d 473, 479 (E.D. Pa. 1999), eventually rev'd on other grounds sub. nom. *Ashcroft v. ACLU*, 535 U.S. 564 (2002)).

Plaintiff further contends that no Defendants have "declare[d] or present[d] other evidence that they would find this type of 8.4(g) complaint to be frivolous, let alone disavow[ed] their authority to take any enforcement steps in response to such complaints." *Id.* at 18 (collecting cases). Even if Defendants were to submit such evidence, Plaintiff maintains that the Complaint contains numerous examples of individuals who have imputed bias and bigotry to speakers advancing legal views or mentioning incendiary words, which shows that a disciplinary complaint for this reason would not be considered "frivolous." *Id.*

The Court finds that Plaintiff has standing to bring this pre-enforcement challenge to the Amendments. First, the Court finds Plaintiff's allegation that his speech will be chilled by the Amendments shows a "threat of specific future harm." *Sherwin-Williams*, 968 F.3d at 269–70 (quoting *Laird*, 408 U.S. at 13–14); *see also Speech First*, 979 F.3d 319, 330-331. Plaintiff's alleged fear of a disciplinary complaint and investigation is objectively reasonable based on Plaintiff's allegation that the "vast majority of topics" discussed at Plaintiff's speaking events "are considered biased, prejudiced, offensive, and hateful by some members of his audience, and some members of society at large." ECF No. 1 at ¶ 61.

Furthermore, Plaintiff alleged specific examples of individuals filing disciplinary and Title IX complaints against speakers who were presenting on similar topics as those discussed by Plaintiff, which he alleges will "force[him] to censor himself to steer clear of an ultimately unknown line so that his speech is not at risk of being incorrectly perceived as manifesting bias or prejudice." ECF No. 1 at ¶ 75. Therefore, in addition to showing that the "chilling effect on his speech . . . is objectively reasonable," Plaintiff has shown that he will "self-censor[] as a result." *Killeen*, 968 F.3d at 638.

The Court concludes that Plaintiff's alleged chilling effect constitutes an injury in fact that is concrete, particularized, and imminent. *SBA List*, 573 U.S. at 158. Plaintiff's allegations of future injury suffice because Plaintiff has shown that "the threatened injury is 'certainly impending,'" and that "there is a 'substantial risk' that the harm will occur.'" *Id*. (quoting *Clapper*, 568 U.S. at 437) (internal citations omitted).

Plaintiff has further shown that he has "an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder." *SBA List*, 573 U.S. at 157–58 (quoting *Babbitt*, 442 U.S. at 298). First, neither party challenges that the speech in which Plaintiff intends to engage is affected with a constitutional interest. *See generally* ECF No. 15; ECF No. 25 at 11.

Second, Plaintiff has also clearly shown a likelihood that the activity in which he intends to engage is "arguably proscribed" by the Amendments. *Speech First, Inc.*, 979 F.3d at 332. Plaintiff has alleged that he intends to mention epithets, slurs, and demeaning nicknames as part of his presentation on First Amendment and Due Process rights. ECF No. 1 at ¶¶ 62-63. Rule 8.4(g) explicitly states that it is attorney misconduct to, "by **words** or conduct, knowingly manifest bias or prejudice." Pa.R.P.C. 8.4(g) (emphasis added). Both parties agree that the language used in Rule 8.4(g) mirrors Pennsylvania Code of Judicial Conduct Rule 2.3, which provides, in Comment 2, that "manifestations of bias include . . . epithets; slurs; demeaning nicknames; negative stereotyping . . . ." Plaintiff has shown that by repeating slurs or epithets, or by engaging in discussion with his audience members about the constitutional rights of those who do and say offensive things, he will need to repeat slurs, epithets, and demeaning nicknames. This is arguably proscribed by Rule 8.4(g).

Defendants contend that because Rule 8.4(g) requires an attorney to "*knowingly* manifest bias or prejudice," it "strains credulity" to believe that citing and quoting cases could lead to disciplinary action. ECF No. 15 at 15 (emphasis added). However, since the Court has found that repeating slurs or epithets is arguably proscribed by the statute based on the plain language, whether Plaintiff "knowingly" repeated slurs or epithets is immaterial.

Defendants further contend that, "to the extent that Plaintiff intends to advocate that certain cases were wrongly decided or advanced a different interpretation of relevant law," Rule 8.4(g)'s "clear safe harbor for advocacy" would protect Plaintiff. *Id*. at 16. However, the "advice or advocacy" safe harbor was plainly intended to protect those giving advice or advocacy in the context of representing a client, and not in the context of Plaintiff's intended activity. Therefore, Plaintiff has shown that his intended conduct is arguably proscribed by the Amendments.

Third, Plaintiff has shown that there exists a credible threat of prosecution. Defendants' contention that Plaintiff's injury "depends on an 'indefinite risk of future harms inflicted by unknown third parties'" is not persuasive. *Id*. at 11-12 (quoting *Ceridian*, 664 F.3d at 42) (additional citations omitted). Plaintiff alleged specific examples of individuals filing disciplinary and Title IX complaints against speakers who were presenting on similar topics as those discussed by Plaintiff. ECF No. 1 at ¶¶ 73, 74. Not every complaint filed with the ODC results in a letter to the accused attorney, nor every letter to the accused attorney results in any formal sanction. However, Plaintiff has demonstrated that there is a substantial risk that the Amendments will result in Plaintiff being subjected to a disciplinary complaint or investigation.

Ultimately, the Court is swayed by the chilling effect that the Amendments will have on Plaintiff, and other Pennsylvania attorneys, if they go into effect. Rule 8.4(g)'s language, "by words . . . manifest bias or prejudice," are a palpable presence in the Amendments and will hang over Pennsylvania attorneys like the sword of Damocles. This language will continuously threaten the speaker to self-censor and constantly mind what the speaker says and how the speaker says it or the full apparatus and resources of the Commonwealth may be engaged to come swooping in to conduct an investigation. Defendants dismiss these concerns with a paternal pat on the head and suggest that the genesis of the disciplinary process is benign and mostly dismissive. Defendants further argue that, under the language of Rule 8.4(g) targeting "words," even if a complaint develops past the initial disciplinary complaint stage, actual discipline will not occur given the conduct targeted, good intentions of the Rule and those trusted arbiters that will sit in judgment and apply it as such. But Defendants do not guarantee that, nor did they remove the language specifically targeting attorneys' "words." Defendants effectively ask Plaintiff to trust them not to regulate and discipline his offensive speech even though they have given themselves the authority to do so. So, despite asking Plaintiff to trust them, there remains the constant threat that the Rule will be engaged as the plain language of it says it will be engaged.

It can hardly be doubted there will be those offended by the speech, or the written materials accompanying the speech, that manifests bias or prejudice who will, quite reasonably, insist that the Disciplinary Board perform its sworn duty and apply Rule 8.4(g) in just the way the clear language of the Rule permits. Even if the disciplinary process does not end in some form of discipline, the threat of a disruptive, intrusive, and expensive investigation and investigatory hearing into the Plaintiff's words, speeches, notes, written materials, videos, mannerisms, and practice of law would cause Plaintiff and any attorney to be fearful of what he or she says and how he or she will say it in any forum, private or public, that directly or tangentially touches upon the practice of law, including at speaking engagements given during CLEs, bench-bar conferences, or indeed at any of the social gatherings forming around these activities. The government, as a result, de facto regulates speech by threat, thereby chilling speech. Defendants' attempt to sidestep a direct constitutional challenge by claiming no final discipline will ever be rendered under Rule 8.4(g) fails. The clear threat to Plaintiff's First Amendment rights and the chilling effect that results is the harm that gives Plaintiff standing. Defendant's Motion to Dismiss the Complaint for lack of standing is denied.

II. First Amendment Violation

In their Motion to Dismiss, Defendants contend that Plaintiff's claim that the Amendments constitute either content-based or viewpoint-based discrimination fails to state a claim because the Amendments regulate conduct, not speech. ECF No. 15 at 30. Even if the Amendments regulate speech, Defendants contend, the Amendments are narrowly tailored to achieve Pennsylvania's compelling interest in regulating the practice of law and ensuring that the judicial system is free from discriminatory and harassing conduct. *Id.*

Defendants further contend that the Amendments are not viewpoint-based since they were not enacted based on particular views but rather to prohibit discrimination and harassment. *Id.* at 30 (citing *Wandering Dago, Inc. v. Destito*, 879 F.3d 20, 32 (2d Cir. 2018)). Furthermore, Defendants note that the Amendments apply to all attorneys. *Id.* (citing *Barr v. Lafon*, 538 F.3d 554, 572 (6th Cir. 2008)).

Finally, Defendants contend that the Supreme Court has held that states have a "compelling interest" in regulating professions, and that "broad power" is "especially great" in "regulating lawyers[.]" *Id.* (quoting *In re Primus*, 436 U.S. 412, 422 (1978)) (additional citations omitted). Defendants further contend that states have a substantial interest both in "protect[ing] the integrity and fairness of a State's judicial system," *Gentile v. State Bar of Nevada,* 501 U.S. 1030, 1031

(1991), and in preventing attorneys from engaging in conduct that "is universally regarded as deplorable and beneath common decency," *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 625 (1995) (internal citations omitted). ECF No. 15 at 31.

Plaintiff, on the other hand, contends that Rule 8.4(g)'s prohibition on using words to "manifest bias or prejudice, or engage in harassment or discrimination" is unconstitutional viewpoint discrimination. ECF No. 25 at 19. Plaintiff contends that the Amendments allow for "tolerant, benign, and respectful speech" while disallowing "biased, prejudiced, discriminatory, critical, and derogatory speech." *Id.* Plaintiff highlights *Matal v. Tam*, where the Supreme Court found that a federal statute prohibiting the registration of trademarks that may "disparage or bring into contempt or disrepute" any "persons, living or dead" was a viewpoint-based restriction. *Id.* (citing *Matal v. Tam*, 137 S. Ct. 1744, 1751 (2017)). The Court stated that this "law thus reflects the Government's disapproval of a subset of messages it finds offensive, the essence of viewpoint discrimination." *Matal*, 137 S. Ct. at 1750.

Plaintiff further disputes that Rule 8.4(g) regulates discriminatory and harassing *conduct* and not speech, since the plain language of Rule 8.4(g) restricts "words" in addition to "conduct" and "manifest[ing] bias or prejudice" in addition to "engag[ing] in harassment or discrimination." ECF No. 25 at 20. Plaintiff notes that Rule 8.4(g) mirrors Rule 2.3 of the Pennsylvania Judicial Code of

Conduct, which states that "[e]xamples of manifestations of bias and prejudice include . . . epithets; slurs; demeaning nicknames," and this further underscores that Rule 8.4(g) prohibits the expression of certain words alone, apart from any conduct. *Id*.

Plaintiff further disputes Defendants' claim that because 8.4(g) applies to all attorneys it cannot be viewpoint discrimination. *Id*. at 21. Plaintiff contends that this is not the test for viewpoint discrimination and that the Supreme Court rejected the same argument. *Id*. Plaintiff contends that if the Court finds that the Amendments consist of viewpoint bias, that "end[s] the matter." *Id*. (quoting *Iancu v. Brunetti*, 204 L. Ed. 2d 714 (2019)).

Plaintiff further contends that even though Rule 8.4(g) is a regulation of "professional speech," it is still unconstitutional viewpoint-based discrimination under the Supreme Court's ruling in *Nat'l Inst. of Family & Life Advocates v. Becerra*. *Id*. at 22 (citing *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2375 (2018) [hereinafter *NIFLA*]). Plaintiff contends that Rule 8.4(g) does not fit within either of the two areas that the Court in *NIFLA* recognized justified regulation of professional speech. *Id*. Plaintiff contends that Rule 8.4(g) is not a law that "require[s] professionals to disclose factual, noncontroversial information in their 'commercial speech," nor does it merely "regulate professional

conduct, . . . [that] incidentally involves speech." *Id*. (quoting *NIFLA*, 138 S. Ct. at 2372).

Plaintiff further contends that the Court in *Gentile* and *Sawyer* recognized that when an attorney's speech occurs as part of pending litigation or a client representation, it is "more censurable" because it can "obstruct the administration of justice." *Id*. at 23 (quoting *In re Sawyer*, 360 U.S. 622, 636 (1959)) (citing *Gentile*, 501 U.S. at 1074 ("[O]ur opinions… indicate that the speech of lawyers representing clients in pending cases may be regulated under a less demanding standard than that established for regulation of the press.")). Rule 8.4(g), however, contains no similar limitation, as it applies to any words or conduct uttered "in the practice of law," which includes participating in events where CLE credits are issued. *Id*. (quoting Pa.R.P.C. 8.4(g)).

1. Attorney Speech and Professional Speech

The Court recognizes that Pennsylvania has an interest in licensing attorneys and the administration of justice. However, contrary to Defendants' contention, speech by an attorney or by a professional is only subject to greater regulation than speech by others in certain circumstances, none of which are present here. The Supreme Court in *Gentile v. State Bar of Nevada* found 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. Furthermore, "[e]ven outside the courtroom . . . lawyers in pending cases [are] subject to ethical restrictions on speech to which an ordinary citizen would not be." *Id*. (citing *In re Sawyer*, 360 U.S. 622 (1959)). The Supreme Court has "expressly contemplated that the speech of *those participating before the courts* could be limited." *Id*. at 1072. Additionally, in the commercial context, the Supreme Court's "decisions dealing with a lawyer's right under the First Amendment to solicit business and advertise . . . have not suggested that lawyers are protected by the First Amendment to the same extent as those engaged in other business." *Id*. at 1073 (collecting cases).

In contrast, Rule 8.4(g) does not limit its prohibition of "words . . . [that] manifest bias or prejudice" to the legal process, since it also prohibits these words or conduct "during activities that are required for a lawyer to practice law," including seminars or activities where legal education credits are offered. Pa.R.P.C. 8.4(g). Rule 8.4(g) does not seek to limit attorneys' speech only when that attorney is in court, nor when that attorney has a pending case, nor even when that attorney seeks to solicit business and advertise. Rule 8.4(g) much more broadly prohibits attorneys' speech.

This Court also finds that Rule 8.4(g) does not cover "professional speech" that is entitled to less protection. The Supreme Court "has not recognized 'professional speech' as a separate category of speech." *NIFLA*, 138 S. Ct. at 2371

(finding petitioners were likely to succeed on merits of claim that act requiring clinics that primarily serve pregnant women to provide certain notices violated the First Amendment). "Speech is not unprotected merely because it is uttered by 'professionals.'" *Id*. at 2371-2372.

However, the Supreme Court "has afforded less protection for professional speech in two circumstances." *Id*. at 2372. "First, [Supreme Court] precedents have applied more deferential review to some laws that require professionals to disclose factual, noncontroversial information in their 'commercial speech.'" *Id*. (collecting cases). "Second, under [Supreme Court] precedents, States may regulate professional conduct, even though that conduct incidentally involves speech." *Id*. (collecting cases).

Rule 8.4(g) does not fall into either of these categories. First, Rule 8.4(g) does not relate specifically to commercial speech, nor does it require that professionals "disclose factual, noncontroversial information." *Id*.

Second, Rule 8.4(g) does not regulate professional conduct that incidentally involves speech. The plain language of Rule 8.4(g) explicitly prohibits "words" that manifest bias or prejudice. Furthermore, a comment included in a May 2018 proposal of Rule 8.4(g) "explains and illustrates" that Rule 8.4(g) was intended to regulate speech. Pa.R.P.C., Preamble and Scope ("The Comment accompanying

each Rule explains and illustrates the meaning and purpose of the Rule.") This comment stated, "[e]xamples of manifestations of bias or prejudice include but are not limited to epithets; slurs; demeaning nicknames; negative stereotyping; attempted humor based upon stereotypes; threatening, intimidating, or hostile acts; suggestions of connections between race, ethnicity, or nationality and crime; and irrelevant references to personal characteristics."[7] 48 Pa.B. 2936. This proposed comment reveals that the drafters of Rule 8.4(g) intended to explicitly restrict offensive words in prohibiting an attorney from "manifest[ing] bias or prejudice."

Although the final version of Rule 8.4(g) does not include this comment, the fatal language, "by words . . . manifest bias or prejudice," remains. Removing this candid comment about the intent of the Rule does not also remove the intent of those words. That this language, "by words . . . manifest bias or prejudice," remained in the final version of Rule 8.4(g) illustrates the Rule's broad and chilling implications. If the drafters wished to reform the Rule, they could have easily removed the offending language from the Rule as well the proposed comment. Removing the comment alone did not rid Rule 4.8(g) of its language specifically targeting speech.

[7] This exact language also appears in Comment 2 to Rule 2.3 of Pennsylvania Code of Judicial Conduct. Pa.C.J.C. Rule 2.3. Both parties agree Pennsylvania Code of Judicial Conduct Rule 2.3 mirrors Pennsylvania Rule of Professional Conduct Rule 8.4(g). *See* ECF No. 15 at 28; ECF No. 25 at 7.

Despite this, Defendants tell us to look away from the clearly drafted language of the Rule and focus rather on the conduct component. Plaintiff agrees that if we were looking at conduct, the government has a right to regulate conduct of its licensed attorneys. *See* ECF No. 25 at 21. Defendants try to deflect our attention away from the clear speech regulation in the Rule because they themselves had to know in drafting the Rule they were venturing into the narrowest of channels that permit government to regulate speech. They merge "words" into "conduct" by blithely arguing that the shoal that confronts us is a mere illusion to be ignored and is simply nothing but part of the deep, blue channel. Yet, when the reality of the shoal hits the ship, it will not be the government left ensnared and churning in the sand, it will be the individual attorney and the attorney's practice embedded in an inquisition regarding the manifestation of bias and prejudice, and an exploration of the attorney's character and previously expressed viewpoints, to determine if such manifestation was "knowing."

Defendants cite *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, to support their contention that Rule 8.4(g) is intended to prohibit "conduct carried out by words," and not speech. Transcript of Oral Argument at 25; ECF No. 15 at 17 (citing *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 62 (2006)). In *Rumsfeld*, the Supreme Court held that speech was incidental to the challenged law's requirement that law schools afford equal access to military

recruiters. 547 U.S. at 62. The challenged law denied federal funding to an institution of higher education that prohibited the military from recruiting on its campus. *Id*. at 47. The plaintiffs brought suit, seeking to deny the military from recruiting on their campuses because of "disagreement with the Government's policy on homosexuals in the military," and arguing that the law violated law schools' freedom of speech. *Id*. at 51, 60. The Supreme Court held that the law did not regulate speech, nor did the expressive nature of the conduct regulated bring it under the First Amendment's protection. *Id*. at 65. The Court held, "it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Id*. at 62 (quoting *Giboney v. Empire Storage & Ice Co*., 336 U.S. 490, 502 (1949)).

The Supreme Court's holding in *Rumsfeld* is inapplicable to the case before this Court. Whereas the challenged law in *Rumsfeld* required the plaintiffs to provide equal campus access to military recruiters, a law that clearly regulates conduct, the Amendments explicitly limit what Pennsylvania attorneys may say in the practice of law. Rule 8.4(g)'s prohibition against using "words" to "manifest bias or prejudice" does not regulate conduct "carried out by means of language." *Rumsfeld*, 547 U.S. at 62. It simply regulates speech. Even if the Rule was *intended* to prohibit "harassment and discrimination . . . carried out by words,"

Transcript of Oral Argument at 25, Rule 8.4(g) plainly prohibits "words . . . manifest[ing] bias or prejudice," which regulates a much broader category of speech than supposedly intended.

"Outside of the two contexts discussed above—disclosures under [attorney advertising] and professional conduct—[the Supreme] Court's precedents have long protected the First Amendment rights of professionals." *NIFLA*, 138 S. Ct. at 2374. "The dangers associated with content-based regulations of speech are also present in the context of professional speech." *Id.* "As with other kinds of speech, regulating the content of professionals' speech 'pose[s] the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information.'" *Id.* (quoting *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994)). "States cannot choose the protection that speech receives under the First Amendment [by imposing a licensing requirement], as that would give them a powerful tool to impose 'invidious discrimination of disfavored subjects.'" *Id.* (quoting *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 423-424 (1993)) (additional citations omitted). Defendants may not impinge upon Pennsylvania attorneys' First Amendment rights simply because Rule 8.4(g) regulates speech by professionals.

Furthermore, in *In re Primus*, quoted by Defendants to establish that states have "broad power" to regulate attorneys, the Court ultimately concluded that the

state's application of the disciplinary rules violated the First and Fourteenth Amendments, showing the limits to that "broad" regulation power. 436 U.S. 412, 438 (1978). In *In re Primus*, a lawyer informed a prospective client via letter that free legal assistance was available from a nonprofit organization with which this lawyer worked. *Id*. at 414. Based on this activity, the state disciplinary board charged the lawyer with soliciting a client in violation of the disciplinary rules and administered a private reprimand. *Id*. at 421. The state supreme court then adopted the board's findings and increased the sanction to a public reprimand. *Id*. The Supreme Court found that the "State's special interest in regulating members whose profession it licenses, and who serve as officers of its courts, amply justifies the application of *narrowly drawn* rules to proscribe solicitation that in fact is misleading, overbearing, or involves other features of deception or improper influence." *Id*. at 438 (emphasis added). Even though the state had argued that the regulatory program was aimed at preventing undue influence "and other evils that are thought to inhere generally in solicitation by lawyers of prospective clients," the Court found that "that '[b]road prophylactic rules in the area of free expression are suspect,' and that '[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms.'" *Id*. at 432 (quoting *Button*, 371 U.S., at 438). "Because of the danger of censorship through selective enforcement of broad prohibitions, and '[b]ecause First Amendment freedoms need breathing

space to survive, government may regulate in [this] area only with narrow specificity.'" *Id*. at 432-433 (quoting *Button*, 371 U.S., at 433) (alteration in original). This case does not, therefore, ultimately support Defendants' conclusion nor indicate that Defendants have broad power in this context to regulate attorneys' words.

Rule 8.4(g) does not regulate the specific types of attorney speech or professional speech that the Supreme Court has identified as warranting a deferential review. The speech that Rule 8.4(g) regulates is entitled to the full protection of the First Amendment.

2. Viewpoint-Based Discrimination

The Court finds that the Amendments, Rule 8.4(g) and Comments 3 and 4, are viewpoint-based discrimination in violation of the First Amendment.

"[L]aws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based." *Startzell v. City of Philadelphia, Pennsylvania*, 533 F.3d 183, 193 (3d Cir. 2008) (quoting *Turner Broadcasting*, 512 U.S. at 643) (alteration in original). Content-based restrictions "are subject to the 'most exacting scrutiny,' . . . because they 'pose the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public

debate through coercion rather than persuasion.'" *Id*. (quoting *Turner Broadcasting*, 512 U.S. at 641-642).

Viewpoint discrimination is "[w]hen the government targets not subject matter, but particular views taken by speakers on a subject." *Id*. (quoting *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995)). "Viewpoint discrimination is thus an egregious form of content discrimination." *Id*. (quoting *Rosenberger*, 515 U.S. at 829). "The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Id*. (quoting *Rosenberger*, 515 U.S. at 829).

"If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989). "[T]hat is viewpoint discrimination: Giving offense is a viewpoint." *Matal*, 137 S. Ct. at 1763. The Supreme Court has "said time and again that 'the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.'" *Id*. (quoting *Street v. New York*, 394 U.S. 576, 592 (1969)) (additional citations omitted).

In *Matal v. Tam*, the Supreme Court considered the constitutionality of "a provision of federal law prohibiting the registration of trademarks that may 'disparage . . . or bring . . . into contemp[t] or disrepute' any 'persons, living or dead.'" 137 S. Ct. at 1751. The Court concluded that the provision violated the Free Speech Clause of the First Amendment because "[s]peech may not be banned on the ground that it expresses ideas that offend." *Id.* The Court noted that when the government creates a limited public forum for private speech "some content- and speaker-based restrictions may be allowed," but, "even in such cases . . . 'viewpoint discrimination' is forbidden." *Id.* (citing *Rosenberger*, 515 U.S. at 830-831). The Court clarified that the term "viewpoint" discrimination is to be used in a broad sense and, even if the provision at issue "evenhandedly prohibits disparagement of all group," it is still viewpoint discrimination because "[g]iving offense is a viewpoint." *Id.* at 1763.

In a concurring opinion, Justice Kennedy stated that "[t]he First Amendment guards against laws 'targeted at specific subject matter,' [a] form of speech suppression known as content based discrimination." *Id.* at 1765-1766 (Kennedy, J., concurring) (quoting *Reed v. Town of Gilbert*, 576 U.S. 155, 169 (2015)). "This category includes a subtype of laws that go further, aimed at the suppression of 'particular views . . . on a subject.'" *Id.* (Kennedy, J., concurring) (quoting *Rosenberger*, 515 U.S. at 829) (alteration in original). "A law found to

discriminate based on viewpoint is an 'egregious form of content discrimination,' which is 'presumptively unconstitutional.'" *Id*. (Kennedy, J., concurring) (quoting *Rosenberger*, 515 U.S. at 829–830).

"At its most basic, the test for viewpoint discrimination is whether—within the relevant subject category—the government has singled out a subset of messages for disfavor based on the views expressed." *Id*. at 1766 (Kennedy, J., concurring) (citation omitted). Justice Kennedy further stated that even though the provision at issue applied in "equal measure to any trademark that demeans or offends," it was not viewpoint neutral: "To prohibit all sides from criticizing their opponents makes a law more viewpoint based, not less so." *Id*. at 1766 (Kennedy, J., concurring) (citation omitted).

Similarly, Rule 8.4(g) states that it is professional misconduct for a lawyer, "in the practice of law, by **words** or conduct, to knowingly **manifest bias** or **prejudice** . . . ." Pa.R.P.C. 8.4(g) (emphasis added). While Rule 8.4(g) restricts Pennsylvania attorneys' ability to express bias or prejudice "based upon race, sex, gender identity or expression, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, or socioeconomic status," it allows Pennsylvania attorneys to express tolerance or respect based on these same statuses. *Id*. Defendants have "singled out a subset of message," those words that manifest bias

or prejudice, "for disfavor based on the views expressed." *Matal*, 137 S. Ct. at 1766 (Kennedy, J., concurring) (citation omitted).

As in *Matal*, Defendants seek to remove certain ideas or perspectives from the broader debate by prohibiting *words* that manifest bias or prejudice. The American Civil Liberties Union defines censorship as "the suppression of words, images, or ideas that are 'offensive,' [which] happens whenever some people succeed in imposing their personal political or moral values on others." *What is censorship?*, ACLU, https://www.aclu.org/other/what-censorship (last visited December 7, 2020). This is exactly what Defendants attempt to do with Rule 8.4(g). Although Defendants contend that Rule 8.4(g) "was enacted to address discrimination, equal access to justice, [and] the fairness of the judicial system," the plain language of Rule 8.4(g) does not reflect this intention. Transcript of Oral Argument at 3. Rule 8.4(g) explicitly prohibits words manifesting bias or prejudice, i.e., "offensive" words. In short, Defendants seek to impose their personal moral values on others by censoring all opposing viewpoints.

"A law found to discriminate based on viewpoint is an 'egregious form of content discrimination,' which is 'presumptively unconstitutional.'" *Id*. at 1766 (Kennedy, J., concurring) (quoting *Rosenberger*, 515 U.S. at 829-830). Therefore,

"[t]he Court's finding of viewpoint bias end[s] the matter." *Iancu v. Brunetti*, 139 S. Ct. 2294, 2302 (2019).[8]

The irony cannot be missed that attorneys, those who are most educated and encouraged to engage in dialogues about our freedoms, are the very ones here who are forced to limit their words to those that do not "manifest bias or prejudice." Pa.R.P.C. 8.4(g). This Rule represents the government restricting speech outside of the courtroom, outside of the context of a pending case, and even outside the much broader playing field of "administration of justice." Even if Plaintiff makes a good faith attempt to restrict and self-censor, the Rule leaves Plaintiff with no guidance as to what is in bounds, and what is out, other than to advise Plaintiff to scour every nook and cranny of each ordinance, rule, and law in the Nation. Furthermore, the influence and insight of the May 2018 comments on this self-

[8] Even if the Court were to weigh the competing interests involved, Rule 8.4(g) would not pass either strict scrutiny or intermediate scrutiny. "To survive strict scrutiny analysis, a statute must: (1) serve a compelling governmental interest; (2) be narrowly tailored to achieve that interest; and (3) be the least restrictive means of advancing that interest." *ACLU v. Mukasey*, 534 F.3d 181, 190 (3d Cir. 2008). The compelling interest provided by Defendants is "ensuring that those who engage in the practice of law do not knowingly discriminate or harass someone so that the legal profession 'functions for all participants,' ensures justice and fairness, and maintains the public's confidence in the judicial system." ECF No. 15 at 22-23. However, as addressed at length in this Memorandum, by also prohibiting "words . . . [that] manifest bias or prejudice," the Amendments are neither narrowly tailored nor the least restrictive means of advancing that interest. Pa.R.P.C. 8.4(g). In the same way, the Amendments would not survive intermediate scrutiny as they are not "narrowly tailored to serve a significant governmental interest." *Barr v. Am. Ass'n of Political Consultants, Inc*, 140 S. Ct. 2335, 2356 (2020) (Sotomayor, J., concurring) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).

censorship will loom large as guidance as to the intent of the Rule. *See supra* p. 29.

There is no doubt that the government is acting with beneficent intentions. However, in doing so, the government has created a rule that promotes a government-favored, viewpoint monologue and creates a pathway for its handpicked arbiters to determine, without any concrete standards, who and what offends. This leaves the door wide open for them to determine what is bias and prejudice based on whether the viewpoint expressed is socially and politically acceptable and within the bounds of permissible cultural parlance. Yet the government cannot set its standard by legislating diplomatic speech because although it embarks upon a friendly, favorable tide, this tide sweeps us all along with the admonished, minority viewpoint into the massive currents of suppression and repression. Our limited constitutional Government was designed to protect the individual's right to speak freely, including those individuals expressing words or ideas we abhor.

Therefore, the Court holds that the Amendments, Rule 8.4(g) and Comments 3 and 4, consist of unconstitutional viewpoint discrimination in violation of the First Amendment. Because the Court finds that Plaintiff has standing and that the

Amendments constitute unconstitutional viewpoint discrimination, Defendants' Motion to Dismiss is denied.[9]

As for Plaintiff's Motion for a Preliminary Injunction, for the foregoing reasons, the Court finds Plaintiff has shown that the likelihood of success on the merits of his constitutional claim is "significantly better than negligible." *Reilly*, 858 F.3d at 179.

Second, "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Stilp*, 613 F.3d at 409 (citing *Elrod*, 427 U.S. at 373). Plaintiff alleged that he will be chilled in the exercise of his First Amendment rights at CLE presentations and other speaking events if the Amendments go into effect as planned on December 8, 2020. ECF No. 16-1 at 28 (citing ECF No. 1 at ¶ 60). As the Court has found the Amendments constitute unconstitutional viewpoint discrimination and Plaintiff has alleged a chilling effect that is objectively reasonable in light of the plain language in Rule 8.4(g), Plaintiff has shown he is more likely than not to suffer irreparable harm in the absence of preliminary relief. Plaintiff has thus met the threshold for

[9] The Court also denies Defendant's Motion to Dismiss as to Count II, alleging unconstitutional vagueness.

the "first two 'most critical' factors" in determining whether to grant a preliminary injunction. *Reilly*, 858 F.3d at 179.

As the Court has found that the Amendments violate the First Amendment, the last two factors, (3) the possibility of harm to other interested persons from the grant or denial of the injunction, and (4) the public interest, also favor preliminary relief. On balance, and because Plaintiff has satisfied the first two factors, the factors favor granting the preliminary injunction.[10] Therefore, the Court grants Plaintiff's Motion for Preliminary Injunction.

D. CONCLUSION

For the foregoing reasons, the Court denies Defendants' Motion to Dismiss and grants Plaintiff's Motion for Preliminary Injunction.

An appropriate order will follow.

BY THE COURT:

DATE: December 7, 2020

/s/ Chad F. Kenney

CHAD F. KENNEY, JUDGE

[10] The parties agree that there should be no bond. Transcript of Oral Argument at 50-51; ECF No. 21 at ¶ 50 ("The Defendants bear no risk of financial loss if they are wrongfully enjoined in this case.")

STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL

March 16, 2018

Opinion No. 18-11

American Bar Association's New Model Rule of Professional Conduct Rule 8.4(g)

Question 1

If Tennessee were to adopt the American Bar Association's new Model Rule 8.4(g), or the version of it currently being considered in Tennessee, could Tennessee's adoption of that new Rule constitute a violation of a Tennessee attorney's statutory or constitutional rights under any applicable statute or constitutional provision?

Opinion 1

Yes. Proposed Rule of Professional Conduct 8.4(g) would violate the constitutional rights of Tennessee attorneys and conflict with the existing Rules of Professional Conduct.

ANALYSIS

For the analysis that forms the basis of this opinion, please see the Comment Letter of the Tennessee Attorney General filed with the Tennessee Supreme Court on March 16, 2018, in response to the Court's order of November 21, 2017, soliciting written comments on whether to adopt the amendments to Tennessee Supreme Court Rule 8, Rule of Professional Conduct 8.4, that are being proposed by Joint Petition of the Tennessee Board of Professional Responsibility and the Tennessee Bar Association. A copy of the Comment Letter is attached hereto and incorporated herein.

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Requested by:

The Honorable Mike Carter
State Representative
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STATE OF TENNESSEE

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March 16, 2018

The Honorable Jeffrey S. Bivins, Chief Justice
The Honorable Cornelia A. Clark, Justice
The Honorable Holly Kirby, Justice
The Honorable Sharon G. Lee, Justice
The Honorable Roger A. Page, Justice

Attn: James M. Hivner, Clerk
Tennessee Supreme Court
100 Supreme Court Building
401 7th Avenue North
Nashville, TN 37219

Re: No. ADM2017-02244 — Comment Letter of the Tennessee Attorney General Opposing Proposed Amended Rule of Professional Conduct 8.4(g)

Dear Chief Justice Bivins, Justice Clark, Justice Kirby, Justice Lee, and Justice Page:

This letter is being filed in response to the Court's order of November 21, 2017, soliciting written comments on whether to adopt amendments to Tennessee Supreme Court Rule 8, Rule of Professional Conduct 8.4, that were proposed by Joint Petition of the Tennessee Board of Professional Responsibility ("BPR") and the Tennessee Bar Association ("TBA"). Because proposed Rule of Professional Conduct 8.4(g) would violate the constitutional rights of Tennessee attorneys and conflict with the existing Rules of Professional Conduct, the Tennessee Office of the Attorney General and Reporter strongly opposes its adoption.

The proposed amendments to Rule 8.4 and its accompanying comment are "patterned after" ABA Model Rule 8.4(g).[1] That model rule has been widely and justifiably criticized as

[1] Joint Petition of Board of Professional Responsibility of the Supreme Court of Tennessee and Tennessee Bar Association for the Adoption of a New Tenn. Sup. Ct. R. 8, RPC 8.4(g) at 1, *In re Petition for the Adoption of a New Tenn. Sup. Ct. R. 8, RPC 8.4(g)*, No. ADM2017-02244 (Tenn. Nov. 15, 2017) (hereinafter "Joint Petition").

creating a "speech code for lawyers" that would constitute an "unprecedented violation of the First Amendment" and encourage, rather than prevent, discrimination by suppressing particular viewpoints on controversial issues.[2] To date, ABA Model Rule 8.4(g) has been adopted by only one State—Vermont.[3] A number of other States have already rejected its adoption.[4] Although the BPR and TBA assert in their Joint Petition that their Proposed Rule 8.4(g) "improve[s] upon" ABA Model Rule 8.4(g) by "more clearly protecting the First Amendment rights of lawyers," Joint Petition 1, the proposed rule suffers from the same fundamental defect as the model rule: it wrongly assumes that the only attorney speech that is entitled to First Amendment protection is purely private speech that is entirely unrelated to the practice of law. But the First Amendment provides robust protection to attorney speech, even when the speech is related to the practice of law and even when it could be considered discriminatory or harassing. Far from "protecting" the First Amendment rights of lawyers, Proposed Rule 8.4(g) would seriously compromise them.

If adopted, Proposed Rule 8.4(g) would profoundly transform the professional regulation of Tennessee attorneys. It would regulate aspects of an attorney's life that are far removed from protecting clients, preventing interference with the administration of justice, ensuring attorneys' fitness to practice law, or other traditional goals of professional regulation. Especially since there is no evidence that the current Rule 8.4 is in need of revision, there is no reason for Tennessee to adopt such a drastic change. If the TBA and BPR are right that harassing and discriminatory speech is a problem in the legal profession, then the answer is more speech, not enforced silence in the guise of professional regulation.

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[2] Letter from Edwin Meese III and Kelly Shackelford to ABA House of Delegates (Aug. 5, 2016), https://firstliberty.org/wp-content/uploads/2016/08/ABA-Letter_08.08.16.pdf. *See also, e.g.*, Eugene Volokh, *A speech code for lawyers, banning viewpoints that express 'bias,' including in law-related social activities*, The Volokh Conspiracy (Aug. 10, 2016, 8:53 AM), http://reason.com/volokh/2016/08/10/a-speech-code-for-lawyers-bann; John Blackman, *A Pause for State Courts Considering Model Rule 8.4(g): The First Amendment and Conduct Related to the Practice of Law*, 30 Geo. J. Legal Ethics 241 (2017); Ronald Rotunda, *The ABA Decision to Control What Lawyers Say: Supporting "Diversity" But Not Diversity of Thought,* The Heritage Foundation (Oct. 6, 2016), https://www.heritage.org/report/the-aba-decision-control-what-lawyers-say-supporting-diversity-not-diversity-thought.

[3] *ABA Model Rule 8.4(g) and the States,* Christian Legal Society, https://www.christianlegalsociety.org/resources/aba-model-rule-84g-and-states (last visited Mar. 6, 2018).

[4] Order, *In re Proposed Amendments to Rule 8.4 of the Rules of Professional Conduct*, No. 2017-000498 (S.C. June 20, 2017), https://www.sccourts.org/courtOrders/displayOrder.cfm?orderNo=2017-06-20-01; Order, *In re Amendments to Rule of Professional Conduct 8.4*, No. ADKT526 (Nev. Sep. 25, 2017).

I. Problematic Features of Proposed Rule 8.4(g)

In their current form, the Rules of Professional Conduct do not expressly prohibit discrimination or harassment by attorneys. Rather, Rule 8.4(d) provides that it is "professional misconduct" to "engage in conduct that is prejudicial to the administration of justice." Tenn. Sup. Ct. R. 8, RPC 8.4(d). And comment 3 provides that "[a] lawyer, who in the course of representing a client, knowingly manifests, by words or conduct, bias or prejudice based on race, sex, religion, national origin, disability, age, sexual orientation, or socio-economic status violates paragraph (d) when such actions are prejudicial to the administration of justice." *Id.* at RPC 8.4(d), cmt. 3. Comment 3 also makes clear that "[l]egitimate advocacy representing the foregoing factors does not violate paragraph (d)." *Id.*

Proposed Rule 8.4(g) would establish a new black-letter rule that subjects Tennessee attorneys to professional discipline for "engag[ing] in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status, or socioeconomic status in conduct related to the practice of law." Comment 3 to the proposed rule would define "harassment" and "discrimination" to include not only "physical conduct," but also "verbal . . . conduct"—better known as speech.

Several problematic features of the proposed rule warrant highlighting. First, the proposed rule would apply not only to speech and conduct that occurs in the course of representing a client or appearing before a judicial tribunal, but also to speech and conduct that is merely "*related to the practice of law*." (emphasis added). Comment 4 to the proposed rule explains that "[c]onduct related to the practice of law includes representing clients; interacting with witnesses, coworkers, court personnel, lawyers, and others while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business or social activities in connection with the practice of law." Far from cabining the scope of the proposed rule, comment 4 leaves no doubt that the proposed rule would apply to virtually any speech or conduct that is even tangentially related to an individual's status as a lawyer, including, for example, a presentation at a CLE event, participation in a debate at an event sponsored by a law-related organization, the publication of a law review article, and even a casual remark at dinner with law firm colleagues.[5] Such speech or conduct would be "professional misconduct" even if it in no way prejudices the administration of justice.

[5] Indeed, the report that recommended adoption of Model Rule 8.4(g) to the ABA House of Delegates explained that the rule would regulate any "conduct lawyers are permitted or required to engage in because of their work as a lawyer," including "activities such as law firm dinners and other nominally social events at which lawyers are present solely because of their association with their law firm or in connection with their practice of law." Report to the House of Delegates 9, 11 (May 31, 2016), https://www.americanbar.org/content/dam/aba/administrative/ professional_ responsibility/scepr_report_to_hod_rule_8_4_amendments_05_31_2016_resolution_and_report_ posting.authcheckdam.pdf.

Second, the proposed rule would prohibit a broad range of "harassment or discrimination," including a significant amount of speech and conduct that is not currently prohibited under federal or Tennessee antidiscrimination statutes. To the extent that federal antidiscrimination laws apply to attorneys engaged in speech or conduct related to the practice of law, they generally apply only in the employment and education contexts and prohibit discrimination only on the basis of race, color, national origin, religion, sex, age, or disability. *See* 20 U.S.C. § 1681 (Title IX); 29 U.S.C. § 623 (ADEA); 29 U.S.C. § 794 (Rehabilitation Act); 42 U.S.C. § 2000d (Title VI); 42 U.S.C. § 2000e-2 (Title VII); 42 U.S.C. § 12112 (ADA). The Tennessee Human Rights Act similarly applies only in certain limited areas, including employment, and prohibits discrimination only on the basis of "race, creed, color, religion, sex, age or national origin." Tenn. Code Ann. § 4-21-401. Under both federal and state antidiscrimination laws, moreover, the only discrimination or harassment that is actionable in the employment context is that which results in a materially adverse employment action or is sufficiently severe and pervasive to create a hostile work environment. *See, e.g., White & Burlington N. & Santa Fe Ry. Co.*, 364 F.3d 789, 795 & n.1 (6th Cir. 2004) (en banc) (explaining that "not just any discriminatory act by an employer constitutes discrimination under Title VII"); *Frye v. St. Thomas Health Servs.*, 227 S.W.3d 595, 602, 610 (Tenn. Ct. App. 2007). And the only harassment that is actionable in the education context is that which is sufficiently severe and pervasive to effectively bar a student from receiving educational benefits. *See, e.g., Doe v. Miami Univ.*, 882 F.3d 579, 590 (6th Cir. 2018). Federal and state antidiscrimination laws also explicitly protect religious freedom by exempting religious organizations from their ambit. *See, e.g.*, 42 U.S.C. § 2000e-1(a); Tenn. Code Ann. § 4-21-405.

Proposed Rule 8.4(g) would reach well beyond federal and state antidiscrimination laws. For one thing, the proposed rule would prohibit any and all "harassment or discrimination"—even that which does not result in any tangible adverse consequence and is not sufficiently severe or pervasive to create a hostile environment. The proposed amendments to comment 3, which attempt to clarify what constitutes "harassment or discrimination," do nothing to alleviate this concern. The proposed comment simply states that "discrimination includes harmful verbal or physical conduct that manifests bias or prejudice towards others," and "[h]arassment includes sexual harassment and derogatory or demeaning verbal or physical conduct." In other words, any speech or conduct that could be considered "harmful" or "derogatory or demeaning" would constitute professional misconduct within the meaning of the proposed rule. And while proposed comment 3 states that "[t]he substantive law of antidiscrimination and anti-harassment statutes and case law *may* guide application of paragraph (g)" (emphasis added), there is no requirement that the scope of Proposed Rule 8.4(g) be limited in that manner.

Even more troubling, Proposed Rule 8.4(g) would prohibit "harassment or discrimination" on the basis of characteristics that are not expressly covered by federal and state antidiscrimination laws—namely, "sexual orientation, gender identity, marital status, [and] socioeconomic status." It is no secret that individuals continue to hold diverse views on issues related to sexual orientation and gender identity, and those who hold traditional views on sexuality and gender frequently do so because of sincerely held religious beliefs. As the U.S. Supreme Court recognized in *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015), for example, many who consider "same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises." By deeming as "professional misconduct" any speech that someone may view as "harmful" or "derogatory or demeaning" toward homosexuals or transgender individuals,

Proposed Rule 8.4(g) would prevent attorneys who hold traditional views on these issues from "engag[ing] those who disagree with their view in an open and searching debate," *Obergefell*, 135 S. Ct. at 2607.

Unlike Title VII and the Tennessee Human Rights Act, Proposed Rule 8.4(g) includes no exception to protect religious freedom. Comment 4a to the proposed rule gives a nod to the First Amendment by stating that paragraph (g) "does not restrict any speech or conduct not related to the practice of law, including speech or conduct protected by the First Amendment." As explained below, however, nearly all speech and conduct that is "related to the practice of law" is also protected by the First Amendment, so that explanatory comment in fact does nothing to protect attorneys' First Amendment rights.

Third, Proposed Rule 8.4(g) would prohibit not only speech and conduct "that the lawyer knows . . . is harassment or discrimination," but also that which the lawyer "reasonably should know is harassment or discrimination." In other words, the proposed rule would subject an attorney to professional discipline for uttering a statement that was not actually known to be or intended as harassing or discriminatory, simply because someone might construe it that way.

II. Proposed Rule 8.4(g) Would Violate the U.S. and Tennessee Constitutions and Conflict with the Rules of Professional Conduct.

As a result of these and other problematic features, Proposed Rule 8.4(g) would violate the U.S. and Tennessee Constitutions and conflict with the spirit and letter of the existing Rules of Professional Conduct.

A. Proposed Rule 8.4(g) Would Infringe on Tennessee Attorneys' Rights to Free Speech, Freedom of Association, Free Exercise of Religion, and Due Process.

Proposed Rule 8.4(g) would clearly violate the First Amendment rights of Tennessee attorneys, including their rights to free speech, freedom of expressive association, and the free exercise of religion, and equivalent protections under the Tennessee Constitution.[6]

The First Amendment prohibits the government from regulating protected speech or expressive conduct based on its content unless the regulation is the least restrictive means of achieving a compelling government interest. *See Brown v. Entertainment Merchants Ass'n*, 564 U.S. 786, 799 (2011). That most exacting level of scrutiny would apply to Proposed Rule 8.4(g) because it regulates speech and expressive conduct that is entitled to full First Amendment protection based on viewpoint.

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[6] The Tennessee Constitution also protects the rights to free speech, freedom of expressive association, and free exercise of religion. *See* Tenn. Const. art. I, § 19 (right to free speech); Tenn. Const. art. I. § 3 (right to free exercise of religion). This Court has held that these rights are at least as broad as those guaranteed by the First Amendment to the U.S. Constitution. *See, e.g., S. Living, Inc. v. Celauro*, 789 S.W.2d 251, 253 (Tenn. 1990); *Carden v. Bland*, 288 S.W.2d 718, 721 (Tenn. 1956).

Expression that would be deemed discrimination or harassment on the basis of one of the categories included in Proposed Rule 8.4(g) is entitled to robust First Amendment protection, even though listeners may find such expression harmful or offensive. *See Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 206 (3d Cir. 2001) (Alito, J.) ("[T]here is . . . no question that 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."). The U.S. Supreme Court has made clear that, save for a few narrowly defined and historically recognized exceptions such as obscenity and fighting words, the "'the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.'" *Matal v. Tam*, 137 S. Ct. 1744, 1763 (2017) (plurality opinion) (quoting *Street v. New York*, 394 U.S. 576, 592 (1969)); *see also, e.g., Brown*, 564 U.S. at 791, 798 (noting that "disgust is not a valid basis for restricting expression"); *Snyder v. Phelps*, 562 U.S. 443, 458 (2011) ("[S]peech cannot be restricted simply because it is upsetting . . . ."); *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118 (1991) ("[T]he Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." (internal quotation marks omitted)). Indeed, the very "point of all speech protection . . . is to shield just those choices of content that in someone's eyes are misguided, or even hurtful." *Hurley v. Irish-American Gay, Lesbian and Bisexual Grp. of Boston, Inc.*, 515 U.S. 557, 574 (1995); *see also Texas v. Johnson*, 491 U.S. 397, 408 (1989) ("[A] principal function of free speech under our system of government is to invite dispute." (internal quotation marks omitted)).

The fact that the speech at issue is that of attorneys does not deprive it of protection under the First Amendment. As a general matter, the expression of attorneys is entitled to full First Amendment protection, even when the attorney is acting in his or her professional capacity. *See, e.g., In re Primus*, 436 U.S. 412, 432-38 (1978) (applying strict scrutiny to invalidate on First Amendment grounds discipline imposed on attorney for informing welfare recipient threatened with forced sterilization that ACLU would provide free legal representation). Courts have permitted the government to limit the speech of attorneys in only narrow circumstances, such as when the speech pertains to a pending judicial proceeding or otherwise prejudices the administration of justice. *See Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1072 (1991); *Mezibov v. Allen*, 411 F.3d 712, 717 (6th Cir. 2005); *Bd. of Prof'l Responsibility v. Slavin*, 145 S.W.3d 538, 549 (Tenn. 2004).[7]

[7] Courts have also applied a lower level of scrutiny to regulations that implicate only the commercial speech of attorneys. *See, e.g., Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 622-24 (1995); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 455-56 (1978). Proposed Rule 8.4(g) cannot be defended on that ground, because it reaches non-commercial speech. Some courts have also suggested that regulations of "professional speech" should be subject to a lower level of scrutiny. *See, e.g., Pickup v. Brown*, 740 F.3d 1208, 1225-29 (9th Cir. 2013). But neither the U.S. Supreme Court, the Sixth Circuit, nor the Tennessee Supreme Court has so held. In any event, Proposed Rule 8.4(g) is not limited to "professional speech"—that is, personalized advice to a paying client, *see, e.g., Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor and City Council of Balt.*, 879 F.3d 101, 109 (4th Cir. 2018)—but instead reaches speech or conduct that is merely "related to the practice of law."

This Court's decision in *Ramsey v. Board of Professional Responsibility*, 771 S.W.2d 116 (Tenn. 1989), is particularly instructive. There, a District Attorney General's law license was suspended because he made remarks to the media that were critical of the judicial system. This Court held that the disciplinary sanctions violated the First Amendment because the attorney's remarks, though "disrespectful and in bad taste," were protected expression. *Id.* at 122. This Court made clear that "[a] lawyer has every right to criticize court proceedings and the judges and courts of this State after a case is concluded," as long as those statements are not false. *Id.* at 122. Were the rule otherwise, this Court explained, it would "close the mouths of those best able to give advice, who might deem it their duty to speak disparagingly." *Id.* at 121. Proposed Rule 8.4(g) is not limited to speech and conduct that pertains to a pending judicial proceeding or that actually prejudices the administration of justice; rather, it reaches all speech and conduct in any way "related to the practice of law"—speech that is entitled to full First Amendment protection.

Proposed Rule 8.4(g) would not only regulate speech that is protected by the First Amendment, but it would also do so on the basis of viewpoint. But "it is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995). "When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant." *Id.* at 829 (referring to "[v]iewpoint discrimination" as "an egregious form of content discrimination"). Proposed Rule 8.4(g) discriminates based on viewpoint because it would permit certain expression that is laudatory of a person's race, sex, religion, or other protected characteristic, while prohibiting expression that is "derogatory or demeaning" of that characteristic. Indeed, proposed comment 4 makes clear that "[l]awyers may engage in conduct undertaken to *promote* diversity and inclusion without violating this Rule." (emphasis added). Like the trademark disparagement clause that the U.S. Supreme Court invalidated on First Amendment grounds in *Matal*, Proposed Rule 8.4(g) "mandat[es] positivity." 137 S. Ct. at 1766 (Kennedy, J., concurring in part and concurring in the judgment).

Because Proposed Rule 8.4(g) would regulate protected speech based on its viewpoint, it would be "presumptively unconstitutional" and could be upheld only if it were narrowly tailored to further a compelling government interest. *Rosenberger*, 515 U.S. at 830. But the proposed rule could not satisfy that exacting scrutiny. Even assuming that the government has a compelling interest in preventing discrimination in particular contexts such as employment or education, *see Saxe*, 240 F.3d at 209, or in protecting the administration of justice, Proposed Rule 8.4(g) is not narrowly tailored to further those interests because it would reach all speech and conduct in any way "related to the practice of law," regardless of the particular context in which the expression occurs or whether it actually interferes with the administration of justice.

Indeed, the Joint Petition does not establish empirically or otherwise any actual need for the proposed rule. The section of the Joint Petition titled "the need for proposed rule 8.4(g)" does not document any instances of harassment or discrimination brought to the attention of the BPR or TBR. Nor does it explain in what way discriminatory or harassing speech by attorneys harms the legal profession or the administration of justice. It simply agrees with the ABA House of Delegates' ipse dixit that the proposed rule is "in the public's interest" and "in the profession's interest." Joint Petition 2 (internal quotation marks omitted).

Even if discrete applications of Proposed Rule 8.4(g) could be upheld—for example, a discriminatory comment made during judicial proceedings that actually prejudices the administration of justice—the rule would still be subject to facial invalidation because it is unconstitutionally overbroad. A law may be invalidated under the First Amendment overbreadth doctrine "if a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *United States v. Stevens*, 559 U.S. 460, 473 (2010) (internal quotation marks omitted). The "reason for th[at] special rule in First Amendment cases is apparent: An overbroad statute might serve to chill protected speech." *Bates v. State Bar of Ariz.*, 433 U.S. 350, 380 (1977). A person "might choose not to speak because of uncertainty whether his claim of privilege would prevail if challenged." *Id.* The overbreadth doctrine "reflects the conclusion that the possible harm to society from allowing unprotected speech to go unpunished is outweighed by the possibility that protected speech will be muted." *Id.*

Because Proposed Rule 8.4(g) would apply to any "harassment or discrimination" on the basis of a protected characteristic, including a single comment that someone may find "harmful" or "derogatory or demeaning," that is in any way "related to the practice of law," including remarks made at CLE events, debates, and in other contexts that do not involve the representation of a client or interaction with a judicial tribunal,[8] it would sweep in a substantial amount of attorney speech that poses no threat to any government interest that might conceivably justify the statute. Even if the BPR may ultimately decide not to impose disciplinary sanctions on the basis of such speech, or a court may ultimately invalidate on First Amendment grounds any sanction imposed, the fact that the rule on its face would apply to speech of that nature would undoubtedly chill attorneys from engaging in speech in the first place. But this Court has cautioned that "we must ensure that lawyer discipline, as found in Rule 8 of the Rules of [Professional Conduct], does not create a chilling effect on First Amendment Rights." *Ramsey*, 771 S.W.2d at 121.

Proposed Rule 8.4(g) also suffers from a related problem: the terms "harassment," "discrimination," "reasonably should know," "related to the practice of law," and "legitimate advice or advocacy" are impermissibly vague under the Due Process Clause. "A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." *F.C.C. v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012). To comport with the requirements of due process, a regulation must "provide a person of ordinary intelligence fair notice of what is prohibited.'" *Id.* (quoting *United States v. Williams*, 553 U.S. 285, 304 (2008)). But how is an attorney to know whether certain speech or conduct will be deemed harassing or discriminatory under the rule? Or whether certain speech or conduct will be deemed sufficiently "related to the practice of law" to fall within the ambit of the proposed rule? Determining whether an attorney "knows" or "reasonably should know" that the speech is harassing or discriminatory would require speculating about whether someone might view the speech as "harmful" or "derogatory or demeaning." Is an attorney who participates in a debate on income inequality engaging in discrimination based on socioeconomic status when he makes a negative remark about the "one percent"? How about an attorney who comments at a CLE on

[8] Even statements made by an attorney as a political candidate or a member of the General Assembly could be deemed sufficiently "related to the practice of law" to fall within the scope of Proposed Rule 8.4(g). So too could statements made by an attorney in his or her capacity as a member of the board of a nonprofit or religious organization.

immigration law that illegal immigration is draining public resources? Is that attorney discriminating on the basis of national origin? The vagueness of the proposed rule only exacerbates its chilling effect on attorney speech. *See id.* at 254.

Clarity of regulation is important not only for regulated parties, but also "so that those enforcing the law do not act in an arbitrary or discriminatory way." *Id.* at 253; *see also Davis-Kidd Booksellers, Inc. v. McWherter*, 866 S.W.2d 520, 532 (Tenn. 1993) ("[T]he more important aspect of the vagueness doctrine is not actual notice, but . . . the requirement that a legislature establish minimum guidelines to govern law enforcement"). The lack of clarity in Proposed Rule 8.4(g)'s terms creates a substantial risk that determinations about whether expression is prohibited will be guided by the "personal predilections" of enforcement authorities rather than the text of the rule. *Kolender v. Lawson*, 461 U.S. 352, 356 (1983) (internal quotation marks omitted). In fact, the proposed rule would effectively require enforcement authorities to be guided by their "personal predilections" because whether a statement is "harmful" or "derogatory or demeaning" depends on the subjective reaction of the listener. *See, e.g., Dambrot v. Cen. Mich. Univ.*, 55 F.3d 1177, 1184 (6th Cir. 1995) (invalidating university "discriminatory harassment" policy on vagueness grounds because "in order to determine what conduct will be considered 'negative' or 'offensive' by the university, one must make a subjective reference"). Especially in today's climate, those subjective reactions can vary widely. *See id.* (observing that "different people find different things offensive").

Proposed Rule 8.4(g) would also infringe on the First Amendment right of Tennessee attorneys to engage in expressive association. The First Amendment protects an individual's "right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 647 (2000). That right is "crucial in preventing the majority from imposing its views on groups that would rather express other, perhaps unpopular, ideas." *Id.* at 647-48. Proposed Rule 8.4(g) is sufficiently broad that even membership in an organization that espouses views that some may consider "harmful" or "derogatory or demeaning" could be deemed "conduct related to the practice of law" that is "harassing or discriminatory." In this respect, the proposed rule is far broader than Rule 3.6 of the Code of Judicial Conduct. The latter rule prohibits a judge from "hold[ing] membership in any organization that practices invidious discrimination on the basis of race, sex, gender, religion, national origin, ethnicity, or sexual orientation," but comment 4 to the rule makes clear that "[a] judge's membership in a religious organization as a lawful exercise of the freedom of religion is not a violation" of the rule. Tenn. Sup. Ct. R. 10, CJC 3.6(A) & cmt. 4. Proposed Rule 8.4(g), by contrast, is not limited to "invidious" discrimination and contains no exception for membership in a religious organization.

Because Proposed Rule 8.4(g) includes no exception for speech or conduct that is motivated by one's religious beliefs, it would also interfere with attorneys' First Amendment right to the free exercise of religion. Indeed, by expressly prohibiting harassment or discrimination based on "sexual orientation" and "gender identity," the proposed rule appears designed to target those holding traditional views on controversial matters such as sexuality and gender—views that are often "based on decent and honorable religious or philosophical premises," *Obergefell*, 135 S. Ct. at 2602. It is well settled that the Free Exercise Clause protects not only the right to believe, but also the right to act according to those beliefs. *See, e.g., Emp't Div., Dep't of Human Res. of*

Or. v. Smith, 494 U.S. 872, 877 (1990) (explaining that "the 'exercise of religion' often involves not only belief and profession but the performance of (or abstention from) physical acts"). While gathering for worship with a particular religious group is unlikely to be deemed conduct "related to the practice of law," serving as a member of the board of a religious organization, participating in groups such as the Christian Legal Society, or even speaking about how one's religious beliefs influence one's work as an attorney may well be. The proposed rule may also violate Tennessee's Religious Freedom Restoration Act, which prohibits the government from "substantially burden[ing] a person's free exercise of religion even if the burden results from a rule of general applicability," unless the burden is the least restrictive means of furthering a compelling government interest. Tenn. Code Ann. § 4-1-407(c).

The Joint Petition asserts that Proposed Rule 8.4(g) addresses the First Amendment concerns that have plagued ABA Model Rule 8.4(g) by adding an additional sentence to comment 4 and a new comment 4a. Joint Petition 6-7. But these supposed improvements in fact do nothing to increase protection for attorneys' First Amendment rights. The new sentence in comment 4 provides that "[l]egitimate advocacy protected by Section (g) includes advocacy in any conduct related to the practice of the law, including circumstances where a lawyer is not representing a client and outside traditional settings where a lawyer acts as an advocate, such as litigation." But proposed section (g) itself states only that "[t]his paragraph does not preclude legitimate advice or advocacy *consistent with these Rules*." (emphasis added). So even if "legitimate advocacy" includes advocacy both in the course of representing a client and in other contexts, such advocacy is allowed only if it is otherwise consistent with Proposed Rule 8.4(g)—i.e., only if it does not constitute harassment or discrimination based on a protected characteristic. That circular exception is no exception at all. Moreover, the proposed rule nowhere defines what constitutes "legitimate" advocacy; the BPR would presumably get to draw the line between legitimate and illegitimate advocacy, creating a further risk that advocacy of controversial or politically incorrect positions would be deemed harassment or discrimination that constitutes professional misconduct.

Proposed comment 4a is likewise of no help. It provides that "Section (g) does not restrict any speech or conduct not related to the practice of law, including speech or conduct protected by the First Amendment. Thus, a lawyer's speech or conduct unrelated to the practice of law cannot violate this Section." All that comment 4a does, in other words, is reiterate that the proposed rule reaches all speech and conduct that *is* related to the practice of law. But that is the very feature of the proposed rule that gives rise to many of its First Amendment problems. The comment rests on the same erroneous premise as the proposed rule itself: that attorney speech and conduct that *is* related to the practice of law is *not* protected by the First Amendment. As explained above, that is simply not the case. Attorney speech, even speech that is connected with the practice of law, ordinarily is entitled to full First Amendment protection.

The Joint Petition asserts that Proposed Rule 8.4(g) is consistent with the First Amendment because it "leaves a sphere of *private thought and private activity* for which lawyers will remain free from regulatory scrutiny." Joint Petition 6 (emphasis added). That statement is alarming. It makes clear that the goal of the proposed rule is to *subject* to regulatory scrutiny all attorney expression that is in any way connected with the practice of law. That approach is wholly inconsistent with the First Amendment.

B. Proposed Rule 8.4(g) Would Conflict with the Rules of Professional Conduct.

In addition to violating the constitutional rights of Tennessee attorneys, Proposed Rule 8.4(g) would also conflict in numerous respects with the spirit and letter of the existing Rules of Professional Conduct. Most fundamentally, the proposed rule would disregard the traditional goals of professional regulation by "open[ing] up for liability an entirely new realm of conduct unrelated to the actual practice of law or a lawyer's fitness to practice, and not connected with the administration of justice." Blackman, *supra*, at 252. Even violations of criminal law are left unregulated by the Rules of Professional Conduct when they do not "reflect[] adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects." Tenn. Sup. Ct. R. 8, RPC 8.4(b). But Proposed Rule 8.4(g) would subject attorneys to professional discipline for speech or conduct that violates neither federal nor state antidiscrimination laws and has no bearing on fitness to practice law or the administration of justice.

The proposed rule also threatens to interfere with an attorney's broad discretion to decide which clients to represent. While the proposed rule states that it "does not limit the ability of a lawyer to accept, decline, or withdraw from a representation in accordance with RPC 1.16," the latter rule only addresses the circumstances in which an attorney is *required* to decline or withdraw from representation. An attorney who would prefer not to represent a client because the attorney disagrees with the position the client is advocating, but is not required under Rule 1.16 to decline the representation, may be accused of discriminating against the client under Proposed Rule 8.4(g) Take, for example, an attorney who declines to represent a corporate executive because the attorney believes corporate executives are responsible for the rising income inequality in our country. Would that attorney have discriminated based on socioeconomic status? While the attorney may be able to contend that his or her personal views concerning the client's wealth created a "conflict of interest" that prevented representation under the Rule of Professional Conduct 1.7, it is far from clear how the seeming tension between that rule and Proposed Rule 8.4(g) would be resolved.

The proposed rule may also chill attorneys from representing clients who wish to advocate positions that could be considered harassment or discrimination based on a protected characteristic, or at least from doing so zealously as required by the Rules of Professional Conduct. The proposed rule states that it "does not preclude legitimate advice or advocacy consistent with these Rules," but, as noted above, the "consistent with these Rules" qualifier renders that circular exception meaningless. Comment 5d to the proposed rule states that "[a] lawyer's representation of a client does not constitute an endorsement by the lawyer of the client's views or activities." While that clarification may provide some comfort that an attorney's representation of a client will not be deemed harassment or discrimination, it is largely duplicative of existing Rule of Professional Conduct 1.2 and, if anything, adds to the uncertainty regarding whether an attorney's decision *not* to represent a client could subject the attorney to discipline.

More generally, the proposed rule infringes on the ability of attorneys to practice law in accordance with their religious, moral, and political beliefs. Yet the Rules of Professional Conduct make clear that lawyers should be "guided by personal conscience" and informed by "moral and ethical considerations." Tenn. Sup. Ct. R. 8, RPC Preamble and Scope; *see also id.* at RPC 2.1

("In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social, and political factors that may be relevant to the client's situation.").

* * *

Because Proposed Rule 8.4(g) would violate the constitutional rights of Tennessee attorneys and conflict with the existing Rules of Professional Conduct, it is incumbent on the Office of the Attorney General to urge this Court to reject its adoption.[9] The existing Rules of Professional Conduct are sufficient to provide for the discipline of attorneys whose expressions of "bias or prejudice" are in fact "prejudicial to the administration of justice." Tenn. Sup. Ct. R. 8, RPC 8.4, cmt. 3. And existing federal and state antidiscrimination laws may provide recourse for individuals who are subjected to discrimination or harassment by attorneys in the workplace or in educational institutions. To the extent that the Joint Petition seeks to suppress speech on controversial issues such as same-sex marriage or gender identity, it is directly contrary to the First Amendment principle that the remedy for speech with which one disagrees is "more speech, not enforced silence." *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring). "Society has the right and civic duty to engage in open, dynamic, rational discourse." *United States v. Alvarez*, 567 U.S. 709, 728 (2012). As members of a highly educated profession, attorneys are uniquely equipped to engage in informed debate on these and other important issues. Such debate should be encouraged, not silenced.

Sincerely,

Herbert H. Slatery III
Attorney General and Reporter

[9] The Attorneys General of Louisiana, South Carolina, and Texas have likewise concluded that ABA Model Rule 8.4(g) would violate the First Amendment and Due Process Clause. *See* La. Att'y Gen. Op. 17-0114 (Sept. 8, 2017); S.C. Att'y Gen. Op. on Constitutionality of ABA Model Rule 8.4(g) (May 1, 2017); Tex. Att'y Gen. Op. KP-0123 (Dec. 20, 2016).