Case No. 22-1733

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

ZACHARY GREENBERG,

Plaintiff - Appellee,

v.

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

Defendants - Appellants.

On Appeal from the U.S. District Court
Eastern District of Pennsylvania
Hon. Chad F. Kenney
Case No. 20-03822

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF APPELLEE AND AFFIRMANCE

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RULE 29 STATEMENT

As required by Federal Rule of Appellate Procedure 29, Amicus Curiae attests that all parties have consented to this filing and that no party's counsel authored any portion of this brief. No person other than Amicus Curiae, including all parties to this litigation and their counsel, contributed money intended to fund the preparing or submitting of this brief.

IDENTITY AND INTEREST OF AMICUS CURIAE

Pacific Legal Foundation (PLF) is the nation's leading public interest organization advocating in courts and with policymakers throughout the country to defend individual liberty and limited government. PLF is concerned about the chilling effect imposed by overbroad and unduly vague laws that restrain First Amendment freedoms. PLF attorneys have represented clients in free speech cases before the United States Supreme Court and the United States Courts of Appeals.[1]

[1] *See, e.g.*, *Minnesota Voters Alliance v. Mansky*, 138 S. Ct. 1876 (2018); *American Society of Journalists and Authors, Inc. v. Bonta*, 15 F.4th 954 (9th Cir. 2021).

Pennsylvania's Rule of Professional Conduct 8.4(g) and similar rules inspired by ABA Model Rule 8.4(g) raise special concerns for PLF attorneys, who regularly speak and write about racial equality and other controversial topics. PLF worries that its attorneys may face threats of bar discipline should rules like Pennsylvania's spread. This concern is not hypothetical. One of PLF's attorneys, as discussed below, faced the threat of an ethics complaint under Rule 8.4(g) for expressing herself on social media about racial equality issues.

INTRODUCTION

Loose rules governing speech have often led to politically motivated enforcement that silences dissidents and chills protected expression. Throughout our history, partisan administrations and agencies have often weaponized vague laws restricting speech to entrench dogma and purge dissent, from Anthony Comstock's abuses of nineteenth century obscenity laws to state bars' abuses of their disciplinary authority to punish attorneys who championed unpopular causes.

A similar danger lurks in the vague and capacious language in Pennsylvania Rule of Professional Conduct 8.4(g), a danger exemplified by how officers have abused similar anti-harassment laws. This Court

should hold bar officers accountable for adopting anti-harassment and anti-discrimination rules narrow enough to deny refuge for arbitrary or viewpoint-discriminatory enforcement.

ARGUMENT

I. There is a long and ugly history of regulators abusing vague laws to penalize dissent and silence dissidents.

Laws regulating speech with subjective and broad language have often served as weapons for partisan abuse. Perhaps the most prominent American example is the notorious Sedition Act, which made it a crime to

> write, print, utter or publish . . . any false, scandalous and malicious writing or writings against the government of the United States, or the President of the United States, with intent to defame . . . or to bring them . . . into contempt or disrepute; or to excite against them . . . the hatred of the good people of the United States.

This vague language allowed for vicious partisan enforcement by the Adams Administration, sweeping up legitimate political dissent and even the occasional drunken joke about the President.[2]

Amorphous anti-obscenity laws also provide a striking example of the abuses achievable with subjective and vague statutory language.

[2] Jacob Mchangama, *Free Speech: A History from Socrates to Social Media* 200 (2022).

Such laws served as a partisan weapon in the latter half of the nineteenth century, most notably under the paternalistic micromanagement of postmaster general Anthony Comstock. In Comstock's hands, federal legislation barring "obscene, lewd, lascivious, or filthy" publications from entering the mail became a weapon for waging political battles against unpopular viewpoints.[3] Thanks to his abuses of this statute, it remains known today as the Comstock Act.

The subjective language in the Comstock Act gave Comstock and his puritanical allies broad opportunities for hounding political opponents. Comstock used the Act to silence critics of monogamous marriage, supporters of women's suffrage, and birth-control advocates.[4] For example, under the banner of obscenity enforcement, Comstock persecuted feminist Victoria Woodhull—the first woman candidate for president—because her newspaper included articles criticizing religious notions of chastity and marriage.[5] Later, in 1912, Comstock used the Act to censor two articles on birth control by leading feminist Margaret

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[3] Margaret A. Blanchard & John E. Semonche, *Anthony Comstock and His Adversaries: The Mixed Legacy of This Battle for Free Speech*, 11 Comm. L. & Pol'y 317, 327 (2006).
[4] *Id.* at 325, 332, 361.
[5] *Id.* at 325–26.

Sanger.[6] He later jailed Sanger's husband for distributing her pamphlet "Family Limitation," which described how to prevent pregnancy.[7]

Comstock's obscenity campaign went beyond persecuting political enemies to censoring prominent works of literature and art. Notable victims of Comstock's campaigns included Walt Whitman's *Leaves of Grass*, which contained poems alluding to intercourse,[8] Leo Tolstoy's *Kreutzer Sonata*, about a man who murders his wife in a jealous rage,[9] and the ancient Greek comedy *Lysistrata*, in which women put an end to the Peloponnesian War by refusing to have sex with their husbands.[10]

The use of obscenity laws to censor legitimate political and artistic expression was possible in large part thanks to the law's ambiguous language. As Judge Learned Hand put it, the "vague subject-matter" of the Comstock Act was at the mercy of "general notions about what is

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[6] *Id.* at 353.
[7] *Id.* at 354.
[8] *Id.*
[9] *Id.*
[10] Mchangama, *supra* n.2, at 16.

decent" such that it "put thought in leash to the average conscience of the time."[11]

II. Anti-harassment laws like the Pennsylvania Rule have been abused to punish unpopular speech.

This trend continues today. Consider, for instance, how schools have weaponized Title IX's anti-harassment and anti-discrimination regulations to quell dissent and discriminate against unpopular viewpoints, much like Comstock converted obscenity law to the same ends.

Title IX of the Education Amendments of 1972 and related regulations rely on anti-harassment and anti-discrimination provisions not unlike the rule at issue here. Federal regulation defines sexual harassment in part as "[u]nwelcome conduct [on the basis of sex] determined by a reasonable person to be so severe, pervasive, and

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[11] *United States v. Kennerly*, 209 F. 119, 121 (S.D.N.Y. 1913). *See also Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (stating, with regard to an obscenity law: "I shall not today attempt further to define the kinds of material I understand to be embraced within [the statute]; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that.").

objectively offensive that it effectively denies a person equal access to the recipient's education program or activity."[12]

Like the Comstock Act of old, this anti-harassment law has been retrofitted as a political weapon. Take, for example, the plight of Laura Kipnis, a film and gender studies professor at Northwestern University. She published a 2015 essay in *The Chronicle of Higher Education* called "Sexual Paranoia Strikes Academe," claiming that "[i]n the post-Title IX landscape, sexual panic rules" and that if "you wanted to produce a pacified, cowering citizenry, this [approach to Title IX enforcement] would be the method."[13] Ironically, Northwestern investigated her for Title IX harassment based on the article, thus engaging in the very overzealous abuse of Title IX Kipnis was criticizing.[14] Though the school eventually dropped the investigation, it began *another* Title IX investigation in response to a book Kipnis wrote about her Title IX experience.[15] While she was eventually cleared of wrongdoing, ultimate

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[12] 34 C.F.R. § 106.30(a)(2).
[13] Laura Kipnis, *Sexual Paranoia Strikes Academe*, The Chronicle of Higher Education (Feb. 27, 2015).
[14] Jeannie Suk Gersen, *Laura Kipnis's Endless Trial by Title IX*, The New Yorker (Sept. 20, 2017).
[15] Jonathan Haidt & Greg Lukianoff, *The Coddling of the American Mind* 207–08 (2019).

exoneration did not erase the months of stress, fear, wasted time, and legal costs.

This was not a unique experience. A recent example of similar abuse comes from Southern Utah University, where the school's Title IX office determined that Professor Richard Bugg engaged in discrimination and harassment by refusing to use non-binary pronouns when requested to do so by a student.[16]

Similarly, a professor at Shawnee State University faced discipline under a nondiscrimination policy due to his refusal to use a student's preferred pronoun. That policy defined sex-based discrimination as "negative or adverse treatment based on . . . gender identity . . . [which] denies or limits the individual's ability to obtain the benefits of Shawnee State's programs or activities."[17] The policy also defined sexual harassment as "harassing conduct that limits, interferes with or denies educational benefits or opportunities, from both a subjective (the

[16] *See* Second Amended Complaint, *Bugg v. Benson*, No. 4:22-cv-00062-DN (D. Utah Oct. 3, 2022).

[17] *See* Report & Recommendation, *Meriwether v. Trustees of Shawnee State University*, No. 1:18-cv-753, 2019 WL 4222598, at *2 (S.D. Ohio Sept. 5, 2019), *affirmed in part, vacated in part, reversed in part by Meriwether v. Hartop*, 992 F.3d 492 (6th Cir. 2021).

complainant's) and an objective (reasonable person's) viewpoint."[18] In a legal challenge, the Sixth Circuit held that the professor had plausibly alleged a valid free speech claim that these policies had been unlawfully applied against him.[19]

These and other abuses of Title IX and related policies in the educational context have led to a serious chilling effect. Harvard Law professor Jeannie Suk Gersen noted, in examining Laura Kipnis's story, that many faculty self-censor thanks to abuses of university anti-harassment provisions:

> Title IX can also be used to discourage disagreement, deter dissent, deflect scrutiny, or register disapproval of people whom colleagues find loathsome. . . . That risk is now built into the professional life of those of us in universities who engage on subjects related to gender and sexuality. Like Kipnis, I routinely hear from teachers who say they are refraining from teaching and writing on such topics for fear of attracting Title IX complaints, which bring possibilities of termination, demotion, pay cuts, and tens of thousands of dollars in legal fees.[20]

As Title IX demonstrates, anti-harassment provisions, if not carefully limited, offer politically motivated enforcers a tempting weapon

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[18] *Id.*
[19] *Meriwether v. Hartop*, 992 F.3d 492, 511–12 (6th Cir. 2021).
[20] Suk Gersen, *supra* n.14.

for viewpoint discrimination and provoke self-censorship on matters of public concern.

III. Bar Regulators are not above the temptation to wield bar regulations as political weapons.

As shown by the history of politically motivated bar discipline, bar regulators are likely to engage in similar abuses of the 8.4(g) rule. State bars are marred by a sad past of abusing bar regulations to engage in Comstock crusades against bar members with unpopular views. Indeed, some have argued that the entire array of various barriers to entry thrown up by bars over the years exists to curate homogeneity of culture and thought: "[T]he established bar adopted educational requirements, standards of admission, and 'canons of ethics' designed to maintain a predominantly native-born, white, Anglo-Saxon, Protestant monopoly of the legal profession."[21]

Broad discretion granted by flexible and vague bar regulations offer regulators opportunity to control bar membership to better align with

[21] Monroe H. Freedman, *Understanding Lawyers' Ethics* (1990); *see also* Marcoux, Shannon, *Are Sanctions the New SLAPP? Analyzing Oil Companies' Weaponization of Ethics Accusations Against Human Rights Attorneys*, 52 Envtl. L. 217, 236 (2022) ("Attorney licensing and disciplinary procedures have been used in racist, sexist, xenophobic, and classist ways for more than a century.").

their own ideological visions. This discretion is particularly prone to abuse because bar regulators often are not subject to transparency in the exercise of their enforcement discretion and the disciplinary process.[22] This opacity opens wider avenues for politically motivated enforcement than contexts in which public scrutiny and procedural constraints are more robust, such as in the exercise of criminal prosecutorial discretion.[23]

This concern is not hypothetical. A host of controversial views over the decades has put lawyers in the teeth of zealous bar regulators. Numerous attorneys who helped to resist the World War I draft were disbarred for going against the grain.[24] A North Carolina attorney who urged schools to obey the federal desegregation order suddenly faced disbarment proceedings.[25] Civil rights attorneys in the mid-twentieth

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[22] *See* Bruce Green, *Selectively Disciplining Advocates*, 54 Conn. L. Rev. 151, 186–194 (2022).

[23] *Id.* at 189–90 ("[D]isciplinary prosecutors are under even less constraint and scrutiny than criminal prosecutors, with the result being that there are even weaker incentives for them to exercise principled, fair, and consistent discretion . . . . Disciplinary counsel has even more latitude than criminal prosecutors to make arbitrary, biased, unfair, or unprincipled decisions.").

[24] James E. Moliterno, *Politically Motivated Bar Discipline*, 83 Wash. U. L.Q. 725, 735 (2005).

[25] *Id.* at 741–42.

century often faced bar regulator hostility, which often discouraged lawyers from representing civil rights plaintiffs.[26]

During the McCarthy Era, the American Bar Association armed state bars with lists of attorneys who had exercised their Fifth Amendment rights against self-incrimination during committee inquiries and encouraged bars to strip them of their licenses.[27] When a group of lawyers faced contempt for representing accused communists, Justice Hugo Black, in dissent to an affirmance of the contempt judgment, wrote: "[T]his summary blasting of legal careers . . . constitutes an overhanging menace to the security of every courtroom advocate in America. The menace is most ominous for lawyers who are obscure, unpopular, or defenders of unpopular persons or unorthodox causes."[28] Several of the attorneys were subsequently disbarred despite long records of upright membership.[29]

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[26] *Id.* at 742–43; *see also NAACP v. Button*, 371 U.S. 415 (1963) (First Amendment challenge to an overbroad barratry law designed to hobble civil rights litigation).
[27] Moliterno, *supra* n.24, at 737.
[28] *Sacher v. United States*, 343 U.S. 1, 18 (1952) (Black, J., dissenting).
[29] Moliterno, *supra* n.24, at 737–38.

These anecdotes likely skim the surface of a deeper problem. There is no way to know how many attorneys would have expressed a certain viewpoint but kept silent after witnessing public examples of persecution like those above. Nor do such anecdotes speak to the number of investigations and proceedings that have penalized dissident attorneys without coming to the light of day. The known history of abuse of regulatory authority, however, indicates that the problem is not a trivial one and justifies a wary approach to bar regulations prone to similar abuses.

IV. Pennsylvania's rule presents a serious risk of similar abuses.

Pennsylvania's 8.4(g) rule raises the same risks of viewpoint-discriminatory enforcement as the Comstock Act, Title IX's anti-harassment mandate, and similar laws that burden particular viewpoints and offer broad leeway for politically motivated enforcers.

Indeed, the rule's definition of harassment is even looser than the definition found in Title IX regulations. Harassment is simply "conduct that is intended to intimidate, denigrate or show hostility or aversion toward a person" because of their membership in a protected class. Unlike Title IX, there is no requirement that such conduct be "severe,

pervasive, and objectively offensive" as understood by a reasonable observer. Such "severe and pervasive" language is common in workplace and school harassment laws[30] and helps ensure that anti-harassment provisions do not trespass upon protected expression.[31]

In the absence of a severe and pervasive standard, the Pennsylvania rule sweeps within its ambit a wide range of protected expression. These include simple one-off statements, "microaggressions," or impolitic remarks, such as the "mere utterance of an . . . epithet which engenders offensive feelings," simple "discourtesy or rudeness," or even just "a lack of racial sensitivity."[32] Hence, dead-naming a transgender

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[30] *See, e.g.*, *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 67 (1986) (articulating the severe or pervasive standard under Title VII); *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 633 (1999) (similar standard under Title IX).

[31] *See DeJohn v. Temple University*, 537 F.3d 301, 320 (3d Cir. 2008) ("Yet, unless harassment is qualified with a standard akin to a severe or pervasive requirement, a harassment policy may suppress core protected speech."); Margaret Tarkington, *"Breathing Space to Survive"—the Missing Component of Model Rule 8.4(g)*, 50 Hofstra L. Rev. 597, 613 (2022) ("A requirement that incivility or verbal expressions of bias be either 'severe' or 'pervasive' as required in the employment discrimination context would in large part alleviate punishment of devoted attorneys who are working to protect their client's interests.").

[32] *Faragher v. City of Boca Raton*, 524 U.S. 775, 787 (1998) (cleaned up).

attorney at a bar association event or a single off-color joke in the office could place an attorney's career in jeopardy.

Likewise, the rule's focus on the speaker's motive rather than the actual impact of the speech on the legal system takes the rule yet a step farther than Title IX's and similar anti-harassment provisions. In federal anti-harassment law, enforcers must show that the speech or conduct had an actual impact on the environment or interests that the government seeks to protect. Under Title IX, for instance, speech can only reach the level of actionable harassment if it has the real-word impact of "effectively den[ying] a person equal access to the recipient's education program or activity."[33] Likewise, Title VII liability attaches only if the alleged harassment "alter[s] the conditions of the victim's employment and create[s] an abusive working environment."[34] This demand that enforcers prove a genuine injury to the government's asserted interest limits abuse.

Bar regulators, however, need not demonstrate that the alleged harassment has any effect whatsoever on the court system, the legal

[33] 34 C.F.R. § 106.30(a)(2).
[34] *Meritor*, 477 U.S. at 67 (cleaned up).

profession, or the administration of justice generally. A presumption of harm to these interests may be less concerning if the Pennsylvania rule only regulated speech while engaged in client representation, but it extends well beyond that context to CLEs, bar association events, bench-bar conferences, and the law firm setting. Unburdened by the need to show that an attorney's speech in fact threatens the bar's legitimate interests, bar regulators are more likely to wield the rule to pursue *illegitimate* interests—such as viewpoint discrimination.

The rule's reliance on vague language accentuates this risk. Terms like "denigrate," "show hostility," and "aversion" invite arbitrary and discriminatory enforcement. Much like a ban on "offensive" signs—or Comstock Act terms like "obscene, lewd, lascivious, or filthy"—these words are "hopelessly ambiguous and subjective."[35] These terms may trigger enforcement because they "encompass any speech that might simply be offensive to a listener, or a group of listeners, believing that they are being subjected to or surrounded by hostility."[36] It takes little imagination to foresee how voicing unpopular political viewpoints would

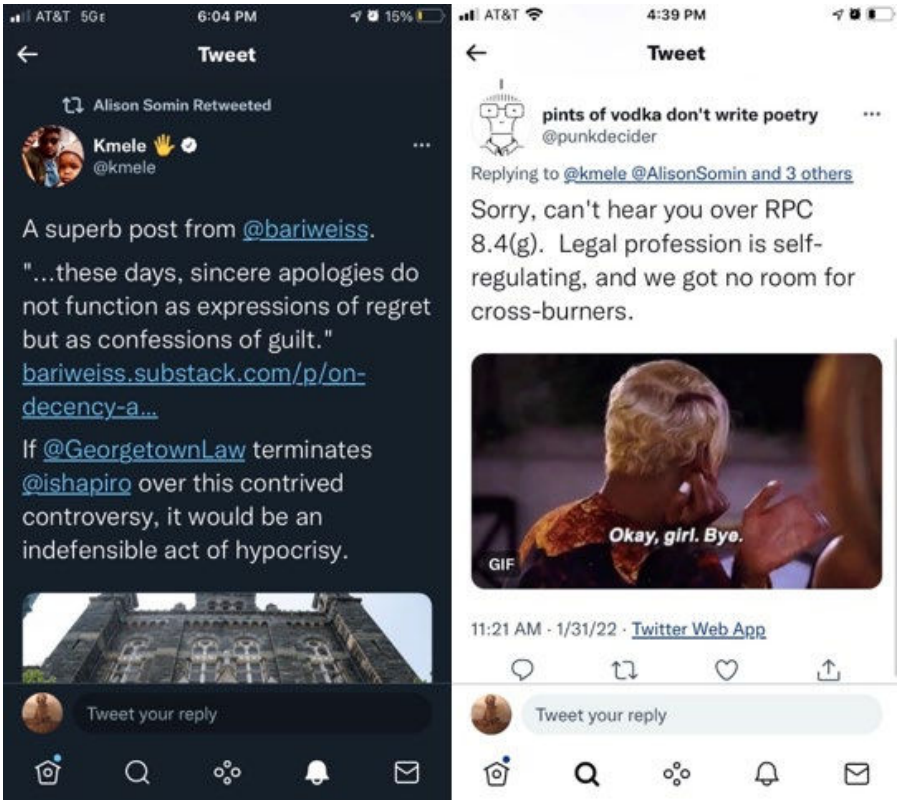
[35] *See McCauley v. University of the Virgin Islands*, 618 F.3d 232, 250 (3d Cir. 2010).
[36] *See DeJohn*, 537 F.3d at 320.

fall within the crosshairs of the rule. These are but a few examples of viewpoints that an attorney might face 8.4(g) enforcement for vocalizing:

- Lia Thomas should not participate in women's swimming (hostility based on gender identity);
- Homosexual behavior is a sin (aversion based on sexual orientation);
- Pfizer's fellowship program open only to minorities is morally wrong (hostility based on race).

One real-world example deserves mention because it concerns Amicus Pacific Legal Foundation specifically. PLF attorney Alison Somin recently faced a threatened 8.4(g) complaint for expressing a political viewpoint on Twitter. Ms. Somin had retweeted an article about the controversy over Georgetown's treatment of lecturer Ilya Shapiro after he criticized President Biden for nominating a Supreme Court candidate based on race. The retweeted article and the original tweet took the position that it would be "indefensible" for Georgetown to fire Shapiro over a "contrived controversy." A Twitter user then replied to the retweet with an implied threat of an 8.4(g) complaint against Ms. Somin: "Sorry, can't hear you over RPC 8.4(g). Legal profession is self-regulating, and

we got no room for cross-burners." The Twitter exchange is reproduced below:



It may seem simple to shrug off such a threat, but the rule's vague and subjective language obliterates any confidence that the threat is empty. Unfortunately, the fear that a random social media user might call upon government agencies to police tweets is not far-fetched.[37]

[37] *See, e.g.*, *FDRLST Media, LLC v. NLRB*, 35 F.4th 108 (3d Cir. 2022) (NLRB prosecuted journalist for a tweet about unionization after a random Twitter user filed a complaint that the tweet constituted an unfair labor practice).

The risk of partisan censorship is further heightened by the rule's one-sidedness. In each of the examples above, someone expressing the opposing view would not face 8.4(g) enforcement. If Ms. Somin had expressed her support for race-based nominations of Supreme Court candidates, she would not fall within the rule, nor would a lawyer who expressed support for Lia Thomas. Perceived "hostility" toward a group is sanctionable, while support for the group is not. The Sedition Act likewise had an obvious viewpoint bias built into the law by punishing only criticism of the President, not praise for him. This lack of even-handedness renders the rule viewpoint-based, since it allows a "positive or benign [comment] but not a derogatory one."[38] The rule's focus on "a subset of messages [the bar] finds offensive . . . is the essence of viewpoint discrimination."[39]

In short, the rule's broad and amorphous terms throw open the door to twenty-first century Comstocks. While the orthodoxy du jour may have changed, the zeal for suppressing unpopular viewpoints has not. Professor Suk Gersen's insight regarding overzealous Title IX

[38] *Matal v. Tam*, 137 S. Ct. 1744, 1766 (2017) (Kennedy, J., concurring).
[39] *Id.*

enforcement applies with perhaps even greater force to the broader language in 8.4(g), which can "be used to discourage disagreement, deter dissent, deflect scrutiny, or register disapproval of people whom colleagues find loathsome."[40] And, as Justice Black warned regarding past politically motivated ethics enforcement, this "menace is most ominous for lawyers who are obscure, unpopular, or defenders of unpopular persons or unorthodox causes."[41]

The Chief Disciplinary Counsel's promise not to abuse his authority under 8.4(g) is small comfort. The government's position throughout this case amounts to a plea to simply trust them to play nice. But such a request cannot stand in for the "[p]recision of regulation [that] must be the touchstone in an area so closely touching our most precious freedoms."[42] This Court cannot "uphold an unconstitutional statute merely because the Government promised to use it responsibly."[43] History shows the dangers of such trust.

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[40] Suk Gersen, *supra* n.14.
[41] *Sacher*, 343 U.S. at 18.
[42] *Button*, 371 U.S. at 438.
[43] *United States v. Stevens*, 559 U.S. 460, 480 (2010).

CONCLUSION

If the Pennsylvania State Bar wishes to address harassment and discrimination in the legal profession, it must do so with the precision demanded by the First Amendment. As written, the rule threatens to "put thought in leash" to state bar regulators.[44] This Court should affirm the lower court's judgment.

DATED: October 27, 2022.

Respectfully submitted,

PACIFIC LEGAL FOUNDATION

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[44] *Kennerly*, 209 F. at 121.

COMBINED CERTIFICATES

I hereby certify

that I, Ethan W. Blevins, am a member in good standing of the bar of this Court, and a member in good standing of the state bars of Utah, Washington, and Montana, and the Bar of the U.S. Ninth Circuit Court of Appeals; and that Alison Somin is a member in good standing of the state bar of Virginia and the Bar of the U.S. Tenth Circuit Court of Appeals;

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DATED: October 27, 2022.

s/ Ethan W. Blevins
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