No. 22-1733

In the 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 United States District Court
for the Eastern District of Pennsylvania (No. 2:20-cv-03822)

AMICUS CURIAE BRIEF OF LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC. IN SUPPORT OF APPELLANTS AND REVERSAL

Karen L. Loewy
LAMBDA LEGAL DEFENSE
AND EDUCATION FUND, INC.
1776 K Street, 8th Floor
Washington, DC 20006
(202) 804-6245
kloewy@lambdalegal.org

Ethan Rice
Omar Gonzalez-Pagan
LAMBDA LEGAL DEFENSE
AND EDUCATION FUND, INC.
120 Wall Street, 19th Floor
New York, NY 10005
(212) 809-8585
erice@lambdalegal.org
ogonzalez-pagan@lambdalegal.org

Counsel for Amicus Curiae

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, counsel for *Amicus* certify that *Amicus Curiae* is a registered non-profit and has no parent corporations, nor does any publicly held corporation own 10% or more of its stock.

TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 3

ARGUMENT 4

I. IN BARRING DISCRIMINATION AND HARASSMENT, RULE 8.4(g) REGULATES CONDUCT THAT RECEIVES NO FIRST AMENDMENT PROTECTION 4

A. Rule 8.4(g) Explicitly Regulates Conduct. 5

B. Rule 8.4(g) Seeks To Provide Equal Opportunity In The Legal System By Prohibiting Harassing And Discriminatory Conduct. 6

C. Rule 8.4(g)'s Incidental Burden On Expression Does Not Offend The First Amendment 13

II. THE DISCIPLINARY BOARD OF THE PENNSYLVANIA SUPREME COURT HAS A COMPELLING INTEREST IN BARRING DISCRIMINATION AND HARASSMENT BY MEMBERS OF THE BAR AND IN PRESERVING THE INTEGRITY OF THE LEGAL SYSTEM 15

A. States Have A Compelling Interest In Eradicating Discrimination And Harassment And In Maintaining Confidence In The Integrity Of The Legal System 16

B. The Harms From Discrimination And Harassment Directed At LGBTQ People In The Legal System Underscore The Disciplinary Board's Compelling Interest In Eradicating This Conduct. 19

CONCLUSION 28

CERTIFICATE OF BAR MEMBERSHIP 29

CERTIFICATION OF COMPLIANCE 30

CERTIFICATE OF SERVICE 31

TABLE OF AUTHORITIES

Cases

Aguilar v. Avis Rent A Car Sys., Inc., 980 P.2d 846 (Cal. 1999) 11
Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975)...7
Arcara v. Cloud Books, 478 U.S. 697 (1986) 15
Baty v. Willamette Indus., Inc., 172 F.3d 1232 (10th Cir. 1999), *overruled on other grounds*, *Nat'l R.R. Passenger Corp. v. Morgan,* 536 U.S. 101 (2002) 11
Berthiaume v. Smith, 875 F.3d 1354 (11th Cir. 2017)...17
Caperton v. A.T. Massey Coal Co., 556 U.S. 868 (2009)................................ 18, 19
Cervelli v. Aloha Bed & Breakfast, 415 P.3d 919 (Haw. Ct. App. 2018) 1
DeJohn v. Temple Univ., 537 F.3d 301 (3d Cir. 2008)...12
Doe v. Boyertown Area Sch. Dist., 897 F.3d 518 (3d Cir. 2018) 16
Doe v. City of New York, 583 F. Supp. 2d 444 (S.D.N.Y. 2008) 14
Edmonson v. Leesville Concrete Co., Inc., 500 U.S. 614 (1991) 26
Evancho v. Pine-Richland Sch. Dist., 237 F. Supp. 3d 267 (W.D. Pa. 2017) 1
Expressions Hair Design v. Schneiderman, 581 U.S. 37 (2017)...............................9
Giboney v. Empire Storage & Ice Co., 336 U.S. 490 (1949) 5
Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975)..8, 19
Hishon v. King & Spaulding, 467 U.S. 69 (1984) 10, 13
Hively v. Ivy Tech Cmty. Coll. of Indiana, 853 F.3d 339 (7th Cir. 2017) 1
In re Charges of Unprofessional Conduct, 597 N.W. 2d 563 (Minn. 1999).... 17, 26
In the Matter of Abrams, 488 P.3d 1043 (Col. 2021) 18, 26
McCauley v. Univ. of the Virgin Islands, 618 F.3d 232 (3d Cir. 2010) 12
Mullaney v. Aude, 730 A.2d 759 (Md. Ct. Spec. App. 1999)..................................17
Nat'l Conf. of Bar Exam'rs. v. Multistate Legal Stud., Inc., 458 F. Supp. 2d 252 (E.D. Pa. 2006)..19
Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2361 (2018) 12, 13
Norwood v. Harrison, 413 U.S. 455 (1973) 13
Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75 (1998) 9, 11
Pittsburgh Press Co. v. Pittsburgh Comm'n on Hum. Rel., 413 U.S. 376 (1973) ..14
Powers v. Ohio, 499 U.S. 400 (1991) 27
Principe v. Assay Partners, 586 N.Y.S.2d 182 (N.Y. Sup. Ct. 1992).....................17
R.A.V. v. City of St. Paul, Minn., 505 U.S. 377 (1992)................................ 9, 14, 16
Roberts v. U.S. Jaycees, 468 U.S. 609 (1984) .... passim
Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486 (M.D. Fla. 1991).....11

Rumsfeld v. F. for Acad. & Inst. Rts., Inc., 547 U.S. 47 (2006) 5, 9, 12, 15
Runyon v. McCrary, 427 U.S. 160 (1976), ... 14, 15
Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200 (3d Cir. 2001)................ 9, 10, 12
SmithKline Beecham Corp. v. Abbott Lab'ys, 740 F.3d 471 (9th Cir. 2014) 17
Texas Dep't of Hous. & Cmty. Affs. v. Inclusive Communities Project, Inc., 576 U.S. 519 (2015)..7
Tingley v. Ferguson, No. 21-35815, 2022 WL 4076121 (9th Cir. Sept. 6, 2022)...13
Wetzel v. Glen St. Andrew Living Cmty., LLC, 901 F.3d 856 (7th Cir. 2018) 1
Whitman-Walker Clinic, Inc. v. U.S. Dep't of Health & Hum. Servs., 485 F. Supp. 3d 1 (D.D.C. 2020), *appeal dismissed*, No. 20-5331, 2021 WL 5537747 (D.C. Cir. Nov. 19, 2021) 1, 7
Williams-Yulee v. Florida Bar, 575 U.S. 433 (2015) 18, 19, 20
Wisconsin v. Mitchell, 508 U.S. 476 (1993) 8

Statutes

42 U.S.C. § 1981 14
42 U.S.C. § 2000a et seq. 7
42 U.S.C. § 2000e et seq. 7
42 U.S.C. § 3601 et seq. 7
42 U.S.C. § 18116(a) 7

Other Authorities

Peter Blanck, et al., *Diversity and Inclusion in the American Legal Profession: Discrimination and Bias Reported by Lawyers with Disabilities and Lawyers Who Identify as LGBTQ+*, 47 Am. J.L. & Med. 9 (2021)..................................24
Todd Brower, *Twelve Angry—And Sometimes Alienated—Men: The Experiences and Treatment of Lesbians and Gay Men During Jury Service*, 59 Drake L. Rev. 669 (2011) 20
Inst. for the Advancement of the Am. Legal Sys., *Public Perspectives on Trust and Confidence in the Courts* (2020), https://iaals.du.edu/sites/default/files/documents/publications/public_perspectives_on_trust_and_confidence_in_the_courts.pdf 26
S. E. James, et al., *The Report of the 2015 U.S. Transgender Survey*, National Center for Transgender Equality (Dec. 2016), https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf... 22, 23, 24

Jud. Council of State of Cal., *Sexual Orientation Fairness in the California Courts: Final Report of the Sexual Orientation Fairness Subcommittee of the Judicial Council's Access and Fairness Advisory Committee* (2001), https://www.courts.ca.gov/documents/sexualorient_report.pdf 21, 22, 23

Lambda Legal, *Protected and Served? A National Survey Exploring Discrimination by Police, Prisons and Schools Against LGBT People and People Living with HIV in the United States* (2014), https://www.protectedandserved.org/previous-survey .... passim

Christy Mallory, et al., *The Impact of Stigma and Discrimination Against LGBT People in Pennsylvania*, The Williams Institute, 37 (Nov. 2021), https://williamsinstitute.law.ucla.edu/wp-content/uploads/Impact-LGBT-Discrimination-PA-Nov-2021.pdf 25

Task Force on Sexual Orientation Issues, N.J. Supreme Court, *Final Report of the Task Force on Sexual Orientation Issues* (2001) 21, 22

Robert N. Weiner, "*Nothing to See Here": Model Rule of Professional Conduct 8.4(g) and the First Amendment*, 41 Harv. J.L. & Pub. Pol'y 125, 128 (2018) ...12

What We Know Project, Cornell University, *What Does the Scholarly Research Say about the Effects of Discrimination on the Health of LGBT People* (2019), https://whatweknow.inequality.cornell.edu/wp-content/uploads/2019/12/LGBT-Discrimination-Printable-Findings-121319.pdf 25

Rules

Pa. R.P.C. 8.4 .... passim

Pa. R.P.C., pmbl. 5, 11

INTEREST OF AMICUS CURIAE[1]

Amicus curiae **Lambda Legal Defense and Education Fund, Inc.** ("Lambda Legal") is the nation's oldest and largest non-profit legal organization committed to achieving full recognition of the civil rights of LGBTQ people, and people living with HIV through impact litigation, education, and public policy work. For nearly fifty years, Lambda Legal has worked to secure and enforce anti-discrimination protections for LGBTQ people in every area of a person's life. *See, e.g.*, *Wetzel v. Glen St. Andrew Living Cmty., LLC*, 901 F.3d 856 (7th Cir. 2018) (housing); *Hively v. Ivy Tech Cmty. Coll. of Indiana*, 853 F.3d 339 (7th Cir. 2017) (en banc) (employment); *Whitman-Walker Clinic, Inc. v. U.S. Dep't of Health & Hum. Servs.*, 485 F. Supp. 3d 1 (D.D.C. 2020), *appeal dismissed*, No. 20-5331, 2021 WL 5537747 (D.C. Cir. Nov. 19, 2021) (health care); *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267, 275 (W.D. Pa. 2017) (education); *Cervelli v. Aloha Bed & Breakfast*, 415 P.3d 919 (Haw. Ct. App. 2018) (public accommodations). In 2005, Lambda Legal established its Fair Courts Project to expand access to justice in the courts for LGBTQ and HIV-affected communities. The communities Lambda

---

[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution toward the preparation or submission of this brief. No person other than *Amicus Curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

Legal represents depend upon a fair and impartial legal system to enforce their constitutional and other rights.

Lambda Legal has seen the wide range of discriminatory and harassing conduct LGBTQ people have experienced that deprive them of equal treatment and is committed to robust enforcement of provisions like Pennsylvania Rule of Professional Conduct 8.4(g) ("Rule 8.4(g)" or "the Rule").

Furthermore, as a legal organization, Lambda Legal knows firsthand the critical importance of ensuring that our legal systems are free from discriminatory and harassing conduct. *Amicus* and our clients have long had to overcome anti-LGBTQ discrimination in order to vindicate their legal rights. Provisions like Rule 8.4(g) are critical for establishing that discriminatory conduct has no place in the practice of law and help fulfill the promise of equal justice under law.

Amicus curiae files this brief pursuant to Federal Rule of Appellate Procedure 29(a)(2). All parties consent to its filing.

SUMMARY OF ARGUMENT

In adopting Rule 8.4(g) of the Pennsylvania Rules of Professional Conduct, the Pennsylvania Supreme Court and its Disciplinary Board sought to further some of the most compelling interests in our system of government: ensuring equal access to our legal system and preserving the integrity of and public confidence in that system. In doing so, Rule 8.4(g) seeks to address an actual and significant problem, that of discriminatory and harassing conduct within the legal system. Like innumerable nondiscrimination protections across the country, Rule 8.4(g) targets conduct that deprives people of an equal opportunity to participate in public life based on protected aspects of their identities. Rule 8.4(g) thus bars attorneys from "knowingly *engag[ing] in conduct* constituting discrimination or harassment" in the practice of law (emphasis added).

In declaring unlawful this proscription of discriminatory and harassing behavior, the District Court applied the wrong analysis. Rule 8.4(g) expressly regulates conduct, not speech or expression, and any incidental burden on expression does not offend the First Amendment. Not only does the Rule explicitly target conduct by its plain terms, it builds on well-established jurisprudence recognizing that barring harassment and discrimination is a matter of regulating conduct that deprives another of equality, not suppressing messages or viewpoints.

And while Rule 8.4(g) is properly viewed as regulating conduct, the District Court erred further in its assessment of Plaintiff-Appellee's speech claims because Rule 8.4(g) would survive any level of scrutiny. Discrimination and harassment in the legal system deprive individuals of meaningful access to and participation in the courts, particularly those whose identities historically have been targeted for unequal treatment, like LGBTQ people. In turn, this discriminatory conduct decreases public trust in the legal profession and the courts. Countless precedents elucidate the Disciplinary Board's compelling interest both in eliminating discrimination and harassment from the legal system and in maintaining the integrity of the legal profession. The prevalence, breadth, and variety of harassment and discrimination faced by LGBTQ people in the legal system serve to bolster these compelling interests. Because Rule 8.4(g) advances the Disciplinary Board's compelling interests, the District Court was wrong to declare it unlawful and enjoin its implementation.

ARGUMENT

I. IN BARRING DISCRIMINATION AND HARASSMENT, RULE 8.4(g) REGULATES CONDUCT THAT RECEIVES NO FIRST AMENDMENT PROTECTION.

Because Rule 8.4(g), on its face, only seeks to regulate conduct, the district court erred in concluding that the Rule directly regulates speech. "[I]t has never

been deemed an abridgment of freedom of speech … 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." *Rumsfeld v. F. for Acad. & Inst. Rts., Inc.*, 547 U.S. 47, 62 (2006) [hereinafter *FAIR*] (quoting *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949)). Like countless anti-discrimination provisions across the country, Rule 8.4(g) targets only conduct that deprives others of equal opportunity and participation in civic society based on protected aspects of their identities. Critically, the Rule ensures that officers of the legal system, "having a special responsibility for the quality of justice," do not engage in discrimination or harassment—behaviors that diminish the quality of that justice for those seeking legal redress and fail to accord "respect for the legal system and for those who serve it." Pa. R.P.C., pmbl. [5]. Rule 8.4(g) thus fits cleanly within the well-established jurisprudence holding that such prohibitions of discriminatory and harassing conduct do not run afoul of the First Amendment.

A. Rule 8.4(g) Explicitly Regulates Conduct.

The text and structure of the challenged Rule make plain that it is directed at conduct, not speech or expression. As part of the Pennsylvania Rules of Professional *Conduct* (emphasis added), Rule 8.4(g) is but one of the provisions that "define proper conduct for purposes of professional discipline." *Id.* In particular, Rule 8.4(g) is among the Rules' establishment of what actions constitute professional

misconduct. Pa. R.P.C. 8.4 (emphasis added). The plain language of Rule 8.4(g) deems "*conduct* constituting harassment or discrimination based on race, sex, gender identity or expression, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, or socioeconomic status" in the practice of law to constitute such misconduct. *Id.* (emphasis added). It sets forth that an attorney's actions that amount to harassment or discrimination violate the code of conduct required for all members of the legal profession in Pennsylvania.

The Comments to the Rule do not alter this understanding. They lay out the contexts that constitute the practice of law, differentiating them from contexts of pure expression, and define the conduct that comprises impermissible harassment and discrimination under the Rule. Framed explicitly in terms of "conduct," Comments four and five explain that harassment and discrimination include conduct that knowingly and intentionally subjects another person to intimidation, denigration, hostility, and differential, adverse treatment because that person possesses one of the protected traits. *See* Pa. R.P.C. 8.4 cmts. 4, 5. Nothing in either the Rule itself or the Comments directly regulates or targets expression.

B. Rule 8.4(g) Seeks To Provide Equal Opportunity In The Legal System By Prohibiting Harassing And Discriminatory Conduct.

In barring invidious discrimination in the practice of law, the Rule mirrors countless nondiscrimination provisions aimed at ensuring equal opportunity for people who, because of a protected aspect of their identity, face adverse differential

treatment, disparate terms or conditions, and/or harassment, whether in the workplace, housing, health care, public accommodations, or, here, the legal system. *See, e.g.*, 42 U.S.C. § 2000a et seq. (public accommodations); 42 U.S.C. § 2000e et seq. (employment); 42 U.S.C. § 3601 et seq. (housing); 42 U.S.C. § 18116(a) (health care).

Each of these provisions targets discriminatory conduct to fulfill the objective of ensuring equal access for those who have previously been excluded. *See, e.g.*, *Texas Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc.*, 576 U.S. 519, 539 (2015) ("The [Fair Housing Act], like Title VII and the [Age Discrimination in Employment Act], was enacted to eradicate discriminatory practices within a sector of our Nation's economy."); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 624 (1984) (anti-discrimination law "reflects the State's strong historical commitment to eliminating discrimination and assuring its citizens equal access to publicly available goods and services); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975) ("the central statutory purposes" of Title VII were "eradicating discrimination throughout the economy"); *Whitman-Walker Clinic, Inc. v. U.S. Dep't of Health & Hum. Servs.*, 485 F. Supp. 3d 1, 11 (D.D.C. 2020) (Section 1557 of the Affordable Care Act's "express anti-discrimination mandate" is "[a]n important component of the ACA's effort to ensure the prompt and effective provision of health care to all individuals"), *appeal dismissed*, No. 20-5331, 2021 WL 5537747 (D.C. Cir. Nov. 19, 2021). These

provisions are "example[s] of … permissible content-neutral regulation of conduct." *Wisconsin v. Mitchell*, 508 U.S. 476, 487 (1993).

Rule 8.4(g) is no different. It requires that lawyers refrain from conduct that deprives people of equal opportunity in a system intended to protect and vindicate people's rights. As "lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the courts,'" *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792–93 (1975), the Rule is aimed at lawyers' harassing and discriminatory conduct in order to advance equality in the administration of justice.

The District Court's suggestion that the Disciplinary Board is somehow attempting to "relabel" speech as conduct ignores both the text and structure of the Rule itself and that the Rule builds on an established understanding of anti-discrimination provisions' prohibitions of harassment of discrimination. By its very terms, Rule 8.4(g) proscribes "*knowingly engag[ing] in conduct* constituting discrimination or harassment." Pa. R.P.C. 8.4(g) (emphasis added).

Moreover, the goal of eliminating discrimination and ensuring equal opportunity "is unrelated to the suppression of expression" and is instead about protecting against deprivation of individual dignity and protecting society from being denied "the benefits of wide participation in political, economic, and cultural life." *Roberts*, 468 U.S. at 624-25. Rule 8.4(g) does not bar a lawyer's expression

of *views*, however odious they may be, about upon race, sex, gender identity or expression, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, or socioeconomic status; it bars a lawyer from engaging in conduct denying equality to a client, witness, opposing counsel, or other participant in the legal process on that basis. As Justice Scalia noted in *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998), provisions barring harassment are not "general civility code[s]," but are directed at discrimination because of a protected trait.

Though harassing or discriminatory *conduct* may sometimes take the form of words, that does not mean that a rule proscribing such *conduct* targets speech. The Supreme Court has repeatedly refused to take such a broad view. *See, e.g.*, *Expressions Hair Design v. Schneiderman*, 581 U.S. 37 (2017); *FAIR*, 547 U.S. at 62. Rather, the Court has noted that "words can in some circumstances violate laws *directed not against speech but against conduct*." *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 389 (1992) (emphasis added). For example, that Title VII's prohibition on race-based discrimination in hiring "will require an employer to take down a sign reading 'White Applicants Only' hardly means that the law should be analyzed as one regulating the employer's speech rather than conduct." *FAIR*, 547 U.S. at 62. Indeed, in *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200 (3d Cir. 2001), this Court similarly recognized that speech "may be proscribed not on the ground of any expressive idea that the statement communicates, but rather because

it *facilitates the threat of discriminatory conduct*." *Id.* at 208 (emphasis added). The primary purpose of provisions like the Rule is to end the discrimination or harassment of another person, not to suppress the message or viewpoint being shared. *See Roberts*, 468 U.S. at 628 ("acts of invidious discrimination … cause unique evils that government has a compelling interest to prevent—wholly apart from the point of view such conduct may transmit.").

Moreover, the Supreme Court has applied these principles to legal practice. As Appellants have noted, the practice of law involves verbal and written work when advocating for a client. Appellants' Br. 34-35, ECF 22. Nonetheless, legal practice is fully subject to workplace discrimination laws. In *Hishon v. King & Spaulding*, 467 U.S. 69 (1984), the Supreme Court held that Title VII forbids a law firm from refusing to promote an associate because of her sex. *Id*. at 71–73, 77–79. The firm argued it was exempt from Title VII because its work enjoys First Amendment protection. *Id*. at 78. The Court rejected the argument, holding that Title VII neither regulates speech nor targets the expressive content of a company's work, but targets the conduct of workplace discrimination. *Id*. Rule 8.4(g) does the same.

The District Court's focus on the comment addressing harassment[2] missed the mark in suggesting that it "necessitate[s] the policing of expression." JA91. On the

---

[2] In doing so, the District Court ignored both the actual text of the Rule—barring a lawyer from" knowingly engaging in *conduct* constituting harassment or

contrary, as the Supreme Court emphasized in *Oncale*, harassment does not violate Title VII "because the *words* used have sexual content or connotations" but because the harassment "expose[s an employee] to disadvantageous terms or conditions of employment." 523 U.S. at 80 (cleaned up) (emphasis added); *see also Baty v. Willamette Indus., Inc.*, 172 F.3d 1232, 1246-47 (10th Cir. 1999) (rejecting argument that First Amendment is infringed when harassment finding was based exclusively on offensive workplace speech; "the Supreme Court has strongly suggested that Title VII, in general, does not contravene the First Amendment"), *overruled on other grounds*, *Nat'l R.R. Passenger Corp. v. Morgan,* 536 U.S. 101 (2002); *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1535 (M.D. Fla. 1991) ("pictures and verbal harassment are not protected speech because they act as discriminatory conduct in the form of a hostile work environment."); *Aguilar v. Avis Rent A Car Sys., Inc.*, 980 P.2d 846, 856 n.6 (Cal. 1999) ("an employer that utters or tolerates racial epithets or insults in the workplace that are so severe or pervasive as to alter the working conditions of targeted minority employees similarly may not take refuge in the claim that the racial harassment, because spoken, may not constitutionally be treated as employment discrimination.").

---

discrimination"—in favor of the comments, and that the comments "do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules." Pa. R.P.C. pmbl. [14].

Rule 8.4(g) seeks to prevent the deprivation of another person's equal opportunity, not lawyers' ability to express themselves. As one commentator noted,

> The primary focus [of Rule 8.4(g)] is harmful verbal or physical conduct that manifests bias or prejudice towards others, and harassment through derogatory or demeaning verbal or physical conduct, sexual advances, and requests for sexual favors--in other words, invidiously disparate *treatment* and abusive or predatory *behavior*. To the extent that items in this litany do or can involve speech, the involvement is largely incidental to the point of the prohibition. Primarily, speech is evidence of the discrimination. For speech to serve that function is neither unusual nor impermissible, so long as speech is not the sole gravamen of the prohibition.

Robert N. Weiner, *"Nothing to See Here": Model Rule of Professional Conduct 8.4(g) and the First Amendment*, 41 Harv. J.L. & Pub. Pol'y 125, 128 (2018).[3]

Rule 8.4(g) is comparable to the licensing rule upheld just days ago by the Ninth Circuit. Framed in terms of "unprofessional conduct" by a health care provider, the Court ruled that Washington's ban on so-called conversion therapy

---

[3] The District Court's reliance on *Saxe*, 240 F.3d 200, and its progeny, including *DeJohn v. Temple Univ.*, 537 F.3d 301 (3d Cir. 2008), and *McCauley v. Univ. of the Virgin Islands*, 618 F.3d 232 (3d Cir. 2010), is misplaced. As noted above, *Saxe* recognized that speech "may be proscribed … [if] it *facilitates the threat of discriminatory conduct*." 240 F.3d at 208. Setting aside the District Court's strained effort to draw textual parallels between Rule 8.4(g) and the provisions directly regulating student speech at issue in those cases, the paradigm of school speech cases is inapposite to a professional conduct rule. *See* Appellants' Br. 35-36, ECF No. 22. Finally, the Supreme Court has squarely recognized since *Saxe* that regulations of conduct that only incidentally burden speech do not implicate the First Amendment, *see, e.g.*, *Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2372-73 (2018) ("NIFLA"), even when prohibited conduct is accomplished by verbal or written expression. *FAIR*, 547 U.S. at 62.

regulated conduct, not speech. "States do not lose the power to regulate the safety of medical treatments performed under the authority of a state license merely because those treatments are implemented through speech rather than through scalpel." *Tingley v. Ferguson*, No. 21-35815, 2022 WL 4076121, *2 (9th Cir. Sept. 6, 2022). The same is true here for legal practice.

C. Rule 8.4(g)'s Incidental Burden On Expression Does Not Offend The First Amendment.

Because the Rule's objective is ensuring equal opportunity within the legal system, any incidental burden on expression stemming from barring harassing and discriminatory conduct does not offend the First Amendment. As the Supreme Court has made clear, invidious discrimination "has never been accorded affirmative constitutional protections." *Norwood v. Harrison*, 413 U.S. 455, 469-70 (1973); *see also Hishon*, 467 U.S. at 78. On the contrary, "potentially expressive activities that produce special harms distinct from their communicative impact . . . are entitled to no constitutional protection." *Roberts*, 468 U.S. at 628.

In *NIFLA*, the Supreme Court emphasized that it has regularly "upheld regulations of professional conduct that incidentally burden speech" as permissible under the First Amendment. 138 S. Ct. at 2372-73. As Appellants have well argued, Rule 8.4(g) falls plainly into this category as regulation of a lawyer's conduct. Appellants' Br. 26-28, ECF No. 22. The Rule's particular application to lawyers is not the sole basis for surviving First Amendment concerns. More broadly,

"[w]here the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy." *R.A.V.*, 505 U.S. at 390; *see also Doe v. City of New York*, 583 F. Supp. 2d 444, 448 (S.D.N.Y. 2008) ("restraints on speech stemming from . . . anti-discrimination provisions are merely incidental to the statutes' objective of remedying . . . discrimination.").

For this reason, the Supreme Court held that a newspaper's commercial advertisement received no First Amendment protection against an ordinance barring assisting in the commission of discriminatory employment practices. *See Pittsburgh Press Co. v. Pittsburgh Comm'n on Hum. Rel.*, 413 U.S. 376 (1973). Despite the plainly expressive nature of a newspaper ad, the Court concluded that First Amendment implications are absent when the conduct being advertised violated the ordinance "and the restriction on advertising is incidental to a valid limitation on economic activity." 413 U.S. at 389.

Runyon v. McCrary, 427 U.S. 160 (1976), is also illustrative here. In *Runyon*, a private school refused to admit African American students, prompting the children to sue for admission under section 1 of the Civil Rights Act of 1866, 42 U.S.C. § 1981. 427 U.S. at 163-64. The school argued that teaching non-white children would violate its segregationist beliefs and argued that the First Amendment gave it a right to discriminate. *Id*. at 175–177. The Court rejected the argument. "[I]t may

be assumed that parents have a First Amendment right to send their children to educational institutions that promote the belief that racial segregation is desirable," the Court explained. *Id*. at 176. "But it does not follow that the practice of excluding racial minorities from such institutions is also protected by the same principle." *Id.*

Simply put, the Supreme Court "ha[s] not traditionally subjected every criminal and civil sanction imposed through legal process to 'least restrictive means' scrutiny simply because each particular remedy will have some effect on the First Amendment activities of those subject to sanction." *Arcara v. Cloud Books*, 478 U.S. 697, 706 (1986). The same principles apply to Rule 8.4(g), which only prohibits "*knowingly engag[ing] in conduct* constituting discrimination or harassment." Pa. R.P.C. 8.4(g) (emphasis added). Because any impact on expressive speech is incidental to preventing discriminatory conduct, the District Court erred in subjecting it to heightened First Amendment scrutiny. *FAIR*, 547 U.S. at 62.

II. THE DISCIPLINARY BOARD OF THE PENNSYLVANIA SUPREME COURT HAS A COMPELLING INTEREST IN BARRING DISCRIMINATION AND HARASSMENT BY MEMBERS OF THE BAR AND IN PRESERVING THE INTEGRITY OF THE LEGAL SYSTEM.

Though Rule 8.4(g) is properly viewed as regulating conduct without implicating First Amendment concerns, even if, *arguendo,* the Court views it as regulating speech, the Rule can survive any level of scrutiny. The district court erred in finding that eradicating discrimination and harassment and maintaining public

confidence in the legal system are "amorphous justifications untethered to attorneys or Pennsylvania" and "insufficient to serve as a compelling interest." JA104, 107. Barring discrimination and harassment to combat the harm this conduct causes has long been found to be a compelling state interest. Eliminating discrimination and harassment in the legal system also furthers the compelling interest in maintaining public confidence in that system. The experiences of LGBTQ people navigating discrimination and harassment throughout the legal system substantiates that these interests are compelling.

A. States Have A Compelling Interest In Eradicating Discrimination And Harassment And In Maintaining Confidence In The Integrity Of The Legal System.

There is "no doubt" that a state's interest in ensuring the "basic human rights of members of groups that have historically been subjected to discrimination" is compelling. *R.A.V.,* 505 U.S. at 395. Ensuring equal access to goods and services in the public sphere is an interest "of the highest order." *Roberts*, 468 U.S. at 624. *See also, e.g., Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 527-528 (3d Cir. 2018) (noting compelling state interest in preventing discrimination).

This interest is no less compelling when the discrimination or harassment occur in the legal system or at the hands of attorneys. Failing to address such discrimination "demean[s] the dignity of the individual and threaten[s] the impartiality of the judicial system." *SmithKline Beecham Corp. v. Abbott Lab'ys*,

740 F.3d 471, 485 (9th Cir. 2014); *cf. Berthiaume v. Smith*, 875 F.3d 1354, 1359 (11th Cir. 2017) (failing to address potential for anti-LGBTQ discrimination deprives litigant of a fair trial).

Courts around the country have recognized the critical importance of eradicating such conduct in the practice of law. *See, e.g.*, *In re Charges of Unprofessional Conduct*, 597 N.W. 2d 563, 567-568 (Minn. 1999) ("When any individual engages in race-based misconduct it undermines the ideals of a society founded on the belief that all people are created equal. When the person who engages in this misconduct is an officer of the court, the misconduct is especially troubling."); *Mullaney v. Aude*, 730 A.2d 759, 767 (Md. Ct. Spec. App. 1999) (cleaned up) ("These actions ... have no place in our system of justice and when attorneys engage in such actions they do not merely reflect on their own lack of professionalism but they disgrace the entire legal profession and the system of justice that provides a stage for such oppressive actors."); *Principe v. Assay Partners*, 586 N.Y.S.2d 182, 185 (N.Y. Sup. Ct. 1992) ("[D]iscriminatory conduct on the part of an attorney is inherently and palpably adverse to the goals of justice and the legal profession. … While the conduct here falls under the heading of sexist, the same principle applies to any professional discriminatory conduct involving any of the variations to which human beings are subject, whether it be religion, sexual orientation, physical condition, race, nationality or any other difference.").

Rule 8.4(g) directly advances this compelling interest. Specifically, it serves compelling interests in "protecting clients and other participants in the legal process from harassment and discrimination, and eliminating the expression of bias from the legal process." *In the Matter of Abrams*, 488 P.3d 1043, 1050 (Col. 2021) (addressing Colorado's Rule 8.4(g)). Ensuring that discrimination and harassment pose no bar to meaningfully accessing the courts and participating in the legal system fulfills constitutional guarantees of due process and equal protection. Surely no interest could be more compelling or fundamental.

Additionally, addressing discrimination and harassment in the legal profession furthers the government's separate compelling interest in safeguarding the integrity of and confidence in the legal system and the legal profession. In *Williams-Yulee v. Florida Bar*, 575 U.S. 433 (2015), the Supreme Court addressed these interests as implicated by concerns about the integrity of the judiciary:

> We have recognized the "vital state interest" in safeguarding "public confidence in the fairness and integrity of the nation's elected judges." … The importance of public confidence in the integrity of judges stems from the place of the judiciary in the government. … The judiciary's authority … depends in large measure on the public's willingness to respect and follow its decisions. As Justice Frankfurter once put it for the Court, "justice must satisfy the appearance of justice." *Offutt v. United States*, 348 U.S. 11, 14, 75 S.Ct. 11, 99 L.Ed. 11 (1954). It follows that public perception of judicial integrity is "a state interest of the highest order."

575 U.S. at 445-46 (quoting *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 889 (2009)). Codes of conduct for judges advance the "vital state interest" in

"maintain[ing] the integrity of the judiciary and the rule of law." *Caperton*, 556 U.S. at 889.

Regulation of attorney conduct also furthers this interest. "The interest of the State in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice." *Goldfarb*, 421 U.S. at 792. *See also Nat'l Conf. of Bar Exam'rs. v. Multistate Legal Stud., Inc.*, 458 F. Supp. 2d 252, 262 (E.D. Pa. 2006) ("States have a compelling interest in regulating admission to the bar both to maintain the integrity of the legal system and to protect the safety of their citizens."). While a state's interest in maintaining confidence in the legal system does "not easily reduce to precise definition" or "lend itself to proof by documentary record," "…no one denies [the interest] is genuine and compelling." *Williams-Yulee*, 575 U.S. at 447. Rule 8.4(g) unquestionably serves these critical interests.

B. The Harms From Discrimination And Harassment Directed At LGBTQ People In The Legal System Underscore The Disciplinary Board's Compelling Interest In Eradicating This Conduct.

In adopting Rule 8.4(g), Appellants sought to address the very real problem of discrimination and harassment within the legal system. The experiences of those who have faced discrimination or harassment within the legal system because of a protected aspect of their identity provide exactly the "proof by documentary record" underlying Appellants' compelling interest in maintaining confidence in the legal

profession. *Williams-Yulee*, 575 U.S. at 447. Not only do identity-based discrimination and harassment directly harm those targeted, but they also erode the public's confidence in the integrity of the legal system. Appellants have highlighted myriad examples of harassment and discrimination by members of the bar. Appellants' Br. 50-53, ECF No. 22. *Amicus curiae* offers the experiences of LGBTQ people to underscore the scope and impact of such discrimination and harassment.

Empirical studies have found a high prevalence of discrimination and harassment directed at LGBTQ people in the legal system. *See, e.g.,* Todd Brower, *Twelve Angry—And Sometimes Alienated—Men: The Experiences and Treatment of Lesbians and Gay Men During Jury Service*, 59 Drake L. Rev. 669, 674 (2011) (examining empirical studies evaluating experiences of LGB people with court systems). A 2012 community survey conducted by Lambda Legal, which found high levels of discriminatory experiences by LGBTQ people in the courts, confirms these findings. Nineteen percent of respondents with recent interaction with the court system reported experiencing or observing discriminatory conduct. Lambda Legal, *Protected and Served? A National Survey Exploring Discrimination by Police, Prisons and Schools Against LGBT People and People Living with HIV in the United States*, 7 (2014), https://www.protectedandserved.org/previous-survey [hereinafter *Protected & Served?*]. The survey also found that "transgender

respondents were at least twice as likely—and transgender women at least four times more likely—to report misconduct in the courthouse than their cisgender counterparts." *Id*. at 12. Moreover, "as with all forms of discrimination, respondents with multiple marginalized identities—such as being a lesbian living with HIV, a gay man with a disability or a low-income transgender person of color—were more likely to report misconduct and abuse." *Id.* at 7.

These results mirror the findings of other surveys across the country. In a California study of lesbian, gay, and bisexual court users, 56% of people reported experiencing or witnessing negative conduct when sexual orientation played a role in the court contact. Jud. Council of State of Cal., *Sexual Orientation Fairness in the California Courts: Final Report of the Sexual Orientation Fairness Subcommittee of the Judicial Council's Access and Fairness Advisory Committee*, 19 (2001), https://www.courts.ca.gov/documents/sexualorient_report.pdf [hereinafter *California Study*]. In New Jersey, 45% of lesbian and gay court users reported observing or experiencing negative behavior in the courts directed at litigants or witnesses. Task Force on Sexual Orientation Issues, N.J. Supreme Court, *Final Report of the Task Force on Sexual Orientation Issues,* 26 (2001) [hereinafter *New Jersey Study*]. In 2015, the largest national survey of transgender and nonbinary people, with over 27,000 respondents, found that 13% of respondents who visited courthouses over the previous year experienced discrimination or harassment by

court staff based on knowledge or belief that they were transgender. S. E. James, et al., *The Report of the 2015 U.S. Transgender Survey*, National Center for Transgender Equality, 16, 219-220 (Dec. 2016), https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf [hereinafter *2015 U.S. Transgender Survey*]. An additional 2% of respondents—over 500 people—avoided going into a courthouse altogether in the previous year for fear they would face mistreatment because they are transgender. *Id.* Fear of discrimination caused a similar number to avoid seeking any type of legal services, while among those who accessed services from an attorney, clinic, or other legal professional, 6% reported discrimination or harassment because they are transgender. *Id.* at 221.

As this data illustrates, discrimination and harassment are not limited to any role within the legal system. Judges, attorneys, and court employees were all found to engage in discriminatory and harassing conduct in many of the surveys. *See, id.* at 220-21; *California Study* at 19; *New Jersey Study* at 26; *Protected & Served?* at 7.

The discriminatory conduct reported in these studies ranges from epithets to laughter to physical attack because of the court user's sexual orientation or gender identity. LGBTQ people have reported a wide variety of verbal harassment, including hearing "derogatory terms, ridicule, snickering, or jokes … in open court,"

California Study at 19; or "hearing a judge, attorney or other court employee make negative comments about a person's sexual orientation, gender identity or gender expression." *Protected & Served?* at 7. Others reported verbal harassment more broadly. *See 2015 U.S. Transgender Survey* at 219-20. Though less frequent, survey results also included reports of feeling threatened or being physically attacked in a court setting because of their sexual orientation or transgender status. *Id.* at 220; *California Study* at 5.

Aside from harassment, LGBTQ people regularly report being denied equal treatment or service in court. *See, e.g., id.* at 7; *2015 U.S. Transgender Survey* at 220. In the California Study, a full 30% of all respondents, regardless of their role in the court system, believed those who knew their sexual orientation did not treat them with respect and 39% believed their sexual orientation was used to diminish their credibility when it became known. *California Study* at 5. This unequal treatment is compounded for LGBTQ people of color, with lower incomes, or living with disabilities, including HIV. *Protected & Served?* at 7; *2015 U.S. Transgender Survey* at 220.

Additionally, many LGBTQ people have reported having their LGBTQ identity raised by an attorney or judge during a court proceeding in which it was wholly irrelevant and/or against their will, adding another layer of bias as they seek to vindicate or protect their rights. *Protected & Served?* at 7, 12-13. These types of

irrelevant and unwilling disclosures were experienced disproportionately by transgender people, people of color, and people with lower incomes. *Id*. at 10, 12-13.

Discriminatory conduct is not limited to the courthouse, however. LGBTQ people seeking representation or legal assistance have faced similar conduct from lawyers in their offices or at clinics. For example, transgender people seeking legal assistance reported being denied equal treatment or service or being verbally harassed. *2015 U.S. Transgender Survey* at 221. Nonbinary respondents were twice as likely as transgender men and women to be denied equal treatment or verbally harassed when trying to access legal services. *Id*.

Clients and litigants are not the only targets this conduct either. LGBTQ attorneys also face discrimination and harassment. In 2020, the American Bar Association collaborated on a study of the experiences of LGBTQ+ attorneys and disabled attorneys in the workplace. This study found that LGBQ attorneys are significantly more likely to report both subtle and overt discrimination, "including harassment, bullying, abuse, and vandalism," while transgender lawyers have the highest probability of experiencing overt discrimination. Peter Blanck, et al., *Diversity and Inclusion in the American Legal Profession: Discrimination and Bias Reported by Lawyers with Disabilities and Lawyers Who Identify as LGBTQ+*, 47

Am. J.L. & Med. 9, 20, 22 (2021). Lawyers with multiple minority identities experience higher levels of discrimination. *Id.* at 16-17.

These experiences of discrimination and harassment when accessing the legal system cause significant harm. Hundreds of studies have concluded that discrimination is associated with harm to LGBTQ people's mental and physical health. *See, e.g.,* What We Know Project, Cornell University, *What Does the Scholarly Research Say about the Effects of Discrimination on the Health of LGBT People* (2019), https://whatweknow.inequality.cornell.edu/wp-content/uploads/2019/12/LGBT-Discrimination-Printable-Findings-121319.pdf (examining findings of 300 peer-reviewed studies on the impacts of discrimination on LGBT people). The negative health outcomes among LGBTQ people from discrimination include depression, anxiety, PTSD, suicidality, cardiovascular disease, and many others. *Id.* This is just as true in Pennsylvania as anywhere else. *See* Christy Mallory, et al., *The Impact of Stigma and Discrimination Against LGBT People in Pennsylvania*, The Williams Institute, 37 (Nov. 2021), https://williamsinstitute.law.ucla.edu/wp-content/uploads/Impact-LGBT-Discrimination-PA-Nov-2021.pdf.

Discrimination encountered in the legal system itself is no different. In fact, the harm may be more severe when it occurs in places such as courthouses.

> …[T]he injury caused by the discrimination is made more severe because the government permits it to occur within the courthouse itself.

> Few places are a more real expression of the constitutional authority of the government than a courtroom, where the law itself unfolds. …
>
> Race discrimination within the courtroom raises serious questions as to the fairness of the proceedings conducted there. Racial bias mars the integrity of the judicial system and prevents the idea of democratic government from becoming a reality.

Edmonson v. Leesville Concrete Co., Inc., 500 U.S. 614, 628 (1991). All types of identity-based discrimination faced by individuals in the legal system harm those individuals and the public's trust in the legal system. Ending this harm is at the root of Rule 8.4(g).

Discrimination and harassment in the legal system damage public confidence. In a recent survey, "[a] majority of participants expressed concerns about the fairness of the current civil process, many of which centered on perceptions of systemic racial or gender bias, differential treatment based on financial ability, and judicial biases." Inst. for the Advancement of the Am. Legal Sys., *Public Perspectives on Trust and Confidence in the Courts* (2020), https://iaals.du.edu/sites/default/files/documents/publications/public_perspectives_on_trust_and_confidence_in_the_courts.pdf. Discriminatory actions "not only undermine confidence in our system of justice, but also erode the very foundation upon which justice is based." *In re Charges of Unprofessional Conduct*, 597 N.W. 2d at 568. "There is no question that a lawyer's use of derogatory or discriminatory

language that singles out individuals involved in the legal process damages the legal profession and erodes confidence in the justice system." *Abrams*, 488 P.3d at 1053.

Rule 8.4(g)'s prohibition of harassment and discrimination by members of the bar is premised on the recognition that such conduct within the legal system "offends the dignity of persons and the integrity of the courts." *Powers v. Ohio,* 499 U.S. 400, 402 (1991). Safeguarding against both such infringements is unmistakably a compelling government interest.

CONCLUSION

For the foregoing reasons, *Amicus Curiae* respectfully urges this Court to reverse the District Court's decision and uphold the constitutionality of Rule 8.4(g) of the Pennsylvania Rules of Professional Conduct.

Dated: September 13, 2022

Respectfully submitted,

s/ Ethan Rice

Ethan Rice (NY Bar 5255997)
Omar Gonzalez-Pagan (NY Bar 5294616)
LAMBDA LEGAL DEFENSE
AND EDUCATION FUND, INC.
120 Wall Street, 19th Floor
New York, NY 10005
(212) 809-8585
erice@lambdalegal.org
ogonzalez-pagan@lambdalegal.org

Karen L. Loewy (DC Bar 1722185)
LAMBDA LEGAL DEFENSE
AND EDUCATION FUND, INC.
1776 K Street NW, 8th Floor
Washington, DC 20006
(202) 804-6245
kloewy@lambdalegal.org

Counsel for Amicus Curiae

CERTIFICATE OF BAR MEMBERSHIP

I hereby certify that all counsel for *Amicus Curiae* are members of the bar of the United States Court of Appeals for the Third Circuit.

Dated: September 13, 2022

Respectfully submitted,

s/ Ethan Rice
Ethan Rice
Counsel for Amicus Curiae

CERTIFICATION OF COMPLIANCE

1. This brief complies with the type-volume limitations of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B) because this brief contains 5,876 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).
2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14-point font.
3. Pursuant to Third Circuit Local Appellate Rule 31.1(c), I hereby certify that the text of the electronic brief is identical to the text in the paper copies.
4. Pursuant to Third Circuit Local Appellate Rule 31.1(c), I hereby certify that a virus detection program was run on the electronic version of this brief using Webroot Endpoint Protection, version CE 22.3, and that no virus was detected.

Dated: September 13, 2022

Respectfully submitted,

s/ Ethan Rice
Ethan Rice
Counsel for Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that on this date, I filed the foregoing *Amicus Curiae* Brief of Lambda Legal Defense and Education Fund, Inc. in Support of Appellants with the Clerk of the Court for the United States Court of Appeals for the Third Circuit using the Appellate CM/ECF system, which will automatically serve electronic copies upon all counsel of record.

Dated: September 13, 2022

Respectfully submitted,

s/ Ethan Rice
Ethan Rice
Counsel for Amicus Curiae