Exhibit A

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

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Case No. 2:20-cv-03822-CFK

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ZACHARY GREENBERG,

Plaintiff,

v.

JOHN P. GOODRICH, *ET AL*.

Defendants.

BRIEF OF *AMICUS CURIAE* CHRISTIAN LEGAL SOCIETY IN SUPPORT OF PLAINTIFF ZACHARY GREENBERG

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Interest of *Amicus Curiae*[1]

Christian Legal Society (CLS) is a nondenominational association of Christian attorneys, law students, and law professors. Since its founding in 1961, CLS has ministered to Christian attorneys and law students, advocated for First Amendment freedoms for all Americans, and supported legal aid. CLS has numerous members and attorneys in Pennsylvania, many of whom are associated with CLS chapters in Pittsburgh and Philadelphia. Additionally, CLS has student chapters at three Pennsylvania law schools. CLS – especially its members in Pennsylvania – is concerned with the outcome of this case because of its effect on the free exercise and free speech rights of individuals. CLS filed comments concerning Pennsylvania's proposed adoption of Rule 8.4(g) the three times the Disciplinary Board of the Supreme Court of Pennsylvania held a comment period but was precluded from doing so with this latest version of the rule because the Disciplinary Board bypassed the usual comment period.

Summary of Argument

Pennsylvania's Rule 8.4(g) is unconstitutional under the analyses of three recent United States Supreme Court decisions.

Argument

Pennsylvania's Rule 8.4(g) is a variant of the highly controversial and deeply flawed ABA Model Rule 8.4(g), which has been rejected or abandoned by over a dozen states in the five years since its promulgation.[2] Pennsylvania's Rule 8.4(g) provides, in part,

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[1] No counsel for any party authored this brief in whole or in part. No person or entity other than *amicus* and its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

[2] After five years of careful study by state supreme courts and state bar associations in many states across the country, at least 13 states have abandoned ABA Model Rule 8.4(g), or a variant thereof, as unconstitutional or unworkable. States whose high court or state bar associations have rejected ABA Model Rule 8.4(g) or a variant thereof include Arizona, Idaho, Illinois, Louisiana,

> It is professional misconduct for a lawyer to:
>
> …
>
> (g) in the practice of law, knowingly engage in conduct constituting harassment or discrimination based upon race, sex, gender identity or expression, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, or socioeconomic status. … This paragraph does not preclude advice or advocacy consistent with these Rules.
>
> [3] For the purposes of paragraph (g), conduct in the practice of law includes (1) interacting with witnesses, coworkers, court personnel, lawyers, or others while appearing in proceedings before a tribunal or in connection with the representation of a client; (2) operating or managing a law firm or law practice; or (3) participation in judicial boards, conferences, or committees; continuing legal education seminars; bench bar conferences; and bar association activities where legal education credits are offered. The term "practice of law" does not include speeches, communications, debates, presentations, or publications given or published outside the contexts described in (1)-(3).
>
> [4] "Harassment" means conduct that is intended to intimidate, denigrate or show hostility or aversion toward ….
>
> [5] "Discrimination" means conduct that a lawyer knows manifests an intention: to treat a person as inferior …; to disregard relevant considerations of individual characteristics or merit …; or to cause or attempt to cause interference with the fair administration of justice ….

Like its predecessor, Pennsylvania's newest Rule 8.4(g) is unconstitutional under current United States Supreme Court precedent. The rule not only ignores, but also fails to meet the

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Minnesota, Montana, Nevada, New Hampshire, North Dakota, South Carolina, South Dakota, Tennessee, and Texas. Utah has held two public comment periods but has not issued any sort of decision. Vermont and New Mexico are the only states to have adopted ABA Model Rule 8.4(g) in full.

State attorneys general have issued opinions critical of ABA Model Rule 8.4(g) in Alaska, Arizona, Louisiana, South Carolina, Tennessee, and Texas. *See. e.g.*, Tenn. Att'y Gen. Letter (Mar. 16, 2018) at 10, Letter from Attorney General Slattery to Supreme Court of Tennessee, https://www.clsreligiousfreedom.org/sites/default/files/site_files/ABA%208.4(g)/TN%20AG%20Opinion.pdf ("[T]he 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.")

standards set forth in, three Supreme Court cases: *Iancu v. Brunetti*, 139 S. Ct. 2294 (2019), *Nat'l Inst. of Family and Life Advocates v. Becerra (NIFLA)*, 138 S. Ct. 2361 (2018), and *Matal v. Tam*, 137 S. Ct. 1744 (2017).

The First Amendment fully protects offensive, derogatory, or demeaning speech. Any state effort to single out such speech for sanction is a viewpoint-based speech restriction and is subject to the strictest First Amendment scrutiny. *Iancu v. Brunetti*, 139 S. Ct. 2294 (2019); *Matal v. Tam*, 137 S. Ct. 1744 (2017). The only speech restriction that will survive First Amendment scrutiny is when the government can demonstrate that the restriction serves a compelling state interest in a narrowly tailored manner. *Id.* Additionally, the First Amendment analysis does not change simply because the speech restriction is imposed on a lawyer. "Derogatory" or "demeaning" speech is not subject to decreased constitutional protection simply because it is spoken by a lawyer in a setting "related to the practice of law." The First Amendment protects "professional speech" as fully as it does speech by nonprofessionals. *Nat'l Inst. of Family and Life Advocates v. Becerra (NIFLA)*, 138 S. Ct. 2361 (2018).

I. *NIFLA* Protects Lawyers' Speech from Content-based Restrictions like Rule 8.4(g)

Under the Court's analysis in *NIFLA*, Pennsylvania's Rule 8.4(g) is an unconstitutional content-based restriction on lawyers' speech. The *NIFLA* Court held that government restrictions on professionals' speech – including attorneys' professional speech – are generally subject to strict scrutiny review because they are content-based speech restrictions and are, therefore, *presumptively unconstitutional*.

The Court explained that "[c]ontent-based regulations 'target speech based on its communicative content.'"[3] "[S]uch laws 'are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.'"[4] As the Court observed, "[t]his stringent standard reflects the fundamental principle that governments have '"no power to restrict expression because of its message, its ideas, its subject matter, or its content."'"[5]

The Court firmly rejected the idea that professional speech is less protected by the First Amendment than other speech. The Court stressed that "*this Court has not recognized 'professional speech' as a separate category of speech. Speech is not unprotected merely because it is uttered by* '*professionals.*'"[6] The Court reaffirmed that its "precedents have long protected the First Amendment rights of professionals" and "has applied strict scrutiny to content-based laws that regulate the noncommercial speech of lawyers."[7] The Court was clear that a state regulation of attorney speech would be subject to strict scrutiny to ensure that any regulation is narrowly tailored to achieve a compelling interest.

Comment [3] to Pennsylvania's Rule 8.4(g) explains that "discrimination" includes "conduct that … manifests an intention[] to treat a person as inferior" and "harassment" includes "conduct that is intended to intimidate, denigrate or show hostility or aversion." By redefining both "harassment" and "discrimination" in terms of actions, Pennsylvania's Rule 8.4(g) attempts to remove words and verbal conduct – in other words, speech – from its purview. In actuality, it

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[3] *NIFLA v. Becerra*, 138 S. Ct. 2361, 2371, quoting *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015).
[4] *Id.*
[5] *Id.*, quoting *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972).
[6] *Id.* at 2371-72 (emphasis added).
[7] *Id.* at 2374.

fails. Comment [3] also defines the term "practice of law" as not including "speeches, communications, debates, [and] presentations … outside the contexts described in (1)-(3)." If Rule 8.4(g) does not include each of these forms of verbal communication outside of the specified contexts, then it necessarily includes speeches, communications, debates, presentations – again all verbal communications – given within the context of (1)-(3). Pennsylvania's Rule 8.4(g)'s definition of "practice of law" reveals the rule's focus on speech. Added to that, state officials have articulated no compelling interest for this discriminatory speech restriction. Nor is the restriction narrowly tailored. There can be no denying that Pennsylvania's Rule 8.4(g) regulates professional speech in violation of the ruling and analysis in *NIFLA*.

II. Under *Matal* and *Iancu*, Rule 8.4(g) Invites Unconstitutional Viewpoint Discrimination

Separately, the broad definitions of "harassment" and "discrimination" render Pennsylvania's Rule 8.4(g) unconstitutional under the United States Supreme Court's decisions in *Matal* and *Iancu*. The Supreme Court, first in *Matal* and again in *Iancu*, ruled that government officials may not determine whether speech is "derogatory or demeaning" because that invites viewpoint discrimination; therefore, laws or rules violate the First Amendment if they create opportunities for viewpoint discrimination and chilling speech.

In *Matal*, a unanimous Court held that a federal statute was facially unconstitutional because it allowed government officials to penalize "disparaging" speech. The Court made clear that a government prohibition on disparaging, derogatory, demeaning, or offensive speech is blatant viewpoint discrimination and, therefore, unconstitutional.[8] In his concurrence, Justice

[8] *Matal v. Tam*, 137 S. Ct. 1744, 1753-1754, 1765 (plurality op.).

Kennedy, joined by Justices Ginsburg, Sotomayor, and Kagan, observed that it is unconstitutional to suppress speech that "demeans or offends."[9]

In the decision, all nine justices struck down a provision of a longstanding federal law, the Lanham Act, declaring it unconstitutional because it allowed government officials to deny trademarks for terms that may "disparage or bring into contempt or disrepute" living or dead persons. Allowing government officials to determine what words do and do not "disparage" a person "offends a bedrock First Amendment principle: Speech may not be banned on the ground that it expresses ideas that offend."[10] Justice Alito, writing for a plurality of the Court, noted that "[s]peech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express 'the thought that we hate.'"[11]

Also in his concurrence, Justice Kennedy stressed that "[t]he danger of viewpoint discrimination is that the government will remove certain ideas or perspectives from a broader debate," particularly "if the ideas or perspectives are ones a particular audience might think offensive."[12] Justice Kennedy closed with a sober warning:

> A law that can be directed against speech found offensive to some portion of the public can be turned against minority and dissenting views to the detriment of all. The First Amendment does not entrust that power to the government's benevolence. Instead, our reliance must be on the substantial safeguards of free and open discussion in a democratic society.[13]

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[9] *Id.* at 1766 (2017) (Kennedy, J., concurring) (emphasis supplied).
[10] *Id.* at 1751 (quotation marks and ellipses omitted).
[11] *Id.* at 1764, quoting *United States v. Schwimmer*, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting) (emphasis supplied).
[12] *Id.* at 1767 (Kennedy, J., concurring).
[13] *Id.* at 1769 (Kennedy, J., concurring).

Justice Kennedy explained that the federal statute allowed unconstitutional viewpoint discrimination because the government permitted "a positive or benign mark but not a derogatory one," which "reflects the Government's disapproval of a subset of messages it finds offensive," which is "the essence of viewpoint discrimination."[14]

In 2019, the Supreme Court reaffirmed its rejection of viewpoint discrimination. The challenged terms in *Iancu* were "immoral" and "slanderous" and, once again, the Court found the terms were viewpoint discriminatory because they allowed government officials to pick and choose which speech to allow. In her opinion for the Court, Justice Kagan explained that the terms "immoral" and "scandalous" insert a "facial viewpoint bias in the law [that] results in viewpoint-discriminatory application."[15] The Lanham Act's prohibition on "immoral[] or scandalous" trademarks was unconstitutional because:

> [I]t allows registration of marks when their messages accord with, but not when their messages defy, society's sense of decency or propriety. Put the pair of overlapping terms together and the statute, on its face, distinguishes between two opposed sets of ideas: those aligned with conventional moral standards and those hostile to them; those inducing societal nods of approval and those provoking offense and condemnation. The statute favors the former, and disfavors the latter.[16]

Because Pennsylvania's Rule 8.4(g) will punish lawyers' speech on the basis of viewpoint, it is unconstitutional under the analyses in both *Matal* and *Iancu*. In this newest version of Rule 8.4(g), Pennsylvania tried a slight of hand move in an attempt to remove the rule from the purview of Supreme Court precedent, this time by redefining "harassment" and "discrimination" without using terms like "disparaging" or "demeaning" or "derogatory" or "offensive." Instead, the new rule defines "harassment" and "discrimination" with terms like "denigrate" and "intimidate" and

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[14] *Id.* at 1766 (Kennedy, J., concurring) (emphasis supplied).
[15] *Iancu v. Brunetti,* 139 S. Ct. 2294, 2300 (2019).
[16] *Id.*

"show hostility or aversion toward" and "treat as inferior." Changing the words used to define "harassment" and "discrimination" does not, however, change their meaning or intent, which remain unconstitutional.[17]

Under the *Matal* and *Inacu* analyses, these definitions are still examples of viewpoint discrimination. In *Matal*, the Supreme Court unanimously held that a federal statute was facially unconstitutional because it allowed government officials to penalize "disparaging" speech. The Court made clear that a government prohibition on disparaging, derogatory, demeaning, or offensive speech is blatant viewpoint discrimination and, therefore, unconstitutional.[18] A rule that permits government officials to punish lawyers for speech that the government determines to be "harmful" or "derogatory or demeaning" – or that "is intended to intimidate, denigrate or show hostility or aversion toward" is the epitome of an unconstitutional rule.

As described above, viewpoint discrimination also occurs when government officials have unbridled discretion to determine the meaning of a statute, rule, or policy in such a way that they can favor particular viewpoints while penalizing other viewpoints. The provision of Rule 8.4(g) that exempts "advice or advocacy consistent with these Rules" permits such unbridled discretion, as do the terms "intimidate," "denigrate," "hostility," "aversion" and "inferior."

As an aside, this rule would also wreak havoc on employment relationships in law offices, given its express application to "operating or managing a law firm or law practice." The rule would remove the protections and developments of decades of labor and employment law doctrines regarding "harassment" and "discrimination" and, in their place, yoke lawyers and employees with

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[17] For example, the word "disparage" is, in fact, a synonym for "denigrate." *See* https://www.thesaurus.com/browse/denigrate.

[18] 137 S. Ct. at 1753-1754, 1765 (plurality op.); *see also, id.* at 1766 (unconstitutional to suppress speech that "demeans or offends") (Kennedy, J., concurring, joined by JJ. Ginsberg, Sotomayor, and Kagan).

vague standards outside the purview of traditional legal rules. This vagueness and uncertainty itself point to the chilling effect of Rule 8.4(g).

Conclusion

Pennsylvania's Rule 8.4(g)'s prohibition of harassment and discrimination is in severe tension with First Amendment case law because it imposes sanctions based on the content and the viewpoint of the speech. *NIFLA* clarifies that the First Amendment protects "professional speech" just as fully as other speech; there is no free speech carve-out that countenances content-based restrictions on professional speech. *Matal* and *Iancu* affirm that the terms used in Pennsylvania's Rule 8.4(g) create constitutional viewpoint discrimination. Clearly, Pennsylvania's Rule 8.4(g) unconstitutionally targets speech protected by the First Amendment and United States Supreme Court precedent.

This court appropriately enjoined the previous version of Pennsylvania's Rule 8.4(g). The court should now grant plaintiff's request for summary judgment on this newest version of Pennsylvania's Rule 8.4(g) as well.

Respectfully submitted,

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