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Via email: wendy.wussow@nebraska.gov

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Clerk of the Supreme Court
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P.O. Box 98910
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RE: Comment on Proposed Amendments to Neb. Ct. R. of Prof. Cond. § 3-508.4

Dear Ms. Wussow:

The Office of the Attorney General appreciates the opportunity to comment on the proposed changes to Neb. Ct. R. of Prof. Cond. § 3-508.4. The petition submitted in support of the proposal acknowledges that the "American Bar Association [ABA] has amended its Rules of Professional Conduct" to include similar language. *See* Petition for Revision to the Nebraska Rules of Professional Conduct at ¶ 12. But that ABA model rule—commonly known as ABA Rule 8.4(g)—and variations of it have been widely rejected by States,[1] deemed unconstitutional by many State Attorneys General,[2] declared unconstitutional by at least one federal court,[3] and resoundingly

[1] *See generally* Josh Blackman, *ABA Model Rule 8.4(g) in the States*, 68 Cath. U. L. Rev. 629 (2019) (summarizing the developments in many States that have considered ABA Rule 8.4(g) or variations of it).

[2] *See* Ark. Op. Att'y Gen. No. 2020-055 (July 14, 2021); Tenn. Op. Att'y Gen. No. 18-11 (March 16, 2018); La. Op. Att'y Gen. No. 17-0114 (Sept. 8, 2017); S.C. Op. Att'y Gen. (May 1, 2017); Tex. Op. Att'y Gen. No. KP-0123 (Dec. 20, 2016).

[3] *See Greenberg v. Goodrich*, No. CV 20-03822, --- F. Supp. 3d ---, 2022 WL 874953, at *37 (E.D. Pa. Mar. 24, 2022) ("In conclusion, the Court finds that Rule 8.4(g) is an unconstitutional infringement of free speech according to the protections provided by the First Amendment. The Court also finds that Rule 8.4(g) is unconstitutionally vague under the Fourteenth Amendment."); *Greenberg v. Haggerty*, 491 F. Supp. 3d

criticized in legal scholarship.[4] The rule that has been proposed here suffers from all the deficiencies of ABA Rule 8.4(g)—and then some. As explained below, our office has concluded that the proposal is unconstitutional and recommends that it not be adopted.

We recognize that lawyers are held to a high standard when representing clients and that discriminatory treatment of individuals has no place in the practice of law. Our office fully supports those principles. But the proposed rule reaches far beyond that. It covers not only what lawyers do and say when practicing law but everything they do and say anywhere, even when not representing clients or engaging in the practice of law. Its sweeping scope and vague language will chill attorneys' constitutionally protected speech and conduct throughout Nebraska. "When laws against harassment attempt to regulate oral or written expression . . . , however detestable the views expressed may be, we cannot turn a blind eye to the First Amendment implications."[5] Because of these constitutional concerns, we recommend that the Court reject the proposed amendments.

Background and Summary of the Proposed Rule

Neb. Ct. R. of Prof. Cond. § 3-508.4 already forbids attorneys from "engag[ing] in *adverse discriminatory treatment* of litigants, witnesses, lawyers, judges, judicial officers or court personnel on the basis of the person's race, national origin, gender, religion, disability, age, sexual orientation or socio-economic status" when they are "*in the course of . . . employment*" in "*a professional capacity.*" (emphasis added). The proposed amendments seek to strike that text and replace it with two provisions containing far more sweeping language.

The first would prohibit "conduct that the lawyer knows or *reasonably should know* is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status *in connection with a lawyer's professional activities.*" (emphasis added). And the second would forbid lawyers from "engag[ing] in conduct that the

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12, 32–33 (E.D. Pa. 2020), *appeal dismissed*, No. 20-3602, 2021 WL 2577514 (3d Cir. Mar. 17, 2021) (similar).

[4] *See, e.g.*, Michael S. McGinniss, *Expressing Conscience with Candor: Saint Thomas More and First Freedoms in the Legal Profession*, 42 Harv. J.L. & Pub. Pol'y 173 (2019); George W. Dent, Jr., *Model Rule 8.4(g): Blatantly Unconstitutional and Blatantly Political*, 32 Notre Dame J.L. Ethics & Pub. Pol'y 135 (2018); Josh Blackman, *Reply: A Pause for State Courts Considering Model Rule 8.4(g) the First Amendment and "Conduct Related to the Practice of Law"*, 30 Geo. J. Legal Ethics 241 (2017) (hereinafter, "Blackman, *Pause*").

[5] *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 206 (3d Cir. 2001) (Alito, J.).

lawyer knows or *reasonably should know* is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status *that reflects adversely on the lawyer's fitness as a lawyer.*" (emphasis added). The second provision is broader because while the first requires the conduct to occur "in connection with . . . professional activities," the second sweeps in any conduct, even if unconnected to those professional activities, so long as others deem it to "reflect[] adversely on the lawyer's fitness as a lawyer."

These changes would broaden the rule in at least five ways. First, the rule would no longer be restricted to "adverse discriminatory treatment," but would broadly prohibit "harassment or discrimination" on the proscribed grounds. Harassment, of course, includes written or spoken "words,"[6] which means the expanded rule would explicitly prohibit speech. Confirming this point, the comments to ABA Rule 8.4's similarly worded provision expressly state that harassment "includes . . . derogatory or demeaning verbal . . . conduct" and discrimination includes "harmful verbal . . . conduct that manifests bias or prejudice towards others."[7]

Second, the rule would not be limited to situations where "a lawyer is employed in a professional capacity" and acting "in the course of such employment." Rather, it would reach conduct and statements, even if unconnected to the practice of law, that someone might deem to "reflect[] adversely on the lawyer's fitness as a lawyer." A person's conduct or statements in countless contexts—such as social media posts or public political rallies—might reflect adversely on his or her fitness to be a lawyer (just consider the breadth of the Nebraska State Bar Commission's character and fitness inquiry). The text itself underscores this broad scope by stating that whether "discrimination or harassment reflects adversely on a lawyer's fitness as a lawyer shall be determined after consideration of *all the circumstances*" including the "seriousness" of what was said or done. Under this standard, if an offending statement or action is considered serious enough in the eyes of the enforcement officials, it need not be at all connected to the practice of law. The proposed rule is thus an unprecedented regulatory expansion that seeks to broadly police the private speech of attorneys.

Third, the other new provision—which covers speech and conduct "in connection with a lawyer's professional activities"—would also cast an incredibly broad and chilling net. The amendments nowhere define the phrase "in connection with . . . professional activities," but its scope appears vast. It would reach beyond situations

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[6] *Harassment*, Black's Law Dictionary (11th ed. 2019) (defining "harassment" to include "[w]ords, conduct, or action").

[7] American Bar Association, Rule 8.4 Misconduct – Comment 3, https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_8_4_misconduct/comment_on_rule_8_4/.

where "a lawyer is employed in a professional capacity" and apply to legal debates, CLE presentations, law-firm social functions, law-firm operations, and bar-association events—to name just a few. Indeed, the ABA interprets the similar phrase in ABA Rule 8.4(g)—"related to the practice of law"—to include "operating or managing a law firm or law practice" and "participating in bar association, business or social activities in connection with the practice of law."[8]

Fourth, the proposed text would ban not only speech and conduct "that the lawyer knows . . . is harassment or discrimination," but also speech and conduct that the lawyer "*reasonably should know* is harassment or discrimination." (emphasis added). This means that the rule would subject an attorney to professional discipline for a statement that is not known or intended to be harassment. It is enough if a person might construe it that way.

Fifth, the amendments would expand the list of prohibited classifications to include categories such as "gender identity" that implicate hotly debated and deeply divisive social issues. The U.S. Supreme Court has recognized that "gender identity" is a "sensitive political topic[]" that is "undoubtedly [a] matter[] of profound . . . concern to the public."[9] This rule would subject attorneys to discipline for expressing unpopular views that some might deem discriminatory or harassing on these controversial subjects. And it, in turn, would have the effect of suppressing the expression of particular viewpoints on important issues of public concern.

It is particularly notable that the proposed rule would ban a significant amount of speech and conduct *not* prohibited under current federal or Nebraska nondiscrimination law. Three points illustrate this. First, federal and Nebraska nondiscrimination laws do not apply to everything attorneys say and do, but only when they are acting as employers, public accommodations, or educators.[10] Yet the proposed rule applies to all lawyers' statements and conduct that might "reflect[] adversely on [their] fitness as a lawyer" or that are remotely connected to their "professional activities." Second, while federal and Nebraska laws forbid discrimination based on race, national origin, religion, sex, age, and disability, they do not generally address "gender identity."[11] The lone exception is that federal employment law's prohibition on

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[8] *Id.*

[9] *Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2476 (2018) (cleaned up).

[10] *See, e.g.*, 42 U.S.C. § 2000e-2(a) (Title VII employment); Neb. Rev. Stat. § 48-1104 (employment); Neb. Rev. Stat. § 20-134 (public accommodation); 20 U.S.C. § 1681 (Title IX education).

[11] *See, e.g.*, 42 U.S.C. § 2000e-2(a) (listing "race, color, religion, sex, [and] national origin"); Neb. Rev. Stat. § 48-1104 (listing "race, color, religion, sex, disability, marital status, [and] national origin").

sex discrimination bars an employer from firing employees simply because of their gender identity, but the U.S. Supreme Court was clear that its holding on that issue does not extend beyond that narrow situation.[12] Third, the only harassment forbidden in the employment or educational context is that which is severe or pervasive or results in a materially adverse employment action.[13] The proposed rule imposes no such restrictions on its definition of harassment.

While the amendments would shield certain "legal advice and advocacy" from punishment, that text is too narrow to make much of a difference. The relevant proposed language states that the new prohibitions "do not preclude legal advice and advocacy when harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status are at issue." Notice the mismatch between the proposal's sweeping prohibitions—which extend beyond a lawyer's professional activities—and this language's narrow focus on "legal advice and advocacy *when harassment or discrimination . . . are at issue.*" (emphasis added). Although this clause ensures that lawyers defending against discrimination or harassment suits may give legal advice to clients and present relevant legal arguments to courts, it has no application outside that limited context. But the proposed rule, in sharp contrast, sweeps in a substantial amount of speech and conduct stretching far beyond that narrow setting. This clause is thus wholly inadequate to avoid the constitutional concerns discussed below.

Freedom of Speech and Overbreadth

Our office has concluded that the proposed rule violates freedom of speech under the federal and state constitutions.[14] The Nebraska Supreme Court has held that "the guarantee of freedom of speech under the Nebraska Constitution is the same

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[12] *See Bostock v. Clayton Cty., Georgia*, 140 S. Ct. 1731, 1753 (2020) ("The only question before us is whether an employer who fires someone simply for being . . . transgender has discharged or otherwise discriminated against that individual 'because of such individual's sex.'").

[13] *See Davis Next Friend LaShonda D. v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 633 (1999) (a Title IX damages claim for harassment exists "only for harassment that is so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit"); *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986) (a Title VII claim for harassment is actionable only if the harassment is "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment") (cleaned up).

[14] *See* U.S. Const. amend. I; Neb. Const. art. I, § 5.

as under the First Amendment to the federal Constitution."[15] So we focus our analysis on case law interpreting the First Amendment.

"[D]isciplinary rules governing the legal profession cannot punish activity protected by the First Amendment."[16] Yet the proposed rule covers all sorts of constitutionally protected speech. As discussed above, the rule reaches attorneys' speech that is not even connected to their professional activities, and there is no question that lawyers' speech outside the professional context enjoys full constitutional protection. In addition, attorney expression made "in connection with . . . professional activities"—including at a CLE presentation or a bar association's social function—is likewise constitutionally protected.[17] As the U.S. Supreme Court has affirmed, "[s]peech is not unprotected merely because it is uttered by 'professionals.'"[18] While attorneys' speech might be subject to lesser constitutional protection in narrow circumstances—such as when they are engaged in "commercial advertising"[19] or participating in a "judicial proceeding"[20]—the proposed rule reaches far beyond those limited contexts and so infringes on a substantial amount of constitutional protected speech.

That the proposed rule would target speech considered harassing or offensive to some people does not reduce—let alone eliminate—the constitutional protection. "When laws against harassment attempt to regulate oral or written expression . . . , however detestable the views expressed may be, we cannot turn a blind eye to the First Amendment implications."[21] "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[22] The very "point of all speech protection . . . is to shield just those choices of content that in someone's eyes are misguided, or even hurtful."[23] There is, in other words, "no

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[15] *Dossett v. First State Bank, Loomis, Nebraska*, 261 Neb. 959, 966, 627 N.W.2d 131, 138 (2001).

[16] *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1054 (1991) (plurality).

[17] *See, e.g., In re Primus*, 436 U.S. 412, 432–38 (1978) (applying the First Amendment to invalidate discipline imposed on an attorney who told an indigent client that free legal assistance was available).

[18] *Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2371–72 (2018).

[19] *Zauderer v. Off. of Disciplinary Couns. of Supreme Ct. of Ohio*, 471 U.S. 626, 651 (1985)

[20] *Gentile*, 501 U.S. at 1071–73.

[21] *Saxe*, 240 F.3d at 206 (Alito, J.).

[22] *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (collecting cases).

[23] *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 574 (1995).

categorical 'harassment exception' to the First Amendment's free speech clause."[24] "[T]he free speech clause protects a wide variety of speech that listeners may consider deeply offensive, including statements that impugn another's race or national origin or that denigrate religious beliefs."[25] Though "[s]peech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful," "the proudest boast of our free speech jurisprudence is that we protect the freedom to express the thought that we hate."[26]

The most demanding form of constitutional review—strict scrutiny—applies whenever the government punishes speech based on its content or viewpoint.[27] "Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed."[28] "Viewpoint discrimination is . . . an egregious form of content discrimination" that "targets not subject matter, but particular views taken by speakers on a subject."[29] That is precisely what the proposed rule does. Lawyers who criticize some aspects of immigration law, the distribution of specific government benefits to low-income citizens, Catholic religious beliefs, or certain gender-transition efforts for minors are potentially engaged in harassment or discrimination based on national origin, socioeconomic status, religion, or gender identity. But attorneys who speak approvingly of those topics are safe from professional discipline. This constitutes a preference for one set of perspectives over others. Such "a law disfavoring 'ideas that offend' discriminates based on viewpoint, in violation of the First Amendment."[30]

The State could not show that this kind of viewpoint discrimination satisfies strict scrutiny. That stringent constitutional standard requires proof that the proposed rule "[1] furthers a compelling interest and [2] is narrowly tailored to achieve that interest."[31] Assuming the State has a compelling interest in preventing discrimination in the administration of justice, the proposed rule is not narrowly tailored to further that interest. After all, the proposed language would extend far beyond speech and conduct that occurs during the practice of law to regulate speech and conduct (1) that is in any way connected to "a lawyer's professional activities" or (2) that is unconnected to those professional activities if it "reflects adversely on the lawyer's

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[24] *Saxe*, 240 F.3d at 204.

[25] *Id.* at 206.

[26] *Matal v. Tam*, 137 S. Ct. 1744, 1764 (2017) (plurality) (cleaned up).

[27] *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 171 (2015).

[28] *Id.* at 163.

[29] *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 829 (1995).

[30] *Iancu v. Brunetti*, 139 S. Ct. 2294, 2301 (2019) (cleaned up).

[31] *Reed*, 576 U.S. at 171.

fitness as a lawyer." This includes attorneys' statements during presentations on the law, while attending professional social gatherings, and in personal social media posts. Punishing such a vast array of speech is not remotely, let alone carefully, tailored to safeguarding the administration of justice.

Another way to view the strict scrutiny analysis is as "a balance of the means and the ends. As the government's interest becomes more compelling, the rule's tailoring need not be as narrow. Conversely, when the government's interest becomes less compelling, narrow tailoring becomes essential."[32] While regulating conduct and speech that occurs during the practice of law is within the core function of the Rules of Professional Conduct and likely implicates the government's compelling interest in the administration of justice, this rule reaches speech and conduct far outside the legal practice. "[W]hen the nexus between the legal practice and the speech at issue becomes more attenuated," as it does under the proposed rule, the government's "authority to regulate an attorney's expressions becomes weaker," which means that "narrow tailoring becomes critical to salvage the [proposed rule's] constitutionality."[33] But as explained above, the proposed rule does not come close to satisfying the narrow tailoring requirement.

A party seeking to satisfy strict scrutiny must also show that "the curtailment of free speech [is] actually necessary" to solve a problem—"ambiguous proof will not suffice."[34] In an attempt to satisfy that obligation, the petition proposing these amendments included a survey on sex discrimination in the legal profession. *See* Petition for Revision to the Nebraska Rules of Professional Conduct at Ex. A. But that survey does not justify this sweeping proposal. For starters, the survey discusses only sex discrimination. Yet the rule punishes disfavored speech on topics as varied as race, religion, socioeconomic status, and gender identity. Thus, the survey does not support the proposal's broad sweep. In addition, many of the identified instances of sex discrimination involved workplace conduct that occurred while the offender was employed as an attorney. Many of those unfortunate stories—which our office does not condone—are either dealt with by employment nondiscrimination law or already forbidden under the rule's existing language, which bans attorneys "in the course of . . . employment" in "a professional capacity" from engaging in "adverse discriminatory treatment" of others based on "gender." Given this, there is no clear proof that curtailing speech outside the practice of law is necessary to solve the problem.

The proposed rule's threats to free speech are not isolated or minimal, but are far-reaching and systemic. The proposal is thus unconstitutionally overbroad and invalid on its face. A law is impermissibly overbroad in violation of the First Amend-

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[32] Blackman, *Pause*, *supra*, at 256.

[33] *Id.*

[34] *Brown v. Ent. Merchants Ass'n*, 564 U.S. 786, 799–800 (2011).

ment when a "substantial number of its applications are unconstitutional, judged in relation to [its] plainly legitimate sweep."[35] The strong medicine of facially invalidating an overbroad law is warranted because such laws "might serve to chill protected speech."[36] An attorney "who contemplates protected [speech] might be discouraged by the in terrorem effect" of the proposed rule and "choose not to speak because of uncertainty" as to whether he or she will be punished.[37] Subjecting attorneys—professionals who speak, write, and advocate for a living—to such uncertainty concerning all their speech, even speech unconnected to their professional activities, is intolerable. Because of its overbreadth, the rule would effectively operate as an unconstitutional prior restraint on speech—silencing people with the threat of punishment before they utter a word.

Not surprisingly, a federal court has already struck down Pennsylvania's similar rule on free speech grounds.[38] That rule was narrower than this one because it applied only to speech and conduct occurring "in the practice of law" when the lawyer "knowingly engage[d] in . . . harassment or discrimination" based on listed categories.[39] Even though that rule was more tailored than this one, the court held that it violates lawyers' free speech rights and is facially overbroad.[40] The court explained that the rule is not narrowly tailored because it "permits the government to restrict speech outside of the courtroom, outside of the context of a pending case, and outside of the administration of justice."[41] Illustrating the rule's breadth, the court observed that "an attorney showing aversion to another person wearing cheap suits or worn-out shoes at a bench bar conference could be subject to discipline" for discriminating based on socioeconomic status.[42] Thus, the court concluded that the rule "prohibit[s] a substantial amount of protected speech and [is] unconstitutionally overbroad."[43] Because the rule proposed here is much more expansive, the same conclusion is all the more appropriate in this context.

The proponents of the proposed rule might try to dismiss these concerns based on the new comment stating that it would be "relevant" when considering whether

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[35] *United States v. Stevens*, 559 U.S. 460, 473 (2010).

[36] *Bates v. State Bar of Arizona*, 433 U.S. 350, 380 (1977).

[37] *Id.*

[38] *Greenberg*, 2022 WL 874953, at *37; *see also Greenberg*, 491 F. Supp. 3d at 32–33 (enjoining a prior version of the rule).

[39] *Greenberg*, 2022 WL 874953, at *4.

[40] *Id.* at *16–32.

[41] *Id.* at *29.

[42] *Id.* at *32.

[43] *Id.*

"discriminatory" speech or conduct "reflects adversely on fitness as a lawyer" that "the lawyer reasonably believed . . . his or her conduct was protected under the state or federal constitution." This comment does not solve the constitutional problems. To begin with, it applies only to the "reflects adversely" provision and says nothing about the "in connection with . . . professional activities" provision. It is therefore irrelevant that attorneys reasonably believe their speech is constitutionally protected if that speech is connected with their professional activities in any way. Moreover, this comment does not insulate a lawyer from punishment. It simply says that a reasonable belief of constitutional protection is one of many "factors" to be considered. Even if an attorney holds that reasonable belief, he or she might still be disciplined all the same. Finally, this comment does not eliminate—but only underscores—the rule's chilling effect. Attorneys desiring to exercise their First Amendment rights must convince enforcement officials that their belief in constitutional protection is reasonable, so they must still go through the disciplinary process to make their case. That prospect alone will lead countless attorneys to self-censor. The First Amendment exists to prevent that.

Due Process Vagueness

The proposed rule also violates due process. Both the federal and state constitutions guarantee due process of law. The Nebraska Supreme Court has interpreted the State's Due Process Clause, like the free speech protection, "to afford protections coextensive to those of the federal Constitution."[44] Federal case law thus guides our inquiry.

A fundamental principle of the Fourteenth Amendment's Due Process Clause "is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required."[45] A law that "forbids . . . the doing of an act in terms so vague that [people] of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law."[46] This vagueness doctrine applies to both civil and criminal laws,[47] and when a law "interferes with the right of free speech or of association, a more stringent vagueness test should apply."[48] The purpose of the vagueness doctrine is twofold: first, vague laws

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[44] *Keller v. City of Fremont*, 280 Neb. 788, 791, 790 N.W.2d 711, 713 (2010) (per curiam).

[45] *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012).

[46] *Connally v. Gen. Const. Co.*, 269 U.S. 385, 391 (1926).

[47] *Boutilier v. INS*, 387 U.S. 118, 123 (1967).

[48] *Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc.*, 455 U.S. 489, 499 (1982).

fail to provide a "fair warning" of what speech and conduct is prohibited; and second, vague laws permit "arbitrary and discriminatory enforcement" by the government.[49]

The proposed rule is filled with vague language. How will attorneys know whether their speech or conduct occurs "in connection with . . . professional activities" or "reflects adversely on [their] fitness as a lawyer"? The "reflects adversely" standard is particularly problematic because, as discussed above, that determination depends on a "consideration of all the circumstances," including a non-exclusive list of factors. Moreover, when facing words like "harassment" and "discrimination" that are undefined and not tied to any established legal standard, lawyers are left to guess. And determining whether attorneys "reasonably should know" that their speech is harassing or discriminatory forces them to speculate on how others might react. The Tennessee Attorney General, in his opinion analyzing a similar proposed rule, highlighted a few examples to illustrate the myriad questions that might arise:

> Is an attorney who participates in a debate on income inequality engaging in discrimination based on socioeconomic status when he makes a negative remark about the "one percent"? How about an attorney who comments at a CLE on immigration law that illegal immigration is draining public resources? Is that attorney discriminating on the basis of national origin?[50]

Because the rule proposed here extends to speech and conduct unconnected to a lawyer's professional activities, the troublesome examples are even greater still. Suppose an attorney were to write an op-ed explaining potential legal concerns with a local nondiscrimination ordinance adding gender identity as a new protected classification. Has that attorney violated the proposed rule? Or how about a lawyer's social media post explaining why she rejects the tenets of the Jewish religion? Is that speech discriminatory on the basis of religion? The questions and uncertainties abound.

When attorneys are left to guess about these matters—with their careers and livelihoods hanging in the balance—the practical effect is undeniable: attorneys will censor themselves. As the U.S. Supreme Court has observed, when a vague law "abuts upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of those freedoms. Uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked."[51] Preventing this chilling of constitutionally protected activity is precisely why the vagueness doctrine exists. It stands in firm opposition to the proposed rule.

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[49] *Id.* at 498 (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972)).

[50] Tenn. Op. Att'y Gen. No. 18-11 at 8–9.

[51] *Grayned*, 408 U.S. at 109 (cleaned up).

The federal court that invalidated the similar Pennsylvania rule agreed that the vagueness doctrine bars these kinds of professional rules.[52] The court there noted that the rule's use of the terms "harassment" and "discrimination" are not tied to "the definitions of [those] terms in similar contexts."[53] Also, the rule's vague language "invite[s] arbitrary or discriminatory enforcement" and affords "insufficient guidance" to ensure that it will be "implement[ed] . . . in a precise, consistent manner."[54] Therefore, the court held that the rule was "void-for-vagueness."[55] The same is true of the even more expansive rule proposed here.

Expressive Association and Free Exercise of Religion

The U.S. Supreme Court "has recognized a right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion."[56] Government actions that "infringe upon this freedom can take a number of forms," including "impos[ing] penalties" on "individuals because of their membership in a disfavored group."[57]

The proposed rule infringes on attorneys' rights of expressive association, particularly the right to associate for religious purposes. Consider the prohibition on conduct that "the lawyer . . . reasonably should know is harassment or discrimination on the basis of . . . sexual orientation, gender identity, [or] marital status" when that conduct "reflects adversely on the lawyer's fitness as a lawyer." That text would seemingly prohibit an attorney from becoming a member—and even more so a board member or leader—of a religious group that holds views about sexual conduct, gender identity, marriage, or divorce that some consider discriminatory in nature. This prohibition might even forbid a lawyer from attending a religious service espousing certain teachings on these topics. The chill cast by the proposed amendments would force attorneys to reconsider—and possibly renounce—their involvement in such groups.

Additionally, the proposed rule's prohibition on discriminatory conduct "in connection with a lawyer's professional activities" also poses serious expressive association concerns. Some legal groups such as the Christian Legal Society and the J. Reuben Clark Law Society organize around religion and operate consistently with

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[52] *Greenberg*, 2022 WL 874953, at *36.

[53] *Id.* at *35.

[54] *Id.* at *36.

[55] *Id.*

[56] *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618 (1984).

[57] *Id.* at 622 (citing *Healy v. James*, 408 U.S. 169, 180–84 (1972)).

prescribed religious principles. Membership in those types of groups is unquestionably connected to a lawyer's professional activities and thus could subject an attorney to discipline under the proposed rule. This further infringes lawyers' rights of expressive association.

Juxtaposing the proposed amendments with an existing rule of judicial conduct—Neb. Ct. R. of Jud. Cond. § 5-303.6—illustrates the concerns. The judicial rule states that "[a] judge shall not hold membership in any organization that practices invidious discrimination on the basis of race, sex, gender, religion, national origin, ethnicity, or sexual orientation." This provision, unlike the proposed rule, includes two important safeguards for expressive association. First, the comments state that "[a] judge's membership in a religious organization as a lawful exercise of the freedom of religion is not a violation of this [r]ule." Second, the judicial rule does not use the generic word "discrimination" but limits itself to "invidious discrimination," which is an egregious form of discrimination that "involves prejudice or stereotyping."[58] In short, there are ways to help protect expressive association rights, but the proposed rule runs roughshod over those important liberties.

Comparison to Other States

The petition supporting these amendments implies that the new language is consistent with rules that have been amended or proposed in 12 other States. *See* Petition for Revision to the Nebraska Rules of Professional Conduct at ¶ 13. Though our office was unable to complete an exhaustive review of all States' rules of professional conduct, a cursory review revealed that the language proposed here is among the broadest out there.

It is fitting to start with Minnesota's rule since the petition claims that its language is "modeled after the Minnesota Rules of Professional Conduct." *Id.* at ¶ 11. While there are surely similarities between this proposal and Minnesota's language, Minnesota's "reflects adversely" provision is materially narrower. It prohibits "a discriminatory act . . . that reflects adversely on the lawyer's fitness as a lawyer," but only when that act is "prohibited by federal, state, or local statute or ordinance."[59] The language proposed here includes no such similar limitation.

A review of the other States that have supposedly enacted similar provisions reveals that they too are much narrower than the language proposed here. Alaska's rule is limited to conduct that occurs "during the lawyer's professional relations" with

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[58] *Discrimination*, Black's Law Dictionary (11th ed. 2019).

[59] Minnesota Rules of Professional Conduct, Rule 8.4(h) Misconduct, https://www.revisor.mn.gov/court_rules/pr/subtype/cond/id/8.4/.

specified individuals who participate in the judicial process.[60] California's rule similarly applies only when the lawyer is "representing a client" or taking actions in "relation to a law firm's operations," and only when the lawyer engages in harassment, discrimination, or retaliation that is "unlawful[]."[61] And Illinois's rule bans conduct only if it "violate[s] a federal, state or local statute or ordinance that prohibits discrimination" and "reflects adversely on the lawyer's fitness as a lawyer."[62] In contrast, the rule proposed here (1) fails to connect harassment and discrimination to unlawful conduct or any existing legal standard and (2) covers speech and conduct that is not even connected to a lawyer's professional activities. The proposed language is, simply put, an outlier. Nebraskan attorneys should not be held to such a sweeping standard imposing onerous restrictions on their constitutional liberties.

Conclusion

We reiterate that discriminatory treatment of individuals has no place within the practice of law. But the proposed rule reaches far beyond that. If adopted, it would transform the Rules of Professional Conduct from the means for regulating legal practice to a tool for policing lawyers' speech in countless context far outside the practice of law. And its practical effect would be to chill a substantial amount of constitutionally protected activity. Conscientious attorneys seeking to avoid the risk of professional discipline would be forced to censor their speech and expressive associations, particularly as they involve hotly debated issues of public importance. Rules governing lawyers should be a model for protecting—not infringing—constitutional rights. This proposal falls short of that standard. We encourage the Court to reject it.

Sincerely,

Douglas J. Peterson
Attorney General
James A. Campbell
Solicitor General

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[60] Alaska Rules of Professional Conduct, Rule 8.4(f) Misconduct, https://casetext.com/rule/alaska-court-rules/alaska-rules-of-professional-conduct/maintaining-the-integrity-of-the-profession/rule-84-misconduct.

[61] California Rules of Professional Conduct, Rule 8.4.1(a)–(b) Prohibited Discrimination, Harassment and Retaliation, https://www.calbar.ca.gov/Portals/0/documents/rules/Rule_8.4.1-Exec_Summary-Redline.pdf.

[62] Illinois Rules of Professional Conduct, Rule 8.4(j) Misconduct, https://casetext.com/rule/illinois-court-rules/illinois-supreme-court-rules/article-viii-illinois-rules-of-professional-conduct-of-2010/rule-84-misconduct#:~:text=%5B1%5D%20Lawyers%20are%20subject%20to,so%20on%20the%20lawyer's%20behalf.