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NCLA Advises Supreme Court to Hear Case Against PA Ethics Rule’s Viewpoint-Based Discrimination

Zachary Greenberg v. Jerry M. Lehocky, in His Official Capacity as Board Chair of the Disciplinary Board of the Supreme Court of Pennsylvania, et al.

Washington, DC (March 4, 2024) – Late Friday, the New Civil Liberties Alliance filed an *amicus curiae* [brief](#) in *Greenberg v. Lehocky*, asking the Supreme Court to hear this important First Amendment case. NCLA’s brief encourages the Court to recognize that lawyers whose speech is chilled by Rule 8.4(g) of Pennsylvania’s Rules of Professional Conduct have standing to bring a pre-enforcement challenge. The Rule exposes attorneys to discipline—including sanctions that threaten their livelihoods—if the state bar decides their speech “constitut[es] harassment or discrimination” with respect to certain viewpoints whether in the practice of law or related thereto. A district court struck the Rule down, but the U.S. Court of Appeals for the Third Circuit reversed that decision, incorrectly contending that lawyer and law educator Zachary Greenberg lacked standing to challenge the Rule. NCLA’s brief is supporting Mr. Greenberg’s petition for a *writ of certiorari* from the U.S. Supreme Court.

Imposed by the Disciplinary Board of the Supreme Court of Pennsylvania, Rule 8.4(g) prohibits speech that expresses disparaging views of another person based on any of 11 listed characteristics. It permits laudatory comments on the same bases. Hence, Mr. Greenberg filed suit shortly before the Rule was scheduled to take effect in December 2020, alleging it violates the First Amendment by imposing content- and viewpoint-based speech restrictions, and is void for vagueness. In March 2022, the district court permanently enjoined a revised but essentially identical speech-restricting Rule, correctly holding that it would unlawfully chill Mr. Greenberg’s speech.

Eschewing the merits, the Third Circuit subsequently decided Mr. Greenberg lacked standing to challenge Rule 8.4(g). The Rule was revised in the middle of litigation, and he had received nonbinding, personal assurance that the Board would not discipline him for the speech used in his CLE courses. The Third Circuit’s decision freed the Board from its heavy burden of proving the case was moot, instead forcing Mr. Greenberg to reestablish standing. Thus shifting the appellant’s mootness burden to the appellee is not supported in law and encourages government gamesmanship. Greenberg’s allegations of chilled speech and content-and viewpoint-discrimination properly established his initial standing to sue under the relaxed standard the Supreme Court and other federal courts use to determine if a free speech claimant’s alleged injury supports standing. It was improper to revisit the question.

The Third Circuit’s erroneous decision could prevent pre-enforcement challenges to the Rule by allowing Defendants to purport to exempt anyone who threatened to sue, while leaving the Rule in place to chill everyone else’s speech. That approach jeopardizes the protection of free expression for many thousands of attorneys subject to similar state bar-adopted rules across the country. Rule 8.4(g) clearly engages in viewpoint- and content-based discrimination restricting the speech of attorneys, so it must be subject to normal First Amendment standing analysis. NCLA trusts the Justices will recognize the dangerous speech-suppressing precedent the Third Circuit set and restore Mr. Greenberg’s standing to protect his First Amendment liberties of speech and free expression.

NCLA released the following statements:

“The hasty mid-litigation amendment to Rule 8.4 and the non-binding assurances of a temporary bar official that Mr. Greenberg would not be prosecuted were obvious ploys to derail Mr. Greenberg’s successful challenge to the unconstitutional Rule. The Supreme Court should grant certiorari and put an end to the Pennsylvania bar’s unseemly gamesmanship that allows government officials to evade the Constitution.”

— **Peggy Little, Senior Litigation Counsel, NCLA**

“The First Amendment protects attorneys’ speech just as much as everyone else’s. The district court properly struck down this content- and viewpoint-discriminatory rule, and the Third Circuit’s standing gymnastics were not consistent with how standing and mootness ought to be analyzed on appeal. The Supreme Court should take this case, reverse the holding below on standing, and send it back to the Third Circuit for a ruling on the merits.”

— **Mark Chenoweth, President, NCLA**

For more information visit the *amicus* page [here](#).

ABOUT NCLA

[NCLA](#) is a nonpartisan, nonprofit civil rights group founded by prominent legal scholar [Philip Hamburger](#) to protect constitutional freedoms from violations by the Administrative State. NCLA’s public-interest litigation and other pro bono advocacy strive to tame the unlawful power of state and federal agencies and to foster a new civil liberties movement that will help restore Americans’ fundamental rights.

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