FIRST LIBERTY

January 13, 2024

Clerk
D.C. Court of Appeals
430 E. Street, N.W.,
Washington, D.C. 20001

Submitted Electronically

Re: First Liberty Institute Comment Opposing D.C. Proposed Rule 8.4(h).

Dear Judges on the D.C. Court of Appeals:

First Liberty Institute submits this comment regarding the D.C. Court of Appeal's announcement on November 13, 2024, affording interested parties an opportunity to submit public comment concerning the D.C. Bar's proposed Rule 8.4(h).

First Liberty is a nonprofit, public interest law firm whose mission is to defend religious liberty for all Americans through pro bono legal representation of individuals and institutions of diverse faiths—Catholic, Protestant, Islamic, Jewish, Buddhist, the Falun Gong, Native American religious practitioners, and others. For over thirty years, First Liberty attorneys have worked to defend religious freedom before the courts, including the U.S. Supreme Court, as well as by testifying before Congress, and by advising federal, state, and local officials about constitutional and statutory protections for religious liberty. First Liberty represents individuals who, because of their religious beliefs, have faced discriminatory treatment.

First Liberty opposes the Committee's proposed amendment of D.C. Rule 8.4(h). The First Amendment protects unpopular viewpoints. But for its protections to carry real meaning for non-lawyers, those protections must extend to lawyers who represent unpopular clients. Despite its framing as a rule of professional decorum, D.C's modified Rule 8.4(h) will negatively affect religious attorneys by chilling their speech, deterring zealous representation of faith-based clients and pro bono clients, and adding unnecessary risk to community service opportunities. This Committee should decline to adopt Rule 8.4(h) and ensure that First Amendment protections apply to attorneys, including religious attorneys who work to extend those same protections to their clients regardless of background, income, or social standing.

Background

In 2016, the American Bar Association (ABA) added new paragraph (g) to ABA Model Rule of Professional Conduct 8.4. This rule prohibited lawyers related to the practice of law from harassing or discriminating against members of specific groups. In 2016, the Rules Review Committee began considering whether the D.C. Rules should be amended to adopt a rule similar to ABA Model Rule 8.4(h).[1]

In 2019, the Committee submitted a proposal to adopt ABA Model Rule 8.4(h) as revised D.C. Rule 9.1. Given the comments received in response, the Committee revised its proposal.[2]

In November 2024, the District of Columbia Court of Appeals began considering whether to adopt the Bar's recommendation. We oppose the Committee's proposal to adopt Rule 8.4(h).

Argument

I. D.C.'s modified Rule 8.4(h) disproportionately chills the constitutional rights of religious attorneys.

A. Rule 8.4(h) censors the speech of religious attorneys.

The Supreme Court has long held that government officials may not prevent citizens from speaking religious messages or compel them to speak messages that violate their sincere religious beliefs. *See W.Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."). Government officials may not condition a public benefit on affirming or abjuring a specific set of beliefs or policy statements. *See Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 218 (2013) ("By requiring recipients to profess a specific belief, the Policy Requirement goes beyond defining the limits of the federally funded program to defining the recipient."). Simply put, compelling individuals to mouth support for views they find objectionable violates the Free Speech Clause. *See Janus v. Am. Fed'n of State, Cty., & Mun. Emp., Council 31*, 138 S. Ct. 2448, 2463 (2018).

These protections are even more robust when religious speech is implicated. As the Supreme Court recently held in *Kennedy v. Bremerton School District*, the Free

[1] District of Columbia Court of Appeals Letter, https://www.dcbar.org/getmedia/a7a108af-2008-4d75-b2bc-2213d9db4479/Notice-Rule-8-4, p. 3.

[2] *Id.* at 4.

Exercise and Free Speech Clauses "work in tandem." 142 S. Ct. 2407, 2421 (2022). "Where the Free Exercise Clause protects religious exercises, whether communicative or not, the Free Speech Clause provides overlapping protection for expressive religious activities." *Id.* This double protection for religious speech is "no accident," because "'government suppression of speech has so commonly been directed *precisely* at religious speech that a free-speech clause without religion would be Hamlet without the prince.'" *Id.* (quoting *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995) (emphasis in original)).

By participating in the legal profession, attorneys do not forfeit the First Amendment's protections. The Supreme Court has long held that "disciplinary rules governing the legal profession cannot punish activity protected by the First Amendment." *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1054 (1991). In *National Institute of Family & Life Advocates ("NIFLA") v. Becerra,* the Court made clear that "governments have no power to restrict expression because of its message, its ideas, its subject matter, or its content." 138 S. Ct. 2361, 2371 (2018) (internal citations omitted). The Court held that the First Amendment protects professional speech, including attorney speech, when the government seeks to regulate its content. *Id.* at 2374. The only instances when professional speech receives less protection are when laws require disclosure of "factual, noncontroversial information," or when laws seek to regulate professional conduct rather than speech. *Id.* at 2372. The Court repeatedly mentioned lawyers as professionals deserving First Amendment protection, "appl[ying] strict scrutiny to content-based laws that regulate the noncommercial speech of lawyers." *Id.* at 2374 (citing *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 167 (2015); *NAACP v. Button,* 371 U.S. 415, 438-39 (1963); and *In re Primus,* 436 U.S. 412, 432 (1978)). The Court acknowledged that professionals often disagree about important issues affecting their duties; for example, "lawyers and marriage counselors might disagree about the prudence of prenuptial agreements or the wisdom of divorce." *Id.* at 2375. The Court concluded that "the people lose when the government is the one deciding which ideas should prevail." *Id.* Explicitly rejecting that notion that the professional-speech doctrine removes First Amendment protections from lawyers merely because States have imposed a licensing requirement, the Court made clear that "States cannot choose the protection that speech receives under the First Amendment, as that would give them a powerful tool to impose 'invidious discrimination of disfavored subjects.'" *Id.* (quoting *Cincinnati v. Discovery Network, Inc.,* 507 U.S. 410, 423- 24, n.19 (1993)).

Here, Rule 8.4(h) triggers strict scrutiny under the Free Speech Clause because it regulates speech based on content and viewpoint, and the First Amendment protects attorneys in both instances. Neither of the narrow exemptions the *NIFLA* Court identified applies here. Furthermore, because many lawyers hold sincere religious beliefs that inform their viewpoints and client interactions, including beliefs about marriage, gender identity, and human life, the Rule also impinges on attorneys' free exercise rights. Given that the Free Speech Clause and Free Exercise Clause

provide overlapping protection for religious speech, *Kennedy*, 142 S. Ct. at 2421, the Rule violates both clauses by impermissibly discriminating against religious viewpoints on issues of public concern, such as marriage and gender identity. As the Supreme Court recognized in both *Barnette* and *NIFLA*, society benefits when diverse viewpoints are welcomed rather than stamped out by the government. Religious attorneys offer a particularly valuable perspective by drawing from the moral and ethical norms inherent in their own traditions. "It may be a theological teaching that convinces an attorney that a professional ethical standard is incomplete, and the attorney may be right." Leslie Griffin, *The Relevance of Religion to a Lawyer's Work: Legal Ethics*, 66 FORDHAM L. REV. 1253, 1261 (1998). Furthermore, "[t]he legal profession needs criticism to improve its own standards," and "from their own tradition, religious adherents may gain the insight and the wisdom to know that an ethical standard is deficient." *Id.* Instead of acknowledging the value that diverse religious viewpoints can bring to the legal profession, Rule 8.4(h) short-circuits them by censoring religious speech on important matters of public concern.

B. Rule 8.4(h) deters lawyers from zealously representing faith-based and other pro-bono clients.

If enforced, Rule 8.4(h) will curtail pro bono legal work. ABA Model Rule 6.1 requires lawyers to provide legal services to those unable to pay, suggesting that lawyers provide a "substantial majority" of their pro bono hours to such places as "charitable" or "religious" organizations." ABA Model Rule 6.1(a)(2). Religious attorneys are often more inclined to engage in pro bono work because their faith motivates them to serve underprivileged communities free of charge. *See, e.g.,* Griffin, *supra*, at 1257 ("[R]eligion will influence some to spend their legal careers in service of the poor and others to resist the material pressures of the profession[.]"). For example, a large network of Christian legal aid clinics provide pro bono legal services, prayer, and holistic support to those who cannot afford legal assistance.[3] However, because Rule 8.4(h) applies to the "practice of law," which includes pro bono work, it would infringe on attorneys' ability to provide pro bono assistance that aligns with their religious and philanthropic missions. Many legal aid organizations focus on specific populations; for example, Mil Mujeres serves Hispanic clients facing domestic violence,[4] Kids In Need of Legal Defense serves immigrant children only,[5] and the Tahiri Justice Center was founded on Baha'i faith principles and serves immigrant women and girls facing violence.[6] Under Rule 8.4(h), these clinics and the attorneys

[3] *See, e.g.,* Clinic Directory, Christian Legal Aid, https://perma.cc/G3XP-VCWC (listing 65 pro bono clinics by state).

[4] Mil Mujeres Legal Services (2020), https://perma.cc/3QNF-6TSS.

[5] Kids In Need of Defense (2022), https://perma.cc/DK7E-6UU4.

[6] Tahirih Justice Center (2022), https://perma.cc/V3KP-KFQH.

serving them could be charged with "discriminating" on the basis of religion, sex, national origin, or age.

For the millions of Americans whose faith serves an important role in their daily lives,[7] Rule 8.4(h) would especially harm their religious communities by decreasing access to quality legal representation. Because this Rule expressly includes "sex, . . . sexual orientation, gender identity, [and] marital status," it raises concerns for attorneys who represent religious clients or organizations. Regardless of the attorney's own religious affiliation (or lack thereof), the Rule would have a chilling effect on the attorney's ability to zealously represent a faith-based client because the attorney could be disciplined for "discrimination" in that client representation. In *Obergefell v. Hodges*, the Supreme Court emphasized that "religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned," and it encouraged "an open and searching debate" on the issue. 135 S. Ct. 2584, 2607 (2015). But Rule 8.4(h) will stifle those efforts because "[i]f an individual takes an action based on a sincerely held religious belief and is sued for doing so, an attorney may be unwilling to represent that client in court for fear of being accused of discrimination." Tex. Att'y Gen. Op. KP-0123 (Dec. 20, 2016).

At a cultural moment when controversy about abortion, gender identity, and marriage runs high, it is crucial to recognize how many diverse religious groups have long held sincere beliefs about these issues. At least 20 different faith groups believe that sex is biological and cannot or should not be changed to conform with perceived gender identity. These include Christian denominations such as the Amish community, Assemblies of God, and the Orthodox Church, but they also include minority faith groups such as Buddhism, Confucianism, the Falun Gong, Jehovah's Witnesses, and Shi'ah and Sunni Muslims.[8] These groups often face religious discrimination due to cultural prejudice or a lack of understanding by government officials, and thus it is especially important that they receive high quality, affordable legal counsel. Similarly, at least 13 different faith groups—including Hindus, Navajos, and Zoroastrians as well as Catholics and Protestants—believe that abortion is morally wrong because human life is sacred.[9]

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[7] According to the Pew Research Center, 53% of Americans reported that their religion is "very important in their daily life." Of this group, 73% believe that abortion should be illegal in all or most cases, and 76% oppose same-sex marriage. "Importance of religion in one's life," *Religious Landscape Study*, PEW RESEARCH CENTER (2014), https://perma.cc/BP9L-5NR9.

[8] *See, e.g.*, First Liberty Institute, *Public Comment on Section 1557 NPRM* (Oct. 3, 2022), at 4-9, https://perma.cc/97NU-VCMZ (detailing religious beliefs of 20 different faith groups on sex and gender).

[9] *See, e.g.,* Kiarash Aramesh, *Perspectives of Hinduism and Zoroastrianism on abortion: a comparative study between two pro-life ancient sisters*, J. MED. ETHICS HIST. 12:9 (2019); *EXC, Inc. v Kayenta District Court*, No. SC-CV-07-10 (Navajo Nation Supreme Court, Sept. 10, 2010).

Since religious clients and organizations act according to their sincerely held beliefs protected by the First Amendment, their attorneys must respect these beliefs in order to provide effective and zealous advocacy and representation under the Rules. For example, many faith-based homeless shelters such as the Downtown Hope Center in Anchorage, Alaska, have sex-segregated facilities or admit only biological females because they care for women who have experienced domestic violence. When the Hope Center was sued by a transgender plaintiff for allegedly violating a local nondiscrimination policy, Christian attorneys represented the Center in court. *Downtown Soup Kitchen v. Mun. of Anchorage*, 576 F. Supp. 3d 636 (D. Alaska 2021). When one of the attorneys zealously defended his client's religious liberty, the Anchorage Equal Rights Commission brought charges *against his firm*, in addition to his client, for violating local "non-discrimination" ordinances. *Pamela Basler v. Downtown Hope Center, and Brena, Bell & Clarkson, P.C.*, No. 18-167 (AERC filed May 15, 2018). This action violated the First Amendment rights of both attorney and client and unlawfully interfered with the attorney-client relationship.

As a nonprofit legal organization representing pro bono clients of all faiths, First Liberty Institute currently represents and has represented multiple clients who were wrongfully accused of discrimination because of their religious beliefs. Enforcing Rule 8.4(h) against First Liberty attorneys may compromise their representation, as they would be forced to choose between zealously advocating for their client's rights and facing bar discipline. Below are a few representative examples:

- Melissa Klein, a devout Christian, was accused of violating a local non-discrimination ordinance when she declined to create a custom cake for a same-sex wedding because it conveyed a message that would violate her Christian beliefs. State officials issued a $135,000 fine that bankrupted her family. First Liberty filed a petition of certiorari to the Supreme Court. *Klein v. Or. Bureau of Lab. & Indus.*, No. 22-204 (*petition for cert. filed* Sept. 2, 2022).
- Robyn Strader is a Baptist nurse practitioner whose religious beliefs prevent her from prescribing contraceptives, including abortifacient or sterilizing drugs. CVS refused to grant her a religious accommodation and fired her instead. First Liberty represented her in litigation.
- Lacey Smith and Marli Brown are Christian flight attendants who were fired for asking respectful questions about Alaska Airlines' open support for the Equality Act. First Liberty filed a lawsuit in federal court on their behalf in May 2022. *Marli Brown & Lacey Smith v. Alaska Airlines, Inc., et al.*, No. 2:22-cv-668 (W.D. Wash. filed May 17, 2022).
- Dr. Eric Walsh is a devout Seventh-Day Adventist who is an expert in public health in addition to his pastoral ministry. After Georgia hired him as a district health director, they listened to recordings of his sermons and fired him because of their religious content. After more than a year of litigation, Georgia agreed to pay Dr. Walsh $225,000 to remedy its religious discrimination. *Eric*

Walsh v. Georgia Dep't of Public Health, et al., No. 1:16-cv-01278 (N.D. Ga. dismissed Feb. 15, 2017).

- U.S. Air Force Colonel Bohannon, despite twenty years of decorated military service, was accused of unlawful discrimination by Air Force investigators because he requested a religious accommodation from signing a same-sex spouse appreciation certificate due to his Christian beliefs. First Liberty appealed to the Secretary of the Air Force, and his record was cleared.
- U.S Navy Chaplain Wes Modder, a decorated veteran and former chaplain for Navy SEAL Team Six, was disciplined by the Navy for answering questions about his church's teachings on marriage in private counseling sessions. He nearly lost his job, pension, and retirement benefits. After First Liberty stepped in, Chaplain Modder was exonerated.
- U.S. Army Chaplain Scott Squires was threatened with disciplinary action for declining to conduct a marriage retreat with same-sex couples, because of his denomination's religious doctrine. First Liberty's letters to the Army resulted in his eventual exoneration.

In each of these cases, religious individuals were targeted because of their sincerely held beliefs regarding gender, sexuality, human life, and marriage, which came into perceived conflict with prevailing "non-discrimination" policies in their localities or workplaces. Without zealous pro bono legal representation, these clients would have had no remedy for the discrimination they faced because of their beliefs.

The First Amendment has always protected unpopular viewpoints, *see Vill. of Skokie v. Nat'l Socialist Party of Am.*, 373 N.E.2d 21, 23 (Ill. 1978), and provides extra protection for religious viewpoints under both the Free Speech and Free Exercise Clauses. *Kennedy*, 142 S. Ct. at 2421. This protection must extend to attorneys who represent religious or unpopular clients, or else their clients' ability to seek justice will be permanently curtailed.

C. Rule 8.4(h) deters lawyers from serving religious organizations.

The restraints Rule 8.4(h) places on religious lawyers extend beyond direct client representation. Many religious lawyers provide legal-related services to their communities, which hug the line between formal legal representation (covered by Rule 8.4(h)) and purely private conduct (not covered by Rule 8.4(h)). For instance, Rule 8.4(h) might prevent a lawyer from:

- Providing financial guidance to his synagogue;
- Serving on the board of her local nonprofit pregnancy resource center, which involves speech about abortion;
- Writing a wedding policy for her church while serving as the deaconess of weddings;

- Helping his mosque navigate local zoning codes;
- Sitting on the board of a religious fraternity or sorority;
- Advocating in social justice organizations; or
- Testifying before a legislative body about a matter of public interest.

The question then is whether these attorneys are engaging in the practice of law or whether this is permissible private conduct. Attorneys should not have to constantly fear disciplinary action when their conduct and community service efforts do not neatly fit into one of the categories outlined in the Comments.

II. Rule 8.4(h) is a mechanism for the government to limit ideological and religious viewpoints.

A. Rule 8.4(h) restricts ideologically oriented CLEs.

Although DC does not, most jurisdictions require attorneys to regularly complete continuing legal education ("CLE") "[t]o maintain public confidence in the legal profession and the rule of law, and to promote the fair administration of justice." ABA Model R.C.L.E. pmbl. To do so, attorneys must be able to learn and freely debate matters of public concern. Indeed, attorneys should be among society's most well-spoken advocates on both sides of hot-button political and social issues; "[t]o cut lawyers on one side of these issues out of the conversation undermines the role of the lawyer in the system of justice." Margaret Tarkington, *Reckless Abandon: The Shadow of Model Rule 8.4(g) and a Path Forward*, 95 ST. JOHN'S L. REV. 121, 147 (2022).

But Rule 8.4(h) would do just that, thwarting robust debate as the legal profession develops. Comment 5 defines "conduct with respect to the practice of law" to include "participating in bar association events and work-related social functions."[10] This rule could effectively prohibit CLEs that do not align with the bar's ideologies. It bars attorneys and judges from discussing religious viewpoints on issues of public concern like marriage and gender identity in these forums. This effectively narrows legal education to only certain non-religious viewpoints.

The negative effects of enforcing Rule 8.4(h) would be widespread. For instance, organizations like the Federalist Society and the Christian Legal Society host annual conferences where thousands of attorneys across the country obtain CLE credits.[11] While these seminars are open to all and include diverse viewpoints, they

[10] District of Columbia Court of Appeals Letter, https://www.dcbar.org/getmedia/a7a108af-2008-4d75-b2bc-2213d9db4479/Notice-Rule-8-4, p. 62.

[11] *See, e.g.,* "About Us," *The Federalist Society* (2022), https://perma.cc/9NND- L2EJ (As an organization with about 65,000 members, including judges, attorneys, and law students, "the Society's main purpose is to sponsor fair, serious, and open debate about the need to enhance individual

can present from religious, traditional, or other ideological perspectives. Panelists discuss often present religious viewpoints on current legal issues. But Rule 8.4(h) would deter attorneys from speaking on these panels, or receiving credit for attending, if the Board disagrees with the viewpoints presented.

The First Amendment still protects the viewpoints of speakers presenting on a substantive legal topic. For instance, in an approved CLE on criminal justice reform, the bar could not discipline a speaker for opining that imposing longer sentences would decrease crime rates. Neither could the bar discipline another speaker for suggesting that implementing policies to expand post-incarceration job opportunities would be more effective than imposing harsher sentences. Those viewpoints are protected by the First Amendment, and "[s]ilencing lawyers from expressing their opinions on these issues—especially to other lawyers at law-related functions, CLEs, law school presentations, and conferences—will forestall the wheels of political change; it will silence much-needed conversation and accommodation across the aisle of political divide." Tarkington, *supra*, at 147.

Furthermore, the legal profession needs ideological diversity to thrive. Attorneys, as the "very people who are necessary to consider and implement political change," are on the front lines of speech and debate on matters of public concern and must be free to deliberate these issues from multiple perspectives. Tarkington, *supra*, at 147. Rule 8.4(h) attempts to restrain speech on the very issues that currently generate the most disagreement, such as abortion and the interaction between LGBTQ rights and religious liberty. It removes religious and conservative viewpoints from these debates and inhibits lawyers from educating one another on critical legal issues. Preventing lawyers from openly discussing matters of public concern in the exact forums intended to foster education and development does not protect against harassment and discrimination. On the contrary, it is an attempt to phase out religious and conservative ideologies in legal practice. Thus, application of Rule 8.4(h) will only serve to stifle development of the law and of the profession.

Moreover, these speech restrictions already extend beyond the legal profession. Many other professionals including doctors, accountants, and teachers must complete regular continued learning requirements. If the bar can prevent lawyers from debating and discussing matters of public concern, other professions will increasingly restrict their members from discussing these important issues in similar forums. For example, Christian physician assistant Valerie Kloosterman was fired by University of Michigan Health–West after 17 years of exemplary patient service, because she requested a religious accommodation from mandatory training that required her to

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freedom"); "About Us," *Christian Legal Society* (2022), https://perma.cc/Z436-FSK3 (describing CLS's mission as "inspiring, encouraging, and equipping Christian attorneys and law students, both individually and in community, to proclaim, love, and serve Jesus Christ through the study and practice of law, through the provision of legal assistance to the poor and needy, and through the defense of the inalienable rights to life and religious freedom").

affirm statements about gender that violated her conscience. If she did not complete the training, she could be terminated, so she asked the hospital's Department of Diversity, Equity, and Inclusion for an accommodation. Instead of granting one, University of Michigan Health–West officials called her "evil" and a "liar," told her she was contributing to gender-dysphoria-related suicides by declining to use biology-obscuring pronouns, and terminated her. *Kloosterman v. Metropolitan Hospital, et al.*, No. 1:22-cv-00944, Complaint, ECF No. 1 (W.D. Mich. filed Oct. 11, 2022). Not only does such hostility violate the Free Exercise Clause, but University of Michigan Health–West's actions also violate the Supreme Court's clear holding that "when the government polices the content of professional speech, it can fail 'to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail.'" *NIFLA*, 138 S. Ct. at 2374-75 (quoting *McCullen v. Coakley*, 573 U.S. 464, 476 (2014)). Content-based regulations are especially dangerous "in the fields of medicine and public health, where information can save lives,'" as "[d]octors help patients make deeply personal decisions" where "their candor is crucial." *NIFLA*, 138 S.Ct. at 2374 (internal citations omitted). Candor is also crucial in the attorney-client relationship, and the government cannot—and should not—attempt to police the content of those conversations.

In sum, the Supreme Court has made clear that states do not have "unfettered power to reduce a group's First Amendment rights by simply imposing a licensing requirement." *NIFLA*, 138 S. Ct. at 2375. Lawyers and other professionals do not check their First Amendment rights at the door when they enter professional practice. *Id.* It is critical that Rule 8.4(h) remain enjoined, lest it become the government's model for silencing religious and conservative viewpoints in other professions.

B. Rule 8.4(h)'s circularity is a vehicle for viewpoint discrimination.

Rule 8.4(h) is also void-for-vagueness under the Fourteenth Amendment. A statute is void for vagueness if its "prohibitions are not clearly defined." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). "Vague laws offend several important values"; (1) they "may trap the innocent by not providing fair warning," (2) they lead to "arbitrary and discriminatory enforcement," and (3) in "sensitive areas of basic First Amendment freedoms, vague laws operat[e] to inhibit the exercise of those freedoms." *Id.* at 108-09 (internal citations omitted). Rule 8.4(h)'s vagueness empowers the Board to define the standards and discriminatorily enforce them. First, the Board must determine whether the words or conduct at issue are "in the practice of law." Furthermore, Rule 8.4(h) states that it "does not preclude providing legitimate advice or engaging in legitimate advocacy *consistent with these rules*." It is unclear whether this means that to be consistent with the other Rules, advice or advocacy must also be consistent with Rule 8.4(h). Legitimate advice or advocacy that is consistent with all of the other D.C. Rules might still run afoul of Rule 8.4(h). Thus,

the admonition is circular: speech is authorized by Rule 8.4(h) if it is authorized by Rule 8.4(h). *The Pitfalls in the New ABA Model Rule 8.4(g)*, CHRISTIAN LEGAL SOCIETY (Feb. 2017), at 8, https://perma.cc/BF6F-E62F. This circular framework, combined with its utterly vague terms, creates a confusing, chilling effect and violates the Fourteenth Amendment on vagueness grounds.

The only way to enforce such a vague and circular rule is through complaints that draw attention to potential violations. In *DeJohn v. Temple University*, the Third Circuit examined a public university's harassment policy that used similarly vague terminology. The Court held it unconstitutional. "[T]he policy's use of 'hostile,' 'offensive,' and 'gender-motivated' is, on its face, sufficiently broad and subjective that they 'could conceivably be applied to cover any speech' of a 'gender-motivated' nature 'the content of which offends someone.'" *DeJohn*, 537 F.3d at 317.

In *NIFLA*, the Court made clear that the First Amendment protects professional speech when the government tries to regulate its content. 138 S. Ct. at 2374-75 ("States cannot choose the protection that speech receives under the First Amendment, as that would give them a powerful tool to impose 'invidious discrimination of disfavored subjects.'" (quoting *Cincinnati*, 507 U.S. at 423-24)). That is precisely the problem with Rule 8.4(h). Its circularity and vagueness will allow the Board to censor religious and conservative viewpoints. The First and Fourteenth Amendments prohibit such censorship, and thus Rule 8.4(h) is unconstitutional.

Today's legal profession is by no means flawless. Yet its character and quality can only improve if devout attorneys from diverse religious backgrounds are free to serve their clients and communities without fear of Board discipline, and if attorneys with unorthodox viewpoints can freely debate matters of public concern. In short, the protections of the First Amendment must extend to attorneys too, if our society is ever to experience "mutual respect and tolerance, not censorship and suppression, for religious and nonreligious views alike." *Kennedy*, 142 S. Ct. at 2416.

Conclusion

For the foregoing reasons, the Court should not abandon important religious liberty protections and should reject DC Rule 8.4(h).

Sincerely,

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FIRST LIBERTY INSTITUTE