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N6777 Hilltop Drive
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February 20, 2023

Clerk of the Supreme Court
Attention: Deputy Clerk - Rules
P. O. Box 1688
Madison, Wisconsin 53701-1688
clerk@wicourts.gov

Dear Justices of the Wisconsin Supreme Court:

RE: Rule Petition 22-02, In the Matter of the Amendment of Supreme Court Rule SCR 20:8.4

The undersigned attorney licensed to practice law in Wisconsin respectfully submits to the Wisconsin Supreme Court the enclosed decision of the Idaho Supreme Court regarding American Bar Association Model Rule of Professional Conduct 8.4(g). The Idaho Supreme Court declined to adopt the Model Rule. That decision was published on January 20, 2023.

I ask that you kindly add the Idaho Supreme Court decision to the file of Wisconsin Rule Petition 22-02. Thank you.

Very truly yours,

Donald Cayen

Donald Cayen
Wisconsin State Bar No. 1000139

Enc.

***In re* Idaho State Bar Resolution 21-01**

January 20, 2023

PER CURIAM.

I. INTRODUCTION

In November 2021, the Idaho State Bar Commissioners ("ISB" or "the Bar") submitted proposed Resolution 21-01 for consideration by the Bar's members. The resolution "recommend[ed] Idaho Rule of Professional Conduct 8.4 be amended to include anti-discrimination and anti-harassment provisions." This resolution was voted on by eligible members of the Bar and passed by a margin of 680 to 329. After the resolution was passed, the Bar recommended to the Idaho Supreme Court that this Court adopt the resolution and amend the Idaho Rules of Professional Conduct. We decline to do so.

We acknowledge that a full explanation of our rejection of the resolution is an unusual response. However, we think it appropriate to explain our decision in some detail to explain our rationale for taking the action we are in order to provide guidance going forward in the event the Bar should seek to amend Idaho Rule of Professional Conduct 8.4 in the future. We commend the Bar's continued attempts to address unlawful discrimination and harassment in the legal profession. However, we feel obliged to reject the proposed resolution for the reasons discussed below.

The resolution passed by the Bar recommended that Idaho Rule of Professional Conduct 8.4 be amended as follows (proposed amendments are in bold lettering):

> It is professional misconduct for a lawyer to:
>
> (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
>
> (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
>
> (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
>
> (d) engage in conduct that is prejudicial to the administration of justice;
>
> (e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law; ~~or~~
>
> (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law; **or**~~.~~
>
> **(g) engage in discrimination or harassment, as follows:**

(1) in representing a client or operating or managing a law practice or in the course and scope of employment in a law practice, engage in conduct that the lawyer knows or reasonably should know is unlawful discrimination. This subsection does not limit the ability of a lawyer to accept, decline, or withdraw from a representation as otherwise permitted in these Rules or preclude advice or advocacy consistent with these Rules; and

(2) in representing a client or operating or managing a law practice or in the course and scope of employment in a law practice, engage in conduct that the lawyer knows or reasonably should know is harassment. Harassment is derogatory or demeaning verbal, written, or physical conduct toward a person based upon race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status, or socioeconomic status. To constitute a violation of this subsection, the harassment must be severe or pervasive enough to create an environment that is intimidating or hostile to a reasonable person. This subsection does not limit the ability of a lawyer to accept, decline, or withdraw from a representation as otherwise permitted in these Rules or preclude advice or advocacy consistent with these Rules.

Commentary

...

[3] **Discrimination and harassment by lawyers in violation of paragraph (g) undermine confidence in the legal profession and the legal system. Harassment includes sexual harassment such as unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal, written, or physical conduct of a sexual nature. Factors to be considered to determine whether conduct rises to the level of harassment under paragraph (g)(2) of this Rule include: the frequency of the harassing conduct; its severity; whether it is threatening or humiliating, or a mere offensive utterance; whether it is harmful to another person; or whether it unreasonably interferes with conduct related to the practice of law. Petty slights, annoyances, and isolated incidents, unless extremely serious, will not rise to the level of harassment under paragraph (g)(2). The substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (g).** ~~A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.~~[1]

[1] The stricken language is the current text of Comment 3 to I.R.P.C. 8.4.

[4] "In representing a client or operating or managing a law practice or in the course and scope of employment in a law practice" does not include participation in bar association, business, or social activities outside the context of representing a client or operating or managing a law practice or acting in the course and scope of employment in a law practice.

[5] A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule. A lawyer does not violate paragraph (g) by limiting the scope or subject matter of the lawyer's practice in accordance with these Rules and other law. A lawyer may charge and collect reasonable fees and expenses for a representation consistent with Rule 1.5(a). Lawyers should be mindful of their professional obligations under Rule 6.1 to provide legal services to those who are unable to pay, and their obligation under Rule 6.2 not to avoid appointments from a tribunal except for good cause. A lawyer's representation of a client does not constitute an endorsement by the lawyer of the client's views or activities. See Rule 1.2(b).

[46] A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of Rule 1.2(d) concerning a good faith challenge to the validity, scope, meaning or application of the law apply to challenges of legal regulation of the practice of law.

[~~5~~7] Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.

II. ANALYSIS

As an initial matter, we acknowledge that Resolution 21-01 is narrower than Resolution 17-01, the previous iteration provided to us for approval by the Bar. However, Resolution 21-01 deals with fundamental constitutional rights, and, as a result, is subject to strict scrutiny when considering whether it infringes on those constitutional rights.[2] *Reed v. Town of Gilbert*, 576 U.S. 155, 171 (2015).

A. Resolution 21-01 is more expansive in its scope than Title VII of the Civil Rights Act.

The Professionalism and Ethics section ("P&E Section") of the Idaho State Bar argues that we need not consider the constitutionality of the resolution within the framework provided by First Amendment jurisprudence because the resolution closely mirrors the language contained in Title VII of the Civil Rights Act. *See* 42 U.S.C. §§ 2000e through 2000e-17. The P&E Section asserts that the United States Supreme Court has found Title VII to be constitutional regulation of

[2] The Idaho State Bar is a creature of statute, *see* I.C. § 3-401, and is, therefore, a state actor. Additionally, Idaho Code section 3-413 requires this Court to approve all rules and regulations proposed by the Bar before they become effective.

conduct rather than speech. Because the resolution similarly takes aim at conduct creating hostile or abusive work environments, the P&E Section posits, it does not regulate speech in a manner that implicates First Amendment protections.

Title VII of the Civil Rights Act prohibits employers from discriminating against an individual "because of such individual's race, color, religion, sex, or national origin[.]" 42 U.S.C. § 2000e-2(a)(1). The United States Supreme Court held that Title VII applied to a law firm's decisions for promotion to partnership and, in doing so, rejected the law firm's argument that such an application of Title VII would unconstitutionally infringe on the First Amendment right to freedom of association: "Moreover, as we have held in another context, '[i]nvidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protections.'" *Hishon v. King & Spaulding*, 467 U.S. 69, 78 (1984) (quoting *Norwood v. Harrison*, 413 U.S. 455, 470 (1973)) (alteration in original). Eight years later, the Court cited Title VII's prohibition against sexual discrimination in employment practices as an example of a statute directed at conduct as opposed to speech. *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 389 (1992). These two decisions thus stand for the proposition that the regulation of unlawful employment practices is a permissible regulation of conduct, rather than speech.

In a 2018 decision which fell outside the realm of Title VII, the Supreme Court examined the regulation of "professional speech." *Nat'l Inst. of Family and Life Advocates v. Becerra* (*NIFLA*), 138 S. Ct. 2361, 2371 (2018). The Court noted that professional speech was not a separate category of speech that was less protected than any other type of speech: "Speech is not unprotected merely because it is uttered by 'professionals.' This Court has 'been reluctant to mark off new categories of speech for diminished constitutional protection.'" *Id.* at 2371–72 (quoting *Denver Area Ed. Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727, 804 (1996)). However, the Court then recognized two circumstances in which professional speech had been afforded reduced constitutional protection. *Id.* at 2372. First, the Court's "precedents have applied more deferential review to some laws that require professionals to disclose factual, noncontroversial information in their 'commercial speech.'" *Id.* (citing *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651 (1985)). Second, the Court noted that "states may regulate professional *conduct*, even though that conduct incidentally involves speech." *Id.* (citing *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 884

(1992), *overruled on other grounds by Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022)) (italics added).

The P&E Section claims that the resolution falls under this second category of speech identified in *NIFLA*. As a result, the ISB argues that because Resolution 21-01 attempts to regulate conduct that creates a "hostile work environment," rather than to regulate "the content of the speech that may contribute to the hostile work environment's creation[,]" it does not implicate the First Amendment. In other words, the ISB contends that because the proposed rule primarily concerns conduct, even if speech is incidentally involved in the conduct, it is constitutional.

In *NIFLA*, the Court recognized that it "has upheld regulations of professional conduct that incidentally burden speech." *Id.* However, it ultimately held that regulations that necessarily "alte[r] the content of [] speech" will constitute regulations of "speech as speech" rather than a regulation of speech as conduct. *Id.* at 2371, 2374 (internal quotation marks and citations omitted) (alterations in original). In contrast, regulations that govern "professional conduct, even though that conduct incidentally involves speech[,]" will not be subject to review under the First Amendment. *Id.* at 2372. Generally, professional speech "that is based on [] expert knowledge and judgment [or] within the confines of [the] professional relationship" will be interpreted as a restriction only on conduct. *Id.* at 2371 (internal quotation marks and citations omitted) (alterations in original). This line between professional speech and conduct is necessary to preserve an important and necessary goal—that "[p]rofessionals might have a host of good-faith disagreements, both with each other and with the government, on many topics in their respective fields." *Id.* at 2374–75.

We conclude that the language of the resolution goes beyond the regulation of employment practices and is instead a content-based regulation of speech protected by the First Amendment. As a result, it is subject to a strict scrutiny analysis. While the framework of the resolution is based on Title VII principles of unlawful discrimination and harassment, and while the resolution does regulate some conduct, the resolution also singles out certain topics for professional discipline while leaving other topics not subject to discipline. An argument similar to the P&E Section's argument was rejected by the Court in *R.A.V.*

In that case, the City of St. Paul passed a municipal ordinance that prohibited placement of symbols, objects, or other representations which one knew or had reasonable grounds to know would arouse anger, alarm, or resentment in others on the basis of race, color, creed, religion, or

gender. *R.A.V.*, 505 U.S. at 380. The City argued its regulation was an acceptable regulation of "fighting words," which the Court had previously determined was not entitled to First Amendment protection. *Id.* at 380–81. The Court rejected the City's argument and explained that "fighting words" were not entirely exempt from First Amendment protections, but instead could be regulated because of their constitutionally proscribable conduct – their intent to incite violence by another. *Id.* at 386. However, the Court further explained, "the power to proscribe [speech] on the basis of *one* content element (*e.g.*, obscenity) does not entail the power to proscribe it on the basis of *other* content elements." *Id.* at 386 (italics in original).

The Court determined the ordinance was facially unconstitutional because it applied only to fighting words that insulted or provoked violence on the basis of race, color, creed, religion, or gender. *Id.* at 391. Had the ordinance prohibited all fighting words directed at certain persons or groups, it could have been valid if it met the requirements of the Equal Protection Clause. *Id.* at 392. Instead, the ordinance regulated fighting words based on their content of "bias-motivated hatred and in particular . . . 'virulent notions of racial supremacy,'" and therefore constituted content-based regulation of speech. *Id.*

The holding in *NIFLA* implicates the resolution here, which similarly extends beyond the prohibition of unlawful employment practices to regulate speech based on its content. The Court's decision in *NIFLA* is clear that a category of speech that is subject to regulation can still violate the First Amendment if it singles out sub-categories of that speech based on its content. The resolution here does just that. While the resolution deals with unlawful employment practices, it extends beyond the unlawful employment practices to regulate conduct based on the content of speech and the messages expressed—derogatory and demeaning comments based upon race, sex, religion, identity, marital status, or socioeconomic status. As a result, we conclude that the resolution encompasses speech protected by the First Amendment and must satisfy a strict scrutiny analysis.

B. Resolution 21-01 violates the First Amendment because it is not narrowly tailored to withstand strict scrutiny.

In *NIFLA*, the Supreme Court held:

> The First Amendment, applicable to the States through the Fourteenth Amendment, prohibits laws that abridge the freedom of speech. When enforcing this prohibition, our precedents distinguish between content-based and content-neutral regulations of speech. Content-based regulations "target speech based on its communicative content." *Reed v. Town of Gilbert*, 576 U.S. [155, 162]

> (2015). As a general matter, such laws "are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Ibid.* This 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.'" *Ibid.* (quoting *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95[ ](1972)).

NIFLA, 138 S. Ct. at 2371.

The United States Supreme Court has also instructed that "'the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others[.]'" *Matal v. Tam*, 137 S. Ct. 1744, 1757 (2017). "At its most basic, the test for viewpoint discrimination is whether—within the relevant subject category—the government has singled out a subset of messages for disfavor based on the views expressed." *Id.* at 1766 (Kennedy, J., concurring in part). "We have said time and again that 'the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.'" *Id.* at 1763 (quoting *Street v. New York*, 394 U.S. 576, 592 (1969)); *see also Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 829 (1995) ("Viewpoint discrimination is thus an egregious form of content discrimination.").

The Ninth Circuit Court of Appeals has also recognized that professional speech is protected by the full force of the First Amendment. *Conant v. Walters*, 309 F.3d 629, 637 (9th Cir. 2002). "Being a member of a regulated profession does not [] result in a surrender of First Amendment rights. To the contrary, professional speech may be entitled to 'the strongest protection our Constitution has to offer.'" *Id.* (internal citations omitted). "Attorneys have rights to speak freely subject only to the government regulating with 'narrow specificity.'" *Id.* (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)). "[A] State may not, under the guise of prohibiting professional misconduct, ignore constitutional rights." *Button*, 371 U.S. at 439.

Since its adoption by the American Bar Association ("ABA") in 2016, Model Rule of Professional Conduct 8.4(g) has been adopted by only a handful of states. Wendy N. Hess, *Promoting Civility by Addressing Discrimination and Harassment: The Case for Rule 8.4(g) in South Dakota*, 65 S.D. L. REV. 233, 257 (2020). However, many states have employed their own rules of professional conduct aimed at preventing discrimination and harassment even before the Model Rule was amended. *See id.* at 257–58. There are few judicial opinions addressing the constitutionality of a rule of professional conduct based on the Model Rule. Two cases on point provide a helpful spectrum of constitutionality.

First, the United States District Court for the Eastern District of Pennsylvania heard a pre-enforcement challenge to an amendment to the Pennsylvania Rules of Professional Conduct to include a provision which is similar to Model Rule 8.4(g). *Greenberg v. Haggerty*, 491 F. Supp. 3d 12, 15–16 (E.D. Pa. 2020). The background for *Greenberg* is instructive. In 2020, the Pennsylvania Supreme Court approved the following amendment to Pennsylvania Rule of Professional Conduct 8.4:

> It is professional misconduct for a lawyer to:
>
> * * *
>
> (g) in the practice of law, by words or conduct, knowingly manifest bias or prejudice, or engage in harassment or discrimination, as those terms are defined in applicable federal, state or local statutes or ordinances, including but not limited to bias, prejudice, 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 limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude advice or advocacy consistent with these Rules.
>
> Comment:
>
> * * *
>
> [3] For the purposes of paragraph (g), conduct in the practice of law includes participation in activities that are required for a lawyer to practice law, including but not limited to continuing legal education seminars, bench bar conferences and bar association activities where legal education credits are offered.
>
> [4] The substantive law of antidiscrimination and anti-harassment statutes and case law guide application of paragraph (g) and clarify the scope of the prohibited conduct.

Id. at 16–17.

After concluding that Greenberg, a licensed Pennsylvania attorney, had standing to challenge the amendment, the U.S. District Court concluded that the amendment to the Pennsylvania Rules of Professional Conduct violated the First Amendment because it constituted a content- and viewpoint-based restriction on an attorney's speech. *Id.* at 25. The district court first concluded that professional speech, or attorney speech, "is only subject to greater regulation than speech by others in certain circumstances, none of which are present here." *Id.* at 26. Pennsylvania Rule of Professional Conduct 8.4(g) did not fall into either of those two categories—(1) commercial speech and advertising or (2) conduct that incidentally involves speech—but instead "much more broadly prohibit[ed] attorneys' speech." *Id.* at 27–28.

The district court next concluded that because the Rule sought to distinguish between favored viewpoints and disfavored viewpoints, it constituted viewpoint-based discrimination. *Id.* at 30. As such, the amendment was "subject to the 'most exacting scrutiny,' . . . because [it] 'pose[s] the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion.'" *Id.* (quoting *Startzell v. City of Philadelphia, Pennsylvania*, 533 F.3d 183, 193 (3d Cir. 2008)). In concluding that the amendment was viewpoint-based, the district court stated that "[w]hile Rule 8.4(g) restricts Pennsylvania attorneys' ability to express bias or prejudice 'based upon race, sex, gender identity or expression, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, or socioeconomic status,' it allows Pennsylvania attorneys to express tolerance or respect based on these same statuses." *Id.* at 31. As such, the district court concluded that the amendment to the rule contained "unconstitutional viewpoint discrimination in violation of the First Amendment." *Id.* at 32.

Second, and in contrast to *Greenberg*, the Supreme Court of Colorado has upheld its version of Model Rule 8.4(g), concluding that it did not violate the First Amendment. *Matter of Abrams*, 488 P.3d 1043, 1048 (Colo. 2021). In *Abrams*, an attorney was disciplined by the Colorado State Bar for calling a judge a derogatory anti-gay slur ("gay, fat, f*g") in an email to his clients. *Id.* at 1049. The attorney, Abrams, had his license suspended for three months, which suspension was stayed upon his successful completion of an eighteen-month probationary period. *Id.* at 1050. Abrams challenged the constitutionality of the rule under which he was disciplined, Colorado Rule of Professional Conduct 8.4(g), which provided:

> It is professional misconduct for a lawyer to engage in conduct, in the representation of a client, that exhibits or is intended to appeal to or engender bias against a person on account of that person's race, gender, religion, national origin, disability, age, sexual orientation, or socioeconomic status, whether that conduct is directed to other counsel, court personnel, witnesses, parties, judges, judicial officers, or any persons involved in the legal process.

Id. at 1050, 1052.

The Colorado Supreme Court first acknowledged that "attorneys are entitled to the same level of First Amendment protection as non-attorneys unless a state has a compelling interest in regulating some aspect of their speech or conduct." *Id.* at 1051 (quoting *In re Foster*, 253 P.3d 1244, 1251–52 (Colo. 2011)). The court then concluded that, "[a]lthough the Rule does prohibit some speech that would be constitutionally protected in other contexts, the Rule prohibits such

speech in furtherance of several compelling state interests." *Id.* at 1053. The compelling state interests included regulating the legal profession to protect the public and the integrity of the judicial system, eliminating expressions of bias from the legal profession, and ensuring the effective administration of justice. *Id.* Next, the Colorado Supreme Court concluded that the Rule was "narrowly tailored so that any possible unconstitutional reach of [Colorado Rule of Professional Conduct] 8.4(g) is neither real nor substantial" because it "does not extend to any speech that legitimately furthers a client's interest or relates to the advocacy of policy or political goals, no matter how controversial." *Id.* To further support its narrow tailoring, the court noted the "limited number of times that [Colorado's attorney disciplinary body] has charged violations of the Rule." *Id.* Finally, the Colorado Supreme Court concluded that the rule was neither overbroad nor vague because there was no risk of "chilling or penalizing protected speech," and because a reasonable person would find that the language at issue was "clearly proscribed by Rule 8.4(g)." *Id.* at 1053–54.

The Pennsylvania and Colorado rules differ substantively. On one end of the spectrum, Pennsylvania's rule explicitly covered "words and conduct," and applied to "participation in . . . continuing legal education seminars, bench bar conferences, and bar association activities where legal education credits are offered." *Greenberg*, 491 F. Supp. 3d at 16. The Pennsylvania rule included two comments to assist with interpretation and application of its restrictions. On the opposite end of the spectrum, Colorado's rule is much narrower. It limits the rule's scope to "conduct, in the representation of a client," that engenders bias on account of a protected status. The rule did not include any comments. *Abrams*, 488 P.3d at 1052. On this spectrum, Resolution 21-01 falls closer to the Pennsylvania rule that was struck down because it contains several flaws that call its constitutionality into doubt. Each is discussed below.

1. Resolution 21-01 is both a content- and viewpoint-based regulation of protected speech; therefore, it is subject to strict scrutiny.

First, we conclude that Resolution 21-01 constitutes a content-based restriction on speech because it "applies to particular speech because of the topic discussed or the idea or message expressed." *Reed*, 576 U.S. at 163. Resolution 21-01 favors one viewpoint over another (tolerance for a protected class of persons versus intolerance for a protected class of persons); therefore, it is also a viewpoint-based restriction. The resolution is not limited to speech directed at a person based on *that person's* protected status, but instead prohibits speech because the speech is derogatory or demeaning and the speech is based on a specified protected status.

Title VII specifically prohibits unlawful employment practices taken "because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). However, Resolution 21-01 does not specifically limit its application to individuals who are members of a protected status. Further, it is unclear from the proposed version of Rule 8.4(g) whether the P&E Section intended to limit the reach of the rule to those situations that involve members of a protected class. In other words, it is not clear whether the P&E Section intended to limit harassment and discrimination *against someone* based on that person's protected status, or if it intended to say *any* harassment based on a protected status is unlawful—*i.e.*, if one person does not fall into a protected class as defined by Title VII, but he may be offended by another's comments against a protected class.

The distinction is important. Title VII limits harassment against individuals *because of* their protected status. However, the Bar's proposed rule does not attempt to define a nexus between protected classes and harmful speech, rendering the Bar's suggested analysis under Title VII inapt.

For example, an attorney could speak favorably about same-sex marriage without running afoul of the Bar's rule, but another attorney who speaks disparagingly about same-sex marriage could potentially be engaging in misconduct. Resolution 21-01 applies to "*derogatory* or *demeaning* verbal, written, or physical conduct toward a person based upon race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status, or socioeconomic status" that is so severe and pervasive as to create an environment that is intimidating or hostile to a reasonable person. (Italics added.)

Content- and viewpoint-based regulations of speech are presumptively unconstitutional and subject to strict scrutiny. *Reed*, 576 U.S. at 171. Strict scrutiny "requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest" through the "least restrictive means." *Id.*; *McCullen v. Coakley*, 573 U.S. 464, 478 (2014). When a regulation is presumptively unconstitutional, the burden falls upon the proponent of the regulation to demonstrate its narrow tailoring. *Reed*, 576 U.S. at 171. We conclude that Resolution 21-01 is not narrowly tailored to achieve a compelling state interest.

First, we acknowledge that Idaho has an interest in regulating the legal profession to protect the public and uphold the integrity of the judicial system. Idaho also has a legitimate interest in ensuring the legal profession is free from unlawful discrimination and harassment. The Bar points

out that a recent survey of ISB members strongly indicated that a large percentage of members reported having faced either discrimination or harassment during their employment.

Regardless of whether the above-identified interests are compelling, we conclude that the Resolution is not narrowly tailored because it does not account for potentially unconstitutional issues in its efforts to curb unlawful discrimination and harassment within the legal profession. Although Resolution 21-01 is narrower than the Bar's previous attempt to modify Rule 8.4(g) in Resolution 17-01 and the ABA's Model Rule, it cannot be said that it is the least restrictive means to achieve the above-stated interests. The resolution goes beyond prohibiting conduct made unlawful by Title VII. Colorado's rule, which was upheld as narrowly tailored, is significantly narrower in scope than Resolution 21-01. *See Abrams*, 488 P.3d at 1052. Although directed toward "bias," as opposed to discrimination and harassment, the Colorado rule "does not extend to any speech that legitimately furthers a client's interest or relates to the advocacy of policy or political goals, no matter how controversial." *Id.* at 1053. Further, the Colorado rule was not found to be content- or viewpoint-based. *Id.* The same cannot be said of Resolution 21-01. Consequently, Resolution 21-01 does not survive strict scrutiny.

2. Resolution 21-01 is unconstitutionally overbroad and vague.

"Where a facial challenge is made to an ordinance on overbreadth and vagueness grounds, a court must first decide whether the ordinance 'reaches a substantial amount of constitutionally protected conduct.'" *State v. Doe*, 148 Idaho 919, 925, 231 P.3d 1016, 1022 (2010) (quoting *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 (1982)).

> If the ordinance does not reach a substantial amount of protected conduct, then the overbreadth challenge will fail. A court should then examine the ordinance on the facial vagueness challenge. The ordinance will only be found void for vagueness if it is unconstitutionally vague in all its applications. Normally, where the complaining party has engaged in conduct that is clearly prohibited by the ordinance, he cannot argue that the ordinance is vague.

Id. at 925, 231 P.3d at 1022.

a. *Resolution 21-01 is unconstitutionally overbroad.*

> An ordinance may be facially overbroad if it: (1) seeks to regulate only constitutionally protected speech; (2) impermissibly burdens innocent associations; or (3) places regulations on "the time, place, and manner of expressive or communicative conduct," particularly where the restriction "delegate[s] standardless discretionary power to local functionaries, resulting in virtually unreviewable prior restraints on First Amendment rights."

Doe, 148 Idaho at 925, 231 P.3d at 1022 (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 612–13 (1973)). "[A] law may be invalidated as overbroad if 'a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.'" *United States v. Stevens*, 559 U.S. 460, 473, (2010) (quoting *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449 n.6 (2008)). The first step in an overbreadth analysis is to construe the regulation at issue to determine what it covers. *Id.* at 474. The second step involves a determination of whether the law, as construed, prohibits a substantial amount of protected speech. *United States v. Williams*, 553 U.S. 285, 297 (2008).

Resolution 21-01 covers attorney speech "in representing a client or operating or managing a law practice or in the course and scope of employment in a law practice." In an attempt to narrow the Resolution, the drafters included Comment 4: "'In representing a client or operating or managing a law practice or in the course and scope of employment in a law practice' does not include participation in bar association, business, or social activities outside the context of representing a client or operating or managing a law practice or acting in the course and scope of employment in a law practice." This comment is vague at best because it defines the situations in which the rule *would not* apply as the absence of the situations where the rule *would* apply, rather than attempting to define, for example, what is involved in representing a client and actively operating or engaging in the practice of law. Listing vague exceptions of participation in bar association, business, or social activities outside of the employment context does not narrowly define the situations where the rule applies, and therefore, clearly implicates a substantial amount of protected speech. As written, the resolution's prohibitions would extend to participation in bar association, business, or social activities if that participation occurred in the course, operation, or management of a law practice. It is difficult to conceive of a law firm partner or attorney who participates in bar association activities and business that are not in connection with their law practice. The same is true of law partners and associates who take clients to dinners and participate in social activities to build business for their firm. Additionally, many legal employers encourage their employees who are lawyers to attend these activities as part of their employment, to help develop business for the firm. As a result, comment 4 appears to confirm that a large swath of otherwise protected bar association, business, and social conduct would fall within the Resolution's prohibitions. The Resolution's failure to provide a narrow scope of applicability

could result in punishment of protected speech, which is fatal to the validity of the Resolution in its current form.

Furthermore, the Resolution "delegate[s] standardless discretionary power" to the ISB's disciplinary bodies. *See Doe*, 148 Idaho at 925, 231 P.3d at 1022. By not clearly defining what speech amounts to "intimidating" or "hostile," the Bar's disciplinary bodies will have unbridled discretion to determine whether an attorney has committed misconduct under the proposed Rule 8.4(g). Although the Resolution provides parameters that help to describe harassment, these parameters do not adequately define what conduct is "intimidating" or "hostile" and therefore rises to the level of misconduct proscribed by the rule. We cannot conclude that these parameters are a sufficient framework to define harassment. As such, the Resolution is overbroad, and therefore, it is invalid under the First Amendment. *See Stevens*, 559 U.S. at 482.

b. *Resolution 21-01 is unconstitutionally vague.*

As the United States Supreme Court noted in *Grayned*,

> [v]ague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute abut(s) 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.

Grayned v. City of Rockford, 408 U.S. 104, 108–09 (1972) (footnotes and internal quotation marks omitted).

Resolution 21-01 is also unconstitutionally vague. The Resolution leaves a reasonably prudent attorney with doubt about exactly what type of conduct or speech constitutes misconduct. Comment 4 in Resolution 21-01 attempts to narrow attorney conduct subject to the proposed rule. It specifically exempts "bar association, business, and social activities," but only those that are "outside the context" of what the Resolution *does* include. This comment is confusing because it leaves the reader wondering what is included in the "context of representing a client or operating or managing a law practice or acting in the course and scope of employment in a law practice."

Would a law firm's holiday party fall "outside the context of . . . the course and scope of employment in a law practice[?]" What about a business dinner that included some of the firm's partners but not all of them? What about attendance at the Idaho State Bar Annual Meeting or Bar section meetings when required by one's law firm? These hypotheticals merely offer a small example of the gray area created by the Resolution regarding what type of attorney conduct and speech would rise to the level of professional misconduct.

Finally, and importantly, the Resolution could have a chilling effect on attorney speech. While there is evidence that the Resolution's drafters sought to curb discrimination and harassment identified in the survey conducted by the Bar, such an intent cannot be used to justify the possible chilling of free speech. The Resolution covers a substantial amount of protected speech. By the same token, under a vagueness analysis, protected speech could be chilled due to both the Resolution's expansive scope and its undefined terms. As a result, the Resolution is unconstitutionally vague.

It is for these reasons that this Court has unanimously declined to adopt Resolution 21-01 in its current form. Former United State Supreme Court Justice Louis Brandeis once aptly wrote, "The remedy to be applied is more speech, not enforced silence." *Whitney v. California*, 274 U.S. 357, 377 (1927). While we are reluctant to reject the Bar's efforts to rein in unlawful harassment or discrimination, we are unable to put our imprimatur on Resolution 21-01 because it does not pass constitutional muster.

III. CONCLUSION

For the reasons stated, this Court declines to adopt Resolution 21-01 as it is currently written.

_In re_ Idaho State Bar Resolution 21-01

January 20, 2023

PER CURIAM.

I. INTRODUCTION

In November 2021, the Idaho State Bar Commissioners ("ISB" or "the Bar") submitted proposed Resolution 21-01 for consideration by the Bar's members. The resolution "recommend[ed] Idaho Rule of Professional Conduct 8.4 be amended to include anti-discrimination and anti-harassment provisions." This resolution was voted on by eligible members of the Bar and passed by a margin of 680 to 329. After the resolution was passed, the Bar recommended to the Idaho Supreme Court that this Court adopt the resolution and amend the Idaho Rules of Professional Conduct. We decline to do so.

We acknowledge that a full explanation of our rejection of the resolution is an unusual response. However, we think it appropriate to explain our decision in some detail to explain our rationale for taking the action we are in order to provide guidance going forward in the event the Bar should seek to amend Idaho Rule of Professional Conduct 8.4 in the future. We commend the Bar's continued attempts to address unlawful discrimination and harassment in the legal profession. However, we feel obliged to reject the proposed resolution for the reasons discussed below.

The resolution passed by the Bar recommended that Idaho Rule of Professional Conduct 8.4 be amended as follows (proposed amendments are in bold lettering):

> It is professional misconduct for a lawyer to:
>
> (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
>
> (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
>
> (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
>
> (d) engage in conduct that is prejudicial to the administration of justice;
>
> (e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law; ~~or~~
>
> (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law**; or**~~.~~
>
> **(g) engage in discrimination or harassment, as follows:**

(1) in representing a client or operating or managing a law practice or in the course and scope of employment in a law practice, engage in conduct that the lawyer knows or reasonably should know is unlawful discrimination. This subsection does not limit the ability of a lawyer to accept, decline, or withdraw from a representation as otherwise permitted in these Rules or preclude advice or advocacy consistent with these Rules; and

(2) in representing a client or operating or managing a law practice or in the course and scope of employment in a law practice, engage in conduct that the lawyer knows or reasonably should know is harassment. Harassment is derogatory or demeaning verbal, written, or physical conduct toward a person based upon race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status, or socioeconomic status. To constitute a violation of this subsection, the harassment must be severe or pervasive enough to create an environment that is intimidating or hostile to a reasonable person. This subsection does not limit the ability of a lawyer to accept, decline, or withdraw from a representation as otherwise permitted in these Rules or preclude advice or advocacy consistent with these Rules.

Commentary

…

[3] **Discrimination and harassment by lawyers in violation of paragraph (g) undermine confidence in the legal profession and the legal system. Harassment includes sexual harassment such as unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal, written, or physical conduct of a sexual nature. Factors to be considered to determine whether conduct rises to the level of harassment under paragraph (g)(2) of this Rule include: the frequency of the harassing conduct; its severity; whether it is threatening or humiliating, or a mere offensive utterance; whether it is harmful to another person; or whether it unreasonably interferes with conduct related to the practice of law. Petty slights, annoyances, and isolated incidents, unless extremely serious, will not rise to the level of harassment under paragraph (g)(2). The substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (g).** ~~A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.~~[1]

[1] The stricken language is the current text of Comment 3 to I.R.P.C. 8.4.

[4] "In representing a client or operating or managing a law practice or in the course and scope of employment in a law practice" does not include participation in bar association, business, or social activities outside the context of representing a client or operating or managing a law practice or acting in the course and scope of employment in a law practice.

[5] A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule. A lawyer does not violate paragraph (g) by limiting the scope or subject matter of the lawyer's practice in accordance with these Rules and other law. A lawyer may charge and collect reasonable fees and expenses for a representation consistent with Rule 1.5(a). Lawyers should be mindful of their professional obligations under Rule 6.1 to provide legal services to those who are unable to pay, and their obligation under Rule 6.2 not to avoid appointments from a tribunal except for good cause. A lawyer's representation of a client does not constitute an endorsement by the lawyer of the client's views or activities. See Rule 1.2(b).

[**4**~~6~~] A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of Rule 1.2(d) concerning a good faith challenge to the validity, scope, meaning or application of the law apply to challenges of legal regulation of the practice of law.

[**5**~~7~~] Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.

II. ANALYSIS

As an initial matter, we acknowledge that Resolution 21-01 is narrower than Resolution 17-01, the previous iteration provided to us for approval by the Bar. However, Resolution 21-01 deals with fundamental constitutional rights, and, as a result, is subject to strict scrutiny when considering whether it infringes on those constitutional rights.[2] *Reed v. Town of Gilbert*, 576 U.S. 155, 171 (2015).

A. Resolution 21-01 is more expansive in its scope than Title VII of the Civil Rights Act.

The Professionalism and Ethics section ("P&E Section") of the Idaho State Bar argues that we need not consider the constitutionality of the resolution within the framework provided by First Amendment jurisprudence because the resolution closely mirrors the language contained in Title VII of the Civil Rights Act. *See* 42 U.S.C. §§ 2000e through 2000e-17. The P&E Section asserts that the United States Supreme Court has found Title VII to be constitutional regulation of

[2] The Idaho State Bar is a creature of statute, *see* I.C. § 3-401, and is, therefore, a state actor. Additionally, Idaho Code section 3-413 requires this Court to approve all rules and regulations proposed by the Bar before they become effective.

conduct rather than speech. Because the resolution similarly takes aim at conduct creating hostile or abusive work environments, the P&E Section posits, it does not regulate speech in a manner that implicates First Amendment protections.

Title VII of the Civil Rights Act prohibits employers from discriminating against an individual "because of such individual's race, color, religion, sex, or national origin[.]" 42 U.S.C. § 2000e-2(a)(1). The United States Supreme Court held that Title VII applied to a law firm's decisions for promotion to partnership and, in doing so, rejected the law firm's argument that such an application of Title VII would unconstitutionally infringe on the First Amendment right to freedom of association: "Moreover, as we have held in another context, '[i]nvidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protections.'" *Hishon v. King & Spaulding*, 467 U.S. 69, 78 (1984) (quoting *Norwood v. Harrison*, 413 U.S. 455, 470 (1973)) (alteration in original). Eight years later, the Court cited Title VII's prohibition against sexual discrimination in employment practices as an example of a statute directed at conduct as opposed to speech. *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 389 (1992). These two decisions thus stand for the proposition that the regulation of unlawful employment practices is a permissible regulation of conduct, rather than speech.

In a 2018 decision which fell outside the realm of Title VII, the Supreme Court examined the regulation of "professional speech." *Nat'l Inst. of Family and Life Advocates v. Becerra* (*NIFLA*), 138 S. Ct. 2361, 2371 (2018). The Court noted that professional speech was not a separate category of speech that was less protected than any other type of speech: "Speech is not unprotected merely because it is uttered by 'professionals.' This Court has 'been reluctant to mark off new categories of speech for diminished constitutional protection.'" *Id.* at 2371–72 (quoting *Denver Area Ed. Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727, 804 (1996)). However, the Court then recognized two circumstances in which professional speech had been afforded reduced constitutional protection. *Id.* at 2372. First, the Court's "precedents have applied more deferential review to some laws that require professionals to disclose factual, noncontroversial information in their 'commercial speech.'" *Id.* (citing *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651 (1985)). Second, the Court noted that "states may regulate professional *conduct*, even though that conduct incidentally involves speech." *Id.* (citing *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 884

(1992), *overruled on other grounds by Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022)) (italics added).

The P&E Section claims that the resolution falls under this second category of speech identified in *NIFLA*. As a result, the ISB argues that because Resolution 21-01 attempts to regulate conduct that creates a "hostile work environment," rather than to regulate "the content of the speech that may contribute to the hostile work environment's creation[,]" it does not implicate the First Amendment. In other words, the ISB contends that because the proposed rule primarily concerns conduct, even if speech is incidentally involved in the conduct, it is constitutional.

In *NIFLA*, the Court recognized that it "has upheld regulations of professional conduct that incidentally burden speech." *Id.* However, it ultimately held that regulations that necessarily "alte[r] the content of [] speech" will constitute regulations of "speech as speech" rather than a regulation of speech as conduct. *Id.* at 2371, 2374 (internal quotation marks and citations omitted) (alterations in original). In contrast, regulations that govern "professional conduct, even though that conduct incidentally involves speech[,]" will not be subject to review under the First Amendment. *Id.* at 2372. Generally, professional speech "that is based on [] expert knowledge and judgment [or] within the confines of [the] professional relationship" will be interpreted as a restriction only on conduct. *Id.* at 2371 (internal quotation marks and citations omitted) (alterations in original). This line between professional speech and conduct is necessary to preserve an important and necessary goal—that "[p]rofessionals might have a host of good-faith disagreements, both with each other and with the government, on many topics in their respective fields." *Id.* at 2374–75.

We conclude that the language of the resolution goes beyond the regulation of employment practices and is instead a content-based regulation of speech protected by the First Amendment. As a result, it is subject to a strict scrutiny analysis. While the framework of the resolution is based on Title VII principles of unlawful discrimination and harassment, and while the resolution does regulate some conduct, the resolution also singles out certain topics for professional discipline while leaving other topics not subject to discipline. An argument similar to the P&E Section's argument was rejected by the Court in *R.A.V.*

In that case, the City of St. Paul passed a municipal ordinance that prohibited placement of symbols, objects, or other representations which one knew or had reasonable grounds to know would arouse anger, alarm, or resentment in others on the basis of race, color, creed, religion, or

gender. *R.A.V.*, 505 U.S. at 380. The City argued its regulation was an acceptable regulation of "fighting words," which the Court had previously determined was not entitled to First Amendment protection. *Id.* at 380–81. The Court rejected the City's argument and explained that "fighting words" were not entirely exempt from First Amendment protections, but instead could be regulated because of their constitutionally proscribable conduct – their intent to incite violence by another. *Id.* at 386. However, the Court further explained, "the power to proscribe [speech] on the basis of *one* content element (*e.g.*, obscenity) does not entail the power to proscribe it on the basis of *other* content elements." *Id.* at 386 (italics in original).

The Court determined the ordinance was facially unconstitutional because it applied only to fighting words that insulted or provoked violence on the basis of race, color, creed, religion, or gender. *Id.* at 391. Had the ordinance prohibited all fighting words directed at certain persons or groups, it could have been valid if it met the requirements of the Equal Protection Clause. *Id.* at 392. Instead, the ordinance regulated fighting words based on their content of "bias-motivated hatred and in particular . . . 'virulent notions of racial supremacy,'" and therefore constituted content-based regulation of speech. *Id.*

The holding in *NIFLA* implicates the resolution here, which similarly extends beyond the prohibition of unlawful employment practices to regulate speech based on its content. The Court's decision in *NIFLA* is clear that a category of speech that is subject to regulation can still violate the First Amendment if it singles out sub-categories of that speech based on its content. The resolution here does just that. While the resolution deals with unlawful employment practices, it extends beyond the unlawful employment practices to regulate conduct based on the content of speech and the messages expressed—derogatory and demeaning comments based upon race, sex, religion, identity, marital status, or socioeconomic status. As a result, we conclude that the resolution encompasses speech protected by the First Amendment and must satisfy a strict scrutiny analysis.

B. Resolution 21-01 violates the First Amendment because it is not narrowly tailored to withstand strict scrutiny.

In *NIFLA*, the Supreme Court held:

> The First Amendment, applicable to the States through the Fourteenth Amendment, prohibits laws that abridge the freedom of speech. When enforcing this prohibition, our precedents distinguish between content-based and content-neutral regulations of speech. Content-based regulations "target speech based on its communicative content." *Reed v. Town of Gilbert*, 576 U.S. [155, 162]

> (2015). As a general matter, such laws "are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Ibid.* This 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.'" *Ibid.* (quoting *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95[ ](1972)).

NIFLA, 138 S. Ct. at 2371.

The United States Supreme Court has also instructed that "'the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others[.]'" *Matal v. Tam*, 137 S. Ct. 1744, 1757 (2017). "At its most basic, the test for viewpoint discrimination is whether—within the relevant subject category—the government has singled out a subset of messages for disfavor based on the views expressed." *Id.* at 1766 (Kennedy, J., concurring in part). "We have said time and again that 'the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.'" *Id.* at 1763 (quoting *Street v. New York*, 394 U.S. 576, 592 (1969)); *see also Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 829 (1995) ("Viewpoint discrimination is thus an egregious form of content discrimination.").

The Ninth Circuit Court of Appeals has also recognized that professional speech is protected by the full force of the First Amendment. *Conant v. Walters*, 309 F.3d 629, 637 (9th Cir. 2002). "Being a member of a regulated profession does not [] result in a surrender of First Amendment rights. To the contrary, professional speech may be entitled to 'the strongest protection our Constitution has to offer.'" *Id.* (internal citations omitted). "Attorneys have rights to speak freely subject only to the government regulating with 'narrow specificity.'" *Id.* (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)). "[A] State may not, under the guise of prohibiting professional misconduct, ignore constitutional rights." *Button*, 371 U.S. at 439.

Since its adoption by the American Bar Association ("ABA") in 2016, Model Rule of Professional Conduct 8.4(g) has been adopted by only a handful of states. Wendy N. Hess, *Promoting Civility by Addressing Discrimination and Harassment: The Case for Rule 8.4(g) in South Dakota*, 65 S.D. L. REV. 233, 257 (2020). However, many states have employed their own rules of professional conduct aimed at preventing discrimination and harassment even before the Model Rule was amended. *See id.* at 257–58. There are few judicial opinions addressing the constitutionality of a rule of professional conduct based on the Model Rule. Two cases on point provide a helpful spectrum of constitutionality.

First, the United States District Court for the Eastern District of Pennsylvania heard a pre-enforcement challenge to an amendment to the Pennsylvania Rules of Professional Conduct to include a provision which is similar to Model Rule 8.4(g). *Greenberg v. Haggerty*, 491 F. Supp. 3d 12, 15–16 (E.D. Pa. 2020). The background for *Greenberg* is instructive. In 2020, the Pennsylvania Supreme Court approved the following amendment to Pennsylvania Rule of Professional Conduct 8.4:

> It is professional misconduct for a lawyer to:
>
> * * *
>
> (g) in the practice of law, by words or conduct, knowingly manifest bias or prejudice, or engage in harassment or discrimination, as those terms are defined in applicable federal, state or local statutes or ordinances, including but not limited to bias, prejudice, 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 limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude advice or advocacy consistent with these Rules.
>
> Comment:
>
> * * *
>
> [3] For the purposes of paragraph (g), conduct in the practice of law includes participation in activities that are required for a lawyer to practice law, including but not limited to continuing legal education seminars, bench bar conferences and bar association activities where legal education credits are offered.
>
> [4] The substantive law of antidiscrimination and anti-harassment statutes and case law guide application of paragraph (g) and clarify the scope of the prohibited conduct.

Id. at 16–17.

After concluding that Greenberg, a licensed Pennsylvania attorney, had standing to challenge the amendment, the U.S. District Court concluded that the amendment to the Pennsylvania Rules of Professional Conduct violated the First Amendment because it constituted a content- and viewpoint-based restriction on an attorney's speech. *Id.* at 25. The district court first concluded that professional speech, or attorney speech, "is only subject to greater regulation than speech by others in certain circumstances, none of which are present here." *Id.* at 26. Pennsylvania Rule of Professional Conduct 8.4(g) did not fall into either of those two categories—(1) commercial speech and advertising or (2) conduct that incidentally involves speech—but instead "much more broadly prohibit[ed] attorneys' speech." *Id.* at 27–28.

The district court next concluded that because the Rule sought to distinguish between favored viewpoints and disfavored viewpoints, it constituted viewpoint-based discrimination. *Id.* at 30. As such, the amendment was "subject to the 'most exacting scrutiny,' . . . because [it] 'pose[s] the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion.'" *Id.* (quoting *Startzell v. City of Philadelphia, Pennsylvania*, 533 F.3d 183, 193 (3d Cir. 2008)). In concluding that the amendment was viewpoint-based, the district court stated that "[w]hile Rule 8.4(g) restricts Pennsylvania attorneys' ability to express bias or prejudice 'based upon race, sex, gender identity or expression, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, or socioeconomic status,' it allows Pennsylvania attorneys to express tolerance or respect based on these same statuses." *Id.* at 31. As such, the district court concluded that the amendment to the rule contained "unconstitutional viewpoint discrimination in violation of the First Amendment." *Id.* at 32.

Second, and in contrast to *Greenberg*, the Supreme Court of Colorado has upheld its version of Model Rule 8.4(g), concluding that it did not violate the First Amendment. *Matter of Abrams*, 488 P.3d 1043, 1048 (Colo. 2021). In *Abrams*, an attorney was disciplined by the Colorado State Bar for calling a judge a derogatory anti-gay slur ("gay, fat, f*g") in an email to his clients. *Id.* at 1049. The attorney, Abrams, had his license suspended for three months, which suspension was stayed upon his successful completion of an eighteen-month probationary period. *Id.* at 1050. Abrams challenged the constitutionality of the rule under which he was disciplined, Colorado Rule of Professional Conduct 8.4(g), which provided:

> It is professional misconduct for a lawyer to engage in conduct, in the representation of a client, that exhibits or is intended to appeal to or engender bias against a person on account of that person's race, gender, religion, national origin, disability, age, sexual orientation, or socioeconomic status, whether that conduct is directed to other counsel, court personnel, witnesses, parties, judges, judicial officers, or any persons involved in the legal process.

Id. at 1050, 1052.

The Colorado Supreme Court first acknowledged that "attorneys are entitled to the same level of First Amendment protection as non-attorneys unless a state has a compelling interest in regulating some aspect of their speech or conduct." *Id.* at 1051 (quoting *In re Foster*, 253 P.3d 1244, 1251–52 (Colo. 2011)). The court then concluded that, "[a]lthough the Rule does prohibit some speech that would be constitutionally protected in other contexts, the Rule prohibits such

speech in furtherance of several compelling state interests." *Id.* at 1053. The compelling state interests included regulating the legal profession to protect the public and the integrity of the judicial system, eliminating expressions of bias from the legal profession, and ensuring the effective administration of justice. *Id.* Next, the Colorado Supreme Court concluded that the Rule was "narrowly tailored so that any possible unconstitutional reach of [Colorado Rule of Professional Conduct] 8.4(g) is neither real nor substantial" because it "does not extend to any speech that legitimately furthers a client's interest or relates to the advocacy of policy or political goals, no matter how controversial." *Id.* To further support its narrow tailoring, the court noted the "limited number of times that [Colorado's attorney disciplinary body] has charged violations of the Rule." *Id.* Finally, the Colorado Supreme Court concluded that the rule was neither overbroad nor vague because there was no risk of "chilling or penalizing protected speech," and because a reasonable person would find that the language at issue was "clearly proscribed by Rule 8.4(g)." *Id.* at 1053–54.

The Pennsylvania and Colorado rules differ substantively. On one end of the spectrum, Pennsylvania's rule explicitly covered "words and conduct," and applied to "participation in . . . continuing legal education seminars, bench bar conferences, and bar association activities where legal education credits are offered." *Greenberg*, 491 F. Supp. 3d at 16. The Pennsylvania rule included two comments to assist with interpretation and application of its restrictions. On the opposite end of the spectrum, Colorado's rule is much narrower. It limits the rule's scope to "conduct, in the representation of a client," that engenders bias on account of a protected status. The rule did not include any comments. *Abrams*, 488 P.3d at 1052. On this spectrum, Resolution 21-01 falls closer to the Pennsylvania rule that was struck down because it contains several flaws that call its constitutionality into doubt. Each is discussed below.

1. Resolution 21-01 is both a content- and viewpoint-based regulation of protected speech; therefore, it is subject to strict scrutiny.

First, we conclude that Resolution 21-01 constitutes a content-based restriction on speech because it "applies to particular speech because of the topic discussed or the idea or message expressed." *Reed*, 576 U.S. at 163. Resolution 21-01 favors one viewpoint over another (tolerance for a protected class of persons versus intolerance for a protected class of persons); therefore, it is also a viewpoint-based restriction. The resolution is not limited to speech directed at a person based on *that person's* protected status, but instead prohibits speech because the speech is derogatory or demeaning and the speech is based on a specified protected status.

Title VII specifically prohibits unlawful employment practices taken "because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). However, Resolution 21-01 does not specifically limit its application to individuals who are members of a protected status. Further, it is unclear from the proposed version of Rule 8.4(g) whether the P&E Section intended to limit the reach of the rule to those situations that involve members of a protected class. In other words, it is not clear whether the P&E Section intended to limit harassment and discrimination *against someone* based on that person's protected status, or if it intended to say *any* harassment based on a protected status is unlawful—*i.e.*, if one person does not fall into a protected class as defined by Title VII, but he may be offended by another's comments against a protected class.

The distinction is important. Title VII limits harassment against individuals *because of* their protected status. However, the Bar's proposed rule does not attempt to define a nexus between protected classes and harmful speech, rendering the Bar's suggested analysis under Title VII inapt.

For example, an attorney could speak favorably about same-sex marriage without running afoul of the Bar's rule, but another attorney who speaks disparagingly about same-sex marriage could potentially be engaging in misconduct. Resolution 21-01 applies to "*derogatory* or *demeaning* verbal, written, or physical conduct toward a person based upon race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status, or socioeconomic status" that is so severe and pervasive as to create an environment that is intimidating or hostile to a reasonable person. (Italics added.)

Content- and viewpoint-based regulations of speech are presumptively unconstitutional and subject to strict scrutiny. *Reed*, 576 U.S. at 171. Strict scrutiny "requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest" through the "least restrictive means." *Id.*; *McCullen v. Coakley*, 573 U.S. 464, 478 (2014). When a regulation is presumptively unconstitutional, the burden falls upon the proponent of the regulation to demonstrate its narrow tailoring. *Reed*, 576 U.S. at 171. We conclude that Resolution 21-01 is not narrowly tailored to achieve a compelling state interest.

First, we acknowledge that Idaho has an interest in regulating the legal profession to protect the public and uphold the integrity of the judicial system. Idaho also has a legitimate interest in ensuring the legal profession is free from unlawful discrimination and harassment. The Bar points

out that a recent survey of ISB members strongly indicated that a large percentage of members reported having faced either discrimination or harassment during their employment.

Regardless of whether the above-identified interests are compelling, we conclude that the Resolution is not narrowly tailored because it does not account for potentially unconstitutional issues in its efforts to curb unlawful discrimination and harassment within the legal profession. Although Resolution 21-01 is narrower than the Bar's previous attempt to modify Rule 8.4(g) in Resolution 17-01 and the ABA's Model Rule, it cannot be said that it is the least restrictive means to achieve the above-stated interests. The resolution goes beyond prohibiting conduct made unlawful by Title VII. Colorado's rule, which was upheld as narrowly tailored, is significantly narrower in scope than Resolution 21-01. *See Abrams*, 488 P.3d at 1052. Although directed toward "bias," as opposed to discrimination and harassment, the Colorado rule "does not extend to any speech that legitimately furthers a client's interest or relates to the advocacy of policy or political goals, no matter how controversial." *Id.* at 1053. Further, the Colorado rule was not found to be content- or viewpoint-based. *Id.* The same cannot be said of Resolution 21-01. Consequently, Resolution 21-01 does not survive strict scrutiny.

2. Resolution 21-01 is unconstitutionally overbroad and vague.

"Where a facial challenge is made to an ordinance on overbreadth and vagueness grounds, a court must first decide whether the ordinance 'reaches a substantial amount of constitutionally protected conduct.'" *State v. Doe*, 148 Idaho 919, 925, 231 P.3d 1016, 1022 (2010) (quoting *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 (1982)).

> If the ordinance does not reach a substantial amount of protected conduct, then the overbreadth challenge will fail. A court should then examine the ordinance on the facial vagueness challenge. The ordinance will only be found void for vagueness if it is unconstitutionally vague in all its applications. Normally, where the complaining party has engaged in conduct that is clearly prohibited by the ordinance, he cannot argue that the ordinance is vague.

Id. at 925, 231 P.3d at 1022.

a. *Resolution 21-01 is unconstitutionally overbroad.*

> An ordinance may be facially overbroad if it: (1) seeks to regulate only constitutionally protected speech; (2) impermissibly burdens innocent associations; or (3) places regulations on "the time, place, and manner of expressive or communicative conduct," particularly where the restriction "delegate[s] standardless discretionary power to local functionaries, resulting in virtually unreviewable prior restraints on First Amendment rights."

Doe, 148 Idaho at 925, 231 P.3d at 1022 (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 612–13 (1973)). "[A] law may be invalidated as overbroad if 'a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.'" *United States v. Stevens*, 559 U.S. 460, 473, (2010) (quoting *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449 n.6 (2008)). The first step in an overbreadth analysis is to construe the regulation at issue to determine what it covers. *Id.* at 474. The second step involves a determination of whether the law, as construed, prohibits a substantial amount of protected speech. *United States v. Williams*, 553 U.S. 285, 297 (2008).

Resolution 21-01 covers attorney speech "in representing a client or operating or managing a law practice or in the course and scope of employment in a law practice." In an attempt to narrow the Resolution, the drafters included Comment 4: "'In representing a client or operating or managing a law practice or in the course and scope of employment in a law practice' does not include participation in bar association, business, or social activities outside the context of representing a client or operating or managing a law practice or acting in the course and scope of employment in a law practice." This comment is vague at best because it defines the situations in which the rule *would not* apply as the absence of the situations where the rule *would* apply, rather than attempting to define, for example, what is involved in representing a client and actively operating or engaging in the practice of law. Listing vague exceptions of participation in bar association, business, or social activities outside of the employment context does not narrowly define the situations where the rule applies, and therefore, clearly implicates a substantial amount of protected speech. As written, the resolution's prohibitions would extend to participation in bar association, business, or social activities if that participation occurred in the course, operation, or management of a law practice. It is difficult to conceive of a law firm partner or attorney who participates in bar association activities and business that are not in connection with their law practice. The same is true of law partners and associates who take clients to dinners and participate in social activities to build business for their firm. Additionally, many legal employers encourage their employees who are lawyers to attend these activities as part of their employment, to help develop business for the firm. As a result, comment 4 appears to confirm that a large swath of otherwise protected bar association, business, and social conduct would fall within the Resolution's prohibitions. The Resolution's failure to provide a narrow scope of applicability

could result in punishment of protected speech, which is fatal to the validity of the Resolution in its current form.

Furthermore, the Resolution "delegate[s] standardless discretionary power" to the ISB's disciplinary bodies. *See Doe*, 148 Idaho at 925, 231 P.3d at 1022. By not clearly defining what speech amounts to "intimidating" or "hostile," the Bar's disciplinary bodies will have unbridled discretion to determine whether an attorney has committed misconduct under the proposed Rule 8.4(g). Although the Resolution provides parameters that help to describe harassment, these parameters do not adequately define what conduct is "intimidating" or "hostile" and therefore rises to the level of misconduct proscribed by the rule. We cannot conclude that these parameters are a sufficient framework to define harassment. As such, the Resolution is overbroad, and therefore, it is invalid under the First Amendment. *See Stevens*, 559 U.S. at 482.

b. *Resolution 21-01 is unconstitutionally vague.*

As the United States Supreme Court noted in *Grayned*,

> [v]ague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute abut(s) 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.

Grayned v. City of Rockford, 408 U.S. 104, 108–09 (1972) (footnotes and internal quotation marks omitted).

Resolution 21-01 is also unconstitutionally vague. The Resolution leaves a reasonably prudent attorney with doubt about exactly what type of conduct or speech constitutes misconduct. Comment 4 in Resolution 21-01 attempts to narrow attorney conduct subject to the proposed rule. It specifically exempts "bar association, business, and social activities," but only those that are "outside the context" of what the Resolution *does* include. This comment is confusing because it leaves the reader wondering what is included in the "context of representing a client or operating or managing a law practice or acting in the course and scope of employment in a law practice."

Would a law firm's holiday party fall "outside the context of . . . the course and scope of employment in a law practice[?]" What about a business dinner that included some of the firm's partners but not all of them? What about attendance at the Idaho State Bar Annual Meeting or Bar section meetings when required by one's law firm? These hypotheticals merely offer a small example of the gray area created by the Resolution regarding what type of attorney conduct and speech would rise to the level of professional misconduct.

Finally, and importantly, the Resolution could have a chilling effect on attorney speech. While there is evidence that the Resolution's drafters sought to curb discrimination and harassment identified in the survey conducted by the Bar, such an intent cannot be used to justify the possible chilling of free speech. The Resolution covers a substantial amount of protected speech. By the same token, under a vagueness analysis, protected speech could be chilled due to both the Resolution's expansive scope and its undefined terms. As a result, the Resolution is unconstitutionally vague.

It is for these reasons that this Court has unanimously declined to adopt Resolution 21-01 in its current form. Former United State Supreme Court Justice Louis Brandeis once aptly wrote, "The remedy to be applied is more speech, not enforced silence." *Whitney v. California*, 274 U.S. 357, 377 (1927). While we are reluctant to reject the Bar's efforts to rein in unlawful harassment or discrimination, we are unable to put our imprimatur on Resolution 21-01 because it does not pass constitutional muster.

III. CONCLUSION

For the reasons stated, this Court declines to adopt Resolution 21-01 as it is currently written.