O'Donnell, Shanna RC # 2020-012 f

To: Del Ciampo, Joseph
Subject: RE: Rules Committee - Zelotes Opposition Paper re Proposed R.P.C. 8.4(7) Attached

From: Zelotes Divorce & Custody <zelotes@divorceshark.net>
Sent: Monday, September 14, 2020 12:15 PM
To: Del Ciampo, Joseph <Joseph.DelCiampo@jud.ct.gov>
Cc: Chandler, Alison <Alison.Chandler@jud.ct.gov>
Subject: Rules Committee - Zelotes Opposition Paper re Proposed R.P.C. 8.4(7) Attached

Hello Joseph,

I am forwarding you a copy of my opposition paper arguing against the enactment of proposed RPC 8.4(7).

If you could forward this paper to the members of the Rules Committee it would be greatly appreciated.

I apologize for the delay in getting this to you. I was waiting to hear back from the First Amendment Lawyers Association to determine if they would be co-sponsoring my position paper. I just received word that FALA will be submitting its own position paper in opposition to the proposed rule.

My opposition paper is attached.

Cheers ~ Zenas Zelotes Esq.

Zenas Zelotes Esq. - Trial Attorney

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ZENAS ZELOTES ESQ.

POSITION PAPER IN OPPOSITION TO PROPOSED RPC 8.4(7)

September 14, 2020

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INTRODUCTION

About the Author

The author of the undersigned position paper, Zenas Zelotes Esq. is a 48-year-old divorce attorney having his principal place of business in Stamford CT. Mr. Zelotes is a Marine Corps veteran, a graduate of the University of Iowa College of Law, and a member of the Republican National Lawyers Association.

Proposed Rule is an Omnibus Bill

The Proposed Rule – RPC 8.4(7) –is an omnibus bill.

A proposed article of legislation containing more than one substantive matter.

The Proposed Rule, for example, seeks to implement:

- a ban on discrimination; *and*
- a ban on sexual harassment.

From a legal standpoint – two entirely different subjects – with distinct legal elements – having little to nothing in common.

The reason the Proposed Rule is being presented as an omnibus bill is tactical.

Omnibus bills are a means by which a proponent can expand a positions base of support – alphabet coalitions promising pork for pork – *quid pro quo*.

It is also an "all or nothing" tactic used to back door controversial legislation that, if voted upon independently, would not likely pass.

For example, in our current political climate, a ban against racial discrimination might expect to attract more substantial support than a comparable provision speaking to trans-gender or gender identification issues.

The proponents thus hope that by adopting an “all of nothing” approach, the ancillary beneficiaries might ride the coat tails of those enjoying more popular support.

As a preliminary matter, I encourage the Rules Committee to compartmentalize the Proposed Rule into its logical components and reject the “all of nothing” approach.

EXAMINING THE PROPOSED RULE

Proposed Rule Would Only Punish Speech That is Critical of the Classes

Under the Proposed Rule, it would be professional misconduct for a lawyer to engage in conduct that the lawyer knows or reasonably should know is discrimination on the basis of race, color, ancestry, sex, pregnancy, religion, national origin, ethnicity, disability, status as a veteran, age, sexual orientation, gender identity, gender expression or marital status in conduct related to the practice of law.

The proponents explain, in the proposed official commentary, that “discrimination” would (*inter alia*) include “harmful verbal” conduct that “manifests bias or prejudice towards others.”

Bias is an attitude or opinion that favors a position.

Prejudice is a predisposition favoring one side of an issue.

Bias and prejudice are viewpoints.

Disparagement, in turn, is the expression of a critical viewpoint, expressing a low opinion of a person or a group or persons.

Taken together:

It would be professional misconduct for a lawyer to express an opinion, or make a statement, that the lawyer knows, or reasonably should know, is critical of the enumerated classes.

It would not, however, be professional misconduct for a lawyer to express an opinion, or make a statement, speaks favorably of the enumerated classes.

Under the Proposed Rule, the State would permit one viewpoint – and punish the other.

> *e.g.* In its position paper, the proponents state that uttering a “racist” or “sexist” epithet, with the intent to “disparage” an “individual or group” of individuals demonstrates a type of “bias or prejudice” that would trigger a violation under the Proposed Rule. It would not, however, be professional misconduct to “praise” the same set of individuals or groups. Only the critical statements and viewpoints would be punished.

Proposed Rule Would Be Substantially Broader Than Its ABA Counterpart

The proponents further note that the Proposed Rule is based on an ABA counterpart – ABA Model Rule 8.4(g).

The proponents openly acknowledge, however, that the scope of the Proposed Rule is far more broad than the ABA version; more specifically:

(1) The proposed Connecticut version adds “additional protected categories” not found in the ABA version; and

(2) Unlike the ABA version, the scope of the proposed Connecticut rule would not be confined to speech and conduct performed “when representing a client.”

Instead, the proposed Connecticut rule would extend to any activity or setting that is in any way “related” to the practice of law.

Under the Proposed Rule, any “bias or prejudice” that is critical of their enumerated classes would manifest a rule violation, provided the speech bore only the slightest correlation to the practice of law.

In the proposed official commentary, the proponents explain that conduct “related” to the practice of law would include (*inter alia*):

- representing clients
- interacting with witnesses
- interacting with co-workers
- interacting with court personnel
- interacting with lawyers
- interacting with “others” while engaged in the practice of law
- operating law firm or law practice
- managing a law firm or law practice
- participating in bar association events
- participating in business events
- participating in professional activities
- participating in other events related to the practice of law.

Injunction Against Critical Speech Would Also Extend to Elected Officials and Corporate Officers

In the foregoing list – the proponents are careful not to make an express reference to elected officials performing their official duties or campaigning. They, instead, leave their list open ended.

There can be, however, no reasonable doubt that elected officials who:

- Enact the laws;
- Propose the laws;
- Administer the laws; and/or

- Interpret the laws

Are all engaged in conduct that is "related" to the practice of law.

The proponents indirectly allude to this when they reference RPC 1.2(d):

"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 a lawyer. 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."

Reverse Discrimination Exempt

The proponents infer that reverse discrimination would not be discrimination under the Proposed Rule – provided the discrimination in question promotes "equity" or "diversity."

In the proposed official commentary, the proponents state: "Lawyers may engage in conduct undertaken to promote diversity, equity and inclusion without violating this Rule by, for example, implementing initiatives aimed at recruiting, hiring, retaining and advancing diverse employees …"

There appears, in other words, to be two standards proposed – one for the alphabet left – and another for the rest of us.

CONSTITUTIONAL ANALYSIS

Supreme Court Unanimously Struck Similar Ordinance Targeting Biased and Prejudicial Speech

Our initial and foremost inquiry asks whether the Proposed Rule's punishing disfavored speech and opinions violates the First Amendment's injunction against viewpoint discrimination.

The United States Supreme Court has stated - unanimously - that it does.

in the matter of R.A.V. v. City of St. Paul, 505 U.S. 377 (1992), the United States Supreme Court (unanimously) struck down an ordinance that was near identical to the Proposed Rule in substance.

The RAV matter is both controlling and dispositive.

In the RAV matter, the petitioner allegedly burned a cross inside the fenced yard of a black family that lived across the street. Id. At 379.

Although this conduct could have been punished under any of a number of laws, one of the two provisions under which respondent city of St. Paul chose to charge the petitioner was the St. Paul Bias-Motivated Crime Ordinance, St. Paul, Minn.Legis.Code § 292.02 (1990). Id. At 379-380

The Bias-Motivated Ordinance then provided:

"Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor." Id. at 379-380

> *n.b.* By comparison: the Proposed Rule punishes "harmful verbal" conduct, the speaker knows, or should know, evidences "bias or prejudice" on the basis of race, color, creed, religion, or gender (*inter alia*).

Following the petitioner's conviction, and upon challenge in the state courts, the Minnesota Supreme Court upheld the Bias-Motivated Ordinance.

In so doing, however, the Minnesota Supreme Court was careful to afford the Bias-Motivated Ordinance a narrow construction; holding that the Bias-Motivated Ordinance only reached those expressions that concurrently constituted "fighting words." Id. at 381

n.b. By comparison: the Proposed Rule does not so limit the scope of its application to speech to "fighting words." In this regard, the Proposed Rule's injunction against biased and prejudicial speech is far more reaching in scope than the Bias-Motivated Ordinance.

When challenged in the United States Supreme Court, the State of Connecticut, along with fifteen other states, filed briefs of *amici curiae,* urging affirmance, as did the National Association for the Advancement of Colored People and the National Black Women's Health Project (*inter alia*). *Id*. at 377

Upon review, the United States Supreme Court – unanimously – concluded that the Bias-Motivated Ordinance was facially unconstitutional. *Id*. at 381

As explained by the Supreme Court in *RAV*:

"… we conclude that, even as narrowly construed by the Minnesota Supreme Court, the ordinance is facially unconstitutional. Although the phrase in the ordinance, "arouses anger, alarm or resentment in others," has been limited by the Minnesota Supreme Court's construction to reach only those symbols or displays that amount to "fighting words," the remaining, unmodified terms make clear that the ordinance applies only to "fighting words" that insult, or provoke violence, "on the basis of race, color, creed, religion or gender." Displays containing abusive invective, no matter how vicious or severe, are permissible unless they are addressed to one of the specified disfavored topics. Those who wish to use "fighting words" in connection with other ideas -- to express hostility, for example, on the basis of political affiliation, union membership, or homosexuality -- are not covered. The First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects. See Simon & Schuster, 502 U.S. at 116; Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 229-230 (1987).

"In its practical operation, moreover, the ordinance goes even beyond mere content discrimination to actual viewpoint discrimination. Displays containing some words -- odious racial epithets, for example -- would be prohibited to proponents of all views. But

"fighting words" that do not themselves invoke race, color, creed, religion, or gender -- aspersions upon a person's mother, for example – would seemingly be usable ad libitum in the placards of those arguing in favor of racial, color, etc. tolerance and equality, but could not be used by that speaker's opponents. One could hold up a sign saying, for example, that all "anti-Catholic bigots" are misbegotten; but not that all "papists" are, for that would insult and provoke violence "on the basis of religion." St. Paul has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensbury Rules.

“What we have here, it must be emphasized, is not a prohibition of fighting words that are directed at certain persons or groups (which would be facially valid if it met the requirements of the Equal Protection Clause); but rather, a prohibition of fighting words that contain (as the Minnesota Supreme Court repeatedly emphasized) messages of "bias-motivated" hatred and, in particular, as applied to this case, messages "based on virulent notions of racial supremacy." 464 N.W.2d at 508, 511. One must wholeheartedly agree with the Minnesota Supreme Court that "[i]t is the responsibility, even the obligation, of diverse communities to confront such notions in whatever form they appear," ibid., but the manner of that confrontation cannot consist of selective limitations upon speech. St. Paul's brief asserts that a general "fighting words" law would not meet the city's needs, because only a content-specific measure can communicate to minority groups that the "group hatred" aspect of such speech "is not condoned by the majority." Brief for Respondent 25. The point of the First Amendment is that majority preferences must be expressed in some fashion other than silencing speech on the basis of its content.”

See: RAV @ 391-92

The First Amendment legal analysis as applied to the Proposed Rule would render the exact same result.

Much like the Bias-Motivated Ordinance, the Proposed Rule only applies to persons who express critical or disparaging statements “… on the basis of race, color, ancestry,

sex, pregnancy, religion, national origin, ethnicity, disability, status as a veteran, age, sexual orientation, gender identity, gender expression or marital status."

The state cannot, however, through the enactment of the Proposed Rule, impose special prohibitions on speakers who express disfavored views on disfavored subjects.

RAV makes this clear.

All of this, of course, is not to say that may be instances where a lawyer expresses a bias or prejudice that members of society or the bar might rightly deem reprehensible. Just as there can be little doubt that the proponents of the Proposed Rule opine biased and prejudicial speech offensive.

But “[T]he fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection.”

> *See*: *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55 (1988) citing FCC v. Pacifica Foundation, 438 U.S. 726, 98 S.Ct. 3026, 57 L.Ed.2d 1073 (1978).

> *Also*: *Street v. New York*, 394 U. S. 576, 394 U. S. 592 (1969) ("It is firmly settled that . . . the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers").

Finally, it is also important to note that the United States Supreme Court has expressly rejected the suggestion that “professional speech” is a separate category of speech warranting diminished constitutional protection, especially where, as here, content-based restrictions are involved.

The Constitutional analysis articulated in *RAV* would apply with no less force in the context of quasi-criminal proceedings (*i.e.* professional discipline proceedings) as it would in any other setting.

See: *National Institute of Family and Life Advocates, dba NIFLA, et al v. Becerra, et al.*, Nos. 16-1140, 16-1140, United States Supreme Court (June 26, 2018) ("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." … And it has been especially reluctant to "exemp[t] a category of speech from the normal prohibition on content-based restrictions.")

The Proposed Rule's proposed injunctions on biased and prejudicial speech cannot stand.

Proposed Rule is Ripe for Discriminatory Enforcement

Although the *RAV* case is dispositive and controlling of the speech issues, viewpoint discrimination is not the Proposed Rule's only Constitutional infirmity.

The Proposed Rule also offends the requirements of due process and equal protection.

As the District Court in Connecticut once explained, a proposed application of Rule 8.4 would fail to comport with due process if "a person of ordinary intelligence would lack fair notice of what is prohibited" or if its proposed application were "so devoid of clear meaningful standards" as would authorize or encourage serious discriminatory enforcement.)

> *See*: *Villeneuve v. State of Connecticut, et al*. Civil No. 3:10cv296 (D. Conn; Dec. 2, 2010) (proposed application of Rule 8.4(4) would fail to comport with due process if "a person of ordinary intelligence would lack fair notice of what is prohibited" or if its proposed application were "so devoid of clear meaningful standards" as would authorize or encourage serious discriminatory enforcement.)

That the Proposed Rule would disproportionately target conservative voices and opinions should be obvious.

Under the Proposed Rule, the alphabet soup coalitions would be free promote and advance its left-wing agendas without fear or concern. The proponents state as much in their proposed commentary (*supra*).

Conservative speakers, on the other hand, who are critical of the left, would be not be so fortunate and would, instead, be singled out for their "biased and prejudicial" speech.

The alphabet coalitions would use the Proposed Rule to sanction those who use words or phrases that they opine offensive and. through the Proposed Rule, endeavor to impose a woke speech code upon the bar.

Not only in the practice of law – but in any context remotely "related" to the practice of law. To include, but not limited to, candidates seeking political office.

Under the Proposed Rule, candidates who espouse conservative positions the left opines "biased or prejudiced" would find themselves perpetually defending their law licenses. This would no doubt have a chilling effect on political speech – and, in particular, on conservative Republicans.

Even something an innocuous as humor – telling a joke at a business after hours function, for example – could be punished under the Proposed Rule if the joke in question evidenced bias or prejudice toward one of the protected classes.

Who among us has the moral authority to cast *that* first stone …?

Proposed Rule is Ripe for Discriminatory Sanctions

It is also worth noting that the resulting sanctions imposed could vary substantially based on the political or philosophical leanings of the judge or tribunal, or the physical or philosophical characteristics of the defendant.

These issues, after all, speak to politically charged issues.

It is not unreasonable to anticipate that, in the imposition of discipline, woke defendants on the left would be treated very differently than conservative defendants on the right.

Particularly in a progressive blue state.

The hammer would come down especially hard on conservatives.

As aptly noted by the Supreme Court "outrageousness" in the area of political and social discourse "… has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression."

See: *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55 (1988)

The Rules Committee should special heed of that warning.

The Proposed Rule is ripe for abuse.

Proposed Rule Would Meaningfully Impair Attorney Advocacy

In the courtroom, authentic conservative speakers, like myself, would no less be singled-out and punished for our uses of colorful humor, our satire, our metaphors, our descriptions, our criticisms, or even something as innocuous as our use of politically incorrect pronouns.

Inconvenient truths, that run counter to liberal progressive agendas, would come under perpetual attack as biased and prejudiced.

There can be little doubt that, in such an environment, where attorneys must perpetually endeavor to conform their speech to woke speech codes, under the pains and penalty of disbarment, the quality of an attorney's advocacy would be materially impaired.

Anticipating this critique, the proponents play clever word games. The last sentence of the Proposed Rule states: "This paragraph does not limit the ability of a lawyer to … provide advice, assistance or advocacy consistent with these Rules."

The key words here being "consistent with these Rules."

Advice, assistance or advocacy that is not “consistent with these Rules” – *i.e.* advice, assistance or advocacy that evidences bias or prejudice, as set forth in the first sentence – would not be permitted under the Proposed Rule.

The proponents, in other words, take the position that advice, assistance or advocacy that is critical of the enumerated classes or their agendas is not legitimate advocacy.

Conservatives disagree.

Proposed Rule Would Meaningfully Impair Legal Education

Eugene Volokh, a First Amendment professor at the University of California School of Law, and author of the treatise *The First Amendment and Related Statues*, has argued that passing a law that disciplines attorneys for speech would concurrently stifle debate within the legal community for fear of disciplinary reprimand.

> *See*: Article, Eugene Volokh, “*Texas AG: Lawyer speech code proposed by American Bar Association would violate the First Amendment*”; Washington Post (Dec. 20, 2016)

Professor Josh Blackman, of South Texas College of Law, and author of *Reply: A Pause for State Courts Considering Model Rule 8.4(G) The First Amendment and “Conduct Related to the Practice of Law”*, 30 Geo J. Legal Ethics (2017), in turn, has argued that ABA Rule 8.4(g) might impact the types of hypotheticals and debates law school professors can pose to students, because law professors who have active law licenses could worry about offending a student and being faced with a bar complaint.

> *See*: Josh Blackman, “*My Rejected Proposal for the AALS President’s Program on Diversity: The Effect of Model Rule of Professional Conduct 8.4(g) and Law School Pedagogy and Academic Freedom*” (Nov. 15, 2016)

Professor Ronald Rotunda, the author of the treatise *American Constitutional Law* (Volumes 1 & 2) (West 2016) and *Legal Ethics: The Lawyer’s Deskbook on Professional Responsibility* (ABA-Thomson Reuters 2016), added that under the ABA Model Rule, if

two attorneys spoke on a panel, and an attorney said “Black Lives Matter,” the attorney who responds “Blue Lives Matter” could be subject to discipline under this rule. He further noted that candid debates about illegal immigration or gender-neutral bathrooms would likely involve discussions about national origin, sexual orientation, and gender identity, which means that participants in the debate would be subject to discipline, depending entirely on the speaker’s stance or viewpoint.

> *See:* Rebecca Messall, et al., “*Statement on ABA Model Rule 8.4(g)*”; National Lawyers Association (Mar. 7, 2017)

The Proposed Rule, thus, would not only impermissibly chill the speech of practicing attorneys – it would no less impair the quality of legal education, to the long-term detriment of our profession.

The Proposed Rule Lacks Clear and Meaningful Standards

The broad open-ended reach of the Proposed Rule – extending to any comments or context that is in any way “related” to the practice of law – is devoid of clear and meaningful standards.

Stating the that Proposed Rule would apply in any context “related” to the practice of law, does not afford a person of ordinary intelligence fair notice of when the rule would or would not apply.

While some contexts might be obvious – *e.g.* inside a courtroom – other contexts would not be so clear (*e.g.* chamber of commerce functions; charity events; social media posts; podcasts; comments directed to a local zoning committee; private discussions concerning the practice the law; banter at a golf course with fellow attorneys; *etc.*).

We must also consider that what the left considers acceptable or unacceptable speech is constantly changing. There is no clear consensus even from within. The proposed injunction against biased and prejudicial speech would not be based on clear and meaningful standards but, rather, the subjective and ever-evolving proclamations of the radical left.

Woke speech codes that all too often defy common sense to the point where a person of ordinary intelligence would opine them odious tiresome and ridiculous.

e.g. Woke mandates dictating which pronouns are acceptable when referring to a "man" who "identifies" as a woman; or their ridiculous instance that we refer to "girls" as "cisgender girls" (so as not to offend the [so-called] "transgender girls").

An attorney who violates the woke speech codes would be *guilty by reason of insanity*.

e.g. Take, for example, the proposed injunction against biased or prejudicial speech concerning persons with a "disability." What qualifies as a disability these days …? The list of what the "experts" on the left call a "disability" grows larger all the time. No longer is the A.D.A. confined to traditional norms, such as blindness, the loss of a limb, or mental retardation. In this participation trophy era of perpetual victims – just about anything qualifies. Too much food; not enough exercise? Obesity is a disability. Lost the family farm at Foxwoods? Gambling addiction is a disability. Five o'clock somewhere? Alcoholism is a disability. Problems interacting with your co-workers? A mood disorders is a disability. Can't keep that rascal in your pants? It's not your fault. Sex addiction is a disability. And the list goes on and on and on. Under the Proposed Rule, it would be professional misconduct to speak critically of these "disabled" people and their (less than admirable) lifestyles. The parade of disabled "victims" never ends.

Texas Attorney General Issues Formal Opinion – ABA Rule Unconstitutional

In December 2016, the Attorney General of Texas issued an extensive Formal Opinion on this subject, Texas AG Opinion # KP-0123, opining that the ABA model rule, if adopted, would likely be held unconstitutional.

I have attached a copy of the Texas Attorney General's Formal Opinion in the Appendix and encourage the Rules Committee to review it.

Tennessee Attorney General Issues Formal Opinion – ABA Rule Unconstitutional

In March 2018, the Attorney General of Tennessee also issued an extensive Formal on this subject, Tenn. AG Opinion # 18-11. opining that the ABA model rule, if adopted, would likely be held unconstitutional.

I have attached a copy of the Tennessee Attorney General's Formal Opinion in the Appendix and encourage the Rules Committee to review it.

Montana Legislature Issues Joint Resolution Condemning ABA Rule as Unconstitutional

In April 2017, the Montana legislature issued a joint resolution (Senate No. 15) condemning ABA Model Rule as unconstitutional.

I have attached a copy of the State of Montana's joint resolution in the Appendix and encourage the Rules Committee to review it.

POLICY CONSIDERATIONS

Declaring Discrimination and Harassment Professional Misconduct Would Impose a Tremendous Burden on the State

A few days ago, the CBA circulated a confidential online survey among its members, inquiring (*inter alia*) whether they "believe" they have experienced discrimination or sexual harassment in connection with the practice of law. The CBA presumptively circulated this survey hoping that the information to be derived therefrom would support their position.

I respectfully submit it does the opposite.

Set aside for a moment the obvious – that whether someone “believes” they have been discriminated against – and whether someone has “actually” been discriminated against – is not one and the same.

Set that aside …

Imagine for a moment … if every one of these people … who believes they were somehow discriminated against … or better yet … imagine if a corresponding percentage of the bar as a whole … were to file a grievance complaint against each and every attorney or firm … they “believed” subjected them to discrimination.

Imagine that …

Imagine the burden that would impose on the individual SGC reviewing panels.

Or the burden that would impose on the Office of the Chief Disciplinary Counsel.

“Probable cause” is a very low threshold, after all.

The number of investigations the OCDC would need to perform – and the number of disciplinary proceedings the SGC would need to review and screen – would be staggering.

And discrimination cases not easy to prove. Ask any employment law attorney. They work hard to carry their burdens. It requires significant time and discovery.

Now … let’s add to that ridiculous number … every paralegal … every secretary … and every other disgruntled employee … who “believes” … they too have been discriminated against.

Be it on account of their race, color, ancestry, sex, pregnancy, religion, national origin, ethnicity, disability, status as a veteran, age, sexual orientation, gender identity, gender expression or marital status.

They too are going to file grievance complaints, after all – not just the associate attorneys.

Imagine that …

When the proponents of the proposed rule suggest the Proposed Rule would have no impact on the state – nothing further could be from the truth.

e.g. Bearded transsexual in a dress walks into your fancy law office and applies for a position as your front office receptionist. As a business owner catering to well-to-do conservative clients – are you going to hire that person? If the Proposed Rule were enacted – not hiring that person could cost you your license. Yet hiring that person could damage your image. To be certain, that bearded applicant would no doubt have a big box full of photocopied grievance complaints in the back of his car ready to mail to the SGC. Under the Proposed Rule, firms would constantly be called upon to defend their hiring decisions – not just in extreme instances, such as the bearded transsexual – but anyone who "believes" they were unfairly discriminated against. Under the Proposed Rule, the SGC reviewing panels would become a *de facto* extension of every firm's HR department, constantly called upon to review each firm's hiring decisions. The SGC panels and the OCDC would be overwhelmed.

Also: Finally, imagine if – in additional to everything just mentioned – the SGC reviewing panels and the OCDC were (also) called upon to investigate every allegation … in which an attorney was alleged to have made a statement or expressed a viewpoint … that someone on the alphabet left believes … was "biased or prejudicial." Contemplate the foreseeable resulting logistical burden – not only on the SGC and OCDC – but also on the judiciary in fielding countless as-applied challenges in instances where bias and prejudice were found. The courts would no doubt be compelled to take these speech challenges up, and cases of every sort would be delayed as a result. And if, *arguendo*, a speech violation were found and

the lawyer suspended, his or her clients would then need to find new counsel, on account of his offending speech, causing indirect but material prejudice and harm to his clients. This too would further delay the efficient administration of cases. The foreseeable negative impact on the state and on the efficient administration of justice cannot be understated.

Under the Proposed Rule, the Investigative Burden Would Shift from the Private Sector to the Public Sector

Now contrast that scenario with our current system.

Under our current system, a person who believes he or she has been wrongfully discriminated against would schedule a consultation with a private employment-law attorney. The employment attorney, in turn, would evaluate the subjective merits of the claim, in light of the ADA or EEOA, screen out the meritless and questionable cases, and pursue only those claims he or she believes to be legitimate.

Under our current system, the private sector efficiently performs the screening and does the heavy lifting.

Under the Proposed Rule, however, that burden would now shift to the state. Instead of going to the employment attorney, the aggrieved would go straight to the SGC.

Under the Proposed Rule – the public taxpayers – would fund the investigations in lieu of the private sector attorney.

In fact, it may be the private sector attorney who directs the potential client to the SGC, with the instruction: “If the OCDC finds something, come back and let me know.”

Let the OCDC figure out which claims are worth pursuing in civil court.

Let the OCDC do the heavy lifting.

Both in discrimination cases – and in sexual harassment cases.

The state would pick up the tab.

Nefarious Clients and Others Would No Doubt Abuse the Proposed Rule

Conventional wisdom among lawyers is "never sue a client." The logic being, if you do, you will be invariably grieved (for something) and compelled to defend your license.

But that explanation only tells half the story.

Ask any lawyer who has attempted to collect a significant debt … or any lawyer who has represented clients in a divorce … or any experienced judge sitting on the bench … and they will all tell you the same thing:

Oath or no oath - clients will lie – and often – when it serves their own purposes.

Allegations concerning sexual harassment or discriminatory statements - often nothing more than a "he said, she said" contest – are particularly prone to abuse.

The same analysis would no less apply in the context of a disgruntled or vindictive employee.

Former clients or employees with a grudge could convincingly retell a story of a past instance of sexual assault with someone else and substitute in the name of the attorney.

Innocent attorneys would no doubt be punished.

Fearful for their licenses, countless lawyers would abandon meritorious claims, and pay off fabricated claims, just to avoid running the gauntlet and risking their careers.

It is also reasonable to expect that disgruntled members of the alphabet coalitions would routinely file complaints against firms who do not meet their alphabet quotas.

And it probably goes without saying that their complaints would be aggressively prosecuted by a woke OCDC prosecutor.

n.b. Does anyone seriously envision the OCDC hiring a conservative Republican to screen and prosecute these type of cases ...?

The Proposed Rule is ripe for abuse.

Attorney Insurance Premiums Would Skyrocket

Lawyers accused or harassment or discrimination would, of course, be compelled to file a claim with their insurance carriers each time a complaint is made.

Even if the claim is entirely fabricated – accusations of this sort would need to be vigorously defended. No one expects a reprimand. The stakes would be very high.

This, in turn, would cause the cost of securing malpractice insurance to skyrocket.

On the flip side, carriers might expressly exclude these claims from their scope of coverages, which would mean lawyers accused under the Proposed Rule would be compelled to expend significant out-of-pocket sums retaining private defense counsel, and no insurance coverage would be available if their licenses were suspended.

This is no trivial matter.

And just imagine the number of claims lawyers would need to routinely defend against if the lawyers had to defend their viewpoints and speech. If every time a woke liberal's nose got out of joint – they had to defend themselves before the SGC.

The foreseeable financial impact on private practice firms would be staggering.

Small Firms Would Be Incentivized to Hire Conservative Straight White Males – and Avoid the Protected Classes

An attorney may be privately sympathetic to a social cause – from a philosophical standpoint – but that does not mean he or she is willing to risk their license over it.

An attorney, today, may be willing to hire from within the enumerated classes, comfortable with the risks associated with defending a fabricated ADA or EEOA claim – where a pattern or practice may be required, and the worst case scenario is monetary damages.

That same attorney, however, may have a very different opinion of hiring these persons, if they believe – a single instance – of something they say or do, or – a single instance – of a fabricated claim of misconduct – may cost them their law license.

The foreseen solution …?

Well … the best way to avoid a claim of wrongful termination – based on a person's inclusion in one of the classes – is not to hire them in the first place.

The best way to avoid a claim of sexual harassment – is not to hire to hire women.

And, in particular, attractive women, whose claims of sexual harassment are more likely to be credited as true.

The best way to avoid a claim of biased or prejudicial speech – that's easy – avoid the hypersensitive alphabet – and, in particular, its radicalized youth.

Or (do what I do) – forego hiring altogether and raise your prices.

Were the Proposed Rule enacted, we should reasonably anticipate that solo practitioners and small firms will endeavor to avoid these nefarious problems by avoiding the problematic classes – and, in particular, applicants associated with multiple alphabet categories.

From a business perspective, in any defensible hiring situation, the safest move would be to hire a conservative straight white male.

Or, if you are a female attorney, the safest move would be to hire a conservative straight white female.

It is not just men, after all, who stand to be negatively impacted.

Any time you hire a person with one more letter in their alphabet soup bowl than you have – you, my friend, are in the Proposed Rule's crosshairs.

No one is completely immune.

Small firms of all sorts, thus, would be quick to self-segregate.

And, in candor, as a practical matter, it would not be hard for a small firm or solo practice attorney to pull this off.

Sure, there are risks. And the left will decry discrimination.

But far easier to defend your decision to hire a straight white male attorney – than to defend against a fabricated claim of discrimination or sexual harassment from within.

Now mind you – I'm not advocating this. I'm predicting this.

It is the natural and inevitable response to a Proposed Rule that would make socially inclusive hiring practices a high-stakes game of Russian roulette.

No one wants to spin those chambers - not with their careers.

It is an inconvenient truth.

The Proposed Rule would not help the enumerated classes – it would harm them.

Existing Rules, Statutes and Remedies More Than Adequate

In the _RAV_ case, the Supreme Court discussed the adequacies of alternative remedies.

More specifically, St. Paul and its *amici* argued that "… even if the ordinance regulates expression based on hostility towards its protected ideological content, this discrimination is nonetheless justified because it is narrowly tailored to serve compelling state interests."

See: _RAV_ @ 395

St. Paul and its *amici* asserted that the ordinance "… helps to ensure the basic human rights of members of groups that have historically been subjected to discrimination, including the right of such group members to live in peace where they wish."

See: RAV @ 395

The proponents of the Proposed Rule offer similar arguments.

The Supreme Court's response is instructive:

"We do not doubt that these interests are compelling, and that the ordinance can be said to promote them. But the "danger of censorship" presented by a facially content-based statute, Leathers v. Medlock, 499 U.S. at 448 (1991), requires that that weapon be employed only where it is "necessary to serve the asserted [compelling] interest," Burson v. Freeman, 504 U.S. 191, 199 (1992) (plurality) (emphasis added); Perry Education Assn. v. Perry Local Educators' Assn., 460 U.S. 37, 45 (1983). The existence of adequate content neutral alternatives thus "undercut[s] significantly" any defense of such a statute, Boos v. Barry, supra, 485 U.S. at 329, casting considerable doubt on the government's protestations that "the asserted justification is in fact an accurate description of the purpose and effect of the law," Burson, supra, at 213 (KENNEDY, J.,concurring). See Boos, supra, 485 U.S. at 324-329; cf. Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 586-587 (1983). The dispositive question in this case, therefore, is whether content discrimination is reasonably necessary to achieve St. Paul's compelling interests; it plainly is not. An ordinance not limited to the favored topics, for example, would have precisely the same beneficial effect. In fact, the only interest distinctively served by the content limitation is that of displaying the city council's special hostility towards the particular biases thus singled out.[8] That is precisely what the First Amendment forbids. The politicians of St. Paul are entitled to express that hostility -- but not through the means of imposing unique limitations upon speakers who (however benightedly) disagree."

See: RAV @ 395-96

In other words, a broad content-neutral injunction against fighting words – not so confined to disfavored viewpoints on disfavored subjects – could adequately meet the state's compelling interests.

The exact same could be said of our existing content-neutral provisions of RPC 8.4.

RPC 8.4(4) prohibits "conduct prejudicial to the administration of justice."

RPC 8.4(2), in turn, prohibits "… a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;"

These are enough.

The Proposed Rule, just like the Bias-Motivated Ordinance, is not reasonably necessary to advance the state's compelling interests.

RPC 8.4(2), RPC 8.4(4), the state and federal criminal codes, along with numerous civil remedies available to *bona-fide* victims of harassment and discrimination – are more than sufficient – to police the profession and safeguard the administration of justice.

The Proposed Rule is not only a misguided idea with disastrous consequences – it is unnecessary.

The Road to Hell – Closing Thoughts

We are all familiar with the expression.

I am certain the proponents believe the Proposed Rule would advance the greater good. Just as the Marxists and Bolsheviks of an earlier age (genuinely) believed that "universal equality" (communism) and centrally planned economies would produce just and verdant societies.

But history informs us otherwise.

We are living in an age of mass political hysteria. In a high-stakes election year, dealing with a once-in-a-century pandemic, where get-out-the-vote pandering and cancel-culture demagoguery have been pushed to radical extremes.

Now, perhaps more than ever, the judicial branch must resist the urge to insert itself into emotionally charged identity politics and refrain from legislating by bumper sticker.

The judiciary must instead act as the voice of reason – serving as the wise and reasoned philosopher kings of which Socrates and Aristotle once spoke.

The judiciary must vigorously defend the time-tested principles handed down to us by intellectual giants like Jefferson, Hamilton, and Madison, and defend the First Amendment.

The speech codes inherent to the Proposed Rule are facially unconstitutional. We know this. The holding in RAV is directly on point, unambiguous and controlling.

Even to the limited extent the Court might plausibly enact a rule limited to non-expressive conduct – the cumulative policy considerations identified in this position paper – weigh strongly against it.

Our existing remedies and safeguards are more than adequate.

Wherefore the undersigned respectfully asks that the Proposed Rule be REJECTED.

RESPECTFULLY

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APPENDIX

R.A.V. v. City of St. Paul, 505 U.S. 377 (1992)

505 U.S. 377 (1992)
112 S.Ct. 2538, 120 L.Ed.2d 305, 60 U.S.L.W. 4667
R.A.V.
v.
City of St. Paul
No. 90-7675
United States Supreme Court
June 22, 1992

Argued Dec. 4, 1991

CERTIORARI TO THE SUPREME COURT OF MINNESOTA

Edward J. Cleary argued the cause for petitioner. With him on the briefs was Michael F. Cromett.

Tom Foley argued the cause for respondent. With him on the brief was Steven C. DeCoster. (FN*)

* Briefs of amici curiae urging reversal were filed for the American Civil Liberties Union et al. by Steven R. Shapiro, John A. Powell, and Mark R. Anfinson; for the Association of American Publishers et al. by Bruce J. Ennie; and for the Center for Individual Rights by Gary B. Born and Michael P. McDonald.

Briefs of amici curiae urging affirmance were filed for the State of Minnesota et al. by Hubert H. Humphrey III, Attorney General of Minnesota, and Richard S. Slowes, Assistant Attorney General, Jimmy Evans, Attorney General of Alabama, Grant Woods, Attorney General of Arizona, Richard Blumenthal, Attorney General of Connecticut, and John J. Kelly, Chief State's Attorney of Connecticut, Larry EchoHawk, Attorney General of Idaho, Roland W. Burris, Attorney General of Illinois, Robert T. Stephan, Attorney General of Kansas, J. Joseph Curran, Jr., Attorney General of Maryland, Scott Harshbarger, Attorney General of Massachusetts, Frank J. Kelley, Attorney General of Michigan, Robert J. Del Tufo, Attorney General of New Jersey, Lee I. Fisher, Attorney General of Ohio, Susan B. Loving, Attorney General of Oklahoma, T. Travis Medlock, Attorney General of South Carolina, Charles W. Burson, Attorney General of Tennessee, Mary Sue Terry, Attorney General of Virginia, and Paul Van Dam, Attorney General of Utah; for the Anti-Defamation League of B'nai B'rith by Allen I. Saeks, Jeffrey P. Sinensky, Steven M. Freeman, and Michael Lierberman; for the Asian American Legal Defense and Education Fund et al. by Angelo N. Ancheta; for the Center for Democratic Renewal et al. by Frank E. Deale; for the Criminal Justice Legal Foundation by Kent S. Scheidegger and Charles L. Hobson; for the League of Minnesota Cities et al. by Carla J. Heyl, Robert J. Alfton, and Jerome J. Segal; for the National Association for the Advancement of Colored People et al. by Ronald D. Maines, Dennis C. Hayes, Willie Abrams, and Kemp R. Harshman; for the National Black Women's Health Project by Catharine A. MacKinnon and Burke Marshall; for the National Institute of Municipal Law Officers et al. by Richard Ruda, Michael J. Wahoske, and Mark B. Rotenberg; and for People for the American Way by Richard S. Hoffman, Kevin J. Hasson, and Elliot M. Mincberg.

Charles R. Sheppard filed a brief for the Patriot's Defense Foundation, Inc., as amicus curiae.

Syllabus

After allegedly burning a cross on a black family's lawn, petitioner R.A.V. was charged under, *inter alia,* the St. Paul, Minnesota, Bias-Motivated Crime Ordinance, which prohibits the display of a symbol which one knows or has reason to know "arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender." The trial court dismissed this charge on the ground that the ordinance was substantially overbroad and impermissibly content-based, but the State Supreme Court reversed. It rejected the overbreadth claim because the phrase "arouses anger, alarm or resentment in others" had been construed in earlier state cases to limit the ordinance's reach to "fighting words" within the meaning of this Court's decision in *Chaplinsky v.*

New Hampshire, 315 U.S. 568, 572, a category of expression unprotected by the First Amendment. The court also concluded that the ordinance was not impermissibly content-based, because it was narrowly tailored to serve a compelling governmental interest in protecting the community against bias-motivated threats to public safety and order.

Held: The ordinance is facially invalid under the First Amendment. Pp. 381-396.

(a) This Court is bound by the state court's construction of the ordinance as reaching only expressions constituting "fighting words." However, R.A.V.'s request that the scope of the *Chaplinsky* formulation be modified, thereby invalidating the ordinance as substantially overbroad, need not be reached, since the ordinance unconstitutionally prohibits speech on the basis of the subjects the speech addresses. P. 381.

(b) A few limited categories of speech, such as obscenity, defamation, and fighting words, may be regulated *because of their constitutionally proscribable content.* However, these categories are not entirely invisible to the Constitution, and government may not regulate them based on hostility, or favoritism, towards a nonproscribable message they contain. Thus, the regulation of "fighting words" may not be based on nonproscribable content. It may, however, be underinclusive, addressing some offensive instances and leaving other equally offensive ones alone, so long as the selective prescription is not based on content, or there is no realistic possibility that regulation of ideas is afoot. Pp. 382-390.

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(c) The ordinance, even as narrowly construed by the State Supreme Court, is facially unconstitutional, because it imposes special prohibitions on those speakers who express views on the disfavored subjects of "race, color, creed, religion or gender." At the same time, it permits displays containing abusive invective if they are not addressed to those topics. Moreover, in its practical operation, the ordinance goes beyond mere content, to actual viewpoint, discrimination. Displays containing "fighting words" that do not invoke the disfavored subjects would seemingly be useable *ad libitum* by those arguing in favor of racial, color, etc. tolerance and equality, but not by their opponents. St. Paul's desire to communicate to minority groups that it does not condone the "group hatred" of bias-motivated speech does not justify selectively silencing speech on the basis of its content. Pp. 391-393.

(d) The content-based discrimination reflected in the ordinance does not rest upon the very reasons why the particular class of speech at issue is proscribable, it is not aimed only at the "secondary effects" of [112 S.Ct. 2541] speech within the meaning of *Renton v. Playtime Theatres Inc.,* 475 U.S. 41, and it is not for any other reason the sort that does not threaten censorship of ideas. In addition, the ordinance's content discrimination is not justified on the ground that the ordinance is narrowly tailored to serve a compelling state interest in ensuring the basic human rights of groups historically discriminated against, since an ordinance not limited to the favored topics would have precisely the same beneficial effect. Pp. 393-396.

464 N.W.2d 507 (Minn.1991), reversed and remanded.

SCALIA, J., delivered the opinion of the Court, in which REHNQUIST, C.J., and KENNEDY, SOUTER, and THOMAS, JJ., joined. WHITE, J., filed an opinion concurring in the judgment, in which BLACKMUN and O'CONNOR, JJ., joined, and in which STEVENS, J., joined except as to Part I-A, *post,* p. 397. BLACKMUN, J., filed an opinion concurring in the judgment, *post,* p. 415. STEVENS, J., filed an opinion concurring in the judgment, in Part I of which WHITE and BLACKMUN, JJ., joined, *post,* p. 416.

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SCALIA, J., lead opinion

JUSTICE SCALIA delivered the opinion of the Court.

In the predawn hours of June 21, 1990, petitioner and several other teenagers allegedly assembled a crudely made cross by taping together broken chair legs. They then allegedly burned the cross inside the fenced yard of a black family that lived across the street from the house where petitioner was staying. Although this conduct could have been punished

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under any of a number of laws,[1] one of the two provisions under which respondent city of St. Paul chose to charge petitioner (then a juvenile) was the St. Paul Bias-Motivated Crime Ordinance, St. Paul, Minn.Legis.Code § 292.02 (1990), which provides:

Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.

Petitioner moved to dismiss this count on the ground that the St. Paul ordinance was substantially overbroad and impermissibly content-based, and therefore facially invalid under the First Amendment.[2] The trial court granted this motion, but the Minnesota Supreme Court reversed. That court rejected petitioner's overbreadth claim because, as construed in prior Minnesota cases, *see, e.g., In re Welfare of S.L.J.,* 263 N.W.2d 412 (Minn.1978), the modifying phrase "arouses anger, alarm or resentment in others" limited the reach of the ordinance to conduct that amounts to "fighting words," *i.e.,* "conduct that itself inflicts injury or tends to incite immediate violence . . . ," *In re Welfare of R.A.V.,* 464 N.W.2d 507, 510 (Minn.1991) (citing *Chaplinsky*

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v. New Hampshire, 315 U.S. 568, 572 (1942)), and therefore the ordinance reached only expression "that the first amendment does not protect." 464 N.W.2d at 511. The court also concluded that the ordinance was not impermissibly content-based because, in its view,

the ordinance is a narrowly tailored means toward accomplishing the compelling governmental interest in protecting the community against bias-motivated threats to public safety and order.

Ibid. We granted certiorari, 501 U.S. 1204 [112 S.Ct. 2542] (1991).

I

In construing the St. Paul ordinance, we are bound by the construction given to it by the Minnesota court. *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 339 (1986); *New York v. Ferber*, 458 U.S. 747, 769, n. 24 (1982); *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949). Accordingly, we accept the Minnesota Supreme Court's authoritative statement that the ordinance reaches only those expressions that constitute "fighting words" within the meaning of *Chaplinsky.* 464 N.W.2d at 510-511. Petitioner and his *amici* urge us to modify the scope of the *Chaplinsky* formulation, thereby invalidating the ordinance as "substantially overbroad," *Broadrick v. Oklahoma*, 413 U.S. 601, 610 (1973). We find it unnecessary to consider this issue. Assuming, *arguendo,* that all of the expression reached by the ordinance is proscribable under the "fighting words" doctrine, we nonetheless conclude that the ordinance is facially unconstitutional in that it prohibits otherwise permitted speech solely on the basis of the subjects the speech addresses.[3]

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The First Amendment generally prevents government from proscribing speech, *see, e.g., Cantwell v. Connecticut*, 310 U.S. 296, 309-311 (1940), or even expressive conduct, *see,e.g., Texas v. Johnson*, 491 U.S. 397, 406 (1989), because of disapproval of the ideas expressed. Content-based regulations are presumptively invalid. *Simon & Schuster, Inc. v. Members of*

N.Y. State Crime Victims Bd., 502 U.S. 105 (1991); *id.* at 115 (KENNEDY, J., concurring in judgment); *Consolidated Edison of N.Y. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 530, 536 (1980); *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972). From 1791 to the present, however, our society, like other free but civilized societies, has permitted restrictions upon the content of [112 S.Ct. 2543] speech in a

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few limited areas, which are

of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

Chaplinsky, supra, 315 U.S. at 572. We have recognized that "the freedom of speech" referred to by the First Amendment does not include a freedom to disregard these traditional limitations. *See, e.g., Roth v. United States*, 354 U.S. 476 (1957) (obscenity); *Beauharnais v. Illinois*, 343 U.S. 250 (1952) (defamation); *Chaplinsky v. New Hampshire, supra,* ("fighting words"); *see generally Simon & Schuster, supra,* 502 U.S. at 124 (KENNEDY, J., concurring in judgment). Our decisions since the 1960's have narrowed the scope of the traditional categorical exceptions for defamation, *see New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Gertz v. Robert Welch Inc.,* 418 U.S. 323 (1974); *see generally Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 13-17 (1990), and for obscenity, *see Miller v. California*, 413 U.S. 15 (1973), but a limited categorical approach has remained an important part of our First Amendment jurisprudence.

We have sometimes said that these categories of expression are "not within the area of constitutionally protected speech," *Roth, supra,* 354 U.S. at 483; *Beauharnais, supra,* 343 U.S. at 266; *Chaplinsky, supra,* 315 U.S. at 571-572; or that the "protection of the First Amendment does not extend" to them, *Bose Corp. v. Consumers Union of United States Inc.,* 466 U.S. 485, 504 (1984); *Sable Communications of Cal., Inc. v. FCC,* 492 U.S. 115, 124 (1989). Such statements must be taken in context, however, and are no more literally true than is the occasionally repeated shorthand characterizing obscenity "as not being speech at all," Sunstein, Pornography and the First Amendment, 1986 Duke L.J. 589, 615, n. 146. What they mean is that these areas of speech can, consistently with the First Amendment, be regulated *because of their constitutionally proscribable content* (obscenity, defamation, etc.) -- not that they are categories of speech entirely invisible to the Constitution, so that they may be made the vehicles

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for content discrimination unrelated to their distinctively proscribable content. Thus, the government may proscribe libel; but it may not make the further content discrimination of proscribing *only* libel critical of the government. We recently acknowledged this distinction in *Ferber,* 458 U.S. at 763, where, in upholding New York's child pornography law, we expressly recognized that there was no "question here of censoring a particular literary theme. . . ." *See also id.* at 775 (O'CONNOR, J., concurring) ("As drafted, New York's statute does not attempt to suppress the communication of particular ideas").

Our cases surely do not establish the proposition that the First Amendment imposes no obstacle whatsoever to regulation of particular instances of such proscribable expression, so that the government "may regulate [them] freely," *post* at 400 (WHITE, J., concurring in judgment). That would mean that a city council could enact an ordinance prohibiting only those legally obscene works that contain criticism of the city government or, indeed, that do not include endorsement of the city government. Such a simplistic, all-or-nothing-at-all approach to First Amendment protection is at odds with common sense and with our jurisprudence as well.[4] It is

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not true that "fighting words" have at most a "*de minimis*" expressive content, *ibid.,* or that their content is *in all respects* "worthless and undeserving of constitutional protection," *post* at

401; sometimes they are quite expressive indeed. We have not said that they constitute "*no* part of the expression of ideas," but only that they constitute "no *essential* part of any exposition of ideas." *Chaplinsky,* 315 U.S. at 572 (emphasis added).

The proposition that a particular instance of speech can be proscribable on the basis of one feature (*e.g.,* obscenity) but not on the basis of another (*e.g.,* opposition to the city government) is commonplace, and has found application in many contexts. We have long held, for example, that nonverbal expressive activity can be banned because of the action it entails, but not because of the ideas it expresses -- so that burning a flag in violation of an ordinance against outdoor fires could be punishable, whereas burning a flag in violation of an ordinance against dishonoring the flag is not. *See Johnson,* 491 U.S. at 406-407. *See also* Barnes v. Glen Theatre, Inc., 501 U.S. 560, 569-570 (1991) (plurality); *id.* at 573-574 (SCALIA, J., concurring in judgment); *id.* at 581-582 (SOUTER, J., concurring in judgment); *United*

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States v. O'Brien, 391 U.S. 367, 376-377 (1968). Similarly, we have upheld reasonable "time, place, or manner" restrictions, but only if they are "justified without reference to the content of the regulated speech." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (internal quotation marks omitted); *see also Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 298 (1984) (noting that the *O'Brien* test differs little from the standard applied to time, place, or manner restrictions). And just as the power to proscribe particular speech on the basis of a non-content element (*e.g.,* noise) does not entail the power to proscribe the same speech on the basis of a content element, so also the power to proscribe it 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.

[112 S.Ct. 2545] In other words, the exclusion of "fighting words" from the scope of the First Amendment simply means that, for purposes of that Amendment, the unprotected features of the words are, despite their verbal character, essentially a "nonspeech" element of communication. Fighting words are thus analogous to a noisy sound truck: each is, as Justice Frankfurter recognized, a "mode of speech," *Niemotko v. Maryland*, 340 U.S. 268, 282 (1951) (Frankfurter, J., concurring in result); both can be used to convey an idea; but neither has, in and of itself, a claim upon the First Amendment. As with the sound truck, however, so also with fighting words: the government may not regulate use based on hostility -- or favoritism -- towards the underlying message expressed. *Compare Frisby v. Schultz*, 487 U.S. 474 (1988) (upholding, against facial challenge, a content-neutral ban on targeted residential picketing) *with Carey v. Brown*, 447 U.S. 455 (1980) (invalidating a ban on residential picketing that exempted labor picketing).[5]

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The concurrences describe us as setting forth a new First Amendment principle that prohibition of constitutionally proscribable speech cannot be "underinclusiv[e]," *post* at 402 (WHITE, J., concurring in judgment) -- a First Amendment "absolutism" whereby "within a particular `proscribable' category of expression, . . . a government must either proscribe all speech or no speech at all," *post* at 419 (STEVENS, J., concurring in judgment). That easy target is of the concurrences' own invention. In our view, the First Amendment imposes not an "underinclusiveness" limitation, but a "content discrimination" limitation, upon a State's prohibition of proscribable speech. There is no problem whatever, for example, with a State's prohibiting obscenity (and other forms of proscribable expression) only in certain media or markets, for although that prohibition would be "underinclusive," it would not discriminate on the basis of content. *See, e.g., Sable Communications,* 492 U.S. at 124-126 (upholding 47 U.S.C. § 223(b)(1) (1988), which prohibits obscene telephone communications).

Even the prohibition against content

discrimination that we assert the First Amendment requires is not absolute. It applies differently in the context of proscribable speech than in the area of fully protected speech. The rationale of the general prohibition, after all, is that content discrimination "rais[es] the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace," *Simon & Schuster,* 502 U.S. at 116; *Leathers v. Medlock*, 499 U.S. 439, 448 (1991); *FCC v. League of Women Voters of California*, 468 U.S. 364, 383-384 (1984); *Consolidated Edison Co.,* 447 U.S. at 536; *Police Dept. of Chicago v. Mosley,* 408 U.S.

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at 95-98. But content discrimination among various instances of a class of proscribable speech often does not pose this threat.

When the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable, no significant danger of idea or viewpoint discrimination exists. Such a reason, having been adjudged neutral enough to support exclusion of the entire class of speech from First Amendment protection, is also neutral enough to form the basis of distinction within [112 S.Ct. 2546] the class. To illustrate: a State might choose to prohibit only that obscenity which is the most patently offensive *in its prurience* -- *i.e.,* that which involves the most lascivious displays of sexual activity. But it may not prohibit, for example, only that obscenity which includes offensive *political* messages. *See Kucharek v. Hanaway,* 902 F.2d 513, 517 (CA7 1990), *cert. denied,* 498 U.S. 1041 (1991). And the Federal Government can criminalize only those threats of violence that are directed against the President, *see* 18 U.S.C. § 871 -- since the reasons why threats of violence are outside the First Amendment (protecting individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur) have special force when applied to the person of the President. *See Watts v. United States*, 394 U.S. 705, 707 (1969) (upholding the facial validity of § 871 because of the "overwhelmin[g] interest in protecting the safety of [the] Chief Executive and in allowing him to perform his duties without interference from threats of physical violence"). But the Federal Government may not criminalize only those threats against the President that mention his policy on aid to inner cities. And to take a final example (one mentioned by JUSTICE STEVENS, *post* at 421-422), a State may choose to regulate price advertising in one industry, but not in others, because the risk of fraud (one of the characteristics of commercial speech that justifies depriving it of full First Amendment protection, *see* Virginia

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Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771-7726 (1976)) is in its view greater there. *Cf.* Morales v. Trans World Airlines, Inc., 504 U.S. 374 (1992) (state regulation of airline advertising); *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447 (1978) (state regulation of lawyer advertising). But a State may not prohibit only that commercial advertising that depicts men in a demeaning fashion, *see, e.g.,* L.A. Times, Aug. 8, 1989, section 4, p. 6, col. 1.

Another valid basis for according differential treatment to even a content-defined subclass of proscribable speech is that the subclass happens to be associated with particular "secondary effects" of the speech, so that the regulation is "*justified* without reference to the content of the . . . speech," *Renton v. Playtime Theatres Inc.,* 475 U.S. 41, 48 (1986) (quoting, with emphasis, *Virginia Pharmacy Bd., supra,* 425 U.S. at 771); *see also* Young v. American Mini Theatres, Inc., 427 U.S. 50, 71, n. 34 (1976) (plurality); *id.* at 80-82 (Powell, J., concurring); *Barnes,* 501 U.S. at 586 (SOUTER, J., concurring in judgment). A State could, for example, permit all obscene live performances except those involving minors. Moreover, since words can in some circumstances violate laws directed not against speech. but against conduct (a law against treason, for example, is violated by telling the enemy the nation's defense secrets), a particular content-based subcategory of a proscribable class of speech can be swept up incidentally

within the reach of a statute directed at conduct, rather than speech. *See id.* at 571 (plurality opinion); *id.* at 577 (SCALIA, J., concurring in judgment); *id.* at 582 (SOUTER, J., concurring in judgment); *FTC v. Superior Court Trial Lawyers Assn.*, 493 U.S. 411, 425-432 (1990); *O'Brien,* 391 U.S. at 376-377. Thus, for example, sexually derogatory "fighting words," among other words, may produce a violation of Title VII's general prohibition against sexual discrimination in employment practices, 42 U.S.C. § 2000e-2; 29 CFR § 1604.11 (1991). *See also* 18

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U.S.C. § 242; 42 U.S.C. §§ 1981, 1982. Where the government does not target conduct on the basis of its expressive content, acts are not [112 S.Ct. 2547] shielded from regulation merely because they express a discriminatory idea or philosophy.

These bases for distinction refute the proposition that the selectivity of the restriction is "even arguably `conditioned upon the sovereign's agreement with what a speaker may intend to say.'" *Metromedia, Inc. v. San Diego,* 453 U.S. 490, 555 (1981) (STEVENS, J., dissenting in part) (citation omitted). There may be other such bases as well. Indeed, to validate such selectivity (where totally proscribable speech is at issue), it may not even be necessary to identify any particular "neutral" basis, so long as the nature of the content discrimination is such that there is no realistic possibility that official suppression of ideas is afoot. (We cannot think of any First Amendment interest that would stand in the way of a State's prohibiting only those obscene motion pictures with blue-eyed actresses.) Save for that limitation, the regulation of "fighting words," like the regulation of noisy speech, may address some offensive instances and leave other, equally offensive, instances alone. *See Posadas de Puerto Rico,* 478 U.S. at 342-343.[6]

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II

Applying these principles to the St. Paul ordinance, we conclude that, even as narrowly construed by the Minnesota Supreme Court, the ordinance is facially unconstitutional. Although the phrase in the ordinance, "arouses anger, alarm or resentment in others," has been limited by the Minnesota Supreme Court's construction to reach only those symbols or displays that amount to "fighting words," the remaining, unmodified terms make clear that the ordinance applies only to "fighting words" that insult, or provoke violence, "on the basis of race, color, creed, religion or gender." Displays containing abusive invective, no matter how vicious or severe, are permissible unless they are addressed to one of the specified disfavored topics. Those who wish to use "fighting words" in connection with other ideas -- to express hostility, for example, on the basis of political affiliation, union membership, or homosexuality -- are not covered. The First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects. *See Simon & Schuster,* 502 U.S. at 116; *Arkansas Writers' Project, Inc. v. Ragland,* 481 U.S. 221, 229-230 (1987).

In its practical operation, moreover, the ordinance goes even beyond mere content discrimination to actual viewpoint discrimination. Displays containing some words -- odious racial epithets, for example -- would be prohibited to proponents of all views. But "fighting words" that do not themselves invoke race, color, creed, religion, or gender -- aspersions upon a person's mother, for [112 S.Ct. 2548] example -- would seemingly be usable *ad libitum* in the placards of those arguing *in favor* of racial, color, etc. tolerance and equality, but could not be used by that speaker's opponents. One could hold up a sign saying, for example, that all "anti-Catholic

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bigots" are misbegotten; but not that all "papists" are, for that would insult and provoke violence "on the basis of religion." St. Paul has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensbury Rules.

What we have here, it must be emphasized, is not a prohibition of fighting words that are directed at certain persons or groups (which would be *facially* valid if it met the requirements of the Equal Protection Clause); but rather, a prohibition of fighting words that contain (as the Minnesota Supreme Court repeatedly emphasized) messages of "bias-motivated" hatred and, in particular, as applied to this case, messages "based on virulent notions of racial supremacy." 464 N.W.2d at 508, 511. One must wholeheartedly agree with the Minnesota Supreme Court that "[i]t is the responsibility, even the obligation, of diverse communities to confront such notions in whatever form they appear," *ibid.,* but the manner of that confrontation cannot consist of selective limitations upon speech. St. Paul's brief asserts that a general "fighting words" law would not meet the city's needs, because only a content-specific measure can communicate to minority groups that the "group hatred" aspect of such speech "is not condoned by the majority." Brief for Respondent 25. The point of the First Amendment is that majority preferences must be expressed in some fashion other than silencing speech on the basis of its content.

Despite the fact that the Minnesota Supreme Court and St. Paul acknowledge that the ordinance is directed at expression of group hatred, JUSTICE STEVENS suggests that this "fundamentally misreads" the ordinance. *Post* at 433. It is directed, he claims, not to speech of a particular content, but to particular "injur[ies]" that are "qualitatively different" from other injuries. *Post* at 424. This is word-play. What makes the anger, fear, sense of dishonor, etc. produced by violation of this ordinance distinct from the anger, fear, sense of dishonor, etc. produced by other fighting words is

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nothing other than the fact that it is caused by a distinctive idea, conveyed by a distinctive message. The First Amendment cannot be evaded that easily. It is obvious that the symbols which will arouse "anger, alarm or resentment in others on the basis of race, color, creed, religion or gender" are those symbols that communicate a message of hostility based on one of these characteristics. St. Paul concedes in its brief that the ordinance applies only to "racial, religious, or gender-specific symbols" such as "a burning cross, Nazi swastika or other instrumentality of like import." Brief for Respondent 8. Indeed, St. Paul argued in the Juvenile Court that

[t]he burning of a cross does express a message, and it is, in fact, the content of that message which the St. Paul Ordinance attempts to legislate.

Memorandum from the Ramsey County Attorney to the Honorable Charles A. Flinn, Jr., dated July 13, 1990, in *In re Welfare of R.A.V.,* No. 89-D-1231 (Ramsey Cty.Juvenile Ct.), p. 1, reprinted in App. to Brief for Petitioner C-1.

The content-based discrimination reflected in the St. Paul ordinance comes within neither any of the specific exceptions to the First Amendment prohibition we discussed earlier, nor within a more general exception for content discrimination that does not threaten censorship of ideas. It assuredly does not fall within the exception for content discrimination based on the very reasons why the particular class of speech at issue (here, fighting words) is proscribable. As explained earlier, *see supra* at 386, the reason why fighting words are categorically excluded from the protection of the First Amendment is not that their content communicates any particular idea, but that their content [112 S.Ct. 2549] embodies a particularly intolerable (and socially unnecessary) *mode* of expressing *whatever* idea the speaker wishes to convey. St. Paul has not singled out an especially offensive mode of expression -- it has not, for example, selected for prohibition only those fighting words that communicate ideas in a threatening (as opposed to a merely obnoxious) manner. Rather, it has proscribed fighting

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words of whatever manner that communicate messages of racial, gender, or religious intolerance. Selectivity of this sort creates the possibility that the city is seeking to handicap the

expression of particular ideas. That possibility would alone be enough to render the ordinance presumptively invalid, but St. Paul's comments and concessions in this case elevate the possibility to a certainty.

St. Paul argues that the ordinance comes within another of the specific exceptions we mentioned, the one that allows content discrimination aimed only at the "secondary effects" of the speech, *see* Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986). According to St. Paul, the ordinance is intended, "not to impact on [sic] the right of free expression of the accused," but rather to

> protect against the victimization of a person or persons who are particularly vulnerable because of their membership in a group that historically has been discriminated against.

Brief for Respondent 28. Even assuming that an ordinance that completely proscribes, rather than merely regulates, a specified category of speech can ever be considered to be directed only to the secondary effects of such speech, it is clear that the St. Paul ordinance is not directed to secondary effects within the meaning of *Renton.* As we said in *Boos v. Barry*, 485 U.S. 312 (1988), "[l]isteners' reactions to speech are not the type of `secondary effects' we referred to in *Renton.*" *Id.* at 321. "The emotive impact of speech on its audience is not a `secondary effect.'" *Ibid. See also id.* at 334 (opinion of Brennan, J.).[7]

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It hardly needs discussion that the ordinance does not fall within some more general exception permitting *all* selectivity that for any reason is beyond the suspicion of official suppression of ideas. The statements of St. Paul in this very case afford ample basis for, if not full confirmation of, that suspicion.

Finally, St. Paul and its *amici* defend the conclusion of the Minnesota Supreme Court that, even if the ordinance regulates expression based on hostility towards its protected ideological content, this discrimination is nonetheless justified because it is narrowly tailored to serve compelling state interests. Specifically, they assert that the ordinance helps to ensure the basic human rights of members of groups that have historically been subjected to discrimination, including the right of such group members to live in peace where they wish. We do not doubt that these interests are compelling, and that the ordinance can be said to promote them. But the "danger of censorship" presented by a facially content-based statute, *Leathers v. Medlock,* 499 U.S. at 448 (1991), requires that that weapon be employed only where it is "*necessary* to serve the asserted [compelling] interest," *Burson v. Freeman*, 504 U.S. 191, 199 (1992) (plurality) (emphasis added); *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 45 (1983). The existence of adequate content-neutral alternatives thus "undercut[s] significantly" any defense of such a statute, *Boos v. Barry, supra,* 485 U.S. at 329, casting considerable doubt on the government's protestations that "the asserted justification is in fact an accurate description of the purpose and effect of the law," *Burson, supra,* at 213 (KENNEDY, J., concurring). *See Boos, supra,* 485 U.S. at 324-329; *cf. Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 586-587 (1983). The dispositive question in this case, therefore, is whether content discrimination is reasonably necessary to achieve St. Paul's

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compelling interests; it plainly is not. An ordinance not limited to the favored topics, for example, would have precisely the same beneficial effect. In fact, the only interest distinctively served by the content limitation is that of displaying the city council's special hostility towards the particular biases thus singled out.[8] That is precisely what the First Amendment forbids. The politicians of St. Paul are entitled to express that hostility -- but not through the means of imposing unique limitations upon speakers who (however benightedly) disagree.

* * * *

Let there be no mistake about our belief that burning a cross in someone's front yard is

reprehensible. But St. Paul has sufficient means at its disposal to prevent such behavior without adding the First Amendment to the fire.

The judgment of the Minnesota Supreme Court is reversed, and the case is remanded for proceedings not inconsistent with this opinion.

It is so ordered.

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WHITE, J., concurring

JUSTICE WHITE, with whom JUSTICE BLACKMUN and JUSTICE O'CONNOR join, and with whom JUSTICE STEVENS joins except as to Part I(A), concurring in the judgment.

I agree with the majority that the judgment of the Minnesota Supreme Court should be reversed. However, our agreement ends there.

This case could easily be decided within the contours of established First Amendment law by holding, as petitioner argues, that the St. Paul ordinance is fatally overbroad because it criminalizes not only unprotected expression but expression protected by the First Amendment. *See* Part II, *infra.* Instead, "find[ing] it unnecessary" to consider the questions upon which we granted review,[1] *ante* at 381, the

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Court holds the [112 S.Ct. 2551] ordinance facially unconstitutional on a ground that was never presented to the Minnesota Supreme Court, a ground that has not been briefed by the parties before this Court, a ground that requires serious departures from the teaching of prior cases and is inconsistent with the plurality opinion in *Burson v. Freeman*, 504 U.S. 191 (1992), which was joined by two of the five Justices in the majority in the present case.

This Court ordinarily is not so eager to abandon its precedents. Twice within the past month, the Court has declined to overturn longstanding but controversial decisions on questions of constitutional law. *See* Allied Signal, Inc. v. Director, Division of Taxation, 504 U.S. 768 (1992); *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992). In each case, we had the benefit of full briefing on the critical issue, so that the parties and *amici* had the opportunity to apprise us of the impact of a change in the law. And in each case, the Court declined to abandon its precedents, invoking the principle of *stare decisis. Allied Signal, Inc., supra,* at 783-786; *Quill Corp., supra,* at 317-318.

But in the present case, the majority casts aside long-established First Amendment doctrine without the benefit of briefing and adopts an untried theory. This is hardly a judicious way of proceeding, and the Court's reasoning in reaching its result is transparently wrong.

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I

A

This Court's decisions have plainly stated that expression falling within certain limited categories so lacks the values the First Amendment was designed to protect that the Constitution affords no protection to that expression. *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), made the point in the clearest possible terms:

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. . . . It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

Id. at 571-572. *See also* Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 504 (1984) (citing *Chaplinsky*).

Thus, as the majority concedes, *see ante* at 383-384, this Court has long held certain discrete

categories of expression to be proscribable on the basis of their content. For instance, the Court has held that the individual who falsely shouts "fire" in a crowded theatre may not claim the protection of the First Amendment. *Schenck v. United States*, 249 U.S. 47, 52 (1919). The Court has concluded that neither child pornography nor obscenity is protected by the First Amendment. *New York v. Ferber*, 458 U.S. 747, 764 (1982); *Miller v. California*, 413 U.S. 15, 20 (1973); *Roth v. United States*, 354 U.S. 476, 484-485 (1957). And the Court has observed that,

[l]eaving aside the special considerations when public officials [and public figures] are the target, a libelous publication is not protected by the Constitution.

Ferber, supra, 458 U.S. at 763 (citations omitted).

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All of these categories are content-based. But the Court has held that First Amendment does not apply to them, because their expressive content is worthless or of *de minimis* value to society. *Chaplinsky, supra,* 315 U.S. at 571-572. We have not departed from this principle, emphasizing repeatedly that,

within the confines of [these] given classification[s], the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake, that no process of case-by-case adjudication is required.
Ferber, supra,
458 U.S. at 763-764;
Bigelow v. Virginia
, 421 U.S. 809, 819 (1975). This categorical approach has provided a principled and narrowly focused means for distinguishing between expression that the government may regulate freely and that which it may regulate on the basis of content only upon a showing of compelling need.
[2]

Today, however, the Court announces that earlier Courts did not mean their repeated statements that certain categories of expression are "not within the area of constitutionally protected speech." *Roth, supra,* 354 U.S. at 483. *See ante* at 383, citing *Beauharnais v. Illinois*, 343 U.S. 250, 266 (1952); *Chaplinsky, supra,* 315 U.S. at 571-572; *Bose Corp., supra,* 466 U.S. at 504; *Sable Communications of Cal., Inc. v. FCC,* 492 U.S. 115, 124 (1989). The present Court submits that such clear statements "must be taken in context," and are not "literally true." *Ante* at 383.

To the contrary, those statements meant precisely what they said: the categorical approach is a firmly entrenched part of our First Amendment jurisprudence. Indeed, the Court in *Roth* reviewed the guarantees of freedom of expression in effect at the time of the ratification of the Constitution and concluded,

[i]n light of this history, it is apparent that the unconditional phrasing of the First Amendment was
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not intended to protect every utterance.

354 U.S. at 482-483.

In its decision today, the Court points to "[n]othing . . . in this Court's precedents warrant[ing] disregard of this longstanding tradition." *Burson,* 504 U.S. at 216 (SCALIA, J., concurring in judgment); *Allied Signal, Inc., supra,* at 783. Nevertheless, the majority holds that the First Amendment [112 S.Ct. 2553] protects those narrow categories of expression long held to be undeserving of First Amendment protection -- at least to the extent that lawmakers may not regulate some fighting words more strictly than others because of their content. The Court announces that such content-based distinctions violate the First Amendment because "the government may not regulate use based on hostility -- or favoritism -- towards the underlying message expressed." *Ante* at 386. Should the government want to criminalize certain fighting words, the Court now requires it to criminalize all fighting words.

To borrow a phrase,

Such a simplistic, all-or-nothing-at-all approach to First Amendment protection is at odds with common sense, and with our jurisprudence as well.

Ante at 384. It is inconsistent to hold that the government may proscribe an entire category of speech because the content of that speech is evil, *Ferber, supra,* 458 U.S. at 763-764, but that the government may not treat a subset of that category differently without violating the First Amendment; the content of the subset is, by definition, worthless and undeserving of constitutional protection.

The majority's observation that fighting words are "quite expressive indeed," *ante* at 384, is no answer. Fighting words are not a means of exchanging views, rallying supporters, or registering a protest; they are directed against individuals to provoke violence or to inflict injury. *Chaplinsky,* 315 U.S. at 572. Therefore, a ban on all fighting words or on a subset of the fighting words category would restrict only the social evil of hate speech, without creating the danger of driving viewpoints from the marketplace. *See ante* at 387.

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Therefore, the Court's insistence on inventing its brand of First Amendment underinclusiveness puzzles me.[3] The overbreadth doctrine has the redeeming virtue of attempting to avoid the chilling of protected expression, *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973); *Osborne v. Ohio*, 495 U.S. 103, 112, n. 8 (1990); *Brockett v. Spokane Arcades Inc.,* 472 U.S. 491, 503 (1985); *Ferber, supra,* 458 U.S. at 772, but the Court's new "underbreadth" creation serves no desirable function. Instead, it permits, indeed invites, the continuation of expressive conduct that, in this case, is evil and worthless in First Amendment terms, *see Ferber, supra,* at 763-764; *Chaplinsky, supra,* 315 U.S. at 571-572, until the city of St. Paul cures the underbreadth by adding to its ordinance a catch-all phrase such as "and all other fighting words that may constitutionally be subject to this ordinance."

Any contribution of this holding to First Amendment jurisprudence is surely a negative one, since it necessarily signals that expressions of violence, such as the message of intimidation and racial hatred conveyed by burning a cross on someone's lawn, are of sufficient value to outweigh the social interest in order and morality that has traditionally placed such fighting words outside the First Amendment.[4] Indeed, by characterizing fighting words as a form of "debate," [112 S.Ct. 2554] *ante* at 392, the majority legitimates hate speech as a form of public discussion.

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Furthermore, the Court obscures the line between speech that could be regulated freely on the basis of content (*i.e.,* the narrow categories of expression falling outside the First Amendment) and that which could be regulated on the basis of content only upon a showing of a compelling state interest (*i.e.,* all remaining expression). By placing fighting words, which the Court has long held to be valueless, on at least equal constitutional footing with political discourse and other forms of speech that we have deemed to have the greatest social value, the majority devalues the latter category. *See Burson v. Freeman, supra,* at 196; *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 222-223 (1989).

B

In a second break with precedent, the Court refuses to sustain the ordinance even though it would survive under the strict scrutiny applicable to other protected expression. Assuming, *arguendo,* that the St. Paul ordinance is a content-based regulation of protected expression, it nevertheless would pass First Amendment review under settled law upon a showing that the regulation "`is necessary to serve a compelling state interest and is narrowly drawn to achieve that end.'" *Simon & Schuster, Inc. v. New York Crime Victims Board,* 502 U.S. 105, 118 (1991)

(quoting *Arkansas Writers' Project, Inc., v. Ragland,* 481 U.S. 221, 231 (1987)). St. Paul has urged that its ordinance, in the words of the majority, "helps to ensure the basic human rights of members of groups that have historically been subjected to discrimination. . . ." *Ante* at 395. The Court expressly concedes that this interest is compelling, and is promoted by the ordinance. *Ibid.* Nevertheless, the Court treats strict scrutiny analysis as irrelevant to the constitutionality of the legislation:

The dispositive question . . . is whether content discrimination is reasonably necessary in order to achieve St. Paul's compelling interests; it plainly is not. An ordinance not

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limited to the favored topics would have precisely the same beneficial effect.

Ibid. Under the majority's view, a narrowly drawn, content-based ordinance could never pass constitutional muster if the object of that legislation could be accomplished by banning a wider category of speech. This appears to be a general renunciation of strict scrutiny review, a fundamental tool of First Amendment analysis.[5]

This abandonment of the doctrine is inexplicable in light of our decision in *Burson v. Freeman, supra,* which was handed down just a month ago.[6] In *Burson,* seven of the eight participating members of the Court [112 S.Ct. 2555] agreed that the strict scrutiny standard applied in a case involving a First Amendment challenge to a content-based statute. *See id.* at 198 (plurality opinion); *id.* at 217 (STEVENS, J.,

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dissenting).[7] The statute at issue prohibited the solicitation of votes and the display or distribution of campaign materials within 100 feet of the entrance to a polling place. The plurality concluded that the legislation survived strict scrutiny because the State had asserted a compelling interest in regulating electioneering near polling places, and because the statute at issue was narrowly tailored to accomplish that goal. *Id.* at 208-210.

Significantly, the statute in *Burson* did not proscribe all speech near polling places; it restricted only political speech. *Id.* at 197. The *Burson* plurality, which included THE CHIEF JUSTICE and JUSTICE KENNEDY, concluded that the distinction between types of speech required application of strict scrutiny, but it squarely rejected the proposition that the legislation failed First Amendment review because it could have been drafted in broader, content-neutral terms:

States adopt laws to address the problems that confront them.
The First Amendment does not require States to regulate for problems that do not exist.

Id. at 207 (emphasis added). This reasoning is in direct conflict with the majority's analysis in the present case, which leaves two options to lawmakers attempting to regulate expressions of violence: (1) enact a sweeping prohibition on an entire class of speech (thereby requiring "regulat[ion] for problems that do not exist"); or (2) not legislate at all.

Had the analysis adopted by the majority in the present case been applied in *Burson,* the challenged election law would have failed constitutional review, for its content-based distinction between political and nonpolitical speech could not have been characterized as "reasonably necessary," *ante*

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at 395, to achieve the State's interest in regulating polling place premises.[8]

As with its rejection of the Court's categorical analysis, the majority offers no reasoned basis for discarding our firmly established strict scrutiny analysis at this time. The majority appears to believe that its doctrinal revisionism is necessary to prevent our elected lawmakers from prohibiting libel against members of one political party, but not another, and from enacting similarly preposterous laws. *Ante* at 384.

The majority is misguided.

Although the First Amendment does not apply to categories of unprotected speech, such as fighting words, the Equal Protection Clause requires that the regulation of unprotected speech be rationally related to a legitimate government interest. A defamation statute that drew distinctions on the basis of political affiliation or "an ordinance prohibiting only those legally obscene works that contain criticism of the city government," *ibid.,* would unquestionably fail rational basis review.[9]

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Turning to the St. Paul ordinance and assuming *arguendo,* as the majority does, that the ordinance is not constitutionally overbroad (*but see* Part II, *infra*), there is no question that it would pass equal protection review. The ordinance proscribes a subset of "fighting words," those that injure "on the basis of race, color, creed, religion or gender." This selective regulation reflects the City's judgment that harms based on race, color, creed, religion, or gender are more pressing public concerns than the harms caused by other fighting words. In light of our Nation's long and painful experience with discrimination, this determination is plainly reasonable. Indeed, as the majority concedes, the interest is compelling. *Ante* at 395.

C

The Court has patched up its argument with an apparently nonexhaustive list of *ad hoc* exceptions, in what can be viewed either as an attempt to confine the effects of its decision to the facts of this case, *see post* at 415 (BLACKMUN, J., concurring in judgment), or as an effort to anticipate some of the questions that will arise from its radical revision of First Amendment law.

For instance, if the majority were to give general application to the rule on which it decides this case, today's decision would call into question the constitutionality of the statute making it illegal to threaten the life of the President. 18 U.S.C. § 871. *See Watts v. United States*, 394 U.S. 705 (1969) (per curiam). Surely, this statute, by singling out certain threats, incorporates a content-based distinction; it indicates that the Government especially disfavors threats against the President, as opposed to threats against all others.[10]

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See ante at 391. But because the Government could prohibit all threats, and not just those directed against the President, under the Court's theory, the compelling reasons justifying the enactment of special legislation to safeguard the President would be irrelevant, and the statute would fail First Amendment review.

To save the statute, the majority has engrafted the following exception onto its newly announced First Amendment rule: content-based distinctions may be drawn within an unprotected category of speech if the basis for the distinctions is "the very reason the entire class of speech at issue is proscribable." *Ante* at 388. Thus, the argument goes, the statute making it illegal to threaten the life of the President is constitutional,

> since the reasons why threats of violence are outside the First Amendment (protecting individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur) have special force when applied to the person of the President.

Ibid.

The exception swallows the majority's rule. Certainly, it should apply to the St. Paul ordinance, since

> the reasons why [fighting words] are outside the First Amendment . . . have special force when applied to [groups that have historically been subjected to discrimination].

To avoid the result of its own analysis, the Court suggests that fighting words are simply [112 S.Ct. 2557] a mode of communication, rather than a content-based category, and that the St. Paul ordinance has not singled out a

particularly objectionable mode of communication. *Ante* at 386, 393. Again, the majority confuses the issue. A prohibition on fighting words is not a time, place, or manner restriction; it is a ban on a class of speech that conveys an overriding message of personal injury and imminent violence, *Chaplinsky, supra,* 315 U.S. at 572, a message that is at its ugliest when directed against groups

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that have long been the targets of discrimination. Accordingly, the ordinance falls within the first exception to the majority's theory.

As its second exception, the Court posits that certain content-based regulations will survive under the new regime if the regulated subclass "happens to be associated with particular `secondary effects' of the speech . . . ," *ante* at 389, which the majority treats as encompassing instances in which "words can . . . violate laws directed not against speech, but against conduct. . . ." *Ibid.*[[11]] Again, there is a simple explanation for the Court's eagerness to craft an exception to its new First Amendment rule: under the general rule the Court applies in this case, Title VII hostile work environment claims would suddenly be unconstitutional.

Title VII makes it unlawful to discriminate "because of [an] individual's race, color, religion, sex, or national origin," 42 U.S.C. § 2000e-2(a)(1), and the regulations covering hostile workplace claims forbid "sexual harassment," which includes "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature" which creates "an intimidating, hostile, or offensive working environment." 29 CFR § 1604.11(a) (1991). The regulation does not prohibit workplace harassment generally; it focuses on what the majority would characterize as the "disfavored topi[c]" of sexual harassment. *Ante* at 391. In this way, Title VII is similar to the St. Paul ordinance that the majority condemns because it "impose[s] special prohibitions on those speakers who express views on disfavored subjects." *Ibid.* Under the broad principle the Court uses to decide the present case,

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hostile work environment claims based on sexual harassment should fail First Amendment review; because a general ban on harassment in the workplace would cover the problem of sexual harassment, any attempt to proscribe the subcategory of sexually harassing expression would violate the First Amendment.

Hence, the majority's second exception, which the Court indicates would insulate a Title VII hostile work environment claim from an underinclusiveness challenge because

> sexually derogatory "fighting words" . . . may produce a violation of Title VII's general prohibition against sexual discrimination in employment practices.

Ante at 389. But application of this exception to a hostile work environment claim does not hold up under close examination.

First, the hostile work environment regulation is not keyed to the presence or absence of an economic *quid pro quo, Meritor Savings Bank v. Vinson*, 477 U.S. 57, 65 (1986), but to the impact of the speech on the victimized worker. Consequently, the regulation would no more fall within a secondary effects exception than does the St. Paul ordinance. *Ante* at 394. Second, the majority's focus on the statute's general prohibition on discrimination glosses over the language of the specific regulation governing hostile working environment, which reaches beyond any "incidental" effect on speech. *United States v. O'Brien*, 391 U.S. 367, 376 (1968). If the relationship between the broader statute and specific [112 S.Ct. 2558] regulation is sufficient to bring the Title VII regulation within *O'Brien,* then all St. Paul need do to bring its ordinance within this exception is to add some prefatory language concerning discrimination generally.

As the third exception to the Court's theory for deciding this case, the majority concocts a catchall exclusion to protect against unforeseen problems, a concern that is heightened here

given the lack of briefing on the majority's decisional theory. This final exception would apply in cases in which "there is no realistic possibility that official suppression of ideas is afoot." *Ante* at 390. As I have demonstrated,

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this case does not concern the official suppression of ideas. *See supra* at 401. The majority discards this notion out-of-hand. *Ante* at 395.

As I see it, the Court's theory does not work, and will do nothing more than confuse the law. Its selection of this case to rewrite First Amendment law is particularly inexplicable, because the whole problem could have been avoided by deciding this case under settled First Amendment principles.

II

Although I disagree with the Court's analysis, I do agree with its conclusion: the St. Paul ordinance is unconstitutional. However, I would decide the case on overbreadth grounds.

We have emphasized time and again that overbreadth doctrine is an exception to the established principle that

> a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court.

Broadrick v. Oklahoma, 413 U.S. at 610; *Brockett v. Spokane Arcades, Inc.,* 472 U.S. at 503-504. A defendant being prosecuted for speech or expressive conduct may challenge the law on its face if it reaches protected expression, even when that person's activities are not protected by the First Amendment. This is because

> the possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted.

Broadrick, supra, 413 U.S. at 612; *Osborne v. Ohio,* 495 U.S. at 112, n. 8; *New York v. Ferber, supra,* 458 U.S. at 768-769; *Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 634 (1980); *Gooding v. Wilson*, 405 U.S. 518, 521 (1972).

However, we have consistently held that, because overbreadth analysis is "strong medicine," it may be invoked to strike an entire statute only when the overbreadth of the statute is not only "real, but substantial as well, judged in relation to the statute's plainly legitimate sweep," *Broadrick,*

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413 U.S. at 615, and when the statute is not susceptible to limitation or partial invalidation. *Id.* at 613; *Board of Airport Comm'rs of Los Angeles v. Jews for Jesus Inc.,* 482 U.S. 569, 574 (1987).

> When a federal court is dealing with a federal statute challenged as overbroad, it should . . . construe the statute to avoid constitutional problems, if the statute is subject to a limiting construction.

Ferber, 458 U.S. at 769, n. 24. Of course, "[a] state court is also free to deal with a state statute in the same way." *Ibid. See, e.g., Osborne,* 495 U.S. at 113-114.

Petitioner contends that the St. Paul ordinance is not susceptible to a narrowing construction, and that the ordinance therefore should be considered as written, and not as construed by the Minnesota Supreme Court. Petitioner is wrong. Where a state court has interpreted a provision of state law, we cannot ignore that interpretation, even if it is [112 S.Ct. 2559] not one that we would have reached if we were construing the statute in the first instance. *Ibid; Kolender v. Lawson*, 461 U.S. 352, 355 (1983); *Hoffman Estates v. Flipside, Hoffman Estates, Inc.,* 455 U.S. 489, 494, n. 5 (1982).[12]

Of course, the mere presence of a state court interpretation does not insulate a statute

from overbreadth review. We have stricken legislation when the construction supplied by the state court failed to cure the overbreadth problem.

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See, e.g., Lewis v. City of New Orleans, 415 U.S. 130, 132-133 (1974); *Gooding, supra,* 405 U.S. at 524-525. But in such cases, we have looked to the statute as construed in determining whether it contravened the First Amendment. Here, the Minnesota Supreme Court has provided an authoritative construction of the St. Paul antibias ordinance. Consideration of petitioner's overbreadth claim must be based on that interpretation.

I agree with petitioner that the ordinance is invalid on its face. Although the ordinance, as construed, reaches categories of speech that are constitutionally unprotected, it also criminalizes a substantial amount of expression that -- however repugnant -- is shielded by the First Amendment.

In attempting to narrow the scope of the St. Paul antibias ordinance, the Minnesota Supreme Court relied upon two of the categories of speech and expressive conduct that fall outside the First Amendment's protective sphere: words that incite "imminent lawless action," *Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969), and "fighting" words, *Chaplinsky v. New Hampshire,* 315 U.S. at 571-572. The Minnesota Supreme Court erred in its application of the *Chaplinsky* fighting words test, and consequently interpreted the St. Paul ordinance in a fashion that rendered the ordinance facially overbroad.

In construing the St. Paul ordinance, the Minnesota Supreme Court drew upon the definition of fighting words that appears in *Chaplinsky* -- words "which, by their very utterance, inflict injury or tend to incite an immediate breach of the peace." *Id.* at 572. However, the Minnesota court was far from clear in identifying the "injur[ies]" inflicted by the expression that St. Paul sought to regulate. Indeed, the Minnesota court emphasized (tracking the language of the ordinance) that

the ordinance censors only those displays that one knows or should know will create anger, alarm or resentment based on racial, ethnic, gender or religious bias.

In re Welfare of R.A.V., 464 N.W.2d 507, 510 (1991). I

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therefore understand the court to have ruled that St. Paul may constitutionally prohibit expression that, "by its very utterance," causes "anger, alarm or resentment."

Our fighting words cases have made clear, however, that such generalized reactions are not sufficient to strip expression of its constitutional protection. The mere fact that expressive activity causes hurt feelings, offense, or resentment does not render the expression unprotected. *See United States v. Eichman*, 496 U.S. 310, 319 (1990); *Texas v. Johnson*, 491 U.S. 397, 409, 414 (1989); [112 S.Ct. 2560] *Hustler Magazine, Inc. v. Falwell,* 485 U.S. 46, 55-56 (1988); *FCC v. Pacifica Foundation*, 438 U.S. 726, 745 (1978); *Hess v. Indiana*, 414 U.S. 105, 107-108 (1973); *Cohen v. California*, 403 U.S. 15, 20 (1971); *Street v. New York*, 394 U.S. 576, 592 (1969); *Terminiello v. Chicago,* 337 U.S. 1 (1949).

In the First Amendment context,

[c]riminal statutes must be scrutinized with particular care; those that make unlawful a substantial amount of constitutionally protected conduct may be held facially invalid even if they also have legitimate application.

Houston v. Hill, 482 U.S. 451, 459 (1987) (citation omitted). The St. Paul antibias ordinance is such a law. Although the ordinance reaches conduct that is unprotected, it also makes criminal expressive conduct that causes only hurt feelings, offense, or resentment, and is protected by the First Amendment. *Cf. Lewis, supra,* 415 U.S. at 132.[13] The ordinance is therefore fatally overbroad and invalid on its face.

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III

Today, the Court has disregarded two established principles of First Amendment law without providing a coherent replacement theory. Its decision is an arid, doctrinaire interpretation, driven by the frequently irresistible impulse of judges to tinker with the First Amendment. The decision is mischievous at best, and will surely confuse the lower courts. I join the judgment, but not the folly of the opinion.

BLACKMUN, J., concurring

JUSTICE BLACKMUN, concurring in the judgment.

I regret what the Court has done in this case. The majority opinion signals one of two possibilities: it will serve as precedent for future cases, or it will not. Either result is disheartening.

In the first instance, by deciding that a State cannot regulate speech that causes great harm unless it also regulates speech that does not (setting law and logic on their heads), the Court seems to abandon the categorical approach, and inevitably to relax the level of scrutiny applicable to content-based laws. As JUSTICE WHITE points out, this weakens the traditional protections of speech. If all expressive activity must be accorded the same protection, that protection will be scant. The simple reality is that the Court will never provide child pornography or cigarette advertising the level of protection customarily granted political speech. If we are forbidden from categorizing, as the Court has done here, we shall reduce protection across the board. It is sad that, in its effort to reach a satisfying result in this case, the Court is willing to weaken First Amendment protections.

In the second instance is the possibility that this case will not significantly alter First Amendment jurisprudence, but, instead, will be regarded as an aberration -- a case where the Court manipulated doctrine to strike down an ordinance whose premise it opposed, namely, that racial threats and verbal assaults [112 S.Ct. 2561] are of greater harm than other fighting words. I fear that the Court has been distracted from its

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proper mission by the temptation to decide the issue over "politically correct speech" and "cultural diversity," neither of which is presented here. If this is the meaning of today's opinion, it is perhaps even more regrettable.

I see no First Amendment values that are compromised by a law that prohibits hoodlums from driving minorities out of their homes by burning crosses on their lawns, but I see great harm in preventing the people of Saint Paul from specifically punishing the race-based fighting words that so prejudice their community.

I concur in the judgment, however, because I agree with JUSTICE WHITE that this particular ordinance reaches beyond fighting words to speech protected by the First Amendment.

STEVENS, J., concurring

JUSTICE STEVENS, with whom JUSTICE WHITE and JUSTICE BLACKMUN join as to Part I, concurring in the judgment.

Conduct that creates special risks or causes special harms may be prohibited by special rules. Lighting a fire near an ammunition dump or a gasoline storage tank is especially dangerous; such behavior may be punished more severely than burning trash in a vacant lot. Threatening someone because of her race or religious beliefs may cause particularly severe trauma or touch off a riot, and threatening a high public official may cause substantial social disruption; such threats may be punished more severely than threats against someone based on, say, his support of a particular athletic team. There are legitimate, reasonable, and neutral justifications for such special rules.

This case involves the constitutionality of one such ordinance. Because the regulated conduct has some communicative content -- a message of racial, religious or gender hostility --

the ordinance raises two quite different First Amendment questions. Is the ordinance "overbroad" because

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it prohibits too much speech? If not, is it "underbroad" because it does not prohibit enough speech?

In answering these questions, my colleagues today wrestle with two broad principles: first, that certain "categories of expression [including `fighting words'] are `not within the area of constitutionally protected speech,'" *ante* at 400 (WHITE, J., concurring in judgment); and second, that "[c]ontent-based regulations [of expression] are presumptively invalid." *Ante* at 382 (majority opinion). Although, in past opinions, the Court has repeated both of these maxims, it has -- quite rightly -- adhered to neither with the absolutism suggested by my colleagues. Thus, while I agree that the St. Paul ordinance is unconstitutionally overbroad for the reasons stated in Part II of JUSTICE WHITE's opinion, I write separately to suggest how the allure of absolute principles has skewed the analysis of both the majority and concurring opinions.

I

Fifty years ago, the Court articulated a categorical approach to First Amendment jurisprudence.

There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. . . . It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

Chaplinsky v. New Hampshire, 315 U.S. 568, 571-572 (1942). We have, as JUSTICE WHITE observes, often described such categories of expression as "not within the area of constitutionally protected speech." *Roth v. United States*, 354 U.S. 476, 483 (1957).

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[112 S.Ct. 2562] The Court today revises this categorical approach. It is not, the Court rules, that certain "categories" of expression are "unprotected," but rather that certain "elements" of expression are wholly "proscribable." To the Court, an expressive act, like a chemical compound, consists of more than one element. Although the act may be regulated because it contains a proscribable element, it may not be regulated on the basis of another (nonproscribable) element it also contains. Thus, obscene antigovernment speech may be regulated because it is obscene, but not because it is antigovernment. *Ante* at 384. It is this revision of the categorical approach that allows the Court to assume that the St. Paul ordinance proscribes *only* fighting words, while at the same time concluding that the ordinance is invalid because it imposes a content-based regulation on expressive activity.

As an initial matter, the Court's revision of the categorical approach seems to me something of an adventure in a doctrinal wonderland, for the concept of "obscene antigovernment" speech is fantastical. The category of the obscene is very narrow; to be obscene, expression must be found by the trier of fact to

appea[l] to the prurient interest, . . . depic[t] or describ[e], in a patently offensive way, sexual conduct, [and] taken as a whole, *lac[k] serious literary, artistic, political or scientific value.*

Miller v. California, 413 U.S. 15, 24 (1973) (emphasis added). "Obscene antigovernment" speech, then, is a contradiction in terms: if expression is antigovernment, it does not "lac[k] serious . . . political . . . value," and cannot be obscene.

The Court attempts to bolster its argument by likening its novel analysis to that applied to

restrictions on the time, place, or manner of expression or on expressive conduct. It is true that loud speech in favor of the Republican Party can be regulated because it is loud, but not because it is pro-Republican; and it is true that the public burning of the American flag can be regulated because it involves public burning, and not because it involves the flag. But these

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analogies are inapposite. In each of these examples, the two elements (*e.g.,* loudness and pro-Republican orientation) can coexist; in the case of "obscene antigovernment" speech, however, the presence of one element ("obscenity"), by definition, means the absence of the other. To my mind, it is unwise and unsound to craft a new doctrine based on such highly speculative hypotheticals.

I am, however, even more troubled by the second step of the Court's analysis -- namely, its conclusion that the St. Paul ordinance is an unconstitutional content-based regulation of speech. Drawing on broadly worded *dicta,* the Court establishes a near-absolute ban on content-based regulations of expression, and holds that the First Amendment prohibits the regulation of fighting words by subject matter. Thus, while the Court rejects the "all-or-nothing-at-all" nature of the categorical approach, *ante* at 384, it promptly embraces an absolutism of its own: within a particular "proscribable" category of expression, the Court holds, a government must either proscribe *all* speech or no speech at all.[1] This aspect of the Court's ruling fundamentally misunderstands the role and constitutional status of content-based regulations on speech, conflicts with the very nature of [112 S.Ct. 2563] First Amendment jurisprudence, and disrupts well-settled principles of First Amendment law.

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Although the Court has, on occasion, declared that content-based regulations of speech are "never permitted," *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 99 (1972), such claims are overstated. Indeed, in *Mosley* itself, the Court indicated that Chicago's selective proscription of nonlabor picketing was not *per se* unconstitutional, but rather could be upheld if the City demonstrated that nonlabor picketing was "clearly more disruptive than [labor] picketing." *Id.* at 100. Contrary to the broad dicta in *Mosley* and elsewhere, our decisions demonstrate that content-based distinctions, far from being presumptively invalid, are an inevitable and indispensable aspect of a coherent understanding of the First Amendment.

This is true at every level of First Amendment law. In broadest terms, our entire First Amendment jurisprudence creates a regime based on the content of speech. The scope of the First Amendment is determined by the content of expressive activity: although the First Amendment broadly protects "speech," it does not protect the right to "fix prices, breach contracts, make false warranties, place bets with bookies, threaten, [or] extort." Schauer, Categories and the First Amendment: A Play in Three Acts, 34 Vand.L.Rev. 265, 270 (1981). Whether an agreement among competitors is a violation of the Sherman Act or protected activity under the Noerr-Pennington doctrine[2] hinges upon the content of the agreement. Similarly,

> the line between permissible advocacy and impermissible incitation to crime or violence depends, not merely on the setting in which the speech occurs, but also on exactly what the speaker had to say.

Young v. American Mini Theatres Inc., 427 U.S. 50, 66 (1976) (plurality opinion); *see also Musser v. Utah*, 333 U.S. 95, 100-103 (1948) (Rutledge, J., dissenting).

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Likewise, whether speech falls within one of the categories of "unprotected" or "proscribable" expression is determined, in part, by its content. Whether a magazine is obscene, a gesture a fighting word, or a photograph child pornography, is determined, in part, by its content. Even within categories of protected expression, the First Amendment status of speech is fixed by its

content. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.,* 472 U.S. 749 (1985), establish that the level of protection given to speech depends upon its subject matter: speech about public officials or matters of public concern receives greater protection than speech about other topics. It can, therefore, scarcely be said that the regulation of expressive activity cannot be predicated on its content: much of our First Amendment jurisprudence is premised on the assumption that content makes a difference.

Consistent with this general premise, we have frequently upheld content-based regulations of speech. For example, in *Young v. American Mini Theatres,* the Court upheld zoning ordinances that regulated movie theaters based on the content of the films shown. In *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978) (plurality opinion), we upheld a restriction on the broadcast of specific indecent words. In *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974) (plurality opinion), we upheld a city law that permitted commercial advertising, but prohibited political advertising, on city buses. In *Broadrick v. Oklahoma,* 413 U.S. 601 (1973), we upheld a state law that restricted [112 S.Ct. 2564] the speech of state employees, but only as concerned partisan political matters. We have long recognized the power of the Federal Trade Commission to regulate misleading advertising and labeling, *see, e.g., Jacob Siegel Co. v. FTC*, 327 U.S. 608 (1946), and the National Labor Relations Board's power to regulate an employer's election-related speech on the basis of its content. *See, e.g., NLRB v. Gissel Packing Co.*, 395 U.S. 575, 616-618 (1969).

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It is also beyond question that the Government may choose to limit advertisements for cigarettes, *see* 15 U.S.C. §§ 1331-1340,[3] but not for cigars; choose to regulate airline advertising, *see Morales v. Trans World Airlines*, 504 U.S. 374 (1992), but not bus advertising; or choose to monitor solicitation by lawyers, *see Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447 (1978), but not by doctors.

All of these cases involved the selective regulation of speech based on content -- precisely the sort of regulation the Court invalidates today. Such selective regulations are unavoidably content-based, but they are not, in my opinion, "presumptively invalid." As these many decisions and examples demonstrate, the prohibition on content-based regulations is not nearly as total as the *Mosley* dictum suggests.

Disregarding this vast body of case law, the Court today goes beyond even the overstatement in *Mosley,* and applies the prohibition on content-based regulation to speech that the Court had until today considered wholly "unprotected" by the First Amendment -- namely, fighting words. This new absolutism in the prohibition of content-based regulations severely contorts the fabric of settled First Amendment law.

Our First Amendment decisions have created a rough hierarchy in the constitutional protection of speech. Core political speech occupies the highest, most protected position; commercial speech and nonobscene, sexually explicit speech are regarded as a sort of second-class expression; obscenity and fighting words receive the least protection of all. Assuming that the Court is correct that this last class of speech is not wholly "unprotected," it certainly does not follow that fighting words and obscenity receive the *same* sort of protection afforded core political speech. Yet, in ruling that proscribable speech cannot be regulated based on subject matter,

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the Court does just that.[4] Perversely, this gives fighting words *greater* protection than is afforded commercial speech. If Congress can prohibit false advertising directed at airline passengers without also prohibiting false advertising directed at bus passengers, and if a city can prohibit political advertisements in its buses, while allowing other advertisements, it is ironic to hold that a city cannot regulate fighting words based on "race, color, creed, religion or gender," while leaving unregulated fighting words based on "union membership or homosexuality." *Ante* at 391. The Court today turns First Amendment law

on its head: Communication that was once entirely unprotected (and that still can be wholly proscribed) is now entitled to greater protection than commercial speech -- and possibly greater protection than core political speech. *See Burson v. Freeman*, 504 U.S. 191, 195, 196 (1992).

Perhaps because the Court recognizes these perversities, it quickly offers some *ad hoc* limitations on its newly extended prohibition on content-based regulations. First, the Court states that a content-based regulation is valid "[w]hen the content discrimination is based upon the very reason the entire class of speech . . . is proscribable." In a pivotal passage, the Court writes

the Federal Government can criminalize only those physical threats that are directed against the President, *see* 18 U.S.C. § 871 -- since the reasons why

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threats of violence are outside the First Amendment (protecting individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur) have special force when applied to the . . . President.

Ante at 388. As I understand this opaque passage, Congress may choose from the set of unprotected speech (all threats) to proscribe only a subset (threats against the President), because those threats are particularly likely to cause "fear of violence," "disruption," and actual "violence."

Precisely this same reasoning, however, compels the conclusion that St. Paul's ordinance is constitutional. Just as Congress may determine that threats against the President entail more severe consequences than other threats, so St. Paul's City Council may determine that threats based on the target's race, religion, or gender cause more severe harm to both the target and to society than other threats. This latter judgment -- that harms caused by racial, religious, and gender-based invective are qualitatively different from that caused by other fighting words -- seems to me eminently reasonable and realistic.

Next, the Court recognizes that a State may regulate advertising in one industry, but not another, because "the risk of fraud (one of the characteristics that justifies depriving [commercial speech] of full First Amendment protection . . .)" in the regulated industry is "greater" than in other industries. *Ibid.* Again, the same reasoning demonstrates the constitutionality of St. Paul's ordinance. "[O]ne of the characteristics that justifies" the constitutional status of fighting words is that such words, "by their very utterance, inflict injury or tend to incite an immediate breach of the peace." *Chaplinsky,* 315 U.S. at 572. Certainly a legislature that may determine that the risk of fraud is greater in the legal

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trade than in the medical trade may determine that the risk of injury or breach of peace created by race-based threats is greater than that created by other threats.

Similarly, it is impossible to reconcile the Court's analysis of the St. Paul ordinance with its recognition that "a prohibition of fighting words that are directed at certain persons or groups . . . would be facially valid." *Ante* at 392 (emphasis deleted). A selective proscription of unprotected expression designed to protect "certain persons or groups" (for example, a law proscribing threats directed at the elderly) would be constitutional if it were based on a legitimate determination that the harm created by the regulated expression differs from that created by the unregulated expression (that is, if the elderly are more severely injured by threats than are the nonelderly). Such selective protection is no different from a law prohibiting minors (and only minors) from obtaining obscene publications. *See Ginsberg v. New York*, 390 U.S. 629 (1968). St. Paul has determined -- reasonably in my judgment -- that fighting-word injuries "based on race, color, creed, religion or gender" are qualitatively different and more severe than fighting-word injuries based on other characteristics. Whether the selective proscription of proscribable speech is defined by the protected target ("certain persons or groups") or the basis

of the harm (injuries "based on race, color, creed, religion or gender") makes no constitutional difference: what matters is whether the legislature's selection is based [112 S.Ct. 2566] on a legitimate, neutral, and reasonable distinction.

In sum, the central premise of the Court's ruling -- that "[c]ontent-based regulations are presumptively invalid" -- has simplistic appeal, but lacks support in our First Amendment jurisprudence. To make matters worse, the Court today extends this overstated claim to reach categories of hitherto unprotected speech and, in doing so, wreaks havoc in an area of settled law. Finally, although the Court recognizes

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exceptions to its new principle, those exceptions undermine its very conclusion that the St. Paul ordinance is unconstitutional. Stated directly, the majority's position cannot withstand scrutiny.

II

Although I agree with much of JUSTICE WHITE's analysis, I do not join Part I-A of his opinion because I have reservations about the "categorical approach" to the First Amendment. These concerns, which I have noted on other occasions, *see, e.g., New York v. Ferber*, 458 U.S. 747, 778 (1982) (STEVENS, J., concurring in judgment), lead me to find JUSTICE WHITE's response to the Court's analysis unsatisfying.

Admittedly, the categorical approach to the First Amendment has some appeal: either expression is protected or it is not -- the categories create safe harbors for governments and speakers alike. But this approach sacrifices subtlety for clarity, and is, I am convinced, ultimately unsound. As an initial matter, the concept of "categories" fits poorly with the complex reality of expression. Few dividing lines in First Amendment law are straight and unwavering, and efforts at categorization inevitably give rise only to fuzzy boundaries. Our definitions of "obscenity," *see, e.g., Marks v. United States*, 430 U.S. 188, 198 (1977) (STEVENS, J., concurring in part and dissenting in part), and "public forum," *see, e.g., United States Postal Service v. Council of Greenburgh Civic Assns.*, 453 U.S. 114, 126-131 (1981); *id.* at 136-140 (Brennan, J., concurring in judgment); *id.* at 147-151 (Marshall, J., dissenting); 152-154 (STEVENS, J., dissenting) (all debating the definition of "public forum"), illustrate this all too well. The quest for doctrinal certainty through the definition of categories and subcategories is, in my opinion, destined to fail.

Moreover, the categorical approach does not take seriously the importance of *context.* The meaning of any expression and the legitimacy of its regulation can only be determined

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in context.[5] Whether, for example, a picture or a sentence is obscene cannot be judged in the abstract, but rather only in the context of its setting, its use, and its audience. Similarly, although legislatures may freely regulate most nonobscene child pornography, such pornography that is part of "a serious work of art, a documentary on behavioral problems, or a medical or psychiatric teaching device," may be entitled to constitutional protection; the

question whether a specific act of communication is protected by the First Amendment always requires some consideration of both its content and its context.

Ferber, 458 U.S. at 778 (STEVENS, J., concurring in judgment); *see also Smith v. United States*, 431 U.S. 291, 311-321 (1977) (STEVENS, J., dissenting). The categorical approach sweeps too broadly when it declares [112 S.Ct. 2567] that all such expression is beyond the protection of the First Amendment.

Perhaps sensing the limits of such an all-or-nothing approach, the Court has applied its analysis less categorically than its doctrinal statements suggest. The Court has recognized intermediate categories of speech (for example, for indecent nonobscene speech and commercial speech) and geographic categories of speech (public fora, limited public fora, nonpublic fora)

entitled to varying levels of protection. The Court has also stringently delimited the categories of unprotected speech. While we once declared that "[l]ibelous utterances [are] not . . . within the area of constitutionally protected speech," *Beauharnais v. Illinois*, 343 U.S. 250, 266 (1952), our rulings in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Gertz v. Robert Welch Inc.,* 418 U.S. 323 (1974), and *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.,* 472 U.S. 749 (1985), have substantially qualified this

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broad claim. Similarly, we have consistently construed the "fighting words" exception set forth in *Chaplinsky* narrowly. *See, e.g., Houston v. Hill*, 482 U.S. 451 (1987); *Lewis v. City of New Orleans*, 415 U.S. 130 (1974); *Cohen v. California*, 403 U.S. 15 (1971). In the case of commercial speech, our ruling that "the Constitution imposes no . . . restraint on government [regulation] as respects purely commercial advertising," *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942), was expressly repudiated in *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council Inc.,* 425 U.S. 748 (1976). In short, the history of the categorical approach is largely the history of narrowing the categories of unprotected speech.

This evolution, I believe, indicates that the categorical approach is unworkable, and the quest for absolute categories of "protected" and "unprotected" speech ultimately futile. My analysis of the faults and limits of this approach persuades me that the categorical approach presented in Part I-A of JUSTICE WHITE's opinion is not an adequate response to the novel "underbreadth" analysis the Court sets forth today.

III

As the foregoing suggests, I disagree with both the Court's and part of JUSTICE WHITE's analysis of the constitutionality of the St. Paul ordinance. Unlike the Court, I do not believe that all content-based regulations are equally infirm and presumptively invalid; unlike JUSTICE WHITE, I do not believe that fighting words are wholly unprotected by the First Amendment. To the contrary, I believe our decisions establish a more complex and subtle analysis, one that considers the content and context of the regulated speech, and the nature and scope of the restriction on speech. Applying this analysis and assuming *arguendo* (as the Court does) that the St. Paul ordinance is not overbroad, I conclude that such a selective, subject matter regulation on proscribable speech is constitutional.

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Not all content-based regulations are alike; our decisions clearly recognize that some content-based restrictions raise more constitutional questions than others. Although the Court's analysis of content-based regulations cannot be reduced to a simple formula, we have considered a number of factors in determining the validity of such regulations.

First, as suggested above, the scope of protection provided expressive activity depends in part upon its content and character. We have long recognized that, when government regulates political speech or "the expression of editorial opinion on matters of public importance," *FCC v. League of Women Voters of California*, 468 U.S. 364, 375-376 (1984), "First Amendment protectio[n] is `at its zenith.'" *Meyer v. Grant*, 486 U.S. 414, 425 (1988). [112 S.Ct. 2568] In comparison, we have recognized that "commercial speech receives a limited form of First Amendment protection," *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 340 (1986), and that

> society's interest in protecting [sexually explicit films] is of a wholly different, and lesser magnitude than [its] interest in untrammeled political debate.

Young v. American Mini Theatres, 427 U.S. at 70; *see also FCC v. Pacifica Foundation*, 438 U.S. 726 (1978). The character of expressive activity also weighs in our consideration of its constitutional status. As we have frequently

noted, "[t]he government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word." *Texas v. Johnson*, 491 U.S. 397, 406 (1989); *see also United States v. O'Brien*, 391 U.S. 367 (1968).

The protection afforded expression turns as well on the context of the regulated speech. We have noted, for example, that

[a]ny assessment of the precise scope of employer expression, of course, must be made in the context of its labor relations setting . . . [and] must take into account the economic dependence of the employees on their employers.

NLRB v. Gissel Packing Co., 395 U.S. at 617. Similarly, the distinctive character of a university environment, *see*

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Widmar v. Vincent, 454 U.S. 263, 277-280 (1981) (STEVENS, J., concurring in judgment), or a secondary school environment, *see Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260 (1988), influences our First Amendment analysis. The same is true of the presence of a "'captive audience[, one] there as a matter of necessity, not of choice.'" *Lehman v. City of Shaker Heights,* 418 U.S. at 302 (citation omitted).[6] Perhaps the most familiar embodiment of the relevance of context is our "fora" jurisprudence, differentiating the levels of protection afforded speech in different locations.

The nature of a contested restriction of speech also informs our evaluation of its constitutionality. Thus, for example,

[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.

Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963). More particularly to the matter of content-based regulations, we have implicitly distinguished between restrictions on expression based on *subject matter* and restrictions based on *viewpoint,* indicating that the latter are particularly pernicious.

If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.

Texas v. Johnson, 491 U.S. at 414. "Viewpoint discrimination is censorship in its purest form," *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 62 (1983) (Brennan, J., dissenting), and requires particular scrutiny, in part because such regulation often indicates a legislative effort to skew public debate on an issue. *See, e.g., Schacht v. United States*, 398 U.S. 58, 63 (1970).

Especially where . . . the legislature's suppression of speech suggests an attempt

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to give one side of a debatable public question an advantage in expressing its views to the people, the First Amendment is plainly offended.

First National Bank of Boston v. Bellotti, 435 U.S. 765, 785-786 (1978). Thus, although a regulation that, on its face, regulates speech by subject matter may, in some [112 S.Ct. 2569] instances, effectively suppress particular viewpoints, *see, e.g., Consolidated Edison Co. of N.Y. v. Public Service Comm'n of N.Y.*, 447 U.S. 530, 546-547 (1980) (STEVENS, J., concurring in judgment), in general, viewpoint-based restrictions on expression require greater scrutiny than subject matter-based restrictions.[7]

Finally, in considering the validity of content-based regulations, we have also looked more broadly at the scope of the restrictions. For example, in *Young v. American Mini Theatres,* 427 U.S. at 71, we found significant the fact that "what [was] ultimately at stake [was] nothing more than a limitation on the place where adult films may be exhibited." Similarly, in *FCC v. Pacifica Foundation,* the Court emphasized two dimensions of the limited scope of the FCC ruling. First, the ruling concerned only broadcast material which presents particular problems because it "confronts the citizen . . . in the privacy of the home"; second, the ruling was not a complete ban on the use of selected offensive

words, but rather merely a limitation on the times such speech could be broadcast. 438 U.S. at 749-750.

All of these factors play some role in our evaluation of content-based regulations on expression. Such a multi-faceted analysis cannot be conflated into two dimensions. Whatever the allure of absolute doctrines, it is just too simple to declare expression "protected" or "unprotected" or to proclaim a regulation "content-based" or "content-neutral."

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In applying this analysis to the St. Paul ordinance, I assume *arguendo* -- as the Court does -- that the ordinance regulates *only* fighting words, and therefore is not overbroad. Looking to the content and character of the regulated activity, two things are clear. First, by hypothesis, the ordinance bars only low-value speech, namely, fighting words. By definition, such expression constitutes

> no essential part of any exposition of ideas, and [is] of such slight social value as a step to truth that any benefit that may be derived from [it] is clearly outweighed by the social interest in order and morality.

Chaplinsky, 315 U.S. at 572. Second, the ordinance regulates "expressive conduct, [rather] than . . . the written or spoken word." *Texas v. Johnson,* 491 U.S. at 406.

Looking to the context of the regulated activity, it is again significant that the statute (by hypothesis) regulates *only* fighting words. Whether words are fighting words is determined in part by their context. Fighting words are not words that merely cause offense; fighting words must be directed at individuals so as to, "by their very utterance, inflict injury." By hypothesis, then, the St. Paul ordinance restricts speech in confrontational and potentially violent situations. The case at hand is illustrative. The cross-burning in this case -- directed as it was to a single African-American family trapped in their home -- was nothing more than a crude form of physical intimidation. That this cross-burning sends a message of racial hostility does not automatically endow it with complete constitutional protection.[8]

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[112 S.Ct. 2570] Significantly, the St. Paul ordinance regulates speech not on the basis of its subject matter or the viewpoint expressed, but rather on the basis of the *harm* the speech causes. In this regard, the Court fundamentally misreads the St. Paul ordinance. The Court describes the St. Paul ordinance as regulating expression "addressed to one of [several] specified disfavored *topics,*" *ante* at 391 (emphasis supplied), as policing "disfavored *subjects,*" *ibid.* (emphasis supplied), and as "prohibit[ing] . . . speech solely on the basis of the *subjects* the speech addresses." *Ante* at 381 (emphasis supplied). Contrary to the Court's suggestion, the ordinance regulates only a subcategory of expression that causes *injuries based on* "race, color, creed, religion or

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gender," not a subcategory that involves *discussions* that concern those characteristics.[9] The ordinance, as construed by the Court, criminalizes expression that "one knows . . . [, by its very utterance, inflicts injury on] others on the basis of race, color, creed, religion or gender." In this regard, the ordinance resembles the child pornography law at issue in *Ferber,* which, in effect, singled out child pornography because those publications caused far greater harms than pornography involving adults.

Moreover, even if the St. Paul ordinance did regulate fighting words based on its subject matter, such a regulation would, in my opinion, be constitutional. As noted above, subject-matter-based regulations on commercial speech are widespread, and largely unproblematic. As we have long recognized, subject matter regulations generally do not raise the same concerns of government censorship and the distortion of public discourse presented by viewpoint regulations. Thus, in upholding subject matter

regulations, we have carefully noted that viewpoint-based discrimination was not implicated. *See Young v. American Mini Theatres,* 427 U.S. at 67 (emphasizing "the need for absolute neutrality by the government," and observing that the contested statute was not animated by "hostility for the point of view" of the theatres); *FCC v. Pacifica Foundation,* 438 U.S. at 745-746 (stressing that "government must remain neutral in the marketplace of ideas"); *see also FCC v. League of Women's Voters of California,* 468 U.S. at 412-417 (STEVENS, J., dissenting); *Metromedia, Inc. v. City of San Diego,* 453 U.S. 490, 554-555 (1981) (STEVENS, J., dissenting in part). Indeed, some subject matter restrictions are a functional necessity in contemporary governance: "The First Amendment does not require States to regulate for problems that do not exist." *Burson v. Freeman*, 504 U.S. 207 (1992).

Contrary to the suggestion of the majority, the St. Paul ordinance does *not* regulate expression based on viewpoint. The Court contends that the ordinance requires proponents of racial intolerance to "follow the Marquis [112 S.Ct. 2571] of Queensbury Rules" while allowing advocates of racial tolerance to "fight freestyle." The law does no such thing.

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The Court writes:

One could hold up a sign saying, for example, that all "anti-Catholic bigots" are misbegotten; but not that all "papists" are, for that would insult and provoke violence "on the basis of religion."

Ante at 391-392. This may be true, but it hardly proves the Court's point. The Court's reasoning is asymmetrical. The response to a sign saying that "all [religious] bigots are misbegotten" is a sign saying that "all advocates of religious tolerance are misbegotten." Assuming such signs could be fighting words (which seems to me extremely unlikely), neither sign would be banned by the ordinance, for the attacks were not "based on . . . religion," but rather on one's beliefs about tolerance. Conversely (and again assuming such signs are fighting words), just as the ordinance would prohibit a Muslim from hoisting a sign claiming that all Catholics were misbegotten, so the ordinance would bar a Catholic from hoisting a similar sign attacking Muslims.

The St. Paul ordinance is evenhanded. In a battle between advocates of tolerance and advocates of intolerance, the ordinance does not prevent either side from hurling fighting words at the other on the basis of their conflicting ideas, but it does bar *both* sides from hurling such words on the basis of the target's "race, color, creed, religion or gender." To extend the Court's pugilistic metaphor, the St. Paul ordinance simply bans punches "below the belt" -- *by either party.* It does not, therefore, favor one side of any debate.[10]

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Finally, it is noteworthy that the St. Paul ordinance is, as construed by the Court today, quite narrow. The St. Paul ordinance does not ban all "hate speech," nor does it ban, say, all cross-burnings or all swastika displays. Rather, it only bans a subcategory of the already narrow category of fighting words. Such a limited ordinance leaves open and protected a vast range of expression on the subjects of racial, religious, and gender equality. As construed by the Court today, the ordinance certainly does not "`raise the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace.'" *Ante* at 387. Petitioner is free to burn a cross to announce a rally or to express his views about racial supremacy, he may do so on private property or public land, at day or at night, so long as the burning is not so threatening and so directed at an individual as to, "by its very [execution,] inflict injury." Such a limited proscription scarcely offends the First Amendment.

In sum, the St. Paul ordinance (as construed by the Court) regulates expressive activity that is wholly proscribable, and does so not on the basis of viewpoint, but rather in recognition of the different harms caused by such activity. Taken together, these several considerations persuade

me that the St. Paul ordinance is not an unconstitutional content-based regulation of speech. Thus, were the ordinance not overbroad, I would vote to uphold it.

Notes:

[1] The conduct might have violated Minnesota statutes carrying significant penalties. *See, e.g.,* Minn.Stat. § 609.713(1) (1987) (providing for up to five years in prison for terroristic threats); § 609.563 (arson) (providing for up to five years and a $10,000 fine, depending on the value of the property intended to be damaged); § 609.595 (Supp.1992) (criminal damage to property) (providing for up to one year and a $3,000 fine, depending upon the extent of the damage to the property).

[2] Petitioner has also been charged, in Count I of the delinquency petition, with a violation of Minn.Stat. § 609.2231(4) (Supp.1990) (racially motivated assaults). Petitioner did not challenge this count.

[3] Contrary to JUSTICE WHITE's suggestion, *post* at 397-398, petitioner's claim is "fairly included" within the questions presented in the petition for certiorari, *see* this Court's Rule 14.1(a). It was clear from the petition and from petitioner's other filings in this Court (and in the courts below) that his assertion that the St. Paul ordinance "violat[es] overbreadth . . . principles of the First Amendment," Pet. for Cert. i, was *not* just a technical "overbreadth" claim -- *i.e.,* a claim that the ordinance violated the rights of too many third parties -- but included the contention that the ordinance was "overbroad" in the sense of restricting more speech than the Constitution permits, even in its application to him, because it is content-based. An important component of petitioner's argument is, and has been all along, that narrowly construing the ordinance to cover only "fighting words" cannot cure this fundamental defect. *Id.* at 12, 14, 15-16. In his briefs in this Court, petitioner argued that a narrowing construction was ineffective because (1) its boundaries were vague, Brief for Petitioner 26, and because (2) denominating particular expression a "fighting word" because of the impact of its ideological content upon the audience is inconsistent with the First Amendment, Reply Brief for Petitioner 5; *id.* at 13 ("[The ordinance] is overbroad, *viewpoint-discriminatory* and vague as `narrowly construed'") (emphasis added). At oral argument, counsel for Petitioner reiterated this second point:

It is . . . one of my positions that, in [punishing only some fighting words and not others], even though it is a subcategory, technically, of unprotected conduct, [the ordinance] still is picking out an opinion, a disfavored message, and making that clear through the State.

Tr. of Oral Arg. 8. In resting our judgment upon this contention, we have not departed from our criteria of what is "fairly included" within the petition. *See Arkansas Electric Cooperative Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 382, n. 6 (1983); *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 94, n. 9 (1982); *Eddings v. Oklahoma*, 455 U.S. 104, 113, n. 9 (1982); *see generally* R. Stern, E. Gressman, & S. Shapiro, Supreme Court Practice 361 (6th ed. 1986).

[4] JUSTICE WHITE concedes that a city council cannot prohibit only those legally obscene works that contain criticism of the city government, *post* at 406, but asserts that to be the consequence, not of the First Amendment, but of the Equal Protection Clause. Such content-based discrimination would not, he asserts, "be rationally related to a legitimate government interest," *ibid.* But of course the only *reason* that government interest is not a "legitimate" one is that it violates the First Amendment. This Court itself has occasionally fused the First Amendment into the Equal Protection Clause in this fashion, but at least with the acknowledgment (which JUSTICE WHITE cannot afford to make) that the First Amendment underlies its analysis. *See Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972) (ordinance prohibiting only nonlabor picketing violated the Equal Protection Clause because there was no "appropriate governmental interest" supporting the distinction, inasmuch as "the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content"); *Carey v. Brown*, 447 U.S. 455 (1980). *See generally* Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 124 (1991) (KENNEDY, J., concurring in judgment).

JUSTICE STEVENS seeks to avoid the point by dismissing the notion of obscene anti-government speech as "fantastical," *post* at 418, apparently believing that any reference to politics prevents a finding of obscenity. Unfortunately for the purveyors of obscenity, that is obviously false. A shockingly hard core pornographic movie that contains a model sporting a political tattoo can be found, "*taken as a whole,* [to] lac[k] serious literary, artistic, political, or scientific value," *Miller v. California*, 413 U.S. 15, 24 (1973) (emphasis added). Anyway, it is easy enough to come up with other illustrations of a content-based restriction upon "unprotected speech" that is obviously invalid: the antigovernment libel illustration mentioned earlier, for one. *See supra* at 384. And of course the concept of racist fighting words is, unfortunately, anything but a "highly speculative hypothetica[l]," *post* at 419.

[5] Although JUSTICE WHITE asserts that our analysis disregards "established principles of First Amendment law," *post* at 415, he cites not a single case (and we are aware of none) that even involved, much less considered and resolved, the issue of content discrimination through regulation of "unprotected" speech -- though we plainly recognized that as an issue in *Ferber.* It is, of course, contrary to all traditions of our jurisprudence to consider the law on this point conclusively resolved by broad language in cases where the issue was not presented or even envisioned.

[6] JUSTICE STEVENS cites a string of opinions as

supporting his assertion that "selective regulation of speech based on content" is not presumptively invalid. *Post* at 421-422. Analysis reveals, however, that they do not support it. To begin with, three of them did not command a majority of the Court, *Young v. American Mini Theatres Inc.,* 427 U.S. 50, 63-73 (1976) (plurality); *FCC v. Pacifica Foundation*, 438 U.S. 726, 744-748 (1978) (plurality); *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974) (plurality), and two others did not even discuss the First Amendment, *Morales v. Trans World Airlines Inc.,* 504 U.S. 374 (1992); *Jacob Siegel Co. v. FTC*, 327 U.S. 608 (1946). In any event, all that their contents establish is what we readily concede: that presumptive invalidity does not mean invariable invalidity, leaving room for such exceptions as reasonable and viewpoint-neutral content-based discrimination in nonpublic forums, *see Lehman, supra,* 418 U.S. at 301-304; *see also* Cornelius v. NAACP Legal Defense & Educational Fund, Inc., 473 U.S. 788, 806 (1985), or with respect to certain speech by government employees, *see Broadrick v. Oklahoma*, 413 U.S. 601 (1973); *see also CSC v. Letter Carriers*, 413 U.S. 548, 564-567 (1973).

[7] St. Paul has not argued in this case that the ordinance merely regulates that subclass of fighting words which is most likely to provoke a violent response. But even if one assumes (as appears unlikely) that the categories selected may be so described, that would not justify selective regulation under a "secondary effects" theory. The only reason why such expressive conduct would be especially correlated with violence is that it conveys a particularly odious message, because the "chain of causation" thus *necessarily* "run[s] through the persuasive effect of the expressive component" of the conduct, *Barnes v. Glen Theatre*, 501 U.S. 560, 586 (1991) (SOUTER, J., concurring in judgment), it is clear that the St. Paul ordinance regulates on the basis of the "primary" effect of the speech -- *i.e.,* its persuasive (or repellant) force.

[8] A plurality of the Court reached a different conclusion with regard to the Tennessee anti-electioneering statute considered earlier this Term in *Burson v. Freeman*, 504 U.S. 191 (1992). In light of the "logical connection" between electioneering and the State's compelling interest in preventing voter intimidation and election fraud -- an inherent connection borne out by a "long history" and a "widespread and time-tested consensus," *id.* at 206, 208 -- the plurality concluded that it was faced with one of those "rare case[s]" in which the use of a facially content-based restriction was justified by interests unrelated to the suppression of ideas, *id.* at 211; *see also id.* at 213 (KENNEDY, J., concurring). JUSTICE WHITE and JUSTICE STEVENS are therefore quite mistaken when they seek to convert the *Burson* plurality's passing comment that "[t]he First Amendment does not require States to regulate for problems that do not exist," *id.* at 207, into endorsement of the revolutionary proposition that the suppression of particular ideas can be justified when only those ideas have been a source of trouble in the past. *Post* at 405 (WHITE, J.); *post* at 434 (STEVENS, J.).

[1] The Court granted certiorari to review the following questions:

1. May a local government enact a content-based, `hate-crime' ordinance prohibiting the display of symbols, including a Nazi swastika or a burning cross, on public or private property, which one knows or has reason to know arouses anger, alarm, or resentment in others on the basis of race, color, creed, religion, or gender without violating overbreadth and vagueness principles of the First Amendment to the United States Constitution?

2. Can the constitutionality of such a vague and substantially overbroad content-based restraint of expression be saved by a limiting construction, like that used to save the vague and overbroad content-neutral laws, restricting its application to "fighting words" or "imminent lawless action?"

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It has long been the rule of this Court that "[o]nly the questions set forth in the petition, or fairly included therein, will be considered by the Court." This Court's Rule 14.1(a). This Rule has served to focus the issues presented for review. But the majority reads the Rule so expansively that any First Amendment theory would appear to be "fairly included" within the questions quoted above.

Contrary to the impression the majority attempts to create through its selective quotation of petitioner's briefs, *see ante* at 381-382, n. 3, petitioner did not present to this Court or the Minnesota Supreme Court anything approximating the novel theory the majority adopts today. Most certainly petitioner did not "reiterat[e]" such a claim at argument; he responded to a question from the bench. Tr. of Oral Arg. 8. Previously, this Court has shown the restraint to refrain from deciding cases on the basis of its own theories when they have not been pressed or passed upon by a state court of last resort. *See, e.g., Illinois v. Gates*, 462 U.S. 213, 217-224 (1983).

Given this threshold issue, it is my view that the Court lacks jurisdiction to decide the case on the majority rationale. *Cf. Arkansas Elec. Cooperative Corp. v. Arkansas Public Serv. Comm'n*, 461 U.S. 375, 382, n. 6 (1983). Certainly the preliminary jurisdictional and prudential concerns are sufficiently weighty that we would never have granted certiorari, had petitioner sought review of a question based on the majority's decisional theory.

[2]

In each of these areas, the limits of the unprotected category, as well as the unprotected character of particular communications, have been determined by the judicial evaluation of special facts that have been deemed to have constitutional significance.

Bose Corp. v. Consumers Union of United States Inc., 466 U.S. 485, 504-505 (1948).

[3] The assortment of exceptions the Court attaches to its rule belies the majority's claim, *see ante* at 387, that its new theory is truly concerned with content discrimination. *See*

Part I(C), *infra* (discussing the exceptions).

[4] This does not suggest, of course, that cross-burning is always unprotected. Burning a cross at a political rally would almost certainly be protected expression. *Cf. Brandenburg v. Ohio*, 395 U.S. 444, 445 (1969). But in such a context, the cross-burning could not be characterized as a "direct personal insult or an invitation to exchange fisticuffs," *Texas v. Johnson*, 491 U.S. 397, 409 (1989), to which the fighting words doctrine, *see* Part II, *infra,* applies.

[5] The majority relies on *Boos v. Barry*, 485 U.S. 312 (1988), in arguing that the availability of content-neutral alternatives "`undercut[s] significantly'" a claim that content-based legislation is "`*necessary* to serve the asserted [compelling] interest.'" *Ante* at 395 (quoting *Boos, supra,* at 3329, and *Burson v. Freeman*, 504 U.S. 191, 199 (plurality)). *Boos* does not support the majority's analysis. In *Boos,* Congress already had decided that the challenged legislation was not necessary, and the Court pointedly deferred to this choice. 485 U.S. at 329. St. Paul lawmakers have made no such legislative choice.

Moreover, in *Boos,* the Court held that the challenged statute was not narrowly tailored, because a less restrictive alternative was available. *Ibid.* But the Court's analysis today turns *Boos* inside-out by substituting the majority's policy judgment that a *more* restrictive alternative could adequately serve the compelling need identified by St. Paul lawmakers. The result would be: (a) a statute that was not tailored to fit the need identified by the government; and (b) a greater restriction on fighting words, even though the Court clearly believes that fighting words have protected expressive content. *Ante* at 384-385.

[6] Earlier this Term, seven of the eight participating members of the Court agreed that strict scrutiny analysis applied in *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.,* 502 U.S. 105 (1991), in which we struck down New York's "Son of Sam" law, which required "that an accused or convicted criminal's income from works describing his crime be deposited in an escrow account." *Id.* at 108.

[7] The *Burson* dissenters did not complain that the plurality erred in applying strict scrutiny; they objected that the plurality was not sufficiently rigorous in its review. 504 U.S. at 225-226 (STEVENS, J., dissenting).

[8] JUSTICE SCALIA concurred in the judgment in *Burson,* reasoning that the statute, "though content-based, is constitutional [as] a reasonable, viewpoint-neutral regulation of a nonpublic forum." *Id.* at 214. However, nothing in his reasoning in the present case suggests that a content-based ban on fighting words would be constitutional were that ban limited to nonpublic fora. Taken together, the two opinions suggest that, in some settings, political speech, to which "the First Amendment `has its fullest and most urgent application,'" is entitled to less constitutional protection than fighting words. *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 223 (1989) (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971)).

[9] The majority is mistaken in stating that a ban on obscene works critical of government would fail equal protection review only because the ban would violate the First Amendment. *Ante* at 384-385, n. 2. While decisions such as *Police Dept. of Chicago v. Mosley*, 408 U.S. 92 (1972), recognize that First Amendment principles may be relevant to an equal protection claim challenging distinctions that impact on protected expression, *id.* at 95-99, there is no basis for linking First and Fourteenth Amendment analysis in a case involving unprotected expression. Certainly, one need not resort to First Amendment principles to conclude that the sort of improbable legislation the majority hypothesizes is based on senseless distinctions.

[10] Indeed, such a law is content-based in and of itself, because it distinguishes between threatening and nonthreatening speech.

[11] The consequences of the majority's conflation of the rarely-used secondary effects standard and the *O'Brien* test for conduct incorporating "speech" and "nonspeech" elements, *see generally United States v. O'Brien*, 391 U.S. 367, 376-377 (1968), present another question that I fear will haunt us and the lower courts in the aftermath of the majority's opinion.

[12] Petitioner can derive no support from our statement in *Virginia v. American Bookseller's Assn.*, 484 U.S. 383, 397 (1988), that

> the statute must be "readily susceptible" to the limitation; we will not rewrite a state law to conform it to constitutional requirements.

In *American Bookseller's,* no state court had construed the language in dispute. In that instance, we certified a question to the state court so that it would have an opportunity to provide a narrowing interpretation. *Ibid.* In *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 216 (1975), the other case upon which petitioner principally relies, we observed not only that the ordinance at issue was not "by its plain terms . . . easily susceptible of a narrowing construction," but that the state courts had made no effort to restrict the scope of the statute when it was challenged on overbreadth grounds.

[13] Although the First Amendment protects offensive speech, *Johnson v. Texas,* 491 U.S. at 414, it does not require us to be subjected to such expression at all times, in all settings. We have held that such expression may be proscribed when it intrudes upon a "captive audience." *Frisby v. Schultz*, 487 U.S. 474, 484-485 (1988); *FCC v. Pacifica Foundation*, 438 U.S. 726, 748-749 (1978). And expression may be limited when it merges into conduct. *United States v. O'Brien*, 391 U.S. 367 (1968); *cf. Meritor Savings Bank v. Vinson*, 477 U.S. 57, 65 (1986). However, because of the manner in which the Minnesota Supreme Court construed the St. Paul ordinance, those issues are not before us in this case.

[1] The Court disputes this characterization because it has crafted two exceptions, one for "certain media or markets" and the other for content discrimination based upon "the very reason that the entire class of speech at issue is proscribable." *Ante* at 388. These exceptions are, at best ill-defined. The Court does not tell us whether, with respect to the former, fighting words such as cross-burning could be proscribed only in certain neighborhoods where the threat of violence is particularly severe, or whether, with respect to the second category, fighting words that create a particular risk of harm (such as a race riot) would be proscribable. The hypothetical and illusory category of these two exceptions persuades me that either my description of the Court's analysis is accurate, or that the Court does not, in fact mean, much of what it says in its opinion.

[2] *See Mine Workers v. Pennington*, 381 U.S. 657 (1965); *Eastern Railroad Presidents Conference v. Noerr Motor Freight Inc.,* 365 U.S. 127 (1961).

[3] *See also Packer Corp v. Utah*, 285 U.S. 105 (1932) (Brandeis, J.) (upholding a statute that prohibited the advertisement of cigarettes on billboards and streetcar placards).

[4] The Court states that the prohibition on content-based regulations "applies differently in the context of proscribable speech" than in the context of other speech, *ante* at 387, but its analysis belies that claim. The Court strikes down the St. Paul ordinance because it regulates fighting words based on subject matter, despite the fact that, as demonstrated above, we have long upheld regulations of commercial speech based on subject matter. The Court's self-description is inapt: by prohibiting the regulation of fighting words based on its subject matter, the Court provides the same protection to fighting words as is currently provided to core political speech.

[5] "A word," as Justice Holmes has noted,

is not a crystal, transparent and unchanged, it is the skin of a living thought, and may vary greatly in color and content according to the circumstances and the time in which it is used. *Towne v. Eisner,* 245 U.S. 418, 425 (1918); *see also Jacobellis v. Ohio*, 378 U.S. 184, 201 (1964) (Warren, C.J., dissenting).

[6] *Cf. In re Chase,* 468 F.2d 128, 139-140 (CA7 1972) (Stevens, J., dissenting) (arguing that defendant who, for reasons of religious belief, refused to rise and stand as the trial judge entered the courtroom was not subject to contempt proceedings, because he was not present in the courtroom "as a matter of choice").

[7] Although the Court has sometimes suggested that subject matter based and viewpoint-based regulations are equally problematic, *see, e.g., Consolidated Edison Co. of N.Y. v. Public Service Comm'n of N.Y.,* 447 U.S. at 537, our decisions belie such claims.

[8] The Court makes much of St. Paul's description of the ordinance as regulating "a message." *Ante* at 393. As always, however, St. Paul's argument must be read in context:

Finally, we ask the Court to reflect on the "content" of the "expressive conduct" represented by a "burning cross." It is no less than the first step in an act of racial violence. It was, and unfortunately still is, the equivalent of [the] waving of a knife before the thrust, the pointing of a gun before it is fired, the lighting of the match before the arson, the hanging of the noose before the lynching. It is not a political statement, or even a cowardly statement of hatred. It is the first step in an act of assault. It can be no more protected than holding a gun to a victim['s] head. It is perhaps the ultimate expression of "fighting words."

App. to Brief for Petitioner C-6.

[9] The Court contends that this distinction is "wordplay," reasoning that

[w]hat makes [the harms caused by race-based threats] distinct from [the harms] produced by other fighting words is . . . the fact that [the former are] caused by a *distinctive idea.*

Ante at 392-393 (emphasis added). In this way, the Court concludes that regulating speech based on the injury it causes is no different from regulating speech based on its subject matter. This analysis fundamentally miscomprehends the role of "race, color, creed, religion [and] gender" in contemporary American society. One need look no further than the recent social unrest in the Nation's cities to see that race-based threats may cause more harm to society and to individuals than other threats. Just as the statute prohibiting threats against the President is justifiable because of the place of the President in our social and political order, so a statute prohibiting race-based threats is justifiable because of the place of race in our social and political order. Although it is regrettable that race occupies such a place and is so incendiary an issue, until the Nation matures beyond that condition, laws such as St. Paul's ordinance will remain reasonable and justifiable.

[10] *Cf. FCC v. League of Women Voters of California*, 468 U.S. 364, 418 (1984) (STEVENS, J., dissenting) ("In this case . . . the regulation applies . . . to a defined class of . . . licensees [who] represent heterogenous points of view. There is simply no sensible basis for considering this regulation a viewpoint restriction -- or . . . to condemn it as `content-based' -- because it applies equally to station owners of all shades of opinion").

Texas Attorney General's Formal Opinion – No. KP-0123 (2016)

KEN PAXTON
ATTORNEY GENERAL OF TEXAS

December 20, 2016

The Honorable Charles Perry
Chair, Committee on Agriculture,
Water & Rural Affairs
Texas State Senate
Post Office Box 12068
Austin, Texas 78711-2548

Opinion No. KP-0123

Re: Whether adoption of the American Bar Association's Model Rule of Professional Conduct 8.4(g) would constitute a violation of an attorney's statutory or constitutional rights (RQ-0128-KP)

Dear Senator Perry:

You request an opinion concerning whether this State's adoption of the American Bar Association's new Model Ethics Rule 8.4(g), regarding attorney misconduct due to discrimination, "would constitute a violation of an individual attorney's rights under any applicable statute or constitutional provision."[1]

The American Bar Association ("ABA") is a voluntary organization that serves the legal profession. One of the many services it performs is to propose rules that may "serve as models for the ethics rules" of individual states.[2] The ABA House of Delegates originally adopted the Model Rules of Professional Conduct ("Model Rules") in 1983, and it has amended the Model Rules numerous times since. MODEL RULES OF PROF'L CONDUCT, Preface (AM. BAR ASS'N 2016). All states but one have patterned their rules of professional conduct for attorneys after the Model Rules, but the majority of states have not adopted rules identical to the Model Rules. Instead, states have modified the rules to varying degrees.

In August of 2016, the ABA House of Delegates amended Model Rule 8.4 to add subsection (g), which provides that it is professional misconduct for a lawyer to:

> (g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status

[1]Letter from Honorable Charles Perry, Chair, Senate Comm. on Agric., Water & Rural Affairs, to Honorable Ken Paxton, Tex. Att'y Gen. at 1 (Sept. 19, 2016), https://www.texasattorneygeneral.gov/opinion/requests-for-opinion-rqs ("Request Letter").

[2]*See* AM. BAR ASS'N, MODEL RULES OF PROF'L CONDUCT, ABOUT THE MODEL RULES, http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct.html (last visited Dec. 8, 2016).

> in conduct related to the practice of law. 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 legitimate advice or advocacy consistent with these Rules.

Id. r. 8.4(g). Two comments relevant to subsection (g) were also added to the Rule:

> [3] Discrimination and harassment by lawyers in violation of paragraph (g) undermine confidence in the legal profession and the legal system. Such discrimination includes harmful verbal or physical conduct that manifests bias or prejudice towards others. Harassment includes sexual harassment and derogatory or demeaning verbal or physical conduct. . . .
>
> [4] Conduct related to the practice of law includes representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business or social activities in connection with the practice of law. Lawyers may engage in conduct undertaken to promote diversity and inclusion without violating this Rule by, for example, implementing initiatives aimed at recruiting, hiring, retaining and advancing diverse employees or sponsoring diverse law student organizations.

Id. r. 8.4(g) cmts. 3–4.

In Texas, the State's Supreme Court regulates the practice of law. TEX. GOV'T CODE § 81.011(c). Government Code section 81.024 authorizes the Court to prepare, propose, and adopt rules "governing the state bar," including rules related to "conduct of the state bar and the discipline of its members." *Id.* § 81.024(a)–(b). Before they are promulgated, however, such rules must be approved by members of the State Bar through a referendum. *Id.* § 81.024(g) ("A rule may not be promulgated unless it has been approved by the members of the state bar in the manner provided by this section."). Upon referendum by members of the State Bar, the Court adopted the Texas Disciplinary Rules of Professional Conduct ("Texas Rules").[3] The Court patterned the Texas Rules after the Model Rules to some extent, but it made a number of modifications with regard to certain specific rules and declined to adopt others altogether.

[3]The Texas Rules became effective January 1, 1990, and replaced the Texas Code of Professional Responsibility. TEX. DISCIPLINARY RULES PROF'L CONDUCT preamble, *reprinted in* TEX. GOV'T CODE tit. 2, subtit. G, app. A (Editor's Notes). Over the past twenty-five years, the Texas Supreme Court and the State Bar have conducted five referenda to amend the Rules of Professional Conduct or the Rules of Disciplinary Procedure, and two of those referenda passed. *See* Sunset Advisory Comm'n Staff Report, State Bar of Texas Bd. of Law Exam'rs, 2016–2017, Eighty-fifth Legislature at 15, https://www.sunset.texas.gov (last visited Dec. 8, 2016).

Although the Texas Supreme Court adopts rules rather than the Legislature, the Court has emphasized that its rules should be construed as statutes. *O'Quinn v. State Bar of Tex.*, 763 S.W.2d 397, 399 (Tex. 1988). A Texas lawyer who fails to conform his or her professional conduct to the Texas Rules commits professional misconduct and may lose his or her license to practice law in this State. *See* TEX. RULES DISCIPLINARY P. R. 1.06(W), *reprinted in* TEX. GOV'T CODE, tit. 2, subtit. G, app. A-1 (defining "professional misconduct"). Relevant to your question, the Texas Supreme Court has not adopted Model Rule 8.4(g), and it is not currently part of the Texas Rules. However, if the State were to adopt Model Rule 8.4(g), its provisions raise serious concerns about the constitutionality of the restrictions it would place on members of the State Bar and the resulting harm to the clients they represent.

I. A court would likely conclude that Model Rule 8.4(g) infringes upon the free speech rights of members of the State Bar.

The Framers of the United States Constitution fashioned the constitutional safeguard of free speech to assure the "unfettered interchange of ideas" for bringing about "political and social changes desired by the people." *N. Y. Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964). "All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion"—fall within the full protection of the First Amendment. *Roth v. United States*, 354 U.S. 476, 484 (1957). Contrary to these basic free speech principles, Model Rule 8.4(g) would severely restrict attorneys' ability to engage in meaningful debate on a range of important social and political issues.

While decisions of the United States Supreme Court have concluded that an attorney's free speech rights are circumscribed to some degree in the courtroom during a judicial proceeding and outside the courtroom when speaking about a pending case, Model Rule 8.4(g) extends far beyond the context of a judicial proceeding to restrict speech or conduct in any instance when it is "related to the practice of law." MODEL RULES OF PROF'L CONDUCT r. 8.4(g) (AM. BAR ASS'N 2016); *see also Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1071 (1991). Comment 4 to Model Rule 8.4(g) addresses the expanse of this phrase by explaining that conduct related to the practice of law includes

> representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business or social activities in connection with the practice of law.

MODEL RULES OF PROF'L CONDUCT r. 8.4(g) cmt. 4 (AM. BAR ASS'N 2016). Given the broad nature of this rule, a court could apply it to an attorney's participation in a continuing legal education panel discussion, authoring a law review article, or informal conversations at a bar association event.

One commentator has suggested, for example, that at a bar meeting dealing with proposals to curb police excessiveness, a lawyer's statement, "Blue lives [i.e., police] matter, and we should be more concerned about black-on-black crime," could be subject to discipline under Model Rule

8.4(g).[4] In the same way, candid dialogues about illegal immigration, same-sex marriage, or restrictions on bathroom usage will likely involve discussions about national origin, sexual orientation, and gender identity. Model Rule 8.4(g) would subject many participants in such dialogue to discipline, and it will therefore suppress thoughtful and complete exchanges about these complex issues.

While federal and state law provide heightened protection to most of the classes identified in Model Rule 8.4(g), even in those instances, the law does not prohibit discrimination under all circumstances. Instead, a state action distinguishing between people on the basis of national origin, for example, must be "narrowly tailored to serve a compelling government interest." *Richards v. League of United Latin Am. Citizens*, 868 S.W.2d 306, 311 (Tex. 1993). Yet an attorney operating under Model Rule 8.4(g) may feel restricted from taking a legally supportable position due to fear of reprimand for violating the rule. Such restrictions would infringe upon the free speech rights of members of the State Bar, and a court would likely conclude that Model Rule 8.4(g) is unconstitutional.

II. A court would likely conclude that Model Rule 8.4(g) infringes upon an attorney's First Amendment right to free exercise of religion.

Model Rule 8.4(g) could also be applied to restrict an attorney's religious liberty and prohibit an attorney from zealously representing faith-based groups. For example, in the same-sex marriage context, the U.S. Supreme Court has 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." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607 (2015). The Court has further encouraged "an open and searching debate" on the issue. *Id.* However, operation of Model Rule 8.4(g) would stifle such a debate within the legal community for fear of disciplinary reprimand and would likely result in some attorneys declining to represent clients involved in this issue for fear of disciplinary action. If 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 under the rule. "[D]isciplinary rules governing the legal profession cannot punish activity protected by the First Amendment." *Gentile*, 501 U.S. at 1054. Given that Model Rule 8.4(g) attempts to do so, a court would likely conclude that it is unconstitutional.

III. A court would likely conclude that Model Rule 8.4(g) infringes upon an attorney's right to freedom of association.

"[I]mplicit in the right to engage in activities protected by the First Amendment [is] a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984). "This right is crucial in preventing the majority from imposing its views on groups that would rather express other, perhaps unpopular, ideas." *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 647–48 (2000). Contrary to this constitutionally protected right, however, Model Rule 8.4(g)

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[4] Ronald D. Rotunda, *The ABA Decision to Control What Lawyers Say: Supporting "Diversity" But Not Diversity of Thought*, The Heritage Foundation Legal Memorandum 4 (2016).

could be applied to restrict an attorney's freedom to associate with a number of political, social, or religious legal organizations. The Rule applies to an attorney's participation in "business or social activities in connection with the practice of law." MODEL RULES OF PROF'L CONDUCT r. 8.4(g) cmt. 4 (AM. BAR ASS'N 2016). Many attorneys belong to faith-based legal organizations, such as a Christian Legal Society, a Jewish Legal Society, or a Muslim Legal Society, but Model Rule 8.4(g) could curtail such participation for fear of discipline. In addition, a number of other legal organizations advocate for specific political or social positions on issues related to race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status, or socioeconomic status. Were Texas to adopt Model Rule 8.4(g), it would likely inhibit attorneys' participation in these organizations and could be applied to unduly restrict their freedom of association.

IV. Because Model Rule 8.4(g) attempts to prohibit constitutionally protected activities, a court would likely conclude it is overbroad.

An overbroad statute "sweeps within its scope a wide range of both protected and non-protected expressive activity." *Hobbs v. Thompson*, 448 F.2d 456, 460 (5th Cir. 1971). A court will strike down a statute as unconstitutional if it is so overbroad as to chill individual thought and expression such that it would effectively punish the expression of particular views. *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 583 (1998). In the First Amendment context, a court will invalidate a statute 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) (quotation marks omitted). A law is not overbroad merely because one can think of a single impermissible application. *See New York v. Ferber*, 458 U.S. 747, 771–73 (1982). A finding of substantial overbreadth requires a court "to find a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court." *N.Y. State Club Ass'n v. City of N.Y.*, 487 U.S. 1, 11 (1988) (quotation marks omitted).

Although courts infrequently invalidate a statute for overbreadth, Model Rule 8.4(g) is a circumstance where a court would be likely to do so. *See Finley*, 524 U.S. at 580 ("Facial invalidation is, manifestly, strong medicine that has been employed by the Court sparingly[.]" (quotation marks omitted)). Like those examples discussed above, numerous scenarios exist of how the rule could be applied to significantly infringe on the First Amendment rights of all members of the State Bar. A statute "found to be overbroad may not be enforced at all, even against speech that could constitutionally be prohibited by a more narrowly drawn statute." *Comm'n for Lawyer Discipline v. Benton*, 980 S.W.2d 425, 435 (1998). Because Model Rule 8.4(g) substantially restricts constitutionally permissible speech and the free exercise of religion, a court would likely conclude it is overbroad and therefore unenforceable.

V. As applied to specific circumstances, a court would likely also conclude that Model Rule 8.4(g) is void for vagueness.

A statute is void for vagueness when it "prohibits conduct that is not sufficiently defined." *Id.* at 437. A vague statute offends due process in two ways: (1) by failing to give fair notice of what conduct may be punished; and (2) inviting "arbitrary and discriminatory enforcement by

failing to establish guidelines for those charged with enforcing the law." *Id.* "To survive a vagueness challenge, a statute need not spell out with perfect precision what conduct it forbids." *Id.* But it must explain the prohibited conduct "in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with." *U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 579 (1973). When analyzing whether a disciplinary rule directed solely at lawyers is vague, courts will "ask whether the ordinary lawyer, with the benefit of guidance provided by case law, court rules and the lore of the profession, could understand and comply with it." *Benton*, 980 S.W.2d at 437 (quotation marks omitted).

When a "statute's language is capable of reaching protected speech or otherwise threatens to inhibit the exercise of constitutional rights, a stricter vagueness standard applies than when the statute regulates unprotected conduct." *Id.* at 438. Model Rule 8.4(g) lacks clear meaning and is capable of infringing upon multiple constitutionally protected rights, and it is therefore likely to be found vague. In particular, the phrase "conduct related to the practice of law," while defined to some extent by the comment, still lacks sufficient specificity to understand what conduct is included and therefore "has the potential to chill some protected expression" by not defining the prohibited conduct with clarity. *Id.*; MODEL RULES OF PROF'L CONDUCT r. 8.4(g) (AM. BAR ASS'N 2016). Also, the rule prohibits "discrimination" without clarifying whether it is limited to unlawful discrimination or extends to otherwise lawful conduct. It prohibits "harassment" without a clear definition to determine what conduct is or is not harassing. And it specifically protects "legitimate advice or advocacy consistent with these Rules" but does not provide any standard by which to determine what advice is or is not legitimate. MODEL RULES OF PROF'L CONDUCT r. 8.4(g) (AM. BAR ASS'N 2016). Each of these unclear terms leave Model Rule 8.4(g) open to invalidation on vagueness grounds as applied to specific circumstances.

VI. The Texas Rules of Disciplinary Conduct sufficiently address attorney misconduct to prohibit unlawful discrimination.

Multiple aspects of Model Rule 8.4(g) present serious constitutional concerns that would likely result in its invalidation by a court. The Texas Disciplinary Rules of Professional Conduct, on the other hand, already address issues of attorney discrimination through narrower language that provides better clarification about the conduct prescribed. Texas Disciplinary Rule of Professional Conduct 5.08 provides:

> (a) A lawyer shall not willfully, in connection with an adjudicatory proceeding, except as provided in paragraph (b), manifest, by words or conduct, bias or prejudice based on race, color, national origin, religion, disability, age, sex, or sexual orientation towards any person involved in that proceeding in any capacity.
>
> (b) Paragraph (a) does not apply to a lawyer's decision whether to represent a particular person in connection with an adjudicatory proceeding, nor to the process of jury selection, nor to communications protected as "confidential information" under these Rules. See Rule 1.05(a), (b). It also does not preclude

> advocacy in connection with an adjudicatory proceeding involving any of the factors set out in paragraph (a) if that advocacy:
>
> > (i) is necessary in order to address any substantive or procedural issues raised in the proceeding; and
> >
> > (ii) is conducted in conformity with applicable rulings and orders of a tribunal and applicable rules of practice and procedure.

TEX. DISCIPLINARY R. PROF'L CONDUCT R. 5.08 ("Prohibited Discriminatory Activities"). Model Rule 8.4(g) is therefore unnecessary to protect against prohibited discrimination in this State, and were it to be adopted, a court would likely invalidate it as unconstitutional.

SUMMARY

A court would likely conclude that the American Bar Association's Model Rule of Professional Conduct 8.4(g), if adopted in Texas, would unconstitutionally restrict freedom of speech, free exercise of religion, and freedom of association for members of the State Bar. In addition, a court would likely conclude that it was overbroad and void for vagueness.

Very truly yours,

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

BRANTLEY STARR
Deputy First Assistant Attorney General

VIRGINIA K. HOELSCHER
Chair, Opinion Committee

Tennessee Attorney General’s Formal Opinion – No. 18-11 (2018)

STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL

March 16, 2018

Opinion No. 18-11

American Bar Association's New Model Rule of Professional Conduct Rule 8.4(g)

Question 1

If Tennessee were to adopt the American Bar Association's new Model Rule 8.4(g), or the version of it currently being considered in Tennessee, could Tennessee's adoption of that new Rule constitute a violation of a Tennessee attorney's statutory or constitutional rights under any applicable statute or constitutional provision?

Opinion 1

Yes. Proposed Rule of Professional Conduct 8.4(g) would violate the constitutional rights of Tennessee attorneys and conflict with the existing Rules of Professional Conduct.

ANALYSIS

For the analysis that forms the basis of this opinion, please see the Comment Letter of the Tennessee Attorney General filed with the Tennessee Supreme Court on March 16, 2018, in response to the Court's order of November 21, 2017, soliciting written comments on whether to adopt the amendments to Tennessee Supreme Court Rule 8, Rule of Professional Conduct 8.4, that are being proposed by Joint Petition of the Tennessee Board of Professional Responsibility and the Tennessee Bar Association. A copy of the Comment Letter is attached hereto and incorporated herein.

HERBERT H. SLATERY III
Attorney General and Reporter

ANDRÉE SOPHIA BLUMSTEIN
Solicitor General

SARAH K. CAMPBELL
Special Assistant to the Solicitor General and the Attorney General

Requested by:

The Honorable Mike Carter
State Representative
632 Cordell Hull Building
Nashville, Tennessee 37243

STATE OF TENNESSEE

Office of the Attorney General

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March 16, 2018

The Honorable Jeffrey S. Bivins, Chief Justice
The Honorable Cornelia A. Clark, Justice
The Honorable Holly Kirby, Justice
The Honorable Sharon G. Lee, Justice
The Honorable Roger A. Page, Justice

Attn: James M. Hivner, Clerk
Tennessee Supreme Court
100 Supreme Court Building
401 7th Avenue North
Nashville, TN 37219

Re: No. ADM2017-02244 — Comment Letter of the Tennessee Attorney General Opposing Proposed Amended Rule of Professional Conduct 8.4(g)

Dear Chief Justice Bivins, Justice Clark, Justice Kirby, Justice Lee, and Justice Page:

This letter is being filed in response to the Court's order of November 21, 2017, soliciting written comments on whether to adopt amendments to Tennessee Supreme Court Rule 8, Rule of Professional Conduct 8.4, that were proposed by Joint Petition of the Tennessee Board of Professional Responsibility ("BPR") and the Tennessee Bar Association ("TBA"). Because proposed Rule of Professional Conduct 8.4(g) would violate the constitutional rights of Tennessee attorneys and conflict with the existing Rules of Professional Conduct, the Tennessee Office of the Attorney General and Reporter strongly opposes its adoption.

The proposed amendments to Rule 8.4 and its accompanying comment are "patterned after" ABA Model Rule 8.4(g).[1] That model rule has been widely and justifiably criticized as

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[1] Joint Petition of Board of Professional Responsibility of the Supreme Court of Tennessee and Tennessee Bar Association for the Adoption of a New Tenn. Sup. Ct. R. 8, RPC 8.4(g) at 1, *In re Petition for the Adoption of a New Tenn. Sup. Ct. R. 8, RPC 8.4(g)*, No. ADM2017-02244 (Tenn. Nov. 15, 2017) (hereinafter "Joint Petition").

creating a "speech code for lawyers" that would constitute an "unprecedented violation of the First Amendment" and encourage, rather than prevent, discrimination by suppressing particular viewpoints on controversial issues.[2] To date, ABA Model Rule 8.4(g) has been adopted by only one State—Vermont.[3] A number of other States have already rejected its adoption.[4] Although the BPR and TBA assert in their Joint Petition that their Proposed Rule 8.4(g) "improve[s] upon" ABA Model Rule 8.4(g) by "more clearly protecting the First Amendment rights of lawyers," Joint Petition 1, the proposed rule suffers from the same fundamental defect as the model rule: it wrongly assumes that the only attorney speech that is entitled to First Amendment protection is purely private speech that is entirely unrelated to the practice of law. But the First Amendment provides robust protection to attorney speech, even when the speech is related to the practice of law and even when it could be considered discriminatory or harassing. Far from "protecting" the First Amendment rights of lawyers, Proposed Rule 8.4(g) would seriously compromise them.

If adopted, Proposed Rule 8.4(g) would profoundly transform the professional regulation of Tennessee attorneys. It would regulate aspects of an attorney's life that are far removed from protecting clients, preventing interference with the administration of justice, ensuring attorneys' fitness to practice law, or other traditional goals of professional regulation. Especially since there is no evidence that the current Rule 8.4 is in need of revision, there is no reason for Tennessee to adopt such a drastic change. If the TBA and BPR are right that harassing and discriminatory speech is a problem in the legal profession, then the answer is more speech, not enforced silence in the guise of professional regulation.

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[2] Letter from Edwin Meese III and Kelly Shackelford to ABA House of Delegates (Aug. 5, 2016), https://firstliberty.org/wp-content/uploads/2016/08/ABA-Letter_08.08.16.pdf. *See also, e.g.*, Eugene Volokh, *A speech code for lawyers, banning viewpoints that express 'bias,' including in law-related social activities*, The Volokh Conspiracy (Aug. 10, 2016, 8:53 AM), http://reason.com/volokh/2016/08/10/a-speech-code-for-lawyers-bann; John Blackman, *A Pause for State Courts Considering Model Rule 8.4(g): The First Amendment and Conduct Related to the Practice of Law*, 30 Geo. J. Legal Ethics 241 (2017); Ronald Rotunda, *The ABA Decision to Control What Lawyers Say: Supporting "Diversity" But Not Diversity of Thought,* The Heritage Foundation (Oct. 6, 2016), https://www.heritage.org/report/the-aba-decision-control-what-lawyers-say-supporting-diversity-not-diversity-thought.

[3] *ABA Model Rule 8.4(g) and the States,* Christian Legal Society, https://www.christianlegalsociety.org/resources/aba-model-rule-84g-and-states (last visited Mar. 6, 2018).

[4] Order, *In re Proposed Amendments to Rule 8.4 of the Rules of Professional Conduct*, No. 2017-000498 (S.C. June 20, 2017), https://www.sccourts.org/courtOrders/displayOrder.cfm?orderNo=2017-06-20-01; Order, *In re Amendments to Rule of Professional Conduct 8.4*, No. ADKT526 (Nev. Sep. 25, 2017).

I. Problematic Features of Proposed Rule 8.4(g)

In their current form, the Rules of Professional Conduct do not expressly prohibit discrimination or harassment by attorneys. Rather, Rule 8.4(d) provides that it is "professional misconduct" to "engage in conduct that is prejudicial to the administration of justice." Tenn. Sup. Ct. R. 8, RPC 8.4(d). And comment 3 provides that "[a] lawyer, who in the course of representing a client, knowingly manifests, by words or conduct, bias or prejudice based on race, sex, religion, national origin, disability, age, sexual orientation, or socio-economic status violates paragraph (d) when such actions are prejudicial to the administration of justice." *Id.* at RPC 8.4(d), cmt. 3. Comment 3 also makes clear that "[l]egitimate advocacy representing the foregoing factors does not violate paragraph (d)." *Id.*

Proposed Rule 8.4(g) would establish a new black-letter rule that subjects Tennessee attorneys to professional discipline for "engag[ing] in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status, or socioeconomic status in conduct related to the practice of law." Comment 3 to the proposed rule would define "harassment" and "discrimination" to include not only "physical conduct," but also "verbal . . . conduct"—better known as speech.

Several problematic features of the proposed rule warrant highlighting. First, the proposed rule would apply not only to speech and conduct that occurs in the course of representing a client or appearing before a judicial tribunal, but also to speech and conduct that is merely "*related to the practice of law*." (emphasis added). Comment 4 to the proposed rule explains that "[c]onduct related to the practice of law includes representing clients; interacting with witnesses, coworkers, court personnel, lawyers, and others while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business or social activities in connection with the practice of law." Far from cabining the scope of the proposed rule, comment 4 leaves no doubt that the proposed rule would apply to virtually any speech or conduct that is even tangentially related to an individual's status as a lawyer, including, for example, a presentation at a CLE event, participation in a debate at an event sponsored by a law-related organization, the publication of a law review article, and even a casual remark at dinner with law firm colleagues.[5] Such speech or conduct would be "professional misconduct" even if it in no way prejudices the administration of justice.

[5] Indeed, the report that recommended adoption of Model Rule 8.4(g) to the ABA House of Delegates explained that the rule would regulate any "conduct lawyers are permitted or required to engage in because of their work as a lawyer," including "activities such as law firm dinners and other nominally social events at which lawyers are present solely because of their association with their law firm or in connection with their practice of law." Report to the House of Delegates 9, 11 (May 31, 2016), https://www.americanbar.org/content/dam/aba/administrative/ professional_responsibility/scepr_report_to_hod_rule_8_4_amendments_05_31_2016_resolution_and_report_posting.authcheckdam.pdf.

Second, the proposed rule would prohibit a broad range of "harassment or discrimination," including a significant amount of speech and conduct that is not currently prohibited under federal or Tennessee antidiscrimination statutes. To the extent that federal antidiscrimination laws apply to attorneys engaged in speech or conduct related to the practice of law, they generally apply only in the employment and education contexts and prohibit discrimination only on the basis of race, color, national origin, religion, sex, age, or disability. *See* 20 U.S.C. § 1681 (Title IX); 29 U.S.C. § 623 (ADEA); 29 U.S.C. § 794 (Rehabilitation Act); 42 U.S.C. § 2000d (Title VI); 42 U.S.C. § 2000e-2 (Title VII); 42 U.S.C. § 12112 (ADA). The Tennessee Human Rights Act similarly applies only in certain limited areas, including employment, and prohibits discrimination only on the basis of "race, creed, color, religion, sex, age or national origin." Tenn. Code Ann. § 4-21-401. Under both federal and state antidiscrimination laws, moreover, the only discrimination or harassment that is actionable in the employment context is that which results in a materially adverse employment action or is sufficiently severe and pervasive to create a hostile work environment. *See, e.g.*, *White & Burlington N. & Santa Fe Ry. Co.*, 364 F.3d 789, 795 & n.1 (6th Cir. 2004) (en banc) (explaining that "not just any discriminatory act by an employer constitutes discrimination under Title VII"); *Frye v. St. Thomas Health Servs.*, 227 S.W.3d 595, 602, 610 (Tenn. Ct. App. 2007). And the only harassment that is actionable in the education context is that which is sufficiently severe and pervasive to effectively bar a student from receiving educational benefits. *See, e.g.*, *Doe v. Miami Univ.*, 882 F.3d 579, 590 (6th Cir. 2018). Federal and state antidiscrimination laws also explicitly protect religious freedom by exempting religious organizations from their ambit. *See, e.g.*, 42 U.S.C. § 2000e-1(a); Tenn. Code Ann. § 4-21-405.

Proposed Rule 8.4(g) would reach well beyond federal and state antidiscrimination laws. For one thing, the proposed rule would prohibit any and all "harassment or discrimination"—even that which does not result in any tangible adverse consequence and is not sufficiently severe or pervasive to create a hostile environment. The proposed amendments to comment 3, which attempt to clarify what constitutes "harassment or discrimination," do nothing to alleviate this concern. The proposed comment simply states that "discrimination includes harmful verbal or physical conduct that manifests bias or prejudice towards others," and "[h]arassment includes sexual harassment and derogatory or demeaning verbal or physical conduct." In other words, any speech or conduct that could be considered "harmful" or "derogatory or demeaning" would constitute professional misconduct within the meaning of the proposed rule. And while proposed comment 3 states that "[t]he substantive law of antidiscrimination and anti-harassment statutes and case law *may* guide application of paragraph (g)" (emphasis added), there is no requirement that the scope of Proposed Rule 8.4(g) be limited in that manner.

Even more troubling, Proposed Rule 8.4(g) would prohibit "harassment or discrimination" on the basis of characteristics that are not expressly covered by federal and state antidiscrimination laws—namely, "sexual orientation, gender identity, marital status, [and] socioeconomic status." It is no secret that individuals continue to hold diverse views on issues related to sexual orientation and gender identity, and those who hold traditional views on sexuality and gender frequently do so because of sincerely held religious beliefs. As the U.S. Supreme Court recognized in *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015), for example, many who consider "same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises." By deeming as "professional misconduct" any speech that someone may view as "harmful" or "derogatory or demeaning" toward homosexuals or transgender individuals,

Proposed Rule 8.4(g) would prevent attorneys who hold traditional views on these issues from "engag[ing] those who disagree with their view in an open and searching debate," *Obergefell*, 135 S. Ct. at 2607.

Unlike Title VII and the Tennessee Human Rights Act, Proposed Rule 8.4(g) includes no exception to protect religious freedom. Comment 4a to the proposed rule gives a nod to the First Amendment by stating that paragraph (g) "does not restrict any speech or conduct not related to the practice of law, including speech or conduct protected by the First Amendment." As explained below, however, nearly all speech and conduct that is "related to the practice of law" is also protected by the First Amendment, so that explanatory comment in fact does nothing to protect attorneys' First Amendment rights.

Third, Proposed Rule 8.4(g) would prohibit not only speech and conduct "that the lawyer knows . . . is harassment or discrimination," but also that which the lawyer "reasonably should know is harassment or discrimination." In other words, the proposed rule would subject an attorney to professional discipline for uttering a statement that was not actually known to be or intended as harassing or discriminatory, simply because someone might construe it that way.

II. Proposed Rule 8.4(g) Would Violate the U.S. and Tennessee Constitutions and Conflict with the Rules of Professional Conduct.

As a result of these and other problematic features, Proposed Rule 8.4(g) would violate the U.S. and Tennessee Constitutions and conflict with the spirit and letter of the existing Rules of Professional Conduct.

A. Proposed Rule 8.4(g) Would Infringe on Tennessee Attorneys' Rights to Free Speech, Freedom of Association, Free Exercise of Religion, and Due Process.

Proposed Rule 8.4(g) would clearly violate the First Amendment rights of Tennessee attorneys, including their rights to free speech, freedom of expressive association, and the free exercise of religion, and equivalent protections under the Tennessee Constitution.[6]

The First Amendment prohibits the government from regulating protected speech or expressive conduct based on its content unless the regulation is the least restrictive means of achieving a compelling government interest. *See Brown v. Entertainment Merchants Ass'n*, 564 U.S. 786, 799 (2011). That most exacting level of scrutiny would apply to Proposed Rule 8.4(g) because it regulates speech and expressive conduct that is entitled to full First Amendment protection based on viewpoint.

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[6] The Tennessee Constitution also protects the rights to free speech, freedom of expressive association, and free exercise of religion. *See* Tenn. Const. art. I, § 19 (right to free speech); Tenn. Const. art. I. § 3 (right to free exercise of religion). This Court has held that these rights are at least as broad as those guaranteed by the First Amendment to the U.S. Constitution. *See, e.g., S. Living, Inc. v. Celauro*, 789 S.W.2d 251, 253 (Tenn. 1990); *Carden v. Bland*, 288 S.W.2d 718, 721 (Tenn. 1956).

Expression that would be deemed discrimination or harassment on the basis of one of the categories included in Proposed Rule 8.4(g) is entitled to robust First Amendment protection, even though listeners may find such expression harmful or offensive. *See Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 206 (3d Cir. 2001) (Alito, J.) ("[T]here is . . . no question that the free speech clause protects a wide variety of speech that listeners may consider deeply offensive, including statements that impugn another's race or national origin or that denigrate religious beliefs."). The U.S. Supreme Court has made clear that, save for a few narrowly defined and historically recognized exceptions such as obscenity and fighting words, the "'the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.'" *Matal v. Tam*, 137 S. Ct. 1744, 1763 (2017) (plurality opinion) (quoting *Street v. New York*, 394 U.S. 576, 592 (1969)); *see also, e.g., Brown*, 564 U.S. at 791, 798 (noting that "disgust is not a valid basis for restricting expression"); *Snyder v. Phelps*, 562 U.S. 443, 458 (2011) ("[S]peech cannot be restricted simply because it is upsetting . . . ."); *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118 (1991) ("[T]he Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." (internal quotation marks omitted)). Indeed, the very "point of all speech protection . . . is to shield just those choices of content that in someone's eyes are misguided, or even hurtful." *Hurley v. Irish-American Gay, Lesbian and Bisexual Grp. of Boston, Inc.*, 515 U.S. 557, 574 (1995); *see also Texas v. Johnson*, 491 U.S. 397, 408 (1989) ("[A] principal function of free speech under our system of government is to invite dispute." (internal quotation marks omitted)).

The fact that the speech at issue is that of attorneys does not deprive it of protection under the First Amendment. As a general matter, the expression of attorneys is entitled to full First Amendment protection, even when the attorney is acting in his or her professional capacity. *See, e.g., In re Primus*, 436 U.S. 412, 432-38 (1978) (applying strict scrutiny to invalidate on First Amendment grounds discipline imposed on attorney for informing welfare recipient threatened with forced sterilization that ACLU would provide free legal representation). Courts have permitted the government to limit the speech of attorneys in only narrow circumstances, such as when the speech pertains to a pending judicial proceeding or otherwise prejudices the administration of justice. *See Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1072 (1991); *Mezibov v. Allen*, 411 F.3d 712, 717 (6th Cir. 2005); *Bd. of Prof'l Responsibility v. Slavin*, 145 S.W.3d 538, 549 (Tenn. 2004).[7]

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[7] Courts have also applied a lower level of scrutiny to regulations that implicate only the commercial speech of attorneys. *See, e.g., Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 622-24 (1995); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 455-56 (1978). Proposed Rule 8.4(g) cannot be defended on that ground, because it reaches non-commercial speech. Some courts have also suggested that regulations of "professional speech" should be subject to a lower level of scrutiny. *See, e.g., Pickup v. Brown*, 740 F.3d 1208, 1225-29 (9th Cir. 2013). But neither the U.S. Supreme Court, the Sixth Circuit, nor the Tennessee Supreme Court has so held. In any event, Proposed Rule 8.4(g) is not limited to "professional speech"—that is, personalized advice to a paying client, *see, e.g., Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor and City Council of Balt.*, 879 F.3d 101, 109 (4th Cir. 2018)—but instead reaches speech or conduct that is merely "related to the practice of law."

This Court's decision in *Ramsey v. Board of Professional Responsibility*, 771 S.W.2d 116 (Tenn. 1989), is particularly instructive. There, a District Attorney General's law license was suspended because he made remarks to the media that were critical of the judicial system. This Court held that the disciplinary sanctions violated the First Amendment because the attorney's remarks, though "disrespectful and in bad taste," were protected expression. *Id.* at 122. This Court made clear that "[a] lawyer has every right to criticize court proceedings and the judges and courts of this State after a case is concluded," as long as those statements are not false. *Id.* at 122. Were the rule otherwise, this Court explained, it would "close the mouths of those best able to give advice, who might deem it their duty to speak disparagingly." *Id.* at 121. Proposed Rule 8.4(g) is not limited to speech and conduct that pertains to a pending judicial proceeding or that actually prejudices the administration of justice; rather, it reaches all speech and conduct in any way "related to the practice of law"—speech that is entitled to full First Amendment protection.

Proposed Rule 8.4(g) would not only regulate speech that is protected by the First Amendment, but it would also do so on the basis of viewpoint. But "it is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995). "When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant." *Id.* at 829 (referring to "[v]iewpoint discrimination" as "an egregious form of content discrimination"). Proposed Rule 8.4(g) discriminates based on viewpoint because it would permit certain expression that is laudatory of a person's race, sex, religion, or other protected characteristic, while prohibiting expression that is "derogatory or demeaning" of that characteristic. Indeed, proposed comment 4 makes clear that "[l]awyers may engage in conduct undertaken to *promote* diversity and inclusion without violating this Rule." (emphasis added). Like the trademark disparagement clause that the U.S. Supreme Court invalidated on First Amendment grounds in *Matal*, Proposed Rule 8.4(g) "mandat[es] positivity." 137 S. Ct. at 1766 (Kennedy, J., concurring in part and concurring in the judgment).

Because Proposed Rule 8.4(g) would regulate protected speech based on its viewpoint, it would be "presumptively unconstitutional" and could be upheld only if it were narrowly tailored to further a compelling government interest. *Rosenberger*, 515 U.S. at 830. But the proposed rule could not satisfy that exacting scrutiny. Even assuming that the government has a compelling interest in preventing discrimination in particular contexts such as employment or education, *see Saxe*, 240 F.3d at 209, or in protecting the administration of justice, Proposed Rule 8.4(g) is not narrowly tailored to further those interests because it would reach all speech and conduct in any way "related to the practice of law," regardless of the particular context in which the expression occurs or whether it actually interferes with the administration of justice.

Indeed, the Joint Petition does not establish empirically or otherwise any actual need for the proposed rule. The section of the Joint Petition titled "the need for proposed rule 8.4(g)" does not document any instances of harassment or discrimination brought to the attention of the BPR or TBR. Nor does it explain in what way discriminatory or harassing speech by attorneys harms the legal profession or the administration of justice. It simply agrees with the ABA House of Delegates' ipse dixit that the proposed rule is "in the public's interest" and "in the profession's interest." Joint Petition 2 (internal quotation marks omitted).

Even if discrete applications of Proposed Rule 8.4(g) could be upheld—for example, a discriminatory comment made during judicial proceedings that actually prejudices the administration of justice—the rule would still be subject to facial invalidation because it is unconstitutionally overbroad. A law may be invalidated under the First Amendment overbreadth doctrine "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) (internal quotation marks omitted). The "reason for th[at] special rule in First Amendment cases is apparent: An overbroad statute might serve to chill protected speech." *Bates v. State Bar of Ariz.*, 433 U.S. 350, 380 (1977). A person "might choose not to speak because of uncertainty whether his claim of privilege would prevail if challenged." *Id.* The overbreadth doctrine "reflects the conclusion that the possible harm to society from allowing unprotected speech to go unpunished is outweighed by the possibility that protected speech will be muted." *Id.*

Because Proposed Rule 8.4(g) would apply to any "harassment or discrimination" on the basis of a protected characteristic, including a single comment that someone may find "harmful" or "derogatory or demeaning," that is in any way "related to the practice of law," including remarks made at CLE events, debates, and in other contexts that do not involve the representation of a client or interaction with a judicial tribunal,[8] it would sweep in a substantial amount of attorney speech that poses no threat to any government interest that might conceivably justify the statute. Even if the BPR may ultimately decide not to impose disciplinary sanctions on the basis of such speech, or a court may ultimately invalidate on First Amendment grounds any sanction imposed, the fact that the rule on its face would apply to speech of that nature would undoubtedly chill attorneys from engaging in speech in the first place. But this Court has cautioned that "we must ensure that lawyer discipline, as found in Rule 8 of the Rules of [Professional Conduct], does not create a chilling effect on First Amendment Rights." *Ramsey*, 771 S.W.2d at 121.

Proposed Rule 8.4(g) also suffers from a related problem: the terms "harassment," "discrimination," "reasonably should know," "related to the practice of law," and "legitimate advice or advocacy" are impermissibly vague under the Due Process Clause. "A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." *F.C.C. v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012). To comport with the requirements of due process, a regulation must "provide a person of ordinary intelligence fair notice of what is prohibited.'" *Id.* (quoting *United States v. Williams*, 553 U.S. 285, 304 (2008)). But how is an attorney to know whether certain speech or conduct will be deemed harassing or discriminatory under the rule? Or whether certain speech or conduct will be deemed sufficiently "related to the practice of law" to fall within the ambit of the proposed rule? Determining whether an attorney "knows" or "reasonably should know" that the speech is harassing or discriminatory would require speculating about whether someone might view the speech as "harmful" or "derogatory or demeaning." Is an attorney who participates in a debate on income inequality engaging in discrimination based on socioeconomic status when he makes a negative remark about the "one percent"? How about an attorney who comments at a CLE on

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[8] Even statements made by an attorney as a political candidate or a member of the General Assembly could be deemed sufficiently "related to the practice of law" to fall within the scope of Proposed Rule 8.4(g). So too could statements made by an attorney in his or her capacity as a member of the board of a nonprofit or religious organization.

immigration law that illegal immigration is draining public resources? Is that attorney discriminating on the basis of national origin? The vagueness of the proposed rule only exacerbates its chilling effect on attorney speech. *See id.* at 254.

Clarity of regulation is important not only for regulated parties, but also "so that those enforcing the law do not act in an arbitrary or discriminatory way." *Id.* at 253; *see also Davis-Kidd Booksellers, Inc. v. McWherter*, 866 S.W.2d 520, 532 (Tenn. 1993) ("[T]he more important aspect of the vagueness doctrine is not actual notice, but . . . the requirement that a legislature establish minimum guidelines to govern law enforcement"). The lack of clarity in Proposed Rule 8.4(g)'s terms creates a substantial risk that determinations about whether expression is prohibited will be guided by the "personal predilections" of enforcement authorities rather than the text of the rule. *Kolender v. Lawson*, 461 U.S. 352, 356 (1983) (internal quotation marks omitted). In fact, the proposed rule would effectively require enforcement authorities to be guided by their "personal predilections" because whether a statement is "harmful" or "derogatory or demeaning" depends on the subjective reaction of the listener. *See, e.g., Dambrot v. Cen. Mich. Univ.*, 55 F.3d 1177, 1184 (6th Cir. 1995) (invalidating university "discriminatory harassment" policy on vagueness grounds because "in order to determine what conduct will be considered 'negative' or 'offensive' by the university, one must make a subjective reference"). Especially in today's climate, those subjective reactions can vary widely. *See id.* (observing that "different people find different things offensive").

Proposed Rule 8.4(g) would also infringe on the First Amendment right of Tennessee attorneys to engage in expressive association. The First Amendment protects an individual's "right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 647 (2000). That right is "crucial in preventing the majority from imposing its views on groups that would rather express other, perhaps unpopular, ideas." *Id.* at 647-48. Proposed Rule 8.4(g) is sufficiently broad that even membership in an organization that espouses views that some may consider "harmful" or "derogatory or demeaning" could be deemed "conduct related to the practice of law" that is "harassing or discriminatory." In this respect, the proposed rule is far broader than Rule 3.6 of the Code of Judicial Conduct. The latter rule prohibits a judge from "hold[ing] membership in any organization that practices invidious discrimination on the basis of race, sex, gender, religion, national origin, ethnicity, or sexual orientation," but comment 4 to the rule makes clear that "[a] judge's membership in a religious organization as a lawful exercise of the freedom of religion is not a violation" of the rule. Tenn. Sup. Ct. R. 10, CJC 3.6(A) & cmt. 4. Proposed Rule 8.4(g), by contrast, is not limited to "invidious" discrimination and contains no exception for membership in a religious organization.

Because Proposed Rule 8.4(g) includes no exception for speech or conduct that is motivated by one's religious beliefs, it would also interfere with attorneys' First Amendment right to the free exercise of religion. Indeed, by expressly prohibiting harassment or discrimination based on "sexual orientation" and "gender identity," the proposed rule appears designed to target those holding traditional views on controversial matters such as sexuality and gender—views that are often "based on decent and honorable religious or philosophical premises," *Obergefell*, 135 S. Ct. at 2602. It is well settled that the Free Exercise Clause protects not only the right to believe, but also the right to act according to those beliefs. *See, e.g., Emp't Div., Dep't of Human Res. of*

Or. v. Smith, 494 U.S. 872, 877 (1990) (explaining that "the 'exercise of religion' often involves not only belief and profession but the performance of (or abstention from) physical acts"). While gathering for worship with a particular religious group is unlikely to be deemed conduct "related to the practice of law," serving as a member of the board of a religious organization, participating in groups such as the Christian Legal Society, or even speaking about how one's religious beliefs influence one's work as an attorney may well be. The proposed rule may also violate Tennessee's Religious Freedom Restoration Act, which prohibits the government from "substantially burden[ing] a person's free exercise of religion even if the burden results from a rule of general applicability," unless the burden is the least restrictive means of furthering a compelling government interest. Tenn. Code Ann. § 4-1-407(c).

The Joint Petition asserts that Proposed Rule 8.4(g) addresses the First Amendment concerns that have plagued ABA Model Rule 8.4(g) by adding an additional sentence to comment 4 and a new comment 4a. Joint Petition 6-7. But these supposed improvements in fact do nothing to increase protection for attorneys' First Amendment rights. The new sentence in comment 4 provides that "[l]egitimate advocacy protected by Section (g) includes advocacy in any conduct related to the practice of the law, including circumstances where a lawyer is not representing a client and outside traditional settings where a lawyer acts as an advocate, such as litigation." But proposed section (g) itself states only that "[t]his paragraph does not preclude legitimate advice or advocacy *consistent with these Rules*." (emphasis added). So even if "legitimate advocacy" includes advocacy both in the course of representing a client and in other contexts, such advocacy is allowed only if it is otherwise consistent with Proposed Rule 8.4(g)—i.e., only if it does not constitute harassment or discrimination based on a protected characteristic. That circular exception is no exception at all. Moreover, the proposed rule nowhere defines what constitutes "legitimate" advocacy; the BPR would presumably get to draw the line between legitimate and illegitimate advocacy, creating a further risk that advocacy of controversial or politically incorrect positions would be deemed harassment or discrimination that constitutes professional misconduct.

Proposed comment 4a is likewise of no help. It provides that "Section (g) does not restrict any speech or conduct not related to the practice of law, including speech or conduct protected by the First Amendment. Thus, a lawyer's speech or conduct unrelated to the practice of law cannot violate this Section." All that comment 4a does, in other words, is reiterate that the proposed rule reaches all speech and conduct that *is* related to the practice of law. But that is the very feature of the proposed rule that gives rise to many of its First Amendment problems. The comment rests on the same erroneous premise as the proposed rule itself: that attorney speech and conduct that *is* related to the practice of law is *not* protected by the First Amendment. As explained above, that is simply not the case. Attorney speech, even speech that is connected with the practice of law, ordinarily is entitled to full First Amendment protection.

The Joint Petition asserts that Proposed Rule 8.4(g) is consistent with the First Amendment because it "leaves a sphere of *private thought and private activity* for which lawyers will remain free from regulatory scrutiny." Joint Petition 6 (emphasis added). That statement is alarming. It makes clear that the goal of the proposed rule is to *subject* to regulatory scrutiny all attorney expression that is in any way connected with the practice of law. That approach is wholly inconsistent with the First Amendment.

B. Proposed Rule 8.4(g) Would Conflict with the Rules of Professional Conduct.

In addition to violating the constitutional rights of Tennessee attorneys, Proposed Rule 8.4(g) would also conflict in numerous respects with the spirit and letter of the existing Rules of Professional Conduct. Most fundamentally, the proposed rule would disregard the traditional goals of professional regulation by "open[ing] up for liability an entirely new realm of conduct unrelated to the actual practice of law or a lawyer's fitness to practice, and not connected with the administration of justice." Blackman, *supra*, at 252. Even violations of criminal law are left unregulated by the Rules of Professional Conduct when they do not "reflect[] adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects." Tenn. Sup. Ct. R. 8, RPC 8.4(b). But Proposed Rule 8.4(g) would subject attorneys to professional discipline for speech or conduct that violates neither federal nor state antidiscrimination laws and has no bearing on fitness to practice law or the administration of justice.

The proposed rule also threatens to interfere with an attorney's broad discretion to decide which clients to represent. While the proposed rule states that it "does not limit the ability of a lawyer to accept, decline, or withdraw from a representation in accordance with RPC 1.16," the latter rule only addresses the circumstances in which an attorney is *required* to decline or withdraw from representation. An attorney who would prefer not to represent a client because the attorney disagrees with the position the client is advocating, but is not required under Rule 1.16 to decline the representation, may be accused of discriminating against the client under Proposed Rule 8.4(g) Take, for example, an attorney who declines to represent a corporate executive because the attorney believes corporate executives are responsible for the rising income inequality in our country. Would that attorney have discriminated based on socioeconomic status? While the attorney may be able to contend that his or her personal views concerning the client's wealth created a "conflict of interest" that prevented representation under the Rule of Professional Conduct 1.7, it is far from clear how the seeming tension between that rule and Proposed Rule 8.4(g) would be resolved.

The proposed rule may also chill attorneys from representing clients who wish to advocate positions that could be considered harassment or discrimination based on a protected characteristic, or at least from doing so zealously as required by the Rules of Professional Conduct. The proposed rule states that it "does not preclude legitimate advice or advocacy consistent with these Rules," but, as noted above, the "consistent with these Rules" qualifier renders that circular exception meaningless. Comment 5d to the proposed rule states that "[a] lawyer's representation of a client does not constitute an endorsement by the lawyer of the client's views or activities." While that clarification may provide some comfort that an attorney's representation of a client will not be deemed harassment or discrimination, it is largely duplicative of existing Rule of Professional Conduct 1.2 and, if anything, adds to the uncertainty regarding whether an attorney's decision *not* to represent a client could subject the attorney to discipline.

More generally, the proposed rule infringes on the ability of attorneys to practice law in accordance with their religious, moral, and political beliefs. Yet the Rules of Professional Conduct make clear that lawyers should be "guided by personal conscience" and informed by "moral and ethical considerations." Tenn. Sup. Ct. R. 8, RPC Preamble and Scope; *see also id.* at RPC 2.1

("In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social, and political factors that may be relevant to the client's situation.").

* * *

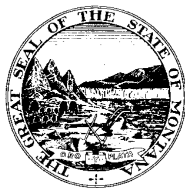
Because Proposed Rule 8.4(g) would violate the constitutional rights of Tennessee attorneys and conflict with the existing Rules of Professional Conduct, it is incumbent on the Office of the Attorney General to urge this Court to reject its adoption.[9] The existing Rules of Professional Conduct are sufficient to provide for the discipline of attorneys whose expressions of "bias or prejudice" are in fact "prejudicial to the administration of justice." Tenn. Sup. Ct. R. 8, RPC 8.4, cmt. 3. And existing federal and state antidiscrimination laws may provide recourse for individuals who are subjected to discrimination or harassment by attorneys in the workplace or in educational institutions. To the extent that the Joint Petition seeks to suppress speech on controversial issues such as same-sex marriage or gender identity, it is directly contrary to the First Amendment principle that the remedy for speech with which one disagrees is "more speech, not enforced silence." *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring). "Society has the right and civic duty to engage in open, dynamic, rational discourse." *United States v. Alvarez*, 567 U.S. 709, 728 (2012). As members of a highly educated profession, attorneys are uniquely equipped to engage in informed debate on these and other important issues. Such debate should be encouraged, not silenced.

Sincerely,

Herbert H. Slatery III
Attorney General and Reporter

[9] The Attorneys General of Louisiana, South Carolina, and Texas have likewise concluded that ABA Model Rule 8.4(g) would violate the First Amendment and Due Process Clause. *See* La. Att'y Gen. Op. 17-0114 (Sept. 8, 2017); S.C. Att'y Gen. Op. on Constitutionality of ABA Model Rule 8.4(g) (May 1, 2017); Tex. Att'y Gen. Op. KP-0123 (Dec. 20, 2016).

Montana Senate Joint Resolution No. 15 (2017)



A JOINT RESOLUTION OF THE SENATE AND THE HOUSE OF REPRESENTATIVES OF THE STATE OF MONTANA MAKING THE DETERMINATION THAT IT WOULD BE AN UNCONSTITUTIONAL ACT OF LEGISLATION, IN VIOLATION OF THE CONSTITUTION OF THE STATE OF MONTANA, AND WOULD VIOLATE THE FIRST AMENDMENT RIGHTS OF THE CITIZENS OF MONTANA, SHOULD THE SUPREME COURT OF THE STATE OF MONTANA ENACT PROPOSED MODEL RULE OF PROFESSIONAL CONDUCT 8.4(G).

WHEREAS, the Supreme Court of the State of Montana, at the urging of an Illinois not-for-profit corporation -- the American Bar Association (ABA)-- entered its Order of October 26, 2016, In Re The Rules of Professional Conduct No. AF 09-0688, proposing to adopt ABA Proposed Rule of Professional Conduct 8.4(g); and

WHEREAS, by the close of the Supreme Court's 45 day public comment period the People of Montana overwhelming expressed their virtually unanimous opposition to Proposed Rule 8.4(g) through hundreds of comments pointedly observing that the proposed rule seeks to destroy the bedrock foundations and traditions of American independent thought, speech, and action, and in response, rather than reject the proposed rule at the close of the comment period, the Supreme Court of the State of Montana relentlessly pursues adoption of Proposed Rule 8.4(g) by extending the time to consider it; and

WHEREAS, Proposed Rule of Professional Conduct 8.4(g) provides it is professional misconduct for a lawyer to engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status, or socioeconomic status in conduct related to the practice of law; and

WHEREAS, Comment [4] to ABA Model Rule 8.4(g) clearly details Model Rule 8.4(g)'s expansive over-reach into every attorney's free speech, opinions, and social activities, when it states: "Conduct related to the practice of law includes representing clients; interacting with witnesses, coworkers, court personnel, lawyers, and others while engaged in the practice of law, operating or managing a law firm or law practice; and participating in bar association, business or social activities in connection with the practice of law"; and

WHEREAS, the ABA is incorporated as a nonprofit corporation under the laws of the State of Illinois, with the stated purpose of promoting the uniformity of legislation throughout the United States without regard to the 50 sovereign state constitutions, thus it was created as a national political advocacy group with a social and political agenda; and

WHEREAS, the ABA, in its legal capacity as a nonprofit corporation is not legally authorized to give legal advice, but rather is engaged in political advocacy and pursues its agenda by proposing rules that may serve as models for the ethics rules of individual states, even though it has no legal capacity to speak on behalf of any attorney nor as the mouthpiece of attorneys throughout the United States, but may only speak as a political advocacy group on behalf of its own corporate social and political agenda; and

WHEREAS, the Illinois corporation in question, the ABA, states that it seeks to force a cultural shift in the legal profession through Proposed Rule 8.4(g), even though the ABA has determined that the conduct sought to be prohibited is so uncommon as to be nearly non-existent (ABA Standing Committee on Ethics, December 22, 2015) and even though ABA's own Committee on Professional Discipline finds the rule to be unconstitutional, for a variety of constitutional reasons (ABA Standing Committee on Professional Discipline, March 10, 2016); and

WHEREAS, pursuant to Article III, section 1, of the Montana Constitution, the power of the government of this state is divided into three distinct branches -- legislative, executive, and judicial -- and that no person or persons charged with the exercise of power properly belonging to one branch shall exercise any power properly belonging to either of the others; and

WHEREAS, pursuant to Article V, section 1, of the Montana Constitution, the legislative power is vested in a Legislature consisting of a Senate and a House of Representatives; and

WHEREAS, the Montana Supreme Court may make rules governing admission to the bar and the conduct of its members; and

WHEREAS, the Constitution for the State of Montana vests the power to enact legislation solely with the Legislature for the State of Montana, including legislation regarding the conduct Proposed Rule 8.4(g) seeks to regulate; and

WHEREAS, the Constitution of the State of Montana vests the Supreme Court with the authority to regulate the conduct of members of the bar, such power is not without limits and such power is limited to regulating conduct which adversely affects the attorney's fitness to practice law, or seriously interferes with the proper and efficient operation of the judicial system; and

WHEREAS, Proposed Rule 8.4(g) would unlawfully attempt to prohibit attorneys from engaging in conduct that neither adversely affects the attorney's fitness to practice law nor seriously interferes with the proper

and efficient operation of the judicial system, therefore the scope of Proposed Rule 8.4(g) exceeds the Supreme Court's constitutional authority to regulate the conduct of attorneys; and

WHEREAS, Proposed Rule 8.4(g)'s expansive scope endeavors to control the speech of state legislators, who are licensed by the Supreme Court of the State of Montana to practice law, whether they are speaking on the Senate floor on legislative matters, speaking to constituents about their positions on legislation, or campaigning for office; and

WHEREAS, Proposed Rule 8.4(g)'s expansive scope endeavors to control the speech of legislative staff and legislative witnesses, who are licensed by the Supreme Court of the State of Montana to practice law, when they are working on legislative matters or testifying about legislation before Legislative Committees; and

WHEREAS, Proposed Rule 8.4(g)'s expansive scope endeavors to control the speech of Montanans, who are licensed by the Supreme Court of the State of Montana to practice law, when they speak or write publicly about legislation being considered by the Legislature; and

WHEREAS, Proposed Rule 8.4(g) infringes upon and violates the First Amendment Rights, including Freedom of Speech, Free Exercise of Religion and Freedom of Association, of Montanans who are licensed by the Supreme Court of the State of Montana to practice law, by prohibiting social conduct and speech which is protected by the First Amendment; and

WHEREAS, in order to fulfill their oath to protect and defend the Constitution of the State of Montana, the Legislators of the State of Montana must ascribe the genuine meaning to the words in the Constitution of the State of Montana, for otherwise it is a meaningless collage of alphabetic symbols and the word "conduct" clearly does not include the concept of "speech"; and

WHEREAS, for the reasons set forth in this resolution, adoption of Proposed Rule 8.4(g), by the Supreme Court of the State of Montana, exceeds the authority vested in it by the Constitution for the State of Montana, to regulate the conduct of the members of the bar; and

WHEREAS, for the reasons set forth in this resolution, adoption of Proposed Rule 8.4(g), by the Supreme Court for the State of Montana, violates the Constitution for the State of Montana Article III, section 1, by usurping the legislative power of the Legislature for the State of Montana; and

WHEREAS, Proposed Rule 8.4(g) will deprive the Legislature of Montana specifically and the State of Montana generally, with candid, thorough, and zealous legal representation and will do so, pursuant to Proposed Rule 8.4(g)'s plain meaning, by imposing a speech code on attorneys and chilling their speech by making it professional misconduct for an attorney to socially or professionally say or do anything, including providing legal advice, which could be construed by any person or activist group as discriminatory; and

WHEREAS, Rule 8.4(g) would directly threaten every attorney in the State of Montana, twenty-four hours per day, with the potential loss of their ability to pursue their chosen career, to provide for the needs of their family, and to pursue life, liberty, and the pursuit of happiness, because at any point in time an attorney could be forced to answer for vague complaints, even if the attorney has not participated in historically unprofessional practices, thereby threatening such attorney's reputation, time, resources, and license to practice law; and

WHEREAS, Proposed Rule 8.4(g) will deprive Montanans and associations of Montanans, with candid, thorough, and zealous legal representation, and Proposed Rule 8.4(g) will do so pursuant to its plain meaning by imposing a speech code on attorneys and chilling their speech by making it professional misconduct for an attorney to say or do anything, including providing legal advice, which could be construed by any person as discriminatory; and

WHEREAS, contrary to the ABA's world view, there is no need in a free civil society, such as exists in Montana, for the cultural shift forced by the proposed rule, and even if such a need did exist, the Supreme Court has no constitutional power to enact legislation of any sort, particularly legislation forcing cultural shift.

NOW, THEREFORE, BE IT RESOLVED BY THE SENATE AND THE HOUSE OF REPRESENTATIVES OF THE STATE OF MONTANA:

(1) That should the Supreme Court of the State of Montana adopt Proposed Rule 8.4(g), it would be an unconstitutional exercise power by that Court.

(2) That if Proposed Rule 8.4(g) is adopted by the Supreme Court of the State of Montana, such rule is unconstitutional and thereby null and void because:

(a) the Constitution of the State of Montana reserves the power of legislation to the Legislature of Montana;

(b) the scope of Proposed Rule 8.4(g) exceeds the Supreme Court's constitutional power to regulate the speech and conduct of attorneys; and

(c) Proposed Rule 8.4(g) infringes upon the First Amendment rights of the Citizens of Montana.

(3) That the Secretary of State send a copy of this resolution to the President of the United States, the United States Supreme Court, the Speaker of the United State House of Representatives, the Majority Leader of the United States Senate, to each member of the Montana Congressional Delegation, the Montana Supreme Court, the Governor of every State in the Union, the American Bar Association, and the Montana Bar Association.

- END -

I hereby certify that the within joint resolution,

SJ 0015, originated in the Senate.

____

President of the Senate

Signed this_______________________________day

of___________________________________, 2017.

____

Secretary of the Senate

____

Speaker of the House

Signed this_______________________________day

of___________________________________, 2017.

SENATE JOINT RESOLUTION NO. 15

INTRODUCED BY D. HOWARD, D. ANKNEY, S. BERGLEE, M. BLASDEL, B. BROWN, D. BROWN, E. BUTTREY, P. CONNELL, A. DOANE, R. EHLI, J. ESSMANN, J. FIELDER, S. FITZPATRICK, W. GALT, F. GARNER, T. GAUTHIER, C. GLIMM, E. GREEF, S. GUNDERSON, G. HERTZ, S. HINEBAUCH, J. HINKLE, M. HOPKINS, B. HOVEN, L. JONES, D. KARY, A. KNUDSEN, C. KNUDSEN, M. LANG, S. LAVIN, D. LENZ, F. MANDEVILLE, W. MCKAMEY, F. MOORE, D. MORTENSEN, A. OLSZEWSKI, R. OSMUNDSON, A. REDFIELD, K. REGIER, T. RICHMOND, A. ROSENDALE, S. SALES, D. SALOMON, D. SKEES, J. SMALL, C. SMITH, N. SWANDAL, R. TEMPEL, F. THOMAS, B. TSCHIDA, G. VANCE, C. VINCENT, S. VINTON, P. WEBB, R. WEBB, J. WELBORN, D. ZOLNIKOV

A JOINT RESOLUTION OF THE SENATE AND THE HOUSE OF REPRESENTATIVES OF THE STATE OF MONTANA MAKING THE DETERMINATION THAT IT WOULD BE AN UNCONSTITUTIONAL ACT OF LEGISLATION, IN VIOLATION OF THE CONSTITUTION OF THE STATE OF MONTANA, AND WOULD VIOLATE THE FIRST AMENDMENT RIGHTS OF THE CITIZENS OF MONTANA, SHOULD THE SUPREME COURT OF THE STATE OF MONTANA ENACT PROPOSED MODEL RULE OF PROFESSIONAL CONDUCT 8.4(G).