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**UNITED STATES DISTRICT COURT FOR THE**

**DISTRICT OF NEW JERSEY**

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| LAWYERS FOR FAIR RECIPROCAL ADMISSION,<br><br>Plaintiff,<br><br>v.<br><br>UNITED STATES, ATTORNEY GENERAL MERICK B. GARLAND, Et.al<br><br>Defendants, | Case No.: 3-22-cv-02399 GAH-DEA<br><br>**REQUEST TO TAKE JUDICIAL NOTICE OF MEMORANDUM OF LAW ON SUPREME COURT FIRST AMENDMENT LICENSED ATTORNEY SPEECH DECISIONS** |

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## REQUEST TO TAKE JUDICIAL NOTICE

Plaintiffs respectfully request this Court to take Judicial Notice of the following Memorandum of Law on Supreme Court First Amendment decisions concerning licensed attorneys. The upshot of the following twenty Supreme Court decisions on *attorney* speech is the High Court does not currently apply and in the past has not subjected restriction on licensed attorney speech to rational basis review.

Many lower court decisions in the past have mistakenly rebuffed Federal District Court local Rules challenges based on rational basis review and the "professional speech" doctrine. *See NAAMJP v. Simandle,* 658 Fed.Appx. 127 (3d Cir. 2016) upholding N. J. District Court local Rules as *rational* and relying on the *professional speech doctrine.*

The Supreme Court, however has recently squarely held restrictions on the First Amendment freedoms are foreign to its First Amendment jurisprudence. *See Janus v. American Federal of State, County, and Municipal Employees* 138 S. Ct. 22448, 2465 (2018) ("This form of minimal scrutiny is foreign to our free-speech jurisprudence."). The Supreme Court has also recently squarely held in the context of a speech licensing restriction there is no such thing as the "professional speech" doctrine. *See NIFLA v. Becerra*, 138 S. Ct. 2361, 2371-72 (2018) **(**But this Court has not recognized "professional speech" as a separate category of speech. Speech is not unprotected merely because it is uttered by "professionals." …This Court has "been reluctant to mark off new categories of speech for diminished constitutional protection.")

This case thus presents an important national issue of first impression. This Memorandum of Law is necessary and proper because Assistant United States attorneys representing the Attorney General in the past have consistently sought to mislead and misrepresent Supreme Court First Amendment precedent.

**MEMORANDUM OF LAW ON SUPREME COURT FIRST AMENDMENT LICENSED ATTORNEY SPEECH CASES**

The First Amendment holds the Government shall make no law that abridges the People's freedoms to speech, assembly, and to petition the government for the redress of grievances. "In cases raising First Amendment issues an appellate court has an obligation to `make an independent examination of the whole record' in order to make sure that `the judgment does not constitute a forbidden intrusion on the field of free expression.'" *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U. S. 485, 499 (1984) (quoting *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 284-286 (1964)). A close review of Supreme Court precedent demonstrates that restrictions on licensed attorney speech are subject to First Amendment protection, strict scrutiny review, and the government bears the burden of proof.

1. In *MINE WORKERS v. ILLINOIS BAR ASSN*., 389 U.S. 217 (1967), the Illinois Supreme Court rejected petitioner's contention that its members had a right, protected by the First and Fourteenth Amendments, to join together and assist one another in the assertion of their legal rights by collectively hiring an attorney to handle their claims. The Supreme Court reversed:

> We hold that the freedom of speech, assembly, and petition guaranteed by the First and Fourteenth Amendments gives petitioner the right to hire attorneys on a salary basis to assist its members in the assertion of their legal rights.
> We start with the premise that the rights to assemble peaceably and to petition for a redress of grievances are among the most precious of the liberties safeguarded by the Bill of Rights. These rights, moreover, are intimately connected, both in origin and in purpose, with the other First Amendment

> rights of free speech and free press. "All these, though not identical, are inseparable." (internal cites omitted) The First Amendment would, however, be a hollow promise if it left government free to destroy or erode its guarantees by indirect restraints so long as no law is passed that prohibits free speech, press, petition, or assembly as such. We have therefore repeatedly held that laws which actually affect the exercise of these vital rights cannot be sustained merely because they were enacted for the purpose of dealing with some evil within the State's legislative competence, or even because the laws do in fact provide a helpful means of dealing with such an evil. *Id.* at 221-22.
> ….
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> but the First Amendment does not protect speech and assembly only to the extent it can be characterized as political. "Great secular causes, with small ones, are guarded. The grievances for redress of which the right of petition was insured, and with it the right of assembly, are not solely religious or political ones. And the rights of free speech and a free press are not confined to any field of human interest. *Id*. at 223.

*Mineworkers* reiterates that laws the affect the exercise of vital First Amendment rights cannot be sustained because they are rational. There is virtually no qualitative difference in this 21st Century 24-7 Information Age challenge to local Rules that restrict the First Amendment freedoms of licensed attorneys from 49 states than the *Mineworkers* decision in 1967 overturning restrictions on unions' prohibiting them from hiring lawyers to represent their members.

2. In *NAACP v. Button*, 371 U. S. 415, 433 (1963), a restriction on attorney speech enacted into law by the State of Virginia was challenged. The Supreme Court's decision in *Brown* v. *Board of Education*, 347 U. S. 483 (1954), holding that maintenance of public schools segregated by race violated the Equal Protection Clause of the Fourteenth Amendment, led to the amendments to Virginia's code in

1956. Virginia enacted these laws "as parts of the general plan of massive resistance to the integration of schools of the state under the Supreme Court's decrees." *Id*. at 445. The NAACP claimed that the challenged law infringes the rights of the NAACP and its members and lawyers to associate for the purpose of assisting persons who seek legal redress for infringements of their constitutionally guaranteed rights. The Supreme Court agreed and first held: "We think petitioner may assert this right on its own behalf, because, though a corporation, it is directly engaged in those activities, claimed to be constitutionally protected, which the statute would curtail. We also think petitioner has standing to assert the corresponding rights of its members." *Id*. at 428.

The Supreme Court further adjudged: "We hold that the activities of the NAACP, its affiliates and legal staff shown on this record are modes of expression and association protected by the First and Fourteenth Amendments which Virginia may not prohibit, under its power to regulate the legal profession, as improper solicitation of legal business violative of Chapter 33 and the Canons of Professional Ethics. *Id*. at 428-29.

The High Court reasoned:

> [T]he First Amendment also protects vigorous advocacy, certainly of lawful ends, against governmental intrusion.(internal cites omitted). In the context of NAACP objectives, litigation is not a technique of resolving private differences; it is a means for achieving the lawful objectives of equality of treatment by all government, federal, state and local, for the members of the Negro community in this country. It is thus a form of political expression.

> Groups which find themselves unable to achieve their objectives through the ballot frequently turn to the courts. … And under the conditions of modern government, litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances. *Id*. at 429-30
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> …
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> "Our form of government is built on the premise that every citizen shall have the right to engage in political expression and association. This right was enshrined in the First Amendment of the Bill of Rights. Exercise of these basic freedoms in America has traditionally been through the media of political associations. Any interference with the freedom of a party is simultaneously an interference with the freedom of its adherents. All political ideas cannot and should not be channeled into the programs of our two major parties. History has amply proved the virtue of political activity by minority, dissident groups . . . ." *Id*. at 431

In light of *Button*, there can be no doubt that restrictions imposed on lawyer speech by the challenged local Rules are subject to review under the First Amendment's speech, association, and petition clauses. As the Supreme Court stated: "Broad prophylactic rules in the area of free expression are suspect. (internal cites omitted) Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *Id*. at 438. It would be difficult to find a more broad and less precise regulation than the challenged local Rules that categorically inhibit the First Amendment freedoms to speech, association, and petition of lawyers licensed in 49 States.

3. In *Garrison v. Louisiana*, 379 US 64 (1964), the District Attorney of Orleans Parish, Louisiana. held a press conference at which he issued a statement disparaging the judicial conduct of eight judges. As a result, he was tried without a

jury before a judge from another parish and convicted of criminal defamation under the Louisiana Criminal Defamation Statute. The Supreme Court of Louisiana affirmed the conviction. The trial court and the State Supreme Court both rejected appellant's contention that the statute unconstitutionally abridged his freedom of expression. The Supreme Court reversed: "Applying the principles of the *New York Times* case, we hold that the Louisiana statute, as authoritatively interpreted by the Supreme Court of Louisiana, incorporates constitutionally invalid standards in the context of criticism of the official conduct of public officials." *Id*. at 77. The First and Fourteenth Amendments embody our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *Id*. at 75.

4. In *Bates v. State Bar of Ariz*., 433 US 350 (1977), the constitutional issue presented was whether the State may prevent the publication in a newspaper of a lawyer's truthful advertisement concerning the availability and terms of routine legal services. The Court held "that the flow of such information may not be restrained, and we therefore hold the present application of the disciplinary rule against appellants to be violative of the First Amendment." *Id*. at 384. The Court applied the intermediate standard of review it uses in advertising cases and overturned the

State Bar of Arizona's conclusion that the attorney violated the Rules of Professional Conduct.

5. *In Re Primus,* 436 U.S. 412 (1978), the Court held that in light of the First and Fourteenth Amendments that a State may not punish a member of its Bar who, seeking to further political and ideological goals through associational activity, including litigation, advises a lay person of her legal rights and discloses in a subsequent letter that free legal assistance is available from a nonprofit organization with which the lawyer and her associates are affiliated. The Court emphasized its prior holdings that "collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment." *Id*. at 426. The High Court also reiterated that "[b]road prophylactic rules in the area of free expression are suspect," and that "[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms." (internal cites omitted). Because of the danger of censorship through selective enforcement of broad prohibitions, and "[b]ecause First Amendment freedoms need breathing space to survive, government may regulate in [this] area only with narrow specificity." *Id*. at 432-33.

6. In *Ohralik v. Ohio State Bar Assn*., 436 U. S. 447 (1978), was decided the same day as *In re Primus*. The facts in *Primus* and *Ohralik* represent polar opposite extremes. In *Ohralik*, an ambulance chasing experienced attorney solicited two

young accident victims at a time when they were especially incapable of making informed judgments or of assessing and protecting their own interests. An eighteen-year-old girl was in a hospital room where she lay in traction. The other eighteen-year-old girl was solicited on the day she came home from the hospital. The attorney employed a concealed tape recorder apparently to verify their consent to the representation agreement. The girls subsequently discharged counsel. He refused to withdraw and continued to represent one of the clients without permission. And, on the other client he charged and collected one/third of a contingent fee settlement despite being terminated. This conduct, which the petitioner never disputed, was itself completely inconsistent with an attorney's fiduciary obligation to fairly and fully disclose to clients his activities affecting their interests. *Id*. at 469.

Petitioner argued there was no constitutional difference between attorney solicitation and attorney advertising that the Court upheld in *Bates*. The Court rejected this argument, reasoning "[t]he entitlement of in-person solicitation of clients to the protection of the First Amendment differs from that of the kind of advertising approved in *Bates*, as does the strength of the State's countervailing interest in prohibition." *Id*. at 445. Petitioner conceded that the State has a legitimate and indeed "compelling" interest in preventing those aspects of solicitation that involve fraud, undue influence, intimidation, overreaching, and other forms of "vexatious conduct. *Id*. at 462. The Court held "that the State—or the Bar acting

with state authorization— constitutionally may discipline a lawyer for soliciting clients in person, for pecuniary gain, under circumstances likely to pose dangers that the State has a right to prevent." *Id*. at 449. The Court did not hold, however, that restraints on attorney speech are not subject to First Amendment scrutiny. The Court in *Ohralik* simply held the discipline at issue there did not require reversal under the First Amendment. *Ohralik* is a solicitation case. It is speech incidental to the commission of unlawful activity not protected by the First Amendment.

7. In *Republican Party of Minn. v. White*, 536 US 765 (2002), the question presented was whether the First Amendment permits the Minnesota Supreme Court to prohibit candidates for judicial election in that State from announcing their views on disputed legal and political issues. The restriction was imposed on a lawyer running for judicial office by the Minnesota Supreme Court and based on Canon 7(B) of the 1972 American Bar Association (ABA) Model Code of Judicial Conduct, and is known as the "announce clause." The Court applied strict scrutiny review and invalidated the announce clause "because it is woefully under inclusive, prohibiting announcements by judges (and would-be judges) only at certain times and in certain forms." *Id*. at 783. The Court reasoned "the notion that the special context of electioneering justifies an abridgment of the right to speak out on disputed issues sets our First Amendment jurisprudence on its head." *Id*. at 781. It is simply not the

function of government to select which issues are worth discussing or debating in the course of a political campaign. *Id*. at 782.

Justice KENNEDY concurring concluded: "I adhere to my view, however, that content-based speech restrictions that do not fall within any traditional exception should be invalidated without inquiry into narrow tailoring or compelling government interests. The speech at issue here does not come within any of the exceptions to the First Amendment recognized by the Court." *Id*. at 793. (These exceptions include obscene speech, defamation, acts tantamount to criminal action, and incitement to imminent unlawful actions. Flag burning, wearing clothes with profanes language, and picketing war veteran funerals is fully protected.)

The holding of *White* makes clear that restrictions on lawyer speech imposed by judges are subject to First Amendment strict scrutiny review and not rational basis review. As in *White*, the challenged local Rules restrict attorney First Amendment freedoms to speech, association, and petition only at certain times and in certain forms. Attorneys are free to speak, associate, and petition on behalf of themselves and their clients before federal administrative agencies, the United States Courts of Appeal, the Supreme Court, and forty percent of the Federal District Courts.

8. In *Gentile v. State Bar of Nev*., 501 US 1030 (1991), at issue was the constitutionality of a ban on political speech critical of the government and its officials in the context of a disciplinary proceeding. An attorney was punished by

the Nevada State Bar for comments critical of the government made at a press conference in which he sought to counter publicity prejudicial to his client The attorney's criminal defendant client was subsequently found innocent and the attorney's press conference comments proved to be well founded. Nevertheless, the Nevada Bar imposed discipline for violating its professional rule of conduct Rule 177's "substantial likelihood of material prejudice" standard. The Supreme Court reversed the attorney's punishment under the ground the Nevada Rule of Professional Conduct at issue was void for vagueness. *Id*. at 1033-34.

The Supreme Court's decision, however, was split over the question of whether an attorney had the same First Amendment protected rights as the press. Justice KENNEDY and three other members held the attorney's comments were classic political speech on a matter of public concern and held:

> Nevada's application of Rule 177 in this case violates the First Amendment. Petitioner spoke at a time and in a manner that neither in law nor in fact created any threat of real prejudice to his client's right to a fair trial or to the State's interest in the enforcement of its criminal laws. Furthermore, the Rule's safe harbor provision, Rule 177(3), appears to permit the speech in question, and Nevada's decision to discipline petitioner in spite of that provision raises concerns of vagueness and selective enforcement. *Id*. at 1033-34.
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> ….
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> This case involves punishment of pure speech in the political forum. Petitioner engaged not in solicitation of clients or advertising for his practice, as in our precedents from which some of our colleagues would discern a standard of diminished First Amendment protection. His words were directed at public officials and their conduct in office. *Id*. at 1034

Justice KENNEDY additionally emphasized the special concerns created by limiting the speech of defense attorneys, like Gentile, who have "the professional mission to challenge actions of the state." *Id* at 105

However, a majority of the Court rejected the attorney's argument that the same stringent standard applied in *Nebraska Press Assn. v. Stuart*, 427 U. S. 539 (1976), to restraints on press publication during the pendency of a criminal trial should be applied to speech by a lawyer whose client is a defendant in a criminal proceeding. *Id*. at 1065. The majority rejected the attorney's argument that the First Amendment to the United States Constitution requires a State, such as Nevada in this case, to demonstrate a "clear and present danger" of "actual prejudice or an imminent threat" before any discipline may be imposed on a lawyer who initiates a press conference such as occurred here. *Id*. at 1069. The majority, however, applied First Amendment review to the Nevada Rule and concluded:

> The restraint on speech is **narrowly tailored** to achieve those objectives. The regulation of attorneys' speech is limited—it applies only to speech that is substantially likely to have a materially prejudicial effect; it is neutral as to points of view, applying equally to all attorneys participating in a pending case; and it merely postpones the attorneys' comments until after the trial. While supported by the substantial state interest in preventing prejudice to an adjudicative proceeding by those who have a duty to protect its integrity, the Rule is limited on its face to preventing only speech having a substantial likelihood of materially prejudicing that proceeding. *Id*. at 1076

JUSTICE O'CONNOR, provided the fifth vote holding that Nevada's Rule was void for vagueness, *Id*. 1082. and upholding the Nevada Rule's "substantial likelihood of material prejudice." She stated:

> I agree that a State may regulate speech by lawyers representing clients in pending cases more readily than it may regulate the press. This does not mean, of course, that lawyers forfeit their First Amendment rights, only that a less demanding standard applies. *Ibid*.

As noted above, the unanimous Court in *Gentile* vacated the discipline imposed under the First Amendment. *Gentile* plainly holds that lawyers do not forfeit their First Amendment rights, and that restrictions on lawyer's First Amendment rights are limited: they must be narrowly tailored; they apply to speech that is substantially likely to have a prejudicial effect at trial; the restrictions are neutral as to points of view; the restrictions apply equally to all attorneys participating in a case; and the restriction at issue merely postpone the attorney's comments until after trial.

9. In *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc*., 508 U.S. 49 (1993), the Court, in construing the right to petition held that litigation could only be enjoined when it is a sham. To be a sham, first, it must be objectively baseless in the sense that no reasonable litigant could expect success on the merits; second, the litigant's subjective motive must conceal an attempt to interfere with the business relationship of a competitor …through the use of

government process — as opposed to the outcome of that process — as an anti-competitive weapon. *Id*. at 60-61.

10. *In Keller v. State Bar of Cal.*, 496 US 1 (1990), members of the respondent State Bar of California, sued that body, claiming its use of their membership dues to finance certain ideological or political activities to which they were opposed violated their rights under the First Amendment of the United States Constitution. The Supreme Court of California rejected this challenge on the grounds that the State Bar is a state agency and, as such, may use the dues for any purpose within its broad statutory authority. The Supreme Court in a decision written by C.J. Rehnquist unanimously over-turned the California's Supreme Court's decision. The Supreme Court, citing *Abood* v. *Detroit Board of Education*, 431 U. S. 209 (1977), noted prohibitions on making contributions to organizations for political purposes implicate fundamental First Amendment concerns. *Id*. at 10. *Abood* has been over-turned by *Janus*. Nevertheless, the First Amendment freedoms are plainly and unambiguously implicated by the local Rule that compel all licensed attorneys to pay dues and associate with a second, third, and fourth state bar associations as a condition precedent to exercise their First Amendment rights in the United States District Courthouse. The power to tax constitutes the power to destroy.

11. In *Legal Services Corp. v. Velazquez*, 531 US 533 (2001), at issue was the constitutionality of a restriction on attorney speech that was enacted by Congress.

That restriction prevented a LSC paid attorney, who represented an indigent, from arguing to a court that a state statute conflicts with a federal statute or that either a state or federal statute by its terms or in its application violates the Constitution. The United States government intervened on behalf of LSC and argued that this Congressionally enacted speech restriction was government funded speech and not subject to First Amendment scrutiny.

The Supreme Court disagreed, and squarely held that that the Congressionally imposed restriction on attorney speech was ***facially unconstitutional***. *Id*. at 549. The Supreme Court reasoned that interpretation of the law and the Constitution is the primary mission of the judiciary when it acts within the sphere of its authority to resolve a case or controversy. An informed, independent judiciary presumes an informed, independent bar.

The High Court concluded:

> By seeking to prohibit the analysis of certain legal issues and to truncate presentation to the courts, the enactment under review prohibits speech and expression upon which courts must depend for the proper exercise of the judicial power. Congress cannot wrest the law from the Constitution which is its source. "Those then who controvert the principle that the constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the constitution, and see only the law." *Id*. at 545.

As in *Legal Services Corp*, the First Amendment speech, associational, and petition restrictions imposed by the challenged local Rules that categorically disqualify lawyers from 49 states are facially unconstitutional because they prohibit

the analysis of certain legal issues and truncate presentation to the courts upon which they depend. It is fundamental that the First Amendment "`was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'" *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 269 (1964). If Congress cannot wrest the law from the Constitution which is its source, then neither can local Rules enacted by majority vote.

In light of *Legal Services Corp*, there can be no doubt that the local Rule restrictions are facially unconstitutional under the First Amendment.

12. In *Holder v. Humanitarian Law Project*, 561 US (2010), the Attorney General was the defendant. At issue were restrictions imposed by Congress on providing four types of material support—"training," "expert advice or assistance," "service," and "personnel" to Foreign Terrorist Organizations. An organization classified as a foreign terrorist organization were provided rights to appeal that classification. Any independent advocacy in which plaintiffs wished to engage was not prohibited. *Id.* at 2710. What plaintiffs were prohibited from doing was providing material support to any foreign terrorist organization. What was at issue was, once an organization was classified as a foreign terrorist organization, were the material support provisions vague or unconstitutional. Plaintiffs, some of whom were attorneys, claimed these statutory terms violated their First Amendment rights to freedom of speech and association. The government argued these material

support provisions were subject to intermediate review. Chief Justice ROBERTS writing for the majority reasoned, "Plaintiffs want to speak [to the Foreign Terrorists Organizations] and whether they may do so under … depends on what they say, " *Id*. at 2723-24, thus since the regulation is related to expression the Court held the standard of review is strict scrutiny. The Preamble to the Constitution proclaims that the people of the United States ordained and established that charter of government in part to "provide for the common defence." As Madison explained, "[s]ecurity against foreign danger is . . . an avowed and essential object of the American Union." The Federalist No. 41, p. 269 (J. Cooke ed.1961). The Court held: "We hold that, in regulating the particular forms of support that plaintiffs seek to provide to foreign terrorist organizations, Congress has pursued that objective consistent with the limitations of the First and Fifth Amendments. *Id*. at 2730. The Court thus upheld the Congressionally imposed restrictions on speech and associational freedoms under the strict scrutiny standards of review.

The holding of *Holder,* where all nine justices applied strict scrutiny, makes clear that restrictions on lawyer speech imposed by judges are subject to First Amendment strict scrutiny review and not rational basis review, even if those speech and association restrictions are relevant to providing speech and associational support to a foreign terrorist organization. Plaintiffs here are not seeking to provide support to a foreign terrorist organization. The government cannot meet its burden

of proof of a compelling interest and narrow tailoring because many District Courts by local Rules authorize all licensed lawyers in good standing *general* admission privileges.

13. In *Garcetti v. Ceballos*, 547 U.S. 410 (2006), deputy district attorney Richard Ceballos worked for the Los Angeles attorney's office. He told his supervisor that he was going to turn over the memo (with his own conclusions redacted as work product) to the defense as exculpatory evidence pursuant to *Brady*. He was called by the defense as a witness at a suppression hearing. He was told by a supervisor that "he would suffer retaliation if he testified that the affidavit contained intentional falsehoods." He claimed that he was retaliated against for complying with the law. The majority in *Garcetti* adopted a categorical approach, holding that public employees only have free speech rights via-a-via their employer when acting as citizens, but not when acting in their capacity as government employees. The Court elaborated: "when public employees make statements pursuant to their official duties the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." *Id.* at 42. According to the majority, when he "went to work and performed the tasks he was paid to perform" he acted as an employee rather than a citizen even if "his duties sometimes require him to speak or write."

Thus, the First Amendment was not implicated because the attorney was speaking as a government employee. This is an example of the government speech doctrine.

14. In *Williams-Yulee v. Florida Bar*, 575 U. S. 433, 135 S.Ct. 1656, 1665, 191 L.Ed.2d 570 (2015), the Supreme Court applied strict scrutiny review and upheld restrictions on attorney speech in the context of a judicial election. The question at issue was whether an attorney running for a judgeship could request money directly from a campaign contributor or whether the request must be made by candidates' election committee. The Court held a State may assure its people that judges will apply the law without fear or favor—and without having personally asked anyone for money. It thus affirmed the judgment of the Florida Supreme Court under the strict scrutiny standard of review.

15. The Court has also invalidated restrictions on an attorney's opportunity to practice law under a strict scrutiny standard of review under the Privileges and Immunities Clause. The Fourteenth Amendment includes a Privileges and Immunities Clause and it incorporates by reference the First Amendment. In *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1985), the Supreme Court held:

> **The lawyer's role in the national economy is not the only reason that the opportunity to practice law should be considered a "fundamental right**." We believe that the legal profession has a noncommercial role and duty that reinforce the view that the practice of law falls within the ambit of the **Privileges and Immunities Clause**.[fn11] **Out-of-state lawyers may — and often do — represent persons who raise unpopular federal claims. In**

> **some cases, representation by nonresident counsel may be the only means available for the vindication of federal rights**. *Id*. at 281-82. (Emphasis added)

The upshot of *Piper* is that a licensed attorney's opportunity to practice law is a fundamental right constitutionally protected that is necessary for the vindication of federal rights protection in our more perfect Union. The right protected by the [Privileges and Immunities Clause] include: "The right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to **institute and maintain actions of any kind in the courts of the state**; to take, hold and dispose of property, either real or personal . . . ." *Piper*, 470 U.S. at 280 fn. 10.

16. Following *Piper*, *Supreme Court of Virginia v. Friedman*, 487 U.S. 59 (1988) squarely holds that *bar admission on motion* (without taking another bar exam) for sister-state attorneys is a constitutionally protected Privilege and Immunity. Virginia argued Ms. Friedman could take the bar examination, and thus the Clause was not offended. The Court rejected this contention stating: "The issue instead is whether the State has burdened the right to practice law, a privilege protected by the Privileges and Immunities Clause, by discriminating among otherwise equally qualified applicants solely on the basis of citizenship or residency. We conclude it has." *Id*. at 67. The norm under the Privileges and Immunities

Clause is comity, i.e. reciprocity. The Supreme Court stated, "we see no reason to assume that nonresident attorneys who, like Friedman, seek admission to the Virginia bar on motion will lack adequate incentives to remain abreast of changes in the law or to fulfill their civic duties." *Id*. at 69. The local Rules on their face, and in practice and effect, discriminate against out-of-state attorneys and citizens, by compelling everyone to hire a locally licensed lawyer or forfeit their statutory and constitutional right to counsel in the federal courthouse.

17. Similarly, in *Frazier v. Heebe,* 482 U.S. 641, 649 (1987): "The question for decision is whether a United States District Court may require that applicants for general admission to its bar **either reside or maintain an office in the State where that court sits**. *Id*. at 642-43. (Emphasis added). The *Frazier* Court in exercising supervisory review (rather than constitutional) and applying "principles of right and justice" standard stated: "**we hold that the District Court was not empowered to adopt its local Rules to require members of the Louisiana Bar who apply for admission to its bar to live in, or maintain an office in, Louisiana where that court sits**." *Id*. at 645. *Frazier* states: "No empirical evidence was introduced at trial to demonstrate why this class of attorneys … should be excluded from the Eastern District's Bar." *Id*. at 646-47. Obviously, rational basis review does not require the introduction of empirical evidence. *Frazier* further squarely holds, **"[s]imilarly, we find the in-state office requirement *unnecessary* and *irrational*.** First, the

requirement is not imposed on in-state attorneys." *Id*. at 649. "The Court finds that the Rules Enabling Act, 28 U. S. C. § 2072, "confirms" its power to decide whether local rules **are *rational and necessary***." *Id*. at 653. *Frazier* also holds *pro hac vice* admission is not an equivalent substitute for *general* admission privileges. Moreover, it is significant to note that *Frazier* cites *Piper* with approval and it was decided 35 years ago *before* fax machines, *before* computers, *before* the internet, *before* email, *before* PACER, *before* smartphones, *before* GPS, and *before Google* democratized information.

18. In *Barnard v. Thorstenn*, 489 US 546 (1989), in order to be admitted to the Bar of the District Court of the Virgin Islands, an otherwise qualified attorney must demonstrate that he or she has resided in the Virgin Islands for at least one year and that, if admitted, the attorney intends to continue to reside and practice in the Virgin Islands. The question before the Supreme Court is whether these residency requirements are lawful. The Supreme Court declined to exercise it supervisory review powers, but held these residence and practice requirements were unlawful under the Privileges and Immunities Clause

Before arriving in the Supreme Court, the case was reheard en banc, and a majority of the full Third Circuit agreed with the original panel decision that the residency requirements of Rule 56(b) were invalid under *Heebe.* See 842 F. 2d 1393 (1988). The en banc court emphasized that alternative and less restrictive means,

short of a residency requirement, were available to the District Court to assure that nonresident bar members would bear professional responsibilities comparable to those imposed on resident attorneys. *Id.*, at 1396. In view of its determination that *Heebe* controlled the case, the Third Circut did not address respondents' claim under the Privileges and Immunities Clause. *Id*. at 551.

The Supreme Court — in light of *Supreme Court of New Hampshire v. Piper* — rejected every justification for this discrimination submitted by the Virgin Islands Bar Association. For example, it reasoned:

> A court in New Jersey may be inconvenienced to some extent by a request to accommodate the conflicting court appearances of a nonresident attorney in New York. But that does not justify closing the New Jersey Bar to New York residents. *Id*. at 555
>
> Petitioners' fourth contention, that the Virgin Islands Bar Association does not have the resources and personnel for adequate supervision of the ethics of a nationwide bar membership, is not a justification for the discrimination imposed here. *Id*. at 556.
>
> In sum, we hold that petitioners neither advance a substantial reason for the exclusion of nonresidents from the Bar, nor demonstrate that discrimination against nonresidents bears a close or substantial relation to the legitimate objectives of the court's Rule. *Id*. at 558-59

The District of Delaware's local Rule discrimination against non-residents fails to adhere to the Hight Court's decisions in *Piper*, *Friedman*, *Frazier v. Heebe*, and *Barnard v. Thorstenn*. The government has the burden of proof, which it cannot meet in light of the Western District of Pennsylvania's local Rules.

19. In contrasts to ***restrictions*** on attorney speech, the Court has upheld ***disclosure*** requirements on attorney speech. As stated by the majority in NIFLA v. Becerra, 138 S.Ct. 2361, 2372 (2018):

> This Court's precedents do not recognize such a tradition for a category called "professional speech." This Court has afforded less protection for professional speech in two circumstances—neither of which turned on the fact that professionals were speaking. First, our precedents have applied more deferential review to some laws that require professionals to disclose factual, noncontroversial information in their "commercial speech." See, *e.g.*, *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651, 105 S.Ct. 2265, 85 L.Ed.2d 652 (1985); *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 250, 130 S.Ct. 1324, 176 L.Ed.2d 79 (2010); *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447, 455-456, 98 S.Ct. 1912, 56 L.Ed.2d 444 (1978).

"In *Zauderer,* for example, this Court upheld a rule requiring lawyers who *advertised* their services on a contingency-fee basis to disclose that clients might be required to pay some fees and costs. Noting that the *disclosure* requirement governed only 'commercial advertising' and required the disclosure of "purely factual and uncontroversial information about information about the terms under which . . . services will be available.'" *NIFLA v. Becerra*, 138 S.Ct. at 2372.

20. *Milavetz* is also an *advertising disclosure* case. *Ohralik* has been discussed above. It is a case that regulates professional conduct [impermissible solicitation of a minor while she was in the hospital] that incidentally involves speech. *See NIFLA v. Becerra*, 138 S.Ct. at 2372. *Ohralik* is an exception to First Amendment protection identical to speech incidental to a crime.

In sum, Supreme Court case law has consistently invalidated restrictions on licensed attorney speech under the First Amendment strict scrutiny standard of review, often finding these restrictions are facially unconstitutional as in *Legal Services*. Plaintiffs' counsel is not aware of any cases where the Supreme Court has **not** applied strict scrutiny review on restrictions on attorney speech, association, or petition freedoms: Except (i) the Court has applied intermediate review in attorney advertising cases, as in *Bates*; (ii) when the lawyer was speaking as a representative of the Government, as in *Garcetti v. Ceballo*s; and (iii) in *Ohralik* where the lawyer was engaged in speech incidental to patently unlawful conduct.

Dated: May 9, 2022

Respectfully submitted,

*/s/ Joseph Robert Giannini*
*For Plaintiffs, LAWYERS FOR FAIR RECIPROCAL ADMSSION*

**PROOF OF SERVICE**

A true and full copy of this pleading has been served by first class mail to:

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And

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This proof of service is submitted under penalty of perjury.

Dated: May 9, 2022

/s/ *Joseph Robert Giannini*

JOSEPH ROBER GIANNINI