State of Rhode Island
Providence, Sc.

Superior Court

Elizabeth Boyer, individually,
And by and for her minor son,
Jeremy Bowen; et al

vs.

C.A. No. 10-1858

Jeremiah S. Jeremiah; et al

Amicus Curiae Memorandum
on behalf of Professors of Legal Ethics

Amicus Curiae
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Interest of Amici Curiae

Amici curiae "Professors of Legal Ethics"[1] submit this brief in opposition to defendants' motion to revoke the *pro hac vice* status of plaintiffs' attorneys. From law schools across the nation, including Arizona, Boston College, Columbia, Georgetown, Stanford, and Yale, *amici* have taught and written for many years on matters of professional responsibility and have served on various committees focusing on such matters. Six of the group's members, Stephen Gillers, David Luban, Thomas Morgan, Margaret Raymond, Deborah Rhode, and Brad Wendel, have co-authored respected casebooks on legal ethics.[2] Members of the group have also written hundreds of law review articles on the ethical obligations of lawyers, including some of the most widely-cited pieces in the field,[3] and have founded and run centers for the study of legal ethics and public service. Individuals within the group also have hands-on experience in legal ethics. They have served as consultants and expert witnesses, testified before Congress,[4] and participated in commissions sponsored by the American Bar Association (ABA) that draft influential model ethics rules. As a group, *amici* respect the careful balance wrought by Rule 3.6 of the Rhode Island Rules of Professional Conduct, which precisely tracks the language of ABA Model Rule 3.6 in protecting both the integrity of judicial proceedings and the lawyer's ability to inform the citizenry about crucial matters of public concern. *Amici* agree that granting defendant's motion in this case would upset that delicate balance and chill the robust debate necessary for democratic governance.

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[1] For a complete listing of *amici*, see Appendix, *infra*.

[2] *See, e.g.,* THOMAS MORGAN & RONALD D. ROTUNDA, PROFESSIONAL RESPONSIBILITY: PROBLEMS AND MATERIALS (10th ed., Foundation Press 2008).

[3] *See* Kristin N. Henning, *Loyalty, Paternalism, and Rights: Client Counseling Theory and the Role of Child's Counsel in Delinquency Cases*, 81 NOTRE DAME L. REV. 245 (2005), *cited in* Graham v. Florida, 130 S. Ct. 2011, 2032 (2010); Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589 (1985) (according to Lexis, cited 259 times in law reviews).

[4] *See* Hearing of the Administrative Oversight and the Courts Subcommittee of the Senate Judiciary Committee Chaired by Sen. Sheldon Whitehouse (D-RI), Fed. News Service, May 13, 2009 (testimony of Prof. David Luban).

Statement of the Case

The Class Plaintiffs seek a declaratory judgment under the provisions of R.I. Gen. Laws §§ 9-30-1, *et seq.*, declaring that the alleged practices of the Truancy Court, including *ex parte* contacts with school officials, inadequate notice of hearings, unwarranted imposition of discipline on children with no unexcused absences, threats to children of incarceration in a juvenile justice facility, and classification of children with severe disabilities as "willful" truants, violate state law and the state and federal constitutions. Plaintiffs also seek a preliminary and permanent injunction prohibiting the Family Court from continuing these practices.[5] Plaintiffs do not seek a trial by jury, and to date neither has any defendant.

Several of the plaintiff parents participated in a press conference on the day their lawsuit was filed. They were accompanied by two of their lawyers, Amy Tabor and Yelena Konanova. Tabor is a Rhode Island attorney and Konanova is a Litigation Fellow with the ACLU's Racial Justice Program, who subsequent to the press conference was admitted *pro hac vice* by the Presiding Justice of the Superior Court. At the press conference, the plaintiff parents described their experiences with the Truancy Court program - experiences included in the allegations of the complaint - and Tabor and Konanova read prepared statements concerning the nature of the legal claims and the legal arguments underlying them. The newspaper account of the press conference attributed only one comment to either Tabor or Konanova: Konanova's statement that, "[T]he plaintiffs are simply seeking a change in the way truancy courts do business in Rhode Island: Stop depriving children and their parents of their basic constitutional rights." (Def. Exh. D).

In conjunction with the press conference, the national office of the ACLU and its local Rhode Island affiliate issued a press release with quotations from Tabor, Rhode Island ACLU Executive Director Steven Brown, and Robin Dahlberg, a Senior Staff Attorney with the national ACLU's Racial Justice Program. The same Providence Journal article reported a quotation attributed to Dahlberg

[5] *Boyer v. Jeremiah*, Complaint at 67-69 (hereinafter Complaint).

from the press release:

> The Truancy Court system appears to have thrown the due process clause of the United States and Rhode Island Constitutions out the window, and it is imperative that Family Court administrators and magistrates follow the law . . . . Pushing kids into the juvenile justice system is not the way to help at-risk youth graduate from high school and, in fact, only increases the likelihood that they will ultimately end up in the criminal justice system.

(Def. Exh. D). Dahlberg was also subsequently admitted *pro hac vice* by the Presiding Justice.

On the same day the plaintiffs filed the Complaint and held the press conference, Konanova also posted a blog entry to the official blog of the ACLU: "Blog of Rights: Because Freedom Can't Blog Itself." The blog post described the experiences of plaintiff Jeremy Bowen and another unnamed minor plaintiff before the so-called "Truancy Courts," proceedings conducted "off-site" at the schools, and charged "that Rhode Island's truancy court system is administered and operated in violation of state and federal law." (Def. Exh. G). The blog post explained the lawsuit was "part of the ACLU's Racial Justice Program's efforts to end the school-to-prison pipeline - a national trend wherein children, and disproportionately children of color, are funneled out of the public school system and into the juvenile and criminal justice systems." (*Id.*) The post concluded by explaining that plaintiffs wanted "judicial and school officials [to] follow clear and well-established federal and state law, and stop depriving children and their parents of their basic legal rights." (*Id.*)

Defendant Jeremiah and each of the Family Court magistrate defendants ("Judicial Defendants") assert that this Court should find that Dahlberg and Konanova's published out-of-court statements violated Rule 3.6 of the Rhode Island Rules of Professional Conduct (the Rule), and as a result, the Judicial Defendants maintain, the Court should revoke their *pro hac vice* status. *Amici* appear before this Court to explain why Rule 3.6(b)(1)'s "safe harbor" provision for discussion of a legal "claim" permits a lawyer to exercise the First Amendment right to inform the public about claims raised in a lawsuit, particularly where the claim is critical of government policy or conduct.

Summary of Argument

Rule 3.6 of the Rhode Island Rules of Professional Conduct strikes a delicate balance between the rights of parties to a fair trial and the rights of attorneys to convey information to the public under the First Amendment. The United States Supreme Court has indicated that courts should read Rule 3.6 to reflect this careful balance of interests. *See Gentile v. State Bar of Nevada,* 501 U.S. 1030, 1070-75 (1991). First Amendment interests loom large in the case at hand, which concerns public comments about claims for equitable and declaratory relief based on alleged unfair procedures of a government agency. *See In re Primus*, 436 U.S. 412, 428 (1978) (protecting American Civil Liberties Union (ACLU) lawyers' communications with prospective clients regarding constitutional litigation, and noting that, for ACLU, "`litigation is not a technique of resolving private differences'; it is `a form of political expression' and `political association'") (citing *NAACP v. Button,* 371 U.S. 415, 429, 431 (1963)).

A fair reading of Rule 3.6 informed by this careful balance would permit the public comments of the attorneys here. Meeting the Rule's "substantial likelihood of material prejudice" test for public comments by an attorney entails an especially high threshold in a case "where the judge is the trier of fact." *Gentile*, 501 U.S. at 1077 (Rehnquist, C.J., dissenting from majority's overturning of earlier version of Rule). While the public comments here manifestly feature a rhetorical flourish, *see* Def. Exh. D (press release asserting that defendants "appear[] to have thrown the due process clause. out the window"), the law generally assumes that judges can cull the wheat from the chaff. *See Gentile*, 501 U.S. at 1077 (Rehnquist, C.J., dissenting) (judges "presumed to be able to discount or disregard" otherwise prejudicial statements). That high threshold should prevail in the instant case, where defendants as of this date have not sought a jury trial and plaintiffs seek only declaratory and injunctive relief.

The First Amendment has also informed interpretation of the "safe harbor" provision of Rule 3.6(b)(1), which permits lawyers to offer information to the public about a "claim." Section (b)(1)'s safe harbor recognizes that lawyers "are in one of the most knowledgeable positions" concerning the issues

raised by a pending lawsuit, and are therefore "a crucial source of information and opinion" for the public. *See Chicago Council of Lawyers v. Bauer*, 522 F.2d 242, 250 (7th Cir. 1975). The public comments of the attorneys in the instant case about due process clearly dovetail with plaintiffs' claims that defendants' practices and procedures are unfair. *Compare* Complaint, *Boyer v. Jeremiah*, No. 10-1858, at 25-30, 62 (alleging pervasive due process violations by defendants), with Def. Exh. D (press release asserting that defendants "appear[] to have thrown the due process clause ... out the window, and it is imperative that ... [defendants] follow the law"). These comments thus fall squarely within the "safe harbor" of Rule 3.6(b)(1). Leaving attorneys without protection for providing such basic information to the public would upset the careful balance that Rule 3.6 establishes and requires.

Courts have buttressed this conclusion through special solicitude for the flow of information about government practices and procedures, including those of the justice system. Providing information to the citizenry about the operation of the judicial system is essential, since the system "exists in a larger context of a government ultimately of the people, who wish to be informed ... and, if sufficiently informed ... might wish to make changes in the system." *See Gentile*, 501 U.S. at 1070. The attorneys' comments in this case explaining plaintiffs' challenge to the legality of the Truancy Court Program educate the public about an important but often overlooked role of government: the exercise of legal authority over juveniles. As with the nonprofit solicitation protected in *Primus* and *Button*, *supra*, the public comments here can promote connection with additional prospective plaintiffs, as well as witnesses. Such comments thus comprise a crucial strand in the fabric of "vigorous advocacy" that the First Amendment protects. *See Button*, 371 U.S. at 429.

Reading Rule 3.6 to permit the public comments of the attorneys here also insulates the Rule from the constitutional infirmity of vagueness. Vagueness regarding the "material prejudice" standard or the scope of the safe harbor under Rule 3.6(b)(1) would deny adequate notice to a prospective speaker critical of the government, and also create an "impermissible risk of discriminatory enforcement." *Gentile*, 501 U.S. at 1050. As the United States Supreme Court observed in invalidating an earlier version of Rule 3.6, this risk increases "when either the speaker or the message

is critical of those who enforce the law." *Id.* To eliminate this risk, this Court should follow the venerable canon that counsels interpreting a rule or statute to avoid a "serious doubt of constitutionality." *Crowell v. Benson*, 285 U.S. 22, 62 (1932). Interpreting Rule 3.6 to permit the public comments of plaintiffs' attorneys about the instant case would neutralize vagueness concerns and preserve the Rule's delicate balance between fair trials and First Amendment values.

Argument

I. *Pro hac vice* counsel's public comments complied with Rule 3.6, which balances First Amendment and fair trial concerns.

A. The "Material Prejudice" Standard of Rule 3.6 Sets a High Threshold for Extrajudicial Statements in Cases Involving Only Declaratory and Injunctive Relief.

Rule 3.6(a) prohibits only extrajudicial statements the lawyer "knows or reasonably should know . . . will have a *substantial likelihood of materially prejudicing an adjudicative proceeding*[.]" (Emphasis added.) In *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991), the United States Supreme Court explained that both the language and interpretation of Rule 3.6 reflect a balance of First Amendment protections and the State's interest in fair trials. *Id.* at 1075. Both the Supreme Court's decision in *Gentile* and the commentary to the Rule would in virtually all cases permit statements like those in the case at bar involving exclusively declaratory and equitable relief.

In *Gentile*, a 5-4 majority of the Court held that although the "substantial likelihood of material prejudice" standard prohibited speech that would otherwise be protected by the First Amendment, it was nevertheless constitutionally permissible because it narrowly targeted lawyer speech imbued with "two principal evils," out-of-court statements that "are likely to influence the actual outcome of the trial" and "are likely to prejudice the jury venire[.]" *Id.* The practical limitation of the scope of the Rule to jury trials was vital to all nine Justices. While a majority of the Court ruled that because of vagueness concerns the prior Rule 3.6 could not be constitutionally applied to extrajudicial statements by a Nevada attorney in a criminal case tried to a jury, *id.* at 1049, Chief Justice Rehnquist and three other Justices argued that largely confining the Rule to jury trials was necessary to preserve the Rule's

constitutionality. Explaining his view, Rehnquist opined that the "substantial likelihood of prejudice" test "will rarely be met where the judge is the trier of fact, since trial judges often have access to inadmissible and highly prejudicial information and are presumed to be able to discount or disregard it." 501 U.S. at 1077 (Rehnquist, C.J., dissenting). That observation would apply with greater force to civil actions like the case at bar presenting primarily legal issues - issues that will not be decided by a jury but by the judge alone as a matter of law.

Comment 6 to Rule 3.6 similarly recognizes that the nature of the adjudicative proceeding plays a significant role in determining whether a lawyer's First Amendment right to publicly speak about their case may be restricted, explaining that:

> Another relevant factor in determining prejudice is the nature of the proceeding involved. Criminal jury trials will be most sensitive to extrajudicial speech. Civil trials may be less sensitive. Non-jury hearings and arbitration proceedings may be even less affected. The Rule will still place limitations on prejudicial comments in these cases, but the likelihood of prejudice may be different depending on the type of proceeding.

In the case at bar, counsel's comments address legal issues in a non-jury proceeding. This Court will surely be able to separate the wheat from the chaff, focusing on the merits and consigning other concerns to the give and take of the public square. Under these circumstances, prohibiting counsel's comments would upset the delicate balance built into the present language of Rule 3.6 by the Rule's drafters and the Supreme Court.

B. Rule 3.6(b)(1) Provides a Safe Harbor for Counsel's Public Comments About Plaintiffs' Claim.

The delicate balance of Rule 3.6 also includes a "safe harbor" provision that broadly affirms a lawyer's First Amendment right to inform the public about his or her case. *See Gentile*, 501 U.S. at 1048; *Attorney Grievance Commission of Maryland v. Gansler*, 377 Md. 656, 683, 835 A.2d 548, 563 (2003). Paragraph (b) "identifies specific matters about which a lawyer's statement would not ordinarily be considered to present a substantial likelihood of material prejudice," and "*should not in any event be considered prohibited by the general prohibition of paragraph (a).*" R.I.R. of Prof.

Conduct 3.6, Comment 4 (emphasis added).

Paragraph (b)'s "safe harbor" provides in pertinent part, that "[n]otwithstanding" the general prohibition of subsection (a), a lawyer may state, as set forth earlier, "the claim, offense or defense involved and, except where prohibited by law, the identity of the persons involved[.]" R.I.R. of Prof. Conduct 3.6(b)(1). The Rule's declaration, "notwithstanding paragraph (a)," signals an intent that "in spite of"[6] or "despite"[7] paragraph (a)'s general limitation on lawyer speech that would pose a "substantial likelihood of materially prejudicing an adjudicative proceeding," there is some speech that is considered important enough that the prohibition does not apply. Paragraph (b) carves out several categories of speech from this limitation,[8] and the first category of speech that is excepted includes lawyer commentary about "the claim . . . involved" in a lawsuit.

Paragraph (b)'s adoption by the Rhode Island Supreme Court demonstrates an affirmative recognition of a lawyer's right to speak publicly about the claim or claims made in the lawsuit, and is consistent with the Court's recognition of the structural importance of the First Amendment, and the value of speech about judicial proceedings:

> There are vital societal interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves. The public . . . has a legitimate interest in the conduct of judicial proceedings, particularly in matters of general public concern. Furthermore, *the subject matter of legal proceedings is often of direct significance in debate and deliberation over questions of public policy*.

R.I.R. of Prof. Conduct 3.6, Comment 1 (emphasis added). Paragraph (b)'s "safe harbor" provision recognizes the notion that lawyers participating in pending litigation "are in one of the most

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[6] *See In re Evans*, 336 B.R. 749, 759 n. 3 (Bankr. S.D. Ohio 2006); *Wilshire Insurance Company v. The Home Insurance Company*, 179 Ariz. 602, 604, 880 P.2d 1148, 1150 (1994); *Klajic v. Castaic Lake Water Agency*, 121 Cal. App. 4th 5, 13, 16 Cal. Rptr.3d 746, 751 (2004); *Daubach v. Honda Motor Company, Ltd.*, 303 Ill. App.3d 307, 315, 707 N.E.2d 746, 750, 236 Ill. Dec. 619, 623 (1999); *RPC Liquidation v. Iowa Department of Transportation*, 717 N.W.2d 317, 321 (Iowa 2006).

[7] *See In re Evans*, 336 B.R. at 754 n. 3; *Klajic*, 121 Cal. App. 4th at 13, 16 Cal. Rptr. 3d at 751.

[8] *See Klajic*, 121 Cal. App. 4th at 13, 16 Cal. Rptr. 3d at 751.

knowledgeable positions" concerning the conduct of judicial proceedings and the issues raised by the pending lawsuit, and are therefore "a crucial source of information and opinion" about the legal and public policy issues raised therein. *See Chicago Council of Lawyers v. Bauer*, 522 F.2d 242, 250 (7th Cir. 1975). Section (b)(1)'s safe harbor provision is intended to preserve the ability of lawyers to speak publicly about the claims brought by their client, and to inform the public about the issues presented by the claim.

In the instant case, due process issues are the very heart of plaintiffs' claims. The Complaint also alleges that defendants threatened plaintiffs with incarceration in a juvenile justice facility. Complaint at 34. Given these allegations, counsel's public comments that the operation of the Truancy Court "appears to have thrown the due process clause of the United States and Rhode Island Constitutions out the window", Def. Exh. D, and that defendants' alleged practices raise concerns about the "school-to-prison pipeline", Def. Exh. G, are clearly pertinent to plaintiffs' claims. They thus fit within the safe harbor provided by Rule 3.6(b)(1). This conclusion, like the conclusion that counsel's comments do not meet the threshold of the "substantial likelihood of material prejudice" standard, dovetails with the core First Amendment interests served by litigation that mounts a systemic challenge to the administration and operation of government.

II. Both Plaintiffs' Legal Challenge to Truancy Court Procedures and Counsel's Public Comments Regarding the Legal Challenge Constitute Core Political Speech Protected by the First Amendment.

"[T]here is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs," *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 346 (1995) (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966)), and especially "discussions of . . . the manner in which government is operated[.]" *Mills*, 384 U.S. at 218-19. "Speech critical of the exercise of state power has traditionally been recognized as lying at the "core" of the First Amendment," *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1035 (1991) (Kennedy, J., joined by Marshall, Blackmun and Stevens), because "[s]peech concerning public affairs . . . is the essence of self-government." *Burson v. Freeman*, 504 U.S. 191, 196 (1992). Consequently First Amendment

decisions "have created a rough hierarchy in the constitutional protection of speech" in which such "[c]ore political speech occupies the highest, most protected position[,]" *R.A.V. v. St. Paul*, 505 U.S. 377, 422 (1992) (Stevens, J., concurring in judgment), because it is considered "central to the meaning of the First Amendment." *Citizens United v. Federal Election Comm'n*, 130 S.Ct. 876, 892 (2010).[9]

The United States Supreme Court has repeatedly stressed that litigation that challenges the constitutionality of government procedures and programs constitutes core political speech entitled to the highest level of First Amendment protection. *See In re Primus*, 436 U.S. 412, 428 (1978) ("For the ACLU ... 'litigation is not a technique of resolving private differences'; it is 'a form of political expression' and 'political association'") (citing *NAACP v. Button*, 371 U.S. 415, 429, 431 (1963)). The First Amendment status of such litigation encompasses challenges not only to legislative enactments or executive regulations, but also to the programs and practices of courts, which "play a vital part in a democratic state." *See Gentile*, 501 U.S. at 1070 (also noting that judicial system "exists in a larger context of a government ultimately of the people, who wish to be informed ... and, if sufficiently informed ... might wish to make changes in the system"); *see also id.* at 1035 (Kennedy, J., concurring) ("the public has a legitimate interest in ... operations" of courts). In this domain, the Court has scrutinized the language and interpretation of statutes to ensure the "vigorous advocacy" that the First Amendment protects. *See Button*, 371 U.S. at 429.

In the instant case, plaintiffs' claims and counsel's comments also fit within the "vigorous advocacy" rubric. The press release, press conference, and blog posting all focused on a government

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[9]First Amendment principles respecting core political speech critical of the government operations, and its policies or systems, are not limited to speech made on street corners, in front of government buildings, or in the traditional media, but also apply to speech critical of government on the Internet. The Supreme Court has recognized that the Internet is the "model for speech that the framers embraced" - "[t]hrough the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer[,]" *Reno v. American Civil Liberties Union*, 521 U.S. 844, 870 (1997), engaging in the 21st century version of "handing out leaflets in the advocacy of a politically controversial viewpoint[,]" the very "essence of First Amendment expression." *See McIntyre*, 514 U.S. at 347.

practice and policy allegedly abridging the statutory and constitutional rights of a vulnerable segment of society - minors - on a systemic basis. Because juvenile proceedings are closed to the public to safeguard the privacy interests of individual children, the public suffers from an information deficit regarding the policies and practices underlying those proceedings. The ability of lawyers such as counsel in this case to explain the claims of the class plaintiffs challenging the legality and constitutionality of the operation of the Family Court's Truancy Court Program helps to educate and inform the public about the Family Court's exercise of government power over juveniles. Counsel's contention that the alleged operation of the Truancy Court "appears to have thrown the due process clause of the United States and Rhode Island Constitutions out the window," Def. Exh. D, thus contributed to the robust debate about governmental institutions that the Supreme Court has located at the First Amendment's core. The same benefit for robust debate accrued for counsel's blog posting linking the Truancy Court's alleged procedures with the "school-to-prison pipeline - a national trend wherein children, and disproportionately children of color, are funneled out of the public school system and into the juvenile and criminal justice systems." Def. Exh. G.

While counsel's comments were not drawn verbatim from the pleadings of the case, the Supreme Court has cautioned against a "narrow, literal conception" of the freedoms that litigation promotes. *Button*, 371 U.S. at 430. Litigation as a "cooperative, organizational activity," *id.*, also entails public education about the problems that a lawsuit seeks to remedy. *See* Peter Margulies, *The Detainees' Dilemma: The Virtues and Vices of Advocacy Strategies in the War on Terror*, 57 BUFF. L. REV. 347, 357-61 (2009) (discussing history of popular mobilization around litigation, including Clarence Darrow's work on behalf of labor activists); Lucie E. White, *Mobilization on the Margins of the Lawsuit: Making Space for Clients to Speak*, 16 N.Y.U. REV. L. & SOC. CHANGE 535 (1987-88). Public education about law reform appeals not just to the citizenry as a whole, but also to the citizenry's elected representatives, who may be in the best position to implement systemic changes. *Id.* Marshaling the experiences of those affected by existing procedures and practices through evocative language is a crucial element of the "vigorous advocacy," *see Button*, 371 U.S. at 429, required in the

legislative context. In conducting a law reform campaign, advocates should not have to choose between a judicial and legislative forum; they should be free to educate audiences in both arenas about problems with existing procedures and practices. Such speech also directly facilitates the conduct of public interest litigation. Just as the Supreme Court viewed gathering clients as essential to the civil rights advocacy in *Button* and *Primus*, speech such as counsel's comments in the instant case can encourage more prospective plaintiffs and witnesses to come forward and tell their own stories. *See White*, *supra*.

The Supreme Court has consistently refused to allow governmental institutions to suppress such robust debate through curbs on lawyer speech. Indeed, to protect core First Amendment interests, courts have carefully scrutinized rules governing lawyer communication with the public. The Court has held that the First Amendment shields public interest litigation from ethics rules prohibiting solicitation of clients. *See Button*, *supra*; *Primus*, *supra*. The Court has also invalidated a federal statute that precluded government-funded lawyers for the indigent from challenging certain programs, deeming such a restriction impermissibly content-based under the First Amendment. *See Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 543-48 (2001) (striking down bar on funding for legal challenges to welfare restrictions); *see also Milavetz, Gallop & Milavetz, P.A. v. United States*, 130 S. Ct. 1324, 1335, 1337, 1338 n. 5 (2010) (construing Bankruptcy Code narrowly to prohibit attorney advice that a client incur pre-filing debt with specific intent to avoid repayment; noting that broader construction would not vindicate Congress' intent and would "seriously undermine the attorney-client relationship"). The Supreme Court's precedents on lawyer communication with the public demonstrate that a construction of Rule 3.6 that prohibited the core political speech at issue here would violate the First Amendment.

The constitutional perils of this construction signal the need for a different interpretive path. It is a fundamental principle of constitutional law and statutory interpretation that "[a] statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score." *United States v. Jin Fuey Moy*, 241 U.S. 394, 401 (1916) (Holmes, J.);

accord, Hometown Properties, Inc. v. Fleming, 680 A.2d 56, 60 (R.I. 1996) ("[I]f a serious doubt of constitutionality is raised, it is a cardinal principle that [a] Court will ascertain whether a construction of the statute is fairly possible by which the question may be avoided.") (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)). A narrow interpretation of Rule 3.6's "material prejudice" standard and a broad construction of the "safe harbor" under Rule 3.6(b)(1) that allowed counsel's public comments would not raise constitutional concerns. Following the avoidance canon, this Court should interpret Rule 3.6 to permit the core political speech entailed in counsel's public comments about the case at bar.

III. A Construction of Rule 3.6 That Prohibited Counsel's Public Comments Would Be Unconstitutionally Vague.

Statutes are unconstitutionally vague when they grant government officials too much discretion and provide insufficient notice to those required to comply. *See Button*, 371 U.S. at 433 (warning of dangers of statutes "susceptible of sweeping and improper application"); *Commonwealth v. Abrams*, 66 Mass. App. Ct. 576, 580, 849 N.E.2d 867, 872 (2006) (discussing notice concerns). When officials have too much discretion, they can select targets on impermissible grounds, such as the desire to curb unpopular groups. *See City of Chicago v. Morales*, 527 U.S. 41, 60 (1999) (holding anti-gang ordinance void for vagueness because, *inter alia*, it gave law enforcement officials unfettered discretion to limit "a substantial amount of innocent conduct"). Moreover, vague rules provide inadequate notice to their intended audience, which must "speculate ... at peril of life, liberty or property ... about the meaning of the rule." *Id.* at 58 (citing *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939)).

The void-for-vagueness doctrine, grounded in due process, acquires special urgency when a statute or regulation's "literal scope unaided by a narrowing state court interpretation, is capable of reaching expression sheltered by the First Amendment." *Smith v. Goguen*, 415 U.S. 566, 573 (1974). In such contexts, clarity is imperative to "eliminate the impermissible risk of discriminatory enforcement, . . . for history shows that speech is suppressed when either the speaker or the message is critical of those who enforce the law." *Gentile*, 501 U.S. at 1050. Adequate notice to a potential

speaker is also vital, to permit protected speech while clearly marking impermissible activity. *Id.* at 1049-50.

Curbing enforcement discretion is a particular concern in public interest lawsuits that challenge government action and policy. Courts should guard against the risk that Rule 3.6 might be used either arbitrarily or in a discriminatory fashion to silence speech critical of the government. *Id.* at 1050. Judicial vigilance protects the core First Amendment status of public interest litigation. *See Primus*, 436 U.S. at 428-30 (employing heightened scrutiny to bar application to ACLU of ethics rule prohibiting solicitation of prospective plaintiffs).

Similar vigilance should protect a public interest litigant's access to out-of-state counsel who may be more willing to challenge government policies than locally admitted counsel, and can marshal greater resources for this arduous task. Courts have generally required a substantial justification for revocation of *pro hac vice* status. *See, e.g., Young v. City of Providence*, 404 F.3d 33 (1st Cir. 2005) (reversing judge's order revoking *pro hac vice* status; viewed in context, plaintiff's counsel had not engaged in misrepresentation punishable under Federal Rules of Civil Procedure); *cf. United States v. Ensign*, 491 F.3d 1109, 1112-13 (9th Cir. 2007) (revocation supported by attorney's failure to disclose pending disciplinary proceedings); *United States v. Nolen*, 472 F.3d 362, 374-75 (5th Cir. 2006) (revocation supported by attorney's impugning of tribunal's integrity and honesty); see generally *Schlumberger Techs. v. Wiley*, 113 F.3d 1553 (11th Cir. 1997) (revocation requires clear violation of ethical rule). Requiring a substantial justification guards against the risk that a state defendant will use ethics rules to insulate itself from effective challenge. *See Button*, 371 U.S. at 430 (warning that the mere "threat of sanctions ... may deter [the] exercise" of First Amendment freedoms). Clear ethics rules that minimize arbitrary enforcement reduce the risk.

Because the United States Supreme Court believed that the "safe harbor" in the prior, pre-2007 version of Rule 3.6 as interpreted by Nevada courts failed this test of concreteness, the Court held that the Rule was unconstitutionally vague. *See Gentile*, 501 U.S. at 1049-50. Prior to 2007, when the current version of Rule 3.6 was adopted by the Rhode Island Supreme Court, the safe

harbor provision provided that "[n]otwithstanding the general prohibition of paragraph (a), a lawyer involved in the investigation or litigation of a matter may state *without elaboration*: (1) the *general* nature of the claim or defense[.]" *See State v. Lead Industries Association, Inc.*, 951 A.2d 428, 460 n.19 (R.I. 2008) (setting forth Rhode Island's pre-2007 version of Rule 3.6) (emphasis added). In *Gentile*, a majority of the Court in an opinion by Justice Kennedy held that, absent any clarifying interpretation by the Nevada Supreme Court, a safe harbor provision identical to Rhode Island's pre-2007 rule failed to provide "fair notice" of the contours separating unrestricted and restricted speech. *Id.* at 1048. Justice Kennedy explained:

> The right to explain the "general" nature of the defense without "elaboration" provides insufficient guidance because "general" and "elaboration" are both classic terms of degree. In the context before us the terms have no settled usage or tradition of interpretation in the law. The lawyer has no principle for determining when his [or her] remarks pass from the safe harbor of the general to the forbidden sea of the elaborated.

Id. *See also Id.* at 1082 (O'Connor, J. concurring) ("a vague law offends the Constitution because it fails to give fair notice to those it is intended to deter and creates the possibility of discriminatory enforcement").

Those vague and problematic terms have been eliminated from the present version of Rule 3.6(b)(1). But the limits or boundaries of the present safe harbor provision are no more precise, and no less vague, than they were with respect to the pre-2007 version. Moreover, the present safe harbor of paragraph (b)(1) provides even less notice of the boundary between prohibited speech and permitted speech. Punishing speech based on an after-the-fact conclusion that it is outside of the present safe harbor provision would be as repugnant to due process principles as was the punishment imposed on the speech in *Gentile*.

This Court can interpret the scope of the safe harbor provided by Rule 3.6(b)(1) to avoid an impermissibly vague construction that would trigger such risks. The Rhode Island Supreme Court's elimination of the only limiting terms -- "general" and "without elaboration" -- in the pre-2007 version of Rule 3.6(b) and (b)(1) plausibly suggests the Court intended to create a more expansive safe harbor.

Therefore, as argued in Part I(B), *supra*, the Court can readily interpret Rule 3.6(b)(1)'s safe harbor for discussion of a "claim" to permit counsel's public comments. Giving lawyers this latitude would eliminate the vagueness concerns that proved fatal to the earlier version of Rule 3.6 addressed by the Supreme Court in *Gentile*.

Conclusion

For the foregoing reasons, the *amici* law professors respectfully urge the Court to deny defendants' motion to revoke the *pro hac vice* status of plaintiffs' attorneys.

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