No. ________

In The

Supreme Court of the United States

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF MULTIJURISDICTION PRACTICE, (NAAMJP), et al.,

Petitioners,

v.

BERYL A. HOWELL, CHIEF JUDGE, U.S. DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, et al.,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The District Of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Frazier v. Heebe*, 482 U.S. 641 (1987), this Honorable Court exercised its supervisory power and abrogated a Louisiana Federal District Court local rule that disqualified out-of-state attorneys for *general* bar admission privileges on the basis of office location, holding "the location of a lawyer's office simply has nothing to do with his or her intellectual ability or experience in litigating cases in Federal District Court." *Id*. at 649. The Court of Appeals for the District of Columbia refused to exercise this Honorable Court's *own unique supervisory power* on the ground that it did not possess this power and it thus refused to adhere to this Court's holding in *Frazier v. Heebe*.

The questions presented are:

1. Are Federal District Court local rules that categorically disqualify otherwise competent and licensed out-of-state attorneys in good standing for *general* bar admission privileges on the basis of office location lawful?

2. Whether United States District Court local rules – that block the free expression of the Bill of Rights protected freedoms to counsel expressive association, and to petition the government for the redress of grievances on the categorical basis of office location – exceed the District Court's prescribed local rule-making authority.

LIST OF PARTIES

Petitioners are the National Association for the Advancement of Multijurisdiction Practice (NAAMJP), Marinna L. Callaway, and Patent Lawyer Doe. Jose Jehuda Garcia and Herbert Howard Detrick II, are no longer parties.

Respondents are Beryl A. Howell, Chief Judge U.S. District Court for the District of Columbia, and the other District Judges including: Emmet G. Sullivan, Colleen Kollar-Kotelly, Ellen S. Huvelle, Reggie B. Walton, John D. Bates, Richard J. Leon, Rosemary M. Collyer, Robert L. Wilkins, James E. Boasberg, Amy Bermnan Jackson, Rudolph Contreras, Ketanji Brown Jackson. These Article III judicial officers are sued in their official capacities.

The Attorney General was a party below. Petitioners are not contesting his dismissal.

CORPORATE DISCLOSURE STATEMENT

The National Association for the Advancement of Multijurisdiction Practice is a public benefit corporation. It is not a publicly traded company. It has no parent, subsidiaries or affiliates. It issues no stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The Opinion affirming the dismissal of the complaint under Fed. R. Civ. Proc. 12(b)(6) and denying Petitioners' Motion for Summary Judgment is set forth in Appendix (1a). It is published at 851 F.3d 12 (D.C. Cir 2017). The District Court's Order is set forth at (15a) and it is not published. The Appellate Court Orders denying rehearing and rehearing *en banc* are set forth at (50a-53a).

JURISDICTION

The judgment of the U.S. Court of Appeals for the District of Columbia Circuit was entered on March 14, 2017. (1a) The timely filed petition for rehearing and rehearing *en banc* was denied on May 18, 2017. (50a-53a) The Honorable Chief Justice Roberts granted an extension to September 15, 2017 to file for certiorari review. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional and substantive provisions involved are set forth in the Petition or the Appendix (54a *et seq*.).

STATEMENT OF THE CASE

This Court exercised its supervisory jurisdiction and abrogated a virtually identical Federal District Court Local Rule barring out-of-state attorneys holding "the location of a lawyer's office simply has nothing to do with his or her intellectual ability or experience in litigating cases in Federal District Court." *Frazier v. Heebe*, 482 U.S. 641, 649 (1987). This Court has also held bar admission on motion is constitutionally protected. *Supreme Court of Virginia v. Friedman*, 487 U.S. 59 (1988); *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1985) (holding an attorney's opportunity to practice law is constitutionally protected because out-of-state lawyers have a constitutional duty to vindicate federal rights and champion locally unpopular claims).

The United States Court of Appeals for the District of Columbia holds *Frazier v. Heebe* is inapplicable because the Supreme Court exercised its "*own unique supervisory authority*" (6a) (emphasis in original) and only the Supreme Court has supervisory review jurisdiction. The panel reasons: "A single district court judge or an appellate panel may not usurp that body's

authority. While this point may be "hyper-technical . . . it is the law." (7a) Hence, the panel holds it will not exercise this Honorable Supreme Court's supervisory and fiduciary responsibility over Local Rules that restrict the freedoms to access the Federal District Court on the basis of office location. The panel cites *Barnard v. Thorstenn*, 489 U.S. 546, 556, 566 (1989), holding difficulties in supervising a nationwide bar membership does not justify discrimination against out-of-state attorneys. The panel, however, refuses to apply *Barnard's holding and its* application of heightened scrutiny on the ground that *Barnard* was decided under the Privileges and Immunities Clause (8a) because the panel holds rational basis is the applicable standard of review for Local Rule challenges.

After *Frazier v. Heebe* was decided, Congress amended the statutory authority for federal courts to prescribe rules in 28 U.S.C. §§ 2071-72.

28 U.S.C. § 2071. *Rule-making power*, in pertinent part provides:

> (a) The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules *for the conduct of their business*. *Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed under section 2072 of this title.* (Emphasis added)

28 U.S.C. § 2072. *Rules of procedure and evidence; power to prescribe*, provides:

> (a) *The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts* (including proceedings before magistrate judges thereof) and courts of appeals. (Emphasis added)
>
> (b) *Such rules shall not abridge, enlarge or modify any substantive right.* All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect. (Emphasis added)

Under the national rules (Supreme Court Rule 5 and Fed. R. App. P. 46) and Acts of Congress (5 U.S.C. § 500(b)), all licensed attorneys are eligible to practice before federal administrative agencies, the Courts of Appeals, and the Supreme Court. All licensed attorneys in good standing, therefore, are eligible to file petitions and serve as counsel in these federal forums for their clients.

Fed. R. Civ. Proc. 83 authorizes District Court to prescribe local rules that are consistent with 28 U.S.C. §§ 2071-72. However, because the Federal Rules of Civil Procedure were adopted in 1937, in an era where federal procedure was governed by state procedural law, they do not squarely address the subject of bar admission. The subject of admission was left to the discretion of the individual District Court, which was, of course, supposed to be exercised consistent with the purposes of the Federal Rules of Civil Procedure. The Rule 1 Scope and Purpose, provides: "These rules govern the procedure in all civil actions and proceedings in the United States district courts, except as stated in

Rule 81. They should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding."

Similar to Supreme Court Rule 5 and Fed. R. App. P. 46, all licensed American attorneys in good standing are eligible for *general* admission privileges to practice in forty percent of the ninety-four Federal District Courts under their respective Local Rules.[1] These Federal District Court's carry out their business without resort to express discrimination in favor or against any particular class of citizens desiring to freely exercise their rights to petition the government with their counsel of choice. There is an even playing field.

However, under Local Rules of the remaining sixty percent of the Federal District Courts, licensed attorneys are categorically disqualified from admission based on the District Courts' adoption of forum state law criteria for federal admission. The District Courts that categorically adopt forum state licensing rules, in aim and effect, delegate federal jurisdiction for federal bar admission criteria to forum state licensing officials, and do so without providing any standards or supervisory review. Petitioners contend that this District Court delegation of federal court jurisdiction and concomitant blanket discrimination against non-forum state attorneys constitutes *censorship*, and it exceeds Local Rule-making discretion. This federal procedural

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[1] http://www.msba.org/uploadedFiles/MSBA/Member_Groups/Sections/Litigation/USDCTMDSurvey0115.pdf.

reliance on state law also defeats the aim and purpose of the Federal Rules of Civil Procedure to make federal procedure uniform and federal.

The irrational impact of blanket disqualification under Local Rules based on forum state law means that a licensed attorney in good standing and representing a client in a federal case is eligible for admission to represent that same client before a federal administrative agency, the United States Courts of Appeals, the Supreme Court, and a Federal District Court located in one State. Yet, this same attorney may be categorically ineligible to represent her client in the same matter before a Federal District Court in a different district in the same State,[2] or a sister-state.

The purpose of Fed. R. Civ. Proc. 1 to "secure the just, speedy, and inexpensive determination of every action and proceeding," is subverted when Local Rules compel experienced federal practice specialists to reinvent the wheel and take another entry level state bar exam or gain admission in states in order to qualify for general admission in the District Court.

After a needle in a haystack time-consuming search for qualified counsel admitted in the United States District Court for the District of Columbia

[2] The Western District of Pennsylvania offers admission privileges to all licensed attorneys, notwithstanding the attorney's forum state. However, the District Courts for the Eastern and Middle Districts of Pennsylvania deny admission to non-Pennsylvania lawyers because those District Courts' Local Rules use the Pennsylvania state reciprocity rules. This same pattern is found in federal local rules in several states.

(D.D.C.) willing to champion Petitioners locally unpopular federal claims, Petitioners filed a Complaint petitioning for an Order declaring that D.D.C. Local Rules shall provide the opportunity for general bar admission privileges to all sister-state attorneys admitted to the highest court of any state,[3] and an Order granting such other relief as just and proper.[4] At the time the Complaint was filed in December 2013, the D.D.C. had an attorney licensing rule based on reciprocity. If an attorney was licensed and in good standing in either the District of Columbia or admitted in a Federal District Court that granted reciprocal admission to an attorney admitted in the D.D.C., that sister-state attorney was eligible for a D.D.C. general admission license.

After seeing the Complaint allegations, the case was stayed by agreement; the D.D.C. *sua sponte* vacated their reciprocity licensing rules; and delegated to local private practice attorneys on its Rules Committee the authority to propose a new Local Rule and invite public comment. The D.D.C. accepted the Rules Committee's recommendations and then adopted Local Civil Rule 83.8 and Local Criminal Rule 57.21 ("Amended Local Rules") which are identical and provide:

> Admission to and continuing membership in the Bar of this Court are limited to: (1) attorneys who are active members in good standing in the District of Columbia Bar; or (2)

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[3] Amended Complaint ¶ 96.

[4] *Ibid*.

> attorneys who are active members in good standing of the Bar of any state in which they maintain their principal law office; or (3) in-house attorneys who are active members in good standing of the Bar of any state and who are authorized to provide legal advice in the state in which they are employed by their organization client.

These Amended Local Rules do not fit squarely in either the forty percent category that track the national rules allowing all licensed attorneys regardless of forum license, or in the sixty percent category that continue to limit federal *general* admission to forum state lawyers. Under this hybrid D.D.C. licensing scheme, District of Columbia licensed attorneys can have their principal office anywhere, and indeed, they are not even required to have an office. All other attorneys in good standing are treated differently. In order to qualify they must be admitted in the state in which they maintain their principal law office. The Amended Local Rules also carve out another licensing exception for in-house corporate counsel, who do not compete with private practice attorneys, from the state of admission and principal office disqualification provisions. Thus, attorneys admitted in the same state can be both qualified and not qualified for D.D.C. admission based on office location. Under the Amended Local Rules, corporations have more rights than criminal defendants and individual American citizens in civil cases.

Under the Amended Local Rule, Petitioners' counsel of choice, although admitted as *pro hac vice* counsel was still barred from filing pleadings in the D.D.C. Attorneys admitted *pro hac vice* are *not* eligible to file pleadings via PACER, and must obtain discretionary leave of the D.D.C. and locally admitted counsel to speak in the courtroom. Petitioners were also disabled by the unjust and needless duplication of time and wasted resources resulting from their being compelled to *associate* with locally admitted counsel law that was less qualified to *speak* and *petition* than *pro hac vice* counsel. Petitioners are also generically prevented from advancing their viewpoint on this federal discrimination because many District Courts' Local Rules categorically deny *pro hac vice* admission on the basis of state of admission or office location.

Petitioners' competence as lawyers in good standing is unchallenged. Petitioners filed an Amended Complaint challenging the Amended Local Rules and moved for summary judgment. The District Judge initially assigned granted a motion to recuse because he would be reviewing his own Court's Local Rules. The case was then assigned in November 2014 to a newly appointed D.D.C. judge who was not involved in the rulemaking. One year later, this District Judge *sua sponte* recused himself. The case was then assigned to a Senior District Judge from Boston. The District Judge held the Petitioners established associational and individual standing. He granted a Rule 12(b)(6) dismissal and denied Petitioners' Motion for Summary

Judgment. The Respondents did not submit any declaration or empirical evidence justifying this licensing discrimination or challenging Petitioners' evidence submitted in their Summary Judgment motion.

A Rule 12(b)(6) dismissal was affirmed on appeal. Both the District Judge and the United States Court of Appeals for the District of Columbia failed to disclose a surfeit of allegations that must be presumed as true, as well as Petitioners' substantive evidence and exhibits submitted in their Motion for Summary Judgment and Appellant Appendix tracking these complaint allegations, including:

- The *ABA Commission on Ethics 20/20* (2012) (recommending that all States adopt reciprocal licensing of all ABA graduates with three years of experience);[5]
- The Obama administration and U.S. Department of Defense and U.S. Department of the Treasury *Supporting Our Military Families: Best Practices for Streamlining Occupational Licensing Across State Lines* (2012) (recommending streamlining of occupational licensing for military personnel and their spouses);[6]
- A Declaration from a nationally recognized testing expert Dr. Phillip Ackerman opining that requiring already licensed

[5] Appellants Appendix p. 68-80; Amended Complaint ¶ 35.

[6] *Id*. at 107-122; Amended Complaint ¶ 10-11.

attorney to pass objective tests to gain admission in another State fails to meet the *Standards for Educational and Psychological Testing* (1999) published by the American Educational and Psychological Association, and the National Council on Measurement;[7]

- A Declaration from Dr. Scot Page, the *Leonid Hurwicz Collegiate Professor of Complex Systems*, *Political Science*, and *Economics* at the University of Michigan opining that reciprocal licensing promotes diversity and beneficial differences in how people represent problems;[8]

- A Declaration from Dr. Mark Leary, the *Garonzik Professor of Psychology and Neuroscience* and the Director of the Social Science Program at Duke University, opining that: "It is my professional opinion that resistance to the American Bar Association's recommendation that States should adopt reciprocal licensing for lawyers can be traced to self-interest, competitive and distrustful orientations toward out-groups, the better-than-average effect, and the inter-individual – intergroup discontinuity effect;"[9]

- Microsoft, *Raising the Bar: An Analysis of African-American and Hispanic-Latino*

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[7] *Id.* at 88-90.

[8] *Id*. at 91-98.

[9] *Id*. at 103-104.

> *Diversity In The Legal Profession*, finding that legal profession is lagging far behind other professions in promoting diversity largely because of licensing barriers.[10]

Petitioners aver that the decisions below confirm that there is no real meaningful opportunity for judicial review of District Court licensing rules because the decisions below wholly fail to disclose the Amended Complaint allegations and substantive evidence Petitioners' submitted.

Further, while the District of Columbia Court of Appeals upheld both individual and association standing, it excluded standing for Patent Lawyer Doe. The panel holds:

> "Indeed, Doe does not describe where he practices law or otherwise suggest the Local Rule's Principal Office Location Provision has inhibited his legal practice." (3a)

However, consistent with the panel's indifference to Petitioners' complaint allegations and substantive evidence, the record shows the panel fails to discern the material facts in Doe's Declaration that contradict the panel's conclusion. Doe, who is a member of the NAAMJP and a licensed lawyer, stated in his Declaration[11] in support of summary judgment the following:

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[10] *Id.* at 149-159. Amended Complaint ¶ 31.

[11] *Id*. at 81-84.

4. In *Sperry v. Florida*, 373 U.S. 379 (1963), the Florida Supreme Court attempted to prohibit a member of the Board of Patents and Trademarks from practicing patent law in Florida. The United States Supreme Court reversed holding that a "State may not enforce licensing requirements which . . . give the State's licensing board a virtual power of review over the federal determination that a person or agency is qualified and entitled to perform certain functions," and found that the state's licensing requirements could not govern practice before the PTO. *Id*. at 385, 388. The U.S. Supreme Court concluded that applying state licensing requirements to practitioners appearing before the PTO would have a "disruptive effect, given that one quarter of the attorney practitioners before the PTO would have been disqualified because they were not licensed in the state in which they were practicing." *Sperry*, 373 U.S. at 401.[12]

5. Similarly, I am not licensed in the state where I have my principal office. The practical effect of the challenged Local Rule is to treat me the same as Mr. Sperry. I work in a law firm where I am surrounded by lawyers who are licensed in the state where I have my principal office. I stand before this court as a licensed Patent Attorney representing myself, and all similarly situated Patent Attorneys. There are, in my opinion, thousands of patent attorneys disabled by the challenged Local rules in our nation's capital. This Court's local

[12] *Id*. at 81.

> rules serve as a role model for other Federal District courts.[13]
>
> . . .
>
> 7. I am disabled by the in-house counsel provision in the Local Rules because at one time I was a registered in-house counsel, but I am not now. Hence, at one time I would have been eligible for admission, but I am not now. This demonstrates the arbitrary and irrational nature of the POLD provisions carving out an exception for in-house counsel. There is no real substantive difference between my status as a patent attorney between working for a law firm, as compared to working for a corporation as a registered in-house patent counsel.
>
> 8. I am further handicapped in exercising my First Amendment Rights to expressive association and petition in this Article III Court because my counsel of choice [counsel of record] is categorically ineligible because he also does not have his principal office in a state where he is licensed. The POLD provisions directly handicap my freedoms to expressive association and petition.[14]

The D.C. Court of Appeals upheld the Rule 12(b)(6) dismissal under the rational basis standard of review, and it rejected all of Petitioners' arguments that a heightened standard of review was applicable. The panel's conclusions will be addressed in turn.

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[13] *Id*. at 82.

[14] *Id*. at 83.

Petitioners argue that under this Court's decision in *Frazier v. Heebe*, a two-pronged *rational* and *necessary* standard of review was appropriate.[15] Petitioners argue this federal licensing and admission discrimination established by the Amended Local Rules is not *necessary* to manage the District Court's docket because forty percent of the District Courts do not discriminate for or against any class of citizens or attorneys in federal licensing on the basis of state of admission or office location. Neither Court below addresses this argument, apparently because of its rational basis holding.

The panel states the rational basis as:

> The Principal Office Provision ensures attorneys who practice before the District Court – but who avoid supervision by the D.C. Bar Association – are subject to supervision by the state to which their practice is most geographically proximate. The Principal Office Provision embodies a reasonable assumption: local licensing control is better positioned to facilitate training sessions, conduct monitoring programs, and field complaints from the public – all rational bases for the Local Rule. (8a)

Petitioner Patent Lawyer Doe is a perfect example of a lawyer disqualified for D.D.C. admission, which undermines the panel theory local "licensing control is better positioned . . . to conduct monitoring programs, and field complaints from the public." *Ibid*. Patent

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[15] *See* footnote 16.

Lawyer Doe is subject to the identical monitoring programs as every other attorney in his firm. According to *Sperry*, twenty-five percent of patent lawyers do not have their office in the state where they are licensed.

Petitioners argue this panel local supervisory efficacy conclusion is arbitrary and a *post hoc* justification because under the D.D.C. licensing rules any attorney admitted to its bar whether generally or *pro hac vice* is subject to the same Rules of Professional Conduct and to the District's Court's active supervision. No empirical evidence has been presented that a misconduct referral from a District Judge or client will not be thoroughly examined on the basis of office location by any state. In fact, the presumption that the D.C. Bar Association will fully investigate any misconduct referral regardless of office location demonstrates the office location presumption is an artifice. This allegedly local supervisory efficacy rationale was also squarely rejected in *Frazier v. Heebe*, *supra*, and in *Barnard v. Thorstenn*, *supra*, 489 U.S. 546 (1989). In *Barnard*, the Respondents argued it was geographically isolated and did not have adequate resources to supervise a nationwide bar membership to justify its discrimination against out-of-state attorneys. This Court rejected this Virgin Islands local supervisory argument under a strict scrutiny standard of review, and held the monitoring problems faced by the Virgin Islands Bar are no greater than those faced by any mainland State with limited resources. *Id*. at 556-57.

The panel also rejects the Petitioners' argument that the D.D.C. licensing rules violate the 28 U.S.C.

§§ 2071-72 and Fed. R. Civ. Proc. 83 local rule-making standards. The panel holds the local rule-making standards are not applicable because other Appellate Courts have rejected Petitioners' claims, and because "it suffices to note NAAMJP has failed to identify any substantive right – whether constitutional, statutory, or derived from national federal rules – that has been infringed by the Local Rule." (6a)

According to the United States District Court for the District of Columbia, the following are not substantive rights:

1. The Federal Right to Counsel

The substantive right to counsel is found in 28 U.S.C. § 1654. *Appearance personally or by counsel*, which provides:

> In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein.

It is important to note that the statutory right to counsel extends to all courts of the United States. All courts by their rules are permitted to manage and conduct causes therein. This statutory right to counsel of choice in the District Court is also cabined within the First and Sixth Amendments. The First Amendment protects "litigation [as] a means for achieving the lawful objectives of equality by all government." *NAACP v. Button*, 371 U.S. 415, 429 (1963). It is thus a form of

political expression. *Ibid*. The First Amendment also sets forth a constitutional right to association, which presupposes a constitutional right to petition in association with counsel of choice. The constitutional right to counsel is further set forth in the Sixth Amendment. The Sixth Amendment has a textually embedded right to counsel because at the Founding the common law did not provide the right to counsel in felony cases. *Luis v. U.S.*, 136 S. Ct. 1083, 1097 (2016), J. Thomas, concurring. The Amended Local Rules 83.8 and 57.21 regulate the intertwined constitutional freedoms to counsel and petition.

The panel decision does not address the Petitioners' right to counsel arguments or this Court's precedent on the right to litigation counsel. The panel also does not address Petitioners' argument that D.D.C. Local Rules that categorically discriminate on the basis of state boundary and office location exceeds the District Court's prescribed rule-making discretion. According to the United States District Court of Appeals for the District of Columbia, the right to counsel is not a right and it can be preempted based on any conceivable rational basis in the record or not.

2. The Federal Right to Petition

The right to petition includes the right to petition for rights. Federal bar admission requirements implicate First Amendment considerations because lawyers assist clients in petitioning the courts. A client's ability

to utilize counsel of choice is important to the full exercise of the rights to petition, expressive association and the Sixth Amendment right to counsel. Petitioners argue the right to petition for the redress of grievances is constitutionally protected *conduct.* For example, Petitioners may not have a right to burn their draft card, but they do have a constitutional right to petition. The panel's sweeping generalization that the constitutional right to petition is not a substantive right nullifies the First Amendment. It sweeps aside *petition* precedent where this Court held: "We have recognized this right to petition as one of the most precious of the liberties safeguarded by the Bill of Rights," *BE&K Constr. Co. v. NLRB*, 536 U.S. 516, 524 (2002), and have explained that the right is implied by "[t]he very idea of a government, republican in form," *Id*. at 525. We thus made explicit that "the right to petition extends to all departments of the Government," and that "[t]he right of access to the courts is . . . but one aspect of the right of petition." *Id*. at 525. The First Amendment historically provides greater protection from prior restraints than after-the-fact penalties, *ibid*., and enjoining a lawsuit could be characterized as a prior restraint. *Id*. at 525. In *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731 (1983), this Supreme Court held a lawsuit cannot be enjoined if it raises genuine issues of material fact, regardless of the plaintiff's motives. *Id*. at 748. The D.D.C. rules are a prior restraint because they categorically enjoin the filing or defending of lawsuits by members of the bar regardless of their or their client's motives in seeking to freely exercising their right to petition.

The panel fails to cite or address these cases, and holds that the right to petition is not implicated because the Local Rules "affects only attorneys who wish to appear before the District Court." (12a) It found that the attorney licensing rules easily pass rational basis review because a chorus of other Courts have held "those attacking the rationality of the [licensing rule] have the burden to negative every conceivable basis which might support it." (7a-8a)

Petitioners contend that the panel's conclusion that the Amended Local Rules affect only attorneys "who wish to appear before the District Court" (12a) is misplaced. Petitioners wish to appear before the District Court. These local rules affect all citizens and corporations ability to freely exercising their rights to petition. In this case, it also affects Petitioners both as litigants and as attorneys desiring to represent the Petitioners. The statutory rights to petition and counsel apply in all federal courts.

3. The Substantive Right to Be Free From Federal Speaker Discrimination on Matters of Public Concern and Prior Restraint

Petitioners' argue that the Amended Local Rules constitutes *speaker* discrimination because the government is taking the right to speak (and petition) away from some lawyers and giving it other, and a prior restraint, citing *Citizens United v. Federal Election Commission*, ___ U.S. ___, 130 S. Ct. 876 (2010), where this Honorable Court held:

> "Quite apart from the purpose or effect of regulating content, moreover, the Government may commit a constitutional wrong when by law it identifies certain preferred speakers. By taking the right to speak from some and giving it to others, the Government deprives the disadvantaged person or class of the right to use speech to strive to establish worth, standing, and respect for the speaker's voice. The Government may not by these means deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration. The First Amendment protects speech and speaker, and the ideas that flow from each." *Id*. at 890.

. . .

> "*Any effort by the Judiciary to decide which means of communications are to be preferred for the particular type of message and speaker would raise questions as to the courts' own lawful authority. Substantial questions would arise if courts were to begin saying what means of speech should be preferred or disfavored." Id.* at 890 (emphasis added).

The District Judge held: "The analogy to the regulations in *Citizens United* is misconceived because those regulations were directly related to a certain kind of speech and were thus unlike the rule challenged in the instant case." (38a) The panel does not address Petitioners' claims regarding *Citizens United*, speaker discrimination, or prior restraint.

4. The Substantive Right to Be Free From Federal Content Discrimination

The panel holds "the Local Rule is not an unconstitutional content-based restriction on speech" (11a) because "[i]f the government enacts generally applicable licensing provisions limiting the class of persons who may practice the profession, it cannot be said to have enacted a limitation on freedom of speech or the press subject to First Amendment scrutiny." (11a).

Petitioners argue the disparate attorney licensing scheme advanced by the Amended Local Rules constitute *content* discrimination because there are several different classes of attorneys eligible or ineligible for *general* admission privileges much like the various sign categories in *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015) that were invalidated as content discrimination: "[W]e have repeatedly 'rejected the argument that discriminatory . . . treatment is suspect under the First Amendment only when the legislature intends to suppress certain ideas.'" *Id*. at 2229. These various D.D.C. Local Rule categories, much like the various categories of signs in *Reed v. Town of Gilbert*, mean that some attorneys, citizens, and corporations can carry any sign they want, assemble, petition, and are provided shade by the Local Rules and some are categorically barred. The panel and the District Judge do not cite or discuss *Reed v. Town of Gilbert*.

Petitioners contend the D.D.C. licensing provisions are *not* generally applicable provisions because of the disparate licensing categories concerning the

same content: federal law equally available to all on matters of public concern.

5. The Substantive Right to Be Free From Federal Viewpoint Discrimination

As the District Court recognizes, Petitioners argue the D.D.C. licensing rules constitute *viewpoint* discrimination "because [they] categorically and specifically prevent attorneys who are not active members in good standing of the states in which they have their principal law offices from obtain[ing] a license and petition[ing] the courts and speak[ing]." (39a) Petitioners argue active members in good standing in the District of Columbia Bar can have their office anywhere (including out of the country), and can be retained by any citizen or corporation. Petitioners rely upon *R.A.V. v. Minnesota*, 505 U.S. 377, 392 (1992) (Respondent "has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules."). Petitioners argue that by discriminating against licensed attorney in good standing the Government is removing ideas and perspectives from a broader debate, which is viewpoint discrimination. "The danger of viewpoint discrimination is that the government is attempting to remove certain ideas or perspectives from a broader debate." *Matal v. Tam*, __U.S __ (2017), Justice Kennedy concurring, Slip Op. p. 4.

The panel holds the D.D.C. licensing scheme "does not discriminate on the basis of the subject matter or

viewpoint of any bar applicant's speech, the area of law an applicant would practice, or the clients an applicant would represent" (12a), while not taking into consideration the fact that Petitioners are already licensed attorneys in good standing. The panel holds, "The Principal Office Provision merely regulates the profession in a manner that, as described above, passes rational basis review." (12a)

6. Equal Protection/ Standard of Review

Petitioners argue, citing *Holder v. Humanitarian Law Project*, 561 U.S. 1, 130 S. Ct. 2705 (2010), that rubber-stamp rational basis should not be the standard of review for licensing regulations that deny access to the federal courthouse. In *Holder*, the government responded to a challenge to a federal statute making it a crime to aid foreign terrorist organizations, *including advice on the law*, that the only thing at issue was *conduct* and not *speech*. *Holder* makes clear *that verbal or written communications, even those that function as vehicles for delivering professional legal* services, to aid foreign terrorist organizations are "*content-based speech*" for purposes of the First Amendment that requires strict scrutiny review. 561 U.S. at 27-28, 130 S. Ct. 2705. *See* Chief Justice Roberts majority conclusion:

> "The Government is wrong that the only thing actually at issue in this litigation is conduct, and therefore wrong to argue that *O'Brien* provides the correct standard of review.

> *O'Brien* does not provide the applicable standard for reviewing a content-based regulation of speech." 130 S. Ct. at 2723.

Moreover, this Supreme Court unanimously applied strict scrutiny review and rejected the intermediate standard. If giving legal advice to foreign terrorists is First Amendment protected, then giving legal advice to American citizens is First Amendment protected. The panel does not address this Court's decision in *Holder v. Humanitarian Law Project.* The panel does not even subject this federal discrimination to intermediate level scrutiny, where the government has the burden of proof.

The panel in applying rational basis review holds, "If the government enacts generally applicable licensing provisions limiting the class of persons who may practice the profession, it cannot be said to have enacted a limitation on freedom of speech or the press subject to First Amendment scrutiny." *Lowe v. SEC*, 472 U.S. 181, 232 (1985) (White, J., concurring in the result). "Regulations on entry into a profession, as a general matter, are constitutional if they 'have a rational connection with the applicant's fitness or capacity to practice' the profession." *Id.* at 228 (quoting *Schware v. Bd. of Bar Examiners*, 353 U.S. 232, 239 (1957)).

Petitioners contend *Lowe v. SEC* is not applicable because it has nothing to do with the free exercise of the constitutional rights to counsel and to petition. The concurrence in *Lowe* is further factually inapplicable

because Mr. Lowe was disqualified from a SEC license because of a conviction for misconduct. The majority held Mr. Lowe was authorized to publish his newsletters without a license, whereas the Petitioners are disqualified despite being licensed attorneys in good standing. Petitioners contend *Schware v. Bd. of Bar Examiners* is also not apposite for the same reasons. *Schware* is not a First Amendment case. It is a Due Process case. The Court in *Schware* overturned the New Mexico Board of Bar Examiners conclusion Mr. Schware was not qualified.

The panel holds that "it suffices to note NAAMJP has failed to identify any substantive right – whether constitutional, statutory, or derived from national federal rules – that has been infringed by the Local Rule." (6a) Petitioners' argue that the Amended Local Rules are not consistent with the national rules and Acts of Congress; and on their face and as applied, prove that the D.D.C. Local Rules *abridge, enlarge, and modify the substantive rights to petition the District Court for the redress of grievances and the auxiliary right to associate and petition with counsel of choice in the District Court*; because government attorneys, attorneys admitted in the District of Columbia, and in-house corporate counsel are not subject to the state admission or principal office location disqualification provisions.

REASONS FOR GRANTING CERTIORARI

I. THIS COURT HAS A NON-DELEGABLE DUTY TO GRANT REVIEW AND EXERCISE ITS SUPERVISORY RESPONSIBILITY OVER THE QUESTIONS PRESENTED

This case presents a pure question of law. There is no meaningful dispute as to any material fact. Review should be granted because of the national importance of the supervisory duty questions presented on matters of public concern in a majority of the Federal District Courts, including the D.D.C., and the absence of any alternative jurisdiction for review of the lawfulness of District Court Local Rules.

The United States Court of Appeals for the District of Columbia, often called the second most influential Court in America, squarely holds as a matter of law that it will not supplant this Honorable Court's *own unique supervisory authority* (6a), and it relieves itself responsibility over Balkanized and uneven attorney licensing in the Federal District Courts. Under the panel's published decision, no lower court can exercise this Honorable Court's supervisory authority over District Court local rules. Moreover, the panel explicitly and implicitly holds that it is not bound by this Court's rationale and holdings in *Frazier v. Heebe* because this Honorable Court exercised its supervisory responsibility. The scope and impact of this holding immunizes all Local Rules from judicial review by any lower court, and it authorizes all lower courts to set aside *Frazier v. Heebe* as binding precedent.

The Justices of this Honorable Court have taken an oath of office to serve as a supervisory guardian and trustee over the Article III Courts and the Constitution. This *unique supervisory authority* as a guardian and trustee is non-delegable. In *Frazier v. Heebe*, *supra*, 482 U.S. 641 (1987), this Court exercised its supervisory responsibility over the Federal District Courts' local rules and reversed a district court's exclusion of a lawyer from its bar. The facts and legal issue in *Frazier v. Heebe*, are almost identical to the facts and legal issue in this case.

There, "[T]he 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. Similarly, as in *Frazier*, under the challenged D.D.C. Local Rule here, applicants for admission are treated differently based on where they have their office. Attorneys admitted to the District of Columbia Court of Appeals are *not* required to maintain their *principal office* anywhere under the D.D.C. Local Rules. They are not even required to have an *office* in a specific location to secure D.D.C. admission. Similarly, as in *Frazier*, the D.D.C. local rules disqualify petitioners solely on the basis of office location. This Honorable Court in *Frazier v. Heebe* overturned the Local Rule. It held: "[S]imilarly, we find the in-state office requirement unnecessary and irrational." *Id*. at 649. It reasoned, "*[A]s the failure to require in-state attorneys*

to have an in-state office reveals, the location of a lawyer's office simply has nothing to do with his or her intellectual ability or experience in litigating cases in Federal District Court." *Ibid.* (Emphasis added).

In *Frazier v. Heebe*, this Honorable Court held the Louisiana Local Rules at issue must satisfy a two pronged *rational and necessary*[16] standard. This Court held discrimination in federal bar admission is difficult to justify:

> "Rules that discriminate against nonresident attorneys are even more difficult to justify in the context of federal-court practice than they are in the area of state-court practice, where laws and procedures may differ substantially from State to State. (cites omitted) There is a growing body of specialized federal law and a more mobile federal bar, accompanied by an increased demand for specialized legal services regardless of state boundaries. (cites omitted) The Court's supervisory power over federal courts allows the Court to intervene to protect the integrity of the federal system,

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[16] *See Frazier*: "We find both requirements to be *unnecessary and irrational*." *Id.* at 646. "We therefore conclude that the residency requirement imposed by the Eastern District is *unnecessary and arbitrarily* discriminates against out-of-state attorneys. *Id*. at 649. Similarly, we find the in-state office requirement *unnecessary and irrational*." *Ibid*. *See* Rehnquist dissenting: "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. As our former Chief Justice observes, there is no difference between *unnecessary and irrational* and *rational* and *necessary*.

> while its authority over state-court bars is limited to enforcing federal constitutional requirements. Because of these differences, the Court has repeatedly emphasized, for example, that disqualification from membership from a state bar does not necessarily lead to disqualification from a federal bar." *Ibid*. n. 7.

If the location of a lawyer's office has nothing to do with intellectual ability or experience litigating cases in the Louisiana District Court, it follows that neither does the location of his or her office in this case arising in our Nation's capital. The principal office location provision fails the two-pronged *rational* and *necessary* standard of review because it has nothing to do with Petitioners' competence, providing public protection, or managing the District Court's docket. In the thirty years since *Frazier* was decided, the admission rules that exclude attorneys from admission based on office location are even more irrational and unnecessary given increased mobility, personal computers, the specialization of legal services and on-line resources, such as PACER, available today.

This exclusion is also not necessary because the District Court has jurisdiction over any attorneys appearing before it regardless of their state of licensure or office location. It is not necessary because many Federal District Courts do not discriminate against sister-state attorneys. There is no correlation between office location and competence or experience in litigating cases in the Federal District Court. This is what this Court has said. This is what the second highest

Court in the United States refuses to adhere. Petitioners contend that the Appeals Court, at a minimum should have applied a rational and necessary standard of review which is consistent with this Court's decision in *Frazier v. Heebe*.

This Supreme Court in *Frazier v. Heebe* further rejected *pro hac vice* admission as a reasonable alternative to *general* admission. *Id.* at 650-51. *Pro hac vice* admission for the Petitioners is little more than a discretionary policy that perpetuates the unnecessary and irrational determination that non-forum attorneys are not qualified to petition or represent their clients in District Court. In many Federal District Courts *pro hac vice* admission is also entirely unavailable on the basis of office location. *Pro hac vice* admission diminishes an individual or other entity's rights to counsel, expressive association and petition, while further driving up the cost of litigation, and compelling individuals, corporations and lawyers to enter a fiduciary relationship with an attorney they may neither want nor need.

This Honorable Court should not allow the lower courts to deliberately side-step the rule of law and binding precedent, nor sanction the deprivation of a seat at the bar for an attorney in good standing on the basis of an *office location*.

II. SUPERVISORY REVIEW IS NECESSARY AND PROPER BECAUSE DISTRICT COURT LOCAL RULE DISCRIMINATION ON THE CATEGORICAL BASIS OF OFFICE LOCATION EXCEEDS PRESCRIBED LOCAL RULE-MAKING STANDARDS

The Bill of Rights guarantees that all American citizens have fundamental rights to counsel, free speech, expressive association, and to petition the Article III Courts for the redress of grievances, regardless of state boundary and office location. These federal rights do not categorically and wholly depend on one state's law or office location.

One year after *Frazier v. Heebe* was decided, Congress in Public Law 100-702 (1988) re-wrote the *Rules Enabling Act* as a consequence of widespread discontent with the proliferation of federal court *local* rules, and because of finding that many of Local Rules conflict with the national rules of general applicability and Acts of Congress. Congress concluded that the rulemaking procedures "lacked sufficient openness," there was no meaningful opportunity for judicial review because the judges who make the rules decide whether they are valid, "and of course the barrier to interlocutory appeal built into Federal rule practice . . . made effective appellate review of such a rule impossible sometimes, impractical most times, and impolitic always." *See* David D. Siegel, *Commentary on*

1988 Revision, following text of 28 U.S.C. § 2071 p. 130-32; following text of 28 U.S.C. § 332 (West U.S.C.A. 2006).

As part of the revamp, Fed. R. Civ. Proc. 83, was subsequently amended and it also provides: "A local rule must be consistent with – federal statutes and rules adopted under 28 U.S.C. § 2072." Fed. R. App. P. 47 was also amended. It also authorizes each Appellate Court to prescribe local rules to manage its docket: "A local rule must be consistent with – but not duplicative of – Acts of Congress and rules adopted under 28 U.S.C. § 2072." The Fed. R. App. P. 47 amendment demonstrates the Congressional intent to incorporate the Section 2072 standards into local rule-making. Congress also added 28 U.S.C. § 332(d)(4), which provides:

> "Each judicial council shall periodically review the rules which are prescribed under section 2071 of this title by district courts within its circuit for consistency with rules prescribed under section 2072 of this title. Each council may modify or abrogate any such rule found inconsistent in the course of such a review."

Section 332(d)(4) was added because of the enormous barrier to effective appellate review that arises when the judges who make their local rules decide whether they are valid.

Section 2071 is concerned with each court making local rules for itself to carry out its duty. Section 2072 is concerned with the promulgation of the general

rules of national applicability. The national rules are prescribed by the Supreme Court and directly approved by Congress before they take effect. On the other hand, Local Rules are not approved by the Supreme Court or by Congress before they take effect. Accordingly, Congress cabined local rule-making discretion to assure they conform to Acts of Congress and the national rules promulgated under Section 2072. The statutory rule-making standards follow:

28 U.S.C. § 2071. *Rule-making power generally*, provides:

> (a) The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules *for the conduct of their business*. *Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed under section 2072 of this title.* (Emphasis added)

28 U.S.C. § 2072. *Rules of procedure and evidence; power to prescribe*, provides:

> (a) *The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts* (including proceedings before magistrate judges thereof) and courts of appeals. (Emphasis added)
>
> (b) *Such rules shall not abridge, enlarge or modify any substantive right.* All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect. (Emphasis added)

Section 2071 by its terms directly incorporates the Section 2072 standards. Fed. R. Civ. Proc. 83 directly incorporates the Section 2072 standard. The 28 U.S.C. § 2072 standard provides that Local Rules "*shall not abridge, enlarge, or modify any substantive right*."

Petitioners submit that the uneven Local Rules are not consistent with the National Rules or Acts of Congress. The *national* rules for federal bar admission prescribed and adopted under 28 U.S.C. § 2072 do not discriminate for or against any class of lawyers or citizens on the basis of *state admission* or *office location*. *See* Supreme Court Rule 5, Fed. R. App. P. 46. The same holds true for practice before federal administrative agencies, under a law enacted by Congress. *See* 5 U.S.C. § 500(b). The rights to counsel and to petition are not subject to forfeiture by judicial vote in these federal tribunals. The aim and intent of the D.D.C. licensing rules is to provide a discrete class of favored lawyers enhanced substantive rights and abridge and modify the substantive rights of another discrete class of disfavored lawyers.

The decisions below exempt Local Rules from any Section 2071-72 standards by holding Local Rules only need be rational. The decisions below produce irrational consequences by holding that District Courts have more discretion in prescribing local rules than this Supreme Court does in prescribing the national rules. According to the panel, in order to carry out the Court's business, Local Rules need only be rational, while national rules needed to carry out the Court's business *shall* to be consistent with Acts of Congress

and they cannot abridge, enlarge, or modify any substantive right. This interpretation makes no sense because it nullifies the rule-making standards set forth in 28 U.S.C. §§ 2071-72 and Fed. R. Civ. Proc. 83. The panel's published decision certifies that District Judges have unbridled discretion in local rule-making, and can ignore Congressional intent to put an end to the Balkanization of Local Rules and an uneven playing field in the District Courts.

The attorney-client privilege and all aspects of petitioning the District Court for redress of grievances are plainly implicated and protected by the Federal Rules of Civil Procedure. Supervisory review is also warranted because the Local Rules further contradict the scope and purpose of the Fed. R. Civ. Proc. 1 to provide an even playing field, and to ensure that all cases are decided to "secure the just, speedy, and inexpensive determination of every action." *Ibid*.

This Court should grant review because this neutral and uniform Section 2072(b) standard makes perfect sense because judges are not legislators. The Section 2072(b) standard that is textually incorporated into Section 2071 is more demanding than strict scrutiny because it applies to any substantive rights and not just constitutional rights. Section 2072(b) standard further prevents any modification or enlargement of any substantive rights, not just abridgements. The rights to counsel, petition and to be free from federal government imposed speaker, content, and viewpoint discrimination are obviously substantive rights. The panel's holding that these substantive rights are not

substantive rights, undermines the rule of law and the integrity of the Article III Courts, including this Honorable Court.

III. THIS COURT'S OWN UNIQUE SUPERVISORY REVIEW IS THE ONLY REAL OPPORTUNITY FOR MEANINGFUL JUDICIAL REVIEW OF THE HODGE-PODGE OF FEDERAL LICENSING STANDARDS

The D.D.C. Local Rules categorically exclude licensed attorneys from its bar based on non-forum licensure and office location. If District Courts and Courts of Appeal will not apply a higher than rational basis standard of review and/or defer to this Honorable Court's supervisory authority, then there is no judicial review of the Local Rules. This Honorable Court has never addressed or decided the generic question presented in this petition, which is: Can Federal District Court local rules with 21st Century technology available categorically exclude otherwise qualified attorneys in good standing from *general* admission privileges on any rational conceivable basis in the record or not? This is a question that is capable of repetition and will continue to evade judicial review, unless this Honorable Court grants review.

It is improbable that the Framers understood the Bill of Rights to protect the rights to counsel, free speech, expressive association, and petition in the Supreme Court and Courts of Appeals, but not in the District Court.

CONCLUSION

Based on the foregoing, review is warranted.

Respectfully submitted,

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United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued January 9, 2017 Decided March 14, 2017

No. 16-5020

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF MULTIJURISDICTION PRACTICE, (NAAMJP), ET AL.,
APPELLANTS

JOSE JUHUDA GARCIA AND
HERBERT HOWARD DETRICK, II,
APPELLEES

v.

BERYL A. HOWELL, CHIEF JUDGE, U.S. DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, ET AL.,
APPELLEES.

Appeal from the United States District Court
for the District of Columbia
(No. 1:13-cv-01963)

Joseph Robert Giannini argued the cause and filed the briefs for appellants. *Raymond Carignan* entered an appearance.

Brian P. Hudak, Assistant U.S. Attorney, argued the cause for appellees. With him on the brief was *R. Craig Lawrence*, Assistant U.S. Attorney.

Before: BROWN and PILLARD, *Circuit Judges*, and EDWARDS, *Senior Circuit Judge*.

Opinion for the Court filed by BROWN, *Circuit Judge*.

BROWN, *Circuit Judge*: The National Association for the Advancement of Multijurisdiction Practice ("NAAMJP") has conducted a thirty-year campaign to overturn local rules of practice limiting those who may appear before a particular state or federal court. *See NAAMJP v. Simandle*, 658 F. App'x 127, 130 (3d Cir. 2016) (noting NAAMJP has "crisscrossed the United States, challenging local bar admission rules"); *Blye v. California Supreme Court*, No. 11-cv-5046, 2014 WL 229830, at *2 n.3 (N.D. Cal. Jan. 21, 2014) (collecting cases dating back to 1987). We now join the chorus of judicial opinions rejecting these futile challenges. *See, e.g.*, *Simandle*, 658 F. App'x 127; *NAAMJP v. Lynch*, 826 F.3d 191 (4th Cir. 2016); *Giannini v. Real*, 911 F.2d 354 (9th Cir. 1990).

In the present case, NAAMJP and two of its members allege bar admission conditions for the United States District Court for the District of Columbia, established in the identical text of Local Civil Rule 83.8 and Local Criminal Rule 57.21 (collectively, the "Local Rule"), violate statutory and constitutional legal standards. Specifically, the Local Rule provides:

> Admission to and continuing membership in the Bar of this Court are limited to: (1) attorneys who are active members in good standing in the District of Columbia Bar; or

> (2) attorneys who are active members in good standing of the Bar of any state in which they maintain their principal law office; or (3) in-house attorneys who are active members in good standing of the Bar of any state and who are authorized to provide legal advice in the state in which they are employed by their organization client.

D.D.C. Local Civ. R. 83.8(a); D.D.C. Local Crim. R. 57.21(a). NAAMJP focuses its challenge on the second option, the Primary Office Provision.

Defendants – Judges of the United States District Court for the District of Columbia (the "District Court") and former Attorney General Loretta Lynch – moved to dismiss NAAMJP's complaint; the district court granted the motion in a thorough and thoughtful opinion.[1] Nonetheless, NAAMJP argues on appeal that the Local Rule (1) violates the Rules Enabling Act, 28 U.S.C. §§ 2071 and 2072; (2) runs afoul of the Supreme Court's decision in *Frazier v. Heebe*, 482 U.S. 641 (1987); (3) improperly applies rational basis review; and (4) violates 28 U.S.C. § 1738, admission requirements of other federal courts and administrative agencies, and the First Amendment to the U.S. Constitution. Because each of these arguments lack merit, we affirm.

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[1] The Honorable Nathaniel M. Gorton of the United States District Court for the District of Massachusetts, sitting by designation, presided over this case below.

I.

As an initial matter, the district court properly concluded it lacked subject-matter jurisdiction to adjudicate (1) all claims brought by Patent Lawyer Doe ("Doe") and (2) all claims asserted against the Attorney General.

Both the Amended Complaint and Doe's Declaration fail to articulate any actual and imminent injury, which is necessary to establish Article III standing in this case. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562-64 (1992). Indeed, Doe does not describe where he practices law or otherwise suggest the Local Rule's Principal Office Provision has inhibited his legal practice. Conclusory assertions of harm, or reference to Doe's practice at a "Big Law firm in San Diego" in briefing on appeal, *see* NAAMJP Br. 7, do not remedy this deficiency.

Additionally, NAAMJP has failed to identify any role whatsoever of the Attorney General – or any member of the executive branch, for that matter – in promulgating or enforcing the District Court's local rules. Accordingly, the district court properly dismissed Doe and the Attorney General.

II.

On the merits, NAAMJP argues the district court improperly applied the Rules Enabling Act, which permits judges to proscribe rules governing practice before their court. Specifically, 28 U.S.C. § 2071 states,

> The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed under section 2072 of this title.

28 U.S.C. § 2071(a). The "rules of practice and procedure prescribed under section 2072 of this title" are rules adopted by the Supreme Court of the United States:

> The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals. . . . Such rules shall not abridge, enlarge or modify any substantive right.

28 U.S.C. § 2072(a)-(b).

The Local Rule at issue here is indisputably "for the conduct of [the District Court's] business," *id.* § 2071(a); it explains which attorneys may practice before the District Court. Moreover, as explained below, the Principal Office Provision does not contravene any Act of Congress or "rules of practice and procedure" adopted by the Supreme Court. *See id.* § 2072(a). As the Third Circuit recently remarked, "The matter is no more complicated than that." *Simandle*, 658 F. App'x at 134 (adopting the Fourth Circuit's analysis in *Lynch*, 826 F.3d at 197).

Nonetheless, NAAMJP argues Sections 2071 and 2072 interlock, contending rules promulgated pursuant to Section 2071 must comply with Section 2072's mandate that "[s]uch rules shall not abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b). Several courts of appeals have summarily rejected this argument. *See Lynch*, 826 F.3d at 197. Here, it suffices to note NAAMJP has failed to identify any substantive right – whether constitutional, statutory, or derived from national federal rules – that has been infringed by the Local Rule. Accordingly, NAAMJP cannot sustain its Rules Enabling Act challenge.

III.

NAAMJP relies heavily on the Supreme Court's decision in *Frazier v. Heebe*, claiming it directly invalidates the Local Rule. But in *Frazier*, the Supreme Court exercised *its own unique supervisory authority* to overturn a local rule regarding bar admission in the Eastern District of Louisiana and, in so doing, made no constitutional ruling. 482 U.S. at 645 ("Pursuant to our supervisory authority, 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. We therefore need not address the constitutional questions presented."). No similar authority vests in a single district court judge. Rather, "[a] rule of a district court . . . remain[s] in effect unless modified or abrogated *by the judicial council of the relevant circuit.*" 28 U.S.C. § 2071(c)(1) (emphasis added).

The "judicial council," in turn, is a body comprised of "the chief judge of the circuit" and "an equal number of circuit judges and district judges of the circuit." *Id.* § 332(a)(1). A single district court judge or an appellate panel may not usurp that body's authority.[2] While this point may be "hyper-technical[ ]," NAAMJP Reply Br. 7, it is the law.

IV.

Although NAAMJP does not identify the district court's equal protection holding as an issue under review, or otherwise clearly argue the district court erred in dismissing the Fifth Amendment claim, it nonetheless argues Judge Gorton erroneously applied "rational basis review" to resolve its claims.

To assess an equal protection claim, this Court begins by determining the appropriate standard of review. If a rule does not infringe a fundamental right or disadvantage a suspect class, no more than rational basis review is required. *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993). Such a rule "comes . . . bearing a strong presumption of validity, and those attacking the rationality of the [rule] have the burden to negative every conceivable basis which might support

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[2] NAAMJP argues *Frazier* created a standard of review requiring district court rules to meet a two-pronged "rational" and "necessary" test. NAAMJP Br. 17-18. The contention finds no support in the *Frazier* majority opinion, and we easily reject it.

it." *Id.* at 314-15. Accordingly, "[w]here there are plausible reasons for [the challenged rule], our inquiry is at an end." *Id.* at 313-14.

Here, the Principal Office Provision is properly subject to rational basis review. For purposes of the Equal Protection Clause, it neither burdens a fundamental right nor targets a suspect class. *See Lynch*, 826 F.3d at 196; *Simandle*, 658 F. App'x at 137. It distinguishes among attorneys based on whether they have been admitted to the bar of the state where their principal law office is located, not on the basis of residency or any protected characteristic. *See* NAAMJP Reply Br. 5 (conceding the Local Rule discriminates "on the basis of office location"). For the same reason, any claim of heightened scrutiny under the Privileges and Immunities Clause also fails. *Cf. Barnard v. Thorstenn*, 489 U.S. 546 (1989) (invalidating a rule requiring Virgin Islands bar applicants to establish year-long residence and intent to remain in the Virgin Islands under the Privileges and Immunities Clause).

Here, the Principal Office Provision ensures attorneys who practice before the District Court – but who avoid supervision by the D.C. Bar Association – are subject to supervision by the state to which their practice is most geographically proximate. The Principal Office Provision embodies a reasonable assumption: local licensing control is better positioned to facilitate training sessions, conduct monitoring programs, and field complaints from the public – all rational bases for the Local Rule. Indeed, much more restrictive district court rules have passed rational basis review in other

circuits. *See, e.g.*, *Simandle*, 658 F. App'x at 130 (District of New Jersey admits only New Jersey bar members); *Lynch*, 826 F.3d at 194-95, 197 (District of Maryland's principal office provision is limited to those jurisdictions with reciprocity for District of Maryland bar members).[3]

V.

NAAMJP raises a number of additional claims under the Constitution and federal statutes. Each fails for the reasons discussed below.

First, NAAMJP asks this Court to declare the Local Rule invalid because it abridges the full faith and credit owed to State actions under 28 U.S.C. § 1738. But NAAMJP does not identify any state action that should compel the D.C. District Court to allow attorneys admitted in other jurisdictions to handle cases in that court. Indeed, there is none, and NAAMJP's Section 1738 claim must fail. *See, e.g.*, *Real*, 911 F.2d at 360 ("Giannini's claim lacks merit because no act, record or judicial proceeding, in New Jersey or Pennsylvania, states that Giannini is entitled to practice law in California."); *Simandle*, 658 F. App'x at 134 n.11 ("Of course, New York's judgment that an individual should

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[3] NAAMJP also claims this case involves structural error. But structural error does not refer to a heightened standard of review. *Arizona v. Fulminante*, 499 U.S. 279, 309-10 (1991) (discussing structural error, which "def[ies] analysis by harmless error standards" because it "affec[ts] the framework within which the trial proceeds" and is not "simply an error in the trial process itself"). Accordingly, the claim lacks merit.

be admitted to its own bar establishes only that fact (*i.e.*, admission to the state bar of New York), and does not even purport to require nationwide bar membership.").

Second, NAAMJP alleges the Local Rule violates admission requirements of other courts and governmental bodies, including Supreme Court Rule 5, setting forth rules for admission to the Supreme Court Bar; Federal Rule of Appellate Procedure 46, establishing general procedures for admission to the bars of the U.S. Courts of Appeals; and rules governing practice before federal administrative agencies. By their plain text, these rules apply only to the bodies that promulgated them, and they do not control the admission requirements of federal district courts. *See, e.g.*, *Real*, 911 F.2d at 360 ("The Supreme Court's Rule only concerns admission to practice before that court. It does not prescribe the requirements to practice before federal district courts. The district court admission rules differ from the Supreme Court admission rules but are not inconsistent in that they each deal with separate courts. Local District Court Rules are not required to mirror Supreme Court Rules."). NAAMJP fails to identify a single rule that reaches beyond its promulgating tribunal to apply to the District Court.

Third, and finally, NAAMJP mounts a First Amendment challenge to the Local Rule, arguing it violates both speech and petition rights. *See* U.S. CONST. amend. I.

Contrary to NAAMJP's suggestion, the Local Rule is not an unconstitutional content-based restriction on speech. Generally, the government may "license and regulate those who would provide services to their clients for compensation without running afoul of the First Amendment." *Moore-King v. Cty. of Chesterfield*, 708 F.3d 560, 569 (4th Cir. 2013); *see also Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 459 (1978) ("A lawyer's procurement of remunerative employment is a subject only marginally affected with First Amendment concerns. It falls within the State's proper sphere of economic and professional regulation."). Accordingly, "[i]f the government enacts generally applicable licensing provisions limiting the class of persons who may practice the profession, it cannot be said to have enacted a limitation on freedom of speech or the press subject to First Amendment scrutiny." *Lowe v. SEC*, 472 U.S. 181, 232 (1985) (White, J., concurring in the result). "Regulations on entry into a profession, as a general matter, are constitutional if they 'have a rational connection with the applicant's fitness or capacity to practice' the profession." *Id.* at 228 (quoting *Schware v. Bd. of Bar Exam'rs*, 353 U.S. 232, 239 (1957)).

Indeed, our sister circuits have rejected NAAMJP's First Amendment challenges to local rules in other district courts for this very reason, finding "the First Amendment does not come into play" when considering restrictions on admission similar to the Principal Office Provision. *Lynch*, 826 F.3d at 196; *see also*, *e.g.*, *NAAMJP v. Castille*, 799 F.3d 216, 220-21 (3d Cir.

2015). Here, the Local Rule "does not discriminate on the basis of the subject matter or viewpoint of any bar applicant's speech, the area of law an applicant would practice, or the clients an applicant would represent." *Castille*, 799 F.3d at 220. Nor does it "regulate when, where, or how attorneys speak, [or] prohibit a category of professional speech." *Id.* at 221. The Principal Office Provision merely regulates the profession in a manner that, as described above, passes rational basis review.

Further, as the district court noted, "[t]he Petition Clause of the First Amendment [as it is invoked here] protects the rights of individuals to access the courts for the resolution of legal disputes." *NAAMJP v. Roberts*, 180 F. Supp. 3d 46, 63 (D.D.C. 2015); *see Borough of Duryea v. Guarnieri*, 564 U.S. 379, 387 (2011). But the Local Rule affects only attorneys wishing to appear before the District Court. And NAAMJP has not established that the Principal Office Provision has prevented private litigants from accessing courts. *See Lynch*, 826 F.3d at 196 n.7 (dismissing NAAMJP's challenge to the rule at issue as "meritless and utterly inapplicable"). Accordingly, NAAMJP's First Amendment arguments fail.[4]

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[4] While NAAMJP raises the district court's determination with respect to the right to free association, it does not develop this argument in its opening brief. Accordingly, the claim is forfeited. *See Cement Kiln Recycling Coal. v. EPA*, 255 F.3d 855, 869 (D.C. Cir. 2001) ("A litigant does not properly raise an issue by addressing it in a cursory fashion with only bare-bones arguments."). In any event, as Judge Gorton clearly held, these claims are baseless. *See Lynch*, 826 F.3d at 196 n.7. NAAMJP's members are free to associate with D.C. District Court Bar members – but

VI.

The Court does not doubt the sincerity of NAAMJP's convictions or its eagerness to reduce barriers to legal practice in the various state and federal courts across the country. Indeed, there may be good *policy* reasons for the outcomes NAAMJP urges. But, as has been amply demonstrated in dozens of legal opinions penned by judges across the country, NAAMJP has identified no *legal* basis upon which to compel federal or state courts to adopt the rules it desires. Accordingly, the judgment of the district court is

Affirmed.

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they must follow one of the multiple paths set forth in the District Court's rules in order to do so.

United States District Court
District of Columbia

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF MULTIJURISDICTION PRACTICE, JOSE JEHUDA GARCIA, MARINNA L. CALLAWAY and HERBERT HOWARD DETRICK, II, **Plaintiffs,** **vs.** **RICHARD W. ROBERTS, EMMET G. SULLIVAN, COLLEN KOLLAR-KOTELLY, ELLEN S. HUVELLE, REGGIE B. WALTON, JOHN D. BATES, RICHARD J. LEON, ROSEMARY M. COLLYER, BERYL A. HOWELL, ROBERT L. WILKINS, JAMES E. BOASBERG, AMY BERMAN JACKSON, RUDOLPH CONTRERAS, KETANJI BROWN JACKSON and ERIC H. HOLDER, JR.,** **Defendants.**	)	**Civil Action No. 13-01963-NMG**

MEMORANDUM & ORDER

GORTON, J.

This case involves allegations that Local Rule 83.8(a)(2) of the United States District Court for the District of Columbia ("D.D.C.") violates federal statutory and constitutional law in requiring certain attorneys, as a condition of bar admission and continuing membership, to be active members in good standing of the Bar of the states in which they maintain their principal law offices.

Pending before this Court are defendants' motion to dismiss the amended complaint and plaintiffs' motion for summary judgment. For the reasons that follow, defendants' motion to dismiss will be allowed and plaintiffs' motion for summary judgment will be denied.

I. Background

A. Challenged rule

Plaintiffs contest the statutory and constitutional validity of D.D.C. Local Rule 83.8(a) which provides that:

> Admission to and continuing membership in the Bar of this Court are limited to:
>
> (1) attorneys who are active members in good standing in the District of Columbia Bar; or

> (2) attorneys who are active members in good standing of the Bar of any state *in which they maintain their principal law office*; or
>
> (3) in-house attorneys who are active members in good standing of the Bar of any state and who are authorized to provide legal advice in the state in which they are employed by their organization client.

D.D.C. R. 83.8(a) (emphasis added). Specifically, plaintiffs object to the "principal law office" provision in D.D.C. Rule 83.8(a)(2) and seek to have that restriction removed from the rule.

B. Parties

Plaintiff National Association for the Advancement of Multijurisdiction Practice ("NAAMJP") is a California public benefit corporation that

> engage[s] in interstate commerce and advocacy throughout the United States for the purpose of improving the legal profession, by petitioning for admission on motion in the dwindling minority of jurisdictions that have not yet adopted the [American Bar Association's] recommendations for reciprocal admission for all lawyers.

NAAMJP claims that the challenged rule prevents its members from joining the D.D.C. Bar.

Plaintiff Jose Jehuda Garcia ("Garcia") is a member of NAAMJP and an attorney who is admitted to, and in good standing of, the Bar of the New Mexico

Supreme Court. He asserts that he is injured by the "principal law office" provision of the rule.

Plaintiff Marinna L. Callaway ("Callaway") is a member of NAAMJP and an attorney who practices in California. She contends that she is "categorically disqualified" from admission to the D.D.C. Bar under the rule because her principal law office is located in "California, a state which refuses her admission." She submits that she would apply for admission to the D.D.C. Bar if defendants were to remove the "principal law office" provision from its rule.

Plaintiff Herbert Howard Detrick, II ("Detrick") is an attorney admitted to, and in good standing of, the bars of several state and federal courts, including the Supreme Courts of New York, New Jersey, Connecticut and Florida and the United States District Courts for the Southern and Eastern Districts of New York and the District of New Jersey. He alleges that he has moved between states several times and that his principal law office is currently located in Zurich, Switzerland. Detrick proclaims that he has

> essentially wasted tens of thousands of dollars and hours in preparing to take repetitive state bar exams and waiting for his results.

He asserts that he is injured by the existing rule and that he would apply for admission to the D.D.C. Bar if defendants were to remove the "principal law office" provision from the rule.

The remaining plaintiff, "Patent Lawyer Doe," is an unnamed member of NAAMJP and a patent lawyer who claims that he is injured by the rule because he is not admitted in the state where his principal law office is located and thus is precluded from admission to the D.D.C. Bar.

Defendants are 1) the Chief Judge and thirteen active United States District Judges of the United States District Court for the District of Columbia at the time of the filing of the complaint and 2) the United States Attorney General at the time of the filing of the complaint. Plaintiffs assert claims against defendants in their official capacities.

C. Procedural history

In December, 2013, plaintiffs filed a complaint in the U.S. District Court for the District of Columbia claiming that the then-existing D.D.C. Local Rule 83.8(a)(2), which contained a prior version of the "principal law office" provision in conjunction with a reciprocity requirement, violated 1) the Rules Enabling Acts of 28 U.S.C. §§ 2071 and 2072, 2) the Supremacy Clause, 3) the First Amendment rights to free speech, free association and petition and 4) the Fifth Amendment rights to equal protection and due process. The case was initially assigned to D.D.C. United States Senior District Judge Thomas F Hogan.

In March, 2014, Judge Hogan allowed defendants' motion to stay the case until defendants voted on a proposal by the District Court's Rules Committee to

remove the reciprocity requirement from the D.D.C. Local Rules. In June, 2014, defendants voted to approve the amended version of D.D.C. Local Rule 83.8(a)(2) that plaintiffs now challenge.

In July, 2014, plaintiffs filed an amended complaint asserting that the "principal law office" provision of D.D.C. Local Rule 83.8(a)(2) violated 1) the Rules Enabling Acts of 28 U.S.C. §§ 2071 and 2072 (Count 1), 2) the Supremacy Clause (Count 2), 3) the First Amendment rights to free speech, free association and petition (Count 3 and 4) the Fifth Amendment rights to equal protection and due process (Counts 4 and 5). Plaintiffs seek a) an order declaring the "principal law office" provision of D.D.C. Local Rule 83.8(a)(2) unconstitutional, b) an injunction against its enforcement and c) an order declaring that the D.D.C. Local Rules shall provide

> general bar admission privileges to all sister-state attorneys admitted to the highest court of any state.

Shortly thereafter, Judge Hogan allowed a joint motion of the parties to stay the case pending resolution of plaintiffs' motion to transfer the instant action and related actions in other district courts to the United States Judicial Panel on Multidistrict Litigation as one consolidated case. The motion to transfer was denied and, in November, 2014, Judge Hogan, upon consideration of plaintiffs' motion for recusal, plaintiffs' affidavit of bias and defendants' response,

voluntarily recused himself "to further the fair administration of justice in this case." The case was randomly reassigned to D.D.C. United States Senior District Judge Randolph D. Moss.

Defendants filed the instant motion to dismiss the amended complaint in November, 2014 and plaintiffs filed their pending motion for summary judgment in January, 2015.

Jurisdictional concerns were time consuming but ultimately, the case was reassigned to the D.D.C. Calendar Committee and then, in November, 2015, by the Chief Justice of the United States to this judicial officer to sit by designation on the United States District Court for the District of Columbia.

In December, 2015, this Court convened a hearing on the pending motions for dismissal and summary judgment. The Court has now heard oral argument from the parties and proceeds to decide the case.

II. Standing

Defendants contend in their motion that the Court should dismiss the complaint because all plaintiffs lack standing.

A. Legal standard

The Article III jurisdiction of a federal court is limited to "Cases" and "Controversies" in which the claimant has standing to litigate before the court. *Lujan* v.

Defenders of Wildlife, 504 U.S. 555, 559-60 (1992). In order to establish constitutional standing, a plaintiff must show 1) an injury in fact, 2) a causal connection between the injury and the conduct complained of, such that the injury is fairly traceable to that conduct and 3) a likelihood that the injury will be redressed by a favorable decision. *Id.* at 560-61. An injury in fact is one that is "concrete and particularized and [] actual or imminent, not conjectural or hypothetical." *Id.* at 560 (internal citations and quotation marks omitted). A plaintiff claiming a prospective injury has standing "where the threatened injury is real, immediate, and direct." *Davis* v. *Fed. Election Comm'n*, 554 U.S. 724, 734 (2008).

B. Application

1. Individual plaintiffs

Defendants contend that the individual plaintiffs lack standing for several reasons. Defendants first claim that the individual plaintiffs lack qualifying injuries because they fail to allege

> that they are not members of the [District of Columbia ("D.C.")] Bar, that they have applied for admission to the [D.C.] Bar or for admission to the Bar of this Court and been rejected, or that they have actual or prospective clients with cases before this Court, whose engagements they may not pursue due to ineligibility for admission to the Bar of this Court.

Defendants concede that Callaway and Detrick submit that they would apply for admission if the "principal law office" provision were removed from the rule, an injury that defendants argue is too conclusory to be "concrete and particularized and . . . actual or imminent," given that plaintiffs could seek to appear *pro hac vice* in court. Defendants, however, assert that the amended complaint does not allege that Garcia, Callaway and Doe are each licensed by at least one state bar and that his or her principal law office is located outside of the licensing state.

Defendants conclude that, as a result, the amended complaint fails to establish injury, causation or redressability for those plaintiffs. Defendants also submit that the amended complaint fails to allege that the individual plaintiffs are ineligible for admission to the D.C. Bar which, defendants suggest, indicates that 1) the individual plaintiffs can seek admission to the D.D.C. Bar under the alternative route provided by D.D.C. Local Rule 83.8(a)(1) and thus 2) their injury pursuant to the challenged rule is "necessarily reduce[d] to the mere inconvenience" of seeking admission to the D.D.C. Bar under Rule 83.8(a)(1).

After accepting all factual allegations as true and drawing all reasonable inferences in plaintiffs' favor, as the Court must in deciding a motion to dismiss, the Court finds that individual plaintiffs Callaway and Detrick have constitutional standing to pursue their claims against the named judges. Callaway and Detrick each claim a qualifying injury in fact: ineligibility for admission to the D.D.C. Bar based on his or

her inability to satisfy the "principal law office" requirement in Rule 83.8(a)(2).

If Callaway or Detrick were to apply for admission to the D.D.C. Bar under the existing version of Rule 83.8(a)(2), their applications would be denied. Callaway is an attorney who is admitted, and who is presumably active and in good standing, in Illinois but not in California, the state in which she has her principal law office. Detrick is an attorney who is admitted, and who is presumably active and in good standing, in at least one state but his principal law office is not located in any of the United States.

Neither Callaway nor Detrick would satisfy Rule 83.8(a)(2) which requires attorneys to be

> active members in good standing of the Bar of any state in which they maintain their principal law office.

D.D.C. R. 83.8(a)(2). It is sufficient for the amended complaint to contend that Callaway and Detrick would apply for admission to the D.D.C. Bar under Rule 83.8(a)(2) in the absence of the "principal law office" provision. The prospective injuries that Callaway and Detrick face under the existing rule are real, immediate, direct and fairly traceable to the "principal law office" provision of the challenged rule. A court order directing the judges of this Court to remove that provision from the rule would redress the purported injuries. A court order directing the Attorney General to do the same, however, would not redress those injuries

because that Cabinet officer plays no role in promulgating or enforcing the local rules of federal courts.

Individual plaintiffs Garcia and Doe, in contrast, have not alleged sufficient facts to establish the requisite injury in fact and thus do not have constitutional standing to bring their claims.[1] Although Garcia and Doe make the bare assertions that they are injured or disabled by the challenged rule, the Court cannot reasonably infer from those assertions that either Garcia or Doe would apply for admission to the D.D.C. Bar under Rule 83.8(a)(2) in the absence of the "principal law office" provision. The injuries that Garcia and Doe face are merely speculative and do not constitute concrete, actual or imminent injuries in fact.

The principle that a plaintiff with a First Amendment overbreadth challenge may be subject to more lenient standing requirements than those set forth by the constitutional standing doctrine does not excuse Garcia or Doe from satisfying those constitutional standing requirements. The overbreadth principle as described in *Broadrick* v. *Oklahoma*, 413 U.S. 601 (1973), creates

> an exception to additional prudential standing doctrines which normally prevent parties

[1] The amended complaint declares that Doe "desires to remain anonymous because of privacy reasons and because he fears reprisal against himself and his clients should his identity become public knowledge." The Court concludes that neither of the purported justifications for anonymity is sufficient and that even if his claims were otherwise viable, they would be dismissed for failure to state a claim unless he pled them in his true name.

> from litigating the rights of others in federal court . . . Under no circumstances, however, does the overbreadth doctrine relieve a plaintiff of its burden to show constitutional standing. [Plaintiff's] overbreadth challenge must therefore meet the [constitutional standing] requirements set forth in *Lujan*.

Advantage Media, L.L.C. v. *City of Eden Prairie*, 456 F.3d 793, 799 (8th Cir. 2006) (citing *CAMP Legal Defense Fund, Inc.* v. *City of Atlanta*, 451 F.3d 1257, 1269-72 (11th Cir. 2006)). *See also Sec'y of State of Md.* v. *Joseph H. Munson Co., Inc.*, 467 U.S. 947, 955-56 (1984) (finding that claims must satisfy the Article III standing requirements but that First Amendment concerns "justify a lessening of *prudential* limitations on standing") (emphasis added). Thus, the observation that Garcia and Doe raise an overbreadth claim under the First Amendment does not overcome the finding that those plaintiffs lack constitutional standing.

Accordingly, the Court finds that Callaway and Detrick have standing to bring their claims against the judges of the District Court for the District of Columbia. The claims raised by Callaway and Detrick against the Attorney General will be dismissed for lack of standing. The claims raised by Garcia and Doe will be dismissed in their entirety.

2. Association plaintiff

An association may assert claims on behalf of its members

> [1] when its members would otherwise have standing to sue in their own right, [2] the interests at stake are germane to the organization's purpose, and [3] neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

Friends of the Earth, Inc. v. *Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000).

NAAMJP satisfies the three requirements of associational standing because 1) Callaway is a NAAMJP member who has individual standing to pursue her claims against the named judges, as discussed above, 2) the existence and continuing enforcement of the "principal law office" provision in Rule 83.8(a)(2) implicates the core interest of NAAMJP in advocating for the uniform adoption of "the [American Bar Association's] recommendations for reciprocal admission for all lawyers" and 3) plaintiffs assert facial challenges and seek declaratory and injunctive relief that do not require the participation of individual NAAMJP members in the action.

Accordingly, the Court finds that NAAMJP has associational standing to bring its claims against the judges of the District Court for the District of Columbia. The claims that NAAMJP asserts against the Attorney General will be dismissed.

III. <u>Legal standards</u>

A. Motion to dismiss

To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 570 (2007). In considering the merits of a motion to dismiss, the Court must resolve all factual doubts and make all factual inferences in the plaintiff's favor. *Tele-Commc'ns of Key West, Inc.* v. *United States*, 757 F.2d 1330, 1335 (D.C. Cir. 1985). Threadbare recitals of the legal elements, supported by mere conclusory statements, do not suffice to state a cause of action. *Ashcroft* v. *Iqbal*, 556 U.S. 662, 678 (2009). A complaint does not state a claim for relief where the well-pled facts fail to warrant an inference of any more than the mere possibility of misconduct. *Id.* at 679.

B. Motion for summary judgment

A party seeking summary judgment has the burden of showing that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A fact is material if it "might affect the outcome of the suit under the governing law. . . ." *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A genuine issue of material fact exists where the evidence with respect to the material fact in dispute "is such that a reasonable jury could return a verdict for the nonmoving party." *Id.*

If the moving party satisfies its burden, then the burden shifts to the non-moving party to set forth specific facts showing that there is a genuine, triable issue. *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 324 (1986). The non-moving party must also present sufficient evidence that could lead a reasonable jury to return a verdict in its favor. *Anderson*, 477 U.S. at 248. The Court must view the entire record in the light most favorable to the non-moving party and make all reasonable inferences in that party's favor. *Id.* at 255.

IV. Application

A. Rules Enabling Acts, 28 U.S.C. §§ 2071, 2072

Count 1 of the amended complaint alleges that Rule 83.8(a)(2) violates the Rules Enabling Acts located at 28 U.S.C. §§ 2071 and 2072. Section 2071 provides that:

> The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed under [28 U.S.C. § 2072].

28 U.S.C. § 2071(a). Section 2072, in turn, provides that:

> The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts. . . . Such rules

> shall not abridge, enlarge or modify any substantive right.

28 U.S.C. § 2072(a)-(b).

The amended complaint contends that § 2071 incorporates the standards set forth in § 2072, such that a rule which violates the "substantive right" provision in § 2072 necessarily violates both §§ 2071 and 2072. Plaintiffs explain that the "principal law office" requirement violates the "substantive right" provision in § 2072 because it abridges a substantive right by 1) withholding general admission privileges from plaintiffs and attorneys who are not members of the D.D.C. Bar, 2) abridging and modifying the Sixth Amendment right to counsel and the First Amendment rights to association and petition, 3) preventing plaintiffs from exercising their constitutional rights to admission on motion to the D.D.C. Bar pursuant to the Privileges and Immunities Clause of Article IV, section 2 and 4) restricting plaintiffs' statutory rights to litigate before the United States Supreme Court, the U.S. Circuit Courts of Appeals and the federal agencies, pursuant to Sup. Ct. R. 5, Fed. R. App. P. 46 and 5 U.S.C. § 500(b). As a result, plaintiffs conclude, Rule 83.8(a)(2) violates §§ 2071 and 2072.

Defendants insist that § 2072, on its face, does not apply to Rule 83.8(a)(2) because 1) section 2072 expressly applies to district court rules prescribed by the United States Supreme Court, 2) Rule 83.8(a)(2) is a district court rule prescribed by the District Court for

the District of Columbia and thus 3) Rule 83.8(a)(2) does not fall within the scope of § 2072.

Defendants also submit that a plain reading of the text of § 2071 demonstrates that 1) section 2071 expressly provides that rules prescribed by the district courts must be consistent with the *rules* promulgated under § 2072, 2) section 2071 does not, however, require rules prescribed by the district courts to be consistent with the *requirements* contained in § 2072 and thus 3) section 2071 does not incorporate the "substantive right" provision set forth in § 2072. As a result, defendants declare, plaintiffs "misread the statutory scheme" in contending that Rule 83.8(a)(1) violates § 2071 as a consequence of violating the "substantive right provision" in § 2072.

Defendants thus conclude that plaintiffs fail to state a violation of either § 2071 or § 2072. In addition, they proclaim that even if the "substantive rights" provision in § 2072 did apply to Rule 83.8(a)(2), plaintiffs' claims would fail because there is no substantive right to practice law before a court without limitation.

The Court agrees with defendants and finds that plaintiffs have not adequately alleged violations of either § 2071 or § 2072. Section 2072, based on a plain reading of its text, does not apply to Rule 83.8(a)(2) because that rule was promulgated by a district court and not by the United States Supreme Court.

Section 2071, in contrast, does apply to Rule 83.8(a)(2) but it 1) requires only that rules prescribed by district courts be consistent with federal statutes

and rules prescribed under § 2072 and 2) does not incorporate the requirements set forth in § 2072 and thus does not incorporate the "substantive right" provision in § 2072. The amended complaint fails to assert a violation of § 2071 because it identifies no federal statute or rule issued pursuant to § 2072 with which Rule 83.8(a)(2) is inconsistent. Plaintiffs' references to Sup. Ct. R. 5, Fed. R. App. P. 46 and 5 U.S.C. § 500(b) are misguided because Rule 83.8(a)(2) governs only the admission of attorneys to the Bar of the District Court for the District of Columbia and does not affect the admission of attorneys to any other court or tribunal. This Court declines to consider plaintiffs' new arguments with respect to Fed. R. Civ. P. 83(a) because plaintiffs cannot rely upon contentions raised for the first time in subsequent briefings to repair defects in the amended complaint.

Even if the amended D.D.C. rule were subject to the "substantive right" provision in § 2072, the amended complaint falls short of alleging a violation of the Rules Enabling Acts because, as discussed below in the overbreadth analysis, there is no protected right to practice law in a particular court without first complying with that court's requirements for admission.

Plaintiffs' reliance on the decision of the United States Supreme Court in *Frazier* v. *Heebe*, 482 U.S. 641 (1987), is to no avail. The plaintiff in the *Frazier* case challenged Rule 21.2, a local rule prescribed by the District Court for the Eastern District of Louisiana that required, as a condition of admission, attorneys

who had already passed the Louisiana Bar Examination also to be in-state residents or to maintain in-state offices. *Frazier*, 482 U.S. at 643, 646. The Supreme Court invalidated the in-state residency and in-state office requirements by exercising its

> supervisory authority to prohibit arbitrary discrimination against members of the Louisiana Bar, residing and having their office out-of-state, who are otherwise qualified to join the Bar of the Eastern District.

Id. at 646. The analysis and holding of the *Frazier* court do not, however, apply to the instant case because Rule 21.2, which subjected lawyers who were already members of the Louisiana Bar to in-state residency and office requirements, is fundamentally distinguishable from Rule 83.8(a)(2). The D.D.C. rule subjects lawyers to a "principal law office" requirement but does not require them to live or work in a particular jurisdiction. Furthermore, the *Frazier* court based its invalidation of Rule 21.2 entirely upon an exercise of the "supervisory power that the [United States Supreme Court] has over lower federal courts," see *id.* at 646, n.4. That is a power missing from the arsenal of this Court. This Court therefore finds plaintiffs' reliance upon the *Frazier* decision unpersuasive and inapposite.

Accordingly, plaintiffs have failed to state a claim under the Rules Enabling Acts upon which relief can be granted.

B. Supremacy Clause

Plaintiffs claim in Count 2 that the "principal law office" provision violates the Supremacy Clause which provides that:

> [T]he laws of the United States . . . shall be the supreme law of the land . . . , anything in the Constitution or laws of any State to the contrary notwithstanding.

U.S. Const. art. VI, cl. 2. Although plaintiffs appear to have conceded their Supremacy Clause claim at oral argument, the Court considers the merits of that claim in the interest of completeness.

Federal law preempts state law pursuant to the Supremacy Clause when 1) Congress expressly provides for preemption of state law in the federal statute, 2) the state law conflicts with a federal statute or 3) the scope of the federal statute indicates that Congress intended the federal law to exclusively occupy the field. *Kurns* v. *R.R. Friction Prods. Corp.*, 132 S. Ct. 1261, 1265-66 (2012).

The amended complaint simply does not identify a state law that allegedly would be preempted by federal law. Rule 83.8(a)(2) is a rule prescribed by a federal court pursuant to its authority under 28 U.S.C. § 2071, a federal statute. The allegations that plaintiffs present in Count 2 do not implicate the laws of any state or of the District of Columbia. Their reliance on *Sperry* v. *Florida*, 373 U.S. 379 (1963), is misplaced because that case involved state laws while the instant case does not. *See Sperry*, 373 U.S. at 384-88 (holding that

state licensing requirements were preempted by the federal statute and regulations allowing non-lawyers to practice before the U.S. Patent Office).

Plaintiffs' reliance on *Augustine* v. *Dep't of Veterans Affairs*, 429 F.3d 1334 (Fed. Cir. 2005), is also inapt. The *Augustine* court held that federal statutes and regulations cannot adopt or incorporate state law standards as their own standards unless Congress or the regulatory agency clearly intended such adoption or incorporation to occur. *Augustine*, 429 F.3d at 1340. Here, the statutory text of § 2071 indicates that Congress clearly intended federal courts to develop their own rules of practice and procedure, and the text of Rule 83.8(a)(2) demonstrates that the drafters of that rule clearly intended to condition bar admission on compliance with the bar licensing requirements of the state in which that attorney has his or her principal law office. Thus, the "principal law office" requirement laid out in Rule 83.8(a)(2) does not violate the *Augustine* principle.

Accordingly, the amended complaint fails to allege a violation of the Supremacy Clause and that claim will be dismissed.

C. First Amendment

In Count 3, plaintiffs challenge Rule 83.8(a)(2) under the First Amendment to the United States Constitution as 1) a substantially overbroad restriction of speech, 2) an unconstitutional prior restraint on speech, 3) a provision that unlawfully discriminates

against speech based on the content and viewpoint expressed, 4) a violation of the right to petition and 5) a violation of the right to association.

Although plaintiffs also seem to have conceded their First Amendment claims at oral argument, the Court again briefly considers the merits of those claims in the interest of completeness.

1. Speech

a. Overbreadth

A law that restricts speech is overly broad and unconstitutional if it

> punishes a substantial amount of protected free speech, judged in relation to [its] plainly legitimate sweep.

Virginia v. *Hicks*, 539 U.S. 113, 118-19 (2003). Facial invalidation of a law under the overbreadth doctrine is "strong medicine [that should be applied] sparingly and only as a last resort." *Broadrick*, 413 U.S. at 613. A court should not facially invalidate a law that

> reflects legitimate [government] interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct [or speech].

Virginia, 539 U.S. at 119.

A lawyer does not have a protected right to practice law in a particular court without satisfying that court's requirements for admission. *Gentile* v. *State*

Bar of Nev., 501 U.S. 1030, 1066 (1991) ("In the United States, the courts have historically regulated admission to the practice of law before them. . . . Membership in the bar is a privilege burdened with conditions. . . .") (internal quotation marks omitted). *See also Brooks* v. *Laws*, 208 F.2d 18, 28 (D.C. Cir. 1953) ("There is no inherent right to practice law. The right arises after qualification under the rules has been established."). A court has the power "to control admission to its bar and to discipline attorneys who appear before it." *Chambers* v. *NASCO, Inc.*, 501 U.S. 32, 43 (1991). The interest in regulating lawyers is "especially great" because

> lawyers are essential to the primary governmental function of administering justice, and have historically been officers of the courts.

Ohralik v. *Ohio State Bar Ass'n*, 436 U.S. 447, 460 (1978) (citations and internal quotation marks omitted).

Here, plaintiffs seek to invalidate Rule 83.8(a)(2) as substantially overbroad on its face by claiming that it categorically discriminates against lawyers based on the locations of their principal law offices, even though those locations have no bearing on intellectual ability or litigation experience. The Court cannot reasonably infer from that assertion that the disputed rule restricts a "substantial" amount of protected speech in light of a court's legitimate interest in regulating, and exclusive right to regulate, the admission of lawyers who appear before it. Plaintiffs' reliance on the *Frazier*

decision is, again, unavailing for the reasons set forth above in the analysis of §§ 2071 and 2072.

Accordingly, the amended complaint does not state a First Amendment claim under an overbreadth theory.

b. Prior restraint

A restriction on speech is an unlawful prior restraint subject to facial invalidation if it gives a government official or agency "unbridled discretion" or "substantial power" to allow or prohibit speech based on its content or viewpoint. *City of Lakewood* v. *Plain Dealer Pub. Co.*, 486 U.S. 750, 757, 759 (1988). The challenged restriction must

> have a close enough nexus to expression, or to conduct commonly associated with expression, to pose a real and substantial threat of the identified censorship risks.

Id. at 759.

Plaintiffs seek to invalidate Rule 83.8(a)(2) as an unlawful prior restraint that, on its face, restricts and

> chills otherwise qualified attorneys from exercising their right to engage in speech in the Federal District Court . . . concerning matters of public concern, solely because of the vagaries of state law.

Plaintiffs also make the glaring assertion that Rule 83.8(a)(2) is analogous to the regulations that govern the distribution of "electioneering communications"

with respect to candidates for federal office as espoused in the case of *Citizens United* v. *Fed. Election Comm'n*, 558 U.S. 310, 320-21 (2010).

The Court is underwhelmed by plaintiffs' arguments. The amended complaint summarily concludes that the rule restricts the right of attorneys to speak about "matters of public concern" based on the "vagaries of state law" without 1) alleging that a government official or agency has "unbridled discretion" or "substantial power" to restrain speech based on its content or viewpoint or 2) arguing that the rule has a sufficiently close nexus to expression or conduct associated with expression. The analogy to the regulations in *Citizens United* is misconceived because those regulations were directly related to a certain kind of speech and were thus unlike the rule challenged in the instant case. The Court cannot reasonably infer that the amended complaint properly alleges that Rule 83.8(a)(2) violates the First Amendment as an unlawful prior restraint.

Accordingly, the prior restraint claim will be dismissed,

c. Content and viewpoint discrimination

There are limits on the ability of the government to regulate speech based on its substantive content or the identity of its speaker. *See Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828-29 (1995). A

law that restricts speech on the basis of "content discrimination" is one that 1) targets speech on a particular subject or 2) engages in "viewpoint discrimination" which occurs when it singles out speech based on the speaker's position on the subject. *Id.* A law that regulates speech as a "time, place and manner restriction" is one that allows or denies speaker *access* to a certain forum of speech. *See Pearson* v. *United States*, 581 A.2d 347, 351 (D.C. Cir. 1990).

The constitutionality of a time, place and manner restriction depends on whether that forum is a traditional public forum, government-designated public forum, limited public forum or non-public forum. *Id.* A non-public forum is a place that is not a "forum[] for public communication or expression by tradition or designation." *Id.* at 352. A restriction on speech in a non-public forum is enforceable as long as it is "reasonable and not an effort to suppress the speaker's point of view." *Id.*

Here, the amended complaint contends that Rule 83.8(a)(2) engages in content and viewpoint discrimination because it categorically and specifically prevents attorneys who are not active members in good standing of the states in which they have their principal law offices from "obtain[ing] a license and petition [ing] the courts and speak[ing]." Plaintiffs claim that the rule is a content-based restriction on speech that fails the time, place and manner standards because it cannot survive strict scrutiny review. Defendants respond that the "principal law office" provision in Rule 83.8(a)(2) is "indisputably content neutral."

Rule 83.8(a)(2), to the extent that it can be characterized as a restriction on speech, is a constitutionally valid time, place and manner restriction. Courthouses are non-public forums. *Pearson*, 581 A.2d at 353. The relevant test is whether Rule 83.8(a)(2), if viewed as a restriction on speech, is reasonable and is not an effort to suppress the viewpoint of a speaker. The Court declines plaintiffs' invitation to apply strict scrutiny review because that is not the appropriate test for restrictions on speech in non-public forums.

In addition, because the place at issue is a non-public forum, the Court need not determine whether Rule 83.8(a)(2) is a content-based or content-neutral restriction. Nevertheless, in the interest of completeness, the Court notes that the amended complaint insufficiently alleges that Rule 83.8(a)(2) is a content-based restriction on speech because 1) on its face, the rule does not discriminate against speech based on its content, viewpoint or speaker identity and 2) there is no allegation that enforcement of the rule involves the receipt or consideration of any information with respect to the viewpoints of the applicants on any particular subject.

Rule 83.8(a)(2), to the extent that it can be characterized as a restriction on speech, is thus constitutionally valid if it is reasonable and is not an effort by the government to suppress the viewpoint of the speaker. The Court finds the "principal law office" provision reasonable in light of 1) the inherent power of a court to regulate the admission of lawyers to its bar, as discussed above in the overbreadth analysis, and 2) the

rational basis for the provision, as discussed below in the equal protection analysis. Plaintiffs do not sufficiently allege in the amended complaint that defendants treat Rule 83.8(a)(2) as an effort to suppress the viewpoint of any speaker. Plaintiffs expound in the amended complaint that:

> The hypothesis that a layman is presumptively competent to represent themselves, unless he or she is mentally ill, while on the other hand, Plaintiff[s and] experienced lawyers are presumptively incompetent based on the location of their principal office makes no sense.

There is, however, no factual allegation that defendants actually consider or embrace this "hypothesis" in the course of issuing or enforcing their rule. The Court concludes that the amended complaint does not sufficiently allege that Rule 83.8(a)(2) is unconstitutional as a time, place and manner restriction or as a content- or viewpoint-based regulation of speech.

Accordingly, the content and viewpoint discrimination claim will be dismissed.

2. Petition

The Petition Clause of the First Amendment protects the right of individuals to access the courts for the resolution of legal disputes. *Borough of Duryea, Pa.* v. *Guarnieri*, 131 S. Ct. 2488, 2494 (2011).

Plaintiffs claim that Rule 83.8(a)(2) violates the Petition Clause because

> it arbitrarily and irrationally presumes that the Plaintiffs, and all experienced lawyers from nonreciprocity jurisdictions, will file sham petitions for an anti-competitive purpose, and only file sham petitions for an anti-competitive purpose based on the location of their principal office[.]

Plaintiffs argue that such a presumption is misplaced and illogical because 1) there is no evidence to support it and 2) it assumes that attorneys from non-reciprocal jurisdictions will file sham petitions despite the possible professional consequences.

Plaintiffs' claim does not survive dismissal because 1) Rule 83.8(a)(2), on its face, sets forth a requirement for bar admission and does not address or restrict the ability of an attorney to file petitions, sham or otherwise, and 2) there is no allegation that the issuance or enforcement of the bar admission rule has anything to do with the filing of petitions. The bare assertion that the drafters of the rule "presumed" that certain attorneys would file sham petitions is worthless.

Accordingly, the Court finds that the amended complaint does not set forth a violation of the Petition Clause and thus will dismiss that claim.

3. Association

Implicit in the right to engage in expressive activities protected by the First Amendment, such as speech, assembly, petition and religion, is the corresponding right to associate freely with others. *Roberts* v. *United States Jaycees*, 468 U.S. 609, 622 (1984). A law that imposes penalties or withholds benefits from individuals based on their membership in a disfavored group violates the right to free association unless there are

> compelling [government] interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.

Id. at 623.

Here, plaintiffs suggest that Rule 83.8(a)(2) impermissibly interferes with the right to free association because the rule

> imposes penalties and withholds privileges based solely on plaintiffs' licensing in disfavored non-reciprocity jurisdictions.

Plaintiffs complain that defendants cannot meet their burden of proving the validity of the rule because the right of an attorney to be admitted on motion is constitutionally protected under the Privileges and Immunities Clause of Article IV, section 2, as interpreted by the United States Supreme Court in *Supreme Court of Va.* v. *Friedman*, 487 U.S. 59 (1988).

Plaintiffs have not asserted a violation of the right to associate freely in the amended complaint. The claim that Rule 83.8(a)(2) treats attorneys differently based on their licensing status in non-reciprocal jurisdictions does not accurately describe the operation of the rule. Rule 83.8(a)(2) limits admission and membership privileges to attorneys who are active members in good standing in the states in which they maintain their principal law offices. The disputed rule does not, as the amended complaint suggests, limit those privileges based on whether attorneys are licensed in jurisdictions that refuse to grant reciprocal privileges.

Plaintiffs also mischaracterize the scope of the Privileges and Immunities Clause as interpreted in the *Friedman* decision. The *Friedman* court held that a rule conditioning bar admission on citizenship or residency in a particular state violated the Privileges and Immunities Clause. *Friedman*, 487 U.S. at 70. The *Friedman* court did not address the constitutionality of a rule that conditions bar admission on a different ground, see *id.* and plaintiffs do not allege that Rule 83.8(a)(2) contains a state citizenship or residency requirement. Accordingly, plaintiffs have not set forth a violation of the right to free association. That claim will be dismissed.

D. Fifth Amendment

Plaintiffs contest the validity of Rule 83.8(a)(2) under the Fifth Amendment to the United States Constitution and assert violations of the equal protection and due process doctrines.

1. Equal protection

A law that sets forth a

> classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge [under the Fifth or Fourteenth Amendment] if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.

F.C.C. v. *Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993). Under rational basis review, the challenger of the classification has the burden to "negate every conceivable basis which might support it." *Id.* at 314-15. The legislative motive or justification for the classification is irrelevant to the rational basis analysis because

> a legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data.

Id. at 315.

The amended complaint asserts an equal protection challenge against Rule 83.8(a)(2) by arguing that

the rule 1) disfavors "otherwise equally qualified sister-state attorneys in bar admission on motion" in violation of the Privileges and Immunities Clause as described in *Friedman*, 2) discriminates against those attorneys in the same manner that bar admission rules in the nineteenth century unlawfully discriminated against women and African-American applicants, 3) intentionally withholds general admission privileges from attorneys from certain states in retaliation against the failure of those states to provide reciprocal admission privileges, 4) irrationally discriminates against an unpopular class in the same manner that the amendment to the state constitution in *Romer v. Evans*, 517 U.S. 620 (1996), unconstitutionally discriminated against individuals on the basis of sexual orientation and 5) irrationally assumes that a layman, who is "presumptively capable of representing herself" in court, is competent while an experienced lawyer who cannot meet the requirements of Rule 83.8(a)(2) is incompetent.

Plaintiffs fail to assert an equal protection claim in the amended complaint. The Privileges and Immunities Clause does not apply to the instant case, as discussed above in the association analysis, because Rule 83.8(a)(2) does not contain a state citizenship or residency requirement. Rule 83.8(a)(2) does not classify individuals along suspect lines such as by race. *See Mass. Bd. of Ret.* v. *Murqia*, 427 U.S. 307, 313 (1976). The rule also does not infringe upon a fundamental right because, as discussed above in the overbreadth analysis, there is no protected right to practice law in a court

without complying with the requirements for admission. Rule 83.8(a)(2) is therefore subject to rational basis review.

Plaintiffs, however, fail to allege the lack of a rational basis for the rule. Their bare assertion of a retaliatory motive is unsupported by factual allegations and, in any event, is irrelevant. Their conclusory statement that the drafters of Rule 83.8(a)(2) were driven by an irrational presumption of competence in laymen but not in experienced lawyers is, likewise, unsupported, wrongheaded and irrelevant. Plaintiffs make no effort to "negate every conceivable basis which might support" the "principal law office" provision and thus do not present an equal protection challenge to Rule 83.8(a)(2).

The Court notes that, even if the equal protection claim survived dismissal, it would not survive summary judgment review because plaintiffs fail to negate the rational basis that defendants set forth in support of the rule. Defendants primarily justify the "principal law office" provision as ensuring that every attorney who practices before the Court is subject to "significant local supervision of a licensing authority," *i.e.*, the bar of the state in which the attorney performs a significant portion of his or her legal work. Defendants submit that the justification rationally assumes that

> local licensing control is more effective than remote supervision . . . because few state bars would be familiar with the legal practice in other states, nor have the incentives to become particularly familiar with it, such that

> they could provide as-effective supervision of the legal work conducted out-of-state.

The Court finds that the "local supervision" justification forms a plausible and rational basis for the "principal law office" provision in Rule 83.8(a)(2). Plaintiffs fail to negate or even address that justification. Their arguments focus instead on identifying a set of attorneys who are not subject to the challenged provision and on presenting examples of invalid rules enacted by other jurisdictions in other contexts. Those efforts fall well short of satisfying plaintiffs' burden of negating the rational basis underlying the imposition of that requirement on another set of attorneys.

Accordingly, the equal protection claim will be dismissed.

2. Due process

Finally, plaintiffs claim procedural and substantive due process violations because

> the same defendant judges who promulgate and enforce the Local Rules are the same judges who decide whether they are unlawful, and no man can be a judge in his own case.

That argument became moot when this case was assigned to an out-of-district judge for adjudication. Accordingly, the due process claim will be dismissed.

ORDER

For the foregoing reasons, defendants' motion for dismissal (Docket No. 23) is **GRANTED**, plaintiffs' motion for summary judgment (Docket No. 25) is **DENIED** and the case is **DISMISSED**. **So ordered.**

/s/ Nathaniel M. Gorton
Nathaniel M. Gorton
United States District Judge

Dated December 31, 2015

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16-5020 **September Term, 2016**

1:13-cv-01963-NMG

Filed On: May 18, 2017

National Association for the Advancement of Multijurisdiction Practice, (NAAMJP), et al.,

Appellants

Jose Juhuda Garcia and Herbert Howard Detrick, II,

Appellees

v.

Beryl A. Howell, Chief Judge, U.S. District Court for the District of Columbia, et al.,

Appellees

BEFORE: Brown and Pillard, Circuit Judges; Edwards, Senior Circuit Judge

ORDER

Upon consideration of appellants' petition for panel rehearing filed on April 27, 2017, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ ______________________
Ken R. Meadows
Deputy Clerk

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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National Association for the Advancement of Multijurisdiction Practice, (NAAMJP), et al.,

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Jose Juhuda Garcia and Herbert Howard Detrick, II,

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v.

Beryl A. Howell, Chief Judge, U.S. District Court for the District of Columbia, et al.,

Appellees

BEFORE: Garland, Chief Judge; Henderson, Rogers, Tatel, Brown, Griffith, Kavanaugh, Srinivasan, Millett, Pillard, and Wilkins*, Circuit Judges; Edwards, Senior Circuit Judge

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* Circuit Judge Wilkins did not participate in this matter.

ORDER

Upon consideration of appellants' petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken R. Meadows
Deputy Clerk

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First Amendment, in pertinent part provides:

Congress shall make no law. . . . abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Sixth Amendment, in pertinent part provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial,. . . . and to have the assistance of counsel for his defense.

28 U.S.C. § 332 *Judicial councils of circuits*, in pertinent part provides:

(d)(4) Each judicial council shall periodically review the rules which are prescribed under section 2071 of this title by district courts within its circuit for consistency with rules prescribed under section 2072 of this title. Each council may modify or abrogate any such rule found inconsistent in the course of such a review.

28 U.S.C. § 2071. *Rule-making power generally*, provides:

(a) The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. *Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed under section 2072 of this title.* (Emphasis added)

28 U.S.C. § 2072. *Rules of procedure and evidence; power to prescribe*, provides,

(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals.

(b) *Such rules shall not abridge, enlarge or modify any substantive right.* All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect. (Emphasis added)

Federal Rule of Civil Procedure 83. *Rules by District Courts; Judge's Directives*

(a) Local Rules.

(1) *In General.* After giving public notice and an opportunity for comment, a district court, acting by a majority of its district judges, may adopt and amend rules governing its practice. *A local rule must be consistent with – but not duplicate – federal statutes and rules adopted under 28 U.S.C. §§2072* and 2075, and must conform to any uniform numbering system prescribed by the Judicial Conference of the United States. A local rule takes effect on the date specified by the district court and remains in effect unless amended by the court or abrogated by the judicial council of the circuit. Copies of rules and amendments must, on their adoption, be furnished to the judicial council and the Administrative Office of the United States Courts and be made available to the public. (Emphasis added)

(2) *Requirement of Form.* A local rule imposing a requirement of form must not be enforced in a way that causes a party to lose any right because of a nonwillful failure to comply.

(b) Procedure When There Is No Controlling Law. A judge may regulate practice in any manner consistent with federal law, rules adopted under 28 U.S.C. §§2072 and 2075, and the district's local rules. No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal law, federal rules, or the local rules unless the alleged violator has been furnished in the particular case with actual notice of the requirement

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Federal Rule of Appellate Procedure

Rule 46. Attorneys (a) Admission to the Bar. (1) Eligibility. An attorney is eligible for admission to the bar of a court of appeals if that attorney is of good moral and professional character and is admitted to practice before the Supreme Court of the United States, the highest court of a state, another United States court of appeals, or a United States district court (including the district courts for Guam, the Northern Mariana Islands, and the Virgin Islands). (2) Application. An applicant must file an application for admission, on a form approved by the court that contains the applicant's personal statement showing eligibility for membership. The applicant must subscribe to the following oath or affirmation: "I, lllllllllll, do solemnly swear [or affirm] that I will conduct myself as an attorney and counselor of this court, uprightly and according to law; and that I will support the Constitution of the United States." (3) Admission Procedures. On written or oral motion of a member of the court's bar, the court will act on the application. An applicant may be admitted by oral motion in open court. But, unless the court orders otherwise, an applicant need not appear before the court to be admitted. Upon admission, an applicant must pay the clerk the fee prescribed by local rule or court order. (b) Suspension or Disbarment. (1) Standard. A member of the court's bar is subject to suspension or disbarment by the court if the member: (A) has been suspended or disbarred from practice in any other court; or (B) is guilty of conduct unbecoming a member of the court's bar. (2) Procedure. The member must be

given an opportunity to show good cause, within the time prescribed by the court, why the member should not be suspended or disbarred. (3) Order. The court must enter an appropriate order after the member responds and a hearing is held, if requested, or after the time prescribed for a response expires, if no response is made. (c) Discipline. A court of appeals may discipline an attorney who practices before it for conduct unbecoming a member of the bar or for failure to comply with any court rule. First, however, the court must afford the attorney reasonable notice, an opportunity to show cause to the contrary, and, if requested, a hearing. (As amended Mar. 10, 1986, eff. July 1, 1986; Apr. 24, 1998, eff. Dec. 1, 1998.)

Rule 47. Local Rules by Courts of Appeals (a) Local Rules. (1) Each court of appeals acting by a majority of its judges in regular active service may, after giving appropriate public notice and opportunity for comment, make and amend rules governing its practice. A generally applicable direction to parties or lawyers regarding practice before a court must be in a local rule rather than an internal operating procedure or standing order. A local rule must be consistent with – but not duplicative of – Acts of Congress and rules adopted under 28 U.S.C. § 2072 and must conform to any uniform numbering system prescribed by the Judicial Conference of the United States. Each circuit clerk must send the Administrative Office of the United States Courts a copy of each local rule and internal operating procedure when it is promulgated or amended. (2) A local

rule imposing a requirement of form must not be enforced in a manner that causes a party to lose rights because of a nonwillful failure to comply with the requirement. (b) Procedure When There Is No Controlling Law. A court of appeals may regulate practice in a particular case in any manner consistent with federal law, these rules, and local rules of the circuit. No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal law, federal rules, or the local circuit rules unless the alleged violator has been furnished in the particular case with actual notice of the requirement. (As amended Apr. 27, 1995, eff. Dec. 1, 1995; Apr. 24, 1998, eff. Dec. 1, 1998.)