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IN THE SUPREME COURT
STATE OF ARIZONA

PETITION TO AMEND ER 8.4, RULE 42, ARIZONA RULES OF THE SUPREME COURT	Supreme Court No. R-10-0031 **Petition to Amend ER 8.4, Rule 42, Arizona Rules of the Supreme Court**

Introduction

The ADF arguments against equal protection resurrect old themes of religion justifying attacks on disfavored groups. Fortunately, in the United States, secular rights trump religious doctrine. The First Amendment to the U.S. Constitution made that clear. The ADF position is antithetical to the principles of law and in violation of the First Amendment principle of separation of church and state.

No government or arm of government may prefer any religion or religion over non-religion.

Under the Constitution of the United States of America, government is prohibited from engaging in acts respecting an establishment of religion.

Government may not advance religion by promoting it, nor may government be hostile to religion or non-religion. In order to realize this constitutional mandate, separation of church and state must be maintained.

Philosophers such as David Hume (1711-1776) and lawyers such as Thomas Jefferson (1743-1826) espoused "individualism, rationalism, and nationalism" over faith-based adherence to church teachings. Jefferson was considered atheistic because he was known to have such opinions as: "[T]he day will come when the mystical generation of Jesus, by the Supreme Being as His Father, in the womb of a virgin, will be classed with the fable of the generation of Minerva in the brain of Jupiter."[1]

During the Enlightenment, philosophers argued that man was created equal "with inherited rights of life and liberty." [2] This sentiment is echoed in the Fourteenth Amendment's Equal Protection Clause——No state shall . . . deny to any person within its jurisdiction the equal protection of the laws, U.S. CONST. amend. XIV, § 1—is made applicable to the federal government through the Fifth Amendment's Due Process Clause——No person shall

[1] Letter from Thomas Jefferson to John Adams (April 11, 1823), in Alf J. Mapp, Jr., The Faiths of Our Fathers: What America's Founders Really Believed 19 (2003).

[2] Witte, John Jr. and Frank S. Alexander. Christianity and Law: An Introduction, New York: Cambridge University Press, 2008.

be...deprived of life, liberty, or property, without due process of law . . .‖, U.S. CONST. amend. V.

The Establishment Clause means that one religious denomination cannot be officially preferred over another, *Larson v. Valente*, 456 U.S. 228, 244 (1982) nor can one version of one religious denomination be favored. What ADF seeks to do is promote one sect over all others. But our governments, our courts and our legal officers – lawyers - are prohibited from promoting one religion over another, or religion over non-religion, *McCreary County v. ACLU of Ky.,* 545 U.S. 844, 860 (2005).

Ensuring the protection for the free exercise of religion was not the sole purpose of the establishment clause, as it was designed to guard against those tendencies to political tyranny and subversion of civil authority which, it was feared, might result from the establishment of religion, *McGowan v. State of Md.,* 366 U.S. 420, 430 (1961). Thus, the Establishment Clause [is] a coguarantor, with the Free Exercise Clause, of religious liberty, *Abington School District v. Schempp*, 374 U.S. 203, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963) at 256 (Brennan, J., concurring). The Constitution prohibits the government not only from establishing one religion as superior but also from establishing any religion at all.

When the government infringes upon a fundamental right, such as the liberty rights guaranteed by the First Amendment, or gives denominational preference towards a religious sect, strict scrutiny is required. *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 608-609 (1989) (Our cases, however, impose no such burden on demonstrating that the government has favored a particular sect or creed. On the contrary, we have expressly required strict scrutiny‘ of practices suggesting a denominational preference,‘ in keeping with the unwavering vigilance that the Constitution requires‘ against any violation of the Establishment Clause.) (internal citations omitted). See also, *Harris v. McRae*, 448 U.S. 297, 312 (1980) (It is well settled that, quite apart from the guarantee of equal protection, if a law impinges upon a fundamental right explicitly or implicitly secured by the Constitution [it] is presumptively unconstitutional. (Internal quotations omitted.)

What ADF seeks is to elevate the beliefs of their religious sect above others and above non-religion. This the law does not allow.

No religious rights are implicated by the proposed rule.

No religious beliefs are violated because the ethical rule goes not to belief or expression but to conduct. As stated in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston et al.,* 515 U.S. 557, 572 (1995) (anti-

discrimination laws "do not, as a general matter, violate the First or Fourteenth Amendments"); *Jews for Jesus, Inc. v. Jewish Community Relations Council, Inc.,* 968 F.2d 286, 295 (2d Cir. 1992) (federal and state anti-discrimination statutes "are plainly aimed at conduct, *i.e.,* discrimination, not speech"); *Butler v. Adoption Media, LLC,* 486 F. Supp. 2d 1022 (N.D. Cal. 2007) (adoption-related website that refused to post profiles for same-sex couples in violation of California's public accommodations law was not engaged in "expressive speech"); *Swanner v. Anchorage Equal Rights Comm'n,* 874 P.2d 274 (1994) (housing anti-discrimination law does not violate constitutional rights to free exercise of religion or due process).

The ADF have misapplied the Free Exercise of Religion Act (FRFA) (ARS 41-1493 et seq). First, it's questionable whether FRFA would apply to this situation at all since the ethical rule is not a state or local ordinance or law. (ARS 41-1493.02) Second, free exercise of religion is already a right under the First Amendment so FRFA adds nothing to the analysis. But even so, the state would have no difficulty showing a compelling state interest in ending discrimination, (*Board of Directors of Rotary International v. Rotary Club of Duarte,* 481 U.S. 537, 549 (1987).

The statute and the only case applying it, *State v. Hardesty*, 222 Ariz. 363, 214 P 3d 1004 (2009) make clear that a party who raises a religious exercise claim or defense under FRFA must establish three elements: (1) that an action or refusal to act is motivated by a religious belief, (2) that the religious belief is sincerely held, and (3) that the governmental action substantially burdens the exercise of religious beliefs. In this case, there is no burden whatsoever on the exercise of religious beliefs let alone a substantial one. By the clear language of the rule, attorneys are able to make any arguments they want. Under ER 1.16(b)(4) attorneys are not required to take any client with whom they have a fundamental disagreement. In fact, they should not. The Arizona Constitution, Section 2, Article 12, makes it clear that religious freedom shall not be used to justify practices that are inconsistent with peace and safety. To paraphrase a bumper sticker, no justice, no peace. If lawyers cannot deliver justice, that would include nondiscrimination toward all clients, then we cannot deliver peace or safety.

ADF is simply complaining that their religion doesn't agree with the proposed rule, but the Constitution forbids . . . the prohibition of theory which is deemed antagonistic to a particular dogma . . . [as] **the state has no legitimate interest in protecting any or all religions from views distasteful**

to them. *Epperson v. Arkansas*, 393 U.S. 97, 106-07 (1968), quoting *Burstyn, Inc. v. Wilson*, 343 U.S. 495, 505 (1952); *Sherbert v. Verner*, 374 U.S. 398, 404 (1963). [3] (emphasis added)

ADF is asking that their religious beliefs be acknowledged above all other beliefs. But the Court has found unconstitutional laws that require conduct in support of religion or a certain religion. In *Wallace v. Jaffree,* the Court invalidated an Alabama statute that authorized a one-minute period of silence in the public schools "for meditation or voluntary prayer." 472 U.S. 38 (1985). Five Justices joined an opinion finding the statute unconstitutional because it constituted government "endorsement and promotion of religion and a particular religious practice." Id. at 57 n.45.

Only private speech, not government speech, endorsing religion, or lack of religion, is protected by the Free Speech and Free Exercise clauses of the Constitution. *The Board of Education of West Side Community Schools (District 66) v. Mergens*, 496 U.S. 226, 250 (1990). ADF as a group or as individual lawyers is free to speak all they want. The Bar and the court are not free to promote a particular religious point of view.

The Equal Protection Clause mandates the nondiscrimination language.

The Equal Protection Clause secures every person against intentional and

[3] See also, *Linnemeir v. Board of Trustees of Purdue University,* 260 F.3d 757, 759 (7th Cir. 2001).

arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through government agents.[4] The Equal Protection Clause is violated when a selection [is] deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification.[5] In *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976), the Court suggested that a classification . . . drawn upon inherently suspect distinctions such as race, religion, or alienage is unconstitutional. If the purpose or the effect of a law is to discriminate between religions, the law is constitutionally invalid. *Braunfeld v. Brown*, 366 U.S. 599, 607, (1961); *Sherbert v. Verner*, 374 U.S. 398, 404 (1963). Ending discrimination is a compelling reason for state action.

At the core of the Constitution's guarantee of equal protection lies the simple command that government must treat citizens as individuals rather than as components of racial, religious, sexual or national origin classes. *Miller v. Johnson*, 515 U.S. 900, 911 (1995). Discrimination is taking action for or against someone because of an attribute. Under the Equal Protection Clause, the Court has listed religion, along with race and national origin, as presumptively

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[4] *Village of Willowbrook v. Olech*, 120 S. Ct. 1073, 528 U.S. 562, 564 (2000); *Sunday Lake Iron Co. v. Township of Wakefield*, 247 U.S. 350, 352 (1918); *Bell's Gap R. Co. v. Com. Of Pennsylvania,* 134 U.S. 232, 237 (1890); Harris, 448 U.S. at 322. See also, *Venters v. City of Delphi*, 123 F.3d 956, 969 (7th Cir. 1997), *U.S. v. Mohammed*, 288 F.2d 236 (7th Cir. 1961); *Mitchell v. Pilgrim Holiness Church Corp.*, 210 F.2d 879 (7th Cir. 1954).

[5] *Oyler v. Boles*, 368 U.S. 448, 456 (1962); *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978).

invalid grounds for discrimination. *Griffin v. Illinois*, 351 U.S. 12, 17 (1956). The court cannot discriminate for or against someone because of their religion, or lack of it.

Here ADF is asking that the court discriminate between religions, select a certain sect of one religion (theirs), and through that, deny the equal protection of some minorities. They are also asking that a religious view be adopted which violates the rights of the nonreligious. ADF is asking precisely that the fundamental right of equal protection and due process should be denied to minorities, i.e. the LGBT community, because of ADF's stated religious beliefs. This is clearly a position that cannot stand and is in violation of fundamental American law.

The regulation of Arizona lawyers mandates the nondiscrimination language.

The Arizona Bar oath of admission requires that lawyers follow the Constitution of the U.S. that requires equal protection and due process and states that lawyers not reject a case of the defenseless or oppressed because of a consideration personal to the lawyer. The Lawyer's Creed of Professionalism of the State Bar of Arizona requires members strive for the improvement of justice to make our system work fairly.

Where individuals enter, as a matter of choice, into a licensed commercial activity they must accept the same professional limits that serve the public welfare as every other practitioner. *Scheehle v. Justices of the Supreme Court of Ariz.,* 120 P.3d 1092 (2005) ("A state may engage in reasonable regulation of licensed professionals"; "An attorney's right to pursue a profession is subject to the paramount right of the state . . . to regulate . . . professions . . . to protect the public . . . welfare.") (internal quotation marks omitted). There is nothing new or novel about the proposition that members of the public depend upon such protection. In fact law is more than a profession, it is a public trust.

In state-licensed professions, there is a compelling state interest in ensuring equality. This principle must apply with particular force to protect clients who repose trust in their attorneys as fiduciaries. Nondiscrimination rules that govern commercial activity "plainly serv[e] compelling state interests," *Board of Directors of Rotary International v. Rotary Club of Duarte,* 481 U.S. 537, 549 (1987). Under federal constitutional principles, neutral nondiscrimination provisions of general applicability that do not target religious belief or practice satisfy the applicable rational basis test of constitutional review. *See Employment Division v. Smith,* 494 U.S. 872, 885-886 (1990)

(rational basis test applies to federal free exercise of religion challenges to state laws).

Thus justices of both the Arizona and Supreme Courts have found that lawyers can be regulated to ensure nondiscrimination. The State Bar rule is consistent with this principle.

ADF has consistently misread the plain language of the rule.

ADF states that writing a letter opposing same sex marriage or lobbying against including gender identity in the state nondiscrimination law may be construed as violating the rule. However, the proposed rule specifically says "in the course of representing a client when such actions are prejudicial to the administration of justice; provided, however, this does not preclude legitimate advocacy when such classification is an issue in the proceeding". Thus the rule itself creates three opt out points.

If a lawyer is not representing a client, s/he has the right to express an opinion. If a lawyer's expression is not prejudicial to justice, s/he can state it. If such advocacy is part of the issue, s/he can state it. But if a lawyer was representing a client who opposed same sex marriage or opposed gender identity in a nondiscrimination law, the lawyer would not be discriminating against the client – they would be doing as the client wanted.

If the lawyer were representing a client who believed that same sex marriage should be legal, and the lawyer went ahead and argued that it should not, they not only would be discriminating against that client, they would be violating other ethical rules. However the ethical code requires that if a lawyer does not believe the action or defense has merit or that it is unjust, s/he is obligated to withdraw.[6]

The ADF examples are not apropos. For example, if a family law client wanted to argue that all custody decisions should be presumptively joint custody regardless of the factual circumstances, some lawyers would strongly oppose that and have to withdraw. If an employment discrimination client wanted to argue that unions violate the rights of workers, some lawyers would withdraw before doing that. Neither of those positions asks the lawyer to do something illegal or unethical, but they do signal that the lawyer considers the action repugnant or has a fundamental disagreement. The ethical rule obliges the lawyer to withdraw. Nothing need be said about dislike of any attribute of the client her/himself. For ADF to argue that lawyers would be forced to represent someone they could not tolerate is sheer sophistry.

[6] ER 1.16 (b)(4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement; …

The ADF makes conflicting claims that they are prohibited from speaking and compelled to speak. Nothing in the rule prohibits or compels speech, but even if it did, it would not violate the First Amendment because religious beliefs do not permit violation of existing laws. This principle was enunciated in *Prince v. Commonwealth of Massachusetts*, 321 U.S. 158, 64 S. Ct. 438, 88 L. Ed. 654 (1944) when a Jehovah Witness was convicted for violation of child labor laws. She argued that her freedom of religion under the First Amendment allowed her to have her child peddle tracts on the street contrary to local laws. The court held that religion is not beyond limitation, the right to practice religion does not include the right to ignore other laws that protect the community, and there is no denial of equal protection by prohibiting one sect from doing what everyone else is prohibited from doing. This reasoning has been followed in cases when Jehovah Witnesses practitioners have argued violation of religious freedom by forced blood transfusions. [7]

Warren Jeffs, self-proclaimed leader of a sect of the Church of the Latter Day Saints, argued that his religious beliefs justified having sex with children.

[7] See also *Jehovah Witnesses v. King County Hospital,* 278 F. Supp 488, 1967; *State v. Perricone*, 37 N.J. 463, 181 A.2d 751, 756, 757; *Hoener v. Bertinato*, 67 N.J. Super. 517, 171 A.2d 140, 143; *People ex rel. Wallace v. Labrenz*, 411 Ill. 618, 104 N.E.2d 769, 774, 30 A.L.R.2d 1132.

He was nevertheless convicted.[8] Christian Science practitioners may let their children die, but they will be convicted regardless of their religious beliefs including in Arizona. [9] ADF's claim is completely without legal basis. Their religious beliefs do not allow them to violate the law nor trump the fundamental rights of others.

Conclusion

In contrast to ADF, many religious persons and churches support nondiscrimination including toward LGBT. Some in fact have gay pastors and gay marriages. What ADF is asking is to elevate their religious beliefs over those of all other members of the Bar. It must be noted that the ADF comment opposing nondiscrimination were made after the closing time for comment. The extension of the time to allow those comments to be included suggests that the religious group has already been given preference. That is precisely what the Constitution says cannot be done.

[8] 9 August 2011, Austin, TX. His conviction in Utah was overturned on other grounds. Christian Science Monitor, Daniel B. Wood, July 27, 2010.

[9] In Child's Death, A Test for Christian Science, David Margolick, August 06, 1990, New York Times, A Child's Death and a Crisis for Faith, Suzanne Sataline, Wall St. Journal, June 12, 2008; Government Pressing Death Case of Six Children against Christian Scientists, Christian Research Institute (DC 602) www.equip.org accessed 26 August 2011.

The rule does not discriminate against any "belief" as it pertains only to conduct. No one's exercise of religion is burdened, as s/he is not forced to believe or do anything whatsoever. Though ADF cries discrimination, on the contrary, to adopt their argument would infringe upon the fundamental right of religious liberty of approximately 20,000 Arizona lawyers by allowing one small sect to use the machinery of the government to promote their version of religion.

The interest in justice and nondiscrimination by the State Bar is a compelling one. It is the bedrock of the law and a principle that all lawyers must adhere to. The below signed attorneys and statewide organization ask that the Court adopt the proposed rule.

Respectfully submitted this date: 28 October 2011

Secular Coalition for Arizona, Matt Schoenley
Chair & Executive Director
Mauricio Hernandez, Attorney, Goodyear, AZ

Electronic copy filed with the
Clerk of the Supreme Court on
28 October 2011

A copy was emailed to:

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On 28 October 2011