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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-12-0018 **Petition to Amend ER 8.4, Rule 42, Arizona Rules of the Supreme Court**

I. Status of Pending Rule

The State Bar had filed a rule change No. R-10-0031. Due to a variety of reasons, the Bar asked that the petition be withdrawn in late December 2011. Only a few weeks later, on 10 January 2012, Cathi Herrod submitted this petition on the same topic contrary to the deliberate process that had been planned. The State Bar of Arizona has submitted a comment asking the Court to reject this petition and delay action on the subject until the 2013 rule-petition cycle. Arizona's legal community needs – and deserves – additional time to sufficiently consider this serious and divisive issue.

II. Introduction

In 1999, a report was submitted to the State Bar Board of Governors from the Lesbian and Gay Taskforce. Seventy-seven percent of judges and attorneys in Arizona had heard disparaging remarks against gays and lesbians and forty-seven percent heard them in public areas of the courthouse. Thirty percent of Arizona judges and attorneys believed that gays and lesbians were discriminated against in the legal profession. Sixty percent of the judges said they did not know about statutes or cases prohibiting discrimination against lesbians and gays. Only thirteen percent knew of the ethical rule prohibiting discrimination on the basis of sexual orientation. Sixty-seven percent of judges and attorneys and eighty percent of law students advocated passage of Arizona laws prohibiting discrimination on the basis of sexual orientation. Forty-three percent of judges and attorneys and fifty-four percent of law students thought the State Bar should adopt policies prohibiting discrimination on sexual orientation.

Ten years later, in 2009, two hundred Arizona attorneys signed a letter from Lambda Legal in favor of adding non-discrimination language to the Arizona oath showing widespread support for the concept and indicating that such discrimination has not ceased and still needs to be addressed.

The Supreme Court has made it clear that discrimination against women or men who don't conform to societal standards for their gender is discrimination. (*Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); *Oncole v. Sundowner Offshort Services*, 523 U.S. 75 (1998); and *Jesperson v. Harrah Operating Company*, 444 F. 3d 1104 (9th Cir. 2006))

EEOC delivered an opinion on April 23, 2012 in a case between Mia Macy, a transgender woman and the Department of Alcohol, Tobacco, Firearms and Explosives that gender-identity discrimination, including transgender status, constitutes sex discrimination, whether based on Title VII or the constitutional guarantee of equal protection of the laws.

The Herrod petition presupposes that we live in a post-racial world, which one might imagine given the wealth of Oprah, the fame of Colin Powell and the election of Barak Obama. But at the beginning of 2010, 926 hate groups operated in the U.S., including neo-Nazis. This was a record number and an increase of more than fifty percent since 2000. In the months that followed Obama's inauguration, six law enforcement officers – including a security guard at the Holocaust Memorial Museum - were murdered by racial extremists according to the Southern Poverty Law Center.

According to law professor Michelle Alexander in *The New Jim Crow:*

Mass Incarceration in the Age of Colorblindness, The New Press, NY, 2010 an extraordinary percentage of black men in the United States are subject to legalized discrimination in employment, housing, education, public benefits and jury service just as their enslaved ancestors were. (p. 1-2) Those enslaved through the criminal justice system don't mistake it for anything other than social control. No other country in the world imprisons so many of its racial or ethnic minorities. The United States imprisons a larger percentage of its black population than South Africa did at the height of apartheid. (p. 6) These racial disparities cannot be explained by rate of drug crime because, "Studies show that people of all colors *use and sell* illegal drugs at remarkably similar rates. If there are significant differences in the surveys to be found, they frequently suggest that whites, particularly white youth, are more likely to engage in drug crime than people of color. … In some states, black men have been admitted to prison on drug charges at rates twenty to fifty times greater than those of white men. And in major cities wracked by the drug war, as many as 80 percent of young African American men now have criminal records and are thus subject to legalized discrimination for the rest of their lives." (p. 7)

It is racial attitudes that drive arrest rates not crime rates. (p. 53) "The War on Drugs, cloaked in race-neutral language, offered whites opposed to

racial reform a unique opportunity to express their hostility toward blacks and black progress, without being exposed to the charge of racism." The Herrod petition represents the same ruse – let's get rid of "special categories" – and thereby erase the facts of racial, ethnic, gender and sexual orientation discrimination.

As Alexander says so eloquently, "Lynch mobs may be gone, but the threat of police violence is ever present. A wrong move or sudden gesture could mean massive retaliation by the police. A wallet could be mistaken for a gun. The "whites only" signs may (be) gone, but new signs have gone up – notices placed in job applications, rental agreements, loan applications, forms for welfare benefits, school applications, and petitions for licenses, informing the general public that "felons" are not wanted here. A criminal record today authorizes precisely the forms of discrimination we supposedly left behind – discrimination in employment, housing, education, public benefits, and jury service. Those labeled criminals can even be denied the right to vote. … Hundreds of years ago, our nation put those considered less than human in shackles; less than one hundred years ago, we relegated them to the other side of town; today we put them in cages. Once released, they find that a heavy and cruel hand has been laid upon them." (p. 138)

No one can doubt that anti-immigrant sentiment has been driven skyward by such laws as SB 1070, now awaiting decision at the Supreme Court, racial profiling by Maricopa County Sheriff Arpaio, now facing a law suit by the Federal Department of Justice, and the anti-ethnic studies law aimed solely at Tucson Unified School District that destroyed an award winning program for all students.

To pretend that we live in a color-blind society that doesn't need to identify and protect its vulnerable classes is to return to a society where those classes of people have no rights that white man need respect. *Dred Scott v. Sandford,* 60 U.S. 393 (1857) It is past time to update our ethical rules to include all classes of persons who face discrimination and to make non-discrimination an enforceable rule rather than an aspirational principle.

III. Equality is a basic principle of the Rule of Law.

A bedrock principle of the Rule of Law is that all people are entitled to equal representation under the law. From Henry II (1154 – 1180) who sent appointed judges to the provinces to consistently apply a uniform legal standard to all subjects, to the Magna Carta (1215) that insisted on individual rights, to the French Revolution (1789) lauding liberty, equality, fraternity, to our own

Declaration of Independence that states that all men are created equal, it has been clear that equality is the basis of the Rule of Law.

Herrod claims that attorneys should be subject to discipline only if their behavior creates a substantial likelihood of materially prejudicing the administration of justice by actually undermining impartiality. This is a very narrow and niggardly view of the law and a lawyers duty. To be a lawyer is to hold a public trust. A cardinal principle for lawyers is that we have an obligation to our clients to represent them to the best of our ability. Not only do our ethical rules require it, but also equality would not be possible under the adversarial system if lawyers did not zealously represent their clients. Equality is also not possible under the law if lawyers are free to discriminate against their clients. The administration of justice is *per se* prejudiced if discrimination exists.

Lawyers must put forward the best argument to ensure that all sides have a level playing field. With the power of the state or large corporations arrayed against a single individual, that individual has no possibility of a level playing field unless the lawyer advocates zealously and without bias or prejudice. The American Bar Association (ABA), which has developed models of regulatory law for the legal profession for over eighty years, has proscribed sexual

orientation discrimination for over ten years.[1] It would be a tragedy indeed if lawyers argued, as legislators have mandated for doctors, that lawyers could lie to their clients, not give them the full information or the best representation because they disagreed with the acts or decisions of the client. Such legislative control of the ethics of the medical field are yet another reason why we should not allow lawyer ethics to be controlled by the legislature as the petition suggests. Basically, what the petition is saying is – the lawyer's values override the client's interests. That is to turn the ethics of lawyers upside down and to violate the trust our clients put in us.

Domestically, such instruments as ethical codes, non-discrimination laws and due process formulas recognize the principles of equality. Internationally, equality is recognized by conventions such as the International Convention on Civil and Political Rights, The European, American and African Conventions on Human Rights, the Convention on the Elimination of Discrimination Against Women signed by nearly every country in the world, the Convention on the Elimination of Racial Discrimination, the Declaration on the Rights of Indigenous Peoples, and the adoption of the South African resolution

[1] *See* ABA, Center for Professional Responsibility, Model Rules of Professional Conduct, Rule 8.4, Comment ¶ 3 (hereafter, "Model Rule 8.4, Comment ¶ 3") (providing that it is misconduct prejudicial to the administration of justice to for an attorney to "knowingly manifest[] by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status"), available at <http://www.abanet.org/cpr/mrpc/ rule_8_4_comm. html>.

A/HRC/17/L.9/Rev.1 on 17 June 2011 at the UN Human Rights Council in recognition of LGBT equality.

But to be clear, equality is not sameness. To insist on sameness in a world that is riddled with discrimination would be to embed discrimination more firmly in the fabric of society. The world is much more complex than that e.g. comparable worth rather than equal pay for equal work. No one can argue there are not differences between men and women, Blacks and whites, gay and straight. But all such differences are on a Bell curve with much overlap, and difference does not mandate inequality. What one side sees as innate differences, the other sees as proof of oppression. But our country has dealt with inequality since its founding and the trajectory has been an ever-expanding inclusion of previously disfavored groups into the body politic.

Often the principles of equality are honored in the breach such as the widespread practice of slavery in the 16-20th centuries, many examples of genocide including against Native Americans, prohibition of civil rights to women, Jim Crow, various incarnations of anti-immigrant fever and violence and discrimination against the LGBT community. But lawyers have a long, proud and pivotal role, especially in the United States, in converting the theory of equality to a reality. Lawyers were instrumental in opposing slavery and

indeed a lawyer president, Lincoln, issued the Emancipation Proclamation. Thurgood Marshall, a future Supreme Court justice, toiled for twenty years before *Brown v. Board of Education* ended official segregation in the U.S. Lawyers Crystal Eastman and Roger Baldwin formed the American Civil Liberties Union that works tirelessly to ensure that the guarantees of our Bill of Rights are not tarnished. Elizabeth Cady Stanton, daughter and wife of lawyers, worked for eighty years for women's right to vote. Alice Paul, another lawyer, crafted and fought for the Equal Rights Amendment. The calling of a lawyer is to work for human rights – that includes non-discrimination.

IV. The existing rule and that previously proposed is constitutional.

What the proposed rule in R-10-0031 prohibited was conduct not expression. In *Wisconsin v. Mitchell*, the U.S. Supreme Court held that hate crimes statutes do not implicate First Amendment freedoms because they target conduct, not expression. *Wisconsin v. Mitchell*, 508 U.S. 476, 487 (1993); *see also United States v. Stewart*, 65 F.3d 918, 930 (11th Cir. 1995) Non-discrimination laws do not impinge on the freedom of expression because it is conduct that is prohibited, not expression. *Roberts v. U.S. Jaycees,* 468 U.S. 609, 628 (1984) ("acts of invidious discrimination . . . like violence or other types of potentially expressive activities that produce special harms distinct

from their communicative impact . . . are entitled to no constitutional protection.") Thus, "acts are not shielded from regulation merely because they express a discriminatory idea or philosophy." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 390 (1992)

The court made clear in *Wisconsin v. Mitchell* that a law aimed at conduct that is unprotected by the First Amendment, e.g. discrimination, will be upheld. Especially when the rule is aimed at a desire to redress the greater individual and societal harm inflicted by bias-inspired conduct, such as the rule at issue here, that is a sufficient explanation for the provision over and above mere disagreement with offenders' beliefs or biases. The court, one year after deciding *R.A.V. v. City of St. Paul,* restricted that case and stated that *R.A.V.* was explicitly directed at expression while *Mitchell* was directed at conduct because the main crux of the Court's argument in *R.A.V.* was that the "fighting words" rationale used by the state could be applied only on proscribable conduct, and they had used it on nonproscribable conduct. Discrimination is proscribable conduct, and therefore the rationale of *R.A.V.* does not impact this matter.

Further, the court in *R.A.V.* also explained that the state could regulate professions differently e.g. price advertising in one profession but not another

because the danger or cost of fraud in that arena is more serious than in another. In this case, the danger or cost of discrimination in the legal profession is more serious than in another profession because as lawyers, we embody the Rule of Law and follow ethical rules in the best interest of our clients. In fact, Supreme Court Rule 41(h) prohibits lawyers from "reject[ing] for any consideration personal to [the lawyer] the cause of the defenseless or oppressed."

The defendant in *Mitchell* made the same argument as Herrod has made that the statute was chilling on their free speech. The Court rejected that argument because it was too speculative. The court went on to say that if a person did in the future violate a law by their conduct, rules of evidence commonly do permit previous declarations in evidence to prove motive or intent.

Because the existing and proposed rule addresses conduct not speech, because it addresses proscribable behavior i.e. discrimination and because the purpose is to ensure the Rule of Law and improve the administration of justice by making the precepts of equality reality, it is perfectly in line with constitutional principles both state and federal.

V. Lawyers are obliged to enhance the administration of justice.

Herrod suggests that lawyers should not act until the legislature does. But the legislature has made discrimination against these groups illegal in many different ways. [2] Current law even includes someone who has a felony and mental illness so perhaps we should extend the ethical rule to those categories as well. Even if the legislature has not acted on a specific category that does not hamper the court from finding that a given form of discrimination is wrongful. *Lans v. Mutual Life Insurance Co. of NY* (145 Ariz. 68, 699 P 2d 1299, 1985).

The Arizona Constitution is certainly not silent on the topic nor is it foreign to Arizona law. Section 2 Article 13 "Equal Privileges and Immunities" makes it clear that no law shall be enacted granting any class of citizens any more rights or privileges than any other. Section 2 Article 36 specifically names classes of persons who shall not be discriminated against in public employment, education or contracting.

Further, it is not the province of the legislature to regulate lawyers. The Arizona Supreme Court has recognized its authority in this area "since the early

days of statehood." *Scheehle v. Justices of the Supreme Court of Ariz.,* 120 P.3d 1092, 1099 n. 8 (2005). The Court regulates by "promulgating rules" that "further the administration of justice," and it exercises that function "pursuant to its own constitutional authority over the bench, the bar, and the procedures pertaining to them." *Id.* at 1099, 1100. As long as these rules are an "appropriate exercise of the court's constitutional authority" they are "valid even if they are not completely cohesive with related legislation." *Id.* at 1099. "Although the legislature may, by statute, regulate the practice of law, such regulation cannot be inconsistent with the mandates of this Court." Id.

To further the administration of justice and enhance the Rule of Law, lawyers must act to make equality under both the national and state constitutions a reality not just a talking point. The Herrod proposed modification of the ethical rule is a violation of that goal and should be soundly rejected.

VI. The subjects of the proposed rule are clearly defined.

The Herrod petition claims that it clarifies what words and conduct are prohibited. In fact, it does the opposite. The courts have been clarifying bias and prejudice for years and changing the definition when necessary due to the

[2] ARS 20-448 life insurance, ARS 23-425 employees, ARS 3-3120 employees, ARS 36-506 hospitalization, ARS 41-1442 public accommodations, ARS 41-1465 age, ARS 41-1491.19 disability, ARS 41-

evolution of our society. The terms "bias" and "prejudice" are used in the Arizona Code of Judicial Conduct Canons, the Rules of Practice of the United States District Court for the District of Arizona, the Local Rules for the United States Bankruptcy Court, the Arizona rules of evidence and too many cases to list.

The terms are also found in a wide variety of legislation, anti-discrimination acts and human rights declarations, from all over the country. For example, Colorado's Department of Regulatory Agencies, Civil Rights Division, sets out definitions of "gender identity" and "gender expression." "Gender identity" is defined as "innate sense of one's own gender," and "gender expression" [as the term self explains] means "external appearance, characteristics or behaviors typically associated with a specific gender." "Sexual orientation" is defined as "heterosexuality, homosexuality, bisexuality, transgender status, or the perception thereof." [Colorado Public Accommodations Provisions of the Colorado Anti-Discrimination Act, Title 24, Art. 34, Part 6, Colorado Revised Statutes.]

New York City's Commission on Human Rights also provides definitions of these terms [8-102(23) states "the term gender shall include actual or perceived sex and shall also include a person's gender identity, self-image,

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1492 et seq public accommodation, ARS 41-1491 sale or rental, to name a few.

appearance, behavior or expression, whether or not that gender identity, self-image, appearance, behavior or expression is different from that traditionally associated with the legal sex assigned to that person at birth."] The Office of the State of New York's Comptroller begins an executive order (2001 and 2003) with the following: "[w]hereas discrimination based on race, creed, color, National origin, sex (including gender identity or expression) disability, age, marital status, sexual orientation, genetic predisposition or carrier status, and Vietnam Era Veteran status is prohibited under State or local law or executive order ... ."

The Supreme Court has had no problem understanding what sexual orientation is.[3] Scholars have published many academic legal articles about sexual orientation and gender identity.[4]

The badges of slavery or servitude that are prohibited discrimination under the Thirteenth Amendment have been defined and evolving for more than

[3] *See, e.g., Lawrence v. Texas,* 539 U.S. 558, 581 (2003) (O'Connor, J., concurring in the judgment) (describing invalidated Texas sodomy statute as criminalizing only sodomy engaged in by those with a "same-sex sexual orientation"); *Romer v. Evans,* 517 U.S. 620 (1996) (overturning a state constitution amendment that repealed and banned all anti-discrimination measures based on sexual orientation); *Hernandez-Montiel v. INS,* 225 F.3d 1084, 1093 (9th Cir. 2000) ("Sexual orientation and sexual identity are immutable; they are so fundamental to one's identity that a person should not be required to abandon them."), *overruled on other grounds by Thomas v. Gonzales*, 409 F.3d 1177, 1187 (9th Cir. 2005).

[4] *See, e.g.,* Chai Feldblum, *Sexual Orientation, Morality and the Law: Devlin Revisited,* 57 U. Pitt. L. Rev. 237 (1996); *Note, The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification,* 98 Harv. L. Rev. 1285 (1985); Jennifer Levi, *Clothes Don't Make the Man (or Woman), But Gender Identity Might*, 5 Colum. J. Gender & L. 90 (2006); Fatima Mohyuddin, *United States Asylum Law in*

a hundred years. Servitude is larger than slavery and the intent of the Thirteenth Amendment was to forbid all shades and conditions of African slavery, *Slaughter-House Cases*, 83 U.S. 36, 21 L. Ed. 394, 16 Wall 36 (1872). The mere prohibition of discriminatory laws is not enough, but all vestiges of slavery are illegal, *Sethy v. Alameda County Water District*, 545 F2d 1157 (1976); *District of Columbia v. Carter*, 409 U.S. 418, 421-22, 93 S.Ct. 602, 34 L.Ed.2d 613 (1973). The Thirteenth Amendment, upon which 42 U.S.C. 1982 is based, is an absolute bar to discrimination, private as well as public, federal as well as state. In fact it was private discrimination that provided the focal point for the creation of 42 U.S.C. 1982 according to *DC v. Carter*.

Another purpose of the Thirteenth Amendment was to eliminate stigmatization *Southend Neighborhood Imp. Ass'n v. St Clair County*, 743 F 2d 1207 (CA 7 (Ill) 1984). The amendment nullifies both sophisticated and simple minded discrimination, *Nerbern v. Lake Lorelei, Inc*, 308 F. Supp 407, 24 Ohio Mis. 201, O.O. 2d 189, 53 O.O. 2d 290, (S. D. Ohio 1968).

Further, the changes in what constitute "badges of slavery or servitude" show the progress of our society e.g. in *Corrigan v. Buckley*, 46 S. C 521, 271 U.S. 323, 70 L. Ed. 969 (1926) the court ruled that restrictive race covenants on

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the Context of Sexual Orientation and Gender Identity: Justice for the Transgendered?, 12 Hastings Women's L.J. 387 (2001).

land did not violate the prohibitions on badges of slavery. However in 2004, the court held that the Fair Housing Act was designed to provide nationwide fair housing to minorities who had previously been victims of invidious racial discrimination and is a valid exercise of congressional power under the Thirteenth Amendment to eliminate badges and incidents of slavery. *See Jones v. Alfred H. Mayer Co.,* 392 U.S. 409, 413, 419, 438, 439-440, 88 S.Ct. 2186, 20 L.Ed.2d 1189 (1968); *Mitchell v. Cellone*, 389 F. 3d 86, 88, (CA 3 (Pa.) 2004) *Jones* ruled that 42 U.S.C. 1982, based on the Thirteenth Amendment bans all racial discrimination in housing, private as well as public. Under *Jones*, when an action by private officials is enforced by an arm of the government, it becomes a public action. Like *Dred Scott supra* and *Plessy v. Ferguson*, 163 U.S. 537 (1896), the *Corrigan* case has since been overturned by *Jones*, *Mitchell* and *Brown v. Board of Education*, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954) and stands today as an embarrassment in our legal history.

Regardless, due process does not "require 'impossible standards' of clarity," *Kolender v. Lawson*, 461 U.S. 352, 361 (1983), and the constitutional prohibition against excessive vagueness does not invalidate every statute that could have been crafted with greater precision, "'for in most English words and phrases there lurk uncertainties.'" *McSherry v. Block,* 880 F.2d 1049, 1054 (9th

Cir.1989) (quoting *Rose v. Locke,* 423 U.S. 48, 50 (1975) (internal citation omitted)); *see also Grayned v. City of Rockford,* 408 U.S. 104, 110 (1972) ("Condemned to the use of words, we can never expect mathematical certainty from our language."); *United States v. Gilbert,* 813 F.2d 1523, 1530 12, (9th Cir. 1987), *overruled on other grounds as stated in United States v. Hanna,* 293 F.3d 1080, 1088 n.5 (9th Cir. 2002) ("Words inevitably contain germs of uncertainty." (quoting *Broadrick v. Oklahoma,* 413 U.S. 601, 608 (1973)). Rather, to satisfy due process, a statute simply "must be sufficiently clear so as to allow persons of ordinary intelligence a reasonable opportunity to know what is prohibited." *Foti v. City of Menlo Park*, 146 F.3d 629, 638 (9th Cir. 1998) (internal quotation marks omitted).

A long and rich jurisprudence shows that there is a difference in discrimination and abuse. Everyone should be protected from abuse by an attorney and everyone is. Lawyers must be competent (Rules of Professional Conduct 1.1), we must be diligent (Rule 1.3), we must communicate so the client can make informed decisions (Rule 1.4), we must maintain confidentiality (Rule 1.6), we must not have a conflict of interest (Rule 1.7 and 1.8), we have special duties if the client has diminished capacity (Rule 1.14), we must keep their property safe (Rule 1.15), we must decline or terminate

representation if we are impaired (Rule 1.16), we must respect the rights of others (Rule 4.4), we are obligated to report another lawyer's misconduct (Rule 8.3) and we can't commit crimes, be dishonest or engage in conduct that is prejudicial to the administration of justice. Any physical abuse or financial abuse is covered by criminal laws so it is hard to think what abuse is not already covered.

But discrimination, while it is abusive, is different from abuse because it already has centuries of legal meaning. Discrimination is directed at those who have historically suffered, been targeted or are minorities. Such targeted groups are not "special interest" groups as the petition alleges. Rather, they are seeking the same interest as everyone else – equality. They are not asking for protection **for** their own behavior – they are asking protection **from** the behavior of others who would oppress them.

Eliminating the named classes who have undoubtedly suffered discrimination would not make the rule more inclusive; it would make it meaningless and open the rule to a never-ending stream of frivolous complaints.

VII. The existing and previously proposed rule maintains attorney independence.

No attorney is forced to represent a client with whom they fundamentally disagree. In fact, ER 1.16(b)(4) provides that a lawyer shall not represent a client or shall withdraw from representation if "the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement." Reliance on *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 115 S. Ct. 238, 132 L. Ed. 2d 487 (1995) adds no assistance because Arizona lawyers are protected by ER 1.16(b)(4). An "opt out" provision already exists. *Legal Services Corporation v. Velazquez et al* 531 U.S. 533 (2001) is also inapposite because that case dealt with the freedom of attorneys to represent clients without state control over which issues they could or could not argue. That is not the issue here as evidenced by the protections of ER 1.16(b)(4).

Under ER 1.16(b)(4) no speech is compelled. Such arguments were explicitly rejected in several other states. *See, e.g., Morrison v. Bd. of Educ.,* 521 F.3d 602 (6th Cir. 2008) (rejecting student's free speech, due process and free exercise of religion challenge to school policy prohibiting discrimination and harassment based on sexual orientation); *Butler v. Adoption Media, LLC,*

486 F.Supp.2d 1022 (N.D. Cal. 2007) (rejecting claim that California's public accommodations law violated free speech rights). Under the Herrod view of the law, any individual or business that claimed ideological opposition to serving women, African-Americans, Hispanics, gays and lesbians, or people with disabilities would be entitled to do so on First Amendment grounds, simply by asserting that it was against their religious values. If their position were correct, it would eviscerate the governments' ability to eliminate discrimination because history shows us that the only way disadvantaged groups have moved closer to equality is by creating special classes of protection for the historically disadvantaged.

Conclusion

Unfortunately, earlier arguments against some of these very same protected groups were based on still existing stereotypes and prejudices. It was claimed that Negroes had smaller brains to justify excluding them from voting. It was claimed that if women ran, their uterus would fall and render them sterile to justify excluding them from sports. Those who seek to indulge their own prejudices will find a rationale no matter how farfetched. The evolution of the law in this country has been toward a more inclusive society as we recognize the truth of and seek to make real the words of the Declaration of Independence.

To suggest that certain persons are not entitled to equal rights is to return to the *Dred Scott supra* decision in which Negroes were said to have no rights that white men needed to follow. To suggest that prohibiting discrimination is unconstitutional is to return to the *Plessy v. Ferguson supra* decision in which arbitrary distinctions were justified. Those theories, like those cases, are long discredited and stand as an emblem of shame on our legal system.

As attorneys concerned about human rights, the below signed attorneys, non-attorney residents of Arizona and legal and human rights organizations ask that the Herrod petition be rejected.

Respectfully submitted this date: 16 M

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