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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. Introduction

The changes proposed by Herrod in the rule regarding misconduct would eliminate all categories of protected persons with the result that the rule would be toothless – somewhat like Rodney King's famous, "can't we all just get along." The history of discrimination in this country has proven time and again that without specifically drafted protections, vulnerable minorities will not receive justice. These vulnerable minorities are not asking for "special rights" as the petition claims, but simple justice.

The proposal also underrates the importance of non-discrimination in the administration of justice. By definition, there can be no justice if there is discrimination against disfavored groups. Yet the petitioner claims that to force

attorneys not to discriminate might cause the attorneys to violate their own conscience or sincerely held religious beliefs or moral principles. For a lawyer, justice is, or should be, a moral principle, but at a minimum is an aspiration.

The religious argument against equal protection is not new as the cases below will show. Fortunately, the First Amendment to the U.S. Constitution makes it clear that secular rights trump religious doctrine. The Arizona Constitution is even more strident in prohibiting religious doctrine becoming law. The petition is antithetical to the principles of law and in violation of the First Amendment principle of separation of church and state.

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

Under the Constitution of the United States, 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. As Thomas Jefferson said in 1802,

> Believing with you that religion is a matter which lies solely between man and his God, that he owes to none other for his faith or his worship, that the legislative powers of government reach actions only, and not

opinions, I contemplate with solemn reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion, or prohibiting the free exercise thereof,' thus building a wall of separation between Church and State." [1]

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."[2]

During the Enlightenment, philosophers argued that man was created equal "with inherited rights of life and liberty." [3] 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.

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[1] Eisenberg, Gail Schnitzer, Turn to the constitution in Prayer: *Freedom from Religion Foundation v. Obama*, The constitutionality and the politics of the national day of prayer, 68 National Lawyers Guild Review No. 4, Winter 2011.

[2] 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).

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

CONST. amend. XIV, § 1—is made applicable to the federal government through the Fifth Amendment's Due Process Clause——No person shall 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 the petition No. 12-0018 seeks is to promote one sect, and their particular beliefs about certain peoples, 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 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.)

III. Neutral laws of general applicability do not impact religious rights.

The First Amendment challenge by religious groups to exempt them from following the law is not a new phenomenon. The Supreme Court has

established that if a neutral law of general applicability has some impact on religion, so long as the law is not targeted toward that religion, it is constitutional. "[A] law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." (*Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 531, 533 (1993)) See also *North Coast Women's Care Medical Group, Inc., v. San Diego County Superior Court*, 189 P. 3d 959, 968, 44 Cal. 4th 1145 (2008)

In *Employment Division, DHR v. Smith*, 494 U.S. 872, 879-80, 882, 885, 888-89, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990) two Native Americans were terminated from their employment due to using peyote in a religious ceremony. They were then denied unemployment benefits because they were fired for cause. The court was asked to determine if this action by the state violated the free exercise of religion.

First the court asked if using peyote in a religious ceremony was illegal in Oregon. When they found that it was, they said that the free exercise clause does not relieve a person from complying with a law that his religion requires or forbids if the law is not specifically directed toward religious practice (neutrality principle). "We have never held that an individual's religious beliefs

excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate. … Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs. The mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities (footnote omitted)."

Rights of religious freedom and free speech do not exempt a professional from complying with prohibitions against discrimination based on sexual orientation. "Amendment's right to the free exercise of religion "does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).' " (*Smith, supra,* at p. 879, 110 S.Ct. 1595.)

The court used this approach to affirm criminal laws against polygamy in *Reynolds v. United States,* 98 U.S. 145, 25 L.Ed. 244 (1879). The court said, "Laws … are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. . . . Can a man excuse his practices to the contrary because of his religious belief?

To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself." … "Respondents urge us to hold, quite simply, that when otherwise prohibitable conduct is accompanied by religious convictions, not only the convictions but the conduct itself must be free from governmental regulation. We have never held that, and decline to do so now."

Yet, that is precisely what the Herrod petition is asking – that though discrimination can be lawfully prohibited, some lawyers should be exempt from that prohibition due to their religious beliefs. This the law cannot do. To allow each individual to obey or not obey a law because of their personal beliefs "contradicts both constitutional tradition and common sense." (*Reynolds v. United States,* 98 U.S., at 167) To have such a principle would allow persons to insist on religious exemptions from civic obligations such as payment of taxes, health and safety regulation, child abuse and child labor laws, compulsory vaccination laws, drug laws, traffic laws, OSHA and minimum wage laws, animal cruelty laws, environmental protection and, most relevant for this petition, laws providing for equal opportunity for the races. "The First Amendment's protection of religious liberty does not require this." *Smith* supra

Religious liberty cannot be used to deny another person fundamental Constitutional rights. The Supreme Court has made it clear that abolishing racial discrimination is an overarching value in our society and of great importance for our justice system. *Bob Jones University, Goldsboro Christian Schools v. United States*, 461 U.S. 574, 591, 594, 602- 604, 103 S. Ct. 2017, 76 L. Ed. 2d 157 (1983). In the *Bob Jones* case, both schools claimed the right to discriminate against African-Americans based on their Biblical beliefs. The Supreme Court disagreed and upheld the IRS withdrawal of their 501(c)3 tax-exempt status because their actions were not to the benefit of society.

The court listed not only the many laws passed to abolish racial discrimination in education, but also pointed out laws passed to abolish racial discrimination in other areas such as employment and voting rights and executive orders related to selective service and military forces. Groups that seek to continue the negative traditions of discrimination cannot be acting for the public good. The very essence of the Bar and its members is that it and we should be acting for the public good.

Bob Jones and Goldsboro schools claimed that the nondiscrimination rules could not be applied to them because they discriminated based on sincerely held religious beliefs. That argument fell flat. The court said,

"However, "[n]ot all burdens on religion are unconstitutional. . . . The state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest." (*United States v. Lee,* 455 U.S. 252, 257-258, 102 S.Ct. 1051, 1055, 71 L.Ed.2d 127 (1982) (citations omitted)). For example, Jehovah's Witnesses are not allowed to violate child labor laws because they believe their child should be selling printed material on public streets. (*Prince v. Massachusetts,* 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645 (1944))

A neutral rule that applies to all is not a violation of religious beliefs or exercise. In *Christian Legal Society Chapter of the University of California, Hastings College of the Law v. Martinez*, 130 S. Ct. 2971, 2994, 561 U.S. ___ (2010), the Christian Legal Society (CLS) claimed that the policy of Hastings College of Law that student groups must accept all-comers as members violated its First Amendment rights to free speech, expressive association and free exercise of religion by forcing it to accept members who do not accept the groups core beliefs about religion and sexual orientation. That argument was rejected. The court held that the policy was a reasonable, viewpoint-neutral condition and what CLS sought was not parity but an exemption from the policy: "The First Amendment shields CLS against state prohibition of the

organization's expressive activity, however exclusionary that activity may be. But CLS enjoys no constitutional right to state subvention of its selectivity." (p. 2978)

CLS made the same arguments as the religious lawyers have made here – that the nondiscrimination policy burdens their viewpoint. The court responded that, "[a] regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." (*Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989)) See also *Madsen v. Women's Health Center, Inc*., 512 U.S. 753, 763, 114 S.Ct. 2516, 129 L.Ed.2d 593 (1994). ("[T]he fact that the injunction covered people with a particular viewpoint does not itself render the injunction content or viewpoint based."). Even if a regulation has a differential impact on groups wishing to enforce exclusionary membership policies, "[w]here the [State] does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy." *R.A.V. v. St. Paul*, 505 U.S. 377, 390, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992). See also *Roberts*, 468 U.S., at 623, 104 S.Ct. 3244 (State's non-discrimination law did not "distinguish between prohibited and permitted activity on the basis of viewpoint."); *Board of*

Directors of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 549, 107 S.Ct. 1940, 95 L.Ed.2d 474 (1987).

Rather, the governmental interest in eradicating racial discrimination is compelling and substantially outweighs whatever burden is placed on the petitioners' exercise of their religious beliefs. In fact, in this case, there is no burden – all a lawyer has to do is reject the case or withdraw if s/he finds out s/he can no longer represent the client. (ER 1.16)

IIII. No religious beliefs are implicated because the non-discrimination rules go to conduct.

No religious beliefs are violated because the ethical rule and commentary prohibiting discrimination goes not to belief or expression but to conduct. See *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).

Petitioners have no claim under 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 and Arizona Constitution 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 statements 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. If lawyers cannot deliver justice, and justice must include nondiscrimination toward all clients, then we cannot deliver peace or safety. In bumper stick speak: no justice, no peace.

The petitioner is simply complaining that her religion doesn't agree with the existing or previously proposed rule, but **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). [4] (emphasis added))

The Court has found unconstitutional laws that require conduct in support of religion or a certain religion. In *Wallace v. Jaffree,* 472 U.S. 38 (1985), the Court invalidated an Alabama statute that authorized a one-minute period of silence in the public schools "for meditation or voluntary prayer." 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)) Petitioner as an individual lawyer is free to speak all she wants. The Bar and the court, on the other hand, are not free to promote a particular religious point of view. It's the conduct - discrimination- not the religious perspective, that is the issue. The Herrod petition like the Christian Legal Society is simply confusing its own viewpoint-based objections to equal protection with viewpoint discrimination.

V. Professionals must abide by the ethical standards of their field.

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.") There is nothing new or

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

novel about the proposition that members of the public depend upon such protection by the Bar. 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). Thus justices of both the Arizona and Supreme Courts have found that lawyers can be regulated to ensure nondiscrimination. The existing State Bar rule is consistent with this principle.

Obedience to a rule that does not require any verbal or symbolic message cannot be seen as support for that law. After all, lawyers represent criminal defendants and no presumption is made that they support any criminal behavior; lawyers represent corporations who have violated anti-trust laws or polluted the environment and no presumption is made that the lawyer supports pollution; lawyers represent child abusers and pedophiles and no one suggests that lawyers agree with sexual abuse. To allow a lawyer to not obey a rule because s/he claims it violates their beliefs would, in effect, permit each individual to

choose which laws s/he would obey merely by declaring agreement or opposition.

A lawyer is simply not free to make up their own rules about how they will perform in their profession. Bruff was an EAP counselor who wanted only to counsel in areas that did not conflict with her religion and LGBT behavior conflicted according to her. She assumed she would have to counsel homosexuals, but she also assumed she could refer such individuals when they sought counseling on their relationships. However, she never raised the issue with her employer or sought accommodation. "Instead, she apparently assumed she would only have to perform those aspects of the position she found acceptable. Title VII does not require an employer to accommodate such an inflexible position." *Bruff v. North Mississippi Health Services*, 244 F. 3d 495 (5th Cir. 2001)

Religious intolerance has been the theme of several recent cases in which a violation of Free Expression or Free Exercise was alleged based on professional discipline. The clear theme from the cases is that Free Expression is allowed but when the person attempts to impose those religious beliefs on others, the profession can disallow that behavior.

In *Keeton v. Anderson-Wiley*, 644 F. 3d 865, 895, 897 (11th Cir. 2011) a counseling student claimed that her Christian faith caused her to believe that she must tell a student it was not acceptable to be gay because it was morally wrong, and further, that she felt bound to attempt to convert students from being homosexual to heterosexual. She claimed the university violated her First Amendment right by discriminating against her viewpoint, by retaliating against her for exercising her First Amendment rights and by compelling her to express beliefs with which she did not agree.

Relying on the neutrality principle, the court asked if the point of the law was to infringe upon or restrict practices because of a religious motivation, *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 531, 533 (1993). The court next asked if a burden was imposed selectively only on conduct motivated by religious belief. In the *Keeton* case, as here, the issue was never her religious belief; it was her actions i.e. her attempt to convert others to her belief. She insisted on imposing her personal religious views on her clients, in violation of the ACA Code of Ethics. She was not told to change her beliefs, but to be aware of them and not impose them on clients. That is precisely all this ethical rule asks for lawyers. If you take a client's case, you may not impose your beliefs on the client. A lawyer has options – don't take

the case or withdraw. The court found in *Keeton* that she took the course voluntarily, and having signed up, she has no right to then refuse to comply with the conditions.

As the court said in *Keeton*, "Every profession has its own ethical codes and dictates. When someone voluntarily chooses to enter a profession, he or she must comply with its rules and ethical requirements. Lawyers must present legal arguments on behalf of their clients, notwithstanding their personal views. Judges must apply the law, even when they disagree with it. So too counselors must refrain from imposing their moral and religious values on their clients." We become lawyers voluntarily. Being a lawyer is a high calling entailing public trust and carrying with it a duty to see that justice is done. If Herrod and others cannot practice law in a fair and just way, they should choose another field of endeavor. In seeking to exempt their beliefs from the neutral application of the rule is looking for preferential, not equal, treatment. Preferential treatment cannot be given to one religious belief as that would violate the First Amendment and the Arizona Constitution as the establishment of religion.

In *Walden v. CDC et al*, No. 10-11733, 2012 WL 371871 (11th Cir. Feb. 7, 2012), Walden was an EAP counselor at CDC who was fired when she said

she could not provide counseling to someone in a same sex relationship. Rather than simply referring the clients to someone else, she insisted on telling them her personal, religious reasons that she could not work with them. The issue was again not her religious belief, but her actions in expressing displeasure or negative judgments to persons who had come for counseling, a most vulnerable time.

However, in the *Walden* case, the plaintiff was required to counsel every client who came and was not at liberty to refuse i.e. the rule was applied neutrally. Here, the rule is also applied neutrally but in addition, attorneys are at liberty to deny any client or to withdraw after representation begins if they are asked to do something against their belief, and in fact they should withdraw. (ER 1.16)

The *Axson-Flynn v. Johnson*, 356 F. 3d 1277 (2004) case makes clear the application of the neutrality principle and the impact on this petition. In that case, the student told the university in advance that she would not take Gods name in vain or use the F word in her acting class due to her Mormon religion. She was admitted to the program but when she refused to read the script exactly as it had been written with those words in it, they disciplined her. She sued under the Free Exercise clause. The court was clear that a school can restrict

certain speech when it is related to pedagogical concerns and when it is not pretext for wrongful discrimination. In the *Axson-Flynn* case, the school had previously granted an exception to a Jewish student not to do an improv exercise on Yom Kippur. Therefore, the neutrality principle was breached i.e. the rule was not applied equally to all, and thus a question of fact was presented so that summary judgment was inappropriate. Such facts are not present here. The ethical rule would apply to all attorneys equally.

Likewise, in *Ward v. Polite*, 667 F. 3d 727 (6th Cir. 2012) when the student counselor said she could not counsel gays and asked to refer them to another counselor, she was removed from the program. But in fact the school did not have a no-refer policy and the code of ethics did allow referral, so she should not have been terminated from the program. Since the structure of our ethics code does allow rejection or referral of the client, the case is not apropos.

The message is clear – under professional ethics, lawyers are free to express their religious beliefs. But they are not free to discriminate against clients based on those beliefs especially since they have an available escape route i.e. denial of representation or withdrawal.

VI. 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.

The Arizona Constitution, Article 2 section 12 ensures that liberty of conscience shall not be construed to justify practices that would be inconsistent with the peace and safety of the state. Surely allowing lawyers to discriminate against clients based on the lawyer's religious beliefs would be inconsistent with the peace and safety of the state. Arizona Constitution Article 2 section 13 reinforces the federal equal protection clause by saying that no law shall be enacted granting any privileges to one set of citizens that doesn't belong to them all. To say, we won't discriminate against all but one particular group would violate the Arizona constitution. Finally, Arizona Constitution Article 2 section 36 states that preferential treatment or discrimination is prohibited based on an enumerated set of criteria – race, sex, color, ethnicity or national origin –

in public employment, education or contracting. As lawyers, we should care that public justice be included.

VII. Ethical 8.4 as it stands and as it was proposed in R-10-0031 violated no rights of attorneys.

The previous proposed rule (R-10-0031, now withdrawn) said "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 created 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 gender identity, interracial marriage or the speaking of Spanish 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, gender identity discrimination should be unlawful, and supported interracial marriage or using Spanish, 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 gives that lawyer an out – it 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.[5]

The withdrawal option can be useful for many situations. 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 arguing 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 1.16 obliges the lawyer to withdraw. Nothing need be said about dislike of any attribute of the client her/himself. To argue that lawyers would be forced to represent someone they could not tolerate is sheer sophistry.

[5] 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; …

VIII. The Equal Protection Clause mandates the nondiscrimination language.

The Equal Protection Clause secures every person against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through government agents.[6] The Equal Protection Clause is violated when a selection [is] deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification.[7] 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.

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 invalid grounds for discrimination. (*Griffin v. Illinois*, 351 U.S. 12, 17 (1956))

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[6] *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).

The court cannot discriminate for or against someone because of their religion, or lack of it.

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*, *supra* 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,[8] when Warren Jeffs, self-proclaimed leader of a sect of the Church of the Latter Day Saints, argued that his religious beliefs justified

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

[8] 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.

having sex with children but was nevertheless convicted,[9] where Christian Science practitioners let their children die, but are convicted regardless of their religious beliefs including in Arizona. [10] Likewise here, since all lawyers are prohibited from discriminating, there is no denial of equal protection by prohibiting one sect from discriminating.

The petitioner is asking that the court discriminate between religions, select a certain sect of one religion (hers), and through that device, deny the equal protection of some minorities. 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)) The petition is also asking that a religious view be adopted by the Bar and by the Court. Such action violates the rights of other religions and the nonreligious. The petitioner is asking precisely that the fundamental right of equal protection and due process should be denied to minorities because of her

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

[10] 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.

stated religious beliefs. This is clearly a position that cannot stand and is in violation of fundamental American law.

CONCLUSION

Many religious persons and churches support nondiscrimination including toward LGBT. Some in fact have gay pastors and gay marriages. In an Orwellian twist, African Americans ministers, with strong Christian religious beliefs, often lead the civil rights struggles. They fought for hundreds of years in the streets and in the courts for equality and justice. Yet, in the name of religious belief in the same God, the Herrod interpretation would deny equal protection to African-Americans.

What the petition is asking is to elevate one religious belief over another. The rule as it stands 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. To adopt the petition would infringe upon the fundamental right of religious liberty of approximately 22,000 Arizona lawyers by allowing one small sect to use the machinery of the government to promote their version of religion.

The petition is an attempt to turn clock back to the 1950s when discrimination was freely practiced, it's an attempt to question sixty years of

jurisprudence, it's an attempt to march Arizona backward to *Plessy v. Ferguson*, *supra*. The petition ignores facts, reason and the lived experiences of the majority of Arizona residents. It would give Arizona yet another black eye in race relations moving us from the twenty-first Century to the eighth.

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 petition is completely without legal merit. Religious beliefs do not allow practitioners to violate the law nor trump the fundamental rights of others. The below signed attorney and two organizations ask that the Court reject the proposed rule.

Respectfully submitted this date: 17 May 20

Secular Coalition for Arizona, Matt Schoenley
Chair & Executive Director
Humanist Society of Greater Phoenix
Richard Dewey, President

Electronic copy filed with the
Clerk of the Supreme Court on
17 May 2012

A copy was emailed to:

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