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8 **IN THE SUPREME COURT**
9 **STATE OF ARIZONA**

10 In the Matter of:
11 PETITION TO AMEND CANON 2.3,
12 RULE 81, ARIZONA RULES OF
13 THE SUPREME COURT

Supreme Court No. R-15-0014

**Comment in Opposition to Petition
to Amend Canon 2.3, Rule 81,
Arizona Rules of the Supreme
Court**

14
15 The 87 undersigned Arizona attorneys hereby submit this Comment in
16 opposition to the Petition to Amend Canon 2.3 in Rule 81 of the Arizona Rules of
17 the Supreme Court.

18 **INTRODUCTION**

19 The current Rule 2.3(B) of the Arizona Code of Judicial Conduct
20 (hereinafter “Judicial Conduct Code”) provides that “(B) A judge shall not, in the
21 performance of judicial duties, by words or conduct manifest bias or prejudice, or
22 engage in harassment, including but not limited to bias, prejudice, or harassment
23 based upon race, sex, gender, religion, national origin, ethnicity, disability, age,
24 sexual orientation, marital status, socioeconomic status, or political affiliation, and
25 shall not permit court staff, court officials, or others subject to the judge’s
26 direction and control to do so.” And Rule 2.3(C) of the Judicial Conduct Code
27 requires judges to require lawyers in proceedings before the court to refrain from
28 manifesting such bias or prejudice or engaging in such harassment.

1 The Petitioners seek to add a new protected class—“gender identity”—to
2 Rule 2.3(B) and (C)’s list of protected classes.

3 The Petitioners’ stated reason for their request is to conform the Judicial
4 Conduct Code “to the corresponding ethics rule which governs lawyer bias and
5 prejudice.”

6 The “ethics rule” to which the Petitioners refer is Rule 8.4(d) of the Arizona
7 Code of Professional Conduct (hereinafter “Attorney Conduct Code”), which
8 provides that “It is professional misconduct for a lawyer to: . . . (d) engage in
9 conduct that is prejudicial to the administration of justice.” Comment [3] of Rule
10 8.4 provides: “A lawyer who in the course of representing a client, knowingly
11 manifests by words or conduct, bias or prejudice based upon race, sex, religion,
12 national origin, disability, age, sexual orientation, gender identity or
13 socioeconomic status, violates paragraph (d) when such actions are prejudicial to
14 the administration of justice. This does not preclude legitimate advocacy when
15 race, sex, religion, national origin, disability, age, sexual orientation, gender
16 identity or socioeconomic status, or other similar factors, are issues in the
17 proceeding. A trial judge’s finding that peremptory challenges were exercised on
18 a discriminatory basis does not alone establish a violation of this Rule.”

19 For the reasons set forth herein, the undersigned Arizona attorneys object to
20 the Petitioners’ Petition.

21 **A. ADDING “GENDER IDENTITY” WILL CREATE**
22 **CONFUSION IN THE JUDICIAL CONDUCT CODE**

23 Adding “gender identity” to the Judicial Conduct Code will render the
24 Judicial Conduct Code ambiguous and confusing, because the Judicial Conduct
25 Code already protects both “sex” and “gender.” Since sex and gender must be
26 referring to different things, Arizona v. Eddington, 266 P.3d 1057, 1059 (Ariz.
27 2011) (if different terms in a statute are construed to mean the same thing, then
28 they are redundant, and we generally construe statutes so that no part is rendered

1 redundant or meaningless), adding “gender identity” will raise the question: What
2 is the difference between “sex,” “gender,” and “gender identity”? Under the
3 above-cited Eddington rule, since “gender” cannot mean the same thing as “sex,”
4 and since “gender identity” cannot mean the same thing as “gender,” what *do*
5 those terms mean? The Petitioners do not even acknowledge this significant
6 problem, let alone offer an explanation as to how these different terms can be
7 rationally distinguished. The Petitioners’ suggested amendment will render these
8 terms either redundant or meaningless, and it would be wise to avoid either result.

9 Further, the confusion that will arise on account of adding “gender identity”
10 to the Judicial Code of Conduct will raise constitutional due process issues. It is a
11 fundamental principle of due process that persons not be forced to guess at the
12 meaning of the law. Smith v. Goguen, 415 U.S. 566, 574 (1974). Since adding
13 “gender identity” to the Judicial Conduct Code will create confusion as to what
14 “sex,” “gender,” and “gender identity” mean and how they differ from one
15 another, a judge would be relegated to guessing what those terms mean, and face
16 professional discipline should she guess wrong.

17 Since adopting the Petitioners’ Petition will introduce into the Judicial
18 Conduct Code an ambiguity and confusion which does not now exist in the
19 Judicial Conduct Code, the Petitioners’ Petition should be denied.

20 **B. GRANTING THE PETITIONERS’ PETITION WILL NOT**
21 **CONFORM THE JUDICIAL CONDUCT CODE TO THE**
22 **ATTORNEY CONDUCT CODE**

23 For a variety of reasons, amending Rule 2.3(B) and (C) of the Judicial
24 Conduct Code to add “gender identity” as an additional protected class will not, in
25 fact, conform Rule 2.3 of the Judicial Conduct Code to Rule 8.4 of the Attorney
26 Conduct Code.

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1. Amending Rule 2.3 of the Judicial Conduct Code as Petitioners Request Would Not Conform the Judicial Conduct Code to the Attorney Conduct Code Because Rule 2.3 of the Judicial Conduct Code is a Rule Whereas Comment [3] to Rule 8.4(d) of the Attorney Conduct Code is Not.

The reason the Petitioners’ requested amendment would not result in Rule 2.3 of the Judicial Conduct Code being conformed to Rule 8.4 of the Attorney Conduct Code is because there is no *Rule* of the Attorney Code of Conduct corresponding to Rule 2.3 of the Judicial Conduct Code.

The “rule” of the Attorney Conduct Code to which the Petitioners refer is not a Rule at all, but rather a mere Comment—Comment [3]—to Rule 8.4 of the Attorney Conduct Code.

A Rule and a Comment are not the same. “*Comments do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules.*” Preamble [14] to the Arizona Code of Professional Conduct. “*The Comments are intended as guides to interpretation, but the text of each Rule is authoritative.*” Preamble [21] to the Arizona Code of Professional Conduct. See also, Miami Business Services, LLC v. Davis, 299 P.3d 477 (Okla. 2013)(the court is not bound by the Comments to the Rules of Professional Conduct); Carpenito’s Case, 651 A.2d 1 (N.H. 1994)(The Comments are intended as guides to interpretation of the Rules). So although it is certainly true that *Comment [3]* to Rule 8.4 of the Attorney Conduct Code lists “gender identity” as a protected class, there is in fact no *Rule* in the Attorney Conduct Code that contains any anti-bias provision with any protected classes.

1 **2. Amending the Judicial Conduct Code as Petitioners**
2 **Request Would not Conform the Judicial Conduct Code to**
3 **the Attorney Conduct Code Because the Judicial Conduct**
4 **Code Already Contains “Gender” As A Protected Class.**

5 Still another reason that adding “gender identity” to Rule 2.3(B) and (C) of
6 the Judicial Conduct Code will not result in conforming the Judicial Conduct
7 Code to the Attorney Conduct Code is that Rule 2.3(B) and (C) of the Judicial
8 Conduct Code already contains gender protection language that Comment [3] to
9 Rule 8.4 of the Attorney Conduct Code does not.

10 In particular, the protected classes of Rule 2.3(B) and (C) of the current
11 Judicial Conduct Code are: “*race, sex, gender, religion, national origin, ethnicity,*
12 *disability, age, sexual orientation, marital status, socioeconomic status, or*
13 *political affiliation.*” So Rule 2.3(B) and (C) of the Judicial Conduct Code
14 already contains three gender-related terms in its protected class list—namely,
15 “sex,” “gender,” and “sexual orientation.”

16 The classes listed in Comment [3] of the Attorney Code of Conduct, on the
17 other hand, are: “*race, sex, religion, national origin, disability, age, sexual*
18 *orientation, gender identity or socioeconomic status.*” Thus, although the
19 Attorney Conduct Code also already contains three gender-related terms in its
20 class list—namely, “sex,” “sexual orientation,” and “gender identity”—they are
21 not exactly the same as the classes protected in the Judicial Conduct Code. The
22 Attorney Conduct Code list includes “gender identity” but not “gender.” The
23 Judicial Conduct Code list includes “gender” but not “gender identity.”

24 What this means is that—if the Petitioner’s Petition is granted—the Judicial
25 Conduct Code will protect no fewer than **four** gender-related classes (“sex,”
26 “gender,” “sexual orientation” and “gender identity”), whereas the Attorney
27 Conduct Code will list only **three** gender-related classes (“sex,” “sexual
28 orientation,” and “gender identity”). So, amending the Judicial Conduct Code as
 Petitioners request will still not conform the Codes to one another.

1 **C. RULE 2.3(B) and (C) OF THE ABA MODEL CODE OF**
2 **JUDICIAL CONDUCT DOES NOT LIST “GENDER**
3 **IDENTITY” AS A PROTECTED CLASS, AND ARIZONA**
4 **SHOULD NOT DO SO EITHER**

5 Nearly every state’s code of judicial conduct—including Arizona’s—is
6 based on the ABA Model Code of Judicial Conduct. However, the ABA Model
7 Code of Judicial Conduct Rule 2.3(B) and (C) does not list “gender identity” as a
8 protected class. Neither should Arizona.

9 **D. VIRTUALLY NO OTHER STATE LISTS “GENDER**
10 **IDENTITY” AS A PROTECTED CLASS IN RULE 2.3 OF ITS**
11 **JUDICIAL CONDUCT CODE, AND ARIZONA SHOULD NOT**
12 **DO SO EITHER**

13 The Petitioners go to great lengths arguing that “gender identity” deserves
14 express protection in the Arizona Code of Judicial Conduct. But in so doing, they
15 fail to point out that virtually no other state in the union lists “gender identity” as a
16 protected class in its Code of Judicial Conduct.

17 Indeed, a survey of the various state codes of judicial conduct reveals that,
18 other than Oregon, no other state, nor the District of Columbia, lists “gender
19 identity” as a protected class in its code of judicial conduct. And Oregon differs
20 from Arizona in that Oregon’s code of judicial conduct does not list “gender” as a
21 protected class, whereas Arizona does. Thus, Oregon avoids the confusion that
22 will result should Arizona’s Code of Judicial Conduct be amended to add “gender
23 identity.”

24 So, despite the Petitioners’ argument that it is imperative that “gender
25 identity” be added to Arizona’s Judicial Conduct Code list of protected classes,
26 only one other state has seen fit to do so, and that state does not list “gender” in its
27 list of protected classes, as Arizona does.

28 Since neither the ABA, nor virtually any other state, nor the District of
 Columbia, has deemed “gender identity” worthy of inclusion in its list of judicial
 code of conduct’s protected classes, there is no good reason for Arizona to do so

1 either. In fact, it would be unwise for Arizona to take a position so completely out
2 of step with the rest of the nation’s rules of judicial conduct.

3 **E. THE PETITIONERS PRESENT NO EVIDENCE THAT**
4 **“GENDER IDENTITY” BIAS IS A PROBLEM AMONG**
5 **ARIZONA JUDGES OR STAFF**

6 In support of their assertion that “gender identity deserves expressed
7 protection,” the Petitioners cite only two publications—one from the U.S. Office
8 of Personnel Management and the other from the U.S. Equal Employment
9 Opportunity Commission. However, neither of those sources provides any
10 support for the proposition that Arizona judicial officers or their staff members
11 engage in discriminatory conduct on account of “gender identity.”

12 Since solutions to non-existent problems should be rejected, so should the
13 Petitioners’ Petition.

14 **F. THE PETITIONERS’ PETITION PERPETUATES THE**
15 **UNWISE POLICY OF ADDING A NEVER ENDING LIST OF**
16 **SPECIALLY PROTECTED CLASSES TO CODES OF**
17 **CONDUCT**

18 In light of the Petitioners’ purported purpose of conforming the Judicial
19 Conduct Code to the Attorney Conduct Code, it should be noted that the Judicial
20 Conduct Code already contains four more protected classes than does Comment
21 [3] to Rule 8.4 of the Attorney Conduct Code. In addition to race, sex, religion,
22 national origin, disability, age, sexual orientation and socioeconomic status (all of
23 which are listed in Comment [3] to Rule 8.4 of the Attorney Conduct Code), the
24 Judicial Conduct Code protects gender, ethnicity, marital status, and political
25 affiliation, none of which are listed in Comment [3] to Rule 8.4 of the Attorney
26 Conduct Code.

27 So the Judicial Conduct Code currently lists 12 classes of specially
28 protected groups. The Petitioners now seek to add a 13th class—“gender identity.”

1 The Petitioners' Petition continues this never-ending process of adding
2 specially protected classes to anti-discrimination/anti-bias provisions of both the
3 Judicial Conduct Code and the Attorney Conduct Code.

4 As pointed out above, it has now reached the absurd result that the
5 proliferating classes cannot even be rationally identified or distinguished from
6 other protected classes (see, for example, the above-discussed problem of
7 distinguishing between "sex," "gender," and "gender identity").

8 Furthermore, there is real confusion over what some of the current
9 classifications even mean. For example, "gender identity" is objectively
10 indeterminable. "Gender identity" is, by definition, completely subjective,
11 depending entirely upon a person's self-perception, which may have nothing to do
12 with how they objectively appear to others. The concept is completely malleable
13 and subject to change. There is absolutely no requirement that someone have a
14 temporally consistent "gender identity." In fact, proponents of gender identity
15 protection admit that "gender identity" is not only changeable over time but also
16 that different "gender identities" may exist simultaneously and in different
17 contexts. See, for example, *Self-Determination In A Gender Fundamental State:
18 Toward Legal Liberation Of Transgender Identities*, 12 Tex. J. on C.L. & C.R.
19 101, 104 (2006) ("[I]ndividuals may identify as any combination of gender
20 identity referents simultaneously or identify differently in different contexts or
21 communities. Furthermore, two individuals may deploy the same signifier to
22 identify themselves or their communities, but mean very different things by the
23 descriptor they choose. And various individuals may view one person's gender
24 differently and thus deploy different gender signifiers to refer to that individual."),
25 written by a proponent of a "right to gender self-determination" and who posits
26 "the addition of infinite new classifications of individuals' genders within and
27 outside of the gender categories society currently comprehends." Consequently,
28 under the Petitioners' proposed amendment, judges are being directed not to

1 discriminate against something that neither they nor gender identity advocates
2 themselves can even define let alone objectively perceive or rely upon as having
3 any objectively consistent existence.

4 In addition, providing a list of specially protected groups has now pushed
5 the Arizona legal profession and the State Bar into the improper role of taking
6 positions on contentious political and social issues, including issues of personal
7 morality. It is not appropriate for groups to use the official authorities of the legal
8 profession in order to advance their own political and social agendas, especially
9 when there is wide disagreement among members of the Arizona legal profession
10 as to the agendas of the groups seeking professional and Bar support.

11 Using the legal profession in this inappropriate manner results in frequent
12 petitions to change the Rules to include recognition and protection to new groups
13 seeking support for their particular interests. Indeed, this has already occurred
14 repeatedly in Arizona. In particular, those seeking recognition of and protection
15 based upon certain sexual behaviors, sought and were granted recognition of
16 “sexual orientation” as a protected group. But that proved insufficient to satisfy
17 the claims of those who sought special recognition and protection based on
18 “gender identity,” which was added to Comment [3] to Rule 8.4 of the Attorney
19 Conduct Code in 2003. However, the inclusion of those two groups still proved
20 insufficient to satisfy those who sought special recognition and protection based
21 on “gender expression,” and advocates pressed for that addition in 2011. Even
22 now there are additional groups who claim that their peculiar characteristics merit
23 special recognition and protection (see, for example, The National Association to
24 Advance Fat Acceptance (NAAFA) which has resolved “[t]hat ‘height and
25 weight’ be included as a protected category in existing local, state, and federal
26 civil rights statutes” and the Wesleyan University Office of Residential Life which
27 has recognized no fewer than 15 “sexually or gender dissident communities,”
28 represented by the acronym LGBTTTQQFAGPBDSM. See

1 Respectfully submitted this the 20th day of May, 2015.

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