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IN THE SUPREME COURT
STATE OF ARIZONA

In the Matter of: PETITION TO AMEND RULES 2.3 AND 3.6, ARIZONA CODE OF JUDICIAL CONDUCT, RULE 81, RULES OF THE SUPREME COURT	Supreme Court No. R-15-0020 **COMMENT IN OPPOSITION TO PETITION TO AMEND RULES 2.3 AND 3.6, ARIZONA CODE OF JUDICIAL CONDUCT, RULE 81, RULES OF THE SUPREME COURT OF ARIZONA**

The 88 undersigned Arizona attorneys hereby submit this Comment in opposition to the Petition to Amend Canon 2.3 in Rule 81 of the Arizona Rules of the Supreme Court.

INTRODUCTION

The current Rule 2.3(B) of the Arizona Code of Judicial Conduct (hereinafter "Judicial Conduct Code") provides that "(B) A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, or engage in harassment, including but not limited to bias, prejudice, or harassment based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, and shall not permit court staff, court officials, or others subject to the judge's direction and control to do so." And Rule 2.3(C) of the Judicial Conduct Code

requires judges to require lawyers in proceedings before the court to refrain from manifesting such bias or prejudice or engaging in such harassment.

The Petitioners seek to add a new protected class—"gender identity"—to Rule 2.3(B) and (C)'s list of protected classes.

The current Rule 3.6(A) of the Judicial Conduct Code provides that "(A) A judge shall not hold membership in any organization that practices invidious discrimination on the basis of race, sex, gender, religion, national origin, ethnicity, or sexual orientation."

The Petitioners seek to add a new protected class—"gender identity"—to Rule 3.6(A) as well.

The Petitioners' stated reason for their requested amendments is to conform the Judicial Conduct Code to the provisions of the Arizona attorney Code of Professional Conduct (hereinafter "Attorney Conduct Code").

The "ethics rule" of the Attorney Conduct Code which the Petitioners liken to Rule 2.3 of the Judicial Conduct Code is Rule 8.4(d) of the Attorney Conduct Code," which provides that "It is professional misconduct for a lawyer to: . . . (d) engage in conduct that is prejudicial to the administration of justice." Comment [3] of Rule 8.4 provides: "A lawyer who in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, gender identity or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice. This does not preclude legitimate advocacy when race, sex, religion, national origin, disability, age, sexual orientation, gender identity or socioeconomic status, or other similar factors, are issues in the proceeding. A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this Rule."

There is no Attorney Conduct Code Rule that prohibits attorneys from being members of organizations that practice invidious discrimination.

For the reasons set forth herein, the undersigned Arizona attorneys object to the Petitioners' Petition.

A. ADDING "GENDER IDENTITY" WILL CREATE CONFUSION IN THE JUDICIAL CONDUCT CODE

Adding "gender identity" to Rules 2.3(B) and (C) and 3.6(A) of the Judicial Conduct Code will render the Judicial Conduct Code ambiguous and confusing. That is because the Judicial Conduct Code already protects both "sex" and "gender." Since sex and gender must be referring to different things, Arizona v. Eddington, 266 P.3d 1057,1059 (Ariz. 2011)(if different terms in a statute are construed to mean the same thing, then they are redundant, and we generally construe statutes so that no part is rendered redundant or meaningless), adding "gender identity" will raise the legitimate question: What is the difference between "sex," "gender," and "gender identity," since they will all be listed as protected classes? Under the above-cited Eddington rule, since "gender" cannot mean the same thing as "sex," and since "gender identity" cannot mean the same thing as "gender," what *do* those terms mean? What is the difference between "sex" and "gender," and, more importantly, what is the difference between "gender" and "gender identity"? The Petitioners do not even acknowledge this significant problem, let alone offer an explanation as to how these different terms can be rationally distinguished. The Petitioners' suggested amendments will render these terms either redundant or meaningless, and it would be wise to avoid either result.

Further, the confusion that will arise on account of adding "gender identity" to the Judicial Conduct Code will raise constitutional due process issues. It is a fundamental principle of due process that persons not be forced to guess at the meaning of the law. Smith v. Goguen, 415 U.S. 566, 574 (1974). Since adding "gender identity" to the Judicial Conduct Code will create confusion as to what "sex," "gender," and "gender identity" mean and how they differ from one

another, a judge would be relegated to guessing what those terms mean, and face professional discipline should she guess wrong.

Since adopting the Petitioners' Petition will introduce into the Judicial Conduct Code an ambiguity and confusion which does not now exist, and which may violate due process, the Petitioners' Petition should be denied.

B. GRANTING THE PETITIONERS' PETITION WILL NOT CONFORM THE JUDICIAL CONDUCT CODE TO THE ATTORNEY CONDUCT CODE

For a variety of reasons, amending Rules 2.3(B) and (C) and 3.6(A) of the Judicial Conduct Code to add "gender identity" as an additional protected class will not, in fact, conform Rules 2.3(B) and (C) and 3.6(A) of the Judicial Conduct Code to the Attorney Conduct Code.

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 the Attorney Conduct Code is because there is no *Rule* of the Attorney Code of Conduct corresponding to Rule 2.3(B) and (C) of the Judicial Conduct Code.

The "rule" of the Attorney Conduct Code the Petitioners claim is a "corresponding ethics rule" to Judicial Conduct Code Rule 2.3(B) is, in fact, 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," there is, in fact no *Rule* in the Attorney Conduct Code that contains any anti-bias provision with any protected classes.

2. Amending the Judicial Conduct Code, as Petitioners Request, Would Not Conform the Judicial Conduct Code to the Attorney Conduct Code Because There Is No Rule In The Attorney Conduct Code Comparable To Rule 3.6(A) Of The Judicial Conduct Code

There is no Rule in the Attorney Conduct Code that prohibits attorneys from holding membership in organizations that practice invidious discrimination. Therefore, there is no Judicial Conduct Code Rule to which Rule 3.6(A) of the Judicial Conduct Code can conform.

3. Amending the Judicial Conduct Code, as Petitioners Request, Would Not Conform the Judicial Conduct Code to the Attorney Conduct Code Because The Judicial Conduct Code Already Contains "Gender" As A Protected Class.

Still another reason that adding "gender identity" to Rules 2.3(B) and (C) and 3.6(A) of the Judicial Conduct Code will not result in conforming the Judicial Conduct Code to the Attorney Conduct Code, is that both Rule 2.3(B) and (C) and Rule 3.6(A) of the Judicial Conduct Code already contain gender protection language that Comment [3] to Rule 8.4 of the Attorney Conduct Code does not.

In particular, the protected classes of Rule 2.3(B) and (C) of the current Judicial Conduct Code are: "*race, **sex**, **gende**r, religion, national origin, ethnicity, disability, age, **sexual orientation**, marital status, socioeconomic status, or*

political affiliation." (our emphasis). So Rule 2.3(B) of the Judicial Conduct Code already contains three gender-related terms in its protected class list—namely, "sex," "gender," and "sexual orientation."

Likewise, the protected classes of Rule 3.6(A) of the Judicial Conduct Code are "*race, **sex**, **gende**r, religion, national origin, ethnicity, or **sexual orientation***." (our emphasis). So Rule 3.6(A) of the Judicial Conduct Code also already contains three gender-related terms in its protected class list—namely, "sex," "gender," and "sexual orientation."

Note, first, that the protected classes listed in Rule 2.3(B) and (C) and Rule 3.6(A) of the Judicial Conduct Code itself are already significantly different from one another. In addition to their shared protected classes, Rule 2.3(B) and (C) of the Judicial Conduct Code protects several classes that Rule 3.6(A) does not—namely, disability, age, marital status, socioeconomic status, and political affiliation. So adding "gender identity" to Rules 2.3(B) and (C) and 3.6(A) will not even conform those Judicial Conduct Code Rules to one another, let alone to the Attorney Conduct Code.

Second, compare the gender-related classes currently listed in Comment [3] of the Attorney Conduct Code with the gender-related protected classes currently listed in Rules 2.3(B) and (C) and 3.6(A) of the Judicial Conduct Code. The Attorney Conduct Code Comment lists "***sex***," "***sexual orientation***," *and* "***gender identity,***" whereas the Judicial Conduct Code lists "***sex***," "***sexual orientation***," and "***gender***."

So, although the Judicial Conduct Code does not currently list "gender identity" as a protected class, the Judicial Conduct Code lists "gender" as a protected class, whereas Comment [3] of Rule 8.4 of the Attorney Conduct Code does not.

What this means is that—if the Petitioner's Petition is granted—the Attorney Conduct Code will recognize **three** gender-related classes (sex, sexual

orientation, and gender identity), while the Judicial Conduct Code will protect **four** gender-related classes (sex, gender, sexual orientation, and gender identity).

So, amending the Judicial Conduct Code as the Petitioners request will still not conform the Codes to one another. In fact, it will make the Codes even more different from one another.

C. RULE 2.3 OF THE ABA MODEL CODE OF JUDICIAL CONDUCT DOES NOT LIST "GENDER IDENTITY" AS A PROTECTED CLASS, AND ARIZONA SHOULD NOT DO SO EITHER

Nearly every state's code of judicial conduct—including Arizona's—is based on the ABA Model Code of Judicial Conduct. However, the ABA Model Code of Judicial Conduct does not list "gender identity" as a protected class in either its Rule 2.3(B) and (C) or Rule 3.6(A). Neither should Arizona.

D. VIRTUALLY NO OTHER STATE LISTS "GENDER IDENTITY" AS A PROTECTED CLASS IN RULE 2.3(B) OF ITS JUDICIAL CONDUCT CODE, AND ARIZONA SHOULD NOT DO SO EITHER

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

Indeed, a survey of the various state codes of judicial conduct reveals that, other than Oregon, no other state, nor the District of Columbia, lists "gender identity" as a protected class in its code of judicial conduct. And Oregon differs from Arizona in that Oregon's code of judicial conduct does not list "gender" as a protected class, whereas Arizona does. Thus, in adopting "gender identity" as a protected class without having adopted "gender" as a protected class, Oregon avoids the ambiguity and confusion that will result should Arizona's Code of Judicial Conduct be amended to add "gender identity."

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

Since neither the ABA, nor virtually any other state, nor the District of Columbia, have 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 either. In fact, it would be unwise for Arizona to take a position so completely out of step with the rest of the nation's rules of judicial conduct.

E. NO OTHER STATE LISTS "GENDER IDENTITY" AS A PROTECTED CLASS IN RULE 3.6(A) OF ITS CODE OF JUDICIAL CONDUCT, AND ARIZONA SHOULD NOT DO SO EITHER

Not only does virtually no other state include "gender identity" in Rule 2.3 or its equivalent of its code of judicial conduct, *no* other state includes "gender identity" in Rule 3.6(A) or its equivalent in its code of judicial conduct.

Since neither the ABA, nor any other state, nor the District of Columbia, have deemed "gender identity" worthy of inclusion in its list of judicial code of conduct's protected classes in Rule 3.6(A), there is no good reason for Arizona to do so either. In fact, it would be unwise for Arizona to take a position so completely out of step with the rest of the nation's rules of judicial conduct.

F. THE PETITIONERS PRESENT NO RELIABLE EVIDENCE THAT GENDER IDENTITY BIAS IS A PROBLEM AMONG ARIZONA JUDGES OR STAFF

In advancing their Petition, the Petitioners claim that gender identity discrimination by judges and court officials is a "critical problem." However, they fail to support that assertion with any reliable information.

They devote nearly three pages of their Petition to discussing the *Injustice at Every Turn Report*, but nearly all the information they provide relates to

unemployment or underemployment, poverty, homelessness, crime, and incarceration, of those identifying as transgender. None of which demonstrates that judges or their staffs discriminate against those appearing before them on account of being transgender. And when discrimination by judges or court officials is discussed, they admit that the respondents participating in the study actually report that discrimination by judges and court officials is on the lower end of the spectrum—with only 12% of the respondents reporting such discrimination—the significance of which becomes even more apparent in light of the fact that the Report claims that members of the transgender population have a much higher rate of contact with the judicial system than does the population in general.

Further, the Report itself is seriously flawed and cannot be relied upon to conclude that Arizona judges and court officials actually discriminate against people who identify as transgender.

First, the Report was not an objective attempt to determine whether there was discrimination against those who identity as transgender. Rather, the Report was admittedly a study "*undertaken with the dogged commitment of the National Center for Transgender Equality and the National Gay and Lesbian Task Force to bring the full extent of discrimination against transgender and gender non-conforming people to light*." (our emphasis). Report, page 1. In other words, there was an admitted agenda behind the Report – namely, to demonstrate that there *is* such discrimination, rather than to determine *whether there is* such discrimination. When a study sets out "with the dogged commitment" to prove a certain proposition, rather than to conduct an objective study, the outcome is hardly surprising.

The greatest flaws in the Report, however, are that the questions posed to study participants were not specific as to what constituted the perceived discrimination and none of the claimed discrimination was actually substantiated.

The Report simply asked participants whether they have experienced from judges or court officials a denial of equal treatment, harassment, or disrespect based on their gender identity. In response the participants checked a box if they thought they had experienced such treatment.

Significantly, the study did not request or collect any information on what the participants actually experienced or the context of their experience. One cannot, of course, question the participants' *subjective* perception that they were discriminated against on account of their gender identity—but someone's *subjective* perception cannot be a substitute for an *objective* determination. In reporting perceived discrimination, was the participant referring to a verbal slur that was clearly aimed at gender identity, or had the participant simply experienced an unfavorable judicial outcome that the participant attributed to his or her gender identity or gender non-conformance? The first would clearly be discrimination based on gender identity. The second may or may not be. But the Report makes absolutely no effort to determine which is which.

In addition, the study did not, and apparently did not even make any attempt, to substantiate the truth of the reported discrimination. No interviews were conducted. No probing or clarifying questions were posed. The report of perceived discrimination was accepted as the equivalent of actual discrimination. No reliable scientific study would be conducted in that manner.

For these reasons, the Report does not provide reliable information on the incidence of gender identity discrimination by Arizona judges or court officials and cannot support a claim that gender identity discrimination is a problem among Arizona judges and court officials warranting a modification of the Judicial Conduct Code.

G. THE PETITIONERS' CLAIM THAT GOVERNMENTS AT ALL LEVELS ARE BANNING GENDER IDENTITY DISCRIMINATION IS NOT ACCURATE

In support of their Petition, the Petitioners make the claim that governments at all levels are banning discrimination based on gender identity. The facts prove otherwise.

First, the Petitioners themselves admit that there is *no federal law* expressly prohibiting gender identity discrimination.

Second, although the Petitioners do not mention it, the State of Arizona has not seen fit to enact any law prohibiting gender identity discrimination either. And although the Petitioners point out that four municipalities in Arizona ban gender identity discrimination, the significance of that fact deflates when one considers that there are 91 municipalities in Arizona. http://ballotpedia.org/Cities_in_Arizona (last visited April 20, 2015). That less than 5% of Arizona municipalities have protected gender identity demonstrates that the municipalities that protect gender identity are the exception rather than the rule.

The Petitioners also claim that, in the wake of the U.S. Supreme Court's Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) decision, a number of federal courts have interpreted the ban on sex discrimination in employment in Title VII of the Civil Rights Act of 1964 to include discrimination based on gender identity. That is inaccurate.

First of all, the list of protected classes under Title VII does *not* include the term "gender identity."

Second, Congress has repeatedly refused to enact the Employment Non-Discrimination Act (ENDA), the sole purpose of which is to add sexual orientation and gender identity to Title VII and other federal non-discrimination laws. Hence it is clear that Congress's intent is not to protect gender identity in Title VII or other federal non-discrimination laws.

Third, the Price Waterhouse case did not even involve a claim of gender identity discrimination, and so cannot and does not stand for the proposition that Title VII protects gender identity.

And, finally, the post-Price Waterhouse lower federal court cases the Petitioners cite do not stand for the proposition that Title VII bans gender identity discrimination. For example, Smith v. City of Salem, 378 F.3d 566, 576-577 (6th Cir. 2004) stands for the proposition that Price Waterhouse recognizes sexual-stereotyping – not gender identity discrimination – as sex discrimination under Title VII. And Glenn v. Brumby, 663 F.3d 1312 (11th Cir. 2011) was affirming Glenn v. Brumby, 724 F.Supp.2d 1284, 1300 (N.D. Georgia 2010), which recognized that transsexuals are not members of a protected class based on sex. There are no U.S. Courts of Appeal or U.S. Supreme Court cases recognizing gender identity as a protected class under Title VII. See, for example, Etsitty v. Utah Transit Auth., 502 F.3d 1215, 1222 (10th Cir. 2007)(transsexuals are not a protected class under Title VII). And although the EEOC has taken the position that Title VII protects gender identity, that position was recently rejected by the U.S. District Court for the Eastern District of Michigan in EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 2:14-cv-13710(E.D. Michigan 2014), which stated in a recent *Opinion & Order* that "*transgender or transsexual status is currently not a protected class under Title VII*."

So, to the extent the Petitioners contend that—in adding gender identity to Arizona's Judicial Conduct Code—the Arizona legal profession would simply be conforming to federal and Arizona law, such is not the case and should be rejected.

H. THE PETITIONERS' PETITION PERPETUATES THE UNWISE POLICY OF ADDING A NEVER ENDING LIST OF SPECIALLY PROTECTED CLASSES TO CODES OF CONDUCT

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

The Judicial Conduct Code already lists 12 classes of specially protected groups. The Petitioners seek to add a 13th class—"gender identity."

The Petitioners' Petition continues what has turned out to be a never-ending process of adding specially protected classes to anti-discrimination provisions of professional codes of conduct.

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

Furthermore, there is real confusion over what some of the current classifications even mean. For example, "gender identity" is objectively indeterminable. "Gender identity" is, by definition, completely subjective, depending entirely upon a person's self-perception, which may have nothing to do with how they objectively appear to others. The concept is completely malleable and subject to change. There is absolutely no requirement that someone have a temporally consistent "gender identity." In fact, proponents of gender identity

protection admit that "gender identity" is not only changeable over time but also that different "gender identities" may exist simultaneously and in different contexts. See, for example, *Self-Determination In A Gender Fundamental State: Toward Legal Liberation Of Transgender Identities*, 12 Tex. J. on C.L. & C.R. 101, 104 (2006) ("[I]ndividuals may identify as any combination of gender identity referents simultaneously or identify differently in different contexts or communities. Furthermore, two individuals may deploy the same signifier to identify themselves or their communities, but mean very different things by the descriptor they choose. And various individuals may view one person's gender differently and thus deploy different gender signifiers to refer to that individual."), written by a proponent of a "right to gender self-determination" and who posits "the addition of infinite new classifications of individuals' genders within and outside of the gender categories society currently comprehends." Consequently, under the Petitioners' proposed amendment, judges are being directed not to discriminate against something that neither they nor gender identity advocates themselves can even define let alone objectively perceive or rely upon as having any objectively consistent existence.

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

Using the legal profession in this inappropriate manner results in frequent petitions to change the Rules to include recognition and protection to new groups who seek support for their particular interests. Indeed, this has already occurred repeatedly in Arizona. In particular, those seeking recognition of and protection

based upon certain sexual behaviors sought and were granted recognition of "sexual orientation" as a protected group. But that proved insufficient to satisfy the claims of those who sought special recognition and protection based on "gender identity," which was added to Comment [3] to Rule 8.4 of the Attorney Conduct Code in 2003. However, the inclusion of those two groups still proved insufficient to satisfy those who sought special recognition and protection based on "gender expression," and advocates unsuccessfully pressed for that addition in 2011. Even now there are additional groups who claim that their peculiar characteristics merit special recognition and protection (see, for example, The National Association to Advance Fat Acceptance (NAAFA) which has resolved "[t]hat 'height and weight' be included as a protected category in existing local, state, and federal civil rights statutes" and the Wesleyan University Office of Residential Life which has recognized no fewer than 15 "sexually or gender dissident communities," represented by the acronym LGBTTQQFAGPBDSM. See http://www.wesleyan.edu/reslife/housing/program/open_house.htm). It is only a matter of time before additional groups come forward to press their peculiar interests on the legal profession. Allowing itself to be used in this manner damages the credibility and effectiveness of the legal profession and leads special interest groups to believe they can use the authority of the legal profession simply to advance their own political and social agendas rather than to advance the legitimate interests of the legal profession as a whole.

CONCLUSION

While we, of course, affirm the principle that Arizona judges must behave civilly and perform their judicial functions impartially, it is clear that the amendments the Petitioners seek to make to the Arizona Code of Judicial Conduct do not serve that end. Not only are they unnecessary, but they create ambiguity and confusion in the Code, place Arizona out of step with other states' rules, and continue the unwise policy of adding to the Code what threatens to be an

unending list of indefinable protected classes. Therefore, for all the reasons set forth herein, we the undersigned attorneys and members of the State Bar of Arizona object to the Petitioner's Petition to Amend Rules 2.3(B) and (C) and 3.6(A), Rule 81, of the Arizona Rules of the Supreme Court.

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

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