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IN THE SUPREME COURT OF THE STATE OF ARIZONA

In the Matter of:	)	No. R-17-0032
	)	
	)	**COMMENT OPPOSING PETITION**
Petition to Amend ER 8.4, Rule 42,	)	**TO AMEND ER 8.4, RULE 42,**
Arizona Rules of the Supreme Court	)	**ARIZONA RULES OF THE**
	)	**SUPREME COURT**
	)	
	)	
	)	
	)	

Pursuant to Rule 28 of the Arizona Rules of the Supreme Court, I wish to register my opposition to the petition to amend ER 8.4 by adopting ABA Model Rule 8.4(g) by appending it as Ariz. R. Sup. Ct. 42, ER 8.4(h).

I do not tolerate harassment, discrimination, or other bad behavior among members of the bar. Three years ago, I co-signed Petition R-15-0020, which sought to amend the Code of Judicial Conduct and expand the list of suspect classes that should be protected from discrimination by judges. What differentiates that petition from the current petition to adopt Model Rule 8.4(g) is the expansion of the scope of disciplinary authority over attorneys beyond anything previously contemplated.

I will not be repetitive of other comments that have been submitted. I concur entirely with the comments of Professors Volokh and Blackman, as well as all of the comment submitted by Snell & Wilmer except for what I consider to be its misapplication of article 2, section 8 of the Arizona Constitution to this issue. Andrew Halaby and Brianna Long's article "New Model Rule of Professional Conduct 8.4(g): Legislative History, Enforceability Questions, and a Call for Scholarship," 41 *J. Legal Prof.* 201 (2017), which provides a thorough history of the adoption of the Model Rule by the ABA, makes the case for more study of this issue rather than rush ahead with a change that is far more expansive than is permitted either by separation of powers or the First Amendment.

I have a couple of additional thoughts to add. Professor Volokh accurately describes the inevitability of employment disputes within law firms morphing into bar complaints. Equally foreseeable is the likely increase in bar complaints against attorneys who choose to stand for political office. Any candidate who campaigns on, and any officeholder who votes on, a plan to cut economic benefits to some persons will undoubtedly receive bar complaints for discrimination based on socioeconomic status. Earlier this year Professor Blackman himself was recently loudly protested (and shouted down) by City University of New York students,[1] because they deemed

[1] https://reason.com/blog/2018/04/12/cuny-josh-blackman-students-speech (last visited May 21, 2018).

his views and those of the Federalist Society as a whole to be racist. Of course, such wrongheaded views were based on the refusal of said students to read Professor Blackman's writings on separation of powers, and for such persons it is easier to make false assumptions, but law students who are willing to shout down a lecture on the First Amendment would be no less willing to subject those speakers to bar complaints.

Given the lack of study of this issue, one cannot say at this time whether such complaints would be treated as meritorious or frivolous. But there is no consequence for filing a frivolous complaint due to absolute immunity, *see Drummond v. Stahl*, 127 Ariz. 122 (1980), and even frivolous complaints cause stress for the recipient. Particularly in such fractious times as these where partisans regularly compare political opponents to Hitler, the timing for such a petition could not possibly be more wrong.

The petition correctly points out that our profession suffers from implicit bias and prejudice. But when bias is subconscious, the solution is education, not discipline. I cannot discern how the petition would actually accomplish its stated goals; if anything, I fear a backlash and other unintended consequences.

DATED: May 21, 2018.

By /s/ David J. Euchner
David J. Euchner

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Supreme Court of Arizona

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