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May 1, 2023

Re: ADM File 2022-03: Proposed Amendment to MCR 1.109

Dear Clerk of the Court Larry S. Royster,

The topic of gender ideology is polarizing. Some align their thinking on this topic to Aristotelian-Thomistic anthropology, others base their understanding on secular notions of relative equality, others base their thinking on biology, while still others anchor their beliefs on Church teachings regarding morality and the Biblical understanding of the complementarianism of the sexes. What is true: people's opinions on this issue starkly disagree. What is also true: the State Bar of Michigan should not force everyone to adhere to its chosen ideology. And if it does, such an abuse of its authority will result in the unconstitutional compulsion of speech, most antithetical to the protections of the First Amendment of the United States Constitution.

On January 18, 2023, the Michigan Supreme Court notified members of the State Bar that it is discerning whether to amend MCR 1.109. The proposed amendment provides:

> Parties and attorneys may also include any personal pronouns in the name section of the caption, and courts are required to use those personal pronouns when referring to or identifying the party or attorney, either verbally or in writing. Nothing in this subrule prohibits the court from using the individual's name or other respectful means of addressing the individual if doing so will help ensure a clear record.

ADM File No. 2022-03, Proposed Amendment to MCR 1.109(D)(1)(b). In sum, a party or attorney would be able to ***require*** a judge to use "***any*** personal pronoun" the party or attorney chooses. *Id.* (emphasis added). This compelled speech would be in both written and verbal form. The judge would only be able to refer to the party or attorney by name or by a different "respectful means" when "doing so will help ensure a clear record." *Id.* The proposed amendment suppresses freedom of thought and expression and stunningly ignores the importance of the individual and unique facts of each case to the court's determinations, both in its verbal interactions with the parties and attorneys and in its written communications, including even the court's written opinions.

As an initial matter, the proposed amendment interferes with the court's role to act in an unbiased manner in its administration of justice. The amendment would strip courts of the ability to make unbiased fact-finding determinations that arise in sexual harassment cases, Title VII cases, child custody and parental rights disputes requiring the court to weigh the best interest of the child, criminal cases, First Amendment cases involving religious liberty, etc.

Being forced to use certain pronouns at the mere request of a party could even aid and abet the miscarriage of justice. Take, for example, a criminal prosecutor whose case hinges on establishing the identity of the defendant. At the time of the offense, the defendant appeared as a cisgendered, biological man. At trial, the defendant is dressed as a woman. The court's repeated use of feminine pronouns before a jury could easily have the effect of assisting the defense at the expense of the prosecution. Or consider the child custody dispute where the future of a five-year-old girl's gender is being decided by the court. Would it not interfere with the impartial judgment of the court if it must automatically refer to the child by masculine pronouns without consideration for the particular facts of the case before the court, including the child's mental and physical health? The examples of confusion and bias that would skew sexual harassment and Title VII cases are *ad nauseum*. Imagine a sex stereotyping case where the court is required to use pronouns that directly alter the very nature of the claims before it. In short, the facts of specific cases matter and affect the language the court should use.

Michigan's court rules have never compelled judges to refer to parties using preferred pronouns. And for good reason, it is wholly inappropriate to compel the court to adopt specific factual determinations, including how to characterize the parties who appear before it. It is one thing to require respectful discourse and professionalism from a jurist; this is already protected by the court rules. It is a far different thing to "require" that the court use "any pronoun" that a party or attorney selects. There is no valid, non-political reason to add this blanket requirement to compel this speech from judges now. Judges should not be barred, at penalty of being grieved and reprimanded, from serving the demands of justice as controlled by and tailored to the specific demands, facts, laws, and needs of the cases before them.

The proposed amendment seeks to meet the demands of an ideology and to offer affirmation to perhaps some plaintiffs, defendants, and attorneys. This is in and of itself beyond the role of the court, but then the proposed amendment also seeks to do so with no regard for the detrimental effect it has on the administration of justice, whether its application is appropriate for the specific case before the court, and with no concern for the effect it has on the rights of others, including other litigants and judges. Such a sweeping and broad amendment is not necessary, nor is it constitutional.

The Thomas More Law Center[1] opposes the proposed amendment to MRC 1.109 because it unconstitutionally compels speech in violation of the First Amendment of the United States Constitution.

I. The Proposed Amendment Unconstitutionally Compels Speech.

The First Amendment prohibits a governmental body from establishing a rule "abridging the freedom of speech." U.S. Const. amend I. This idea is uniquely American—that true liberty exists only where men and women are free to hold and express conflicting political and religious viewpoints. Under our Constitution, a governmental body must not interfere with its citizens living out and expressing their freedoms and instead embrace the security and liberty that only a pluralistic society affords.

Our jurisprudence is rich with holdings that protect the rights of individuals against government compelled speech. The U.S. Supreme Court has long prohibited the government from compelling speech that "requires affirmation of a belief and an attitude of the mind." *W. Virginia State Bd. of Ed. v. Barnette*, 319 U.S. 624, 633 (1943). In *Barnette*, for example, the State required that every public-school student recite the pledge of allegiance. Failure to conform was considered "insubordination," and a student who did not comply was disallowed readmission to the academic environment. *Id.* at 627. *Barnette* expressly rejected the notion that school districts and administrators were somehow beyond the reach of ordinary First Amendment rules and found their role was "reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and . . . discount important principles of our government as mere platitudes." *Id.* at 637. The U.S. Supreme Court in *Barnette* also addressed the idea of "simulat[ing] assent by words without belief" or being compelled to make "a gesture barren of meaning." Id. at 633-34 (emphasis added). It found that the purpose or literal meaning of the compelled speech does not change or depend on whether the words are stated with conviction or belief. *Id.* at 631-34. Meaning that the compulsion of the speech itself violated the First Amendment, regardless of whether the words could be stated without the speaker truly believing or agreeing in their ideology.

Indeed, "the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (holding that a state may not compel individuals to display "Live free or die" on state issued license plates affixed to their vehicles); *see also Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.,* 515 U.S. 557, 573 (1995) (holding that the government "may not compel

[1] The Thomas More Law Center is a national, public interest law firm based in Ann Arbor, Michigan. We are committed to defending and promoting the First Amendment liberties and Judeo-Christian values.

affirmance of a belief with which the speaker disagrees"). No governmental body may force individuals to deliver messages to which they do not agree or do not wish to express. This protection is made all the more important for matters like the aim of the proposed amendment to MCR 1.109, which directly targets deeply held personal beliefs pertaining to morality, religion, science, sexuality, sociology, and politics. "Freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom." *Barnette*, 319 U.S. at 641. The real test of the First Amendment is whether it protects "the right to differ as to things that touch the heart of the existing order." *Id.* at 641-42. As Justice Jackson brilliantly penned,

> If there is any fixed star in our constitutional constellation, it is that ***no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein***.

Id. at 642 (emphasis added). The need to protect liberty and raring appeals for freedom of speech remain just as important and relevant today as when the U.S. Supreme Court first issued its opinion in *Barnette*, perhaps even more so as we face the continued fracturing and growing divergence of ideas, religious beliefs, and political ideologies in our society. *See, e.g., Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission,* 138 S. Ct. 1719, 1745-46 (2018) (Thomas, J., concurring) (stating that where a governmental body seeks to penalize and compel expression of religious viewpoint, courts must apply the strict scrutiny standard to the government's free speech restriction).[2]

Given the state of our society, it is not surprising that the Sixth Circuit Court of Appeals has already addressed the very issue posed by the proposed amendment to MCR 1.109—whether compelling the use of preferred pronouns violates our First Amendment freedoms. *Meriwether v. Hartop*, 992 F.3d 492 (6th Cir. 2021). The Sixth Circuit held it does. In *Meriwether*, the plaintiff, "like many people of faith" held "religious convictions [that] influence how he thinks about 'human nature, marriage, gender, sexuality, morality, politics, and social issues." *Id.* at 498. Like many members and judges in the State Bar of Michigan, the plaintiff believed that he could not affirm ideas regarding gender ideologies and sexuality with which he disagreed as being objective truth by using preferred pronouns. *Id.* at 498-508.

The Sixth Circuit stated, echoing the sentiments of *Barnette*, *Wooley*, and *Hurley* that "[w]ithout genuine freedom of speech, the search for truth is stymied, and the ideas and debates necessary for the continuous improvement of our republic cannot flourish." *Meriwether*, 992 F.3d at 503.

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[2] This protection from compelled speech does not only apply to opinions and beliefs, but even extends to statements of fact. *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 62 (2006).

The Sixth Circuit asked whether the plaintiff's speech was a matter of public concern and answered in the affirmative. *Id.* at 507-09. The Sixth Circuit found that "[p]ronouns can and do convey a powerful message implicating a sensitive topic of public concern." *Id.* at 508. After the Sixth Circuit determined that the plaintiff raised a plausible First Amendment claim, the case settled in favor of the plaintiff in the district court, and he was awarded $400,000. *Meriwether v. Hartop*, Case No. 1:18-cv-00753-SJD-KLL, Stip. of Dismissal (S.D. Ohio Apr. 14, 2022); https://adflegal.org/case/meriwether-v-trustees-shawnee-state-university.

Lastly, the proposed amendment seeks to curtail speech on the basis of its content and, therefore, must pass strict scrutiny review. *See e.g., Bible Believers v. Wayne Cnty.*, 805 F.3d 228, 248 (6th Cir. 2015) (en banc). Under strict scrutiny, the government's speech restriction must be "narrowly tailored to be the least-restrictive means available to serve a compelling government interest." *Id.* The proposed amendment's restriction on speech is far-sweeping and overbroad. It seeks to both silence the speaker's message based on its viewpoint and compel language to which the speaker does not agree, at all times, in all circumstances, for all cases. It is unfathomable that any serious federal court would conclude that the proposed amendment's restriction on free speech passes strict scrutiny review. The proposed amendment violates the free speech clause of the First Amendment.

II. The Proposed Amendment Unconstitutionally Kowtows to a Heckler's Veto.

The proposed amendment stems from a concurring opinion in *People v. Gobrick*, where Judge Boonstra wrote "separately only because this Court should not be altering its lexicon whenever an individual prefers to be identified in a manner contrary to what society, throughout all of human history, has understood to be immutable truth." No. 352180, 2021 Mich. App. LEXIS 7185, at *25 (Ct. App. Dec. 21, 2021). The facts of *Gobrick* are informative to more fully understand the objection.

In *Gobrick*, the Defendant was a biological man "convicted of three counts of child sexually abusive activity, MCL 750.145c(2), and one count of using a computer to commit a crime, MCL 752.796; MCL 752.797(3)(f)." *Id.* at *1. The details of the facts leading to the Defendant's convictions are sexually explicit and disturbing. *Id.* at *1-3. In the trial court, the Defendants' counsel requested a mental competency evaluation which revealed that the Defendant "had a self-reported history of having multiple personalities" but "had control over" the personalities which "kept him company." *Id.* at *3-4.

Footnote 1 of the majority opinion states "[a]lthough the parties referred to defendant as 'Mr. Gobrick' during the trial court proceedings, defendant's appellate brief indicates that defendant identifies as female and prefers to be referred to using the

nonbinary pronouns they and them." *Id*. at *1, fn. 1. Judge Boonstra agreed with the majority's decision to uphold the Defendants' multiple convictions for criminal sexual abuse against children. He wrote a concurrence concerned by the appellate court's decision to adopt the Defendant's preferred pronouns of they and them. Judge Boonstra stated,

> Once we start down the road of accommodating pronoun (or other) preferences in our opinions, the potential absurdities we will face are unbounded. I decline to start down that road, and while respecting the right of dictionary- or style-guide-writers or other judges to disagree, do not believe that we should be spending our time crafting our opinions to conform to the "wokeness" of the day.
>
> I decline to join in the insanity that has apparently now reached the courts.

Id. at *26. Judge Boonstra's concurrence drew stark criticism from the American Civil Liberties Union (ACLU), who joined with nineteen political advocacy organizations to berate the judge.[3] In the letter, the political advocacy organizations express a differing view that preferred pronouns do not express "immutable truth."[4] The letter argues, "Judge Boonstra's uninformed statements are unacceptable if Michigan is to ensure that transgender people are provided equal access to justice." *Id*.

The letter fails to acknowledge that all three judges reached the same conclusion, regardless of the majority and concurrence's differing use of pronouns. The letter does not specifically explain how transgendered people are withheld this "equal access to justice" to which they refer. Instead, the letter states that pronoun use "has no effect on the outcome of the proceedings." *Id*. It is hard to square the assertions that not using preferred pronouns both denies equal access to justice and at the same time bears no effect on the judicial proceedings.

The letter calls upon "the Michigan judiciary" to "acknowledge the requested pronouns of all litigants and parties before them, in both pleadings as well as inside the courtroom, as a vital component of equal access to justice." *Id*. Noticeably, the letter fails to even contemplate a less drastic approach that does not go to the extreme of silencing dissent, compelling judge's speech, and trampling on their constitutional right to freedom of speech in order to address their complaints. In short, the letter

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[3] https://michiganadvance.com/2022/02/07/judges-transphobic-comments-in-case-prompt-rebuke-from-lgbtq-groups/; https://www.outfrontkzoo.org/news/judgeboonstra?fbclid=IwAR0GC7FJY3BE4o9qcdriAIEGf36w5hkLD6kSjLThHVDJK81PLDJjBH8oesA.

[4] https://www.outfrontkzoo.org/news/judgeboonstra?fbclid=IwAR0GC7FJY3BE4o9qcdriAIEGf36w5hkLD6kSjLThHVDJK81PLDJjBH8oesA.

urges the Michigan judiciary to change their court rules to compel uniformity of thought and expression. And that is exactly what the proposed amendment would do—silence dissent and control speech that offers a differing opinion, speech like Judge Boonstra's concurrence. The government should not endeavor to control expression regarding matters of public concern.

If this court bends to the demands of the nineteen special interest groups who called upon it to change the state's court rules, it will be acting contrary to one of the "bedrock First Amendment principles": the government may not "restrict speech based on listener reaction." *Lewis v. Wilson,* 253 F.3d 1077, 1082 (8th Cir. 2001); *see also Ctr. for Bio-Ethical Reform, Inc. v. L.A. Cnty. Sheriff Dep't*, 533 F.3d 780, 790 (9th Cir. 2008). This is known in First Amendment parlance as a "heckler's veto." *Lewis,* 253 F.3d at 1082; *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 134-35 (1992). A "heckler" should not have the power to control a judge's words and opinions and force the court to use only words that the "heckler" prefers. Nor should this court impose restrictions on speech due to anticipated or actual reactions of opponents of the speech.

There are many legitimate ways to fight words and ideas to which one disagrees, especially if the person with whom you disagree is an elected judge. A party may seek leave or the right to appeal, a grievance or complaint can be filed before the Michigan Judicial Tenure Commission, a person could engage in the political process to try to elect a different judge, a person can speak out publicly, etc. The solution to fighting ideas to which one disagrees, however, is not changing the court rules to silence ideas and remove those thoughts from public debate.

III. The Proposed Amendment Is Not Supported By Legal Precedent.

The proposed amendment seeks to adopt a rule contrary to controlling U.S. Supreme Court and Sixth Circuit precedent which prohibit compelled speech. *See* Section I; *Meriwether*, 992 F.3d at 507, 514-17 (discussing how mandatory personal pronoun rules force government employees to express and deliver messages to which they disagree on religious grounds and can violate the First Amendment). The Fifth Circuit has also rejected the mandatory use of pronouns based upon a litigant's subjective preference. *United States v. Varner*, 948 F.3d 250, 255 (5th Cir. 2020). In reaching its holding, the Fifth Circuit aptly noted that ***no other court has required the mandatory use of preferred pronouns***. *Id*. ("None has adopted the practice as a matter of binding precedent, and none has purported to obligate litigants or others to follow the practice."). The Eighth Circuit also declined to mandate that litigants and courts refer to defendants by their preferred pronouns. *United States v. Thomason*, Nos. 19-2537, 19-3702, 20-1230, 2021 U.S. App. LEXIS 23230, at *8-9 (8th Cir. Aug. 5, 2021). Federal district courts and state courts have refused to compel speech in the same vein. *See, e.g., Jones v. Hodge Unit Staff Officers*, No. 6:21cv318, 2022 U.S. Dist. LEXIS 235639, at *1 n.1 (E.D. Tex. Dec. 21, 2022) (stating "it would

be improper for the Court to require" the use of preferred pronouns based on an expressed gender identity); *Loudon Sch. Brd. v. Cross*, Case No. 210584, Op. & Order Affirming Prelim. Inj. (Va. Aug. 30, 2021), available at https://adfmedialegalfiles.blob.core.windows.net/files/CrossOrderVSC.pdf (affirming a preliminary injunction of school policies that required teachers to use preferred pronouns).

The proposed amendment is devoid of precedential support. It is politically motivated to silence speech expressing any viewpoint similar to that of Judge Boonstra's concurrence in *People v. Gobrick*. It compels one specific type of speech: speech that agrees and affirms one viewpoint pertaining to human sexuality and gender ideology. Under the proposed amendment, the only acceptable viewpoint is that of the ACLU and other likeminded political organizations who asked this court to change its rules due to their disagreement and disdain for the thoughts expressed in Judge Boonstra's concurrence. Under the proposed amendment, judges who ascribe to a traditional Judeo-Christian viewpoint or who do not agree with the ACLU, *et al.*, are unwelcome on the bench. While judges must follow the law and apply rules to which they disagree, never before in Michigan have those rules required judges to use words and expressions in their opinions that affirm a certain gender identity ideology, even when doing so directly contradicts their sincerely held religious beliefs or moral convictions. The proposed amendment requires some judges to speak against their convictions and their consciences or get off the bench.

Conclusion

Imagine for a moment if the tides were turned and the Michigan Supreme Court was deciding whether to amend MRC 1.109 to require a judge to use only pronouns that correspond to the biological sex of an attorney or party. Would the court and some members of the bar be so eager to have the State Bar weigh in? This begs the question—is it a proper exercise of authority for this court to compel judges to adopt certain positions on gender ideology at all? Of course, it is not.

If the proposed amendment passes, a judge will likely bring a lawsuit to vindicate the loss of First Amendment freedom the amendment imposes on jurists—through compelling speech that betrays the role of the court as an unbiased administrator of justice, compelling speech and expression to which the judge disagrees, and compelling the abandonment of deeply held beliefs regarding human sexuality and gender. The State Bar of Michigan has no right to force this compulsion. In its ostensible effort to be "tolerant" or "diverse," it would, in fact, be enacting ***the least tolerant court rule in all its history***. It would be taking a side in the culture war—one that it knows would alienate all of its members who disagree with the amendment for religious, political, moral, personal, constitutional, or scientific reasons.

For these reasons, the court should reject the proposed amendment.

Respectfully,

THOMAS MORE LAW CENTER

/s/ Richard Thompson
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/s/ Erin Elizabeth Mersino
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