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Michigan Supreme Court
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RE: Administrative File 2022-03, MCR 1.109 amendment

To the Chief Justice and the Justices of the Michigan Supreme Court:

I write to express my support for the proposed amendment to Michigan Court Rule 1.109, which requires judges to address others with the pronouns those people designate. The proposed amendment reflects duties that judges already bear under the Code of Judicial Conduct and the Michigan Rules of Professional Conduct. It is consistent with this Court's precedent on the First Amendment. The Court should adopt it.

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We are in the midst of a national shouting match about gender. If the judiciary has any role in this fevered climate, it is ensuring that the shouting becomes a civil conversation when it enters Michigan's courtrooms.

That is the chief virtue of the proposed amendment to MCR 1.109. It does not take sides. For example, it does not require everyone to declare their pronouns whether they like it or not. Instead, it provides that, when a litigant or attorney informs a judge how they would like to be addressed, a judge should respect that request.

Of course one can come up with extreme examples of requests that a court should not honor. But lawyers are in the business of drawing and enforcing reasonable lines. Courts can allow parties to tell them whether they use *he, she*, or *they* without inviting parties to request "Your Majesty." Moreover, rejecting the proposed amendment on First Amendment

grounds would create dangerous precedent. If the First Amendment exempts a judge from honoring an attorney or litigant's choice of *he*, *she,* or *they*, then the First Amendment also exempts attorneys and litigants from honoring a judge's choice of "Your Honor." It would protect litigants who deliberately misgender *judges.* The Court should not invite a race to the rhetorical bottom by rejecting the proposed amendment.

In a way, the proposed amendment is redundant. Canon 2 of the Code of Judicial Conduct already requires judges to treat every person with "courtesy and respect," regardless of "gender, or other protected personal characteristic."[1] The United States Supreme Court has recognized that being transgender is a protected personal characteristic.[2] So if a person tells a judge which pronouns they use, Canon 2 requires that judge to use that person's pronouns—even if the judge harbors different views about gender.

Michigan Rule of Professional Conduct 6.5(b) applies here, too: "A lawyer serving as an adjudicative officer shall, without regard to a person's race, *gender, or other protected personal characteristic*, treat every person fairly, *with courtesy and respect*."[3]

Many judges have recognized these basic rules of civility over the years, even before gender became the subject of vociferous debate.[4] But it is apparent that the judiciary needs guidance on how rules of civility apply to gender. Exhibit A is the concurring opinion in *People v Gobrick* (2022).[5] Rather than use a litigant's pronouns (they/them), the concurrence denigrated that litigant, even labelling that litigant's views as "insanity."

[1] Code of Judicial Conduct, Canon 2(B).
[2] *Bostock v Clayton County, Georgia,* 140 S Ct 1731, 1737 (2020).
[3] MRPC 8.5(b).
[4] Materials from a program called *Pride & Pronouns: Understanding & Addressing Gender Identity in the Courtroom and Beyond* list opinions in which judges have respected litigants' views about their proper pronouns: https://www.nawj.org/uploads/files/events/webinars/pridepronounsprogrammaterials.pdf)
[5] *People v Gobrick* (2022), unpublished per curiam opinion of the Court of Appeals, issued December 21, 2021 (Doc. No. 352180) (Boonstra, J, concurring).

Thankfully, Justice Welch's concurrence in an order denying leave from *Gobrick* addressed one of the gaps in the *Gobrick* concurrence's analysis.[6] As Justice Welch wrote, language changes and courts evolve. Her final observation is critical: "The Court of Appeals' simple explanation in a footnote as to how and why it was using a gender-neutral pronoun demonstrates that words matter and that a small change to an opinion, even if unrelated to the merits, can go a long way toward ensuring our courts are viewed as open and fair to all who appear before them."[7]

One might add that the singular *they* is hardly a new creation. Many of the greatest writers in the English language—Austen, Dickens, Woolf, to name a few—have used the singular *they*. And if literature is unpersuasive, one might listen to their own speech for a while to see how often the singular *they* appears. (A person who says, "I ordered a pizza and I thought they would be here an hour ago," is using *they* to refer to the delivery person, not the delivery person and the pizza.)

There is a need and a sound rationale for the proposed amendment. Allowing people to declare their pronouns—without forcing everyone to declare their pronouns—is reasonable and civil. Including the singular *they* is consistent with centuries of English usage. The Court should adopt the amendment to Rule 1.109.

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None of the counterarguments to the proposed amendment holds water.

Some have protested that requiring judges to use others' pronouns violates judges' right to freedom of speech under the United States Constitution. Not so. There are many rules regulating expression from lawyers and judges. Courts—including this one—have upheld those rules

[6] *People v Gobrick,* 981 NW2d 59 (2022) (Welch, J, concurring).
[7] *Id.*

against First Amendment challenges. As Lori Shemka's comment on the proposed amendment explains, this Court's opinion in *Grievance Administrator v Fieger* (2006) is the controlling precedent on this point.[8] And it defeats a First Amendment argument.

In fact, Canon 2 warns that "[a] judge must … accept restrictions on conduct that might be viewed as burdensome by the ordinary citizens and should do so freely and willingly."[9] Picking up a gavel means accepting the obligation to treat people with civility, even when those people belong to groups that a judge dislikes. Judges willingly forego the right to vent their political spleen in public, and they certainly have no right to do so from the bench. Again, Michigan Rule of Professional Conduct 6.5 applies here. Rule 6.5(a) states that "[a] lawyer shall take particular care to avoid treating [persons involved in the legal process] discourteously or disrespectfully because of the person's race, *gender, or other protected personal characteristic*."[10] Rule 6.5(b) extends these obligations to judges. (Again, Lori Shemka also provides helpful commentary on the proposal and the Canons.)

Some have argued that gender is objective and judges have a duty to speak and write accurately. Let us assume for argument's sake that gender is truly objective. (It is not. People who make this claim are referring to sex, not gender.) Even so, this objection has no merit. As several commentators have observed, objectivity in gendered words has hardly troubled the judiciary before.[11] Courts have long used words like *mankind* and phrases like "all men are created equally" without wringing their hands about including women in expressions that refer only to men.[12] Opinions using *he, him,* and *his* to refer to all genders are legion.

[8] *Grievance Administrator v Fieger,* 476 Mich 231, 261 (2006).
[9] Code of Judicial Conduct, Canon, 2(A).
[10] MRPC 6.5(a) (emphasis added).
[11] Chan Tov McNamarah, *Misgendering as Misconduct,* 68 UCLA L. Rev. Discourse 40, 51 (2020).
[12] *Id.*

An appeal to "objectivity" in gendered language ignores centuries of English usage. To paraphrase the late Rev. Peter Gomes of Harvard Divinity School, this claim about objectivity is a fig leaf covering naked prejudice.

Some may also claim that requiring judges to use the designated pronouns of attorneys and litigants violates judges' rights to the free exercise of religion. This argument lacks merit, too. If the Free Exercise Clause allows judges to make the bench a throne from which their religious views reign, then judges can, say, administer the Eucharist in the courtroom. But judicial displays of religiosity are unconstitutional.[13] Religion cannot justify a judge's decision to misgender an attorney or litigant.

The proposed amendment is constitutional and appropriate. It ensures that Michigan's courtrooms foster civility and respect. The Court should adopt it.

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The views expressed here are my own—although I can say, with pride and gratitude, that my partners and colleagues have offered their support.

I have a host of reasons, both personal and professional, to write in support of the proposed amendment. I will highlight three.

The first is my belief that courtrooms must foster respectful conversations rather than shouting matches. By making the designation of pronouns optional and directing judges to simply respect those who choose to disclose pronouns, the proposed rule does exactly that. Courts

[13] See, e.g., *American Civil Liberties Union of Ohio Foundation, Inc. v DeWeese,* 633 F3d 424 (CA 6, 2011) (holding that hanging poster of Ten Commandments in courtroom violated the Establishment Clause); *North Carolina Civil Liberties Union Legal Foundation v Constangy,* 947 F2d 1145 (CA 4, 1991).

can become a shelter from the rhetorical storm on this issue and go about the business of adjudicating disputes with civility.

The second is my belief in law's promise: that every person has equal worth and every person is entitled to equal dignity before the law. The proposed amendment to Rule 1.109 is faithful to that promise. It will contribute to a wiser and more civil Michigan.

The third reason is more personal. The Court has heard and will continue to hear from people who cite their faith as a reason to oppose the amendment. They do not speak for all people of faith. Not at all.

In my religious tradition, there are two laws more important than any other rule. The second of these laws is that we must treat each other as we want to be treated. Everyone—every justice on this Court, every judge on the Court of Appeals, our loved ones, our friends, our colleagues, our neighbors, *everyone*—wants to be addressed with the pronouns and names they think appropriate. The amendment reflects this core principle. In my view, no other rationale is needed.

I urge the Court to adopt the proposed amendment, and I am grateful to the Court for considering it.

Very truly yours,

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(he/him)

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