Order

Michigan Supreme Court
Lansing, Michigan

September 27, 2023

Elizabeth T. Clement,
Chief Justice

Brian K. Zahra
David F. Viviano
Richard H. Bernstein
Megan K. Cavanagh
Elizabeth M. Welch
Kyra H. Bolden,
Justices

ADM File No. 2022-03

Amendment of Rule
1.109 of the Michigan
Court Rules

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On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following amendment of Rule 1.109 of the Michigan Court Rules is adopted, effective January 1, 2024.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

Rule 1.109 Court Records Defined; Document Defined; Filing Standards; Signatures; Electronic Filing and Service; Access

(A)-(C) [Unchanged.]

(D) Filing Standards.

(1) Form and Captions of Documents.

(a) [Unchanged.]

(b) The first part of every document must contain a caption stating:

(i)-(vi) [Unchanged.]

Parties and attorneys may also include Ms., Mr., or Mx. as a preferred form of address and one of the following personal pronouns in the name section of the caption: he/him/his, she/her/hers, or they/them/theirs. Courts must use the individual's name, the designated salutation or personal pronouns, or other respectful means that are not inconsistent with the individual's designated salutation or personal pronouns when addressing, referring to, or identifying the party or attorney, either orally or in writing.

(c)-(f) [Unchanged.]

(2)-(10) [Unchanged.]

(E)-(H) [Unchanged.]

Staff Comment (ADM File No. 2022-03): The amendment of MCR 1.109(D)(1)(b) allows parties and attorneys to provide a preferred salutation or personal pronoun in document captions and requires courts to use one of the following means of addressing, referring to, or identifying the party or attorney: the individual's name, preferred salutation, personal pronoun, or other respectful means that is not inconsistent with the individual's designated salutation or personal pronoun.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

WELCH, J. (*concurring*).

I fully support the Court's amendment of MCR 1.109(D). As former Chief Justice MCCORMACK once observed, "[p]ublic confidence is the only currency that courts and judges have, and impartiality is central to public confidence." McCormack, *Staying Off the Sidelines: Judges as Agents for Justice System Reform*, 131 Yale L J Forum 175, 181 (2021). Chief Justice Burger of the United States Supreme Court long ago shared the same commitment to the basic principle that "[a] sense of confidence in the courts is essential to maintain the fabric of an ordered liberty for a free people." Burger, *State of the Judiciary: 1970*, 42 NY St B J 589, 597 (1970). I write separately to briefly explain why I believe amending MCR 1.109(D) is a positive step forward that will bolster public confidence in the judiciary and help to promote a sense of fairness among members of the public who interact with the courts.

Our courts and court staff must conduct business in a way that is cognizant of changes in language and societal norms. The amendments to MCR 1.109(D) reflect that basic truth and acknowledge that with changes in our society, our vocabulary also evolves. In order to be fair and impartial, courts, as the face of the third branch of government, must conduct business in a way that does not give the appearance of misgendering individuals, intentionally or otherwise. A primary goal of this change is to ensure that the judiciary operates in a manner that is objectively respectful of the individual identity and personal pronouns of the members of the public that we serve, regardless of the subjective viewpoints of individuals working within the court system. I agree with Justice BOLDEN that the MCR 1.109 amendments are not a landmark change given the long-existing requirement that all judges must treat those before them respectfully.

It was not that long ago that many judges would not permit a female attorney to use the salutation "Ms." instead of the unmarried "Miss" or married "Mrs." The salutation was

the subject of much debate, which today has largely been forgotten. Later generations of attorneys would likely be confounded by the notion that women in court had to use a salutation that indicated marital status while men faced no such requirement. Society has, thankfully, long moved past that debate. Judges no longer have to know the marital status of female attorneys appearing before them in order to professionally address them in court. Today, requiring the use of "Miss" or "Mrs." in court would be not just antiquated, but also disrespectful and discriminatory. Extending the use of gender neutral or personally specified pronouns to litigants or parties reflects another societal shift.[1] It also aligns with the Legislature's recent amendment of the Elliott-Larsen Civil Rights Act, MCL 37.2101 *et seq*., to explicitly prohibit discrimination on the basis of sexual orientation or gender identity, see 2023 PA 6.

It is not a secret that the notion of honoring a person's specified pronouns has become a source of much debate. The judiciary has certainly not been immune to this, as evidenced by extensive comments submitted and testimony offered at the public hearing in response to the proposed rule change. The objections tend to be three-fold: (1) grammatical confusion, (2) record confusion, and (3) personal beliefs.

The first objection is that the use of the pronoun "they" for a nonbinary individual is grammatically confusing when referring to one person. Admittedly, this is a societal shift, but it is not one without history. As I previously noted in *People v Gobrick*, 510 Mich 1029, 1029 (2022) (WELCH, J., concurring), "lexicographers and the authors of English style guides have long changed practices to reflect the evolution of the English lexicon." While a shift may require more intentionality (and a bit of practice) for generations that grew up learning one language rule, the next generation shifts quickly and with ease. In fact, society has used "they" as a singular pronoun since at least the 1300s, Merriam-Webster.com Dictionary, *Singular 'They'* <https://www.merriam-webster.com/wordplay/singular-nonbinary-they> (accessed September 1, 2023) [https://perma.cc/AE6L-FX2A], and only shifted to the masculine "he" preference more recently.

Historically speaking, prominent authors, like William Shakespeare and Jane Austen, have used gender neutral pronouns in their writing. See, e.g., Shakespeare, *The Rape of Lucrece* (1594) ("Now leaden slumber with life's strength doth fight; And every one to rest themselves betake, Save thieves, and cares, and troubled minds, that wake."); Austen, *Sense and Sensibility* (Whitehall: T. Egerton, 1811), p 217 (" 'Perhaps then you

[1]The medical community has also changed its views over time. In 2013, the Diagnostic and Statistical Manual of Mental Disorders (DSM-V) finally ceased pathologizing homosexuality as a personality disorder. See McHenry, *"Gay is Good": History of Homosexuality in the DSM and Modern Psychiatry*, 18 Am J Psychiatry Residents' J 1, 5 (Sept 2022).

would bestow it as a reward on that person who wrote the ablest defence of your favorite maxim, that no one can ever be in love more than once in their life—for your opinion on that point is unchanged I presume?' "). Over a decade ago, one of the most well-known lexicographers and scholars in the realm of legal writing, Professor Bryan Garner, noted the increasingly common usage of "they" as a singular pronoun and described the modern resistance to the singular use of "they" as an unfortunate phenomenon. See Garner, LawProse, *Garner's Usage Tip of the Day: Sexism (4)* <https://lawprose.org/garners-usage-tip-of-the-day-sexism-4/> (posted August 2, 2012) (accessed September 1, 2023) [https://perma.cc/8HTQ-4UZ7] (stating that "[t]hough the masculine singular personal pronoun may survive awhile longer as a generic term, it will probably be ultimately displaced by 'they,' which is coming to be used alternatively as singular or plural. This usage is becoming common" and noting that "[s]peakers of American English resist this development more than speakers of British English, in which the indeterminate 'they' is already more or less standard[, and the fact that] it sets many literate Americans' teeth on edge is an unfortunate obstacle to what promises to be the ultimate solution to the problem" of the sexism inherent in defaulting to the masculine singular personal pronoun). Writing in 2020, Professor Garner noted:

> In the last five years alone, the singular *they* has been accepted (mostly for transgender people) by most style guides, starting with the *Washington Post* in 2015 and most recently, in 2019, by *The Associated Press Stylebook* and *The Chicago Manual of Style*, together with the style guides of the *New York Times* and professional associations such as the American Medical Association and the American Psychological Association. That trend of acceptance by professional copy editors was largely credited with swaying members of the American Dialect Society in voting for the singular *they* as the society's word of the decade for 2010–2019. [Garner, National Review, *On the New Uses of 'They'* <https://www.nationalreview.com/magazine/2020/02/10/on-the-new-uses-of-they/> (posted January 23, 2020) (accessed August 31, 2023).]

It is also worth noting that while the third-person pronoun "they" can refer either to one person or to a group of people, the human brain has the remarkable ability to understand the difference quickly. The second-person pronoun "you" likewise can refer to one person or many people, something that was also discussed in Professor Garner's National Review article. And yet writers—and their readers—skillfully navigate that distinction through context and without controversy. You can tell the difference if I am addressing you, the reader, or you, the public. While it may take some additional time for some to adjust to the change, society has navigated grammatical shifts many times through the centuries.

The second objection raised to the use of a person's specified pronouns in the judiciary is that a record will be confusing if underlying evidence identifies a party by one gender, but that person prefers a different pronoun in court proceedings. I noted in *Gobrick*

that a footnote made it very clear in that case why the Court of Appeals majority used a gender-neutral pronoun in the opinion. *Gobrick*, 510 Mich at 1030 (WELCH, J., concurring). Additionally, I noted that the use of gender-neutral pronouns was not a new concept. In 1994, the United States Supreme Court avoided using gendered pronouns in a decision involving a transgender party. See *Farmer v Brennan*, 511 US 825 (1994) (using gender-neutral pronouns and procedural labels for transgender inmate who alleged discrimination based on their transgender status). More recently, the United States Supreme Court has embraced pronouns that match a transgender litigant's gender identity. *Santos-Zacaria v Garland*, 598 US 411 (2023) (using the pronouns "she" and "her" to refer to and match the gender-identity of a transgender asylum seeking individual).

Finally, people object to honoring a person's specified pronouns on the basis that they do not personally agree with the notion that someone can switch genders or be nonbinary. This was the subject of a great deal of the input we received after publishing the proposed amendments. Whether for religious or other reasons, many comments reflected a personal belief that gender could not change. But the rule provides that "other respectful means" can be used to address a party who makes a specific pronoun request. Certainly, asking our judges to be respectful to litigants using other general neutral means (such as addressing a party as "Attorney Smith" or "Plaintiff Smith") does not force anyone to violate their beliefs.

Judges are ultimately public servants. We serve the entire public and are required to treat those who come before us with civility and respect. The gender identity of a member of the public is a part of their individual identity, regardless of whether others agree or approve. Additionally, it is not always possible to know someone's personal pronouns based solely on visual observation, and allowing parties and attorneys to identify their personal pronouns for the courts removes ambiguity and the risk of misgendering an individual. This rule provides much needed guidance and provides courts with several options for how to respectfully address parties and attorneys who wish to designate a specific salutation or personal pronoun. See MCR 1.109(D)(1)(b). The amendment of MCR 1.109(D) will help to promote and preserve the judiciary's credibility and currency with the public that we serve while also providing guidance to judges and court staff.

BOLDEN, J., joins the statement of WELCH, J.

BOLDEN, J. (*concurring*).

I fully agree with the Court in adopting this amendment. I write to demonstrate my support and mitigate potential concerns raised during the public comment process. To me, this amendment of MCR 1.109 is not landmark. Rather, it mirrors the expectations found in our judicial canons. The amendment seeks to spell out what the judicial canons require and provide an avenue for litigants and attorneys to ask to be acknowledged in a certain way and thus treated with dignity. It aims to prevent judges from discriminating based on gender identity. It ensures that judges respect people. Allowing individuals to include

their personal pronouns in filings affords judges the opportunity to ensure those appearing before them receive the respect they deserve. The judicial canons already require treating every person with courtesy and respect without regard to a person's race, gender, or other personal protected characteristic. This amendment is merely a more detailed example of how judges must act to meet the requirements articulated in the canons, and it is in line with our antidiscrimination caselaw, statutes, and policies.

Judges must set aside personal biases when overseeing judicial proceedings. There are three requirements within the canons that this amendment provides guidance and clarity about. They all boil down to how judges are expected to treat individuals in their courtrooms. First, "judge[s] should always be aware that the judicial system is for the benefit of the litigant and the public, not the judiciary." Code of Judicial Conduct, Canon 1(A). Second, "[w]ithout regard to a person's race, gender, or other protected personal characteristic, a judge should treat every person fairly, with courtesy and respect." *Id*. at Canon 2(B). Third, "[w]ithout regard to a person's race, gender, or other protected personal characteristic, a judge should treat every person fairly, with courtesy and respect," and "[t]o the extent possible, a judge should require staff, court officials, and others who are subject to the judge's direction and control to provide such fair, courteous, and respectful treatment to persons who have contact with the court." *Id*. at Canon 3(A)(14). In sum, the canons emphasize the expectation that judges will treat litigants with fair, courteous, and respectful treatment. This amendment merely falls in line with what judges are already required to do.

Practically, the amendment allows parties and attorneys—if they so choose—to include their personal pronouns in the case caption. This signals to judges how to properly identify the parties and practitioners before them when referring to these individuals by pronouns. This ensures that every person, including those who are gender nonconforming or those who have a gender-neutral name, can easily clarify for the court how they would like to be addressed. This is not about special treatment; it is about ensuring that anyone who identifies by a particular pronoun receives the dignity of being addressed by that gender when they are before a judge.

Appearing before a court can oftentimes be intimidating. This amendment helps to break down some of the fear, intimidation, and anxiety parties may have when stepping into courtrooms. As Justice WELCH has stated, "words matter and . . . 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." *People v Gobrick*, 510 Mich 1029, 1030 (2022) (WELCH, J., concurring). Members of the LGBTQ+ community, for example,[2] may feel more secure within a courtroom following our adoption of this

[2] As noted, this amendment won't only help members of the LGBTQ+ community; those who have gender-neutral names and those who are gender nonconforming will also benefit

amendment. As United States Supreme Court Justice Sotomayor recently wrote in dissent, "LGBT people do not seek any special treatment. All they seek is to exist in public. To inhabit public spaces on the same terms and conditions as everyone else." *303 Creative LLC v Elenis*, 600 US ___, ____; 143 S Ct 2298, 2330 (2023) (Sotomayor, J., dissenting).

Through the public comment process, concerns were raised about the potential for unlimited pronouns to be considered, which would seem to erode the ability of the judges to control their courtroom. The amended rule, however, does not impede any judge's ability to manage the proceedings. It plainly states that courts may use other means of respectful address "if doing so will help ensure a clear record." Therefore, judges retain discretion.[3]

Some commenters have raised First Amendment concerns, arguing that the amendment compels speech and/or infringes upon religious liberty. However, Code of Judicial Conduct, Canon 2(A) and caselaw help to address these concerns. First, Canon 2(A) requires judges to "accept restrictions on conduct that might be viewed as burdensome by the ordinary citizen and [they] should do so freely and willingly." See 99 Cong Rec, part 1064 (August 5, 1986), p 43, Hearings before the Subcommittee on the Judiciary on the Nomination of Judge Antonin Scalia to be Associate Justice of the Supreme Court of the United States (opining that "one of the primary qualifications for a judge is to set aside personal views" and that one's personal "repugnance for the law" must be separated from one's "impartial judgment") (statement of Scalia, J.). Similarly, the United States Supreme Court has explained that government employees have certain limitations on their freedom that they must accept in the workplace. See *Garcetti v Ceballos*, 547 US 410, 418-419 (2006) ("Government employers, like private employers, need a significant degree of control over their employees' words and actions; without it, there would be little chance for the efficient provision of public services."), citing *Connick v Myers*, 461 US 138, 143 (1983); *Fulton v Philadelphia*, 593 US ___, ___;141 S Ct 1868, 1878 (2021) (acknowledging that when individuals enter into government employment, they accept certain restrictions on their freedoms). Judges, of course, are employed by the government, and when they are on the bench, they are not working in their individual capacity.

The United States Supreme Court also concluded in *Garcetti* that a government employer can restrict its employees' speech if the speech "has some potential to affect the

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from the clarity they can now provide to the court.

[3] This amendment does not require judges to use a pronoun. Courts may still refer to litigants by last name or by a party designation, such as "plaintiff" or "defendant." Likewise, courts may still refer to attorneys by last name or another title like "counselor." What this amendment does is require judges who are provided with pronouns identified by a party or attorney to refrain from using nondesignated pronouns when using pronouns to refer to those individuals during legal proceedings.

entity's operations." *Garcetti*, 547 US at 418. "Public employees . . . often occupy trusted positions in society. When they speak out, they can express views that contravene governmental policies or impair the proper performance of governmental functions." *Id.* at 419. This applies here. This amendment ensures that the courts—one of this country's most important public services and employers—function properly and efficiently to ensure justice. Being a judge comes with restrictions and rules, just like any other job, and here, the primary concern is the administration of justice. The public has a right to use the courts and feel respected, and this amendment makes the courts more inclusive and approachable for all. Further, by making the courts more inclusive, this increases the courts' legitimacy and perceived fairness, which are both critical to a well-functioning judicial system. Access to justice has been of paramount importance to this Court for decades, and how specific population groups are treated affects their perceived trust in the courts. See generally Kelly, Weber, & Hood, *The Role of the Michigan Open Justice Commission in Improving Public Trust and Confidence*, 79 Mich B J 1200, 1200 (2000).

In addition, it is the duty of courts and judges to not discriminate against members of any protected class; doing so would impair the judiciary's functioning and legitimacy. Since the United States Supreme Court held that the protected class of "sex" encompasses sexual orientation and gender identity, it would appear that gender identity is a "protected personal characteristic," see Canons 2(B) and 3(A)(14), and judges therefore may not discriminate against a person on the basis of gender identity. See *Bostock v Clayton Co*, 590 US ___; 140 S Ct 1731 (2020) (holding that discrimination on the basis of a person's sexual orientation or gender identity is sex discrimination). This Court also recently held that, under the Elliott-Larsen Civil Rights Act (ELCRA), MCL 37.2101 *et seq*., discrimination based on "sex" includes discrimination based on sexual orientation, adopting much of the analysis in *Bostock* as its framework. *Rouch World, LLC v Dep't of Civil Rights*, 510 Mich 398, 403 (2022). Moreover, the Legislature recently amended MCL 37.2302—although not yet effective—to expand the ELCRA to prohibit discrimination based on sexual orientation and gender identity in "public service[s]."[4] Surely, the courts provide a public service, and therefore, courts must not discriminate against people on the basis of their sexual orientation or gender identity.

Within the last few years, the United States Court of Appeals for the Fifth Circuit decided against "compelling" pronoun use for the sake of judicial impartiality and clarity. *United States v Varner*, 948 F3d 250, 255-258 (CA 5, 2020). However, *Varner* does not represent binding authority. See *People v Lucynski*, 509 Mich 618, 638 n 10 (2022) ("The decisions of intermediate federal courts are not binding on this Court, although they may

[4] MCL 37.2302 was amended by 2023 PA 6. It will be effective 91 days after the final adjournment of the 2023 regular legislative session.

be considered for their persuasive value.") Nor does *Varner* preclude this Court from exercising its rulemaking authority to enact this amendment.[5]

While Michigan is the first state court to amend its court rules to expressly include such comprehensive protection for personal pronouns—history is made by being the first.[6] We are sending a signal that "[a]ll members of the public are entitled to inhabit public spaces on equal terms." *303 Creative LLC*, 600 US at ____; 143 S Ct at 2341 (Sotomayor, J., dissenting). This is a step in the right direction. Adopting this amendment makes Michigan courts more welcoming and inclusive for all.

This amendment affords parties and attorneys basic respect and merely reinforces what is already required of judges under the judicial canons. Judges must also accept limits on their freedoms as part of their privilege to serve on the bench, for the betterment of the courts, and to uphold other policies. For the foregoing reasons, I agree fully with the amendment of MCR 1.109.

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[5] *Varner* also operates outside any controlling rules about how courts are to refer to litigants. *Varner*, 948 F3d at 255 (noting that "[the defendant] identifies no federal statute or rule requiring courts or other parties to judicial proceedings to use pronouns according to a litigant's gender identity"). Although the Fifth Circuit speculated that such a rule might present "delicate questions about judicial impartiality," *id*. at 256, such concerns were obiter dictum, hypothetical, and, in my opinion, unfounded. For reasons I explain throughout this statement, I believe it is perfectly within the realm of this Court's authority to require judges who choose to use identifying pronouns to use those requested by the parties. See also McNamarah, *Some Notes on Courts and Courtesy*, 107 Virginia L Rev Online 317 (December 2021) (arguing that the justifications for misgendering individuals set out in *Varner* are unconvincing and asserting that judicial courtesy in respecting an individual's pronouns serves to promote institutional authority); Brown, *Get With the Pronoun*, 17 Legal Comm & Rhetoric: JAWLD 61 (2020) (arguing that purposeful and intentional use of the singular "they" and other requested pronouns enhances clarity).

[6] Certainly, though, courts are not the first public employer to require its employees to respect the identified genders of those they serve. For example, federal prison workers are held to this standard. United States Department of Justice, Federal Bureau of Prisons, *Transgender Offender Manual* (January 13, 2022), p 10 (requiring that "[s]taff interacting with inmates who have a[n] . . . assignment of transgender, shall either use the authorized gender-neutral communication with inmates (e.g., by the legal last name or "Inmate" last name) or the pronouns associated with the inmate's identified gender. Deliberately and repeatedly mis-gendering an inmate is not permitted."), available at <bop.gov/policy/progstat/5200-08-cn-1.pdf> (accessed July 12, 2023) [https://perma.cc/C8LA-FZU7].

ZAHRA, J. (*dissenting*).

I dissent from the implementation of this rule. As the United States Court of Appeals for the Sixth Circuit noted, "the use of gender-specific titles and pronouns has produced a passionate political and social debate."[7] The hundreds of comments both supporting and opposing this proposed rule attest to this division. Some believe that the use of preferred pronouns is simply a matter of courtesy and that those who oppose it are stubborn, perhaps even bigoted. Others, however, believe they should not be compelled, especially under oath and/or in conflict with their deeply held religious beliefs, to affirm a person's preferred pronouns that are inconsistent with the biological gender on that person's birth certificate. All told, this is a fluid political debate into which our judicial branch of state government should not wade, let alone dive headfirst and claim to have resolved. Such hubris has no place within the operation of a judicial branch of state government. As aptly stated by the Catholic Lawyers Society of Metropolitan Detroit, "[t]he Court should decline to insert itself into one of the most controversial social issues of our time, declare a winner, dismiss objections as mere products of bigotry, and threaten to punish dissenters whilst ignoring their constitutional rights." I am deeply troubled by the Court's willingness to do so.

To the extent this Court is merely attempting to ensure that all litigants are treated respectfully, this rule change is entirely unnecessary. Our Code of Judicial Conduct, Canon 2(B), provides that "a judge should treat every person fairly, with courtesy and respect." This is accomplished without the proposed rule. To the extent a litigant requests use of a pronoun inconsistent with the biological gender reflected on the litigant's birth certificate, courts should have the discretion to accommodate that request in deference to the litigant's wishes or, alternatively, refer to the litigant without using any pronouns. In this way, judges will not be required to act inconsistent with their religious beliefs, and every litigant will be treated with courtesy and respect. Certainly, if a judge elects to reject the use of personal pronouns or the use of a gender-neutral method of identifying a litigant or lawyer, and instead uses pronouns inconsistent with those desired by the litigant simply to demean that litigant, such conduct would violate the Code of Judicial Conduct, Canon 2(B). But what if a judicial officer fails to use a preferred pronoun out of a sense of religious conviction? I have little doubt that this question will one day be resolved by the Supreme Court of the United States. Until that time, this Court should do everything in its power to avoid taking sides in this social debate.

This proposed rule change is much worse than a solution in search of a problem; it is a directive that will undoubtedly inflame conflict and exacerbate the social division of

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[7] *Meriwether v Hartop*, 992 F3d 492, 508 (CA 6, 2021); see also *United States v Varner*, 948 F3d 250 (CA 5, 2020) (choosing not to use a preferred pronoun for sake of clarity and judicial impartiality); *Farmer v Perrill*, 275 F3d 958 (CA 10, 2001) (choosing to use a preferred pronoun as a courtesy in deference to the plaintiff's wishes).

the people of Michigan. Let us not overlook the fact that it is decidedly rare for a litigant to request that a court use a preferred pronoun that is inconsistent with the biological gender reflected on the litigant's birth certificate. The first noted instance in our courts was in December 2021, when a Court of Appeals judge wrote a concurring opinion explaining why he would not abide by a criminal defendant's preference to be referred to by the pronouns "they" and "them."[8] The concurring opinion was zealous, but not disrespectful. It simply defined this emerging issue to the Michigan judicial system. It is unprecedented for this Court to take such swift action in the face of such a novel and evolving issue. The swiftness with which the Court imposes this rule does not account for the actual problems that it is certain to create.[9]

This court rule is an open invitation to abuse by litigants eager to gain any measure of control over their fight. It is all too common for litigants possessing a scorched-earth mentality to delay, distract, and inject confusion into legal proceedings. The goal is usually a mistrial or to harbor error for appellate review. This is no small matter. This situation is rendered all the more untenable by the absence of language providing courts with the authority and discretion to stifle bad-faith litigants. While the overwhelming majority of parties and lawyers in Michigan's courts act in good faith even when they strongly disagree with each other, courts routinely and, sadly, regularly encounter those who seek to misuse or abuse the judicial system, and a rule that denies trial courts the authority to control such actors is misconceived and imprudent.[10]

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[8] *People v Gobrick*, unpublished per curiam opinion of the Court of Appeals, issued December 21, 2021 (Docket No. 352180) (BOONSTRA, J., concurring).

[9] The proposed rule, MCR 1.109(D)(1)(b), provides:

> Parties and attorneys may also include Ms., Mr., or Mx. as a preferred form of address and one of the following personal pronouns in the name section of the caption: he/him/his, she/her/hers, or they/them/theirs. Courts must use the individual's name, the designated salutation or personal pronouns, or other respectful means that is not inconsistent with the individual's designated salutation or personal pronouns when addressing, referring to, or identifying the party or attorney, either orally or in writing.

[10] Abuses of the system by lawyers and litigants are well documented. See, e.g., *In the Interest of CG*, 403 Wis 2d 229, 268-269 (2022) (discussing cases in which a party has sought to force courts to use a new name consisting of an obscenity or racial epithet); *Giron v Chase Home Mtg Fin, LLC*, unpublished opinion of the United States District Court for New Mexico, issued June 13, 2012 (Case No. 12-cv-033), nn 1 and 2 (discussing the grammatical gymnastics that "sovereign citizens" force courts to play with respect to names).

Apparently to avoid violating the free-speech rights of private citizens, the above rule applies only to judges, and it does not compel the use of any preferred personal pronouns by the parties themselves, attorneys, witnesses, or others.[11] If any private citizen refuses to acknowledge another's designated salutation or personal pronouns, the judge cannot compel them to do so. Still, "if a court were to compel the use of particular pronouns at the invitation of litigants, it could raise delicate questions about judicial impartiality."[12] In some cases, "a court may have the most benign motives in honoring a party's request to be addressed with pronouns matching his 'deeply felt, inherent sense of [his] gender.' "[13] "Yet in doing so, the court may unintentionally convey its tacit approval of the litigant's underlying legal position."[14] In some cases, the use of preferred pronouns might even be hurtful to another party. An example provided by comment mentioned a rape case involving a biological male defendant and a biological female victim. Under the rule, if the defendant asks the court to refer to the defendant using she/her pronouns, the court is required to do so, which could cause further trauma or embarrassment to the victim.

More pragmatically, unlike the rule proposed for comment, the rule that a majority of the Court adopts provides no basis for the judge to ensure a clear record under circumstances when a private citizen refuses to acknowledge another's preferred personal pronouns. The result would be a record littered with inconsistent usage of pronouns to identify the same person. At the least, there are far too many circumstances in which the rule will lead to unnecessary confusion at trial and on appellate review.

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[11] Whether compelling a government official, such as a judge, to use a litigant's preferred personal pronouns violates aspects of the First Amendment presents a question of first impression.

[12] *Varner*, 948 F3d at 256, citing Code of Conduct for United States Judges, Canon 2(A) ("A Judge Should Avoid Impropriety and the Appearance of Impropriety in All Activities"), which is the federal equivalent to Canon 2 of the Michigan Code of Judicial Conduct. The commentary that accompanies the federal canon states, in part:

> Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges . . . . A judge must avoid all impropriety and appearance of impropriety. This prohibition applies to both professional and personal conduct. A judge must expect to be the subject of constant public scrutiny and accept freely and willingly restrictions that might be viewed as burdensome by the ordinary citizen.

[13] *Id*., quoting *Edmo v Corizon, Inc*, 935 F3d 757, 768 (CA 9, 2019) (alteration in *Varner*).

[14] *Varner*, 948 F3d at 256.

Further, there is a distinct likelihood that judges will accidentally and repeatedly use the wrong pronoun and be held accountable by the Judicial Tenure Commission. Indeed, even in the single noted case in which a litigant preferred to be referred to by the pronouns "they" and "them," "defendant's counsel frequently defaulted to 'he/him' during oral argument[.]"[15] Suffice to say that if defense counsel in that case, someone who actually had a relationship with his client, repeatedly failed to identity his client by the proper salutation and personal pronouns, then we should expect that our judges will often violate the rule as well. The difference of course is that judges are subjected to far greater scrutiny and can be held accountable under this rule.

In sum, the rule adopted by a majority of the Court will create problems and will only cause confusion within our courts. The majority's good intentions on this matter will only impede the efficient administration of justice in our courts. Judges are already obligated to treat everyone with courtesy and respect.[16] And judges can treat everyone with courtesy and respect by avoiding personal pronouns and referring to litigants and attorneys by court-appropriate designations, such as plaintiff [last name], defendant [last name], counselor [last name], witness [last name], etc. Courts already often engage in this practice particularly when writing in criminal cases with multiple defendants and civil cases with several parties. I trust that our judges will continue to treat all persons with courtesy and respect. I dissent from the promulgation of this court rule that unnecessarily compels judges to use a litigant's or attorney's preferred personal pronouns.

VIVIANO, J., joins the statement of ZAHRA, J.

VIVIANO, J. (*dissenting*). I agree with Justice ZAHRA's dissenting statement and write separately to offer a few additional reasons why the rule the Court adopts today is ill-founded. In explaining the motivations behind the rule, Justice WELCH's concurrence cites a former colleague's article advocating for judges to act as activists for change in the legal system. McCormack, *Staying Off the Sidelines: Judges as Agents for Justice System Reform*, 131 Yale L J Forum 175, 181 (2021). The article attempted to soften its jarring call to action by focusing on "improvements" in the justice system. *Id*. at 184. But the danger, as seen today, is that judges emboldened to seek improvements rather than neutrally administer the law will wade into socially and politically fraught topics that have little to do with the judicial system. It is sadly consistent with this Court's recent practice. See, e.g., Administrative Order No. 2022-1, 508 Mich ___, ___ (VIVIANO, J., dissenting) ("I dissent from today's order establishing the Commission on Diversity, Equity, and Inclusion, a catchphrase that is politically fraught—and for that reason alone should be approached with extreme caution by the judicial branch.").

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[15] *Gobrick* (BOONSTRA, J., concurring), unpub op at 2.

[16] See Code of Judicial Conduct, Canons 2(B) and 3(A)(14).

The majority, according to Justice WELCH, undertakes this quest, in part, to increase public confidence in the courts. Again, our former colleague explained this way of thinking:

> Nothing undermines public confidence more than the perception that the judicial system is broken, rigged, or overseen by judges who are indifferent to the experiences of human beings. Judicial participation in reform efforts does not undermine public confidence; it provides evidence that such confidence has been earned. [*Staying Off the Sidelines*, 131 Yale L J Forum at 188.]

This appears to be premised on a circular logic: by breaching norms and traditions restraining judges from policymaking, judges can demonstrate that the confidence reposed in them is "earned." Seeking reforms thus generates the public confidence necessary for the courts to function and for judges to, I suppose, seek even further reforms. That cannot be the case. By that reasoning, change is an end in itself. But that can hardly be what our former colleague, or the majority today, means. They would of course not support a reform that strongly encourages judges to refer to parties and attorneys based on their biological gender at birth. Thus, change and improvement means reforms that impose one side's view.

When the topic is political, as it is here, such actions can only undermine the public's confidence in courts' ability to serve as impartial arbiters of the law. The old saying that "turnabout is fair play" should counsel caution. The membership of this Court changes, and majorities with different perspectives succeed one another. A majority with a different outlook might view the Court's present action as empowering them to implement rules that would be anathema to the present majority. Indeed, such a majority could seek to implement a rule contrary to that adopted today. What would stop it? This Court's repeated forays into such topics set a precedent for this Court to dabble in politics through our rulemaking authority. And all the arguments that the concurrences employ against the constitutional concerns with the present action could in turn be employed to support the opposite rule. I have my doubts that the majority would be so cavalier about the First Amendment implications of their actions if the shoe was on the other foot.

This is not, of course, an attempt to take sides in the social and political debate that the majority wades into or to advocate for the opposite rule—quite to the contrary. My purpose is to demonstrate the foolishness of judges taking *any* stance on this or any other contentious political topic, especially when doing so is unnecessary. This administrative matter arose as a result of a single episode: Judge BOONSTRA's separate opinion discussing this topic, with which a majority of the Court of Appeals panel disagreed. See *People v Gobrick*, unpublished per curiam opinion of the Court of Appeals, issued December 21, 2021 (Docket No. 352180) (BOONSTRA, J., concurring). Moreover, as Justice ZAHRA

explains, our ethical rules already require that judges treat parties with respect. Code of Judicial Conduct, Canon 2(B). There has been no indication that this rule is insufficient to address any relevant concerns in a neutral manner.

Justice WELCH believes today's action is necessary to instill public confidence in the courts by reflecting "societal shift[s]." Respectfully, I disagree on how courts acquire and maintain the public's trust. I certainly do not believe that it is by our ability to detect and measure public sentiment. For one thing, we do not have the training or institutional capacity to study and correctly interpret the necessary data. Cf. *People v Betts*, 507 Mich 527, 584 (2021) (VIVIANO, J., concurring in part and dissenting in part) ("Given the nature of our role of adjudicating individual disputes and the consequent institutional limitations this role entails, we must exercise 'humility about the capacity of judges to evaluate the soundness of scientific and economic claims[.]' ") (citation omitted). More importantly, although we are elected by the people, our duty in adjudicating disputes and overseeing the courts is not to provide the particular results that certain people or groups might desire on policy issues. Rather, we are elected to faithfully interpret and enforce the laws and regulations adopted by the policymaking branches, so far as they are consistent with the Constitution. And with regard to our rulemaking authority, we are constitutionally confined to matters of "practice and procedure," Const 1963, art 6, § 5, an area that does not encompass substantive law, *McDougall v Schanz*, 461 Mich 15, 27 (1999). In this realm, too, we should endeavor to remain neutral on pressing political topics and refrain from conveying any policy positions on them.

Only in this way, through the impartial adjudication of cases and administration of the courts, can we earn the confidence of the public and be worthy of that confidence. When courts dabble in politics, they invariably alienate the losing side of the political debate and forfeit legitimacy with large portions of the public. Bork, *The Tempting of America: The Political Seduction of the Law* (New York: Simon & Schuster, 1990), p 2; see generally AO 2022-1, 508 Mich at ___ (VIVIANO, J., dissenting) (noting the "danger when courts wade into hotly disputed social issues"). By once again taking stances in a political debate, the Court will not earn the public's trust, nor should it. Rather than instilling confidence, the result, I fear, will be to encourage the view that this Court is a political institution. If this view becomes entrenched, both sides may seek to use the judicial power to advance their own political ends. And all that will matter in adjudicating cases and administering the courts is the achievement of "politically desirable results[.]" *The Tempting of America*, p 1. This would be a tragic result for the rule of law and the people of Michigan. I therefore dissent.