Comment of
Distinguished Professor Emeritus William Wagner & Mr. Tim Denney, Esq.
(Former Chairs of the Religious Liberty Law Section) [1]

ADM File No. 2023-35

Before the Michigan Supreme Court
June 3, 2025

I. Introduction

Thank you for providing us the opportunity to provide this public policy comment on ADM File No. 2023-35 - Proposed Amendments of Canon 3 of the Michigan Code of Judicial Conduct and Rule 6.5 of the Michigan Rules of Professional Conduct.

In our personal capacities we share the following thoughts and concerns about the proposed amendments, opposing enactment as currently written.

Sexual Orientation Gender Identity (SOGI) speech censorship laws regulating professions (e.g., lawyers, physicians, pharmacists, counselors, etc.) substantially interfere with a Christian person's religious identity and expressive exercise of their religious conscience. Amending Canon 3 and Rule 6.5 to include SOGI speech censorship will inevitably collide with the constitutionally protected conscience held by many religious people who know gender is immutable and grounded in biological scientific reality, (as distinct from secular progressive views grounded in self-determined fluidity). If enacted, the proposed amendments will likely result in government enforcement actions against Christian and other religious people in ways that violate the First Amendment and the fundamental constitutional liberty and equal protection interests judicially recognized by the U.S. Supreme Court in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

---

[1] William Wagner holds the title of Distinguished Professor Emeritus after serving on the faculty at the University of Florida Levin College of Law and Western Michigan University Cooley Law School, where he taught Constitutional Law and Professional Responsibility. He currently holds the Faith and Freedom Center Distinguished Chair at Spring Arbor University. Before joining academia, he served as U.S. Magistrate Judge in the United States Courts, senior assistant United States Attorney in the Department of Justice, and as a legal counsel in the United States Senate. He is also the Founding President of the Great Lakes Justice Center and the former Chair of the Religious Liberty Law Section of the State Bar of Michigan.

Timothy W. Denney, Esq., is the Managing Partner at Rickard, Denney, Leichliter, Childers & Bosch in Lapeer, Michigan. He has practiced law in Michigan since graduating from the University of Michigan Law School in 1986. Mr. Denney is the former Chair of the Religious Liberty Law Section of the State Bar of Michigan.

II. The First Amendment Doubly Protects Religious Expression, Warranting the Strictest Scrutiny of Government Actions, Including the Proposed Rules Here.

Ratified in 1791, the First Amendment to the United States Constitution provides that "Congress shall make no law respecting the establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech ...." U.S. Const. amend I. The Supreme Court holds liberty protected by the First Amendment applicable to the States via the Fourteenth Amendment. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (Free Exercise); *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (Free Speech).

The liberty guaranteed by the First Amendment is, at its core, "the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994). Indeed, "[t]he First Amendment envisions the United States as a rich and complex place where all persons are free to think and speak as they wish." *303 Creative LLC v Elenis,* 600 U.S. 570, 603 (2023)

> The First Amendment protects "the freedom to think as you will and to speak as you think." *303 Creative*, 600 U.S. at 584 (cleaned up); *Boy Scouts of America v. Dale*, 530 U. S. 640, 660-661 (2000). The Supreme Court has long held that "the First Amendment protects an individual's right to speak his mind regardless of whether the government considers his speech sensible and well intentioned or deeply misguided," *303 Creative,* 600 U.S. at 586 citing, *Hurley v Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U. S. 557, 574 (1995) Undeniably, the First Amendment protects not just "speakers whose motives the government finds worthy; its protections belong to all, including to speakers whose motives others may find misinformed or offensive." *303 Creative,* 600 U.S. at 595. Indeed, "the government may not compel a person to speak its own preferred messages." *Id.* at 586 citing, *Tinker v. Des Moines Independent Community School Dist*., 393 U. S. 503 (1969) and *National Institute of Family and Life Advocates v. Becerra,* 585 U. S. 755, 766 (2018) (*NIFLA*)

Facing a credible threat of future enforcement, along with an ongoing injury caused by the proposed amendments' chilling effect on one's intention to exercise their rights under the First Amendment, expect lawyers and judges to challenge the constitutionality of the proposed SOGI speech censorship rules. The chill is especially fridged given the notorious history of state authorities' hostile and otherwise unconstitutional enforcement against Christian people. See, e.g., *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n,* 584 U.S. 617 (2018); *303 Creative*, 600 U.S. 570.

A. Strict Scrutiny and the Free Speech Clause

Reflecting an accurate historical understanding of the plain meaning of the Free Speech Clause, the Supreme Court stated in *Police Dep't of Chicago v Mosley*, 408 U.S. 92, 96 (1972)

> Our people are guaranteed the right to express any thought, free from government censorship. The essence of this forbidden censorship is content control. Any restriction on expressive activity because of its content would completely undercut the profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open. *Id.* (cleaned up).

A State, therefore, "has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Id.* at 95. A State's "regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed" *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015).

Content-based regulation of expression by government authorities, therefore, faces strict scrutiny, the highest standard of review in constitutional analysis. *Turner,* 512 U.S. at 641; *Reed,* 576 U.S. at 163; *R.A.V. v. St. Paul*, 505 U.S. 377, 395 (1992)

The proposed rules here depend on what is spoken. Because the rules regulate both the topic and viewpoint of the lawyer, they necessarily are content based. Here the State's rule "pose[s] the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or [to] manipulate the public debate through coercion rather than persuasion." *Turner*, 512 U.S. at 641; *NIFLA,* 585 U.S. at 771.

The SOGI speech censorship amendments cleverly deem speech as conduct. Even if a rule "*generally* functions as a regulation of conduct" though, the U.S. Supreme Court requires heightened scrutiny if what the government is regulating (censoring) "under the statute consists of communicating a message." *Holder v Humanitarian Law Project*, 561 U.S. 1, 27-28 (2010). That is, a person's verbal communication does not magically convert into conduct when expressed while providing professional services. See, *NIFLA*, 585 U.S. at 767. Moreover, the Supreme Court has long prohibited state sponsored censorship "under the guise" of regulating conduct. *NAACP v. Button*, 371 U.S. 415, 439 (1963). The unprincipled characterizing of expression here as conduct is nothing less than the use of state power to manipulate the suppression of information with which the State disagrees. Allowing a state regime to deem the spoken word conduct empowers a regime to censure *any kind* of expression. The penchant for misbranding one viewpoint as *conduct,* as it relates to

a debated issue of great public concern, chronically enables it to pursue censorship of disfavored ideas and viewpoints. *303 Creative*, 600 U.S. at 588 (cleaned up).

A religious person's expression and exercise of religious conscience is not invidious discrimination, bias, prejudice, or harassment. Christian people know God created all human life in His image. Thus, for Christian people, every person holds inherent value and deserves respect. No sincere follower of Jesus would, therefore, ever truly discriminate, harass, or manifest bias or prejudice against a person based on who they are. Christian people are called, though, to adhere to a standard of behavior and beliefs and can never, then, concede their constitutionally protected right of religious conscience. We condemn true invidious discrimination, harassment, bias, and prejudice, and hold no animus toward anyone. We seek respectful consideration of all viewpoints and reject the notion that honest disagreement based on religious conscience equates with bigotry. The State's proposed unprincipled conversion of religious speech into misconduct here, though, diabolically empowers it to suppress political and religious information related to matters of great public concern with which the State disagrees.

The bench and bar cannot change the reality that what it really seeks to regulate here is the expression of a person's viewpoint grounded in religious conscience. Indeed, the State's regulatory regime, in enforcing the SOGI speech censorship rule, must examine the content of the person's statements and viewpoint to determine whether a violation of the law occurred.

Here the proposed amendments expressly ban "words" that manifest some vague notion of bias, prejudice, and harassment based upon religion, sex, gender identity or expression, and sexual orientation, *yet allows words that manifest bias based on religious identity and religious orientation*. The State thus enforces its irreligious and unscientific view that gender is not immutable, while prohibiting the legal counselor from offering a different viewpoint consistent with his or her religious conscience.

When a state targets "particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant." *Rosenberger v Rector & Visitors of the Univ. of Virginia,* 515 U.S. 819, 829 (1995) citing *R.A.V.,* 505 U.S. at 391. "[N]o matter how controversial," the First Amendment protects all viewpoints. *303 Creative* at 603. Because viewpoint discrimination is so egregious, states "must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Rosenberger,* 515 U.S. at 829. Such speech is not unprotected merely because it is uttered by a professional (including legal counselors and judges). *NIFLA*, 585 U.S. at 767. Indeed, the First Amendment protects a professional's expression by constitutionally limiting the state from regulating "the content of professional speech," thus "preserv[ing] an uninhibited marketplace of ideas in which truth [ ] ultimately prevail[s]." *Id*., at 772 (cleaned up). Certainly, no state, including Michigan, holds the "unfettered power"

to reduce a group's First Amendment liberty "by simply imposing a licensing requirement." *Id.* at 773. The "danger of content-based regulations" in the fields of medicine and law is especially prevalent "where information can save lives." *Id.* at 771 (cleaned up).

Applying the strictest of scrutiny, the Supreme Court, in *Janus, R.A.V.*, and *Reed v Town of Gilbert* struck down government actions compelling speech and regulating expression in a content-based way (e.g., viewpoint or topic-based regulation). *Reed v Town of Gilbert*, 576 U.S. 155 (2015) (holding a town's content-based regulation failed strict scrutiny); *R.A.V.,* 505 U.S. at 382 (holding content-based law "presumptively invalid"); *Janus v. Amer Fed of State, County, and municipal Employees, Council 31, et a*l., 585 U.S. 878 (2018) (holding state's action violated speech rights of certain individuals by compelling them to subsidize private speech on matter of substantial public concern.)

B. Strict Scrutiny and the Free Exercise Clause

It is unconstitutional *per se* for the Michigan bench and bar to use its licensing scheme to forcibly change the religious views of its members. The Supreme Court has described the Free Exercise Clause as containing an "absolute prohibition of infringements on the 'freedom to believe.'" *McDaniel v. Paty*, 435 U.S. 618, 627 (1978). See also, *Braunfeld v. Brown*, 366 U.S. 599, 603 (1961) ("The freedom to hold religious beliefs and opinions is absolute."). Here, in two ways, the proposed rules use a licensing scheme to forcibly change, by force of law and punishment, the religious views of Michigan judges and counselors at law. First the State conditions its license to serve as on whether the counselor's utterances submit to an irreligious secular viewpoint hostile to the counselor's Christian faith. And second, the State cleverly misbrands religious expression as conduct, so that it may discipline and ultimately revoke a counsellor's license based upon what the counsellor *says,* as perceived by those in authority who do not share her religious viewpoint. The First Amendment absolutely forbids Michigan to do what it seeks to accomplish here: to change the religious views of its judges and attorneys.

Reflecting an accurate historical understanding of the plain meaning of the Free Exercise Clause, the Supreme Court, in *Sherbert v. Verner* and *Wisconsin v. Yoder,* struck down government actions that substantially interfered with a person's sincerely held religious beliefs. *Sherbert,* 374 U.S. 398 (1963) (denying unemployment benefits to a person who lost her job when she did not work on her Sabbath); *Yoder*, 406 U.S. 205 (1972) (overturning convictions for violations of state compulsory school attendance laws incompatible with sincerely held religious beliefs).

Under these decisions, a person's unalienable right to the free exercise of religious conscience appropriately required government to face the most rigorous scrutiny when seeking to justify its interference with such a fundamental liberty interest.

The Supreme Court has made clear that "religious and philosophical objections" to SOGI issues are constitutionally protected. *Masterpiece Cakeshop,* 584 U.S. at 631 (citing *Obergefell* 576 U.S. 644, 679-80 (2015) and holding that "[t]he First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths.").

For Christian people in states like Michigan, though, that right continues to manifest as a mirage. In practice, state authorities elevate SOGI rights above all others, especially the free exercise of religious conscience. Theophobia has replaced homophobia, and the government has become the installer and enforcer of this new tyranny. Special preferences embodied in government SOGI classifications, and the SOGI speech censorship provisions in the proposed amendments, exalt a particular belief system of what is offensive over another and, by its very nature, signals official disapproval of a Christian person's religious identity, expression, and religious beliefs. "Just as no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, it is not, as the Court has repeatedly held, the role of the State or its officials to prescribe what shall be offensive." *Masterpiece Cakeshop,* 584 U.S. at 638 (internal quotations and citations omitted).

As the Supreme Court has so clearly stated:

> [T]he government, if it is to respect the Constitution's guarantee of free exercise, cannot impose regulations that are hostile to the religious beliefs of affected citizens and cannot act in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices. . . . The Constitution commits government itself to religious tolerance, and upon even slight suspicion that proposals for state intervention stem from animosity to religion or distrust of its practices, all officials must pause to remember their own high duty to the Constitution and to the rights it secures.

Masterpiece Cakeshop, 584 U.S. at. 638 (citing Church of *Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 547 (1993) (internal quotes omitted). It is worth noting that while the Court here characterized its analysis as addressing a lack of neutrality in the government's action, government imposition of SOGI preferences is unavoidably *always* hostile and can never be "neutral" toward the religious identity and beliefs of orthodox Christian people. Indeed, special SOGI preferences, like the SOGI conversation censorship law here, *necessarily* require Christian people to relinquish their religious identity and the freedom to express and exercise their religious

conscience. For the First Amendment to have meaning, it must include the right to hold and manifest beliefs without fear of government punishment or coercion.

The government SOGI speech censorship amendments here substantially interfere with judges and counselors' religious identity and exercise of their religious conscience. Michigan's bench and bar ought not require its members to disavow their sincerely held religious beliefs to stay licensed. Here Michigan proposes to expressly require its judges and attorneys to renounce their religious character, identity, and sincerely held religious conscience, or face professional discipline. When a government action imposes a penalty on the free exercise of religious expression, that government action must face the "most rigorous" scrutiny. *Fulton v. City of Philadelphia*, 593 U.S. 522, 541 (2020); *Trinity Lutheran Church of Columbia, Inc.* v. *Comer,* 582 U.S. 449, 466 (2017); *Lukumi*, 508 U.S. at 546. "Under that stringent standard, only a state interest of the highest order can justify the government's discriminatory policy." *Trinity Lutheran,* 582 U.S. at 466 (citing *McDaniel*, 435 U.S. at 628 (cleaned up); *Fulton*, 593 U.S. at 541.

And as *Masterpiece Cakeshop* recognized, "these disputes must be resolved with tolerance, without undue disrespect to sincere religious beliefs," and without subjecting persons living a gay lifestyle to indignities "when they seek goods and services in an open market." 584 U.S. at 640.

In *Fulton*, the Supreme Court confirmed that when First Amendment religious liberty is at stake:

> A government policy can survive strict scrutiny only if it advances "interests of the highest order" and is narrowly tailored to achieve those interests. *Lukumi*, 508 U.S. at 546 (cleaned up). Put another way, so long as the government can achieve its interests in a manner that does not burden religion, it must do so.

593 U.S. at. 541

While the government action in *Fulton* was not generally applicable, nothing in the Court's holding suggests the fundamental nature of the constitutional protection ought to diminish where it is.

C. The Complimentary Purposes of the First Amendment Clauses Work in Tandem to Doubly Protect Religious Expression

In *Kennedy*, the Supreme Court confirmed that "…a [n]atural reading" of the First Amendment leads to the conclusion that "the Clauses have complementary purposes" where constitutional protections for religious speech and the free exercise of religion "work in tandem," doubly protecting a person's religious expression and exercise of

religious conscience. *Kennedy,* 597 U.S. at 523, 532. In such situations, *Kennedy* reaffirmed the application of strict scrutiny. *Id.*

Those proposing the SOGI speech censorship amendments fail to understand the complimentary purposes of the clauses, thereby failing to read these clauses in tandem -- where only those state interests of the *highest order* can justify state interference with a person freely expressing their religious conscience.

The proposed SOGI speech censorship amendments substantially interfere with judges' and counselors' expressive exercise of their religious conscience and identity. Here, the State proposes to expressly require judges and lawyers to renounce their religious expression, conscience, beliefs, and identity, or face professional discipline under the full force of law and punishment. When the government substantially interferes with a citizen's religious expression and conscience, that government action must face "strict scrutiny." *Kennedy,* 597 U.S. at 523, 532.

The First Amendment "is essential to our democratic form of government, and it furthers the search for truth. Whenever ... a State prevents individuals from saying what they think on important matters or compels them to voice ideas with which they disagree, it undermines these ends." *Janus*, 585 U.S. at 893. It bears repeating that such actions "pose the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or [to] manipulate the public debate through coercion rather than persuasion." *Turner*, 512 U.S. at 641; *NIFLA,* 585 U.S. at 771.

Here a State authority "seeks to compel this speech in order to excise certain ideas or viewpoints from the public dialogue." 303 *Creative,* 600 U.S. at 588 citing *Turner*, 512 U.S. at 642 (cleaned up). Here the SOGI speech censorship rule coerces professionals to betray their conscience-based convictions. "Forcing free and independent individuals to endorse ideas they find objectionable is always demeaning, and for this reason, ... a law commanding 'involuntary affirmation' of objected-to beliefs would require 'even more immediate and urgent grounds' than a law demanding silence." *Janus,* 585 U.S. at 893 quoting *West Virginia Bd. of Ed. v. Barnette,* 319 U.S. 624, 633 (1943); and see*, 303 Creative*, 600 U.S. at 589 (holding that "is enough, more than enough to represent an impermissible abridgment of the First Amendment's right....")(cleaned up).

The First Amendment "includes both the right to speak freely and the right to refrain from speaking at all. The right to eschew association for expressive purposes is likewise protected." *Janus*, 585 U.S. at 892 (cleaned up). Indeed, "[i]f 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." *Barnette,* 319 U.S. at 642; see also *303 Creative* 600 U.S. at 584-85. Likewise, "it is not, as the Court

has repeatedly held, the role of the State or its officials to prescribe what shall be offensive." *303 Creative,* 600 U.S. at 602 quoting, *Masterpiece Cakeshop,* 584 U.S. at 665. Will a judge or lawyer's membership in a church that believes marriage must be between one man and one woman be used as evidence in a disciplinary proceeding to establish manifest bias or prejudice?

The Michigan bench and bar's deliberate choice to elevate one view of what it finds offensive over another indicates the State's biased, non-neutral official disapproval of some of its member's religious beliefs.

The First Amendment "is a natural outgrowth of the framers' distrust of government attempts to regulate religion and suppress dissent." *Kennedy,* 597 U.S. at 524 citing A Memorial and Remonstrance Against Religious Assessments, in Selected Writings of James Madison 21, 25 (R. Ketcham ed. 2006). The Supreme Court has long recognized "in Anglo–American history, ... government suppression of speech has so commonly been directed precisely at religious speech that a free-speech clause without religion would be Hamlet without the prince." *Kennedy,* 597 U.S. at 524 quoting *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995).

Bearing witness to the intolerant laws of seventeenth century England that persecuted individuals because of their religious views, the First Amendment balances the need for freedom of speech and religion with the need of a well-ordered central government. *See, e.g.*, Mark A. Knoll, *A History of Christianity in the United States and Canada* 25-65 (1992); F. Makower, *The Constitutional History and Constitution of the Church of England* 68-95 (photo. reprt. 1972) (1895). The First Amendment embodies an ideal that is uniquely American—that true liberty exists only where men and women are free to hold and express conflicting political and religious viewpoints. Under this aegis, the government must not interfere with its citizens living out and expressing their freedoms but embrace the security and liberty only a pluralistic society affords. That is why the First Amendment protects expression of a religious person's viewpoints and ideas, subjecting a state to the strictest of scrutiny if it substantially interferes. See, e.g., *Masterpiece Cakeshop,* 584 U.S. at 663-664 (Thomas, J., concurring) (noting, the necessity of applying "the most exacting scrutiny" in a case where a state law penalized expression of cake designer) citing *Texas v. Johnson*, 491 U.S. 397, 412 (1989); accord, *Holder,* 561 U.S. at 28; see also, *Reed*, 576 U.S. at 164.

In *Shurtleff v. Boston*, the Supreme Court unanimously reaffirmed that government "may not exclude speech based on 'religious viewpoint'; doing so 'constitutes impermissible viewpoint discrimination,'" 596 U.S. 243, 258 (2022) (quoting *Good News Club v. Milford Central School*, 533 U.S. 98, 112 (2001)). See also, *Rosenberger*, 515 U.S. at 828-830.

The SOGI speech censorship amendments require involuntary acceptance of political policy preferences, by force of law and punishment and is especially wrong because the government action here substantially interferes with constitutionally protected liberty. Here, the proposed amendments, masquerading as a *neutral rule regulating conduct*, effectively censures the viewpoint of many judges and counselors, a religious viewpoint consistent with their conscience and inherent in their personal religious identity. Moreover, the SOGI speech censorship amendments seek to compel these professionals to engage in expression conflicting with it. The disturbing diminishment of First Amendment religious conscience and expression, as a practical matter, denudes any meaningful constitutional protection for liberty as a limit on the exercise of state power.

D. Significance of *Obergefell*

In *Obergefell v. Hodges*, the Supreme Court found in the Constitution a right of personal identity for all citizens. 576 U.S. 644 (2015). The Justices in the majority held that: "The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity." *Id.* at 651; *see also Masterpiece Cakeshop,* 584 U.S. 631. *Obergefell* affirmed, therefore, not just freedom to define one's belief system, but freedom to exercise one's conscience associated with it.

Because *Obergefell* defined a fundamental liberty right as including "most of the rights enumerated in the Bill of Rights," and "liberties [that] extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs," this new right of personal identity must broadly comprehend factual contexts well beyond the same-sex marriage facts of that case. 576 U.S. at 663. If the Supreme Court meant what it said in *Obergefell*, the right of personal identity applies not just to those who find their identity in their sexuality and sexual preferences—but also to citizens who define and express their identity via their religious beliefs.

Christian judges and lawyers find their identity in Jesus Christ and the ageless, sacred tenets of His Word in the Holy Bible. For followers of Jesus, adhering to His commands is the most personal choice central to their individual dignity and autonomy. A Christian person, whose identity inheres in his or her religious faith orientation, is entitled to at least as much constitutional protection as those who find their identity in their sexual preference orientation. Proponents of initiatives like those here grievously err suggesting otherwise, cancelling a professional's humanity, dignity, and autonomy, demanding that they abandon their identity when expressing principles that are so central to their life and faith.

There can be no doubt that the Supreme Court's recently identified substantive due process right of personal identity protects against government authorities who

use public policy to persecute, oppress, and discriminate against Christian people.[2] Indeed, government must not use its power, irrespective of whether neutrally applied, in ways hostile to religion or religious viewpoints under this new "autonomy" paradigm. *Masterpiece Cakeshop,* 584 U.S. at 631. "[R]eligious and philosophical objections" to SOGI issues are constitutionally protected *Id.* at 631, (citing *Obergefell*, 576 U.S. at 679-80). Certainly, government ought to protect, not impede, the free expression of religious conscience. *See, e.g., Trinity Lutheran,* 582 U.S. at 462 (holding the government violates the Free Exercise Clause if it conditions a generally available public benefit on an entity giving up its religious character); *Burwell v. Hobby Lobby Stores, Inc.,* 573 U.S. 682, 719 (2014) (holding the RFRA applies to federal regulation of activities of closely held for profit companies); *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 196 (2012) (barring an employment discrimination suit brought against a religious school). State actions must uphold constitutionally protected freedoms, not grant special protections for some, while coercing others to engage in expression contrary to their religious identity and conscience.

Contrary to *Obergefell's* holding, the proposed amendments eviscerate the constitutional right to one's religious identity and religious expression.

E. Strict Scrutiny for Expression Grounded in Religious Conscience and Identity

Kennedy explains that the First Amendment Clauses "have complementary purposes" where constitutional protections for religious speech and the free exercise of religion "work in tandem," doubly protecting a person's religious expression and exercise of religious conscience. 597 U.S. at 523, 532. *Obergefell* teaches that beyond the First Amendment's double protection for religious expression, a substantive due process right to personal identity also compels the Supreme Court to always provide religious people with the highest standard of constitutional protection. Government action not only must avoid interfering with a citizen's religious expression and free exercise of religious conscience, protected by the First Amendment, it must also refrain from violating their personal religious identity rights. In this light, therefore, the proposed amendments cannot stand. If they remain, government authorities will use such provisions to oppress religious members of the bench and bar under the guise professional misconduct regulation. Moreover, only if the Supreme Court restores full protection for First Amendment freedom of conscience, will other constitutional freedoms remain secured. The Michigan Supreme Court should,

[2] While we question the cogency of the substantive due process jurisprudence that birthed the court-created liberty articulated in *Obergefell,* we expect the government to follow the now-established constitutional Rule of Law, including when it protects the personal identity and viewpoints of religious people.

therefore, preserve the right of all persons to exercise fundamental freedoms under the First Amendment, as applied to the states through the Fourteenth Amendment.

III. The Proposed Rule Violates Due Process and is an Affront to Good Governance under the Rule of Law

A. Due Process: The Proposed Rule is Void for Vagueness.

The Due Process clauses of the United States Constitution and the Michigan Constitution require that the law provide predictability for all citizens. US Const, Am XIV; Const 1963, art 1, § 17. An unambiguously drafted rule affords prior notice to the citizenry of conduct proscribed. A fundamental principle of due process, embodied in the right to prior notice, is that a rule is void for vagueness where its prohibitions are not clearly defined. Although citizens may choose to roam between legal and illegal actions, governments of free nations insist that laws give an ordinary citizen notice of what is prohibited, so that the citizen may act accordingly. If a person must guess at what a rule means, or if the proscriptions are not clearly defined, then the rule cannot stand. See, e.g., *Grayned v City of Rockford*, 408 US 104 (1972).

> A law is unconstitutionally vague if a reasonable person cannot tell what speech is prohibited and what is permitted. Unduly vague laws violate due process whether or not speech is regulated. For example, in *Kolender v. Lawson*, the Court declared unconstitutional California's loitering law and declared that "the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. * * * In part, the vagueness doctrine is about fairness; it is unjust to punish a person without providing clear notice as to what conduct was prohibited. Vague laws also risk selective prosecution; under vague statutes and ordinances the government can choose who to prosecute based on their views or politics.

Erwin Chemerinsky, *Constitutional Law – Principles and Policies*, 3rd Ed, pgs. 941-942 (citing *Kolender v Lawson*, 461 US 352 (1983)).[3]

The Michigan Supreme Court has held at least three ways exist for a law may be found unconstitutionally vague:

[3] Erwin Chemerinsky has been cited numerous times by the United States Supreme Court for his constitutional analysis, amicus briefs, and treatises. See, e.g. *American National Red Cross v. S.G.*, 505 U.S. 247 (1992); *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co*., 559 U.S. 393 (2010); *Duncan v. Walker*, 533 U.S. 167 (2001); *Wisconsin Dept. of Corrections v. Schacht*, 524 U.S. 381 (1998).

1. failure to provide fair notice of what conduct is prohibited,
2. encouragement of arbitrary and discriminatory enforcement, or
3. being overbroad and impinging on First Amendment freedoms.

People v Lino, 447 Mich 567, 575-576; 527 NW2d 434 (1994).

The United States Supreme Court has further explained the vagueness doctrine:

> As generally stated, the void-for-vagueness doctrine requires ... sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. Although the doctrine focuses both on actual notice to citizens and arbitrary enforcement, we have recognized recently that the more important aspect of vagueness doctrine is not actual notice, but the other principal element of the doctrine--the requirement that a legislature establish minimal guidelines to govern law enforcement.

Kolender, 461 US at 357-358 (1983) (emphasis added) (internal citations omitted). If the bench and bar here fail to provide these minimal guidelines, a rule may permit "a standardless sweep" that allows government authorities "to pursue their personal predilections." *Id.*

The Supreme Court further held that "[w]hen speech is involved, rigorous adherence to those requirements is necessary to ensure that ambiguity does not chill protected speech." *FCC v Fox*, 132 S Ct. 2307, 2317 (2012). The language of the proposed rules renders them unconstitutionally vague under all three vagueness doctrines. Of particular concern here, because the ambiguous language prevents notice of what constitutes misconduct, government authorities can arbitrarily define the offense *after* the commission of the expression.

B. An Affront to Good Governance Under the Rule of Law

Beyond the Due Process violations, arbitrarily enforcing vague provisions to suppress free expression of religious conscience undermines good governance under the rule of law. A principal precept of the rule of law is that it provides predictability for individuals in the conduct of their affairs. As discussed above, a vague provision provides no such predictability and opens the door for government authorities to decide what the law means after the conduct occurs. That which is prohibited becomes clear only after a government authority selectively enforces the vague rule against a citizen—based upon the authority's own morally relative construal of the ambiguous language. To be sure, the exercise of such discretion provides the means for an

authority to efficiently advance a political agenda. The insidious consequences of doing so, however, include the deterioration of fundamental democratic principles and good governance under the rule of law.

In the case of a vaguely worded rule, enforcement can, without prior notice of the conduct prohibited, lead to a citizen's loss of liberty interests. Moreover, if the rule vaguely regulates free expression, an ominous chill on the exercise of fundamental freedoms accompanies its promulgation. Compelled by the piercing chill of an unpredictable potential enforcement, citizen lawyers and judges cease exercising their basic liberties. Fearing loss of their license, they cease to assemble, pray, worship, or even speak.

In a pluralistic society, numerous conflicting points of view exist. Historically, therefore, the perpetuation of functional democracy requires free and open debate. Government enforcement actions against Christian professionals around the world and in the United States illustrate, however, just how efficiently government can use a vague law to suppress free expression and the free exercise of religious conscience.

IV. Conclusion

For the reasons discussed herein, we oppose the proposed amendments until they can be rewritten in a way that accommodates the fundamental constitutional rights of all citizens, and not just those encouraging its passage.