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August 3, 2023

By email to admcomment@courts.mi.gov

Chief Justice Elizabeth T. Clement
Michigan Supreme Court
Lansing, Michigan

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

Dear Chief Justice Clement:

We write in response to the July 19, 2023 letter submitted by the Catholic Lawyers Society of Metropolitan Detroit supplementing its prior statement opposing the proposed amendment to MCR 1.109. In a nutshell, the Catholic Lawyers Society contends that the United States Supreme Court's recent decision in *303 Creative LLC v Elenis*, 143 S Ct 2298 (2023), signifies that the proposed amendment to MCR 1.109 would violate judges' and court employees' rights to freedom of speech. As representatives of an organization with considerable expertise in the First Amendment, including defending the First Amendment rights of those with whom we strongly disagree, we are confident that there is no legal basis for the position that the proposed amendment would be unconstitutional.

When judges and their staff speak from the bench, issue opinions and orders, or otherwise communicate on the record or in connection with a case before them, they do so in their judicial capacity and not in their capacity as private citizens. Indeed, one function of the ceremonial robe typically worn by judges in the courtroom is to remind the public, and the judges themselves, that the judge is sitting as "the court," and not as the individual who happens to occupy the judicial office. See Ewing, *Why Do Judges Wear Black Robes? Amy Coney Barrett Has the Answer*, NPR (October 13, 2020) <<https://n.pr/43U8xIR>>. In other words, judges and their staff speak pursuant to their official duties as officers of the court when they use pronouns to refer to or identify parties or attorneys in the proceedings before them.

This fact is dispositive for First Amendment purposes: "When public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes . . ." *Garcetti v Ceballos*, 547 US 410, 421; 126 S Ct 1951; 164 L Ed 2d 689 (2006). "Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen." *Id.* at 421-422. Accordingly, regulations pertaining to what judicial officers and their staff may or must say or communicate pursuant to their official duties on the bench and in the courtroom or courthouse do not implicate or infringe upon the First Amendment rights of the individuals who happen to occupy those positions.

To the contrary, it is both appropriate and necessary for the judiciary as a whole to regulate judicial conduct to ensure public confidence in the fairness of the justice system. “It is quite likely that all judges disagree with some aspect of the law for religious, personal, or moral reasons. Yet the judiciary plays a key role in preserving the principles of justice and the rule of law, which requires the consistent application of the law regardless of the judge’s personal views.” *In re Neely*, 390 P3d 728, 738 (Wyo, 2017) (rejecting judge’s First Amendment challenge to requirement that she perform same-sex marriages). The proposed amendment to MCR 1.109 would appropriately adopt a consistent and uniform standard of conduct regarding pronoun usage for courts in our state.

Sincerely,

Jay Kaplan
Dan Korobkin
ACLU of Michigan