

**Public Policy Position**  
**Amicus Brief – *Rouch World v MDCR* (Docket No. 162482)**

The LGBTQA Law Section is a voluntary membership section of the State Bar of Michigan, comprised of 215 members. The LGBTQA Law Section is not the State Bar of Michigan and the position expressed herein is that of the LGBTQA Law Section only and not the State Bar of Michigan. To date, the State Bar does not have a position on this item.

The LGBTQA Law Section has a public policy decision-making body with 12 members. On March 3, 2021, the Section adopted its position after a discussion and vote at a scheduled meeting. 9 members voted in favor of the Section’s position, 0 members voted against this position, 0 members abstained, 3 members did not vote.

**Explanation:**

The LGBTQA Section’s amicus brief in *Rouch World v MDCR* (Docket No. 162482) urges the Michigan Supreme Court to overturn the Court of Appeals’ opinion in *Barbour v Dep’t of Social Services*, 198 Mich App 183; 497 NW2d 216 (1993), in light of the United States Supreme Court decision in *Bostock v Clayton Cty*, 590 U.S. \_\_\_\_; 140 S Ct 1731; 207 L Ed 2d 218 (2020), and find that the Elliott-Larsen Civil Rights Act, MCL 37.2101 *et seq.*, prohibits discrimination on the basis of sexual orientation and gender identity.

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STATE OF MICHIGAN  
IN THE SUPREME COURT

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ROUCH WORLD, L.L.C., a Michigan Limited  
Liability Company, and UPROOTED  
ELECTROLYSIS, L.L.C., a Michigan  
Limited Liability Company,

Plaintiffs-Appellees,

SUPREME CT NO: 162482

COA NO: 355868

COC NO: 20-000145-MZ

v

MICHIGAN DEPARTMENT OF CIVIL RIGHTS AND  
DIRECTOR OF THE DEPARTMENT OF CIVIL RIGHTS,

Defendants-Appellants.

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**BRIEF OF AMICUS CURIAE OF THE LGBTQA LAW SECTION OF THE  
STATE BAR OF MICHIGAN IN SUPPORT OF DEFENDANTS-APPELLANTS  
MICHIGAN DEPARTMENT OF CIVIL RIGHTS AND DIRECTOR OF THE  
DEPARTMENT OF CIVIL RIGHTS**

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## **STATEMENT OF JURISDICTION**

Amicus adopts by reference the Statement of Jurisdiction of Defendants-Appellants Michigan Department of Civil Rights and Director of the Michigan Department of Civil Rights.

## STATEMENT OF QUESTIONS PRESENTED

Amicus adopts by reference the Statement of Questions Presented by Defendants-Appellants Michigan Department of Civil Rights and Director of the Michigan Department of Civil Rights. With the following additions:

I. Is discrimination against persons based on sexual orientation and gender identity prevalent across the country and in Michigan?

Amicus curiae answer: Yes.

Defendants-Appellants answer: Yes.

Plaintiffs-Appellees answer: Has not answered.

Court of Appeals answer: Has not answered.

Court of Claims answer: Has not answered.

II. Does the Elliott-Larsen Civil Rights Act forbid discrimination against an individual based on their sexual orientation?

Amicus curiae answer: Yes.

Defendants-Appellants answer: Yes.

Plaintiffs-Appellees answer: No.

Court of Appeals answer: Has not answered.

Court of Claims answer: No. Unless the Court of Appeals or this Court overturns *Barbour v Dep't of Social Services*.

III. Does *Bostock v Clayton County* demand that *Barbour v Dep't of Social Services* be overruled because to allow it to stand continues to reinforce a second-class citizenship for LGBTQA individuals?

Amicus curiae answer: Yes.

Defendants-Appellants answer: Yes.

Plaintiffs-Appellees answer: Has not answered.

Court of Appeals answer: Has not answered.

Court of Claims answer: Has not answered stating this is a matter for the Court of Appeals or this Court.

IV. Does discrimination against an individual because of sexual orientation or gender identity also constitute discrimination because of sex because it embodies sex stereotyping and reinforces a second-class citizenship?

Amicus curiae answer: Yes.

Defendants-Appellants answer: Yes, but has not answered whether discrimination based on sex reinforces a second-class citizenship.

Plaintiffs-Appellees answer: Has not answered.

Court of Appeals answer: Has not answered.

Court of Claims answer: Has not answered.

## **STATEMENT OF FACTS**

Amicus adopts the Statement of Facts and Material Proceedings presented in its brief by Defendants-Appellants Michigan Department of Civil Rights and Director of the Michigan Department of Civil Rights.

## **STANDARD OF REVIEW**

Amicus adopts the Standard of Review presented in the brief of Defendants-Appellants Michigan Department of Civil Rights and Director of the Michigan Department of Civil Rights.

## STATEMENT OF INTEREST OF AMICUS CURIAE<sup>1</sup>

Under MCR 7.312(H), the LGBTQA Law Section, as *amicus curiae*, respectfully submits this brief in support of the Defendants-Appellants, Michigan Department of Civil Rights and Director of the Michigan Department of Civil Rights.

State bar associations serve the legal community and citizens of each state. Adrienne B. Koch, *The Case for Bar Associations: Why They Matter*, ABA Journal (Feb. 4, 2019) <<https://www.abajournal.com/voice/article/the-case-for-bar-associations>> (accessed Dec. 17, 2021). They “educate the public about legal issues,” report on legal trends, serve as a central point of engagement in pro bono work, advocate for legal reform, and “maintain the integrity of the legal profession.” *Id.*

The mission of the State Bar of Michigan (SBM) in particular is to promote improvements in the administration of justice and advancements of jurisprudence, improve relations between the legal profession and the public, and promote the interests of the legal profession in this State. *State Bar of Michigan Overview*, State Bar of Michigan, <[https://www.michbar.org/public\\_medioresources/overview](https://www.michbar.org/public_medioresources/overview)> (accessed Dec. 17, 2021). It has over 42,000 members and, with limited exceptions, all attorneys practicing are required to join and maintain membership in the SBM to practice law in Michigan. *Id.* To fulfill its demanding mission, the SBM operates a wide variety of programs benefiting the public interest. *Id.* This includes supporting voluntary sections that serve as a central point for engaging attorneys to help educate the public on legal issues, developments in the law, and legal rights. One such voluntary section tasked with preserving the integrity of our legal system is the LGBTQA Law Section of the SBM.

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<sup>1</sup> Pursuant to MCR 7.312(H)(4), amici state that no counsel for a party authored this brief in whole or in part, nor did anyone, other than amici or their counsel, make a monetary contribution intended to fund the preparation or submission of this brief.

The purpose of the LGBTQA Law Section of the SBM is twofold. First, the LGBTQA Law Section reviews law, cases, regulations, and other legal matters that affect lesbian, gay, bisexual, transgender, queer, questioning, and allies in the State of Michigan. *Mission*, State Bar of Michigan: LGBTQA Law Section, <<https://connect.michbar.org/lgbtqa/home>> (accessed Dec. 17, 2021). Second, it promotes the fair and just administration of those laws. *Id.* To effectuate this mission, the LGBTQA Law Section educates the SBM and the public, acts as a resource for the State Bar on LGBTQA-related issues, and coordinates action with other sections and affinity bar associations. *New SBM Section Will Focus on LGBTQA Law*, State Bar of Michigan, <<https://www.michbar.org/news/newsdetail/nid/5416/New-SBM-Section-Will-Focus-on-LGBTQA-Law/New-SBM-Section-Will-Focus-on-LGBTQA-Law>> (accessed Dec. 17, 2021).

The LGBTQA Law Section’s mission to promote fair and just administration of laws affecting the LGBTQA community forms the foundation of its compelling interest in this case. As detailed in this brief, the plain text of the Elliott-Larsen Civil Rights Act (ELCRA) prohibits discrimination based on sexual orientation and gender identity and is of considerable public importance. We note that, while Plaintiffs-Appellees did not challenge ELCRA’s coverage of transgender status, we agree with the Court of Claims’ holding that discrimination based on an individual’s gender identity is prohibited under ELCRA as these terms together generally encompass a larger, diverse community that faces discrimination based on sex.<sup>2</sup> Protection from

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<sup>2</sup> Sexual orientation, gender identity and expression (“SOGIE status”) covers a number of diverse identities. Sexual orientation includes individuals who identify as asexual, bisexual, gay, lesbian, pansexual/fluid, queer, questioning, or straight. Gender identity and expression includes androgyny, cisgender, crossdresser, intersex, transgender, and transsexual. LGBTQ is a common acronym for lesbian, gay, bisexual, transgender, and queer and is often used to represent all people who are marginalized due to sexual orientation and/or gender identity, as well as to represented identities described above.

discrimination is a core aspect of LGBTQA individuals' rights to receive equal protection under the law as citizens of this State and of this nation.

There are currently over 229,000 self-identifying LGBTQ workers in Michigan, making up approximately 5% of the population. *Michigan's Equality Profile*, Movement Advance Project (2021) <<https://www.lgbtmap.org/equality-map-profiles/MI-summary.pdf>> (accessed Dec. 17, 2021). Statewide more than 373,000 Michiganders age 13 and over identify as LGBTQ. *Id.* There are 27% of LGBTQ adults raising children in this State. *Id.*

Protection from discrimination is a core aspect of LGBTQ individuals and families receiving equal protection under the law. Interpretation urged by Defendants-Appellants is not only required as a matter of statutory construction but is also necessary to advance the goals and the intent of the ELCRA: to eliminate legal discrimination in employment and ensure equal enjoyment rather than second class citizenship in all "business, or an educational, refreshment, entertainment, recreation, health, or transportation facility, or institution of any kind ... made available to the public." MCL 37.2301(a); MCL 37.2302(1). The interpretation urged by Defendants-Appellants is also consistent with federal precedent. The United States Supreme Court ruled in *Bostock v Clayton Cty* that analogous prohibitions against discrimination "because of ... sex" in Title VII of the Civil Rights Act of 1964 include prohibitions against discrimination because of sexual orientation or gender identity. *Bostock v Clayton Cty*, 590 U.S. \_\_\_; 140 S Ct 1731; 207 L Ed 2d 218 (2020)

Historically, the State of Michigan has used the law to exclude members of the LGBTQ community from having equal rights. If the Court departs from long-standing compelling precedent on the interpretation of "sex" in ELCRA, it will send the wrong message to the community. Specifically, the message would be that LGBTQ people have only the protection

afforded by cases like *Windsor*, *Obergefell*, and *Bostock*, but would continue to be left without protection in the essential areas of employment, housing, public accommodations, public service, and educational contexts. *United States v Windsor*, 570 U.S. 744; 113 S Ct 2675; 186 L Ed 808 (2012); *Obergefell v Hodges*, 576 U.S. 644; 135 S Ct 2584; 192 L Ed 2d 609 (2015); *Bostock*, 140 S Ct at 1731. This Court must correct the mistake of the Court of Claims and ensure that the civil rights laws of this State provide protections that are just as robust as their federal counterparts.

As this Court has recognized, access to justice is a vital part of our judicial system for which the promises of fairness, equality, due process, and liberty are a part of the fabric which our judicial system and our constitutions are based, yet for LGBTQA people that reality and promise has not been met.<sup>3</sup> <sup>4</sup>As an association of lawyers, the LGBTQA Law Section has a strong interest in advocating against discrimination of LGBTQA people in all contexts, including the ones implicated in this case. These issues are even more personal for LGBTQA Law section members. LGBTQA lawyers are subjected to the same “second-class” status as their LGBTQA clients are. LGBTQA attorneys not only face discrimination while practicing law in this State, but also have to live with the hypocrisy of taking the oath to uphold the ideals of equality under the law knowing

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<sup>3</sup> Wyatt Ronan, *New FBI Hate Crimes Report Shows Increase in Anti-LGBTQ Attacks*, Human Rights Campaign, (Nov. 17, 2020) <<https://www.hrc.org/press-releases/new-fbi-hate-crimes-report-shows-increases-in-anti-lgbtq-attacks>> (accessed Dec. 17, 2021).

<sup>4</sup> The Washtenaw County Prosecuting Attorney’s Office in their official legal guidance publication 2021-01: Hate Crimes based on Sexual Orientation and Gender Identity found that “[h]ate crimes perpetuated on the basis of sexual orientation and gender identity are at ‘unacceptably high levels’ and rising.” It has stated that in light of the recent legal developments and in line with the *Bostock* decision that any acts committed because of a person’s sexual orientation and gender identity following the reasoning of *Bostock* will be prosecuted under Michigan’s ethnic intimidation law when the evidence shows that the victim was targeted because of their sexual orientation or gender identity. MCL 750.147b.; *Legal Guidance 2021-01: Hate Crimes Based on Sexual Orientation/Gender Identity*, Washtenaw County Office of the Prosecuting Attorney (Feb. 12, 2021) <<https://www.washtenaw.org/DocumentCenter/View/19590/Legal-Guidance-Hate-Crimes-Based-on-Sexual-OrientationGender-Identity->>.

they will endure a definition of equality that does not include them. This case will directly impact that status by affecting the ability of the entire LGBTQA population of Michigan to fight back against discrimination.

The LGBTQA Law Section's mission to promote fair and just administration of laws affecting the LGBTQA community gives it a strong interest in this case. As detailed in this brief, the plain text of the Elliott-Larsen Civil Rights Act (ELCRA) prohibits discrimination based on sexual orientation, which is of considerable public importance.

## **ARGUMENT**

### I. Discrimination against persons based on sexual orientation and gender identity is prevalent across the country and in Michigan.

Individuals with non-conforming sexual orientation or gender identity have suffered historical indignities in the eyes of the law, and studies have repeatedly shown the vulnerability of its members. This is evident even when reviewing recent phenomena such as the impact of the COVID-19 pandemic. A study by the Williams Institute indicates that persons with nontraditional sexual orientation or gender identity are uniquely vulnerable to economic hardship as its members are at disproportionate risk of experiencing poverty, food insecurity, and employment in highly impacted industries. Kathryn O'Neill, *Economic Vulnerabilities to Covid-19 Among LGBT Adults in California*, UCLA School of Law Williams Institute (May 2020) <<https://williamsinstitute.law.ucla.edu/publications/covid-economics-lgbt-ca/>>, p. 2. Research has also shown that members of this community are almost four times more likely than others to experience violent victimization, such as aggravated or simple assault, sexual assault, and rape. *LGBT People Nearly Four Times More Likely Than Non-LGBT People to be Victims of Violent*

*Crime*, UCLA School of Law Williams Institute (Oct. 2, 2020)  
<<https://williamsinstitute.law.ucla.edu/press/ncvs-lgbt-violence-press-release/>>.

The history of invidious and lawful discrimination against persons with non-conforming sexual orientation or gender identity has effectively branded the LGBTQA community with “second-class” status. A 2020 study showed that more than 1 in 3 of these persons faced discrimination in the past year. Sharita Gruberg et al., *The State of the LGBTQ Community in 2020*, Ctr. For American Progress (Oct. 6, 2020, 9:00 AM), <<https://www.americanprogress.org/issues/lgbtq-rights/reports/2020/10/06/491052/state-lgbtq-community-2020/#Ca=10>>. That type of systemic discrimination has serious impacts. For example, over half of the population who experiences this discrimination say that it has had a moderate or significant negative impact on their psychological well-being. *Id.* at 2. To attempt to avoid being discriminated against, over half of individuals with non-conforming sexual orientation or gender identity hide a personal relationship and one-fifth to one-third have altered other aspects of their personal or work lives. *Id.*

In Michigan, 5% of the workforce identifies as having a nontraditional sexual orientation or gender identity. *Michigan’s Equality Profile*, Movement Advancement Project <[https://www.lgbtmap.org/equality-maps/profile\\_state/MI](https://www.lgbtmap.org/equality-maps/profile_state/MI)> (accessed Dec. 17, 2021). Discrimination is widespread. A study by the Williams Institute confirmed that persons with this status face greater social and economic disparities in states that lack laws prohibiting employment discrimination based on sexual orientation. Amira Hasenbush et al., *The LGBT Divide: A Data Portrait of LGBT People in the Midwestern, Mountain & Southern States*, UCLA School of Law Williams Institute (2014). Michigan conforms with that trend. The impact is undeniable as 28% of individuals in Michigan identifying as having a nontraditional sexual orientation or gender

identity reported having a household income under \$24,000, whereas only 20% of cisgender<sup>5</sup> individuals reported the same. Mallory et al., *The Impact of Stigma and Discrimination Against LGBT People in Michigan*, UCLA School of Law Williams Institute (May 2019) <<https://williamsinstitute.law.ucla.edu/wpcontent/uploads/Impact-LGBT-Discrimination-MI-Apr-2019.pdf>>, p.7. Similarly, among all transgender people who worked in 2015, 27% were fired, denied a promotion, or not hired for a job because of their gender identity or expression. 2015 U.S. Transgender Survey: Michigan State Report, Nat'l Ctr. for Transgender Equality (May 2017) <<https://transequality.org/sites/default/files/docs/usts/USTS-MI-State-Report.pdf>>. Twenty-two percent were subjected to other forms of mistreatment based on their gender identity or expression, including being forced to use a restroom that did not match their gender identity, being told to present in the wrong gender to keep their job, or having a co-worker share information about their transgender status without permission. *Id.* While the statistics regarding the transgender community are particularly shocking, persons with non-conforming sexual orientations are also subjected to physical, emotional, and mental harm as a result of discrimination. For example, 17% of individuals identifying as gay, lesbian, or bisexual have attempted suicide, compared to a mere 4% of the U.S. population. Hottes et al., *Lifetime Prevalence of Suicide Attempts Among Sexual Minority Adults by Study Sampling Strategies: A Systematic Review and Meta-Analysis*, *Am J Public Health* 106, no. 5 (May 1, 2016) <<https://ajph.aphapublications.org/doi/10.2105/AJPH.2016.303088>> pp. e1-e12. The numbers only worsen when looking at youth or individuals with intersectional characteristics. Youth with non-conforming sexual orientations or gender identities are three times more likely than their counterparts to contemplate suicide, make a plan to commit suicide, self-harm, or attempt suicide.

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<sup>5</sup> Individuals whose gender identity matches their sex assigned at birth.

*Suicide Prevention Month: A summary of data on LGBT Suicide*, UCLA School of Law Williams Institute (Aug. 31, 2020) <<https://williamsinstitute.law.ucla.edu/press/suicide-prevention-media-alert/>> (accessed Dec. 17, 2021). Asian, Black, Alaskan Native/Pacific Islander and Latino youth with non-conforming sexual orientation or gender identities were at a significantly higher risk of suicidality. *Id.*

Discrimination against LGBTQA people in other contexts covered by the ELCRA is widespread in Michigan as well. One study found 27% of same-sex tester couples were discriminated against, despite being provided with better credentials in terms of income, down payment, and credit than different-sex tester couples.<sup>6</sup> Sexual Orientation and Housing Discrimination in Michigan, Mich. Fair Housing Ctrs. (Jan. 2007) <[https://www.fhcmichigan.org/images/Arcus\\_web1.pdf](https://www.fhcmichigan.org/images/Arcus_web1.pdf)>, p. 3, 9. Despite the patchwork of protections available under federal, state, and local laws, only 50% of individuals with non-conforming sexual orientation or gender identity are homeowners, compared to 70% of cisgender persons. Romero et al., *LGBT People and Housing Affordability, Discrimination, and Homelessness*, UCLA School of Law Williams Institute (Apr. 2020) <<https://williamsinstitute.law.ucla.edu/publications/lgbt-housing-instability/>>.

Limiting coverage under ELCRA removes legal tools that could be used to fight ongoing inequities. In education, 70.8% of students with non-conforming sexual orientation report verbal harassment based on sexual orientation and 13% report being physically assaulted. *The 2015 National School Climate Survey*, GLSEN (2016). An overwhelming 63.5% reported that the staff did nothing to respond or told the student to ignore the behavior. *Id.* One study focusing on transgender students found that 79% of those who were out or perceived as transgender

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<sup>6</sup> “Tester couples” refers to couples assembled and given credentials for the purpose of the study.

experienced some kind of harassment, including prohibitions on dressing according to their gender identity, harsher discipline, harassment, or physical or sexual assault. 2015 U.S. Transgender Survey: *Michigan State Report, Nat'l Ctr. for Transgender Equality* (May 2017) <<https://transequality.org/sites/default/files/docs/usts/USTS-MI-State-Report.pdf>>. That study also found that 30% of transgender people in Michigan had experienced some kind of mistreatment in a place of public accommodation in the previous year. *Id.* at 2.

As an association of lawyers tasked with the duty of both serving and educating the greater community, the LGBTQA Law Section has a strong interest in standing against discrimination based on sexual orientation or gender identity in all contexts, including the ones implicated in this case. The LGBTQA community has long suffered indignities under Michigan law. Indeed, Michigan's statewide ban on marriage-equality was only just ruled unconstitutional in July 2015. The legal arguments in support of covering sexual orientation under ELCRA are clear and compelling. Finding otherwise would limit protections against discrimination and allow unfair denial of equal opportunities and consideration under the law. Just as the United States Supreme Court found that state bans on same-sex marriage "burden the liberty of same-sex couples" and "abridge central precepts of equality," denying individuals protection from discrimination based on sexual orientation under ELCRA "works a grave and continuing harm, serving to disrespect and subordinate gays and lesbians." *Obergefell*, 134 S Ct at 2590-91 (2015). Therefore, we respectfully request that this Court find that ELCRA's prohibition of discrimination based on "sex" applies to both sexual orientation and transgender status.

II. The Elliott-Larsen Civil Rights Act forbids discrimination against an individual based on their sexual orientation.

The Michigan Legislature in 1976 passed the Elliott-Larsen Civil Rights Act (ELCRA), MCL 37.2101-37.2804. The ELCRA provides: “The opportunity to obtain employment, housing and other real estate, and the full and equal utilization of public accommodations, public service, and educational facilities without discrimination because of religion, race, color, national origin, age, sex, height, weight, familial status, or marital status as prohibited by this act, is recognized and declared to be a civil right.” MCL 37.2102.

“The term “sex” has been broadly interpreted in Michigan law. Extending the term “sex” to include more than biology is consistent with statutory definitions of “sex.” For example, the Legislature in MCL 2201(d) illuminated the expansive definition of “sex”, stating that “(d) ‘Sex’ includes, *but is not limited to*, pregnancy, childbirth, or a medical condition related to pregnancy or childbirth ...” (emphasis added).<sup>7</sup>

The ELCRA “is aimed at the prejudices and biases borne against persons because of their membership in a certain class and seeks to eliminate the effects of offensive or demeaning stereotypes, prejudices, and biases.” *Miller v CA Muer Corp*, 420 Mich 355, 363; 362 NW2d 650 (1984) (internal quotation marks and internal citation omitted). The ELCRA “recognizes that freedom from discrimination because of sex is a civil right.” *Hamed v Wayne Co*, 490 Mich 1, 6; 803 NW2d 237 (2011) [citing MCL 37.2102(1)]. “Accordingly, the act prohibits discrimination

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<sup>7</sup> The term “sex” has also included sexual harassment in MCL § 37.2103(i): “(i) *Discrimination because of sex includes sexual harassment*. Sexual harassment means unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct or communication of a sexual nature under the following conditions:” (emphasis added). If the term “sex” is broad enough to include pregnancy, childbirth and sexual harassment then it is broad enough to include sexual orientation and gender identity.

because of sex in employment, places of public accommodation, and public services.” MCL 37.2202; MCL 37.2302.

The ELCRA further provides that “[e]xcept where permitted by law, a person shall not ... [d]eny an individual the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation or public service because of ... sex....” MCL 37.2302(a). “The operative language of § 302(a) ... is not a duplicate of the equal protection provision (§ 2) of the declaration of rights in article 1 of the Michigan Constitution, . . .” *Dep’t of Civil Rights ex rel Forton v Waterford Twp Dept of Parks and Rec*, 425 Mich 173, 185; 387 NW2d 821 (1986). The ELCRA not only codified the Michigan Constitution’s Equal Protection Clause, but also broadened it to include categories not covered, such as age, sex, and marital status. *Doe v Dep’t of Corrections*, 323 Mich App 479, 508; 917 NW2d 730 (2018) (O’Connell, dissenting) (citation omitted). “It is without doubt, then, that the Civil Rights Act is intended to enlarge the scope of civil rights beyond the state action limitation 3 of article 1, § 2 of the Michigan Constitution to cover nongovernmental conduct in the handling of public accommodations.” *Forton*, 425 Mich at 186.

A. The question therefore is, what does “sex” mean in the ELCRA?

The goal of statutory interpretation is to discern and give effect to the intent of the Legislature. *See, People v Dowdy*, 489 Mich 373, 379; 802 NW2d 239 (2011). The focus is on the plain and ordinary meaning of the statutory text. MCL 8.3a (“All words and phrases shall be construed and understood according to the common and approved usage of the language....”); *Jespersion v Auto Club Ins Ass’n*, 499 Mich 29, 34; 878 NW2d 799 (2016) (“When interpreting statutory language, we begin with the plain language of the statute. We must give effect to the Legislature’s intent, and the best indicator of the Legislature’s intent is the words used.”) (citation

and quotation marks omitted). And “[w]hen the plain and ordinary meaning of statutory language is clear, judicial construction is neither necessary nor permitted.” *Pace v Edel-Harrelson*, 499 Mich 1, 7; 878 NW2d 784 (2016).

If a statute’s language is clear and unambiguous, courts enforce the language as written and judicial construction is neither required nor permitted. *People v Gardner*, 482 Mich 41, 50; 753 NW2d 78 (2008) (internal citation omitted). “[R]ecourse to the dictionary is unnecessary when the legislative intent may be readily discerned from reading the statute itself.” *ADVO-Sys, Inc v Dep’t of Treasury*, 186 Mich App 419, 424; 465 NW2d 349 (1990) (internal citation omitted). “A statute is not ambiguous merely because a term it contains is undefined.” *Diallo v LaRochelle*, 310 Mich App 411, 418; 871 NW2d 724 (2015) (internal quotations marks and internal citations omitted).

Where a word in a statute is unambiguous (even if seemingly controversial) there is a distinct danger in consulting legislative history or earlier proposed clarifying amendments. “[C]onstruing an unambiguous statute by relying on legislative history or potential amendment allows a reader, with equal plausibility, to pose a conclusion of his own that differs from that of the majority.” *People v Rogers*, \_\_\_ Mich App \_\_\_; \_\_\_ NW2d \_\_\_ (2021) (Docket No. 346348) (Servitto, D, concurring) (Slip Op, at p 1) (citing *People v Gardner*, 482 Mich 41, 57; 753 NW2d 78 (2008)).

In *Robinson v Ford Motor Co*, 277 Mich App 146; 744 NW2d 363 (2007), the Plaintiff complained of same-sex harassment in the workplace that created a hostile work environment. Ford Motor Company argued that because the ELCRA didn’t mention same-sex harassment claims, the Plaintiff had no case. The Michigan Court of Appeals cited *Oncale v Sundowner Offshore Services, Inc*, 523 U.S. 75, 80; 118 S Ct 998; 140 L Ed 2d 201 (1998), where the United

States Supreme Court interpreted Title VII's prohibition against "discrimination ... because of ... sex," 42 USC § 2000e-2(a)(1). *Robinson*, 277 Mich App at 363. The Michigan Court of Appeals in completing its analysis of the case stated: "MCL 37.2202(1)(a) prohibits, 'discriminat[ion] ... because of ... sex' in a 'term' or 'condition' of employment. The language of the CRA does not exclude same-gender harassment claims. Accordingly, we reject defendant's claim that the CRA excludes same-gender, hostile-work-environment claims." *Id.* at 368. The Michigan Court of Appeals made clear in its opinion that a party may not craft its own conception of what is or is not encompassed in the usage of the word "sex" in ELCRA.

Here, the ELCRA prohibits discrimination based on sex and it doesn't matter whether "sex" is construed as heterosexual, gay, lesbian, bisexual, asexual, pansexual, transsexual, or any permutation or combination within the understanding of what "sex" is or might be. The ELCRA states in no uncertain terms that sex is irrelevant and must not be considered. No one making decisions about employment, housing, public services, public accommodation, and education can consider sex, no matter what "sex" encompasses or entails. MCL 37.2102. "Sex" – however defined – is simply *not* supposed to encompass any part of the decision-making process.

There are those who insist that sex is set by genital structures on a person's body. However, over the past century, scientists understand "sex" as biological but also involving multiple variables and contested factors. The concept of "sex" is therefore inherently knotty because its "variables" are multiple and come in far more than two versions, and no single biological factor is determinative. Stark biological definitions of "sex" conflict with the understanding that sex involves multiple biological and social factors. Katrina Karzasis, *The Misuses of 'biological sex'*, *The Lancet* (Vol 394, Nov. 23, 2019).

In 1973, a prescient Note in the Yale Law Journal observed,

The vast majority of Americans view marriage to be *by definition* a union of man and woman; a scarcely smaller number see homosexuality as “unnatural” and morally reprehensible. The easy answer to these propositions is that the Fourteenth Amendment was passed for the express purpose of preventing the enforcement of exclusionary classifications based upon deeply felt beliefs which are not grounded on objective, rational distinctions. Not long before the passage of that Amendment, thousands of Americans sincerely believed that a voter was “by definition” a white, male, property owner, and that interracial marriages were immoral.

Note, *The Legality of Homosexual Marriage*, 82 Yale L.J. 573, 582 (1973) [footnotes omitted].

More than a few things in society have changed since 1973, but “sex” isn’t one of them. “Sex” is a very broad concept, and historically never has been and likely never will be confined to an either-or proposition. That is why in the ELCRA considerations of sex are prohibited: one person’s “ick” factor about another’s sexual being – real or perceived – has and should have nothing to do with their employment, housing, public services, public accommodation, and education. Everyone is entitled to equal treatment, regardless of their sexual orientation. The State does not have an interest in its citizens being excluded from fundamental pursuits based on their sexual orientation:

Discrimination, in constitutional terms, refers to baseless and irrational line drawing. There are occasions when regulatory lines are legitimately drawn on the basis of some of the protected categories: age, e.g., distinguishing childhood from adulthood; marital status, e.g., tax laws, zoning laws; and national origin, e.g., immigration laws. When there is a sufficiently important governmental interest and the classification is adequately related to that interest, it does not amount to discrimination to draw legislative lines on the basis of those classifications.

*Forton*, 425 Mich at 189.

Those who seek to maintain a strictly male-female view of sex simply want to reject and avoid the humanity of those who do not conform to their idea of that male-female viewpoint, so they can continue to justify discriminating against gender non-conforming persons. “Science does not drive these policies; the desire to exclude does. This intentional gerrymandering of sex opportunistically uses the idea of ‘biological sex’—which lends a veneer of science and thus rationality to any definition—to remove certain individuals from a category based on intolerance.”

Katrina Karzasis, *The Misuses of 'biological sex'*, *supra*. “Defining a person’s sex identity using decontextualized ‘facts’ is unscientific and dehumanizing.” Simón(e) D Sun, *Stop Using Phony Science to Justify Transphobia*, *Scientific American* (Jun. 13, 2019), p 6 (accessed Dec. 17, 2021).

The ELCRA forbids discrimination against an individual based on their sexual orientation, regardless of how they express it. Sex is absolutely irrelevant and must not be considered in decisions affecting a person’s employment, housing, public services, public accommodation, and education.

III. *Bostock v Clayton County* demands that *Barbour v Dep’t of Social Services* be overruled because to allow it to stand continues to reinforce a second-class citizenship for LGBTQA individuals.

The Court of Appeals decided *Barbour v Dep’t of Social Services*, by relying on case law that has been overturned by *Bostock v Clayton Cty*. Specifically, *Barbour* looked to Title VII and federal precedent interpreting that provision. *Barbour v Dep’t of Social Services*, 198 Mich App 183, 185; 497 NW2d 216 (1993). Since the case law that the Court of Appeals relied on is no longer good law, this Court must overturn *Barbour*.

**A. *Bostock* held that language in Title VII that is analogous language to the ELRCA prohibits discrimination based on sexual orientation.**

The United States Supreme Court in *Bostock* held that in cases where an employer fired an employee who was gay or transgender that “sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids.” *Bostock*, 140 S Ct at 1737.

Title VII like ELCRA prohibits employers from taking certain actions against an employee because of sex. Following the majority’s reasoning in *Bostock*, the “but-for” causations standard, like comparable provisions in state law cases, has historically been afforded a broad interpretation.

*Id.* at 1739-40. As noted by the Court in *Bostock*, the “but-for” causation standard must not be rigid because an event often has more than one but for cause. *Id.* at 1747.

The United States Supreme Court in applying the test to the consolidated cases before it, was faced with only one possible answer: “The statute’s message for our cases is equally simple and momentous: An individual’s homosexuality or transgender status is not relevant to employment decisions. That’s because it is impossible to discriminate against a person for being homosexual or transgender without discriminating against an individual based on sex. *Id.* at 1741 (emphasis added).

The Court further found that “sex” and “sexual orientation” and “sex” and one’s “transgender status” are inextricably intertwined. If an employer identified that the employee had a non-conforming sexual orientation or transgender status, the employer must have also impermissibly considered the employee’s sex in conjunction with what sex(es) the employee is attracted to. *Id.* It would not be possible for an employer, or anybody for that matter, to discriminate against the other on the basis of sexual orientation or transgender status alone, because the terms “sexual orientation” and “transgender” cannot be understood or defined without explicit reference to sex. *Id.*

In his opinion, Justice Gorsuch went further to ensure that the Court’s opinion was impenetrable. Justice Gorsuch explained that the holding of the Court is additionally supported by three of the Court’s leading precedents: (1) *Phillips v Martin Marietta Corp*, 400 U.S. 542; 91 S Ct 496; 27 L Ed 2d 613 (1971) (sex-plus discrimination); (2) *Los Angeles Dep’t of Water & Power v Manhart*, 435 U.S. 702; 98 S Ct 1370; 55 L Ed 2d 657 (1978) (policies relying on sex-based generalizations about a group of employees are impermissible sex discrimination); and (3) *Oncale*, 118 S Ct at 998 (same-sex harassment is sex discrimination). The Court in drafting these three

opinions built the foundations for the *Bostock* decision. Ultimately, these three cases provided additional support for the Court's holding that the prohibition of sex discrimination includes the prohibition of discrimination based on sexual orientation and gender identity. As such, *Bostock* requires that this Court find that the ELCRA's prohibition on sex discrimination includes prohibition on discrimination based upon sexual orientation and gender identity.

**B. This Court routinely relies on federal interpretations of federal law to guide interpretations of state law including the ELCRA.**

Michigan Courts have been guided numerous times in its interpretation of the Michigan Civil Rights Act by looking to the federal court interpretations of federal statutes. *Chambers Trettco, Inc.*, 463 Mich 297, 313; 614 NW2d 910 (2000) (citing *Summer v Goodyear Tire & Rubber Co*, 427 Mich 505, 5254; 398 NW2d 368 (1986)). In the context of employment discrimination, this Court has relied on federal law and precedent for guidance. *Sniecinski v Blue Cross & Blue Shield of Mich*, 469 Mich 124, 133; 666 NW2d 186 (2003) (incorporating federal case law on Federal Civil Rights Act for "cases involving indirect or circumstantial evidence" of discrimination); *Town v Michigan Bell Tel Co*, 455 Mich 688, 695; 568 NW2d 64 (1997) (noting Michigan Court's use of the McConnell Douglas test for establishing a prima facie case of discrimination).

*Bostock* has significantly impacted the enforcement of many states' human rights laws. Recently, a Texas Court of Appeals addressed the issue of whether *Bostock* applied to the Texas Commission on Human Rights Act (TCHRA), which like Michigan's ELCRA bans sex discrimination. *Tarrant Cnty. Coll. Dist v Sims*, No. 05-20-00351-CV (Tex. App. Mar. 10, 2021). The Texas Court of Appeals held, that in light of the United States Supreme Court's decision in *Bostock*, they were compelled to read the TCHRA's ban on sex discrimination "as prohibiting discrimination based on an individual's status as a homosexual or transgender person." *Id.*

Moreover, Texas is not the only state to endorse SCOTUS’s reasoning in *Bostock*. Many other courts and several states have already relied on the United States Supreme Court decision in *Bostock* to construe provisions of state or local law and adopt the Court’s *Bostock* reasoning. *Lucas v United States*, 240 A3d 328, 338-39 (DC 2020) (relying on *Bostock* to interpret District of Columbia statute; *ME v TJ*, \_\_\_ SE2d \_\_\_; 2020 WL 7906672, at \*7-8 (NC App 2020) (Docket No. COA 18-1045) (relying on *Bostock* to interpret provision in the North Carolina constitution); *McGuire v Newark*, 2020-Ohio-4226 56-57; 2020 WL 5056993 (Ohio App, 2020) (relying on *Bostock* to interpret Ohio statute). In February 2021, Florida’s Commission on Human Relations issued a notice that it would begin following *Bostock* when investigating state-level sex discrimination cases. Florida Commission on Human Resources <<https://fchr.myflorida.com/sexual-discrimination>>. Five other states – Arizona, Kansas, Nebraska, North Dakota, and Pennsylvania have adopted *Bostock* into law. Eric Bachman, *The Bostock Decision One Year Later: How LGBTQ+ Employment Discrimination Laws are Evolving*, Forbes (Jun. 10, 2021) <<https://www.forbes.com/sites/ericbachman/2021/06/10/the-bostock-decision-one-year-later-how-lgbtq-employment-discrimination-laws-are-evolving/?sh=44ce0df8293d>> (accessed Dec. 17, 2021).

**C. Applying SCOTUS’ reasoning from *Bostock* to ELCRA is crucial to demolish the vestiges of “second-class” status stamped upon LGBTQ+ people in Michigan?**

Endorsing SCOTUS’s reasoning in *Bostock* to ELCRA is crucial to demolish the vestiges of “second-class” status stamped upon LGBTQ+ people and the right to discriminate against all LGBTQ+ people who live, work, and visit the State of Michigan. The ELCRA statute has been deemed to be more expansive than most other state human rights laws. As such, there is simply no

legitimate reason why the civil rights laws of this State, which this Court has often stated should be liberally construed, should provide less protections than their federal counterparts.

In many instances state laws offer more protections than those available under federal law. For example, Title VII only applies to employers with at least fifteen employees. 42 U.S.C. Section 2000e. Protections for employees who are employed by employers with less than fifteen employees must hope that state law will provide them protection. Luckily, the majority of states employment discrimination laws including Michigan covers smaller employers. Every individual deserves the right to show up as their whole person in all aspects of their lives. As such the LGBTQA Law Section of the SBM implores this Court to apply the ELCRA to the discrimination our community as long endured as this is the only way to achieve equality for all Michiganders.

Only this Court can remedy and correct precedential decisions that were based on old and antiquated notions that continue to harm our citizens much like the vestiges of race and sex discrimination preventing women and blacks and ethnic minorities from being full class citizens.

IV. Discrimination against an individual because of sexual orientation or gender identity also constitutes discrimination because of sex because it embodies sex stereotyping and reinforces a second-class citizenship.

Discriminating against an individual because of sexual orientation also constitutes discrimination based on sex because it embodies sex stereotyping and reinforces a second-class citizenship inequality. In *Price Waterhouse v Hopkins*, 490 U.S. 228; 109 S Ct 1775; 104 L Ed 2d 268 (1989), the United States Supreme Court, held that employment decisions based on sex stereotypes constitutes discrimination because of sex under Title VII of the Civil Rights Act. Ann Hopkins, who was not considered for partnership, filed a lawsuit based on sex discrimination under Title VII of the Civil Rights Act. *Price Waterhouse*, 109 S Ct at 1780. Partners said that Hopkins

“overcompensated for being a woman,” that she should take “a course at charm school” and described her as being “macho.” *Id.* at 235. (quotations in the original). Hopkins was advised that in order to improve her chances of becoming a partner she should “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.” *Id.* (quotations in the original and citation omitted).

Addressing sex stereotypes, the Court stated:

As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for, "[i]n forbidding employers to discriminate against individuals because of their sex, *Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.*"

*Price* at 252. (quoting *Los Angeles Dept. of Water & Power v Manhart*, 435 U. S. 702, 435 U. S. 707, n. 13 (1978) (quoting *Sprogis v United Air Lines, Inc.*, 444 F.2d 1194, 1198 (CA7 1971))) (emphasis added). The bedrock of the Court’s ruling in *Bostock* – that “it is impossible to discriminate against a person for being homosexual or transgender without discriminating against an individual based on sex” – means that sex stereotyping based on a person’s sexual orientation or gender identity is a part of that entire spectrum. *Bostock*, 140 S Ct at 1741. Sex stereotypes are regularly used to disparage, ridicule, harass, and discriminate against LGBTQA people and those who are perceived to be LGBTQA. The basis for these stereotypes includes clothing, hair, make-up, jewelry, body type, voice, mannerisms, interests, hobbies, and certain fields of employment. They are all based on social constructs about femininity and masculinity. In *Waldo v Consumers Energy Company*, 726 F3d 802 (CA 6 2013), the Plaintiff, a woman, was employed as an electrical line worker. Her male coworkers told her that this was not a job for a woman. *Waldo*, 726 F3d at 811. They locked her in a porta-potty and told her to “pee like a man,” and told her that “purses

aren't allowed here in this type [of] work,” and when she carried a change purse in her pocket they called her a “dike.” *Id.* at 810-11. These are all sex-based stereotypes, one of which is used to degrade lesbians. Slurs that are directed at a person’s sexuality are not separated from those which are not – they are all discriminatory comments.

While *Waldo* was based on a hostile work environment, nothing in the ELCRA requires a determination of a Plaintiff’s sexual orientation. The intent of the person making these comments does not matter. The sexual orientation of the victim of discrimination also does not matter. The question is whether the discrimination was because of the person’s sex. Under ELCRA, heterosexuals are not excluded from seeking damages for the reason that one or more of the discriminatory actions was directed at their wrongfully perceived sexuality. Similarly, people who identify as being homosexual should not be prevented from making a claim if the discrimination is based on their actual sexuality. To do so treats LGBTQA people as second-class citizens. As stated in *Romer v Evans*, 517 U.S. 635; 116 S Ct 1620; 134 L Ed 2d 855 (1996), a state cannot “deem a class of persons a stranger to its laws.”

## CONCLUSION

The *Bostock* decision by the United States Supreme Court afforded an entire community of people protection in the workplace under a law which they were previously excluded. This decision also bestowed upon the LGBTQA community a sense of equality and personhood that so many others take for granted. Every person, regardless of certain immutable characteristics, deserves to stand on equal footing with those that enjoy the most privilege in our society, for no one is equal until we are all equal. The *Bostock* decision should leave no doubt that sexual orientation is encompassed in the definition of “sex” and therefore people should have protection based on their sexual orientation and gender identity under the ELCRA. If the Court issues this

holding, our State will get one step closer to achieving full equality for all its citizens and visitors, by removing the barriers of discrimination and “second-class” status that LGBTQA people have been relegated to in the State of Michigan.

We respectfully urge the Court to overturn *Barbour* in light of the United States Supreme Court decision in *Bostock* and find that the ELCRA prohibits discrimination on the basis of sexual orientation and gender identity.

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Respectfully submitted,

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