Co-Chairs Laura Reyes Kopack and Rasha Demashkieh
Michigan Civil Rights Commission
110 West Michigan Avenue, Suite 800
Lansing, MI 48913

June 30, 2017

Dear Co-Chairs Reyes Kopack and Demashkieh:

We are writing to request that the Michigan Civil Rights Commission ("Commission") issue an interpretative statement finding that the prohibition on sex discrimination in employment, housing, and public accommodations found in Michigan's Elliott-Larsen Civil Rights Act ("Elliott-Larsen"), MCL 37.2101 *et seq.*, includes a prohibition on discrimination based on an individual's gender identity and sexual orientation. The Commission has the authority to issue such a statement under MCL 37.2601; MCL 24.201 *et seq.*; Mich Admin Code, R 37.23.

This interpretative statement is of critical importance to lesbian, gay, bisexual, and transgender (LGBT) Michiganders. As you are no doubt aware, unlike 18 other states[1], Michigan does not have a state law that explicitly prohibits anti-LGBT discrimination in employment, housing, or public accommodations. The Commission itself has concluded that discrimination against LGBT people in Michigan "exists and is significant" and "has direct negative economic effects on Michigan."[2] In addition, although the federal prohibition on sex discrimination in employment under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1) ("Title VII"), has been interpreted to encompass discrimination based on gender identity and sexual orientation, many LGBT people in Michigan do not receive the benefit of this prohibition, because they work for employers with fewer than fifteen employees, the threshold for Title VII coverage.

Amending Elliott-Larsen to prohibit discrimination based on gender identity and sexual orientation is a top public policy priority for Michigan's LGBT community and our respective organizations. We believe that such an amendment is essential to ending anti-LGBT discrimination in Michigan and we recognize that a statutory amendment will remain necessary, even if the Commission issues the interpretative statement we are requesting. Having said that, it has been nearly 33 years since Michigan's state legislature

[1] Freedom for All Americans, *LGBT Americans Aren't Fully Protected From Discrimination in 32 States* <http://www.freedomforallamericans.org/states/> (accessed July 19, 2016).

[2] Michigan Department of Civil Rights, *MDCR Report Finds Negative Economic Impact to Allowing Discrimination Against LGBT in Michigan* <http://www.michigan.gov/mdcr/0,4613,7-138-4954_47773-293875--,00.html> (accessed May 25, 2017).

first considered such an amendment. In the intervening three decades, LGBT Michiganders have remained unprotected. The issuance of an interpretative statement is not a substitute for legislative action, but it would be an important incremental step forward that would provide LGBT Michiganders with access to the Commission's administrative remedies when they face discrimination.

Precedent Under Federal Law

The interpretation we are requesting is consistent with existing precedent under federal law. The theory of LGBT discrimination being considered as "sex discrimination" has its genesis with the US Supreme Court decision in *Price Waterhouse v Hopkins*, 490 US 228, 239 (1989).[3] In *Price*, the employer refused to make a female senior manager, Hopkins, a partner at least in part because she did not act as some of the partners thought a woman should act. *Id.* at 230-31. She was informed, for example, that to improve her chances at partnership she should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." *Id.* at 235. The Court specifically pointed out that under Title VII the term "sex" includes both gender and the biological distinctions that distinguish men from women, and concluded that discrimination for failing to conform with gender based expectations violates Title VII, holding that "[i]n the specific context of stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender." *Id.* at 250. Gender discrimination occurs anytime an employer treats an employee differently for failing to conform to any gender expectations or norms. *Id.* at 244.

This theory of gender stereotyping has been carried over to the context of transgender discrimination where federal courts have held that the term "sex" encompasses both sex, that is the biological differences between men and women, and gender. *Schwenk v Hartford*, 204 F 3d 1187, 1202 (9th Cir 2000). In *Schwenk*, a prison guard sexually assaulted a transgender prisoner, and the prisoner successfully sued alleging that the guard had violated the Gender Motivated Violence Act (GMVA) because the guard's attack constituted discrimination because of gender within the meaning of both GMVA and Title VII. In *Smith v City of Salem*, 378 F 3d 566 (6th Cir 2004), Smith, who was diagnosed with gender dysphoria began presenting as female at work. Co-workers began making comments that her appearance was not sufficiently masculine and her employer subjected her to numerous psychological evaluations, eventually suspending her. The Sixth Circuit (which covers Michigan) held that Smith

[3] Subsequent to *Price Waterhouse*, in 1998 the Supreme Court held in *Oncale v Sundowner Offshore Services*, 523 US 75,82 (1998) that same-sex sexual harassment is a cognizable claim under Title VII. The significant analysis of the Supreme Court illustrates that although same-sex sexual harassment may not have been within the original scope of Congress when it enacted Title VII, "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils." *Id.* at 79. *Oncale* is important for transgender and gay discrimination claims because the Supreme Court established Title VII as an evolving statute, capable of expansion in covering similar problems not originally envisioned by Congress. The *Oncale* decision implies that in the area of employment discrimination, the Supreme Court may likely extend definitions incorporating discrimination not originally envisioned by the men and women who created Title VII.

was discriminated against because of her sex, in violation of Title VIl, "both because of (her) gender non-conforming conduct and more generally because of her identification as a "transsexual." *Id.* at 571. The Court noted that the "Supreme Court made clear that in the context of Title VII, discrimination because of 'sex' includes gender discrimination." *Id.* at 572. A similar result was reached by the Sixth Circuit in *Barnes v Cincinnati*, 401 F 3d 729 (2005), where a transgender male to female police officer was demoted by the City due to her failure to comply with gender stereotypes in violation of Title VII.

In *Glenn v Bumbry*, 663 F 3d 1312 (11th Cir 2011) an employer fired Elizabeth Glenn, a transgender woman, because he considered it "inappropriate" for her to appear at work as a woman and found it "unnatural" and "unsettling" that she would appear wearing women's clothing. *Id.* at 1320. The firing supervisor further testified that the decision to dismiss Glenn was based on his perception of Glenn as "a man dressed as a woman and made up as a woman," and admitted that his decision to fire her was based on the "sheer fact of the transition." *Id.* at 1320-21. The Court found such action to constitute gender stereotyping and to violate Title VII.

In *Schroer v Billington*, 557 F Supp 2d 293 (DDC 2008), the Library of Congress rescinded an offer of employment to a transgender job applicant after the applicant informed the Library's hiring officials that she intended to undergo gender transition. It did not matter for the purposes of Title VII liability whether the Library withdrew its offer of employment because it perceived Schroer to be an insufficiently masculine man, an insufficiently feminine woman, or otherwise gender non-conforming. *Id.* at 305. In any case, Schroer was entitled to judgment based on a *Price Waterhouse*-type claim for sex stereotyping.

The Equal Employment Opportunity Commission (EEOC) addressed the issue of transgender job discrimination as sex discrimination in the case of *Macy v Holder*, 2012 WL 1435995 (EEOC April 20, 2012). Macy, a transgender police detective was denied a position for which she was qualified with a federal crime laboratory, after she informed the Director that she was in the process of transitioning from male to female. In holding that Macy's complaint for discrimination would be accepted by the EEOC as a complaint of sex discrimination, the EEOC noted that a transgender person who has experienced discrimination based on gender identity may establish a prima facie of sex discrimination through a number of different formulations:

1. She didn't get the job because the employer believed that "biological men" should consistently present as men and wear male clothing.
2. The Director was willing to hire her when he thought she was a man.
3. Gender is the consideration for the employer's action.

The EEOC in reviewing previous federal court decisions holding that transgender discrimination constituted sex discrimination, concluded that intentional discrimination against a transgender individual because that person is transgender, is by definition "based on sex" and that such discrimination therefore, violates Title VII. The EEOC found that the inclusion of gender discrimination in Title VII is important to the issue of

transgender discrimination "because the term 'gender' encompasses not only a person's biological sex, but also the cultural and social aspects associated with masculinity and femininity." *Macy,* 2012 WL 1435995 at *5. In holding that Title VII does afford transgender people protection against discrimination, the EEOC emphasized that:

> Applying Title VII in this manner does not create a new "class" of people covered under Title VII—for example, the "class" of people who have converted from Islam to Christianity or from Christianity to Judaism. Rather, it would simply be the result of applying the plain language of the statute prohibiting discrimination on the basis of religion to practical situations in which such characteristics are unlawfully taken into account.
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> *Macy v Holder*, 2012 WL 1435995 at *11

As a result of the *Macy* decision, the EEOC began accepting complaints of employment discrimination from transgender individuals under the sex discrimination theory.

Subsequent to *Macy*, the EEOC held that sexual orientation discrimination in employment also violated Title VII. In *Baldwin v FAA*, 2105 WL 6150868 (July 15, 2015)[4], complainant David Baldwin, a supervisory air traffic control specialist alleged that he was denied a permanent position with the Federal Aviation Administration because his supervisor (involved in the selection process) disapproved of his sexual orientation. When Baldwin mentioned to his co-workers that he and his partner attended Mardi Gras, his supervisor said, "We don't need to hear about that gay stuff." His supervisor also told Baldwin that he was "a distraction in the radar room," when his participation in conversations included the mention of his male partner. The EEOC concluded that sexual orientation is inherently a "sex-based consideration," for purposes of a Title VII allegation of sex discrimination, because an employer has "relied on sex-based considerations" or "taken gender into account" when taking the challenged employment action. *Baldwin*, 2015 WL 6155068 at *9. The EEOC considers sexual orientation discrimination to be sex discrimination because it entails treating an employee less favorably because of an employee's sex. If individuals can demonstrate (along the lines of *Price Waterhouse*) that they were treated adversely because they were viewed based on their appearance, mannerisms and conduct as insufficiently masculine or feminine, they will have a claim under Title VII. Since *Baldwin*, the EEOC has been

[4] Prior to *Baldwin*, the EEOC had determined that sexual orientation discrimination was a claim of sex discrimination in a number of cases. See *Veretto v United States Postal Office*, EEEOC Appeal No. 0120110873, 2011 WL 2663401 (EEOC July 1, 2011); *Castillo v U.S. Postal Service*, EEEOC Request No 050110649, 2011 WL 6960810 (EEEOC Dec 20, 2011); *Baker v Social Security Administration*, EEOC Appeal No 0120110008, 2013 WL 1182258 (EEOC January 11, 2013); *Dupras v Department of Commerce*, EEOC Request No. 0520110648, 2013 WL 1182329 (EEOC March 15, 2013); *Culp v Department of Homeland Security*, EEOC Appeal No. 0720130012, 2013 WL 2146756 (EEOC May 7, 2013).

accepting and processing employment discrimination complaints based on sexual orientation under the theory of sex discrimination.[5]

The full bench of the U.S. Court of Appeals for the Seventh Circuit recently held in *Hively v Ivy Tech Community College*, 853 F 3d 339 (7th Cir 2017) that Title VII prohibits employment discrimination on the basis of sexual orientation. The eight member majority of the eleven-judge bench found that several key Supreme Court decisions have broadened the meaning of "because of sex" in Title VII. [6] This broadening includes a complex law of sexual harassment, including same-sex sexual harassment and discrimination against a person who fails to conform to "a certain set of gender stereotypes." *Hively*, 853 F 3d at 344.

While there have been a number of federal appellate decisions that have held that discrimination against LGBT people for failure to conform with gender stereotypes is illegal sex discrimination, the Seventh Circuit decision says that not being heterosexual represents the "ultimate case" of not conforming to sex stereotypes because "it is based on assumptions about the proper behavior for someone of a given sex." In other words, LGBT people inherently will not conform to gender stereotypes and that fact more often than not is the impetus for discrimination. As the Court further explained, "[a]ny discomfort, disapproval, or job decision based on the fact that the complainant- a woman or a man- dresses different, speaks different, or dates or marries a same-sex partner, is reaction purely based on sex." *Hively* at 347.

Applying the Seventh Circuit's ruling in *Hively*, a federal district court in Wisconsin (part of the Seventh Circuit) ruled that an autistic man, who used to be a student in the Eau Claire School District can maintain his action under Title IX based on a claim that he was subjected to harassment based on sex-stereotyping and a perception by other students that he was gay. *Bowe v Eau Claire Area School District*, 2017 WL 145882, (D. Wis. April 24, 2017). In *Whitaker v Kenosha Unified School District*, a federal court held that a transgender student, who was denied the right to access restroom

[5] There have also been a number of federal district court decisions, holding that sexual orientation discrimination based on gender stereotypes is sex discrimination in violation of Title VII. *Teveer v Billington*, 34 F Supp 3d 100, 116 (D.D.C. 2014) (plaintiff stated a claim of discrimination on the basis of sex when he "alleged that he is a homosexual male whose sexual orientation is not consistent with Defendant's perception of acceptable gender roles, that his status as a homosexual male did not conform to Defendant's gender stereotypes associated with men under their supervision; *Boutillier v Hartford Public Schools*, 2014 WL 4794527 (D Conn 2014) (denying an employer's motion to dismiss by finding that plaintiff, a lesbian, had set forth a plausible claim that she was discriminated against based on sex due to her non-conforming gender behavior; *Centola v Potter*, 183 F Supp 2d 403, 410 (D Mass 2002) (sexual orientation discrimination and harassment "[are] often, if not always, motivated by a desire to enforce heterosexually defined gender norms."); *Deneffe v SkyWest, Inc*, 2015 WL 2265373 at *6 (D Colo May 11, 2015) (denying employer's motion to dismiss by finding that the plaintiff, a homosexual male, had sufficiently alleged that he failed to conform to male stereotypes by not taking part in male "braggadocio" about sexual exploits with women, not making jokes about gay pilots, designating his same-sex partner as beneficiary, and flying with his same sex partner on employer flights.)

[6] This decision was non-partisan in that 5 out of the 8 majority judges were appointed by Republican presidents.

facilities in accordance with his gender identity, was discriminated against due to gender stereotyping in violation of Title IX. In finding that Title IX was violated, the Court credited the existence of the legal argument regarding gender stereotyping under Title VII employment cases. *Whitaker v Kenosha Unified School District*, 2016 WL 5239829 (September 22, 2016).[7]

A federal district court in Colorado recently held in *Smith v Avanti* that a landlord discriminated against Tonya and Rachel Smith when she refused to rent to them because of their "uniqueness." The Smiths are a same-sex couple and Rachel is transgender. The Court found that the Smiths were discriminated against because they did not conform to traditional gender stereotypes in violation of the Fair Housing Act, which prohibits discrimination on the basis of sex. *Smith v Avanti*, 2017 WL 1284723 (D. Col. April 5, 2017).

In addition, the federal regulations governing Section 1557 of the Affordable Care Act, 81 Fed Reg 31375 (May 18, 2016), make it clear that transgender persons are protected against discrimination on the basis of sex with regards to health insurance coverage as well as health care programs and organizations that receive federal funding. The federal regulations also stated that gay and lesbian persons may be protected against discrimination in health care where the facts demonstrate that such discrimination occurred due to gender stereotyping.[8]

In sum, existing interpretations of federal laws prohibiting sex discrimination by both federal courts and federal agencies provides strong support for the Michigan Civil Rights Commission to issue a statement interpreting Elliott-Larsen's parallel prohibition on sex discrimination to encompass discrimination based on both gender identity and sexual orientation.

Analysis of Michigan Law

Michigan's Elliott-Larsen Civil Rights Act forbids discrimination on the basis of sex. The preceding analysis of existing federal interpretations of the scope of sex discrimination is equally applicable to Michigan's parallel law, in particular with respect to employment discrimination. The statutory language defining sex discrimination in both Title VII and in the Elliott-Larsen Civil Rights Act is almost identical. Therefore, just as

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[7] In addition, federal agencies, including the U.S. Department of Housing and Urban Development, the U.S. Department of Labor, the U.S. Equal Employment Opportunity Commission, and the U.S. Occupational Health and Safety Administration all have concluded that transgender persons are protected against discrimination under federal civil rights laws prohibiting sex discrimination and must be permitted to access the same restrooms as everyone else.

[8] *See Rumble v Fairview Health Services,* 2015 WL1197415 (D. Minn. March 16, 2016), holding that a transgender patient had stated a claim for sex discrimination in violation of Section 1557 of the Affordable Care Act, when he alleged that he was treated in a discriminatory manner because he was transgender. *See also Franciscan Alliance Inc v Burwell,* 2016 WL 7638311 (N.D. Texas December 31, 2016), where a federal judge issued a 50 state injunction regarding enforcement of Section 1557 as it pertains to transgender transition-related health care services and abortion-related services. The injunction has been appealed to the 5th Circuit Court of Appeals, on behalf of intervenor, the ACLU. February 10, 2017.

the EEOC and federal courts have found repeatedly that anti-LGBT discrimination is a violation of Title VII, so too should the Michigan Civil Rights Commission find that this practice constitutes sex discrimination in violation of the Elliott-Larsen Civil Rights Act.

Indeed, the courts, including the Michigan Supreme Court, have on more than one occasion recognized that the Elliott-Larsen Civil Rights Act is analogous to federal law and that federal precedent is highly persuasive when considering questions of interpretation of state civil rights law.[9] Therefore, the significant body of existing federal precedent can and should be used to interpret Michigan law with respect to the scope of Elliott-Larsen's prohibition on sex discrimination in employment, housing, and public accommodations.

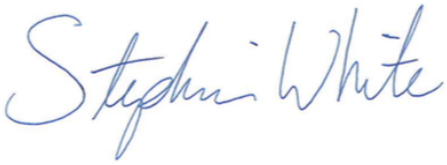
Conclusion

Accordingly, we respectfully request that the Michigan Civil Rights Commission, pursuant to its authority to interpret the Elliott-Larsen Civil Rights Act, issue an interpretative statement finding that it is unlawful sex discrimination to discriminate in employment, housing, or public accommodations based on an individual's gender identity or sexual orientation.

We appreciate the opportunity to submit this request for the Commission's consideration and look forward to hearing from you. If you have any questions, please contact Nathan Triplett, Equality Michigan Director of Public Policy & Political Action, at (517) 719-6499 or ntriplett@equalitymi.org.

[9] *See Civil Rights Comm v Chrysler Corp*, 80 Mich App 368; 263 NW2d 376 (1977) ("The Federal courts have had a much greater opportunity to review questions dealing with racial discrimination in employment than have the state courts. We believe that Federal precedent, although not binding, is persuasive in determining what the substantive law of racial discrimination in employment is at the present time."); *Northville Public Schools v Civil Rights Comm*, 118 Mich App 573; 325 NW2d 497 (1982) ("Federal courts have had a much greater opportunity to review questions concerning discrimination in employment than have state courts. Consequently, federal precedent dealing with such questions is often highly persuasive[.]"); *Sumner v. Goodyear Co*., 427 Mich. 505, 525, 398 N.W.2d 368 (1986) ("[A]s we have done in the past in discrimination cases, turn to federal precedent for guidance in reaching our decision."); *Radtke v Everett*, 442 Mich 368, 381–382, 501 NW2d 155 (1993) ("While this Court is not compelled to follow federal precedent or guidelines in interpreting Michigan law, this Court may, 'as we have done in the past in discrimination cases, turn to federal precedent for guidance in reaching our decision.'"); *Humeny v. Genex Corp*. 390 F.3d 906 (6th Cir. 2004) ("Cases brought pursuant to the ELCRA are analyzed under the same evidentiary framework used in Title VII cases.").

Respectfully,



Stephanie White
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On behalf of:

ACLU of Michigan
Affirmations
Equality Caucus of Genesee County
Equality Michigan
Gender Identity Network Alliance
GLSEN Southeast Michigan
Grand Rapids Pride
Inclusive Justice
Jackson Pride Center
Jim Toy Community Center
Lansing Association for Human Rights
LGBT Detroit
Michigan Unitarian Universalist Social Justice Network
OutCenter
OutFront Kalamazoo
Perceptions
PFLAG Ann Arbor
PFLAG Clinton Township
PFLAG Detroit
PFLAG Family Reunion/Detroit
PFLAG Genesee County
PFLAG Greater Lansing
PFLAG Grosse Pointe
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PFLAG Keweenaw
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Up North Pride