

STATE OF MICHIGAN
IN THE COURT OF APPEALS

THE PEOPLE OF THE STATE OF
MICHIGAN,

Plaintiff-Appellant,

v

DEONTON AUTEZ ROGERS,

Defendant-Appellee.

Court of Appeals No. 346348

Wayne County Circuit Court
No. 18-006351-01-FH

**AMICUS BRIEF OF ATTORNEY GENERAL DANA NESSEL
IN SUPPORT OF THE PEOPLE OF THE STATE OF MICHIGAN**

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STATEMENT OF QUESTIONS PRESENTED

1. The circuit court interpreted MCL 750.147b, which criminalizes malicious intimidation or harassment of someone “because of that person’s . . . gender,” to not include conduct committed against a transgender person. Did the circuit court’s erroneous legal interpretation result in an abuse of discretion when it quashed the bindover?

Appellant’s answer: Yes.

Appellee’s answer: No.

Trial court’s answer: No.

Amicus’ answer: Yes.

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STATUTES INVOLVED

MCL 750.147b, provides, in pertinent part:

(1) A person is guilty of ethnic intimidation if that person maliciously, and with specific intent to intimidate or harass another person because of that person's race, color, religion, gender, or national origin, does any of the following:

(a) Causes physical contact with another person.

(b) Damages, destroys, or defaces any real or personal property of another person.

(c) Threatens, by word or act, to do an act described in subdivision (a) or (b), if there is reasonable cause to believe that an act described in subdivision (a) or (b) will occur.

(2) Ethnic intimidation is a felony punishable by imprisonment for not more than 2 years, or by a fine of not more than \$5,000.00, or both.

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INTRODUCTION

Kimora Steuball, a transgender woman, identifies and presents herself to the world as a woman even though she was born biologically male. One night, she entered a gas station in Detroit to get cigarettes; defendant Deonton Rogers walked up and began harassing her. Rogers antagonized her, repeatedly calling her a man; he interrogated her about her genitals, asking her to display them; and then he pulled a gun, threatening to kill her. Frightened, Steuball tried to dislodge the gun from his hands. Rogers fired a shot into Steuball's shoulder and fled.

Among other charges, the district court bound Rogers over on one count under Michigan's so-called "ethnic intimidation" statute, which criminalizes malicious intimidation or harassment against an individual "because of that person's . . . gender." But the circuit court quashed that charge, holding that the statute does not contemplate harm committed against transgender individuals.

The circuit court abused its discretion for multiple reasons. First, the plain language of the statute encompasses acts committed against a victim "because of that person's gender." Dictionaries and medical resources agree that the definition of "gender" contemplates not just one's biological sex, but the social and cultural traits typically associated with sex. Discrimination against transgender individuals because their appearance does not abide by societal expectations is discrimination on the basis of gender.

The logic of this straightforward reasoning mirrors recent cases holding that the concept of *sex* discrimination under federal law includes transgender discrimination. When someone discriminates against a transgender person, the

victim's sex and gender are necessary components. That is, the discrimination occurs only because the victim's outward appearance (her female gender) does not match the social stereotype expected of her (and her male sex). Put differently, would Steuball have a bullet wound in her shoulder if she instead presented herself as a man when she was looking to buy cigarettes at that gas station? No. It is the perceived mismatch of her gender and her sex that drove Rogers to belittle, intimidate, and ultimately shoot her.

Finally, the statute's text reflects the purpose of the statute: to protect marginalized communities from malicious threats and danger. Transgender individuals suffer unbearably high rates of discrimination in education, housing, and employment, and like Steuball, are all too often targets of violence.

The statute means what it says, and transgender intimidation is gender intimidation. This Court should reverse the circuit court's decision as an erroneous legal interpretation and reinstate the charge, and it should do so in a published opinion on this issue of first impression.

STATEMENT OF FACTS AND PROCEEDINGS

Deonton Rogers threatens to kill a transgender woman with a gun and shoots her in the shoulder.

Defendant Deonton Rogers confronted Kimora Steuball as she walked into a gas station to buy some cigarettes; he commented that she was tall (for a woman) at 6'5". (Prelim Tr, pp 7–8.) Soon enough, the defendant confronted Steuball and stated, "you're a nigga," which meant "you're a man." (Prelim Tr, p 8.) Steuball protested, telling him, "nigga is somebody that identify themselves as a man, carry themselves as a man. I don't do that. I'm a transgender." (Prelim Tr, p 8.)

Defendant continued to attempt to get "a reaction out of" Steuball. (Prelim Tr, p 8.) He asked to see her genitalia and prodded her with insulting remarks, calling her a man. (Prelim Tr, p 8.) Steuball attempted to ignore Rogers, but he showed Steuball a gun and threatened, "I'll kill you." (Prelim Tr, p 9.)

She believed him to be serious and tried to pull the gun away from him, but the defendant "kept trying to aim[] the gun toward [Steuball]." (Prelim Tr, p 10.) The gun went off and hit Steuball in the shoulder, requiring hospitalization, surgery, and physical rehabilitation therapy. (Prelim Tr, p 11–12.)

The circuit court quashes the ethnic intimidation charge bindover

The prosecutor charged Rogers with several counts, including one count of "ethnic intimidation" under MCL 750.147b, which criminalizes malicious intimidation or harassment against an individual "because of that person's race, color, religion, *gender*, or national origin." (Emphasis added.) After the preliminary

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examination proofs, Rogers argued that the ethnic intimidation charge did not encompass his acts committed against a transgender individual.

The district court disagreed and bound over the ethnic intimidation charge. After reviewing various dictionary definitions of “gender,” the court found that the “ordinary, contemporary, and common meaning of ‘gender’ ” requires the conclusion that “a transgender person who is targeted based on their behavioral and social displays of gender” is protected by the act. (9/6/18 Dist Ct Op and Order.)

The circuit court, however, granted Rogers’ motion to quash.¹ First, it held that there was insufficient evidence to establish that Rogers caused physical contact with the victim. (11/7/18 Cir Ct Op and Order, p 9.) Second, as an independent basis for quashing the count, the court held that “gender,” as used in the ethnic intimidation statute, did not include discrimination for being transgender. (*Id.* at 10.) The court relied on MCL 750.10 of the penal code, which states that “the masculine gender includes the feminine and neuter genders.” (*Id.*) The court interpreted this provision to provide a definition of “gender” and, since MCL 750.10 does not explicitly reference “transgender,” found it is not an actionable ground under the statute. (*Id.*)

Wayne County sought leave to appeal, which this court granted.

¹ The court also granted Rogers’ motion to quash counts I and II, discharging a firearm in or at a building causing injury and/or serious impairment. Wayne County did not appeal the circuit court’s decision to quash those two counts. (1/4/19 Wayne Co Br, p 3.)

STANDARD OF REVIEW

“A district court’s decision regarding a bindover is reviewed for an abuse of discretion, and a court necessarily abuses its discretion when it makes an error of law.” *People v Feeley*, 499 Mich 429, 434 (2016) (cleaned up). Questions of law, including the construction of a statute, are reviewed de novo. *Id.*

ARGUMENT

I. Discrimination “because of [a] person’s gender” includes discrimination because a person is transgender.

Michigan’s “ethnic intimidation” statute criminalizes the malicious intimidation or harassment of someone “because of that person’s . . . gender.” MCL 750.147b(1). The statute’s language is clear, as is the purpose behind it: to provide a measure of protection to marginalized communities, including those discriminated against on the basis of their gender. Here, Rogers intimidated, threatened to kill, and shot Steuball, a transgender woman, because Steuball did not identify or present herself as a man, and Rogers apparently believed she should have.

Rogers’ discriminatory actions touch on the concepts of both sex and gender. These concepts are related but distinct, and whichever word the Legislature used, transgender discrimination would be actionable.

A. Properly understood, transgender discrimination is sex discrimination.

It is the combination of Steuball's sex and her gender that led Rogers to maliciously intimidate her. Consequently, Rogers' actions are rightly considered both sex discrimination and gender discrimination.

The meaning of the federal sex discrimination statute under Title VII continues to percolate, and the United States Supreme Court is poised to decide next term whether sex discrimination includes transgender discrimination. See, e.g., *Equal Emp't Opportunity Comm'n v RG & GR Harris Funeral Homes, Inc*, 884 F3d 560 (CA 6, 2018), cert granted 139 S Ct 1599 (2019).² Given the interrelatedness of sex and gender discrimination, this brief will first survey the proper scope of federal law on sex discrimination against transgender individuals, which will inform the scope of gender discrimination against the same.

Just last year, in *RG & GR Harris Funeral Homes, Inc* ("*Harris*"), the Sixth Circuit determined that employment discrimination because of a person's transgender status was prohibited by Title VII's bar on "discriminat[ion] against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex." 42 USC 2000e-2(a)(1); 884 F3d 560 (2018). Aimee Stephens had been living consistent with her biological sex (as a male) and served as a funeral director at the defendant's company. When Stephens

² This Court has held that discrimination on the basis of sexual orientation is not encompassed by ELCRA, see *Barbour v Dept of Soc Services*, 198 Mich App 183, 185 (1993), but has not yet passed on whether it contemplates discrimination on the basis of transgender status.

informed the company's owner that she intended to transition from male to female and would present herself as a woman, including dressing in stereotypically women's clothing, she was fired. *Id.* at 568–569.

Stephens reported her firing to the Equal Employment Opportunity Commission (EEOC), and after investigation, the EEOC filed suit against the funeral home, raising claims of sex discrimination under Title VII. *Id.* at 566–567. The Sixth Circuit concluded that the funeral home's firing was actionable under two different theories. First, that it discriminated on the basis of sex stereotypes, a type of sex discrimination first recognized by the Supreme Court in *Price Waterhouse v Hopkins*, 490 US 228 (1989). *Harris*, 884 F3d at 571–574. Second, the Court found that Stephens suffered actionable sex discrimination because of her transgender and transitioning status. *Id.* at 574–580.

Most pertinent here is the second theory. On that point, the Court was emphatic that “it is analytically impossible to fire an employee based on that employee's status as a transgender person without being motivated, at least in part, by the employee's sex.” *Id.* at 575. That is because the motivating factor behind such discrimination is “the non-conformance of an individual's gender identity and appearance with sex-based norms or expectations.” *Id.* In other words, the Court held that a person's sex is a necessary ingredient for transgender discrimination—if Stephens had been a biological female, the funeral home would not have batted an eye if she said she planned to dress and present herself as a woman. *Id.* (“[W]e ask whether Stephens would have been fired if Stephens had been a woman who sought

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to comply with the women’s dress code. The answer quite obviously is no.”) The decision to fire her, then, was contingent on her sex and thus presented an actionable claim of sex discrimination.

Harris is not alone in this understanding of sex discrimination. For example, the Seventh Circuit has also found that sex discrimination in education under Title IX³ includes transgender discrimination. *Whitaker v Kenosha Unified Sch Dist No 1 Bd of Ed*, 858 F3d 1034, 1048 (CA 7, 2017), cert dis 138 S Ct 1260 (2018) (granting a preliminary injunction to a transgender boy against his school, permitting him to use the restroom consistent with his gender identity). See also *Glenn v Brumby*, 663 F3d 1312, 1317 (CA 11, 2011) (“[D]iscrimination against a transgender individual because of her gender-nonconformity is sex discrimination, whether it’s described as being on the basis of sex or gender.”); cf *Hively v Ivy Tech Cmty Coll of Indiana*, 853 F3d 339, 345 (CA 7, 2017) (holding that discrimination on the basis of sexual orientation is a type of sex discrimination).

Whenever transgender discrimination is at issue, both sex and gender are too. In this way, the Sixth Circuit’s tight logic applies with even greater force in the statute at issue in this case. As described more fully below, Rogers maliciously intimidated Steuball only because her gender appears inconsistent with her biological sex. As in *Harris*, if Steuball’s gender coincided with her biological sex (as

³ 20 USC 1681(a) provides that no person “shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving Federal financial assistance.”

a male), would Rogers have harassed, intimidated, and shot Steuball? “The answer quite obviously is no.” *Harris*, 884 F3d at 575.

B. Plainly, transgender discrimination is gender discrimination and Michigan’s ethnic intimidation statute protects against it.

The *Harris* decision’s understanding of *sex* discrimination against transgender individuals—as a phenomenon that necessarily accounts for both sex and gender—informs the understanding of *gender* discrimination and supports the prosecutor’s position in this case.

In fact, transgender discrimination fits even more squarely within the scope of MCL 750.147b(1), which criminalizes malicious intimidation or harassment of someone “because of that person’s . . . gender.” Both the straightforward language of the statute and its purpose—to punish intimidating threats or violence against minority communities—point to the same interpretation: transgender discrimination is gender discrimination.

1. The concept of “gender” encompasses the attitudes and behaviors that a given culture associates with biological sex.

While the concepts of “sex” and “gender” are related, they are distinct. “Gender is inextricably linked to sex, but not defined by it.” *Sex, Gender and Medicine*, Stanford Medicine, Spring 2017;⁴ *Sex, Gender, and Why the Differences Matter*, 10 American Medical Association Journal of Ethics 7, p 427, July 2008

⁴ Available at <https://stanmed.stanford.edu/2017spring/how-sex-and-gender-which-are-not-the-same-thing-influence-our-health.html>

("[T]he terms sex and gender are not synonyms . . ."). See also Ilona M. Turner, *Sex Stereotyping Per Se: Transgender Employees and Title VII*, 95 Calif L Rev 561, 563 (2007) ("To begin with, it is impossible to make a clean distinction between the categories of 'sex' and 'gender' . . .").

In short, a person's "sex" typically refers to the biological component—whether one is biologically male or female. "Gender," on the other hand, also encompasses the social and cultural aspects of one's identity and relates to masculinity and femininity.

Given the lack of a statutory definition for "gender" in MCL 750.147b(1), turning to dictionaries is appropriate. *Krohn v Home-Owners Ins Co*, 480 Mich 145, 156–157 (2011). "Gender" is understood as a concept defined not solely by biology, but by social and cultural factors too. See Dictionary.com (defining "gender" as "either the male or female division of species, especially *as differentiated by social and cultural roles and behavior*") (emphasis added). The concept includes "the behavioral, cultural, or psychological traits *typically associated with one sex.*" Merriam-Webster Online (defining "gender") (emphasis added); see also Oxford Dictionary Online (defining "gender") ("Either of the two sexes (male and female), *especially when considered with reference to social and cultural differences rather than biological ones.*") (emphasis added).

It is not as if gender and sex are unconnected. Rather, the distinction between the two is the *focus* of the term: the emphasis of "gender" is on the behavioral, social, and cultural aspects typically associated with males and

females—masculinity and femininity. Health and medical organizations recognize the distinction too. Organizations like the World Health Organization⁵ and the American Psychological Association (APA), for example. The APA’s Dictionary of Psychology differentiates the concepts in its definition of gender:

In a human context, the distinction between gender and sex reflects the usage of these terms: Sex usually refers to the biological aspects of maleness or femaleness, whereas gender implies the psychological, behavioral, social, and cultural aspects of being male or female (i.e., masculinity or femininity).^[6]

See also American Psychological Association, *Guidelines for Psychological Practice with Lesbian, Gay, and Bisexual Clients*, Vol 67, No 1, p 11 (“Gender refers to the attitudes, feelings, and behaviors that a given culture associates with a person’s biological sex.”) (emphasis added).

This understanding of gender is not new. By the time the landmark article *Doing Gender* was published in 1987, the concept of gender was well-acknowledged, if not fully understood. In the late 1960s, it was rudimentary that gender was “constructed through psychological, cultural, and social means.” Candace West & Don H. Zimmerman, *Doing Gender*, *Gender and Society*, Vol. 1 No 2 (June 1987), p 125; see also *id.* at 127 (“gender” contemplates “normative conceptions of attitudes and activities appropriate for one’s sex category”). Though the conceptualization of

⁵ “‘Sex’ refers to the biological and physiological characteristics that define men and women,” while “‘Gender’ refers to the socially constructed roles, behaviors, activities, and attributes that a given society considers appropriate for men and women.” World Health Organization, *What do we mean by “sex” and “gender”?* Available at <https://www.legal-tools.org/doc/a33dc3/pdf/>

⁶ Available at <https://dictionary.apa.org/gender>

gender continues to develop, the fundamental understanding has been consistent for decades.

Consistent with the difference in terminology, sometimes an individual's sex and that person's gender do not align. When they do, that person is considered cisgender; when they do not align, the term used for that person's gender identity is "transgender." See, e.g., Taylor Flynn, *Transforming the Debate: Why We Need to Include Transgender Rights in the Struggles for Sex and Sexual Orientation Equality*, 101 Colum L Rev 392 (2001). The term "transgender" identifies individuals "whose appearance, behavior, or other personal characteristics differ from traditional gender norms." *Id.* at 392. The very meaning of transgenderism depends on the perceived mismatch between the societal expectations of one's sex and their expressed gender. See *Glenn v Brumby*, 663 F3d 1312, 1316 (2011) ("A person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes.").

Kimora Steuball, the victim in this case, is a transgender woman. (Prelim Tr at 5.) She testified that, "I was born a man, but I identify myself as a woman. I carry myself as a woman." (Prelim Tr at 5.) It is this—identifying and carrying herself as a woman, contrary to her biological sex—for which defendant Rogers identified and intimidated Steuball.

2. A similarly worded federal statute barring gender discrimination applies to transgender discrimination.

Similar language in federal law has been held to apply to discrimination against transgender individuals. Although caselaw is scarce (perhaps due to the relative rarity with which statutes use the term “gender” in discrimination statutes), federal authority construing similar statutory language agrees. In 2000, the Ninth Circuit considered whether the Gender Motivated Violence Act (GMVA), 42 USC 13981(c),⁷ provides a cause of action for transgender victims of gender-motivated violence. *Schwenk v Hartford*, 204 F3d 1187, 1201–02 (CA 9, 2000). Similar to Michigan’s statute, the GMVA defines “crime of violence motivated by gender” as a “crime of violence committed *because of gender or on the basis of gender*, and due, at least in part, to an animus based on the victim’s gender.” *Id.* at § 13981(d)(1) (emphasis added); *Schwenk*, 204 F3d at 1198.

The Ninth Circuit determined that Schwenk, a transgender female, properly alleged a cause of action against a prison guard who sexually assaulted Schwenk because the assault “stem[med] from the fact that he believed that [Schenk] was a man who ‘failed to act like’ one.” *Id.* at 1202. Knowing that Schwenk was a transgender female, the guard made “an escalating series of unwelcome sexual advances and harassment that culminated in a sexual assault” in Schwenk’s prison cell. *Id.* at 1193. The Ninth Circuit found the statute applicable because the evidence suggested that the guard’s actions “were motivated, at least in part, by

⁷ Since *Schwenk* was decided, the statute was relocated in the federal code to 34 USC 12361.

Schwenk’s gender,” that is, “by her assumption of a feminine rather than a typically masculine appearance or demeanor.” *Id.* at 1202.

So too, here, Rogers intimidated and shot Steuball not because of her biological sex, but because of the way in which she presented herself: she “carr[ie]d [herself] as a woman,” (Prelim Tr at 5), as “a man who failed to act like one,” *Schwenk*, 204 F3d at 1198 (internal quotation marks omitted). Rogers’ actions against Steuball were motivated “by [Steuball’s] assumption of a feminine rather than a typically masculine appearance or demeanor.” *Id.* at 1202. As in *Schwenk*, Steuball was discriminated against because of her gender.

3. Even if a restrictive interpretation of sex discrimination was accurate, the Legislature’s conspicuous use of “gender” in the ethnic intimidation statute speaks volumes.

If there is any doubt about the Legislature’s intended meaning of gender discrimination in the ethnic intimidation statute, it becomes manifest in light of its decision to use the particular term “gender.” Unfortunately, and contrary to the sound reasoning of the Sixth Circuit’s *Harris* decision, various courts and other authorities have interpreted discrimination on the basis of sex to be a narrow concept that excludes transgender discrimination. See, e.g., AG Opinion, No 7305, issued July 20, 2018 (collecting federal cases interpreting Title VII’s language prohibiting discrimination “based on sex” and concluding that protection of

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discrimination based on sexual orientation or gender identity is not contemplated by ELCRA) (opinion of Attorney General Schuette).⁸

But even if these authorities were correct about this narrow interpretation (they are not), the statute at issue here uses the term “gender” rather than “sex.” This choice makes the Legislature’s intent to cover transgender discrimination all the more salient. It surely could have copied from the many statutes using “sex” that were enacted prior to or contemporaneous with the ethnic intimidation act’s passage. See, e.g., MCL 37.2102(1) (the Elliot-Larsen Civil Rights Act, enacted in 1976, created a cause of action for discrimination in employment, housing, and public accommodations on the basis of “religion, race, color, national origin, age, sex, height, weight, familial status, or marital status”); MCL 339.2515 (enacted in 1980, prohibiting discrimination in broker-seller real estate agreements “because of religion, race, color, national origin, age, sex, disability, familial status, or marital status”); MCL 554.652 (enacted in 1990, prohibiting discrimination in the admission or removal of a campground on the basis of “a person’s religion, race, color, national origin, age, sex, height, weight, or marital status”). Instead, the Legislature charted a different course for this provision.

Thus, even if sex discrimination did not include transgender discrimination, the Legislature’s choice of the distinct but related term “gender” speaks volumes. To hold otherwise would be to run afoul of the “fundamental principle of statutory

⁸ The Department of Attorney General recently determined that the Michigan Civil Rights Commission is not bound by this Attorney General opinion. See <https://www.ag.state.mi.us/opinion/datafiles/2010s/op10384.htm>

construction” that “when the Legislature uses different words, the words are generally intended to connote different meanings.” *S Dearborn Env’tl Improvement Assn, Inc v Dept of Env’tl Quality*, 502 Mich 349, 369 (2018) (brackets omitted).

4. Transgender people are an at-risk population that need protection of the ethnic intimidation statute, with its purpose to punish bigotry against minorities.

As the language of the statute indicates, Michigan’s ethnic intimidation statute was intended to punish violence against minorities. When engaging in statutory interpretation, “[s]tatutory language should be construed reasonably,” meaning “the purpose of the act” must be kept in mind. *McCahan v Brennan*, 492 Mich 730, 739 (2012). And reference to legislative analysis about the statute’s purpose can buttress what the text already confirms. See *Jackson v Estate of Green*, 484 Mich 209, 230 (2009) (“Not only is this interpretation consistent with the plain language of the statute, it is also consistent with the legislative history of the statute.”). The legislative analyses of the bill that became the ethnic intimidation act stated that “bigotry-motivated violence is especially repugnant to society and not to be countenanced,” and that the “apparent problem,” was an increase in vandalism and violence against Jews, and “other minority groups, including blacks, orientals, and homosexuals.” House Legislative Analyses, HB 4113.⁹

Notwithstanding the outmoded language, the analyses support the textually clear

⁹ The four versions of analysis contain the quoted language. See House First Analysis, HB 4113 Oct. 8, 1987; House Second Analysis, HB 4113, Oct. 30, 1987; Senate First Analysis, HB 4113, Dec. 8, 1988; House Third Analysis, HB 4113, Jan. 20, 1989.

purpose of the act: to punish the societal ill of “bigotry” against “minorities.” *Id.* Unfortunately, the transgender community is often targeted for bigotry and suffers severe consequences.

These consequences permeate all areas of life, from health care to education, from the housing market to the job market. Transgender individuals are at risk for poverty, unemployment, sexual exploitation, and violence. See M. Dru Levasseur, *Gender Identity Defines Sex: Updating the Law to Reflect Modern Medical Science is Key to Transgender Rights*, 39 Vt L Rev 943, 948–951 (2015). In a study about LGBT individuals’ experiences in health care, for example, “transgender and gender-nonconforming respondents reported the highest rates of experiencing: refusals of care (nearly 27%), harsh language (nearly 21%), and even physical abuse (nearly 8%).” *Id.* at 950. In K-12 education, 78% of transgender children reported harassment, and over a third reported physical assault. Jaime M. Grant, Lisa A. Mottet & Justin Tanis, *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey*, National Center for Transgender Equality and National Gay and Lesbian Task Force, 2011, p 33.¹⁰

Even when trying to secure the basics of shelter and a stable job, transgender individuals are subject to heightened burdens. Nearly 20% of transgender individuals were refused a home or an apartment due to their transgender status, and the same percentage experienced homelessness. *Id.* at 4. More than 1 in 4

¹⁰ Available at https://transequality.org/sites/default/files/docs/resources/NTDS_Report.pdf

reported being fired due to their transgender or gender-nonconforming status and nearly half reported adverse employment action on that ground. *Id.* at 3. Not only is the unemployment rate for transgender individuals double that of cisgender individuals, *id.*, transgender and gender-nonconforming individuals are four times more likely to have an annual household income under \$10,000, Levasseur, 39 Vt L Rev at 949.

All in all, 63% of transgender individuals have experienced “a serious act of discrimination,” one having a major impact on the person’s quality of life, including eviction, homelessness, denial of medical care, or even physical assault due to bias. Grant, Mottet & Tanis, p 8.

The last of these serious acts—physical assault—is the focus of the case before this Court. And transgender individuals, especially racial minority transgender individuals, suffer violence at an extremely heightened rate. Levasseur, 39 Vt L Rev at 948 n 20 (“Transgender women of color, in particular, are being murdered at an epidemic rate.”)

The problems are progressing, not abating. The American Medical Association recently resolved to call for better data collection of hate crimes against transgender individuals, concerned that “fatal anti-transgender violence in the U.S. is on the rise and most victims were black transgender women.” See American Medical Association, *AMA adopts new policies on first day of voting at 2019 annual*

meeting, June 10, 2019.¹¹ Just this April, for the first time, the Michigan Incident Crime Reporting (the division of Michigan State Police required by statute to keep crime statistics) started keeping a category to document crimes against transgender individuals.

This move to better record keeping follows from rising murder rates. In 2017, at least 29 transgender people were murdered in the United States, the most ever recorded. Human Rights Campaign, *Violence Against the Transgender Community in 2018*.¹² And they are happening in our State as well. Just weeks ago, a Detroit man allegedly targeted and killed a transgender woman and two gay men. *Detroit man charged in triple homicide targeting LGBTQ community*, Detroit Free Press, June 6, 2019.¹³

In short, these members of our community are marginalized, constant subjects of discrimination, and at a heightened risk of violence. These maladies are compounded by membership in other communities that are subject to discrimination, especially communities of color. A plain language interpretation of the ethnic intimidation statute is all that is required to ensure that crimes against this vulnerable community are recognized as the law intended.

¹¹ Available at <https://www.ama-assn.org/press-center/press-releases/ama-adopts-new-policies-first-day-voting-2019-annual-meeting>

¹² Available at <https://www.hrc.org/resources/violence-against-the-transgender-community-in-2018>

¹³ Available at <https://www.freep.com/story/news/local/michigan/detroit/2019/06/06/detroit-man-charged-triple-homicide-targeting-lgbtq-community/1373416001/>

C. The circuit court legally erred in quashing the ethnic intimidation charge against Deonton Rogers.

Rogers harassed, intimidated, and ultimately shot Kimora Steuball.

Contrary to the plain statutory language and the purpose of the ethnic intimidation statute to protect marginalized communities, Rogers viewed Steuball's outward appearance as a woman (her gender) as inconsistent with her biological sex, of a male. Rogers' words and actions bear this out: he effectively called her a man even after she explained that she is a transgender woman. Not once but repeatedly. He asked to see her genitalia. And when Steuball ignored Rogers, he pulled out a gun and threatened to kill her.

Rogers' conduct was predicated on Steuball's gender being inconsistent with the stereotype of a male. Rogers words and actions would not have occurred but for Steuball's appearance as a transgender woman. If Steuball presented to the world and to Rogers as a 6'5" man waiting for cigarettes at a gas station, none of this would have happened. It is only because Steuball identifies and presents as a woman that Rogers intimidated and shot her—because of her gender. The circuit court's erroneous contrary legal ruling resulted in an abuse of discretion. *Feeley*, 499 Mich at 434 (“[A] court necessarily abuses its discretion when it makes an error of law.”)

Further undermining the circuit court's ruling is its inexplicable citation to MCL 750.10 as evidence that “gender” as used in the ethnic intimidation statute does not include discrimination against transgender individuals. MCL 750.10 simply ensures that the *grammatical* use of a particular gender in the criminal code

(typically, the male), applies to all genders. MCL 750.10 provides that, in criminal code, “The masculine gender includes the feminine and neuter genders.” This is not a definition of “gender.” This Court has recognized the simplicity of the Legislature’s intent with this provision: it “indicates a clear legislative intent that the Penal Code apply to females as well as males.” *People v Gilliam*, 108 Mich App 695, 700 (1981) (the defendant argued the felony-nonsupport statute unconstitutionally only applied to men; this Court noted that it applies to women too, citing MCL 750.10); see also Dictionary.com (“gender,” when used as a concept of “grammar,” refers to “masculine, feminine, and neuter” genders in Latin and German languages).

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CONCLUSION AND RELIEF REQUESTED

Kimora Steuball suffered the fate that far too many transgender members of our State do—taunting, intimidation, and violence—only because she does not conform her appearance to society’s and Rogers’ expectations. Fortunately, our law provides a modicum of protection and will not countenance hostile and dangerous conduct simply because she is transgender. This Court should give full effect to the text and the purpose of the ethnic intimidation statute and hold that it protects transgender intimidation.

For these reasons, Attorney General Dana Nessel respectfully requests this Court reverse the circuit court and reinstate the ethnic intimidation charge.

Respectfully submitted,

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