STATE OF MICHIGAN
IN THE SUPREME COURT

THE PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

DEONTON AUTEZ ROGERS,

Defendant-Appellee.
_____/

Supreme Court No. 161034

Court of Appeals No. 346348

Wayne Circuit Court No. 18-6351-01-FH

AMICUS BRIEF OF ATTORNEY GENERAL DANA NESSEL IN SUPPORT OF THE PEOPLE OF THE STATE OF MICHIGAN'S APPLICATION FOR LEAVE TO APPEAL

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STATEMENT OF INTEREST OF AMICUS CURIAE

Dana Nessel is the Attorney General of the State of Michigan. The Legislature has authorized the Attorney General to participate in any action in any state court when, in her own judgment, she deems it necessary to participate to protect any right or interest of the State or the People of the State. See MCL 14.28; MCL 14.101. See also MCR 7.312(H)(2) (permitting filing by the Attorney General without leave of Court). The Attorney General is also the State's chief law enforcement officer. *Fieger v Cox*, 274 Mich App 449, 451 (2007).

STATEMENT OF QUESTION PRESENTED

1. The circuit court and Court of Appeals erroneously 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 person because they are transgender. But intimidation against a victim on that ground necessarily implicates gender (as well as sex) because such targeted conduct is premised on the perpetrator's perceived mismatch of the victim's gender and sex assigned at birth. Did the Court of Appeals err in its blanket holding that intimidation of transgender individuals on that basis falls outside the statute?

   Appellant's answer: Yes.

   Appellee's answer: No.

   Trial court's answer: No.

   Amicus' answer: Yes.

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.

INTRODUCTION

Kimora Steuball is a transgender woman, which is to say that she identifies and presents herself to the world as a woman even though she was assigned male at birth. One night, while purchasing cigarettes at a Detroit gas station, defendant Deonton Rogers walked up and began harassing her. Rogers antagonized Steuball, repeatedly calling her a man. He also interrogated Steuball about her genitals, asking her to display them, and then he pulled a gun and threatened to kill her. Frightened, Steuball tried to dislodge the gun from his hands. Rogers fired a shot into Steuball's shoulder.

Rogers was charged under Michigan's so-called "ethnic intimidation" statute, which criminalizes malicious intimidation or harassment against a victim "because of that person's . . . gender." The definition of "gender" contemplates not just one's sex assigned at birth,[1] but also the social and cultural traits typically associated with one's sex. And when someone harasses or intimidates a person because of their transgender status, the perpetrator's conduct is "because of" the victim's "gender." In other words, the misconduct occurs because the victim's outward appearance does not match the social stereotype expected of her. The crucial

[1] Amicus will use the phrase "sex assigned at birth" rather than refer to an individual's so-called "biological sex." One's sex assigned at birth refers to the designation of male or female that an infant is given at birth—typically based on external reproductive anatomy. See generally American Psychological Association, *Guidelines for Psychological Practice with Transgender and Gender Nonconforming People,* American Psychologist, 70(9), 832–864 (Dec. 2015), available at https://www.apa.org/practice/guidelines/transgender.pdf. Some courts, though, have used the term biological sex. See, e.g., *Glenn v Brumby*, 663 F3d 1312, 1314 (CA 11, 2011) (referring to a transgender female as a person "born a biological male").

question is whether Steuball would have a bullet wound in her shoulder if she instead identified and presented herself as a man when she was looking to buy cigarettes at that gas station. The answer is no. It is the perceived mismatch of her gender and her assigned sex that drove Rogers to belittle, intimidate, and shoot her.

The Court of Appeals, however, disagreed. But its framing of the question was untenably narrow, asking "whether the word 'gender' . . . includes transgender people." That framing sent the Court of Appeals' majority on the wrong path from the outset. The statute does not focus on whether the victim is the member of some class, but instead on the perpetrator's motivation.

The Court of Appeals also erred in narrowly defining "gender" to mean the same thing as "sex"—even in the face of ample evidence that back in the late 1980s, a distinction, though perhaps opaque, existed. The court not only replaced the Legislature's word choice with the its own construction, but also discarded the Legislature's decision (manifested through its chosen language) to ensure coverage of all gender-based intimidation. And even if the court came to the right statutory interpretation, its conclusion to affirm does not follow—intimidation of a person because of their transgender status necessarily includes intimidation because of sex.

This case raises an important question of statutory construction, and it concerns one of our State's few legal protections for the transgender members of our community, who all too frequently suffer animus-motivated violence. Proper interpretation of the statute will ensure that crimes against this vulnerable community are recognized as the Legislature intended.

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, "[Y]ou'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 taunted 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 Rogers 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, pp 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

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.[2] 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 that intimidation or harassment against a transgender individual is not an actionable ground under the ethnic intimidation statute. (*Id.*)

[2] 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.)

In a published decision, a split Court of Appeals panel affirms.

The Michigan Court of Appeals issued a split, published decision upholding the circuit court's ruling, though on different grounds. *People v Rogers*, ___ Mich App ____, ____ (2020). The majority determined that the circuit court's reliance on MCL 750.10 provides only "grammatical clarity" for the intent of the Legislature that the penal code applies to females as well as males. *Id.*, majority op at 4. That provision, the majority opined, does not have any substantive effect on the ethnic intimidation statute. *Id.*, majority op at 5.

The Court of Appeals majority agreed with the circuit court in its result, however. The majority framed the question as follows: "whether the word 'gender' in MCL 750.147b includes transgender people." *Id.*, majority op at 4. Eschewing what it believed to be legislation "by judicial fiat based upon evolving societal understandings of statutory term or terms," *id.*, the majority proceeded to cabin its interpretation by turning exclusively to two dictionary definitions contemporaneous with the passage of the ethnic-intimidation act. *Id.*, majority op at 5–6. Relying on those definitions, the court decided that, as of the late-1980s and early 1990s, the term "gender" was "synonymous" with the term "sex, being the biological roles of male and female." *Id.*, majority op at 6. The panel concluded, "There is simply no indication that the term gender would have been understood to encompass one who is a transgender person when this statute was enacted in 1988." *Id.*, majority op at 7. Indeed, it asserted that such an idea "strains credulity." *Id.*, majority op at 8.

Although the majority acknowledged that "human decency" counseled for protection of the law here, it believed its hands were tied because of the statutory language. *Id.*, majority op at 10.

Judge Servitto concurred in part and dissented in part, determining that Rogers' conduct did fall within the statute. Analytically, the dissenting judge disagreed with the majority's reference to dictionary definitions because the intent of the statute was plain without them. *Rogers*, dissenting op at 1. The intent of the Legislature, she reasoned, is effectuated here because "the victim here was targeted because of her gender, whether that which was expressed outwardly or that which defendant believed she should have outwardly expressed." *Id.*, dissenting op at 2.

Ultimately, "applying the term 'gender' in any sense, whether it is interpreted as equating with 'sex' [per the majority] or has a broader meaning, defendant engaged in harassment and intimidation of Steuball because of her gender." *Id.*, dissenting op at 4. Put simply, the dissenting judge asked, "[W]ould this incident have occurred had the victim not been biologically assigned male? Undoubtedly not." *Id.*

Through the Wayne County Prosecutor, the People sought leave to appeal.

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

The Court of Appeals majority's erroneous decision began with the wrong question: "whether the word 'gender' in MCL 750.147b includes transgender people." *People v Rogers*, ___ Mich App ___, ___ (2020), majority op at 4.[3] And when you ask the wrong question, you are bound to get the wrong answer. The question, instead, is whether the victim's "gender" was one of the factors motivating the offender's criminal conduct. Though the questions sound similar, the framing matters because the statute does not define a class of *people* who are eligible for protection, but rather a group of *characteristics* upon which a perpetrator may not base their intimidation. And when an offender is motivated by one of those listed characteristics, even in part, the ethnic intimidation statute applies. Here, Rogers harassed and intimidated Steuball because his view of her gender (via her outward physical presentation as a woman) did not match her assigned sex (of a male). Thus, Rogers' actions were motivated both by Steuball's gender and by her sex.

In coming to its erroneous interpretation, the Court of Appeals was laser-focused on two dictionaries that it deemed contemporaneous, and thus wrongly concluded that at the time of enaction of the ethnic-intimidation statute, "gender" was synonymous with "sex." This is contrary to a then-current understanding of the difference between the concepts of sex and gender.

[3] See also *id.* at 7 ("There is simply no indication that the term gender would have been understood to encompass one who is a transgender person when this statute was enacted in 1988.").

Moreover, even adopting the Court of Appeals majority's definition of "gender," the majority still reached the wrong conclusion. Applying the majority's construction—equating sex and gender—Rogers is *still* subject to the ethnic intimidation charge because his conduct was "because of" the mismatch between Steuball's expressed gender and her sex assigned at birth. This case calls for correction. MCR 7.305(B)(5)(a).

This case also involves an issue of significant importance for the State's jurisprudence. MCR 7.305(B)(3). Proper interpretation of this statute touches on Michigan's only hate-crimes law in an era when crimes against certain minority communities are unfortunately on the rise. This Court should grant leave to appeal or peremptorily reverse the decision below.

I. Michigan's ethnic intimidation statute protects against intimidation "because of" the victim's "gender," which includes intimidation based on a person's transgender status.

Michigan's "ethnic intimidation" statute criminalizes the malicious intimidation or harassment of someone "because of that person's race, color, religion, gender, or national origin." MCL 750.147b(1). The statute's language is "straightforward and broad," *People v Schutter*, 265 Mich App 423, 430 (2005), as is the purpose behind it: to provide a measure of protection to marginalized minorities, including those intimidated or harassed on the basis of their gender. Notably, the statute's language makes clear that the offender's specific intent to intimidate or harass need not be the "*sole* reason" for the criminal act. *Id.* (emphasis added). Despite its broad applicability, the Court of Appeals committed

multiple analytic errors in reaching a faulty conclusion—that transgender individuals are, effectively, shut out of the statute's protection. This Court should grant leave or peremptorily reverse.

A. The Court of Appeals erred by concluding that the term "gender" refers solely to sex assigned at birth.

To fully comprehend the Court of Appeals' error when it interpreted the statutory language of "gender" as synonymous with "sex," the interplay between these two concepts is worth consideration, especially as those terms were understood in the late 1980s when the statute was enacted.

While the concepts of "sex" and "gender" are related, they are not coterminous. "Gender is inextricably linked to sex, but not defined by it." *Sex, Gender and Medicine*, Stanford Medicine, Spring 2017.[4] 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' . . . ."). While the concepts are interrelated, a person's "sex" is sometimes used narrowly to refer to someone's sex assigned at birth—whether one is assigned male or female at birth. "Gender," on the other hand, encompasses the social and cultural aspects of one's identity and relates to masculinity and femininity.

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

Both medical resources and dictionaries agree, and this understanding is not a new one. The predominant 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—organizations like the World Health Organization[5] 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 (2012) ("*Gender* refers to the attitudes, feelings, and behaviors that a given culture associates with a person's biological sex.") (emphasis added).

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[5] " 'Sex' refers to the biological and physiological characteristics that define men and women," while " 'Gender' refers to the socially constructed roles, behaviours, 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

1. When MCL 750.147b was enacted in 1988, "gender" was already understood as involving social and cultural aspects related to sex.

The Court of Appeals, by narrowly focusing on two dictionary definitions, concluded that, at the time MCL 750.147b was enacted, the term "gender" was understood only to refer to assigned sex. Given the lack of a statutory definition for "gender" in MCL 750.147b(1), referencing dictionaries is appropriate. *Krohn v Home-Owners Ins Co*, 480 Mich 145, 156–157 (2011). But, as this Court recently cautioned, courts do not outsource their duty to interpret legislative language to Merriam-Webster's. Rather, like the body that writes the laws, this Court is not limited to a single dictionary, nor is a dictionary definition the only available interpretive tool. See *In re Estate of Erwin*, 503 Mich 1, 21 (2018), as mod on reh'g (Oct. 5, 2018) ("The dictionary is but one data point; it guides our analysis, but it does not by itself settle it.").

The Court of Appeals' analysis illustrates the danger of a myopic and uncritical focus on a dictionary definition. A more careful look reveals that, at the time MCL 750.147b was enacted, the definition of "gender" was already transitioning to a broader, more modern understanding. The Court of Appeals relied upon the 1990 printing of the *Webster's Ninth New Collegiate Dictionary*, which defined "gender" as "SEX." The 10th Edition of *Merriam-Webster's Collegiate Dictionar*y, however, first published in 1993, provided a more expansive definition: "a: SEX <the feminine ~> b: the behavioral, cultural, or psychological traits

typically associated with one sex."[7] Similarly, the 1997 printing of *Random House Webster's College Dictionary*, 2d ed, defined "gender," in relevant part as "the societal or behavioral aspects of social identity."[8]

That dictionaries adopted this definition of "gender" shortly after the enactment of MCL 750.147b is important because "[d]ictionaries tend to lag behind linguistic realities." Scalia and Garner, *Reading Law: The Interpretation of Legal Texts* (2012), p 419. As Justice Scalia and Bryan Garner explain, "If you are seeking to ascertain the meaning of a term in an 1819 statute, it is generally quite permissible to consult an 1828 dictionary." *Id.* With this understanding, the dictionaries cited above, printed only a few years after those cited by the Court of Appeals, likely reflect more accurately the understanding of the term "gender" when MCL 750.147b was enacted.

Moreover, looking beyond lay dictionaries, it is clear that this understanding of gender had already taken hold. By the time the landmark article *Doing Gender* was published in 1987, the concept of gender was well-acknowledged, if not fully understood. Candace West & Don H. Zimmerman, *Doing Gender*, Gender and

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[7] This definition was obtained from a 1996 printing of *Merriam-Webster's Collegiate Dictionary*, *Tenth Edition*.

[8] Modern lay dictionaries confirm that "gender" is understood as a concept centered on social and cultural factors. 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).

Society, Vol. 1 No 2 (June 1987). Professors West and Zimmerman explain that, since the 1960s, professors were "careful to distinguish" between sex and gender. *Id.* at 125. Thus, by the time of the article's publication in 1987, it was rudimentary that gender was "constructed through psychological, cultural, and social means," different from the concept of assigned sex. *Id.* at 125; see also *id.* at 127 ("gender" contemplates "normative conceptions of attitudes and activities appropriate for one's sex category"). Though the conceptualization of gender continues to develop, this fundamental understanding has been consistent for decades. See, e.g. Meredith Gould, *Sex, Gender, and the Need for Legal Clarity: The Case of Transsexualism*, 13 Valparaiso L Rev 423, 423 (1979) (warning against "collapsing and confusing sex, a biological condition, with gender, its socio-cultural manifestation").

In line with the difference in terminology, sometimes an individual's sex assigned at birth and that person's gender identity do not align. When they do align, that person is considered "cisgender"; when they do not, 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. What it means to be transgender depends on the perceived mismatch between the societal expectations of one's assigned sex and their expressed gender. See *Glenn v Brumby*, 663 F3d 1312, 1316 (CA 11, 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, "I was born a man, but I identify myself as a woman. I carry myself as a woman." (Prelim Tr at 5.) And it was because of this—her identifying and carrying herself as a woman, contrary to her sex assigned at birth—that defendant Rogers identified and intimidated Steuball.

2. The Legislature's conspicuous use of "gender," rather than "sex," signals that the ethnic intimidation statute was intended to cover all forms of gender-based violence.

Since "sex" and "gender" were not interchangeable during the pertinent time period, the Michigan Legislature's decision to use "gender" is a signal that it meant an interpretation different from "sex," though the terms might be similar. To hold otherwise would run afoul of the "fundamental principle of statutory construction" that "when the Legislature uses different words, the words are generally intended to connote different meanings." *S Dearborn Envt'l Improvement Assn, Inc v Dept of Envt'l Quality*, 502 Mich 349, 369 (2018) (brackets omitted).

If the Legislature intended to use "sex," it surely could have copied from the many statutes using the term "sex" that were enacted prior to and contemporaneous with the ethnic intimidation act's passage. See, e.g., MCL 37.2102(1) (the Elliot-Larsen Civil Rights Act, enacted in 1976, creating 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, perhaps out of an abundance of caution, the Legislature chose a different word for this provision. This choice makes the intent to cover intimidation based upon gender even more salient.

3. A federal court interpreted a similarly worded federal statute barring gender-motivated violence as protecting against conduct directed at a person who is transgender.

Use of the term "gender" in a federal law against gender-motivated violence has been held to apply to intimidation or harassment of transgender individuals. Although caselaw is scarce, the only federal appellate court to rule on the issue confirmed that "gender" motivated violence includes violence against a transgender victim. In 2000, the Ninth Circuit considered whether the Gender Motivated Violence Act (GMVA), 42 USC 13981(c),[9] provides a cause of action for transgender victims of gender-motivated violence. *Schwenk v Hartford*, 204 F3d 1187, 1201–1202 (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*

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

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 [Schwenk] 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 Schwenk's gender," that is, "by her assumption of a feminine rather than a typically masculine appearance or demeanor." *Id.* at 1202.

Similarly, in this case, Rogers' actions against Steuball were motivated "by [Steuball's] assumption of a feminine rather than a typically masculine appearance or demeanor." *Id.* at 1202. Rogers intimidated and shot Steuball because of the way in which she presented herself: she "carr[ied] [herself] as a woman" (Prelim Tr at 5)—or, as the *Schwenk* Court put it, as "a man who 'failed to act like' one." 204 F3d at 1198.

B. Under both the correct statutory interpretation and the Court of Appeals' erroneous one, defendant's conduct falls under the statute.

Treating the statute as covering only certain classes of individuals, the majority asked if the statute covers "transgender people." That is simply not how

the statute is constructed—it focuses on the motivation of the perpetrator, not the class of the victim. This error contributed to the erroneous conclusion below.

And even if, analytically, the Court of Appeals' was correct in importing the term "sex" into the ethnic intimidation statute, its conclusion—that intimidation based on a person's transgender status is not actionable—is incorrect because intimidation because of sex necessarily implicates criminal conduct like Rogers'. The charge should be reinstated because Rogers not only committed his crimes because of Steuball's "gender," but also because of her "sex."

1. The Court of Appeals improperly interpreted the statute as requiring that the victim be of a certain protected class.

The majority asked the wrong question, which unsurprisingly resulted in the wrong answer. It asked "whether the word 'gender' in MCL 750.147b includes transgender people." *Rogers*, majority op at 4. See also *id.*, majority op at 8 ("To conclude that the term 'gender,' [in 1988] included the modern-day understanding of what it is to be a transgender person strains credulity.").

It is true that certain crimes apply only if the victim is of a particular class. See, e.g., MCL 750.145 (contributing to the delinquency of a minor, i.e., under the age of 17); MCL 750.479 (resisting or obstructing certain defined officers); MCL 750.81e (assault or battery of an employee or contractor of a public utility). The majority's analysis suggested that it understood the ethnic intimidation statute as similar to those crimes—it focused on whether the statute's use of the term "gender" defined a class of persons who were protected, i.e., whether "gender" includes

"transgender" persons. *Rogers*, majority op at 4. This is a patent analytical error that leads to a patently incorrect conclusion. The focus of the ethnic intimidation statute is on the perpetrator's specific intent to intimidate or harass "because of" a characteristic of the victim, not whether the victim is of a certain class or category.

2. No matter which construction is applied, Rogers' actions fall within the statute.

But even if the majority had properly focused on the plain reach of the statute, and even if the Legislature had used the term "sex" as the court below effectively held, intimidation on the basis of a person's transgender status would *still* be actionable. The Court of Appeals mistakenly limited the scope of the term "gender" to be co-extensive with "sex." *Rogers,* majority op at 6–7. After this interpretation, the Court of Appeals ended the inquiry. But that was premature. *Even under this alternative construction*, Rogers' conduct is actionable because intimidation of a person because of their transgender identity necessarily involves reliance on their assigned sex. He intimidated, threatened to kill, and shot Steuball, a transgender woman, because Steuball did not identify herself as a male, as Rogers apparently believed she should have. Rogers' malicious intimidation and harassment was therefore "because of" Steuball's sex. MCL 750.147b(1).

As the dissent below noted, "[W]ould this incident have occurred had the victim not been biologically assigned male? Undoubtedly not." *Rogers*, dissenting op, p 4. See also *id.* at 3 ("Even employing the majority's definition, . . . a plain reading of the statute would dictate that, whenever a victim's sex (i.e., 'biological

role of male or female') was the impetus for the intimidating or harassing behavior, the conduct falls within the ethnic intimidation statute.").

A pertinent example of this reasoning at work is the Sixth Circuit's decision in *RG & GR Harris Funeral Homes, Inc* ("*Harris*"), where the Court 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 (CA 6, 2018), cert gtd in part sub nom *RG & GR Harris Funeral Homes, Inc v EEOC*, 139 S Ct 1599 (2019) (emphasis added). Aimee Stephens had been living consistently with her assigned male sex; she served as a funeral director at the defendant's company. When Stephens informed the company's owner that she intended to transition from male to female and would present herself as a woman, including dressing in stereotypical 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, the Court found that Stephens suffered actionable sex discrimination because of her transgender and transitioning status. *Harris*, 884 F3d at 574–580. Second, the funeral home 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). *Id.* at 576–577.[10]

Both theories are helpful here, and they work closely together. The Sixth Circuit 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. In other words, the Court held that a person's sex is a necessary ingredient for transgender discrimination—if Stephens had been assigned 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 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.

Moreover, sex stereotyping is also implicated where an employer discriminates "on the basis of transgender status" because the employer cannot do so without imposing stereotypes regarding the alignment of sex assignment and gender identity. *Id.* at 576. Discrimination because of transgender status is inseparable "from discrimination on the basis of gender non-conformity." *Id.* at 577.

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[10] Unfortunately, and contrary to the sound reasoning of the Sixth Circuit's decision in *Harris I*, 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 discrimination based on sexual orientation or gender identity is not contemplated by ELCRA) (opinion of Attorney General Schuette).

See also *id.* at 572 (describing *Price Waterhouse* as making unlawful an adverse employment action against a woman "for failing to be womanly enough").

So too here, under the Court of Appeals majority's own construction, intimidation stemming from a person's transgender status necessarily includes motivation based on that person's sex. See *id*. at 575. And, Rogers' conduct hinges on notions of gender conformity. See *id.* at 577. In sum, when Rogers intimidated and assaulted Steuball, her sex was a constituent ingredient in his motivation for doing so. Would Steuball have been assaulted if Steuball had been an assigned male who identified as a male? "The answer quite obviously is no." *Id.*

C. Transgender individuals need protection of the ethnic intimidation statute, with its purpose to punish violent bigotry against minorities.

The majority below was right about one thing: "By any measure of human decency, the defendant's treatment of the victim in this case was abhorrent, and Steuball deserves the protection of the law." *Rogers*, majority op at 10.

As the language of the statute indicates, Michigan's ethnic intimidation statute was intended to punish violence against marginalized communities. 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 people of Jewish decent, and "other minority groups." House Legislative Analyses, HB 4113.[11] The analyses support the textually clear purpose of the act: to punish the societal ill of "bigotry" against "minorities." *Id.*

Unfortunately, the transgender community is one of those minorities 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

[11] The four versions of analysis contain the quoted language. See House First Analysis, HB 4113, October 8, 1987; House Second Analysis, HB 4113, October 30, 1987; Senate First Analysis, HB 4113, December 8, 1988; House Third Analysis, HB 4113, January 20, 1989.

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.[12]

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 reported being fired due to their transgender or gender-nonconforming statute 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, Levassuer, 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

[12] Available at https://transequality.org/sites/default/files/docs/resources/NTDS_Report.pdf

transgender individuals, suffer violence at an extremely heightened rate. Levassuer, 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.[13] Just last 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.*[14] And they are happening in our State as well. In June 2019, a Detroit man allegedly targeted and killed a transgender woman and two gay men. *Detroit*

[13] Available at https://www.ama-assn.org/press-center/press-releases/ama-adopts-new-policies-first-day-voting-2019-annual-meeting

[14] Available at https://www.hrc.org/resources/violence-against-the-transgender-community-in-2018

man charged in triple homicide targeting LGBTQ community, Detroit Free Press, June 6, 2019.[15]

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.

D. 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 identity and outward appearance as a woman as inconsistent with her assigned 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.

Under the "straightforward and broad" language of the ethnic intimidation statute, *Schutter*, 265 Mich App at 430, Roger's actions meet the statute. The broad

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

language "contains *no limiting language* to suggest that ethnic intimidation may be charged only when the specific intent to intimidate or harass is the *sole* reason for the underlying criminal act." *Id.* (emphasis added). Rather, "the statute only requires some act of physical contact committed maliciously and accompanied by a specific intent to intimidate or harass because of . . . gender." *Id.* Thus, because Rogers' acts necessarily implicate Steuball's gender—again, her lack of conformity to Rogers' stereotypical idea of how a male should appear—the criminal statute applies.

As the dissent below put it, "would this incident have occurred had the victim not been biologically assigned male? Undoubtedly not." *Rogers*, dissenting op, p 4. If Steuball identified and 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. At least one of the motivating factors for the altercation, *Schutter*, 265 Mich App at 430, was because Steuball identifies and presents as a woman that Rogers intimidated and shot her—i.e., *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.")[16]

[16] Further undermining the circuit court's ruling is its inexplicable reliance on MCL 750.10. That provision 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 "clear legislative intent that the Penal Code apply to females as well as males." *People v Gilliam*, 108 Mich App 695, 700 (1981). On this point, the majority below agreed. *Rogers*, majority op at 4–5.

CONCLUSION AND RELIEF REQUESTED

The Court of Appeals' erroneous, published decision warrants correction. 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 Rogers' expectations. Michigan law provides a modicum of protection for her and does 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 intimidation or harassment of a transgender person on that basis is actionable.

For these reasons, amicus Attorney General Dana Nessel respectfully requests this Court grant leave to appeal or, in the alternative, peremptorily reverse the Court of Appeals and order the circuit court to reinstate the ethnic intimidation charge.

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