STATE OF MICHIGAN
IN THE SUPREME COURT

ROUCH WORLD, LLC, A MICHIGAN LIMITED LIABILITY COMPANY, AND UPROOTED ELECTROLYSIS, LLC, A MICHIGAN LIMITED LIABILITY COMPANY,

Plaintiffs-Appellees,

v

MICHIGAN DEPARTMENT OF CIVIL RIGHTS, and JAMES WHITE, Director of the Michigan Department of Civil Rights,

Defendants-Appellants.
_____/

Supreme Court No. _____

Court of Appeals No. 355868

Court of Claims No. 20-000145-MZ

MICHIGAN DEPARTMENT OF CIVIL RIGHTS AND DIRECTOR JAMES WHITE'S BYPASS APPLICATION FOR LEAVE TO APPEAL

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STATEMENT OF JURISDICTION

Defendants-Appellants Michigan Department of Civil Rights ("MDCR") and its current Director, James White, file this bypass Application for Leave to Appeal under MCR 7.305, seeking to appeal the December 7, 2020 order of the Court of Claims. That order denied in part MDCR and its Director's motion for summary disposition as to MDCR's Interpretative Statement 2018-1, which interpreted discrimination "because of . . . sex" under the Elliott-Larsen Civil Rights Act ("ELCRA"), MCL 37.2101 *et al*, to include discrimination on the basis of "sexual orientation."

MDCR and White filed a timely Application for Leave to Appeal in the Court of Appeals on December 28, 2020 and meet the grounds for a bypass application under MCR 7.305.

STATEMENT OF QUESTION PRESENTED

1. Did the Court of Claims err in concluding that discrimination "because of . . . sex" does not include an individual's sexual orientation under the Elliott-Larsen Civil Rights Act?

Defendants-Appellants' answer:	Yes.
Plaintiffs-Appellees' answer:	No.
Court of Appeals' answer:	Has not yet granted Defendants-Appellants' application and answered.
Court of Claim's answer:	No. Because *Barbour v Dep't of Social Services* is binding, it can only be overruled by the Court of Appeals or this Court.

STATUTE INVOLVED

MCL 37.2302. Public accommodations; prohibited practices

Sec. 302. Except where permitted by law, a person shall not:

(a) Deny an individual the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation or public service because of religion, race, color, national origin, age, sex, or marital status.

(b) Print, circulate, post, mail, or otherwise cause to be published a statement, advertisement, notice, or sign which indicates that the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation or public service will be refused, withheld from, or denied an individual because of religion, race, color, national origin, age, sex, or marital status, or that an individual's patronage of or presence at a place of public accommodation is objectionable, unwelcome, unacceptable, or undesirable because of religion, race, color, national origin, age, sex, or marital status.

INTRODUCTION AND REASONS FOR GRANTING BYPASS APPLICATION

The issue presented in this bypass Application for Leave to Appeal is straightforward: When a person is discriminated against because of her sexual orientation, is that discrimination "because of . . . sex?" Under the plain language of the ELCRA, the answer is yes. MCL 37.2302(a) prohibits a person from "[d]eny[ing] an individual the full and equal employment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation . . . because of . . . sex . . . ." The ELCRA's prohibition on discrimination "because of . . . sex" applies to discrimination based on sexual orientation, because discrimination on that basis includes consideration of the individual's sex.

The U.S. Supreme Court's recent decision in *Bostock v Clayton Co*, 140 S Ct 1731, 1741–1742 (2020), confirms this interpretation. In *Bostock,* the Court held that the plain meaning of the phrase "because of . . . sex" in a provision of Title VII of the 1964 Civil Rights Act—the very same operative phrase used in the ELCRA—includes discrimination premised on an individual's sexual orientation. In that case the Supreme Court reviewed whether an employer can fire someone simply on the basis of one's sexual orientation or gender identity. In holding that an employer cannot do so, the High Court noted that "[t]he answer is clear" because "[a]n employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different

sex." Indeed, as the Court explained, "[s]ex plays a necessary and undisguisable role in the decisions." *Id*.

Unfortunately, however persuasive the ELCRA's plain language and the *Bostock* decision, the Court of Claims was bound by the Court of Appeals' decision to the contrary in *Barbour v Dep't of Social Services*, 198 Mich App 183 (1998). And any panel of the Court of Appeals is likewise bound by *Barbour*, even though *Barbour*'s terse three-page opinion was based exclusively on then-existing federal case law concerning Title VII's analogous provision—case law that has since been overruled by *Bostock*. If the Court of Appeals grants the interlocutory Application for Leave to Appeal, and if the assigned panel disagrees with *Barbour*, the court could choose to convene a conflict panel to resolve this issue. But that mechanism is discretionary and rarely used, and regardless of the outcome, it is highly likely that the losing party would immediately file an application for leave in this Court.

Accordingly, given the uncertainty of Court of Appeals resolution and the fact that this issue is of highest public importance and affects the daily lives of many Michigan residents, bypass and an interlocutory resolution by this Court are warranted. Not only does the case involve a jurisprudentially significant issue of substantial legal and public import, MCR 7.305(B)(1)–(3), it warrants immediate review by this Court. Delaying final adjudication would work "substantial harm," as many Michigan citizens will be unprotected by the law that by its terms should protect them from discrimination in employment, housing, and public accommodations; others will be left in a state of uncertainty as to how to apply the

challenged provision of the ELCRA. MCR 7.305(B)(4)(a). Moreover, because the MDCR is involved, this appeal is related to action of the executive branch of government. MCR 7.305(B)(4)(b).

For these reasons, the MDCR and its Director ask this Court to answer the U.S. Supreme Court's clarion call to one of the most pressing civil rights issues of the day by granting their bypass Application for Leave to Appeal and concluding that the plain language of the ELCRA prohibits discrimination on the basis of an individual's sexual orientation.

STATEMENT OF FACTS AND PROCEEDINGS

The Commission adopts Interpretative Statement 2018-1

This case arises from Plaintiffs Rouch World's and Uprooted Electrolysis's challenge to the Michigan Civil Rights Commission's interpretation of the ELCRA. The Commission interpreted the ELCRA's phrase "because of . . . sex" to include "sexual orientation" and "gender identity."

On May 21, 2018, the Commission adopted Interpretive Statement 2018-1, which states that "sexual orientation" and "gender identity" fall within the meaning of "sex" as used in the ELCRA. (COA App pp 8a–9a [Compl, Pls' Ex A].)[1] Noting analogous federal precedent, the Commission explained:

> [T]he U.S. 6th Circuit Court of Appeals . . . ruled in the case of *EEOC v R.G. & G.R. Harris Funeral Homes, Inc.* that the same language "discrimination because of . . . sex" when used in federal civil rights law protected a transgender Michigan woman who was gender stereotyped and discriminated against for not behaving like a male . . . . [(*Id.*)]

Accordingly, the Commission found "that continuing to interpret the protections afforded by the phrase 'discrimination because of . . . sex' more restrictively by continuing to exclude individuals for reasons of their gender identity or sexual orientation, would itself be discriminatory." (*Id.*)

The Commission further provided notice that it would "process all complaints alleging discrimination on account of gender identity and sexual orientation as complaints because of sex." (*Id.*)

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[1] The Court of Appeals Appendix is attached here as Exhibit 1.

Natalie Johnson and Megan Oswalt file complaint against Rouch World

On April 12, 2019, Natalie Johnson ("Johnson") and Megan Oswalt ("Oswalt") contacted Rouch World, a small business that hosts events such as weddings, celebrations, and small gatherings. (COA App pp 10a–18a [Compl, ¶¶ 7, 20].) Johnson and Oswalt requested that Rouch World host their same-sex marriage ceremony. (*Id.*, ¶ 20.) Rouch World declined and, in doing so, stated that it conflicted with their religious beliefs, but was able to host any other gathering. (COA App pp 10a–18a [Compl, ¶¶ 21, 22].)

Johnson and Oswalt then filed complaints with the MDCR alleging discrimination based on sex as a result of the denial to host their ceremony.[2] (COA App pp 10a–18a [Compl, ¶ 23]; COA App pp 19a–20a[Pls' Ex B, Johnson & Oswalt Complaints].) Specifically, they each explained that

> [o]n or around April 12, 2019, I was informed by [Rouch World's] representative[ ] [that] I could not have my wedding ceremony at [Rouch World's] venue, because [it] does not allow patrons to conduct same sex marriage ceremonies. I believe I was discriminated on the basis of sex, female, for not conforming to sex stereotypes about how women are expected to present themselves in my physical appearance, actions, and/or behaviors. [*Id.*]

[2] MDCR has authority to receive, investigate, and conciliate complaints alleging discrimination on the basis of "sex" under the ELCRA. MCL 37.2602(c). Complaints filed with the MDCR are investigatory and not a "charge." Michigan Civil Rights Commission and MDCR Rules, Rule 37.2(b). During the investigatory stage, MDCR is neutral and requires documentation from both parties. Rule 37.4(10). If sufficient evidence of a violation is found, MDCR must try to rectify the situation through a conciliation. Rule 37.5. Only if this is not possible may MDCR lay charges to initiate a contested case hearing. Rules 37.2(b) and 37.6.

Rouch World responded to the complaint and denied any wrongdoing. (COA App pp 10a–18a [Compl, ¶ 24]; COA App pp 21a–26a [Pls' Ex C, 07/10/2019 Letter].) It claimed that "there is no protection under the ELCRA for the categories of sexual orientation or gender identity." (*Id.*) It further maintained that "[n]either the Department nor the . . . Commission . . . have the authority to change or amend the meaning of the word 'sex' under the ELCRA." (*Id.*) Accordingly, it alleged that the Commission's "attempt to enforce the . . . Interpretative Statement is illegal and an *ultra vires* act." (*Id.*)

MDCR subsequently served Rouch World with interrogatories and a request for production of documents. (COA App pp 27a–38a [Pls' Ex D, 01/09/2020 Order].)

Marissa Wolfe and Uprooted Electrolysis, LLC

On May 28, 2019, Marissa Wolfe ("Wolfe") requested hair removal services from Plaintiff Uprooted Electrolysis, LLC ("Uprooted Electrolysis"). (COA App pp 10a–18a [Compl, ¶¶ 5, 26].) Uprooted Electrolysis declined to provide her with these services citing their religious beliefs. (COA App pp 10a–18a [Compl, ¶¶ 5, 27].) It explained that participating in the transition process from a man to a woman by providing hair removal services conflicted with its sincerely held religious beliefs. (COA App pp 10a–18a [Compl, ¶¶ 5, 27].)

Wolfe then filed a complaint with the MDCR alleging discrimination based on sex as a result of the denial to render her hair removal services. (COA App pp 10a–18a [Compl, ¶¶ 5, 28]; COA App 39a–45a [Pls' Ex E, Wolf Complaint].) She explained that

> [o]n or around May 28, 2019, I sought out services with [Uprooted Electrolysis's] owner; however, she stated that she was uncomfortable working with me. I was discriminated against on the basis of my sex, female, for not conforming to societal expectations for how woman are expected to present themselves in my physical appearance, actions and/or behaviors. (COA App pp 39a–45a [Pl's Ex E.])

Uprooted Electrolysis responded to the complaint on August 20, 2019. (COA App pp 46a–53a [Pl's Ex F, 08/20/2019 Letter.]) It denied any wrongdoing and claimed that discrimination based on gender identity is not a protected category under the ELCRA. (*Id.*)

MDCR subsequently served Uprooted Electrolysis with interrogatories and a request for production of documents. (COA App pp 54a–64a [Pls' Ex G, 2/20/2020 Order].)

Rouch World files suit against the MDCR and Interim Director Engelman

On August 19, 2020, MDCR and Interim Director Engelman (collectively, MDCR) were served with suit by Rouch World, which sought declaratory and injunctive relief.

On September 16, 2020, MDCR filed a motion for summary disposition under MCR 2.116(C)(8), asking the court to dismiss Rouch World and Uprooted Electrolysis's complaint. In particular and relevant here, MDCR argued that the term "sex" under the ELCRA includes sexual orientation and gender identity. (COA App pp 1a–7a [12/7/2020 Op & Order, p 2].)

On December 7, 2020, the Court of Claims granted in part and denied in part the motion for summary disposition. Regarding MDCR's argument as to sexual orientation, the court held that the Court of Appeals has already concluded that

sexual orientation does not fall within the meaning of "sex" under the ELCRA, and it was bound by that opinion. (COA App pp 1a–7a [12/7/2020 Op & Order, p 4, citing *Barbour*, 198 Mich App at 195].) Regarding MDCR's argument as to gender identity, the court held that, "[f]ollowing the *Bostock* Court's rationale, if defendants determine that a person treated someone who 'identifies' with a gender different than the gender that he or she was born as, then that is dissimilar treatment on the basis of sex, and they are entitled to redress that violation through the existing MDCR procedures." (*Id*., p 7.)

The MDCR will suffer substantial harm by awaiting final judgment before taking an appeal.

Under MCR 7.205(B)(1), an appellant must set forth facts showing how it "would suffer substantial harm by awaiting final judgment before taking an appeal" if the appeal is interlocutory in nature. This inquiry is satisfied here where the MDCR would be required to spend the time, money, and resources of the State to litigate lawsuit through discovery on an issue that it purely legal and straightforward in nature. Indeed, regardless of any subsequent litigation in the trial court, the MDCR will be required to appeal, as the Court of Claims has recognized that it is bound by *Barbour*. In its opinion denying in part MDCR's motion, it noted:

> Being a decision published after November 1, 1990, *Barbour* is binding on this Court under MCR 7.215(A) and must be followed. And, whether *Barbour's* reasoning is no longer valid in light of *Bostock v Clayton Co*, __ US __; 140 S Ct 1731; 207 L Ed 2d 218 (2020), and cases containing similar reasoning, is a matter for the Court of Appeals, not this Court.

> As the Court of Appeals held in *In re AGD*, 327 Mich App 332, 343; 933 NW2d 751 (2019)[.] [COA App pp 1a–7a (12/7/20, Op & Order, p 4.)]

On December 28, 2020, MDCR filed an Application for Leave to Appeal in the Court of Appeals, challenging the Court of Claims' decision. MDCR now seeks this Court's immediate review prior to decision by the Court of Appeals. MCR 7.303(B)(1); MCR 7.305(B)(4); MCR 7.305(C)(1).

STANDARD OF REVIEW

Whether to grant leave to appeal is within this Court's discretion. To obtain review by this Court, an appellant must show that his case meets one or more of the criteria set forth in MCR 7.305(B).

The MDCR and its Director seek review of the Court of Claims interpretation of the provisions of the Elliott-Larsen Civil Rights Act ("ELCRA") that prohibits discrimination "because . . . of sex." MCL 37.2302; MCL 37.2402; MCL 37.2504. Statutory interpretation is a question of law that is subject to review de novo on appeal. *Mich Ass'n of Home Builders v Troy*, 504 Mich 204, 212 (2019). Specifically, reviewing an issue de novo means that this Court reviews the legal issue independently, without deference to the lower court. *People v Bruner*, 501 Mich 220, 226 (2018).

Additionally, when interpreting the ELCRA and similar remedial statutes, it is important to remember the "well-established rule that remedial statutes are to be liberally construed to suppress the evil and advance the remedy." *Eide v Kelsey-Hayes*, 431 Mich 26, 34 (1988).

ARGUMENT

I. The ELCRA's prohibition on discrimination "because of . . . sex" includes discrimination on the basis of sexual orientation.

The ELCRA's prohibition on discrimination "because of . . . sex" applies to discrimination based on sexual orientation, because discrimination on that basis includes consideration of the individual's sex. As *Bostock* explains, the plain meaning of the phrase "because of . . . sex"—the very same operative phrase in the ELCRA—includes discrimination premised on an individual's sexual orientation. This case warrants consideration now by this Court, as the Court of Appeals is bound by its own, erroneous decision in *Barbour*, making bypass appropriate here. *Barbour* remains on the books, even though its holding, support, and reasoning have been thoroughly undermined by the Supreme Court's highly persuasive opinion in *Bostock*. This Court should grant this bypass application and hold that the plain language of the ELCRA prohibits discrimination on the basis of an individual's sexual orientation.[3]

[3] This case presents an ideal vehicle for addressing this question because the legal question is cleanly and squarely presented. Although considerations of religious liberty may be weighed in a future case, they are not presented in this appeal. See *Bostock*, 140 S Ct at 1754 (expressing the Court's "deep[ ] concern[ ] with preserving the promise of the free exercise of religion," but stating that "how these doctrines protecting religious liberty interact with Title VII are questions for future cases too.").

A. By its plain text, the ELCRA prohibits discrimination based on sexual orientation.

The Michigan Constitution mandates that "[n]o person shall be denied the equal protection of the laws." Const 1963, art 1, § 2. In recognizing this maxim, it is hard to reconcile the contention that discrimination because of an individual's sexual orientation is not prohibited under the ELCRA when juxtaposed with the language of our Michigan Civil Rights Act and our state constitution, without recalling Orwell's chilling refrain: "all [citizens] are equal, but some [citizens] are more equal than others." *Lind v City of Battle Creek*, 470 Mich 230, 234 (2004).

1. Michigan courts, like the U.S. Supreme Court, interpret statutory language according to its plain terms.

The issue raised on appeal requires this Court to interpret the phrase "because of . . . sex" found repeatedly throughout the ELCRA, MCL 37.2101, *et seq*. The ELCRA is a broad, remedial statute. *Eide*, 431 Mich at 36. This statute is "to be liberally construed to suppress the evil and advance the remedy." *Id*. at 34.

The goal of statutory interpretation "is to give effect to the Legislature's intent, focusing first on the statute's plain language." *State ex rel Gurganus v CVS Caremark Corp*, 496 Mich 45, 59 (2014). In general, words and phrases in a statute should be given their primary and generally understood meaning. MCL 8.3a. When interpreting a statute, the primary goal is to give effect to the intent of the Legislature by construing the language of the statute. *Pace v Edel-Harrelson*, 499 Mich 1, 6–7 (2016). "When the plain and ordinary meaning of statutory language is clear, judicial construction is neither necessary or permitted." *Id.* at 7.

Compare *Bostock*, 140 S Ct at 1743 ("That has always been prohibited by Title VII's plain terms—and that should be the end of the analysis.") (citation omitted).

Applying the principles of statutory construction, the plain language of the phrase "because of . . . sex" in the ELCRA, as is the case with Title VII, evinces one conclusion: that a "discrimination on the basis of homosexuality or transgender status requires" intentional differential treatment of individuals "because of their sex." *Bostock*, 140 S Ct at 1731, 1735. The Supreme Court's persuasive, logical reasoning interpreting Title VII should be applied to the ELCRA, which contains identical operative language.

2. The text of the ELCRA's bar on discrimination "because of . . . sex" is expansive and U.S. Supreme Court precedent on the same issue is "highly persuasive."

The ELCRA broadly and repeatedly prohibits discrimination "because of . . . sex," but does not define that phrase in the Act. MCL 37.2302; MCL 37.2402; MCL 37.2504. Neither does the ELCRA specify precisely what it means to engage in discrimination "because of . . . sex." However, when the word "sex" or the phrase "because of . . . sex" is used in the ELCRA, it either precedes or follows inclusive—rather than exclusive—language, inviting an expansive application of the word "sex" and the phrase "discrimination because of sex" based on the plain meaning of the language.

A more expansive application fits with the most recent authority from the *Bostock*, which concluded once and for all that discrimination based on "sexual orientation" or "gender identity" is unlawful discrimination "because of sex."

Bostock, 140 S Ct at 1753 ("Title VII's prohibition of sex discrimination in employment . . . is written in *starkly broad* terms.") (emphasis added).

Though not strictly binding on this Court's interpretation of state law, Michigan courts look to interpretations of analogous federal provisions for guidance. See, e.g., *Chimielewski v Xermac, Inc*, 457 Mich 593, 601–602 (1998) (noting that, in interpreting provisions of the Handicappers Civil Rights Act, analogous federal precedent (the Americans With Disabilities Act) was persuasive because the analysis under the state statute "largely parallels analysis under the federal . . . [statute]"). This is especially true for the ELCRA because it so closely mirrors federal law, and thus, courts often rely on federal precedent for guidance. See *Radtke v Everett*, 442 Mich 368, 381–382 (1993) (holding that "[w]hile . . . [it] is not compelled to follow federal precedent or guidelines in interpreting Michigan law, . . . [it] may, 'as [it] ha[s] done in the past in discrimination cases, turn to federal precedent for guidance in reaching [its] decision' "), quoting *Sumner v Goodyear Tire & Rubber Co*, 427 Mich 505, 525 (1986).

3. *Bostock*'s sound reasoning interpreting the same statutory language at issue here should control this Court's interpretation.

Crucially, Title VII maintains an identical prohibition as the ELCRA on discrimination "because of . . . sex." 42 USC 2000e-2. And the ELCRA is "clearly modeled after Title VII . . . ." *Rasheed v Chrysler Corp*, 445 Mich 109, 123 n 20 (1994). The U.S. Supreme Court in *Bostock* recently held, based on "the straightforward application of legal terms with plain and settled meanings," that

"discrimination based on homosexuality or transgender status [under Title VII] necessarily entails discrimination *based on sex*; *the first cannot happen without the second*." 140 S Ct at 1746–1747 (emphasis added).

To be clear, it is not just this *conclusion* of the Supreme Court that warrants the same interpretation of Michigan law. Rather, it is the *reasoning* that is not only "highly persuasive" by default, but highly persuasive because of its analytic strength and logic. The Supreme Court's legal analysis of Title VII applies just as well to the ELCRA:

> At bottom, these cases involve no more than the straightforward application of legal terms with plain and settled meanings. For an employer to discriminate against employees for being homosexual or transgender, the employer must intentionally discriminate against individual men and women in part because of sex. That has always been prohibited by Title VII's plain terms—and that "should be the end of the analysis." 883 F. 3d, at 135 (Cabranes, J., concurring in judgment). [140 S Ct at 1743.]

As *Bostock* noted, the statutory words' meaning is the proper focus. *Id.* at 1738–1739. Even if the term "sex" is restricted to the narrow meaning referring to "biological distinctions between male and female," *id.*, the protection against sexual-orientation-discrimination remains robust. That is because "[t]he question isn't just what 'sex' meant, but what [the law] says about it." *Id.* at 1739.

What Michigan and federal law say about discrimination based on sex is extremely similar. The state and federal nondiscrimination provisions share quite a bit in terms of their statutory language, making consistent interpretation essential. First and foremost, the framing of the ELCRA mirrors Title VII—both use the operative phrase, "because of . . . sex." MCL 37.2302; MCL 37.2402; and MCL

37.2504; 42 USC 2000e-2. Moreover, it appears that Michigan and federal law agree that but-for causation is the proper standard for their respective civil rights acts. See *Hecht v Natl Heritage Acads, Inc*, 499 Mich 586, 606 (2016) ("In our caselaw, we have interpreted the CRA to require 'but for causation' or 'causation in fact.' ") (quotation marks omitted); *Bostock*, 140 S Ct at 1739 ("Title VII's 'because of' " test incorporates the simple and "traditional standard of but-for causation.") (quotation marks omitted).

With those concepts defined (and aligned with federal law), the question becomes, under the ELCRA, when a person is discriminated against because of her sexual orientation, is that discrimination "because of . . . sex?" The answer is yes. Just as in Title VII, "[i]f the employer intentionally relies in part on an individual employee's sex when deciding to discharge the employee—put differently, if changing the employee's sex would have yielded a different choice by the employer—a statutory violation has occurred." *Bostock*, 140 S Ct at 1741. As a matter of logic, "it is impossible to discriminate against a person for being homosexual without discriminating against that individual based on sex."[4]

An example illuminates how the ELCRA, like Title VII, operates:

> Consider, for example, an employer with two employees, both of whom are attracted to men. The two individuals are, to the employer's mind, materially identical in all respects, except that one is a man and the other a woman. If the employer fires the male employee for no reason other than the fact he is attracted to men, the employer discriminates against him for traits or actions it tolerates in his female colleague. Put differently, the employer intentionally singles out an employee to

[4] The same goes for discrimination because a person is transgender, *see id.*, but the Court of Claims correctly ruled on that issue.

> fire based in part on the employee's sex, and the affected employee's sex is a but-for cause of his discharge. [*Id.*]

The same analysis should apply under the ELCRA, which, like Title VII, prohibits discrimination on "because of . . . sex," since the phrases are identical. Consequently, the prohibitions should be enforced identically.

Because of the identical statutory language, the Supreme Court's reasoning in *Bostock* should apply here. This Court need look no further than the straightforward application of the ELCRA's legal terms and their plain and ordinary meanings to conclude that *Bostock*'s rubric is the correct one. For example, for a business to discriminate against an individual in the "full and equal utilization of public accommodations" because of that individual's sexual orientation or gender identity, the business must intentionally discriminate against individual men and women in part because of their sex. See MCL 37.2102(1). From the plain and ordinary meaning of the statutory text, a business violates the ELCRA's "full and equal utilization of public accommodations" provision when it intentionally denies an individual based in part on sex. It does not matter if other factors besides the individual's sex contributed to the decision. See *Bostock*, 140 S Ct at 1739 ("Often, events have multiple but-for causes."). Nor does it matter if the business treated women as a group the same when compared to men as a group. See *id.* at 1740 ("[O]ur focus should be on individuals, not groups . . . ."). If the business intentionally relies in part on an individual's sex when deciding to deny a public accommodation—or, put differently, if changing the individual's sex would have led to a different choice by the business—the ELCRA was violated. *Id.* at 1741 ("[I]f

changing the employee's sex would have yielded a different choice by the employer—a statutory violation has occurred."). The parallels between the ELCRA and Title VII are striking and should now be recognized.[5]

B. The federal precedent relied on by the Court of Appeals in its *Barbour* opinion has been reversed by the U.S. Supreme Court.

The Court of Claims denied the MDCR's motion on the grounds that it was bound by the Court of Appeals' decision in *Barbour v Dep't of Social Services*, 198 Mich App 183 (1998), which stands for the proposition that "harassment or discrimination based on a person's sexual orientation is not activity proscribed by the [ELCRA]." (COA App pp 1a–7a [12/7/20 Op & Order, p 4, citing *Barbour*, 198 Mich App at 185].) Significantly, however, the rationale upon which *Barbour* was based—then-existing federal precedent—has been overturned. So, too, should *Barbour*.

Barbour involved allegations against the Department of Social Services that throughout the plaintiff's employment, "he was the victim of sexual harassment and sexual discrimination" based on his sexual orientation. 198 Mich App at 184. In affirming the trial court's grant of summary disposition to the Department on the

[5] Already, this Court has signaled the import of *Bostock* in the context of another civil rights statute with similar statutory language. This Court vacated *People v Rogers*, 331 Mich App 12 (2020), and directed reconsideration in light of *Bostock*. See *People v Rogers*, 950 NW2d 48 (Mich, 2020). In *Rogers*, the Court of Appeals held that Michigan's ethnic intimidation statute, which criminalizes criminalizing certain conduct "because of . . . gender," MCL 750.147b(1), did not apply to conduct committed against a transgender woman because of her gender identity. 331 Mich App at 24–28.

plaintiff's ELCRA claim, the Court of Appeals looked to analogous provisions of Title VII, as well as federal precedent construing provisions of Title VII. *Id.* at 184–185. In particular, the Court of Appeals noted that the trial court "properly considered federal precedent construing provisions of title VII when construing the . . . [ELCRA]." *Id.* at 185. And ultimately, the Court of Appeals, based on its citation to federal circuit caselaw, reasoned that Title VII protections were aimed at gender discrimination, not discrimination based on sexual orientation. *Id.* Accordingly, the Court of Appeals affirmed the trial court's dismissal of the plaintiff's sexual harassment claim. *Id.* at 186.

While *Barbour* has not yet been overruled, its rationale has been thoroughly undermined. *Barbour* relied exclusively on federal precedent—precedent overruled by *Bostock*. See *Barbour*, 198 Mich App at 185 (citing three federal circuit decisions). That precedent is no longer good law, and to the extent it was ever persuasive, its value is vacated now. Instead, *Bostock* made clear that those cases are wrong, and overruled them. Ironically, the principle that led the *Barbour* Court to rule as it did—following analogous federal precedent in discrimination cases, 198 Mich App at 185—counsels that *Barbour* be overruled.

C. MDCR properly opened its investigation into Rouch World's refusal to host a same-sex wedding ceremony.

Rouch World's complaint indicates that they would not "host or participate in a same-sex ceremony." (COA App pp 10a–18a [Compl, ¶ 35].) The other plaintiff, Uprooted Electrolysis, similarly refused to provide services to an individual based

on their gender identity. (COA App pp 1a–7a [12/7/2020 Op & Order, pp 5–7].) The Court of Claims, found however, using the *Bostock* rationale, that Uprooted Electrolysis had discriminated against the individual "because of sex" under the ELCRA. (*Id*.) Specifically, the Court of Claims reasoned that the appropriate "focus was on the individual, and whether the particular decision was based in part on the sex of the plaintiff." (*Id*.) This same reasoning applies to Rouch World's refusal to provide public accommodations to Johnson and Oswalt. Clearly, Rouch World's denial of public accommodations was in part "because of . . . sex." As indicated in *Bostock*, discrimination because of sexual orientation (or gender identity) necessarily and intentionally applies sex-based rules. *Bostock*, 140 S Ct at 1745.

CONCLUSION AND RELIEF REQUESTED

Michigan courts, like the federal courts, need to uphold the protections afforded to all of citizens irrespective of their sexual orientation or gender identity. The plain meaning of "because of . . . sex" necessarily includes sexual orientation within its broad mandate. Waiting for the Court of Appeals to ultimately hold that it is bound by *Barbour* is a needless delay. Such a wait only ensures that our State's nondiscrimination provision remains unduly narrow.

Therefore, Defendants-Appellants respectfully request that this Honorable Court grant their bypass Application for Leave to Appeal and reverse the part of the Court of Claims' decision that held the ELCRA does not protect individuals from discrimination on the basis of sexual orientation.

Respectfully submitted,

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