STATE OF MICHIGAN
IN THE SUPREME COURT

ROUCH WORLD, LLC, AND UPROOTED ELECTROLYSIS, LLC,

Plaintiffs-Appellees,

v

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

Defendants-Appellants.
_____/

Supreme Court No. 162482

Court of Appeals No. 355868

Court of Claims No. 20-000145-MZ

The appeal involves a ruling that a provision of the Constitution, a statute, rule or regulation, or other state governmental action is invalid.

BRIEF ON APPEAL OF APPELLANTS MICHIGAN DEPARTMENT OF CIVIL RIGHTS AND DIRECTOR OF THE MICHIGAN DEPARTMENT OF CIVIL RIGHTS

ORAL ARGUMENT REQUESTED

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STATEMENT OF JURISDICTION

On January 15, 2021, Defendants-Appellants Michigan Department of Civil Rights ("MDCR") and its then Director[1] appealed the Court of Claims' December 7, 2020 order under MCR 7.305(B)(4). The 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, MCL 37.2101, *et seq.*, to include sexual orientation discrimination.

On July 2, 2021, this Court granted the application for leave to appeal and limited the appeal to the issues raised in the application and supporting brief. Accordingly, this Court has jurisdiction to hear this appeal under MCR 7.303(B)(1) and MCL 600.215(2).

[1] The Michigan Civil Rights Commission ("Commission") named John Johnson as MDCR's current Executive Director on July 26, 2021.

STATEMENT OF QUESTIONS PRESENTED

1. Does the prohibition on discrimination "because of . . . sex" in the Elliott-Larsen Civil Rights Act, MCL 37.2101, *et seq*., apply to discrimination based on sexual orientation?

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

STATUTES INVOLVED

MCL 37.2102(1) provides:

> The opportunity to obtain employment, housing and other real estate, and the full and equal utilization of public accommodations, public service, and educational facilities without discrimination because of religion, race, color, national origin, age, sex, height, weight, familial status, or marital status as prohibited by this act, is recognized and declared to be a civil right.

MCL 37.2301(a) provides in part:

> "Place of public accommodation" means a business, or an educational, refreshment, entertainment, recreation, health, or transportation facility, or institution of any kind, whether licensed or not, whose goods, services, facilities, privileges, advantages, or accommodations are extended, offered, sold, or otherwise made available to the public.

MCL 37.2302(a) provides:

> 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.

INTRODUCTION

All Michiganders are entitled to the same civil rights—the right to be free from actionable discrimination in employment, public accommodations and public services, housing, and educational facilities. But too often and for far too long, lesbian and gay individuals have been denied these basic rights. This discrimination is offensive, demeaning, and brings with it "stigmatizing injury" and a "deprivation of personal dignity." *Roberts v US Jaycees*, 468 US 609, 625 (1984).

But those individual consequences are not the only troubling ones. Discrimination is also deeply damaging to the fabric of our society. As Dr. Martin Luther King, Jr. asserted, "Injustice anywhere is a threat to justice everywhere."[2] Exclusion of our gay and lesbian brothers and sisters from the promise of equal civil rights ought to be relegated to the dustbin of history.

Fortunately, our Legislature has long recognized that Michiganders who suffer this kind of discrimination should not be left without recourse. Indeed, by enacting the Elliott-Larsen Civil Rights Act (ELCRA), the Legislature sought "to eliminate the effects of offensive or demeaning stereotypes, prejudices, and biases." *Miller v CA Muer Corp*, 420 Mich 355, 363 (1984). This landmark legislation "recognized and declared" freedom from discrimination "because of . . . sex . . . to be a civil right." MCL 37.2102(1). But current precedent from the Michigan Court of Appeals shut the door on that promise by improperly singling out sexual orientation

[2] National Civil Rights Museum, Dr. King's Legacy, available at https://mlk50.civilrightsmuseum.org/justice.

discrimination as beyond the ELCRA's reach. That understanding of the ELCRA is decidedly wrong, and has been since its inception. This Court should re-open that door because the ELCRA plainly prohibits sex-based discrimination, which includes discrimination on the basis of one's sexual orientation.

Words matter. Statutory text alone necessitates the conclusion that the ELCRA prohibits sexual orientation discrimination. This is true regardless of whether the plain meaning of "sex" is limited to "biological sex" as Rouch World contends. Consider the following example: two individuals—both attracted to women—want to use a place of public accommodation. The individuals are identical in all relevant respects, except that one is male and one is female. If the place of public accommodation turns away the female for the reason that she is attracted to women, it has discriminated against her for traits it tolerates in male customers. Undeniably, sex has played a role in the decision to deny services. This is an impermissible characteristic for discrimination under the ELCRA. For this reason alone, the ELCRA's plain text necessarily and clearly includes sexual orientation.

This conclusion is buttressed by the U.S. Supreme Court's recent decision in *Bostock v Clayton Co*, 140 S Ct 1731 (2020). There, 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 includes discrimination based on sexual orientation. This "answer [was] 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." *Id.* at 1737. Focusing on the "adopted broad language"

of Title VII, the Court "recognize[d] a necessary consequence of that legislative choice: An employer who fires an individual merely for being gay or transgender defies the law." *Id*. at 1754.

So too here. Discrimination on the basis of sexual orientation defies the ELCRA's plain command. Thus, this Court should overrule and conclude that that the plain language of the ELCRA prohibits discrimination on the basis of an individual's sexual orientation. Both individual dignity and the strength and cohesiveness of our society depend on it.

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. On May 21, 2018, the Commission adopted Interpretive Statement 2018-1, which states that "sexual orientation" and "gender identity" fall within the meaning of "discrimination because of . . . sex" as used in the ELCRA. (MSC App, pp 8a–9a.) 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.* at 8a.]

Thus, 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 also explained that it would "process all complaints alleging discrimination on account of gender identity and sexual orientation as complaints because of sex." (*Id.* at 9a.)

Natalie Johnson and Megan Oswalt file a complaint against Rouch World.

On April 12, 2019, Natalie Johnson and Megan Oswalt contacted Rouch World, a small business that hosts events, such as weddings, and requested that it host their same-sex wedding ceremony. (*Id.* at 13a.) Rouch World "declined to host

and participate in the same-sex wedding ceremony because it conflicted with their sincerely held religious beliefs." (*Id.*) According to Rouch World, "[o]ne of the core tenants of the Christian faith is that marriage is a sacred act of worship and a religious ceremony between one man and one woman[.]" (*Id.* at 11a.)

Johnson and Oswalt then filed complaints with the MDCR alleging discrimination based on sex as a result of the denial to host their ceremony.[3] (*Id.* at 13a, 19a, 20a.) 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.* at 19a, 20a.]

Rouch World responded to the complaint and denied any wrongdoing. (*Id.* at 21a–26a.) It asserted that "there is no protection under the ELCRA for the categories of sexual orientation or gender identity." (*Id.* at 21a.) It also 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.*)

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[3] 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." Mich Admin Code, R 37.2(b), 37.6(1)–(2). During the investigatory stage, MDCR is neutral and may require documentation from both parties. Rule 37.4(10). If sufficient grounds of a violation are found, MDCR must invite the respondent to a conference and conciliation prior to issuing a charge in an attempt "to eliminate the alleged discrimination." Rule 37.5(1). Only if conciliation is not possible may MDCR issue a charge and may the Commission or director schedule a contested case hearing. Rules 37.2(b), 37.5, 37.6, 37.12(1).

Marissa Wolfe files a complaint against Uprooted Electrolysis.

On May 28, 2019, Marissa Wolfe requested hair removal services from Plaintiff Uprooted Electrolysis. (*Id.* at 45a.) Uprooted Electrolysis declined and cited religious beliefs. (*Id.* at 12a.) 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. (*Id.* at 12a, 14a, 46a.)

Wolfe then filed a complaint with the MDCR alleging discrimination based on sex as a result of Uprooted Electrolysis's denial. (*Id.* at 45a.) 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. [*Id.*]

Uprooted Electrolysis responded to the complaint and denied any violation of the ELCRA. (*Id.* at 46a–53a.) It asserted that discrimination based on gender identity is not a protected category under the ELCRA as sex "is controlled necessarily by an individual's chromosomal constitution." (*Id.* at 45a, 47a, 54a.)

Rouch World and Uprooted Electrolysis file suit.

On August 19, 2020, Rouch World and Uprooted Electrolysis filed suit against MDCR and Interim Director Mary Engelman[4] (collectively, "MDCR") in the Court of Claims for declaratory and injunctive relief. Specifically, the complaint

[4] Mary Engelman served as MDCR Interim Director until the appointment of now-former Executive Director James White on August 24, 2020. On July 26, 2021, MDCR named John Johnson as Executive Director.

alleged that MDCR "improperly claim[s] that Plaintiffs' [sic] have engaged in a prohibited form of 'sex' discrimination under the ELCRA" because " '[s]exual orientation' and 'gender identity' are not encompassed by the word 'sex[.]' " (*Id.* at 14a–15a.) The complaint further alleged that the "Legislature clearly intended the word 'sex' to mean biological sex[.]" (*Id.* at 15a.) Thus, Rouch World and Uprooted Electrolysis sought, among other things, "a declaratory judgment that 'sexual orientation' and 'gender identity' are not included under ELCRA." (*Id.*)

On September 16, 2020, MDCR filed a motion for summary disposition under MCR 2.116(C)(8). In particular, MDCR argued that the ELCRA's use of the term "sex" plainly includes sexual orientation and gender identity. (*Id.* at 2a.)

On December 7, 2020, the Court of Claims granted in part and denied in part the motion for summary disposition. (*Id.* at 7a.) Regarding MDCR's argument as to sexual orientation, the court held that the Court of Appeals had already concluded that sexual orientation does not fall within the meaning of "sex" under the ELCRA in *Barbour*. (*Id.* at 4a.) The court further held,

> 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* . . . , and cases containing similar reasoning, is a matter for the Court of Appeals, not this Court. [*Id.*]

Regarding MDCR's argument as to gender identity, the court held that discrimination because of sex includes gender identity. In doing so, it reasoned 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*. at 7a.) Thus, "discrimination because of sex under the ELCRA includes discrimination because of an individual's 'gender identity[.]' " (*Id*.)

MDCR appeals.

On December 28, 2020, MDCR filed an application for leave to appeal in the Court of Appeals, challenging the Court of Claims' decision as it relates to sexual orientation. (Appendix 1.) The Court of Appeals granted the application on April 7, 2021. (Appendix 2.)

On January 15, 2021, and while the decision in the Court of Appeals was pending, MDCR filed a bypass application with this Court. This Court granted MDCR's bypass application for leave to appeal on July 2, 2021.

STANDARD OF REVIEW

This Court has granted MDCR's application for leave to appeal the Court of Claims' opinion holding that the ELCRA's prohibition on discrimination "because of . . . sex" does not include sexual orientation discrimination. Statutory interpretation is a question of law that is subject to review de novo. *Mich Ass'n of Home Builders v Troy*, 504 Mich 204, 212 (2019).

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 sole question presented is whether the prohibition against discrimination "because of . . . sex" under the ELCRA, MCL 37.2101, *et seq*., includes discrimination against individuals because of their sexual orientation. The answer to this question begins and ends with the plain text of the statute, which declares as a civil right "[t]he opportunity to obtain employment, housing and other real estate, and the full and equal utilization of public accommodations, public service, and educational facilities without discrimination because of . . . sex[.]" MCL 37.2102(1). If there were any ambiguity, this Court should look to the ELCRA's broad, remedial purpose—"to eliminate the effects of offensive or demeaning stereotypes, prejudices, and biases." *Radke v Everett*, 442 Mich 368, 379 (1993) (citation omitted).

For the reasons set forth below, discrimination based on sexual orientation is discrimination "because of . . . sex" as prohibited by the plain text of the ELCRA.

A. The plain language of the ELCRA prohibits discrimination on the basis of sexual orientation.

In statutory construction, courts begin with the language of the statute. *People v Shami*, 501 Mich 243, 253 (2018) (citation omitted). Where statutory language provides a clear answer, courts should end there as well. *People v Morton*, 423 Mich 650, 655 (1985) ("[T]he search for legislative intent begins and ends in the language of the statute."); *Lorencz v Ford Motor Co*, 439 Mich 370, 376 (1992) (explaining that statutory construction is neither necessary nor permitted "[w]hen a

statute is clear and unambiguous") (citations omitted). But "if construction is necessary, the Court is required to determine and give effect to the Legislature's intent and employ the ordinary and generally accepted meaning of the words used by the Legislature." *Lorencz*, 439 Mich at 376 (citation omitted); see also MCL 8.3a ("All words and phrases shall be construed and understood according to the common and approved usage of the language[.]"). In doing so, courts "may turn to dictionary definitions to aid [their] goal of construing . . . terms in accordance with their ordinary and generally accepted meanings." *People v Morey*, 461 Mich 325, 330 (1999), citing *Oakland County Bd of County Comm'rs v Mich Prop & Cas Guaranty Ass'n*, 456 Mich 590, 604 (1998).

Applying these principles of statutory construction, the plain language of the ELCRA results in one conclusion: discrimination on the basis of sexual orientation is necessarily discrimination "because of . . . sex."

1. Discrimination because of an individual's sexual orientation necessarily constitutes discrimination "because of . . . sex."

Although the ELCRA prohibits, in straightforward fashion, discrimination "because . . . of sex," MCL 37.2102(1); MCL 37.2202(1)(a), (b); MCL 37.2302(a); MCL 37.2402(a), (b), the word "sex" is not expressly defined within the statute. [5] Thus, the Court may consult dictionary definitions in determining what is included within

[5] The ELCRA instructs that "[d]iscrimination because of sex includes sexual harassment." MCL 37.2103(i). It further provides that " '[s]ex' includes, but is not limited to, pregnancy, childbirth, or a medical condition that does not include non therapeutic abortion not intended to save the life of the mother." MCL 37.2201(d).

the word's meaning. *People v Denio*, 454 Mich 691, 699 (1997) ("[W]hen terms are not expressly defined by a statute, a court may consult dictionary definitions.") (citation omitted). However, because the ELCRA was enacted into law in 1976, it is this Court's task to determine what the term "sex" meant at *that* time. *Ronnisch Constr Group, Inc v Lofts on the Nine, LLC*, 499 Mich 544, 563 n 58 (2016) ("In ascertaining the meaning of a term, a court may determine the meaning at the time the statute was enacted by consulting dictionaries from that time."); *Bostock*, 140 S Ct at 1738–1739 (explaining that courts must "orient [themselves] at the time of the statute's adoption . . . and begin by examining the key statutory terms in term before assessing their impact on the case[s] at hand").[6]

What, then, was the common understanding of the term "sex" when the Legislature enacted the ELCRA in 1976? Webster's New Collegiate Dictionary provides several definitions of the term "sex":

> 1: either of two divisions of organisms distinguished respectively as male or female[;] 2: the sum of the structural, functional, and behavioral characteristics of living beings that subserve reproduction by two interacting parents and that distinguish males and females[;] 3 a: a sexually motivated phenomena or behavior[;] b: sexual intercourse[;] 4: genitalia[.] [Webster's New Collegiate Dictionary (1976), p 1062.]

Similarly, the American Heritage Dictionary provides the following definitions for the term:

[6] It may also be appropriate to consult dictionaries from after 1976 as well given that "[d]ictionaries tend to lag behind linguistic realities[.]" *People v Wood*, 506 Mich 114, 133 n 5 (2020) (Viviano, J., dissenting), quoting Scalia & Garner, *A Note on the Use of Dictionaries*, 16 Green Bag 2d 419, 423 (2013).

> 1. a. The property or quality by which organisms are classified according to the functional or reproductive functions. b. Either of two divisions, designated male and female, of this classification. 2. Males or females, collectively. 3. The condition or character of being male or female; the physiological, , and psychological differences that distinguish the male and the female. 4. The sexual urge or instinct as it manifests itself in behavior. 5. Sexual intercourse. 6. The genitalia. [American Heritage Dictionary (1976), p 1123.]

Both dictionaries provide several definitions of "sex," which span from the physiological and structural differences between males and females to the psychological and behavioral differences to the "[t]he sexual urge or instinct as it manifests itself in behavior." Significantly, the latter two categories are not tied exclusively to observable characteristics at birth or, as Rouch World argued below, "biological sex[.]" (MSC App, p 15a.) Rather, a female's sexual attraction to another female—or a male's sexual attraction to another male—falls squarely within the common understanding that "sex" includes "behavioral characteristics" of males and females as well as "[t]he sexual urge or instinct as it manifests itself in behavior." Thus, at the time the ELCRA was enacted, the common understanding of the term "sex" included sexual orientation.

But even if Rouch World is correct, and "sex" referred only to "biological sex," "[t]he question isn't just what 'sex' meant [in 1976], but what [the ELCRA] says about it." *Bostock*, 140 S Ct at 1739. As with Title VII, the ELCRA prohibits persons from taking certain actions "because of" sex. The ordinary meaning of "because of" is "[b]y reason of" or "on account of." American Heritage Dictionary, p 166; Webster's New Collegiate Dictionary, p 98. And in the discrimination context, this Court has held that the term "because of" "require[s] 'but for causation' or

'causation in fact.' " *Hecht v Nat'l Heritage Academies, Inc*, 499 Mich 586, 606 (2016), quoting *Matras v Amoco Oil Co,* 424 Mich 675, 682 (1986); see also *Radke*, 442 Mich at 383 (holding, in the sexual harassment context, a "plaintiff need only show that 'but for the fact of her sex, she would not have been the object of harassment' ") (citation omitted).[7] In other words, sex discrimination occurs "because of" sex when it is the sex of the individual that is "one of the reasons which made a difference in determining whether or not to [discriminate against] the plaintiff." *Matras*, 424 Mich at 682; see *id*. (explaining that "[a]nother formulation would be that [sex] is a determining factor when the unlawful adverse action would not have occurred without [sex] discrimination").

Given the common understanding of the word "sex," adherence to the ELCRA's broad "because of . . . sex" language supports only one conclusion—that discrimination on the basis of sexual orientation necessarily constitutes action that is taken *because of* the individual's sex. Even under Rouch World's understanding of "sex" as "biological sex," sexual orientation discrimination necessarily occurs because of an individual's biological sex. That is, the discrimination is based on whether that individual is *male* or *female*.

The nature of sexual orientation discrimination demonstrates this conclusion. The term "sexual orientation" refers to "a person's predisposition or inclination toward a particular type of sexual activity or behavior; heterosexuality,

[7] To the extent the phrase "because of" is ambiguous, dictionary definitions also support this Court's prior definition of the phrase. See e.g., The American Heritage Dictionary, p 166 (defining "because of" as "[b]y reason of; on account of").

homosexuality, or bisexuality." Black's Law Dictionary (7th ed), p 1379. Take one category of sexual orientation, homosexuality (the attraction to one's own *sex*), for example. "To operationalize this definition and identify the sexual orientation of a particular person, we need to know the sex of the person and that of the people to whom he or she is attracted." *Zarda v Altitude Express, Inc*, 883 F3d 100, 113 (CA 2, 2018). To be sure, "[o]ne cannot consider a person's homosexuality without also accounting for their sex." *Hively v Ivy Tech Community College of Ind*, 853 F.3d 339, 358 (CA 7, 2017) (Flaum, J., concurring). And "[b]ecause one cannot fully define a person's sexual orientation without identifying his or her sex, sexual orientation is a function of sex." *Zarda*, 883 F.3d at 113. In fact, as explained by the Second Circuit, "sexual orientation is doubly delineated by sex because it is a function of both a person's sex *and* the sex of those to whom he or she is attracted." *Id.* (emphasis added). Thus, sexual orientation discrimination is sex discrimination.

Rouch World, however, would have this Court compare the treatment of women who are attracted to women with the treatment of men who are attracted to men, and then ask whether Rouch World has treated the women differently from the men. (MSC App, p 15a.) ("Declining to participate in same-sex marriage ceremonies equally applies to both female/female and male/male marriages; thus, such a declination cannot be based on 'sex' . . . ."). In essence, it contends that it discriminates against individuals who are attracted to the members of the same sex—not because the individual is male or female. This argument defies logic.

Indeed, it *because of the sex* of the individuals that Rouch World has denied services. Two points illustrate the deficiencies of Rouch World's argument.

First, the ELCRA focuses on *individuals*, not groups.[8] MCL 37.2302(a), the public accommodation provision in the ELCRA reads: "[A] person shall not . . . [d]eny an *individual* the full and equal enjoyment of the goods . . . of a place of public accommodation . . . because of . . . sex[.]" The meaning of "individual" in 1976 was as follows: "a particular being or thing as distinguished from a class, species, or collection[.]" Webster's New Collegiate Dictionary, p 586. As with Title VII—which also uses "individual"—the Legislature could have written the ELCRA differently. See *Bostock*, 140 S Ct at 1740–1741. But it did not. Accordingly, whether Rouch World discriminates against women and men equally with respect to its services is of no moment here because the ELCRA *equally* protects individuals of *both* sexes from discrimination. Take the following scenario:

> [A]n employer who fires a woman, Hannah, because she is insufficiently feminine and also fires a man, Bob, for being insufficiently masculine may treat men and women as groups more or less equally. But in *both* cases the employer fires an individual in part because of sex. [*Bostock*, 140 S Ct at 1741.]

In other words, it is not a defense for Rouch World to argue that it discriminates against both women and men because of sex.

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[8] Like the public-accommodations provision, throughout the ELCRA, its protections focus on "individual[s]": MCL 37.2202(1)(a) (discrimination in employment); MCL 37.2202(1)(d) (discrimination because of pregnancy); MCL 37.2203 (discrimination by employment agencies); MCL 37.2204(b) (discrimination by labor organizations); MCL 37.2205 (discrimination in job training); MCL 37.2402(a) (discrimination in education); MCL 37.2402(b) (same).

Second, and relatedly, this defense has already been rejected under Michigan caselaw in the context of interracial associations. In *Graham v Ford*, 237 Mich App 670, 675–676 (1999), the African American plaintiffs claimed that their supervisor discriminated against them on the basis of their race for associating with white employees. In holding that the plaintiffs showed a prima facie case of race discrimination, the court relied on prior precedent involving the ELCRA's application to interracial marriages:

> If an employer discriminates against a white (or black) employee because of the latter's marriage to a black (or white) spouse, the race of both the employee and spouse is a motivating factor. Thus, it must be concluded that the employee in such a case is discriminated against 'because of race' and the civil rights act is applicable. [*Id.* at 677–678, quoting *Bryant v Auto Data Processing*, 151 Mich App 424, 430 (1986).]

To be sure, in the context of interracial marriages, changing the race of one partner makes a difference in determining whether discrimination would have otherwise occurred. It does not matter whether an employer treats black and white employees identically with respect to interracial marriages—both instances constitute race discrimination under the ELCRA.

The same is true for sexual orientation discrimination. See *Bostock*, 140 S Ct at 1741. If this Court were to change the sex of either Johnson or Oswalt, Rouch World's decision regarding their marriage ceremony would be different. Rouch World does not dispute this. (MSC App, p 13a.) Had Johnson or Oswalt been male, they would not have been denied Rouch World's services. "This reveals that the discrimination rests on distinctions drawn according to sex," *Hively*, 853 F3d at 349, which the ELCRA has plainly prohibited since its enactment in 1976.

2. The purpose and remedial nature of the ELCRA reinforce the conclusion that the ELCRA forbids discrimination on the basis of sexual orientation.

This conclusion is bolstered by the purpose and remedial nature of the ELCRA. This Court has recognized that statutory language should "be given a reasonable construction considering its purpose and the object sought to be accomplished." *Morey*, 461 Mich at 330 (cleaned up). And when interpreting remedial statutes, such as the ELCRA, courts should "liberally construe[ ]" them "to suppress the evil and advance the remedy." *Eide*, 431 Mich at 34; see *id.* at 36 (noting the ELCRA's "manifest breadth" and "comprehensive nature").

This Court has already recognized the "evil" the ELCRA is aimed at—"the prejudices and biases' borne against persons because of their membership in a certain class"—as well as the intended remedy—"eliminat[ion] [of] the effects of offensive or demeaning stereotypes, prejudices, and biases." *Miller v CA Muer Corp*, 420 Mich 355 (1984) (cleaned up); *Eide*, 431 Mich at 31 (noting that the ELCRA is intended to "remedy[ ] discrimination in . . . public accommodations"). And the effects of offensive or demeaning stereotypes, prejudices, and biases are as real today as they were in 1976. For example, a recent study found that out of nearly 500 LGBTQ adults sampled, "[o]ne-fifth or more reported personally experiencing discrimination specifically because of their LGBTQ identity across multiple domains of life."[9] Likewise, a study conducted by the MDCR found evidence of

[9] Casey et al., *Discrimination in the United States: Experiences of lesbian, gay, bisexual, transgender, and queer Americans* (2019), available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6864400/pdf/HESR-54-1454.pdf.

discrimination in Michigan based on actual or perceived sexual orientation or gender identity/expression within every area covered by the ELCRA and investigated by the MDCR.[10]

As the U.S. Supreme Court has recognized, "gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth. For that reason the laws and the Constitution can, and in some instances must, protect them in the exercise of their civil rights." *Masterpiece Cakeshop, Ltd v Colo Civil Rights Comm*, 138 S Ct 1719, 1727 (2018); *Hurley v Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 US 557 (1995) (Remedial provisions targeted at discrimination "are well within the State's usual power to enact"). The ELCRA—through both its plain text, purpose, and remedial nature—accomplishes this important and necessary protection.

3. Contemporaneous expectations of the Legislature at the time the ELCRA was passed do not override the plain text of the statute.

The ELCRA's plain text, as well as its broad, remedial purpose, also stands in stark contrast to any suppositions concerning legislative beliefs of how the statute's plain language would be applied. Nevertheless, Rouch World has suggested that a plain language analysis should be rejected because, in its view, the Michigan Legislature, at the time it enacted the ELCRA, did not believe that "sex" covered

[10] *Michigan Department of Civil Rights, Report on LGBT Inclusion Under Michigan Law*, dated January 28, 2013, available at https://www.michigan.gov/documents/mdcr/MDCR_Report_on_LGBT_Inclusion_409727_7.pdf.

"sexual orientation." (MSC App, p 15a.) Thus, according to Rouch World, the plain meaning of sex cannot include sexual orientation.

Not so. As a preliminary matter, Rouch World's argument is not a plain meaning argument at all. Rather, Rouch World attempts to limit the scope of the ELCRA's text to only those applications that the 1976 Legislature would have expected it to reach. That is not how statutory construction works. To the contrary, courts presume that the Legislature intended the meaning it plainly expressed. *People v Petty*, 469 Mich 108, 114 (2003). And they may not speculate as to the intent of the Legislature beyond the words expressed in the statute. *Pohutski v City of Allen Park*, 465 Mich 675, 683 (2002) (citation omitted). See also *People v McIntire*, 461 Mich 147, 153 (1999) ("Any other nontextual approach to statutory construction will necessarily invite judicial speculation regarding the probable, but unstated, intent of the Legislature with the likely consequence that a court will impermissibly substitute its own policy preferences."); *Morton*, 423 Mich at 655 ("[T]he search for legislative intent begins and ends in the language of the statute."). Reliance on the speculative views of the enactment-era legislators would abandon these rules of statutory construction and ignore the plain text *and* remedial purpose of the ELCRA.

Michigan courts have rejected the approach Rouch World suggests. For example, in *Robinson v City of Detroit*, 462 Mich 439, 460 (2000), the Court overruled a previous opinion interpreting the Government Tort Liability Act's phrase "the proximate cause" to mean "a proximate cause" on the basis "that not to

do so would produce a marked change in Michigan law, and that Legislature, in its 'legislative history,' gave no indication that it understood that it was making such a significant change." *Id.* As explained by this Court, "[t]his approach can be best described as a judicial theory of legislative befuddlement." *Id.* "Stripped to its essence, it is an endeavor by the Court to use the statute's 'history' to contradict the statute's clear terms[,]" which the "the Court had no authority to do." *Id.* This Court's reluctance to engage in judicial speculation as to the Legislature's intent vitiates any reliance on the supposed beliefs of the ELCRA's enactors.

4. The actions of subsequent Michigan Legislatures also do not overcome the plain text of the ELCRA.

The same is true of reliance on the actions of subsequent legislatures. Refusing to accept that the plain meaning of the ELCRA controls the outcome of this case, Rouch World has argued that the Michigan Legislature's failure to add classifications, such as sexual orientation, to the ELCRA prevents this Court from interpreting "sex" to include "sexual orientation." (MSC App, p 12a, 15a.) But it is well understood that "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *United States v Price*, 361 US 304, 313 (1960). See also *Sullivan v Finkelstein*, 496 US 617, 632 (1990) (Scalia, J., concurring) ("Arguments based on subsequent legislative history, like arguments based on antecedent futurity, should not be taken seriously, not even in a footnote."); *People v Betts*, __ Mich ___ (2021) (Docket No. 148981); slip op at 17; 2021 WL 306381 ("[T]he intent of a prior legislature cannot be determined by

looking at the actions of a subsequent one.") (citation omitted); *Blank v Dep't of Corrections*, 462 Mich 103, 148 (2000) (Markman, J., concurring) ("[S]ubsequent inaction by a *different* Legislature, whether it be silence or the rejection of an alternative proposal, cannot properly service as an indicator of what a prior Legislature intended.") (emphasis added). Thus, it is irrelevant whether, why, or how many times the Michigan Legislature declined to amend the ELCRA to specify that "sex" includes "sexual orientation."

To the extent such history has any significance, it is only where the text of a statute is ambiguous. And the ELCRA's text is not. A person violates the ELCRA when one of the reasons for his or her "discrimination" against an individual is based in part on that individual's sex. As described above, the ELCRA's plain text prohibits discrimination based on sexual orientation because such discrimination is "because of . . . sex."[11] This plain meaning cannot be overcome by the purported views of subsequent legislators. Accordingly, the portion of the Court of Claims' opinion denying MDCR's motion for summary disposition should be reversed.

B. *Bostock*'s sound reasoning interpreting the same statutory language at issue here is highly persuasive.

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., *Chmielewski v Xermac, Inc*, 457 Mich 593, 601–602 (1998) (noting that, in interpreting provisions of the Persons with Disabilities Civil Rights Act, analogous

[11] The same is true for discrimination because a person is transgender.

federal precedent . . . 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*, 442 Mich at 381–382 (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' ") (citation omitted); *Rasheed v Chrysler Corp*, 445 Mich 109, 137 n 46 (1994) (explaining that "the Legislature intended that our courts look to the more comprehensive federal statutes and precedent for guidance" in interpreting the ELCRA"); see *id.* at 123 n 20 (The ELCRA is "clearly modeled after Title VII.").

Crucially, Title VII maintains an identical prohibition to the ELCRA—against discrimination "because of . . . sex."[12] MCL 37.2101; 42 USC 2000e-2. 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

[12] While Title VII does not contain an identical public accommodations provision as the ELCRA, there is no principled basis for distinguishing the ELCRA's prohibition against "deny[ing] an individual the full and equal enjoyment of the . . . services . . . of a place of public accommodation" from the U.S. Supreme Court's analysis in *Bostock*. Both MCL 37.2202(1)(a) (employment) and MCL 37.2302(a) (public accommodations) prohibit persons from discriminating against individuals "because of . . . sex." And Rouch World does allege that it did not deny Johnson and Oswalt the full and equal enjoyment of its services. Furthermore, the ELCRA itself recognizes that "the full and equal utilization of public accommodations . . . without discrimination because of . . . sex . . . is . . . a civil right." MCL 37.2102(1).

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 the U.S. Supreme Court's *conclusion* that necessarily warrants the same interpretation of Michigan law. Rather, it is the U.S. Supreme Court's *reasoning* that is not only "highly persuasive" in the context of the ELCRA, but also 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." [140 S Ct at 1743 (citation omitted).]

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 language, making consistent interpretation essential. First and foremost, the framing of the ELCRA mirrors Title VII—both use the operative

phrase, "because of . . . sex." See MCL 37.2102; 42 USC 2000e-2.[13] Second, both Michigan and federal law also agree that but-for causation is the proper standard for their respective civil rights acts. See *Hecht*, 499 Mich at 606 (interpreting the ELCRA 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.") (cleaned up).

With those concepts aligned, 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 clear. The U.S. Supreme Court reasoned, in the context of employment discrimination, that "[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. The same is true under the ELCRA. As a matter of logic, "it is impossible to discriminate against a person for being homosexual [or bisexual] without discriminating against that individual based on sex."

Given the identical statutory language, the U.S. Supreme Court's reasoning in *Bostock* should be given consideration here. This Court need look no further than the straightforward application of the ELCRA's plain legal terms to conclude that *Bostock*'s rubric is the correct one. For example, for a business to discriminate

[13] See also MCL 37.2202; MCL 37.2203; MCL 37.2204; MCL 37.2205; MCL 37.2302; MCL 37.2402; MCL 37.2502; and MCL 37.2504.

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); MCL 37.2302(a). From the plain 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. *Id*. 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 sex when deciding to deny a public accommodation—or, put differently, if changing the sex of the individual would have led to a different choice by the business—the ELCRA was violated. *Id.* at 1741. The parallels between the ELCRA and Title VII are striking, and thus, this Court's should afford *Bostock* deference.[14]

[14] This Court has signaled the import of *Bostock* in the context of another civil rights statute with similar language. This Court vacated *People v Rogers*, 331 Mich App 12 (2020), and directed reconsideration in light of *Bostock*. *Rogers*, 506 Mich at 949. Below, the Court of Appeals had held that the ethnic intimidation statute, which criminalizes certain conduct "because of . . . gender," MCL 750.147b(1), did not apply to conduct committed against a transgender woman. 331 Mich App at 24–28. On remand, the court held that the statute's phrase "because of . . . gender" includes transgender status because, "were it not for the complainant's biological sex (male), defendant would not have harassed and intimidated [the complainant.]" *People v Rogers (On Remand)*, __ Mich App __ (2021) (Docket No. 346348); slip op at 6. The Court of Appeals noted that while not binding, *Bostock* "offer[ed] helpful guidance" and gave it "respectful consideration." *Id.*

C. The federal precedent on which the Court of Appeals relied in *Barbour* has been reversed by the United States Supreme Court.

The Court of Claims held 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]." (MSC App, p 4a.) 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 grant of summary disposition to the Department, 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 reliance on federal caselaw, reasoned that Title VII protections were aimed at gender discrimination, not discrimination based on sexual orientation. *Id.* Thus, 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*. *Barbour*, 198 Mich App at 185 (citing four federal circuit decisions).[15] That precedent is no longer good law, and to the extent it was ever persuasive, its value is vacated now. *Rogers*, slip op at 5 (noting that *Bostock* "dispelled" the conclusions made by federal courts "as a misconception"). *Bostock* made clear that those cases are wrong and overruled them. Ironically, the very principle that led the *Barbour* Court to rule as it did—following analogous federal precedent in discrimination cases—counsels that *Barbour* be overruled.[16]

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

Rouch World's complaint indicates that it would not "host or participate in a same-sex ceremony[.]" (MSC App, p 13a.) The other plaintiff, Uprooted Electrolysis, similarly refused to provide services to an individual based on their gender identity. (*Id*. at 12a.) As to the latter, the Court of Claims, citing *Bostock*, held that Uprooted

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[15] See *Henson v City of Dundee*, 682 F2d 897, 901 (CA 11, 1982) (explaining that "Title VII prohibits employment discrimination on the basis of gender"; *DeSantis v Pacific Tel & Tel Co, Inc*, 608 F2d 327, 329–330 (CA 9, 1979) (declining to extend Title VII's protections to "sexual preference such as homosexuality"), overruled by *Nichols v Azteca Restaurant Enterprises, Inc*, 256 F3d 864, 875 (CA 9, 2001); *Williamson v AG Edwards & Sons, Inc*, 876 F2d 69, 70 (CA 8, 1989) ("Title VII does not prohibit discrimination against homosexuals."), citing *DeSantis*, 608 F2d 327; *DeCintio v Westchester Co Med Ctr*, 807 F2d 304, 306 (CA 2, 1986) (" 'Sex,' . . . logically could only refer to membership in a class delineated by gender, rather than sexual activity regardless of gender.").

[16] The Court of Appeals has applied identical logic in *White v Department of Transportation*, __ Mich App __ (2020) (Docket No. 349407); 2020 WL 5849754, when it declined to rely on a Michigan case, which in turn relied on "federal precedent . . . expressly overruled by [the U.S. Supreme Court]." The Court of Appeals reasoned that "[i]t would be a strange result, to say the least, if we continued to follow Title VII precedent overruled by a United States Supreme Court decision based on the same statutory language found in ELCRA." *Id*.

Electrolysis had discriminated against the individual "because of sex" under the ELCRA. (*Id*. at 5a–7a.) 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*. at 7a.)

This same reasoning applies to Rouch World's refusal to provide public accommodations to Johnson and Oswalt. Rouch World's denial of public accommodations was in part "because of . . . sex." Indeed, it specifically denied Johnson and Oswalt's request because it would not "host or participate in a same-*sex* ceremony." (*Id*. at 13a (emphasis added).) Had either Johnson or Oswalt been a man, Rouch World would not have denied their request. In other words, Rouch World denied Johnson and Oswalt "the full and equal enjoyment of the services . . . of a place of public accommodation" for a trait or action it tolerates in men. Thus, "sex played a necessary and undisguisable role in [Rouch] World's decision"—exactly what the ELCRA forbids. *Bostock*, 140 S Ct at 1737.

CONCLUSION AND RELIEF REQUESTED

The ELCRA was enacted to identify and correct inequalities in many aspects of public and private life, from employment to housing, to public accommodations and education. Denying lesbian and gay Michiganders these protections works a severe and ongoing harm, both on the individuals it affects and society at large. This exclusion from the ELCRA's protections and the denial of all the benefits afforded to every other Michigander "abridge[s] central precepts of equality." *Obergefell v Hodges*, 576 U.S. 644, 675 (2015). In crafting the ELCRA, the Legislature used broad language prohibiting discrimination "because of . . . sex." The plain meaning of those words, as they were understood at the time of the ELCRA's enactment and today, encompasses discrimination based on sexual orientation. This Court should finally recognize that the ELCRA bars all discrimination on the basis of sex, including that levied against lesbian and gay persons.

For these reasons, Defendants-Appellants respectfully request that this Court reverse the Court of Claims' opinion and hold that, contrary to *Barbour*, the ELCRA's prohibition on discrimination "because of . . . sex" applies to discrimination based on sexual orientation.

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