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

Dear Co-Chairs Reyes Kopack and Demashkieh:

The American Civil Liberties Union of Michigan (ACLU-M) strongly supports the request that the Michigan Civil Rights Commission issue an interpretative statement finding that the prohibition on sex discrimination in employment, housing and public accommodations found in Michigan's Elliott-Larsen Civil Rights Act ("Elliott-Larsen"), MCL 37.2101 et seq, includes a prohibition on the basis of gender identity and sexual orientation. The Commission clearly has authority to issue a statement under MCL 37.2601; MCL 24.201 et seq; Mich Admin Code, R 37.23.

What the Commission is being asked to do is consistent with a long line of federal legal precedent. Numerous federal district and appeals courts have already concluded that federal civil rights laws prohibiting sex discrimination cover discrimination against LGBT people in employment, housing and public accommodations. Most important, the Sixth Circuit Court of Appeals, which covers Michigan, has held on at least two occasions, that transgender people are protected against employment discrimination under Title VII, the federal civil rights law prohibiting sex discrimination,based on the theory of gender stereotyping. *Smith v City of Salem*, 378 F 3d 566 (6th Cir 2004); *Barnes v Cincinnati*, 401 F 3d 729 (2005).

While it is true that the words "sexual orientation" and "gender identity" do not appear in Title VII (or Elliott-Larsen), this is not judicial engineering by our federal courts. The United States Supreme Court has broadened the meaning of "because of sex" in Title VII to include sexual harassment, *Burlington Industries Inc v Ellsworth*, 118 S Ct 2257 (1998), *Faragher v City of Boca Raton*, 118 S Ct 2275 (1998), same-sex harassment, *Oncale v Sundowner Offshore Services*, 523 US 75 (1998), and gender stereotyping, *Price Waterhouse v Hopkins*, 109 S Ct 1775 (1998).

In *Price Waterhouse*, the Court held that Title VII protects more than just the fact of being a man or woman. Ann Hopkins was denied promotion to a partner because she was

considered insufficiently "feminine." The Court decided that the accounting firm could not take into account Ms. Hopkin's gender expression, wearing short hair and no make up and jewelry, when it evaluated her candidacy. In other words, employers cannot penalize employees for not fitting traditional notions about men and women. And what can be more traditional than the stereotype that men should be attracted only to women, or that women should be attracted to just men, or that men and women should only identify and present in accordance with the genders assigned to them at birth? As the 7th Circuit Court of Appeals explained in *Hively v Ivy Tech Community College*, 853 F 3d 339 (7th Cir 2017), "[a]ny discomfort, disapproval, or job decision based on the fact that the complaint, a woman or a man, dresses different, speaks different, or dates or marries a same-sex partner, is reaction purely based on sex." *Hively* at 347.

Furthermore, the Equal Employment Opportunity Commission , the federal agency tasked to investigate employment discrimination claims under federal law, has concluded that LGBT employment discrimination violates Title VII and has been accepting and investigating such complaints for more than five years. *Macy v Holder*, 2012 WL 1435995 (EEOC April 20, 2012) and *Baldwin v FAA*, 2015 WL 6150868 (July 15, 2015). In addition, the U.S. Department of Housing and Urban Development (HUD) has issued guidance stating that housing discrimination against LGBT people violates sex discrimination prohibitions in the Fair Housing Act, (U.S. Department of HUD, *Equal Access to Housing in HUD Programs Regardless of Sexual Orientation and Gender Identity*, 77 FR 5662, February 3, 2012). The federal regulations governing Section 1557 of the Affordable Care Act, 81 Fed Reg 31375 (May 18, 2016), also make it clear sex discrimination prohibitions protect transgender persons against insurance discrimination and that LGBT people may not be denied health care services on the basis of gender stereotyping.

It is understandable that employers, landlords, and business owners in Michigan are confused regarding their obligations under Elliott-Larsen, while federal courts and agencies are interpreting federal civil rights laws to cover LGBT people, and as of this date the Michigan Department of Civil Rights has not done so. An interpretative statement from the Commission would help to clarify this ambiguity and would result in an application of Elliott-Larsen that is consistent with similar federal civil rights laws.

Since June of 2001 the ACLU of Michigan has had an LGBT Rights Project. Just as the Commission has concluded, the ACLU of Michigan finds LGBT discrimination alive and well In Michigan. In the past 17 years we have received more than 500 complaints of LGBT discrimination, occurring throughout Michigan in employment, housing, education and public accommodations. Despite the fact that more than 40 cities and townships that have LGBT-inclusive human rights ordinances, in most places in Michigan people can fired for being gay, denied an apartment for being lesbian, or be refused services for being transgender. Furthermore, many of the LGBT-inclusive ordinances lack the comprehensive remedies that are

provided under Elliott-Larsen to provide adequate redress. Most of these localities lack the resources to fully investigate discrimination complaints.

In sum, we urge the Commission to what both federal courts and federal agencies have already done- interpret our state civil rights laws prohibiting sex discrimination to cover LGBT people.

Thank you for your time and consideration.

Sincerely,

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