STATE OF MICHIGAN
IN THE COURT OF APPEALS

THE PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

DEONTON AUTEZ ROGERS,

Defendant-Appellee.

_____/

Court of Appeals No. 346348

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

AMICUS BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION OF MICHIGAN AND THE AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF PLAINTIFF-APPELLANT

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STATEMENT OF INTEREST OF AMICI CURIAE[1]

The American Civil Liberties Union and the ACLU of Michigan (collectively "ACLU") file this amicus brief to support a ruling that discrimination against someone because they are transgender is a form of gender-based discrimination. The ACLU is a nationwide, nonprofit, nonpartisan organization with 1.5 million members dedicated to the principles of liberty and equality embodied in the Constitution and this Nation's civil rights laws. Through its national and Michigan LGBT Projects, the ACLU works to protect the rights of lesbian, gay, bisexual, and transgender individuals from discrimination.

Amicus support for the recognition that intimidation or harassment of someone because they are transgender is gender-based should not be construed as support for the effectiveness of hate-crimes laws or for an expansion of the scope and use of the criminal legal system. The ACLU is committed to and has devoted significant resources to ending this country's excessively harsh criminal legal policies and practices, which overwhelming result in overcriminalization and mass incarceration. Our criminal legal system is infected at every stage with bias toward racial minorities and LGBT people, and especially toward transgender women of color. However, a narrow reading of the ethnic intimidation statute to deny transgender people the gender-based protections afforded to everyone else is an

[1] Pursuant to MCR 7.212(H)(3), amici state that no counsel for a party authored this brief in whole or in part, nor did any such counsel or a party make a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici, their members, or their counsel made such a monetary contribution.

unjust and insupportable means of narrowing the scope of this State's criminal legal system and would have harmful consequences for LGBT people who seek protection against discrimination under civil rights laws.

STATEMENT OF QUESTION PRESENTED

Whether an action performed "maliciously, and with specific intent to intimidate or harass another person" because that person is transgender constitutes an intent to intimidate or harass "because of that person's . . . gender" under the ethnic intimidation statute, MCL 750.147b.

Appellant's answer: Yes

Appellee's answer: No

District court's answer: Yes

Trial court's answer: No

Amici's answer: Yes

STATUTES INVOLVED

MCL 750.147b, provides, in pertinent part:

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

> (a) Causes physical contact with another person.
>
> (b) Damages, destroys, or defaces any real or personal property of another person.
>
> (c) Threatens, by word or act, to do an act described in subdivision (a) or (b), if there is reasonable cause to believe that an act described in subdivision (a) or (b) will occur.

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

INTRODUCTION

Kimora Steuball is a transgender woman in that she identifies and presents herself as a woman and was assigned male at birth. She was intimidated and harassed in a gas station by defendant Deonton Autez Rogers because she is transgender. The intimidation led to Mr. Rogers showing Ms. Steuball a gun and threatening to kill her. During the struggle that followed when Ms. Steuball tried to seize the gun from Mr. Rogers, she was shot and seriously injured.

As the United States Supreme Court recently recognized, discrimination because someone is transgender necessarily constitutes discrimination based on sex under Title VII. See *Bostock v Clayton Co, Ga*, 140 S Ct 1731 (2020). Mr. Rogers was charged under the ethnic intimidation statute, MCL 750.147b, for maliciously intimidating or harassing Ms. Steuball because of her gender. Because the meaning of "gender" in the ethnic intimidation statute is at least as broad as "sex," the *Bostock* Court's analysis is instructive. Even under a narrow definition of "sex" as referring only to biological differences between males and females, the *Bostock* Court found that discrimination against someone because they are transgender entails discrimination based on sex.

The same analysis should apply here. A violation of the ethnic intimidation statute does not require a showing that the intimidation was motivated by a person's gender alone or a showing that it was motivated by animus toward all women or all men. Instead, because it is impossible to intimidate someone because they are transgender without acting at least in part because of the victim's sex

assigned at birth, anti-transgender intimidation is necessarily based on the person's gender and therefore violates the statute.

While plaintiff-appellant should prevail even under this narrow definition of "sex," the most accurate understanding of the term at the time the ethnic intimidation statute was enacted sweeps far more broadly. In 1988, as now, "sex" was understood by the courts, the public, and dictionaries to cover the full range of ways in which gender is expressed through appearance and behavior (and was not strictly limited to a person's sex assigned at birth nor to biological differences).

In any event, the plain language of the ethnic intimidation statute covers intimidation and harassment motivated because someone is transgender, because its ban on gender-based harassment and intimidation necessarily includes such conduct motivated even in part by someone's transgender status. Neither assumptions about the Michigan Legislature's purpose in drafting the statute nor about public knowledge of transgender people in the 1980s can override the statute's text. Nor does anything in the statute's legislative history suggest that harassment or intimidation because someone is transgender is somehow carved out from the statute's broader ban on harassment or intimidation based on gender.

Following the U.S. Supreme Court's decision in *Bostock*, the Michigan Court of Claims recently held that the ban on sex discrimination in the Elliott-Larsen Civil Rights Act, MCL 37.2101 *et seq.*, prohibits discrimination because someone is transgender. The same analysis should apply to intimidation or harassment under MCL 750.147b. Given the Michigan Supreme Court's remand for reconsideration in

light of *Bostock*, this Court should reverse the decision below and hold that intimidation or harassment because a person is transgender constitutes gender-based intimidation and harassment under Michigan's ethnic intimidation statute.

STATEMENT OF FACTS AND PROCEEDINGS

In July 2018, Kimora Steuball entered a gas station to purchase cigarettes. In the station, Deonton Rogers made several offensive comments about her while she waited at the cash register. Ms. Steuball is a transgender woman and Mr. Rogers described her as a "tall bitch," voiced his assumptions about her genitals, and said "you're a nigga." (Prelim Tr, pp 5, 8.) Ms. Steuball responded that "[a] nigga is somebody that identifies themselves as a man, carry themselves as a man." "I don't do that," she stated, "I'm a transgender." (*Id.* p 8.) Mr. Rogers asked Ms. Steuball about her genitals, which he perceived to be male, and asked to see them. (*Id.*) He continued to make offensive comments about her, including calling Ms. Steuball a man. (*Id.* pp 8–9, 15.)

Mr. Rogers continued to speak about Ms. Steuball in derogatory terms, which she ignored until he showed her a gun and threatened to kill her. (*Id.* pp 9, 21.) When Mr. Rogers started walking toward the station exit, Ms. Steuball began to fear that he would turn around and shoot her once he reached the door. (*Id.* pp 9–10, 16.) To prevent him from doing so, she grabbed Mr. Rogers's hand as he passed next to her. (*Id.* p 10.) Ms. Steuball attempted to defend herself, but Mr. Rogers continued to try to aim the gun at her. (*Id.*) During their struggle, the gun went off, shattering Ms. Steuball's shoulder. (*Id.* pp 10–11.)

The district court bound Mr. Rogers over on the charge of violating the State's ethnic intimidation statute, MCL 750.147b, based on a review of dictionary definitions for "the ordinary, contemporary, and common meaning of 'gender.'" (9/6/18 Dist Ct Op & Order, p 3.) The court reasoned that "the term gender

encompasses the denotation of a range of identities" and "conclude[d] that a transgender person who is targeted based on their behavioral and social displays of gender . . . is protected under the Ethnic Intimidation Statute in Michigan." (*Id.*)

The circuit court, in contrast, granted Mr. Rogers's motion to quash the ethnic intimidation charge. (11/7/18 Cir Ct Op & Order, p 11.) It did so in part because it concluded, in reliance on MCL 750.10, that "gender" is defined in section 10 of the Michigan Penal Code to include the masculine, feminine, and neuter genders, but does not include transgender people. (*Id.* p 10.) It further relied on the existence of two bills then pending before the Michigan legislature, 2017 SB 121 and 2017 HB 4800, to add the language "gender identification" to the ethnic intimidation statute. (*Id.*)

In a published decision, this Court by a vote of 2-1 affirmed the dismissal of the charge, but on different grounds than those relied upon by the circuit court. *People v Rogers*, 331 Mich App 12; 951 NW2d 50 (2020) (Docket No. 346348), slip op at 1. This Court found that when the statute was enacted in 1988, "gender" meant "sex." *Id.*, slip op at 6–7. It further concluded that "'sex' was at that time, and remains today, associated with the biological roles of male and female." *Id.*, slip op at 6. As additional support for its conclusion that "gender" in the early 1990s should be given the same meaning as "sex," this Court relied on the twenty-seven-year-old decision in *Barbour v Dep't of Social Services*, 198 Mich App 183; 497 NW2d 216 (1993), which found that the Elliott-Larsen Civil Rights Act's prohibition on "sex" discrimination did not include discrimination on the basis of "sexual orientation."

Id., slip op at 7. It therefore interpreted the ethnic intimidation statute to exclude coverage for transgender persons on the ground that intimidation and harassment directed at someone because they are transgender was not based on their "sex" or "gender." *Id.*, slip op at 10.

This Court further justified its holding based on the legislative history behind the ethnic intimidation statute. *Id.*, slip op at 7–8. During the course of its passage, "sexual orientation" was replaced by "gender" in the version eventually enacted into law. *Id.*, slip op at 8. This Court concluded that the legislature, having rejected the addition of the term "sexual orientation," "cannot reasonably be thought to have intended instead to criminalize conduct based on a person being transgender." *Id.*, slip op at 8.

The dissent, in contrast, found that intimidation of someone because they are transgender falls within the scope of the ethnic intimidation statute's protections. *Rogers*, 331 Mich App at __; 951 NW2d at 61 (Servitto, J., dissenting); slip op at 1. The plain language of the statute covers transgender people, making reliance on dictionary definitions unnecessary. *Id.*, slip op at 1–2. However, even under the majority's narrow definition of "gender" as sex assigned at birth (referred to as "biological sex"), intimidation of someone because they are transgender is a violation of the statute because anti-transgender harassment is motivated by a person's sex. *Id.*, slip op at 3–4.

It was further error, according to the dissent, for the majority to rely on *Barbour*, because that sexual-orientation case addressed a different question from

the present one about gender identity, and to rely on legislative history, rather than simply applying the plain meaning of the statute. *Id.*, slip op at 2–3. Mr. Rogers's "conduct and words cannot be seen as motivated by and centered upon anything but the sex (gender) of the victim." *Id.*, slip op at 4.

The prosecution sought leave to appeal. In lieu of granting leave, the Michigan Supreme Court vacated this Court's judgment and remanded the case to this Court "for reconsideration in light of [the U.S. Supreme Court's decision in] *Bostock v Clayton County, Georgia*," a case handed down five months after this Court's decision in the instant case. *People v Rogers*, 950 NW2d 48 (2020). In *Bostock*, the U.S. Supreme Court held that discrimination based on a person's transgender status necessarily constitutes discrimination "because of . . . sex" under Title VII of the federal Civil Rights Act of 1964. *Bostock v Clayton Co, Ga*, 140 S Ct 1731 (2020).

STANDARD OF REVIEW

The question whether an individual's "conduct falls within the scope of a penal statute is a question of statutory interpretation" that this Court reviews "de novo." *People v Flick*, 487 Mich 1, 8–9; 790 NW2d 295 (2010). Where this Court reviews a lower court's decision on a motion to quash that turned on the interpretation of a statute, the review is de novo. *People v March*, 499 Mich 389, 397; 886 NW2d 396 (2016).

ARGUMENT

I. Intimidation or Harassment of Someone Because They Are Transgender Constitutes Intimidation on the Basis of Their Gender Under the Ethnic Intimidation Statute.

This Court has already identified "gender" and "sex" to be synonymous for purposes of understanding the meaning of "gender" in the ethnic intimidation statute. See *People v Rogers*, 331 Mich App 12; 951 NW2d 50, 57 (2020) (Docket No. 346348), slip op at 6 (identifying "gender" and "sex" as synonyms). It follows that intimidation directed against someone because they are transgender, in combination with the predicate acts of malicious physical contact, property damage, or threats of contact or damage combined with a reasonable cause to believe these acts will occur, falls within the scope of the statute. This is true under the U.S. Supreme Court's reasoning in *Bostock*, since discrimination against someone because they are transgender is based at least in part on their sex, even if "sex" is narrowly defined to refer to one's sex assigned at birth. It is also true because, as recognized in *Bostock*, the meaning of the word "sex" by 1988 was sufficiently broad to cover discrimination against transgender people.[2]

[2] This Court used the term "biological sex" in its interpretation of the word "gender" in the statute and its description of Ms. Steuball's sex assigned at birth. Such terminology is, however, not the most accurate way to describe a person's sex assigned at birth, as there are several distinct biological components of sex, "including chromosomal, anatomical, hormonal, and reproductive elements, some of which could be ambiguous or in conflict within an individual." *Radtke v Misc Drivers & Helpers Union*, 867 F Supp 2d 1023, 1032 (D Minn, 2012). Additionally, there is a significant body of scientific research finding that gender identity is itself biologically based. See, e.g., Levasseur, *Gender Identity Defines Sex: Updating the Law to Reflect Modern Medical Science Is Key to Transgender Rights*, 39 Vt L Rev 943, 984 (2015) (citing research). For that reason, a transgender individual's gender

A. Even if "sex" is interpreted narrowly to only include a person's sex assigned at birth, discrimination against someone because they are transgender is based at least in part on "sex."

This Court's recognition that Mr. Rogers's conduct occurred because Ms. Steuball "is a transgender person" supports a conclusion that such conduct was gender-based and falls within the ethnic intimidation statute's "ambit." *Id.*, slip op at 10. The reasoning applied by the U.S. Supreme Court in *Bostock* to conclude that firing someone for being transgender violates Title VII's prohibition on workplace discrimination "because of . . . sex," 140 S Ct at 1737, strongly supports this result. Like Title VII, the ethnic intimidation statute requires only that gender be *a* reason for the intimidation or harassment, not the *sole* reason. Nor is there a requirement under either the statute or Title VII to prove class-based discrimination, such as animus toward all women or all men, but only that a particular individual was subjected to intimidation because of their gender. And because discrimination against someone for being transgender is necessarily motivated at least in part by their sex assigned at birth, Mr. Rogers's conduct was motivated by Ms. Steuball's gender.

1. Intimidation or harassment of someone because they are transgender constitutes intimidation based on gender under the plain language of the ethnic intimidation statute.

The ethnic intimidation statute is violated when a "person maliciously, and with specific intent to intimidate or harass another person because of that person's

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identity is "the single most important *biological* determinant of [the person's] sex." *Id.* at 1004.

race, color, religion, gender, or national origin," commits one of the listed predicate acts. MCL 705.147b. There is no requirement that the protected characteristic be the *sole* basis for the intimidation or harassment, only that it be one of the reasons for the intimidation or harassment. See *People v Schutter*, 265 Mich App 423, 430; 695 NW2d 360 (2005). In *Schutter*, this Court reasoned that the "statutory language is rather straightforward and broad" and "contains no limiting language to suggest that ethnic intimidation may be charged only when the specific intent to intimidate or harass is the sole reason for the underlying criminal act." *Id.* at 430; see also *People v Foust*, unpublished per curiam opinion of the Court of Appeals, issued June 3, 2010 (Docket No. 289997); 2010 WL 2219681, at *2, quoting *Schutter*, 265 Mich App at 430; *Austin v Redford Twp Police Dep't*, 859 F Supp 2d 883, 909 (ED Mich, 2011), quoting *Schutter*, 265 Mich App at 430; *Brooks v Pickett*, unpublished opinion of the United States District Court for the Eastern District of Michigan, issued April 7, 2008 (Case No. 06-15633); 2008 WL 937356, at *12, quoting *Schutter*, 265 Mich App at 423. The Elliott-Larsen Civil Rights Act's prohibition on discrimination "because of" sex as well as other protected characteristics, MCL 37.2202, similarly requires only a showing that the characteristic was *one* of the reasons for the discrimination, and not the *sole* reason. See, e.g., *Matras v Amoco Oil Co*, 424 Mich 675, 682; 385 NW2d 586 (1986) (finding that "[a] jury can find that the discharge was 'because of age' even if age was not the *sole* factor" (emphasis added)).

There is likewise no requirement in the statute for a showing that the intimidation was motivated by animus toward *all* women or *all* men. Under the

statute's requirement to show intimidation against a person "because of *that* person's race, color, religion, gender, or national origin," MCL 750.147b (emphasis added), there need only be a showing that an individual has been subjected to intimidation or harassment due to their race or other protected characteristic. Accordingly, even if someone were to intimidate both a transgender woman and a transgender man in combination with the predicate acts of malicious physical contact, property damage, or threats of contact or damage combined with a reasonable cause to believe these acts will occur, that conduct would fall within the scope of the statute. It would constitute two violations of the statute because each act would have been motivated by the respective victim's gender.

Here, Mr. Rogers intimidated and harassed Ms. Steuball because she looked and behaved as the woman she is, while Mr. Rogers recognized her as a transgender person (and perceived her as a man). He called her a "tall bitch" and "a nigga." (Prelim Tr, p 8.) Ms. Steuball disputed this characterization of herself, because the latter term was for "somebody that identifies themselves as a man, carry themselves as a man," but not her, because she is a transgender woman. (*Id.*) Mr. Rogers questioned Ms. Steuball about her genitals and then asked to see them. (*Id.*) He called her a man, among other offensive comments directed at her to get "a reaction out of [her]," and eventually pulled a gun and threatened to kill her. (*Id.* pp 8–9, 15, 20.)

The district court found that Mr. Rogers intimidated Ms. Steuball because she is transgender. (9/6/18 Dist Ct Op & Order, pp 1–2.) This Court reached the

same conclusion. *Rogers*, slip op at 10. In other words, Mr. Rogers acted because of the divergence between Ms. Steuball's male sex assigned at birth and her living openly, and identifying herself, as a woman. Had Ms. Steuball "carried herself" as a woman but been assigned female at birth, Mr. Rogers would not have intimidated her. Accordingly, her male sex assigned at birth is a "but for" cause of the intimidation she experienced. Under the plain language of the statute, then, it was because of Ms. Steuball's gender that Mr. Rogers intimidated or harassed her.

2. The U.S. Supreme Court's recent ruling in *Bostock v Clayton Co, Ga* supports a finding that transgender people are protected under the ethnic intimidation statute from gender-based intimidation.

The U.S. Supreme Court recently came to the same conclusion, holding that discrimination against an employee for being transgender necessarily constitutes discrimination on the basis of sex. *Bostock*, 140 S Ct at 1737. Like the ethnic intimidation statute, Title VII's prohibition on discrimination "because of sex" sweeps broadly, requiring a showing only that "sex was *one* but-for cause of that decision," rather than that it was the sole cause. *Id.* at 1739. Under Title VII, "a defendant cannot avoid liability just by citing some *other* factor that contributed to its challenged employment decision." *Id.* Title VII is also like the ethnic intimidation statute in that it does not require class-based discrimination, but "makes each instance of discriminating against an individual employee because of that individual's sex an independent violation of Title VII." *Id.* at 1742. As a result, firing both a transgender man and transgender woman "doubles rather than eliminates Title VII liability." *Id.* at 1742–1743.

"[S]ex plays an unmistakable and impermissible role" when an "employer retains an otherwise identical employee who was identified as female at birth," *id.* at 1741–1742, but "intentionally penalizes a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth," *id.* at 1741. The employer may claim that it fired the employee for another reason, such as the fact that they are transgender or openly express themselves as a different gender than their sex assigned at birth, but "it is impossible to discriminate against a person for being . . . transgender without discriminating against that individual based on sex." *Id.* "By discriminating against transgender persons, the employer unavoidably discriminates against persons with one sex identified at birth and another today." *Id.* at 1747.

Whether discrimination has taken place is determined by "a straightforward rule": "An employer violates Title VII when it intentionally fires an individual employee based in part on sex." *Id.* Under that rule, any dispute over the meaning of "sex" in 1964 when Title VII was enacted is beside the point, because firing someone for being transgender is based on their sex, even if that term is narrowly defined as sex assigned at birth, or what the employers referred to as the "biological distinctions between male and female." *Id.* at 1739.

The *Bostock* Court's reasoning commands the same result in this case. Like Title VII, the ethnic intimidation statute requires only that sex be one of the causes of the intimidation, rather than the sole cause, and requires only a showing that an individual faced intimidation because of that specific individual's gender or other

protected characteristic. And it is just as impossible for someone to intimidate "a person for being . . . transgender without [intimidating] that individual based on sex," *id.* at 1741, as it is for an employer to discriminate against an employee for being transgender without acting because of sex. Applying the straightforward rule—whether an individual has been subjected to discrimination "based in part on sex"—to someone who is subjected to intimidation or an adverse employment action because they are transgender leads to the same result. Both necessarily occurred because of sex.

In light of *Bostock*, the Michigan Court of Claims recently held that the Elliott-Larsen Civil Rights Act's ban on discrimination "because of . . . sex," enacted in 1976, necessarily prohibits discrimination because someone is transgender. See *Rouch World, LLC v Mich Dep't of Civil Rights*, unpublished opinion of the Court of Claims, issued December 7, 2020 (Docket No. 20-000145-MZ), pp 3, 7 ("[f]ollowing the *Bostock* Court's rationale" to hold that discrimination based on transgender status constitutes sex discrimination) (attached as Exhibit A). Writing for the Court of Claims, Judge Murray examined this Court's previous decision in the instant case, including its reliance on *Barbour*, but declined to follow its reasoning after a thorough analysis of the intervening decision in *Bostock* and consideration of the Michigan Supreme Court's order vacating and remanding for reconsideration in light of *Bostock*. *Id.* at 5–7.[3]

[3] While the Court of Claims refers to people as being "born male" or "born female," *Rouch World*, pp 6–7, it is more accurate to say that, at birth, some people are assigned male or are assigned female. A person's sex assigned at birth refers to the

As the Court of Appeals of North Carolina recognized in a case challenging a state law on domestic-violence protective orders, "the definition of 'sex' in *Bostock*" instructs that "disparate treatment based on [gender identity] is disparate treatment based, at least in part, upon 'sex' or gender." *ME v TJ*, __ NC App __; __ SE2d __ (2020) (Docket No. COA18-1045); slip op at 66 (attached as Exhibit B). The court's holding expressly referenced the fact that the "recently decided Supreme Court opinion of *Bostock* includes a thorough analysis resulting in the conclusion that discrimination based upon a person's . . . 'transgender status' is always also discrimination based on 'sex,' or gender." *Id.* at 91.

Other courts have similarly applied the *Bostock* Court's reasoning about anti-transgender discrimination to different federal statutory prohibitions on sex discrimination, including Title IX (enacted in 1972) and the Fair Housing Act (enacted in 1968). See, e.g., *Adams ex rel Kasper v Sch Bd of St Johns Co*, 968 F3d 1286, 1305 (CA 11, 2020) ("With *Bostock*'s guidance, we conclude that Title IX . . . prohibits discrimination against a person because he is transgender, because this constitutes discrimination based on sex."); *Grimm v Gloucester Co Sch Bd*, 972 F3d 586, 616 (CA 4, 2020) ("After the Supreme Court's recent decision in *Bostock* . . . we

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designation of male or female that an infant is given at birth, typically based on external reproductive anatomy. See Hembree et al, *Endocrine Treatment of Gender-Dysphoric/Gender-Incongruent Persons: An Endocrine Society Clinical Practice Guideline*, 102 J Clin Endocrinol Metab 3869, 3875 (2017). Because a person's sex, even on a biological level, is more complex than a simple question of external anatomy and comprises factors not immediately identifiable at the moment of birth, see *supra* note 2, it is most precise to refer to people as being assigned to (rather than born as) a particular sex when they enter the world.

have little difficulty holding that a bathroom policy precluding Grimm from using the boys restrooms discriminated against him 'on the basis of sex' [under Title IX]."); see also *Scutt v Dorris*, unpublished opinion of the United States District Court for the District of Hawaii, issued December 14, 2020 (Case No. 20-00333 JMS-WRP); 2020 WL 7344595 at *4 n 6 (Fair Housing Act); *Whitman-Walker Clinic, Inc v US Dep't of Health & Hum Servs*, unpublished opinion of the United States District Court for the District of Columbia, issued September 2, 2020 (Case No. 20-1630 (JEB)); 2020 WL 5232076 at *25 (Section 1557 of the Affordable Care Act).

B. "Sex" at the time of the statute's passage comprised more than simply a person's sex assigned at birth.

The *Bostock* Court, in holding that discrimination because someone is transgender constitutes sex discrimination, explained that "nothing in our approach . . . turns on the outcome of the parties' debate" about the definition of "sex" in 1964. *Bostock*, 140 S Ct at 1739. It is likewise unnecessary for this Court to revisit competing definitions of "sex" and "gender" on remand in order to conclude that intimidation because someone is transgender constitutes intimidation because of that person's gender.

Nonetheless, when the statute was enacted in 1988, more than two decades after Title VII, contemporary definitions of "sex" comprised more than simply a person's sex assigned at birth (or what this Court labeled "biological sex"), but also included functional and behavioral aspects of sex. This Court cited *Webster's Ninth New Collegiate Dictionary*, published in 1990, as providing that "sex" means "either

of two divisions of organisms distinguished respectively as male or female." *Rogers*, slip op at 6. However, *Webster's Ninth* further defines "sex" as "the sum of the *structural, functional, and behavioral characteristics* of living beings that subserve reproduction by two interacting parents and that serve to distinguish males and females." *Webster's Ninth New Collegiate Dictionary* (1990), p 1078 (emphasis added). The Random House College Dictionary published in 1980 includes a similar definition. See *The Random House College Dictionary* (1980), p 1206 (defining "sex" to include "the sum of the structural and functional differences by which the male and female are distinguished, or the phenomena or behavior dependent on these differences"). Both definitions disclose a full range of sex-based characteristics that go beyond a person's sex assignment at birth.

Court decisions further support this broader understanding of "sex" at the time the ethnic intimidation statute was enacted. In interpreting Title VII, the U.S. Supreme Court concluded that by banning sex discrimination "'Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes,'" *Los Angeles Dep't of Water & Power v Manhart*, 435 US 702, 707 n 13; 98 S Ct 1370; 55 L Ed 2d 657 (1978) (citation omitted), such "that gender must be irrelevant to employment decisions," *Price Waterhouse v Hopkins*, 490 US 228, 240; 98 S Ct 1370; 55 L Ed 2d 657 (1989). Therefore, in *Price Waterhouse*, the Court held that Title VII bars not only discrimination against someone because of their sex assigned at birth, but also because of their failure to look or behave in the manner expected of their assigned sex. *Id.* at 250–251.

The Sixth Circuit later applied this reasoning to those who face discrimination because of their "gender non-conforming conduct and, more generally, because of [their] identification as [ ] transsexual." *Smith v Salem*, 378 F3d 566, 571 (CA 6, 2004). "[D]iscrimination against a transgender individual because of her gender-non-conformity is sex discrimination, whether it's described as being on the basis of sex or gender." *Glenn v Brumby*, 663 F3d 1312, 1317 (CA 11, 2001). That is so because "[t]he very acts that define transgender people as transgender are those that contradict stereotypes of gender-appropriate appearance and behavior." *Id.* at 1316 (internal quotation marks and citations omitted); see also *Equal Emp Opportunity Comm'n v RG & GR Harris Funeral Homes, Inc*, 884 F3d 560, 577 (CA 6, 2018) ("[T]ransgender or transitioning status constitutes an inherently gender non-conforming trait."), aff'd sub nom *Bostock*, 140 S Ct 1731.

The district court in *Smith*, in concluding that transgender individuals were denied protection under Title VII, had relied on the same understanding of the word "sex" employed by this Court prior to the Supreme Court's ruling in *Bostock*. The court concluded that "Congress 'had a narrow view of sex in mind' and 'never considered nor intended that this 1964 legislation apply to anything other than the traditional concept of sex.'" *Smith v Salem*, unpublished opinion of the United States District Court for the Northern District of Ohio, issued February 26, 2003 (Case No. 4:02CV1405); 2003 WL 25720984, at *2, quoting *Ulane v E Airlines, Inc*, 742 F2d 1081 (CA 7, 1984). Past federal appellate courts had also interpreted "sex" narrowly to refer to someone's "anatomical and biological characteristics," but not to

"'gender' (referring to socially-constructed norms associated with a person's sex)." *Smith*, 378 F3d at 573, citing *Ulane,* 742 F2d at 1084; *Sommers v Budget Mktg, Inc,* 667 F2d 748, 750 (CA 8, 1982); and *Holloway v Arthur Andersen & Co*, 566 F2d 659, 661–663 (CA 9, 1977). But the Sixth Circuit held that narrowly defining sex to deny transgender people protection under Title VII's 1964 ban on sex discrimination was an approach that had "been eviscerated by *Price Waterhouse*." *Smith*, 378 F3d at 573; see also *Schwenk v Hartford,* 204 F3d 1187, 1201 (CA 9, 2000) ("The initial judicial approach taken in cases such as *Holloway* [and *Ulane*] has been overruled by the logic and language of *Price Waterhouse*.").

This Court's 1993 holding in *Barbour* also cannot support the conclusion that intimidation of transgender people is not gender-based, for two reasons. First, *Barbour* relied on the flawed reasoning of pre-*Price Waterhouse* federal appellate court decisions interpreting "sex" narrowly. See, e.g., *DiSantis v Pacific Tel & Tel Co, Inc,* 608 F2d 327 (CA 9, 1979), abrogated by *Nichols v Azteca Rest Enterprises, Inc*, 256 F3d 864, 875 (CA 9, 2001) (finding that *DeSantis*'s "holding [ ] predates and conflicts with the Supreme Court's decision in *Price Waterhouse*"). Second, discrimination on the basis of transgender status and sexual orientation present distinct legal questions. See *RG & GR Harris Funeral Homes, Inc*, 884 F3d at 579–580. Therefore, upon reconsideration following *Bostock*, this Court—like the Court of Claims in *Rouch World*—should conclude that understandings and definitions of "sex" and "gender" at the time of enactment pose no obstacle to, and in fact support,

the conclusion that intimidating someone because they are transgender is intimidation because of their gender.

II. There Are No Other Grounds for Denying Transgender Individuals Protection from Gender-Based Intimidation.

Part of this Court's previous rationale for concluding that transgender people are excluded from the protections of the ethnic intimidation statute was its assumption that a 1988 legislature "cannot reasonably be thought to have intended . . . to criminalize conduct based on a person being transgender, a term that was not in use at that time in the jurisprudence of our State and had only recently emerged in the media." *Rogers*, slip op at 8. But, as *Bostock* explains, courts must apply the plain language of a statute without making assumptions about the legislature's intentions or expectations in passing it—and the supposition that there was no contemporary public knowledge of transgender persons is misplaced. Moreover, the statute's actual legislative history provides no support for carving out transgender people from the plain language of the statute's protections. *Id.*

A. Applying the statute's plain language, rather than speculation about legislative intent, results in protection of transgender people from gender-based intimidation.

While this Court stated that it was simply interpreting the word "gender" at the time of the ethnic intimidation statute's enactment, *id.*, slip op at 6, it based its conclusion that transgender people fell outside the scope of the statute in part on its supposition that a 1988 legislature could not have "intended . . . to criminalize conduct based on a person being transgender," *id.*, slip op at 8, because that word "was not in use at that time in the jurisprudence of our State and had only recently

emerged in the media." *Id.* "[G]ender would [not] have been understood to encompass one who is a transgender person . . . in 1988," this Court concluded. *Id.*, slip op at 7. However, assumptions about whether the legislature was thinking about how the statute would apply to a specific type of gender-based discrimination cannot override the statute's plain language. And the conclusion that there was no public knowledge of transgender people at the time the statute was enacted is inaccurate and unsupported.

In *Bostock*, the Supreme Court explained that it was duty-bound to apply Title VII as written, not as legislators might have anticipated. *Bostock*, 140 S Ct at 1749. The rule is no different for Michigan courts, which interpret statutes based on their plain meaning and have consistently rejected statutory interpretation based on "unstated legislative intent." *People v Williams*, 491 Mich 164, 178; 814 NW2d 270 (2012). As explained in Section I, intimidation of someone because they are transgender is based on their gender, even if "gender" is narrowly defined. Thus, as in *Bostock*, this may well be an instance when a "statute's application . . . reaches 'beyond the principal evil' legislators may have intended or expected to address." *Bostock*, 140 S Ct at 1749, quoting *Oncale v Sundowner Offshore Servs, Inc*, 523 US 75, 79; 118 S Ct 998; 140 L Ed 201 (1998). But "'it is ultimately the provisions of' those legislative commands 'rather than the principal concerns of our legislators by which we are governed.'" *Id.*, quoting *Oncale*, 523 US at 79; see also *Robinson v Ford Motor Co*, 277 Mich App 146, 153; 744 NW2d 363 (2007) (citing *Oncale* favorably and concluding that same-sex sexual harassment is covered by the Elliott-

Larsen Civil Rights Act, MCL 37.2101 *et seq*.). "Only the written word is the law, and all persons are entitled to its benefit." *Id*. at 1737.

While lack of knowledge of transgender people in 1988 is not a basis for excluding them from protection under the ethnic intimidation statute when its plain terms embrace them, *Bostock* also demonstrates that this Court's previous assumptions about historical knowledge of people who are transgender were misplaced. As the *Bostock* Court noted, courts were considering claims that discrimination against someone for being transgender was sex discrimination as early as 1974. *Bostock*, 140 S Ct at 1751, citing *Holloway*, 566 F2d at 661 (rejecting a 1974 claim that an employer discriminated on the basis of sex when it fired a female employee, identified as "transsexual," for transitioning at work). Courts in Illinois and Michigan also decided claims asserted by transgender individuals. See *Ulane*, 742 F2d at 1084 (reversing a district court's ruling that firing a pilot for being "transsexual" was sex discrimination); *Phillips v Mich Dep't of Corr*, 731 F Supp 792, 801 (WD Mich, 1990) (ordering a prison to continue providing hormone-therapy treatment to a transgender prisoner in a case filed in 1988).

The public had also been exposed to the lives of transgender people for decades prior to 1988, including Christine Jorgensen's transition in the 1950s, Brief of Law & History Professors as Amici Curiae in Support of Respondent Aimee Stephens, *RG & GR Harris Funeral Homes, Inc v Equal Emp Opportunity Comm'n*, 140 S Ct 1731 (2020) (No. 18-107); 2019 WL 3027048, at *12–13, attention in the public and the courts to the expanding availability of surgical treatments for

transgender people in the 1970s, with courts deciding that transgender people are entitled to Medicaid coverage for such treatment, *id.* at *17–21, and Renee Richards's much publicized legal challenge to the United States Tennis Association's refusal to let her compete as a woman, *id.* at *21–22. This public attention continued into the 1980s both nationally and in Michigan. See, e.g., Corry, *HBO's "What Sex am I?"*, New York Times (April 18, 1985) <https://www.nytimes.com/1985/04/18/movies/hbo-s-what-sex-am-i.html> (accessed December 29, 2020); *Michigan Transsexual Runs for Congress*, Greensboro Daily News, (January 13, 1980) p A10, <http://transascity.org/files/news/1980_01_13_Greensboro_NC_Daily_News_A10.jpg> (accessed December 29, 2020).

Whether or not this Court was correct in finding that the specific terms "transgender" and "gender identity" were unfamiliar, there is no question that the courts and the public were aware of the existence of transgender people by 1988, when "gender" was included in the ethnic intimidation statute.[4]

[4] This Court distinguished between "transgender" and "transsexual" people, *Rogers*, slip op at 7 n 6, but did not explain why public knowledge of transgender people *as described by a particular term* was required in order to find that transgender people qualify for protection from gender-based intimidation. Over the past several decades, the term "transsexual" has become outdated and has generally been replaced by "transgender." See American Psychological Association, *Transgender People, Gender Identity, and Gender Expression, What Does Transgender Mean?* <https://www.apa.org/topics/lgbt/transgender> (accessed December 29, 2020).

B. The legislative history of the ethnic intimidation statute fails to evidence any intent to exclude transgender people from its statutory protections.

The legislative history of the ethnic intimidation statute cannot support a conclusion that transgender victims fell outside its scope. The Michigan House of Representatives introduced a bill including the words "sexual orientation" but neither "gender" nor "sex," while the Senate version that was enacted into law replaced "sexual orientation" with "gender." This Court concluded that this history meant that the Legislature was "unwilling to criminalize behavior motivated by the sexual orientation of the victim" and further speculated that therefore the legislature cannot "reasonably be thought to have intended instead to criminalize conduct based on a person being transgender." *Rogers*, slip op at 8.

However, as *Bostock* makes clear, "legislative history can never defeat unambiguous statutory text." *Bostock*, 140 S Ct at 1750. The law in Michigan is no different: where a "statute is clear, there is no ambiguity that would permit or justify looking outside the plain words of the statute," and legislative history should not be used "to cloud a statutory text that is clear." *In re Certified Question from U.S. Court of Appeals for Sixth Circuit*, 468 Mich 109, 116–117; 659 NW2d 597 (2003) (citations omitted). This Court previously justified its use of legislative history on the grounds that there is "uncertainty" over whether transgender people are protected due to "competing definitions of the term gender." *Rogers*, slip op at 7 n 7. But interpreting the plain language of a statute through contemporary dictionary definitions does not constitute textual ambiguity. See *In re Certified*

Question, 468 Mich at 113–117 (relying on a dictionary definition of "intentional" and rejecting the use of legislative history when the statutory text is clear); see also *Bostock*, 140 S Ct at 1749 (finding no ambiguity as to the application of Title VII's ban on sex discrimination to discrimination against someone because they are transgender). Nor do the Legislature's actions concerning "sexual orientation" support any inference about its undisclosed attitudes toward gender identity, a distinct and independent topic.

There are a number of "problems inherent in preferring judicial interpretation of legislative history to a plain reading of the unambiguous text." *People v Gardner*, 482 Mich 41, 57; 753 NW2d 78 (2008). One such problem is the possibility of positing two entirely different interpretations, each having "equal plausibility." *Id.* Here, for example, the legislature could have replaced "sexual orientation" with "gender" because that word was sufficiently broad to prohibit all forms gender-based intimidation, including intimidation directed at someone because of their sexual orientation.[5] Nothing about the plain language of the statute indicates an intent to carve out transgender people from the statute's express prohibition on intimidation on the basis of gender. Just as the *Bostock* Court

[5] The circuit court's reliance on pending bills to add "gender identification" to the statute should similarly be rejected as a basis for excluding transgender people from its coverage. See *Bostock*, 140 S Ct at 1747 (finding that "speculation about why a later Congress declined to adopt new legislation offers a 'particularly dangerous' basis on which to rest an interpretation of an existing law a different and earlier Congress did adopt" (citations omitted)).

refused to put legislative history ahead of a statute's plain language, so too should this Court avoid relying on legislative history here.

CONCLUSION

As the U.S. Supreme Court recognized in *Bostock*, discrimination because someone is transgender constitutes discrimination based on sex under Title VII. So too here. Properly construed under this Court's precedents and the plain language of the ethnic intimidation statute, intimidation or harassment of someone because they are transgender is necessarily based on their gender and can, as here, constitute a violation of that statute. For these reasons, the Court should reverse the decision below.

Respectfully submitted,[6]

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