

IN THE SUPREME COURT

On Appeal from the Michigan Court of Appeals
M. J. Kelly, PJ, and Borrello and Rick, JJ

JOSEPH KUILEMA,

Plaintiff-Appellant,

v

CALVIN UNIVERSITY,

Defendant-Appellee.

Supreme Court Docket No. _____

Court of Appeals Docket No. 367310

Kent County Circuit Court

Case No. 23-03561-CZ

Charissa C. Huang (P75501)
Kevin J. Cowan (P85674)
SMITH HAUGHEY RICE & ROEGGE
Attorneys for Plaintiff-Appellant
100 Monroe Center NW
Grand Rapids, MI 49503
(616) 774-8000
chuang@shrr.com
kcowan@shrr.com

Stephen J. van Stempvoort (P79828)
Jacob L. Carlton (P84859)
MILLER JOHNSON
Attorneys for Defendant-Appellee
45 Ottawa Ave. SW, Ste. 1100
Grand Rapids, MI 49503
(616) 831-1700
vanstempvoorts@millerjohnson.com
carltonj@millerjohnson.com

Lori H. Windham (D.C. Bar No. 501838)
Daniel L. Chen (D.C. Bar No. 1781783)
Pro Hac Vice
THE BECKET FUND FOR RELIGIOUS LIBERTY
Attorneys for Defendant-Appellee
1919 Pennsylvania Ave., NW, Ste. 400
Washington, DC 20006
(202) 955-0095
lwindham@becketlaw.org
dchen@becketlaw.org

APPENDIX OF EXHIBITS TO PLAINTIFF-APPELLANT
JOSEPH KUILEMA'S APPLICATION FOR LEAVE TO APPEAL

VOLUME B OF C
APPENDIX 5

INDEX OF APPENDICES

Volume	Appendix	Description	Page
B	5	Def. Calvin's Mtn. to Dismiss, Brief in Support, and Unopposed Mtn. to File Brief in Excess of 20 Pages	107 - 255

Date: August 22, 2025

By: /s/ Charissa C. Huang

Charissa C. Huang (P75501)

Kevin J. Cowan (P85674)

SMITH HAUGHEY RICE & ROEGGE

Attorneys for Plaintiff-Appellant

100 Monroe Center NW

Grand Rapids, MI 49503

616-774-8000 / 616-774-2461 (fax)

chuang@shrr.com

kcowan@shrr.com

[Index of Appendices 6 and 7 are continued in Volume C of the Appendix of Exhibits.]

APPENDIX 5

STATE OF MICHIGAN
IN THE KENT COUNTY CIRCUIT COURT

JOSEPH KUILEMA,

Plaintiff,

v

CALVIN UNIVERSITY,

Defendant.

Case No. 23-03561-CZ

Hon. Christina Elmore

Charissa C. Huang (P75501)
Lauren M. Ayoub (P85669)
SMITH HAUGHEY RICE & ROEGGE
Attorneys for Plaintiff
100 Monroe Center, NW
Grand Rapids, MI 49503
616.774.8000
chaung@shrr.com

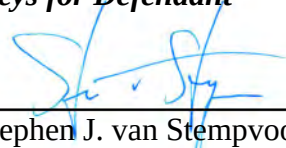
Stephen J. van Stempvoort (P79828)
Jacob L. Carlton (P84859)
MILLER JOHNSON
Attorneys for Defendant
45 Ottawa Avenue, SW - Suite 1100
Grand Rapids, MI 49503
616.831.1700
vanstempvoorts@millerjohnson.com
carltonj@millerjohnson.com

Calvin University's Motion to Dismiss Under MCR 2.116(C)(8)

In lieu of filing an answer, Defendant Calvin University moves pursuant to MCR 2.116(C)(8) to dismiss Plaintiff's complaint for failure to state a claim. This motion is supported by the accompanying brief.

MILLER JOHNSON
Attorneys for Defendant

Dated: May 26, 2023

By 

Stephen J. van Stempvoort (P79828)
Jacob L. Carlton (P84859)
45 Ottawa Avenue SW, Suite 1100
Grand Rapids, MI 49503
616.831.1700
vanstempvoorts@millerjohnson.com
carltonj@millerjohnson.com

STATE OF MICHIGAN
IN THE KENT COUNTY CIRCUIT COURT

JOSEPH KUILEMA,

Plaintiff,

v

CALVIN UNIVERSITY,

Defendant.

Case No. 23-03561-CZ

Hon. Christina Elmore

Charissa C. Huang (P75501)
Lauren M. Ayoub (P85669)
SMITH HAUGHEY RICE & ROEGGE
Attorneys for Plaintiff
100 Monroe Center, NW
Grand Rapids, MI 49503
616.774.8000
chaung@shrr.com

Stephen J. van Stempvoort (P79828)
Jacob L. Carlton (P84859)
MILLER JOHNSON
Attorneys for Defendant
45 Ottawa Avenue, SW - Suite 1100
Grand Rapids, MI 49503
616.831.1700
vanstempvoorts@millerjohnson.com
carltonj@millerjohnson.com

**Brief Supporting Calvin University's Motion to Dismiss
Under MCR 2.116(C)(8)**

Table of Contents

	<u>Page</u>
Index of Authorities	iii
Introduction.....	1
Factual Background	2
A. Calvin is founded by the Christian Reformed Church for the purpose of teaching students in accordance with the doctrinal standards of the denomination.	3
B. Mr. Kuilema begins teaching at Calvin and instructs his students in religious matters—but adopts a Biblical interpretation that is opposite to the interpretation adopted by the CRC and Calvin.	4
C. Mr. Kuilema is denied tenure in 2018.	5
D. Mr. Kuilema fails to be reappointed to a two-year-term after the PSC determines that he did not appropriately consult with university leadership.	6
E. The Board upholds the PSC’s decision.....	7
F. Mr. Kuilema files suit, alleging two claims under ELCRA.....	8
Legal Argument	8
I. Standard of Review.....	8
II. Mr. Kuilema’s ELCRA claims fail as a matter of law.....	9
A. Any claims pertaining to conduct predating April 14, 2020 are time-barred.	9
B. Mr. Kuilema’s associational discrimination claim fails because he has not alleged that he was discriminated against because of his sex.	9
1. Under <i>Rouch World</i> , an employer discriminates on the basis of “sex” only if it would have treated an employee of a different sex differently.....	9
2. Mr. Kuilema does not allege that he was treated differently because of his sex.....	11

C.	The complaint fails to state a claim for retaliation.	14
1.	Disagreements over curriculum do not violate ELCRA.	15
2.	The alleged questioning of a Calvin employee does not give rise to a retaliation claim.	16
III.	Mr. Kuilema’s claims are barred by the First Amendment.	19
A.	The ministerial exception bars claims asserted against religious institutions by employees who are entrusted with teaching students.	19
B.	Mr. Kuilema’s claims are barred by the ecclesiastical abstention (or church autonomy) doctrine.	24
	Conclusion	27

Index of Authorities

	<u>Page(s)</u>
Cases	
<i>Adams v Indiana Wesleyan Univ,</i> No. 3:09-CV-468, 2010 WL 2803077 (ND Ind, July 15, 2010)	22
<i>Barrett v Kirtland Cmty Coll,</i> 245 Mich App 306; 628 NW2d 63 (2001).....	17, 18
<i>Booker v Brown & Williamson Tobacco Co, Inc,</i> 879 F2d 1304 (CA6, 1989)	18
<i>Bostock v Clayton Cnty,</i> 140 S Ct 1731 (2020).....	10, 11, 12, 13
<i>Boy Scouts of Am v Dale,</i> 530 US 640 (2000).....	24
<i>Bryant v Automatic Data Processing, Inc,</i> 151 Mich App 424; 390 NW2d 732 (1986).....	12, 13
<i>Bryce v Episcopal Church in the Diocese of Colorado,</i> 289 F3d 648 (CA10, 2002)	25
<i>Christian Legal Soc’y v Walker,</i> 453 F3d 853 (CA7, 2006)	24
<i>Clark Cty Sch Dist v Breeden,</i> 532 US 268 (2001).....	17
<i>Conlon v InterVarsity Christian Fellowship,</i> 777 F3d 829 (CA6, 2015)	19
<i>Corp of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v Amos,</i> 483 US 327 (1987).....	24
<i>Demkovich v St Andrew the Apostle Parish,</i> 3 F4th 968 (CA7, 2021)	25, 26
<i>Eason v Coggins Mem’l Christian Methodist Episcopal Church,</i> 210 Mich App 261 (1993).....	8
<i>El-Khalil v Oakwood Healthcare, Inc,</i> 504 Mich 152; 934 NW2d 665 (2019).....	2, 3

<i>Fratello v Archdiocese of NY</i> , 863 F3d 190 (CA2, 2017)	20
<i>Frith v Whole Foods Mkt, Inc</i> , 38 F4th 263 (CA 1, 2022)	11, 12, 13
<i>Garg v Macomb Cty Cmty Mental Health Servs</i> , 472 Mich 263; 696 NW2d 646 (2005).....	9, 17
<i>Graham v Ford</i> , 237 Mich App 670; 604 NW2d 713 (1999).....	13
<i>Grussgott v Milwaukee Jewish Day Sch, Inc</i> , 882 F3d 655 (CA7, 2018)	20
<i>Higbee v E Michigan Univ</i> , No. 18-13761, 2019 WL 2502733 (ED Mich, June 17, 2019)	15
<i>Hosanna-Tabor Evangelical Lutheran Church & Sch v EEOC</i> , 565 US 171 (2012).....	20, 24
<i>Maiden v Rozwood</i> , 461 Mich 109; 597 NW2d 817 (1999).....	8
<i>Monteiro v Tempe Union High Sch Dist</i> , 158 F3d 1022 (CA9, 1998)	16
<i>Montell v Diversified Clinical Servs, Inc</i> , 757 F3d 497 (CA6, 2014)	17
<i>Our Lady of Guadalupe Sch v Morrissey-Berru</i> , 140 S Ct 2049 (2020).....	2, 19, 20, 21, 22, 24, 26
<i>Pena v Ingham Cnty Rd Comm’n</i> , 255 Mich App 299; 660 NW2d 351 (2003).....	18
<i>Phillips v UAW Int’l</i> , 854 F3d 323 (CA6, 2017)	18
<i>Radtke v Everett</i> , 442 Mich 368; 501 NW2d 155 (1993).....	9, 18
<i>Rehfield v Diocese of Joliet</i> , 182 NE3d 123 (Ill, 2021)	19
<i>Reynolds v Fed Exp Corp</i> , 544 F App’x 611 (CA6, 2013).....	17

<i>Rouch World, LLC v Dept of Civil Rights,</i> 510 Mich 398 (2022)	9, 10, 11, 12, 13, 14
<i>Smith v Calvary Christian Church,</i> 462 Mich 679; 614 NW2d 590 (2000).....	26
<i>Starkey v Roman Cath Archdiocese of Indianapolis, Inc,</i> 41 F4th 931 (CA7, 2022)	23
<i>Stately v Indian Cmty Sch of Milwaukee, Inc,</i> 351 F Supp 2d 858 (ED Wis, 2004).....	22
<i>Strothers v City of Laurel,</i> 118 F Supp 3d 852 (D Md, 2015)	16
<i>Thomas v Rev Bd of Indiana Emp Sec Div,</i> 450 US 707 (1981).....	26
<i>Tomic v Cath Diocese of Peoria,</i> 442 F3d 1036 (CA7, 2006)	22
<i>Weishuhn v Cath Diocese of Lansing,</i> 279 Mich App 150; 756 NW2d 483 (2008).....	19, 22
<i>Weishuhn v Lansing Cath Diocese (“Weishuhn II”),</i> 287 Mich App 211; 787 NW2d 513 (2010).....	23
<i>Winkler v Marist Fathers of Detroit, Inc,</i> 500 Mich 327; 901 NW2d 566 (2017).....	24, 26
<i>Yin v Columbia Int’l Univ,</i> 335 F Supp 3d 803 (DSC 2018).....	20
Statutes	
42 USC § 12112(b)(4)	14
MCL 37.2202(1)(a).....	9
MCL 37.2402	15
MCL 37.2701(a)	14
Other Authorities	
MCR 2.113(C)	3
MCR 2.116(C)(8).....	2, 3, 8

Introduction

This is an unusual complaint. Instead of arguing that he suffered discrimination based on his own protected characteristics, Joseph Kuilema, a former professor at Calvin University (“Calvin”), alleges that Calvin failed to renew his contract because Mr. Kuilema engaged in advocacy on behalf of other people. But an advocacy-based “associational discrimination” claim is not cognizable under ELCRA. Although Mr. Kuilema asserts that his claim proceeds under ELCRA’s prohibition of discrimination on the basis of “sex,” Mr. Kuilema does not allege that his sex made any difference to whether he was terminated from his position. That is a fatal defect.

Mr. Kuilema’s retaliation claim is similarly flawed. First, he asserts that he suffered retaliation for disagreeing with some of his fellow professors over whether they should have shown a particular film to some of their students. But disputes over curriculum—which would require this Court to adjudicate the relative pedagogical merits of each position—are not grounds for an employment discrimination claim. Second, Mr. Kuilema asserts that he suffered retaliation for disapproving of Calvin’s decision to question another of Calvin’s employees about whether that employee had engaged in conduct that violated Calvin’s policies. But Mr. Kuilema did not assert that disapproval until he appealed Calvin’s determination to non-renew him—that is, until after the decision had already been made. And in any event, an employer’s decision to investigate a potential violation of its policies does not create an objectively hostile work environment, as is required to support Mr. Kuilema’s retaliation claim. The complaint therefore fails to assert a claim that is viable under ELCRA.

Moreover, Mr. Kuilema’s complaint would pose serious constitutional problems if it were allowed to proceed. Calvin is a religious university, and Mr. Kuilema was also a religious leader in the affiliated church. Mr. Kuilema alleges that his teaching contract at Calvin was non-

renewed because he officiated a marriage ceremony, and he invites the Court to judge whether that ceremony was contrary to the religious doctrines of Calvin and its affiliated denomination, the Christian Reformed Church (“CRC”).

The First Amendment precludes this Court from wading into this theological thicket. As the Supreme Court has held, “[w]hen a school with a religious mission entrusts a teacher with the responsibility of educating and forming students in the faith,” the First Amendment bars employment claims against the school by its teachers. *Our Lady of Guadalupe Sch v Morrissey-Berru*, 140 S Ct 2049, 2069 (2020). As evidenced by Mr. Kuilema’s complaint, that is the case here: Calvin entrusted him to teach students from a Christian perspective and to integrate his faith into every aspect of his teaching.

Moreover, “[t]he First Amendment protects the right of religious institutions ‘to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.’” *Id.* at 2055 (citation omitted). Mr. Kuilema’s complaint asks this Court to rule on matters of church government, faith, and doctrine, seeking determinations on whether Calvin properly applied the doctrines of the Christian Reformed Church and, ultimately, whether the University can apply its religious teachings when reappointing a leader at a local church to a teaching position in the midst of an ongoing disagreement over church doctrine. On his own allegations, Mr. Kuilema’s claims are barred by the First Amendment.

In short, Mr. Kuilema is not the appropriate plaintiff, because he has not alleged a viable claim under ELCRA. And Calvin is not an appropriate defendant, because the First Amendment bars Mr. Kuilema’s claims, anyway. The complaint should be dismissed.

Factual Background

As required for purposes of a motion under MCR 2.116(C)(8), the facts alleged in the complaint are treated as if they are true. *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152,

159-60; 934 NW2d 665 (2019). The following statement of facts also relies on the documents attached to the complaint. See *id.* at 163 (“[T]he trial court could properly consider the e-mails [attached to the complaint] under MCR 2.116(C)(8) because they were part of the pleadings. MCR 2.113(C).”). Nothing in this brief should be construed as an admission to any of the allegations in the complaint.

A. Calvin is founded by the Christian Reformed Church for the purpose of teaching students in accordance with the doctrinal standards of the denomination.

Calvin was founded by the CRC and educates students through providing courses “which are of a positively Reformed character entirely in accord with the doctrinal standards of the Christian Reformed Church in North America.” (Ex. A, Complaint, ¶ 10). Calvin’s purpose is to “enrich the education experiences of its students by offering exposure to a variety of disciplines, all from a distinctly Reformed perspective.” (Ex. A, Complaint, ¶ 11).

As the denominational school of the CRC, Calvin is uniquely tied to the CRC. Every member of Calvin’s board of trustees is appointed by the governing body of the CRC, which is known as “Synod.” (Ex. A, Complaint Exhibit 1, Art. VII). Calvin’s articles of incorporation also may not be amended without Synod’s approval. (Ex. A, Complaint Exhibit 1, Art. VI).

Because Calvin must be operated in a manner that is consistent with the CRC’s doctrinal standards, Calvin has developed resources for its professors to guide circumstances in which they disagree with the CRC’s stated position on a particular religious or theological topic. (Ex. A, Complaint Exhibit 2, at 2). In part, Calvin requires an “appropriate tone and strategy” on such occasions—“a strategy that begins by consulting with those in authority, and a tone of humility that cares enough about the confessions to raise difficult issues and, at the same time, ***is willing to submit to the judgment of the church.***” (Ex. A, Complaint Exhibit 2, at 2 (emphasis added)).

B. Mr. Kuilema begins teaching at Calvin and instructs his students in religious matters—but adopts a Biblical interpretation that is opposite to the interpretation adopted by the CRC and Calvin.

In 2008, Mr. Kuilema began teaching as a social work professor at Calvin. (Ex. A, Complaint, ¶ 9). As a professor, Mr. Kuilema’s responsibilities included “teaching courses from a Reformed Christian perspective[.]” (Ex. A, Complaint, ¶ 17). Although he alleges that he did not engage in specific religious rituals or practices with his students, he alleges that he “used . . . his courses to teach students about different faiths and belief systems.” (Ex. A, Complaint, ¶ 20).

As noted in the materials attached to the complaint, Mr. Kuilema stated that the religious creeds and confessions of the Reformed tradition “guide [his] work and life.” (Ex. A, Complaint, Exhibit 5, at 2). His colleagues observed that “Joe is relentless in his integration of faith and his profession in every way” and that “[h]is defense of his views is always expressed in terms of his serious and heartfelt commitment to Reformed theology.” (Ex. A, Complaint, Exhibit 5, at 2-3). His students, likewise, “emphasize how consistently faith is embedded in his classes, remarking for example, that ‘Christian themes were intertwined with every topic that was discussed’ and ‘He has a justice-oriented Christian perspective that we need more of.’” (Ex. A, Complaint, Exhibit 5, at 3). Alumni, too, have pointed “to the formative role [Mr. Kuilema] played in their lives both inside and outside of the classroom. In one instance, a student was brought back to the faith while taking a class with him.” (Ex. A, Complaint, Exhibit 5, at 3).

According to his complaint, Mr. Kuilema also “addressed the CRC’s perspective on certain issues” in his position at Calvin. (Ex. A, Complaint, ¶ 29). Although the complaint alleges that he “did not *teach* the CRC’s perspective in a way which furthered its influence on students,” it nevertheless admits that Mr. Kuilema taught about the CRC’s perspective on various issues. (Ex. A, Complaint, ¶ 29).

In several respects, Mr. Kuilema actively opposed the doctrine of the CRC and Calvin. For instance, he “adamantly voiced his opinions in opposition to the CRC’s position on same-sex marriage.” (Ex. A, Complaint, ¶ 54). Mr. Kuilema was also “bluntly honest and vocal with his students ... whenever he disagreed with the CRC’s position, particularly in regard to its positions regarding LGBTQ+ persons.” (Ex. A, Complaint, ¶ 29). Mr. Kuilema also drafted an article that “was an unequivocal denouncement of [the CRC’s], and inherently Calvin’s, practiced treatment of persons belonging to and associated with the LGBTQ+ community.” (Ex. A, Complaint, ¶ 31).

C. Mr. Kuilema is denied tenure in 2018.

In 2017, Mr. Kuilema applied for tenure, but his application was denied by Calvin’s Board of Trustees the following spring. (Ex. A, Complaint, ¶ 46). As explained in the Board’s letter communicating its decision, the Board determined that its decision was due to Mr. Kuilema’s “communication tone and strategy,” cataloguing a list of incidents that made the Board hesitant about approving tenure. (Ex. A, Complaint Exhibit 2, at 2). The Board informed Mr. Kuilema that it needed more evidence that he would work “within college policies and procedures in the manner expected of faculty members” as well as more evidence that Mr. Kuilema’s communications would “serve to strengthen the college and the broader Christian community in constructive and transparent ways.” (Ex. A, Complaint Exhibit 2, at 3).

Instead of granting tenure, Calvin reappointed Mr. Kuilema to a two-year term. (Ex. A, Complaint, ¶ 64). According to the complaint, the Board’s determination “was based on the CRC’s interpretation of scripture” regarding same-sex relationships. (Ex. A, Complaint, ¶ 49).

D. Mr. Kuilema fails to be reappointed to a two-year-term after the PSC determines that he did not appropriately consult with university leadership.

In October 2021, Mr. Kuilema officiated a wedding of two individuals who both identified as female at the time of the wedding. (Ex. A, Complaint, ¶¶ 66, 72). One of the individuals was a Calvin employee at the time of the wedding. (Ex. A, Complaint, ¶ 67).

Before officiating the wedding, Mr. Kuilema consulted with the pastor of his local church, the leadership of his local church congregation, and the chair of Calvin's Department of Sociology and Social Work. (Ex. A, Complaint, ¶ 69). Despite being previously instructed to consult with university administration regarding his disagreements with the CRC's position, Kuilema did not consult with Calvin's dean, provost, or president about his decision to officiate the same-sex wedding of a Calvin employee. (Ex. A, Complaint, ¶ 95).

Nor did Mr. Kuilema inform Calvin's administration that he had officiated the wedding. Calvin's administration did not learn about Mr. Kuilema's conduct until almost two months later, when, in December 2021, Calvin's provost, Noah Toly, received photographs indicating that Mr. Kuilema had officiated the wedding. (Ex. A, Complaint, ¶ 73).

Provost Toly asked Mr. Kuilema to explain the context for his decision, which Mr. Toly observed was "contrary to the official position of the university and the Christian Reformed Church." (Ex. A, Complaint, Exhibit 3, at 2). Mr. Toly also informed Calvin's Professional Status Committee ("PSC") about Mr. Kuilema's actions in order to aid them in their decision about whether Mr. Kuilema should be reappointed to another two-year term of employment. (Ex. A, Complaint, ¶ 76 & Exhibit 3).

Mr. Kuilema confirmed that he officiated the wedding and provided an explanation of his rationale for doing so. (Ex. A, Complaint, Exhibit 5, at 1). The PSC reviewed "relevant Synodical documents" and obtained input from the leadership of Mr. Kuilema's local church, as

well as the denomination. (Ex. A, Complaint, Exhibit 5, at 1). The Dean of Calvin’s School of Humanities, Arts, and Social Sciences expressed concern over Mr. Kuilema’s failure to consult with his dean, the provost, or the president before engaging in activity that contradicted the CRC’s stated policies and positions. (Ex. A, Complaint, Exhibit 5, at 2). Of particular concern was Mr. Kuilema’s admission that, even if the Dean had counseled him not to officiate the wedding, “he would have done it anyway” because he felt that the request to officiate was “a test from God and that as a matter of personal integrity he had to accept.” (Ex. A, Complaint, Exhibit 5, at 4).

The PSC ultimately concluded that Mr. Kuilema’s conduct did not meet “the high standard for consultation set for all faculty, or those communicated specifically to him by the Board and Provost Brandsen in 2018.” (Ex. A, Complaint, Exhibit 6). As the PSC explained, it “was troubled by Prof. Kuilema’s lack of transparency with the university” before deciding to officiate the wedding. (Ex. A, Complaint, Exhibit 6). The PSC believed that “such a decision should have been made with more forthright communication and consultation with Calvin administrative leadership, including Prof. Kuilema’s Dean and Provost.” (Ex. A, Complaint, Exhibit 6). The PSC was also “troubled by a lack of adherence to the commitments Prof. Kuilema made as a Calvin faculty member to live within institutional guidelines, noting that many other faculty who would like to see institutional and denomination change around LGBTQ+ affirmation shape their advocacy within the bounds of these expectations and guidelines.” (Ex. A, Complaint, Exhibit 6). The PSC recommended against reappointment for the fall of 2022. (Ex. A, Complaint, ¶ 94).

E. The Board upholds the PSC’s decision.

Mr. Kuilema appealed the PSC’s decision in April 2022, but Calvin’s Board of Trustees denied the appeal. (Ex. A, Complaint, ¶ 96). Mr. Kuilema’s employment with Calvin ended in August 2022. (Ex. A, Complaint, Exhibit 4).

Meanwhile, the governing body of the CRC, Synod, determined during the summer of 2022 that the CRC's views on same-sex relationships have "confessional status" within the denomination. (Complaint, ¶ 105). As the complaint alleges, a religious teaching that has confessional status "binds . . . professors at denominational schools, like Calvin" and requires those teachings "to be upheld by professors at denominational schools." (Complaint, ¶¶ 106-107).

F. Mr. Kuilema files suit, alleging two claims under ELCRA.

Mr. Kuilema (who is now a faculty member at Grand Valley State University) subsequently filed this lawsuit. His complaint asserts two claims under ELCRA: (1) a claim for "associational discrimination," and (2) a claim for retaliation. (Complaint, ¶¶ 115-148). Among other allegations, the complaint asserts that Mr. Kuilema's decision to officiate the wedding was not actually contrary to CRC doctrine and that Calvin was "mistaken" for believing that Mr. Kuilema's conduct fell outside the bounds of the CRC's religious position. (Complaint, ¶¶ 88, 93, 99, 113).

Calvin files this motion in lieu of an answer under MCR 2.116(C)(8).

Legal Argument

I. Standard of Review

A defendant is entitled to summary disposition of a claim "if the opposing party has failed to state a claim on which relief may be granted." MCR 2.116(C)(8). A motion under MCR 2.116(C)(8) tests the legal basis of the complaint on the pleadings alone. *Maiden v Rozwood*, 461 Mich 109; 597 NW2d 817 (1999). For purposes of such a motion, "[a]ll well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant." *Id.* at 119. "However, mere conclusions, unsupported by allegations of fact, will not suffice to state a cause of action." *Eason v Coggins Mem'l Christian Methodist Episcopal Church*, 210 Mich App 261, 263 (1993).

II. Mr. Kuilema's ELCRA claims fail as a matter of law.

A. Any claims pertaining to conduct predating April 14, 2020 are time-barred.

As an initial point, the statute of limitations for ELCRA claims is three years. *Garg v Macomb Cty Cmty Mental Health Servs*, 472 Mich 263, 281-82; 696 NW2d 646 (2005). There is no continuing-violations theory under ELCRA. *Id.* at 282. Thus, although the complaint makes several assertions pertaining to the denial of Mr. Kuilema's tenure in 2018, any claim arising from those allegations is time-barred.

B. Mr. Kuilema's associational discrimination claim fails because he has not alleged that he was discriminated against because of his sex.

Count I asserts that Calvin improperly discriminated against Mr. Kuilema "because of . . . sex." MCL 37.2202(1)(a). Mr. Kuilema, however, does not allege that he was discriminated against because of his sex; he alleges only that he was terminated due to his association with and advocacy for individuals who identified as LGBTQ+. That claim—for alleged "associational discrimination"—is not cognizable under ELCRA.

1. Under *Rouch World*, an employer discriminates on the basis of "sex" only if it would have treated an employee of a different sex differently.

"[T]he essence of a sex discrimination civil rights suit is that similarly situated people have been treated differently because of their sex." *Radtko v Everett*, 442 Mich 368, 379; 501 NW2d 155 (1993). As the Michigan Supreme Court recently explained in *Rouch World, LLC v Dept of Civil Rights*, 510 Mich 398 (2022), ELCRA's prohibition of discrimination "because of . . . sex" requires a demonstration that "the discriminatory action would not have occurred **but for the sex of the complainant.**" *Id.* at 420 (emphasis added).

In *Rouch World*, for example, a company denied a woman's request to provide services for her wedding with another woman. *Id.* 424. As the court explained, the key to determining whether there was an ELCRA violation was whether it would have made a difference

if the complainant's sex had been different. In the case before it, the company would have hosted the wedding "[h]ad [the female complainant] instead been a male." *Id.* Because the reason for the company's decision to deny its services turned on the fact that the complainant was a female instead of a male, the court concluded that there was an ELCRA violation: "[B]ut for [the complainant's] sex, Rouch World would have rendered its services to [the complainant]." *Id.*

In reaching this conclusion, *Rouch World* adopted the same analysis that was employed by the United States Supreme Court in *Bostock v Clayton Cnty*, 140 S Ct 1731 (2020). See *Rouch World*, 510 Mich at 421–22 ("[W]e find that *Bostock* offers a straightforward analysis of the plain meaning of analogous statutory language and we agree with its reasoning."). In *Bostock*, the court was tasked with determining the meaning of Title VII, which prohibits employers from taking certain actions because of "sex." The *Bostock* court explained that—just like ELCRA—Title VII employs a but-for standard of causation. *Bostock*, 140 S Ct at 1739. As the *Bostock* court pointed out, "a but-for test directs us to change one thing at a time and see if the outcome changes. If it does, we have found a but-for cause." *Id.*

Applying this but-for standard in order to determine whether someone has suffered discrimination because of their "sex," *Bostock* explained that liability under the statute turns upon whether the employer would have taken different action if the plaintiff's sex had been different. For example, if a woman is terminated for marrying a woman even though a man would not be terminated for marrying a woman, then the woman has suffered discrimination because of her "sex." *Bostock*, 140 S Ct at 1741–42. After all, she would not have been terminated if she was biologically a man instead of a woman. Thus, her "sex" is the but-for cause of her termination. *Id.*

Rouch World explicitly adopted *Bostock*'s reasoning. See *Rouch World*, 510 Mich at 421. For purposes of determining whether a plaintiff was discriminated against because of "sex,"

Michigan courts employ the same “swap test” that was employed in *Bostock*. If changing the sex of the plaintiff would result in a different employment action, then “sex” is the but-for cause of the employer’s conduct. *Id.* at 424. On the other hand, if changing the sex of the plaintiff has no effect on the employer’s decision, then the plaintiff has not suffered discrimination because of “sex.” *Bostock*, 140 S Ct at 1739.

2. Mr. Kuilema does not allege that he was treated differently because of his sex.

Mr. Kuilema does not allege that his sex was a but-for cause of his termination because he does not allege that Calvin would have taken a different course of action if Mr. Kuilema was a different sex. Mr. Kuilema alleges only that he was terminated for associating with LGBTQ+ individuals. He fails to allege that Calvin would not have terminated him if he was not male.

Although Mr. Kuilema asserts that ELCRA allows him to state a claim for “associational discrimination” regardless of the fact that his sex was not a but-for cause of Calvin’s action, Mr. Kuilema is incorrect. As *Rouch World* explains, ELCRA imposes a but-for causation standard and extends only to employees who would not have suffered discrimination but for their sex. See *Rouch World*, 510 Mich at 420 (ELCRA requires but-for causation). Under *Rouch World*’s explication of ELCRA, the statute does not extend to employees who associate with other individuals but who would have suffered the same employment action, regardless of their own sex.

The federal courts have already made this point when explicating the implications of *Bostock*. For example, in *Frith v Whole Foods Mkt, Inc*, 38 F4th 263 (CA 1, 2022), plaintiffs who were non-black asserted racial discrimination claims against their employer when they were prohibited from wearing face masks supporting the Black Lives Matter movement. *Id.* at 267. Although the plaintiffs argued that they could assert “associational discrimination” claims because they suffered discrimination because of their advocacy for persons of a specific race, the court

ruled that the claim was not cognizable under Title VII, due to *Bostock*. *Id.* at 271. Under *Bostock*, “the proper focus is on the protected characteristic of the individual plaintiff. In other words, to constitute unlawful racial discrimination under Title VII, an employment action must have been taken ‘because of’ the race of the individual plaintiff.” *Frith*, 38 F4th at 271.

As *Frith* pointed out, a plaintiff fails to state a claim for employment discrimination by alleging that she suffered discrimination because of her advocacy on behalf of someone else who is in a protected class: “Title VII’s language, as discussed in *Bostock*, forecloses such a theory, which essentially replaces the textual ‘because of such individual’s race’ with the atextual ‘because of such individual’s advocacy for protected individuals.’” *Id.* at 272. The same result is required under *Rouch World*, which adopted *Bostock*’s analysis. Mr. Kuilema cannot assert a claim for associational discrimination based on his advocacy efforts because he has not alleged that his own sex was a but-for cause of the employer’s conduct.

Nor do the Michigan cases upon which Mr. Kuilema relies allow employees to claim that they suffered discrimination without alleging but-for causation with respect to their own protected characteristics.

For example, in *Bryant v Automatic Data Processing, Inc*, 151 Mich App 424; 390 NW2d 732 (1986), the Michigan Court of Appeals determined that discrimination against interracial marriage violated ELCRA because it necessarily was motivated in part by the race of the plaintiff. *Id.* at 430. The plaintiff in *Bryant* was a white woman who was married to a black man. *Id.* at 426. As *Bryant* pointed out, the plaintiff’s race was a but-for cause of the employer’s improper discrimination, because the discrimination arose only because the plaintiff was white and her spouse was black. The plaintiff would not have suffered this type of discrimination if the plaintiff had been a black woman married to a black man. *Id.* at 430 (“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 the spouse is a motivating factor."). As *Frith* explained, "Where a plaintiff claims discrimination based upon an interracial marriage or association, he alleges, by definition, that he has been discriminated against because of his race." *Frith*, 38 F4th at 272. Mr. Kuilema, however, asserts no such claim.

Similarly, in *Graham v Ford*, 237 Mich App 670; 604 NW2d 713 (1999), the plaintiffs alleged that their own race was a but-for cause of the employer's illegal discrimination. The plaintiffs, who were black, alleged that their employer, among other discriminatory acts, "regarded the black plaintiffs unfavorably because of their working relationships with white corrections employees[,]” including by calling employees “Uncle Tom” and by informing the employees that they could do a “far better job portraying their race.” *Id.* at 678-80. In other words, the employer viewed the plaintiffs as acting inconsistently with their own race. Thus, *Graham* involved the same type of scenario as in *Bryant*, where the plaintiffs' own race was a but-for cause of the discrimination that they experienced.

Both *Bryant* and *Graham* are consistent with the swap test imposed under *Rouch World*. In both cases, the plaintiffs claimed that they would not have suffered an adverse employment action but for their own race. Substituting the plaintiffs' race in those cases for a different hypothetical race would have led to a different employment action, just as substituting the plaintiff's sex in *Bostock* and *Rouch World* would have led to a different action. Neither *Bryant* nor *Graham* announced a broader principle that allows an employee to appropriate discrimination claims that belong to someone else simply by claiming that they are “associated” with them. See *Frith*, 38 F4th at 272 (explaining the difference).

When a statutory regime prohibits associational discrimination, it will explicitly say so. The Americans with Disabilities Act, for example, prohibits discrimination on the basis of “the known disability of an individual with whom the qualified individual is known to have **a relationship or association.**” 42 USC § 12112(b)(4). ELCRA contains no such provision and prohibits no such thing.

Mr. Kuilema’s assertion of an “associational discrimination” claim seeks to expand ELCRA well beyond its text, transforming it from a statute that precludes discrimination on the basis of certain immutable characteristics into a statute that precludes discrimination on the basis of differing viewpoints. ELCRA does not extend that far. Instead, the Court must look to the sex of the plaintiff to determine whether a statutory violation has occurred. *Rouch World*, 510 Mich at 540. Because Count One does not allege that Mr. Kuilema was treated differently because of his sex, it fails to state a claim.

C. The complaint fails to state a claim for retaliation.

Count Two suffers the same fate as Count One. MCL 37.2701(a) contains two clauses prohibiting retaliation: the opposition clause, which prohibits retaliation against someone who “opposed a violation of this act,” and the participation clause, which prohibits retaliation against someone who “made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing under this act.” *Id.* Mr. Kuilema’s retaliation claim proceeds only under the opposition clause, asserting that he was retaliated against for two reasons: (1) he opposed his fellow faculty members’ decision to show a particular film, *How Jack Became Black*, to students; and (2) he stated concerns about the PSC’s decision to ask one of the participants in the relevant wedding whether the wedding had occurred. Those allegations do not suffice to state a claim for retaliation.

1. Disagreements over curriculum do not violate ELCRA.

First, Mr. Kuilema alleges that he opposed some of his fellow faculty members' decision to show a film entitled *How Jack Became Black* because, in Mr. Kuilema's view, it perpetuated harmful stereotypes. (**Ex. A**, Complaint, ¶ 78). But Mr. Kuilema cannot manufacture a retaliation claim out of a curriculum dispute between him and his colleagues.

The complaint seems to assert that Mr. Kuilema opposed a violation of MCL § 37.2402, which prohibits an educational institution from discriminating against a student with respect to admission or utilization of the school's services. *Id.* But § 37.2402 says nothing about disputes over curriculum choices, especially curriculum that does not have identifiable effects on particularized students. Instead, § 37.2402 is implicated only when a particular student suffers an "adverse action" as a result of discrimination—that is, an action in the educational context that is comparable to "termination, demotion, salary cut, change to a lesser job title, or a significant loss of benefits" in the employment context. *Pruitt v Michigan State Univ*, unpublished per curiam opinion of the Court of Appeals, issued April 28, 2011 (Docket No. 295957), 2011 WL 1600499, at *4 (attached as **Exhibit B**). In the educational context, that would likely require a student to be denied admission to a program, to receive a failing course grade, or the like. There is no such allegation here.

Nor does it suffice for Mr. Kuilema to allege that he was opposing a general climate of institutional racism. Generally "opposing institutional racist practices" fails to implicate the statute "because there is no indication that these alleged practices deny individuals the full utilization of or benefit from the institution." *Higbee v E Michigan Univ*, No. 18-13761, 2019 WL 2502733, at *3 (ED Mich, June 17, 2019) (attached as **Exhibit C**) (granting motion to dismiss professor's ELCRA retaliation claim for being disciplined for opposing a university's allegedly racist punishment of students).

Instead, Mr. Kuilema has alleged only that he disagreed with some of his fellow faculty members about whether to show one particular film to a class instead of showing a different one. It is not grounds for a retaliation claim for one teacher to disagree with another about whether to have their students listen to a speech by the Dalai Llama or to read an uncensored copy of *Huckleberry Finn* or to engage with any number of cultural artifacts that might trouble or disrupt preconceived notions of power or community: “[A]llegations that a school required that a book be read, and then refused to remove it from the curriculum, fail[] to provide the basis for a claim of discrimination under the Equal Protection Clause or Title VI, even when the school district is also accused of a failure to take steps to remedy a hostile racial environment. It is simply not the role of courts to serve as literary censors or to make judgments as to whether reading particular books does students more harm than good.” *Monteiro v Tempe Union High Sch Dist*, 158 F3d 1022, 1032 (CA9, 1998) (dismissing student’s claim under Title VI for being forced to read *Huckleberry Finn*). See also *Strothers v City of Laurel*, 118 F Supp 3d 852, 865 (D Md, 2015) (dismissing claim alleging that supervisor created hostile work environment by airing a racially charged, “upsetting,” and “offensive” film).

Mr. Kuilema is asking for discrimination laws to be wielded in order to police curriculum debates. That is the function of neither ELCRA nor the courts.

2. The alleged questioning of a Calvin employee does not give rise to a retaliation claim.

Mr. Kuilema also argues that he suffered retaliation because he opposed the fact that Calvin interviewed one of its employees who was a participant in the wedding. (Ex. A, Complaint, ¶ 131-138). There are several flaws in this argument.

First, Mr. Kuilema’s allegations have timing issues. According to Mr. Kuilema, he opposed Calvin’s conduct “in his appeal to his denial of tenure.” (Ex. A, Complaint, ¶ 135). He

was denied tenure in 2018. (**Ex. A**, Complaint Exhibit 2). If Mr. Kuilema is alleging that his opposition occurred in 2018, then his claim is time-barred. See *Garg*, 472 Mich at 281-82.

On the other hand, if Mr. Kuilema is alleging that his opposition occurred when he appealed the PSC's decision in 2022 not to renew his appointment, then his opposition did not occur until after the non-renewal decision had already been made. That is a problem, too, because a plaintiff alleging retaliation cannot show that his or her protected activity caused the adverse employment action if that activity did not occur before the employment action. See *Barrett v Kirtland Cnty Coll*, 245 Mich App 306, 315-317; 628 NW2d 63 (2001) (employee's discrimination complaint could not have been a factor in the decision not to renew the employee's contract when employer circulated a memo recommending terminating the employee six days before the discrimination complaint was filed), *superseded on other grounds by Moldanado v Ford*, 476 Mich 372; 719 NW2d 809 (2006); *Reynolds v Fed Exp Corp*, 544 F App'x 611, 615 (CA6, 2013) (employee could not establish causation because employer "undisputedly contemplated firing the plaintiffs and conducted most of his investigation into their absenteeism *before* hearing the complaint of discrimination." (emphasis in original)). Mr. Kuilema cannot predicate a retaliation claim on alleged opposition conduct that occurred only after the termination decision had already been made. See *Clark Cty Sch Dist v Breeden*, 532 US 268, 272 (2001) ("[e]mployers need not suspend previously planned" actions due to protected activity, "and their proceeding along lines previously contemplated, though not yet definitively determined, is no evidence whatever of causality"); *Montell v Diversified Clinical Servs, Inc*, 757 F3d 497, 507 (CA6, 2014) ("[E]mployees who see the proverbial writing on the wall that they are about to be fired should not be able to use Title VII protections to insulate themselves from adverse employment actions that were previously contemplated.").

Even assuming that Mr. Kuilema's claim surmounts these timing hurdles, it fails to identify an unlawful employment practice that he purportedly was opposing. Although Mr. Kuilema's complaint contends that Calvin subjected an employee to a hostile work environment by questioning her about the wedding that Mr. Kuilema officiated, "whether a hostile work environment exists should be determined by an objective reasonableness standard, not by the subjective perceptions of a plaintiff." *Radtke*, 442 Mich at 388. Moreover, there is "a relatively high bar for what amounts to actionable discriminatory conduct under a hostile work environment theory." *Phillips v UAW Int'l*, 854 F3d 323, 328 (CA6, 2017); see *id.* at 327 n.3 (noting that ELCRA and Title VII's elements are "substantially the same"). A single act rarely establishes a hostile work environment, unless it is an "extremely traumatic experience" such as rape or sexual assault. *Radtke*, 442 Mich at 395.

Here, the complaint simply alleges that, on one occasion, Calvin "questioned" and "investigated" the employee who was involved in the wedding. (Ex. A, Complaint, ¶¶ 86, 131). An investigation does not create an objectively hostile work environment, and it is not an ELCRA violation. See *Pena v Ingham Cnty Rd Comm'n*, 255 Mich App 299, 314; 660 NW2d 351 (2003) ("Plaintiff's subjective perception that he was adversely affected because an investigation occurred does not rise to the level of an objectively verifiable employment action").

Even under the "participation" clause, an employee may not merely "generally assert unfair treatment." *Barrett*, 245 Mich at 319. And courts "have generally granted less protection for opposition than for participation in enforcement proceedings." *Booker v Brown & Williamson Tobacco Co, Inc*, 879 F2d 1304, 1312 (CA6, 1989). The alleged questioning of a Calvin employee is neither an adverse employment action, nor did it create an objectively hostile work environment. It is insufficient to support a retaliation claim under ELCRA.

III. Mr. Kuilema's claims are barred by the First Amendment.

Mr. Kuilema's complaint does not allege valid claims under ELCRA. But even if it did, they would be barred by the First Amendment.

A. The ministerial exception bars claims asserted against religious institutions by employees who are entrusted with teaching students.

The First Amendment protects “the right of churches and other religious institutions to decide matters of faith and doctrine without government intrusion.” *Our Lady of Guadalupe Sch v Morrissey-Berru*, 140 S Ct 2049, 2060 (2020) (cleaned up). One implication of this rule is the so-called “ministerial exception.” *Id.* at 2060-61; see *Weishuhn v Cath Diocese of Lansing*, 279 Mich App 150, 177; 756 NW2d 483 (2008). See also *Conlon v InterVarsity Christian Fellowship*, 777 F3d 829, 836 (CA6, 2015) (ministerial exception cannot be waived and applies against Michigan state-law claims); *Rehfield v Diocese of Joliet*, 182 NE3d 123, 130–31 (Ill, 2021) (dismissing state law claims based upon ministerial exception). Under the ministerial exception, courts must “stay out of employment disputes involving those holding certain important positions with churches and other religious institutions.” *Our Lady*, 140 S Ct at 2060. That is because, without the power to “select, supervise, and if necessary, remove” employees without interference by secular authorities, a wayward leader’s “preaching, teaching, and counseling could contradict the church’s tenets and lead the [religious community] away from the faith.” *Id.*

Although it is referred to as the “ministerial exception,” the doctrine applies not only to formal members of the clergy but also to other leaders of religious organizations, including teachers at religious schools. *Id.* That is because “[t]he religious education and formation of students is the very reason for the existence of most private religious schools, and therefore the selection and supervision of the teachers upon whom the schools rely to do this work lie at the core of their mission.” *Id.* at 2056. Because teachers at such a school are entrusted with “transmitting

the . . . faith to the next generation,” *Hosanna-Tabor Evangelical Lutheran Church & Sch v EEOC*, 565 US 171, 192 (2012), courts routinely bar employment discrimination claims asserted by such employees. See, e.g., *id.* (teacher); *Grussgott v Milwaukee Jewish Day Sch, Inc*, 882 F3d 655 (CA7, 2018) (teacher); *Fratello v Archdiocese of NY*, 863 F3d 190 (CA2, 2017) (principal); *Yin v Columbia Int’l Univ*, 335 F Supp 3d 803 (DSC 2018) (program director). These decisions recognize that, “[w]hen a school with a religious mission entrusts a teacher with the responsibility of educating and forming students in the faith, judicial intervention into disputes between the school and the teacher threatens the school’s independence in a way that the First Amendment does not allow.” *Our Lady*, 140 S Ct at 2069.

That is precisely the circumstance here. As is evident from the complaint, Calvin expects its professors—including Mr. Kuilema—to incorporate the tenets of its faith in all aspects of their teaching. Calvin is the university of the CRC, and it offers education in numerous disciplines—but “all from a distinctly Reformed perspective.” (Ex. A, Complaint, ¶ 11). The courses it offers must be “of a positively Reformed character entirely in accord with the doctrinal standards of the [CRC].” (Ex. A, Complaint, ¶ 10).

Mr. Kuilema admits that his responsibilities included “teaching courses from a Reformed Christian perspective[.]” (Ex. A, Complaint, ¶ 17). He admits that he “used . . . his courses to teach students about different faiths and belief systems.” (Ex. A, Complaint, ¶ 20). His colleagues recognized that he “integrat[ed] . . . faith and his profession in every way,” his students reported that “Christian themes were intertwined with every topic that was discussed” in his classes, and at least one student “was brought back to the faith while taking a class with him.” (Ex. A, Complaint, Exhibit 5, at 2-3). A key assessment in his reappointment application was his demonstrated level of “Reformed Christian Commitment”; it noted, among other religious

activities, his work with his home church to adopt the position that “references to ‘chastity’ in Lords Day 41 of the Heidelberg Catechism do not exclude monogamous same-sex unions[.]” (**Ex. A**, Complaint, Exhibit 5 at 2.)

Mr. Kuilema also held a formal, religious office: he has served as an elder at Sherman Street Church. (**Ex. A**, Complaint, Ex. 5 at 1-2). His title as elder was a factor in his favor when seeking reappointment. See *id.* It also meant that the determinations surrounding his appointment “fall[] into the overlapping space between the Church and the University,” and his reappointment process occasioned consultation between the University and “Sherman Street Church leadership and the Executive Committee of Classis Grand Rapids East,” a larger community of CRC congregations. (**Ex. A**, Complaint, Ex. 5 at 1).

As a teaching professor, Mr. Kuilema also agreed to follow the guidelines and dispute resolution procedures laid out in *Confessional Commitments and Academic Freedom and Handbook for Teaching Faculty*. (**Ex. A**, Complaint, Ex. 6 at 1). He acknowledges that on issues with “confessional status,” a professor “who disagrees with the Synod, is required to submit a document called a ‘gravamen’ to their church and to Calvin” detailing the disagreement. (**Ex. A**, Complaint, ¶ 107). His exhibits show he also agreed to the *Covenant for Faculty Members*, which “points us to an appropriate tone and strategy for expressions of ecclesiastical freedom” while also respecting “the judgment of the church.” (**Ex. A**, Complaint, Ex. 2 at 2, Ex. 3 at 2). Mr. Kuilema’s compliance with this process for his own expressions of “ecclesiastical freedom” were discussed at length in his reappointment process. (**Ex. A**, Complaint, Ex. 2, Ex. 5, Ex. 6).

Given his significant religious functions, Mr. Kuilema’s suit is barred by the ministerial exception. In *Our Lady*, for example, the Court recognized that it should not second-guess the defendant schools’ perception that its teachers “play[ed] a vital part in carrying out the

mission of the church.” *Id.* at 2066. “In a country with the religious diversity of the United States, judges cannot be expected to have a complete understanding and appreciation of the role played by every person who performs a particular role in every religious tradition.” *Id.* And here, it is clear from Mr. Kuilema’s complaint that religious faith and instruction was inextricably entangled with his role at Calvin.

Courts have dismissed similar claims on similar allegations before. For example, in *Adams v Indiana Wesleyan Univ*, No. 3:09-CV-468, 2010 WL 2803077, at *8 (ND Ind, July 15, 2010) (attached as **Exhibit D**), the court granted a motion to dismiss discrimination claims asserted against a religious university by a professor who was the former chair of its social work department, reasoning that, although the plaintiff “may very well have been free to present and discuss secular topics and issues in her classroom, it is also true that she was charged with incorporating the doctrine of the Wesleyan Church into her curriculum.” *Id.*, at *8. Similarly, in *Stately v Indian Cmty Sch of Milwaukee, Inc*, 351 F Supp 2d 858, 869 (ED Wis, 2004), the court dismissed an employee’s claim against religious school in part because the school “requires all of its teachers to integrate Native American culture and religion into their classes.” *Id.* at 869. See also *Tomic v Cath Diocese of Peoria*, 442 F3d 1036, 1040 (CA7, 2006), *abrogated on other grounds by Hosanna-Tabor*, 565 US at 171 (affirming dismissal of complaint by organist). The same result is in order here.

To the extent that Mr. Kuilema’s complaint relies on a list of factors noted in *Weishuhn* as potentially relevant to the ministerial exception, *Weishuhn* predated *Our Lady*. And *Our Lady* specifically rejected the notion that any particular list of factors “must be met—or even that they are necessarily important—in all . . . cases.” *Our Lady*, 140 S Ct at 2063. Moreover, even in *Weishuhn*, the court recognized that the duty of “teaching ‘secular’ classes is not necessarily

‘purely secular’ in the context of religious schools. This is particularly true in this case where plaintiff stated that she incorporated her religious teachings into her mathematics lessons.” *Weishuhn v Lansing Cath Diocese* (“*Weishuhn II*”), 287 Mich App 211, 218–19; 787 NW2d 513 (2010) (internal quotation omitted) (concluding that teacher was ministerial). The same allegations are present here.

Moreover, Mr. Kuilema admits that—despite being in a position that required him to teach from a Reformed perspective that hewed to “the doctrinal standards of the [CRC]” (**Ex. A**, Complaint, ¶ 10)—he actively opposed several of the CRC’s positions on matters that the CRC has deemed to have “confessional” status and which thereby “bind[] . . . professors at denominational schools, like Calvin” and which must be “upheld” by Calvin’s professors. (Complaint, ¶¶ 29, 54, 105-107). Mr. Kuilema may be attempting to evade the ministerial exception by claiming that he did not teach the CRC’s faith but instead opposed it. But the notion that an employee may evade the ministerial exception by alleging that “she did not act in a ministerial capacity, even if she were entrusted to do so” is a mistaken view of how the exception functions. *Starkey v Roman Cath Archdiocese of Indianapolis, Inc*, 41 F4th 931, 941 (CA7, 2022). The relevant question is “what an employee is entrusted to do, not simply what acts an employee chooses to perform.” *Id.* “[A]n employee is still a minister if she fails to adequately perform the religious duties she was hired and entrusted to do.” *Id.*

Instead, Mr. Kuilema’s allegations underscore the necessity for deference to Calvin’s decision. Mr. Kuilema may hold beliefs that differ from those held by Calvin and the CRC. But he is not entitled to force Calvin to allow him to teach those beliefs within its community, when Calvin has determined that they fall outside of its religious tradition. To prevent that, in fact,

is precisely why the ministerial exception was recognized in the first place. *Our Lady*, 140 S. Ct. at 2060.

In that respect, the ministerial exception fosters the pluralism that the First Amendment was adopted to protect. “Religious groups are the archetype of associations formed for expressive purposes.” *Hosanna-Tabor*, 565 US at 200 (Alito, J., and Kagan, J., concurring). And the ability to determine that certain activities in furtherance of a religious organization’s mission should be conducted only by “those committed to that mission” is “a means by which a religious community defines itself.” *Corp of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v Amos*, 483 US 327, 342 (1987) (Brennan, J., concurring). Applying antidiscrimination law to override Calvin’s decision to disaffiliate itself with Mr. Kuilema’s views not only would impair Calvin’s ability “to express those views, and only those views, that it intends to express,” *Boy Scouts of Am v Dale*, 530 US 640, 648 (2000), but would also cause Calvin “as it currently identifies itself to cease to exist.” *Christian Legal Soc’y v Walker*, 453 F3d 853, 863 (CA7, 2006). Ironically, it is Mr. Kuilema, not Calvin, who is impermissibly attempting to impose uniformity where principles of pluralism should govern instead.

B. Mr. Kuilema’s claims are barred by the ecclesiastical abstention (or church autonomy) doctrine.

In addition to guaranteeing religious institutions the freedom to select their own leaders, the First Amendment provides religious institutions the broader autonomy to make decisions of religious import without interference from the courts. This doctrine, sometimes referred to as the ecclesiastical abstention doctrine, and other times referred to as the church autonomy doctrine, “reflects this Court’s longstanding recognition that it would be inconsistent with complete and untrammelled religious liberty for civil courts to enter into a consideration of church doctrine or church discipline . . .” *Winkler v Marist Fathers of Detroit, Inc*, 500 Mich 327,

337-338; 901 NW2d 566 (2017) (cleaned up). “[A]voidance, rather than intervention, should be a court’s proper role when adjudicating disputes involving religious governance.” *Demkovich v St Andrew the Apostle Parish*, 3 F4th 968, 975 (CA7, 2021) (en banc).

The religious autonomy doctrine protects a religious institution’s personnel decisions—even when they do not involve individuals who qualify as “ministers” for purposes of the ministerial exception—when those decisions are “based on religious doctrine.” *Bryce v Episcopal Church in the Diocese of Colorado*, 289 F3d 648, 660 (CA10, 2002). When employees are terminated for their opposition to their religious employer’s doctrinal views, they cannot assert employment discrimination claims, because any adjudication of those claims would require the court to weigh in on the appropriateness of the institution’s religious beliefs. For example, the court in *Curay-Cramer v Ursuline Academy* upheld the dismissal of a Title VII claim against a religious school because it would “necessarily involve inquiry into the good faith of the position asserted by the clergy-administrators and its relationship to the school’s mission. The very process of inquiry can impinge on rights guaranteed by the First Amendment.” 450 F3d 130, 138 (CA3, 2006) (internal quotation and citation omitted).

The same is true here. Mr. Kuilema’s complaint asks this Court to decide whether “CRC’s interpretation of scripture . . . was an unofficial view based on pastoral guidance,” or “a binding issue of confessional status.” (Ex. A, Complaint ¶ 49). He seeks a factfinding that “Calvin incorrectly believed that officiating the wedding was contrary to the CRC’s position regarding same sex relationships,” and on whether “Kuilema had officiated the wedding in accordance with Calvin policies, the CRC doctrine, and his Christian Reformed Church’s approval.” (Ex. A, Complaint ¶¶ 93, 100). His claims also seek a determination on when and whether Synod treats same-sex sexual relationships differently from same-sex marriage, and on Calvin’s theological

distinctions on issues of marriage and gender identity. (Ex. A, Complaint ¶¶ 88, 101, 112, 113). These are all indisputably religious questions. See, e.g., *Demkovich*, 3 F4th at 979 (“How Demkovich’s employment ended—with a dispute over religious doctrine—cements the religious character of their relationship.”).

Those inquiries are off limits under the First Amendment. “[I]t is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation.” *Thomas v Rev Bd of Indiana Emp Sec Div*, 450 US 707, 716 (1981). See also *Smith v Calvary Christian Church*, 462 Mich 679, 684; 614 NW2d 590 (2000) (“[C]ivil courts may not redetermine the correctness of an interpretation of canonical text or some decision relating to government of the religious polity.” (citations and quotations omitted)). And although Mr. Kuilema contends that his beliefs did not actually fall outside the CRC’s stated position at the time of his conduct, this Court cannot “resolv[e] underlying controversies over religious doctrine.” *Our Lady*, 140 S Ct at 2063 n.10. Instead, the Court must “defer to the religious entity’s resolution of such questions, and adjudicate the claim accordingly.” *Winkler*, 500 Mich at 341.

Because Mr. Kuilema pleads that Calvin’s decision to terminate him was based on their religious differences with respect to same-sex relationships, his claims are barred by the religious autonomy doctrine.

* * *

Sometimes, religious communities must make difficult decisions, including about who is best suited to serve in leadership within the community. Not everyone inside the community will agree with all of those decisions, nor will everyone outside of it. But the First Amendment guarantees that defining the boundaries of the religious community, no matter how difficult, is the

prerogative of that community. Otherwise, religious institutions like Calvin would no longer be able to articulate a unique identity, and their distinctive contributions to scholarship, academia, and the wider communities in which they operate would cease to exist. The fact that Calvin has drawn boundaries in places where those who are not of the faith would not draw them (or in places in which there is disagreement within the community about where to draw them) is cause for neither surprise nor alarm. Instead, it reflects precisely the sort of minority viewpoint that the First Amendment protects and celebrates.

Conclusion

The complaint should be dismissed with prejudice.

MILLER JOHNSON
Attorneys for Defendant

Dated: May 26, 2023

By 

Stephen J. van Stempvoort (P79828)
Jacob L. Carlton (P84859)
45 Ottawa Avenue SW, Suite 1100
Grand Rapids, MI 49503
616.831.1700
vanstempvoorts@millerjohnson.com
carltonj@millerjohnson.com

EXHIBIT

1

STATE OF MICHIGAN
CIRCUIT COURT FOR THE COUNTY OF KENT

JOSEPH KUILEMA,

Plaintiff,

v

CALVIN UNIVERSITY,

Defendant.

03561
CASE NO. 23- -CZ

HON. CHRISTINA ELMORE
(P-58218)

Charissa C. Huang (P75501)
Lauren M. Ayoub (P85669)
SMITH HAUGHEY RICE & ROEGGE
Attorneys for Plaintiff
100 Monroe Center, N.W.
Grand Rapids, MI 49503
616-774-8000
chuang@shrr.com

COMPLAINT AND JURY DEMAND

NOW COMES plaintiff, Joseph Kuilema, by and through his attorneys, Smith Haughey Rice & Roegge, and for his Complaint against Calvin University, states as follows:

Parties and Jurisdiction

1. This is an action for retaliation and associational discrimination pursuant to the Michigan Elliot-Larsen Civil Rights Act (the "ELCRA"), MCL 37.2101 *et seq.*
2. Plaintiff Joseph Kuilema ("Kuilema") is an individual, and is and at all relevant times was, a resident of Kent County, Michigan who worked and taught at Calvin University.
3. Calvin University ("Calvin") is a Michigan nonprofit corporation conducting business in Kent County, Michigan.

4. The events giving rise to these causes of action occurred, mostly or at least in substantial part, in Kent County, Michigan.

5. Jurisdiction is proper in this Court pursuant to MCL 600.601 and MCL 600.605.

6. Venue is proper in this Court pursuant to MCL 600.1621 because, at all relevant times, Calvin conducted business in Kent County, Michigan.

7. The amount in controversy exceeds \$25,000, exclusive of interest, costs, and attorney fees.

General Allegations

8. Plaintiff incorporates by reference all preceding paragraphs as if fully restated here.

9. Kuilema began his career as a social work professor at Calvin in 2008.

10. Calvin was incorporated to “provide students courses in the liberal arts including, but not limited to, the sciences, history, philosophy, professional, and pre-professional disciplines, and in theology and religion, which are of a positively Reformed character entirely in accord with the doctrinal standards of the Christian Reformed Church in North America.” (**Exhibit 1**, Calvin’s Articles of Incorporation).

11. Calvin’s purpose is to “enrich the education experiences of its students by offering exposure to a variety of disciplines, all from a distinctly Reformed perspective.”

12. Throughout his career at Calvin, Kuilema displayed characteristics consistent with Calvin’s purpose and the doctrinal standards of the Christian Reformed Church (the “CRC”) in North America.

13. In 2010, Calvin reappointed Kuilema to continue teaching and advising students in the social work program.

14. In 2013, Calvin reappointed Kuilema a second time to continue teaching and advising in the social work department.

15. And in 2015, Calvin reappointed Kuilema for a third time to continue his teaching and advising in the social work department.

16. Kuilema was appointed to the Sociology and Social Work Department, where he taught classes for the social work program. Kuilema also taught in the Global Development Studies program (initially the International Development Studies program). Additionally, Kuilema led a Ghana program, which was not departmentally specific, as well as taught courses within Calvin's Honors program.

17. Kuilema's responsibilities included teaching courses from a Reformed Christian perspective, but he was not tasked with, reasonable for, or expected to teach Reformed Christianity, or to spread Reformed Christianity. Further, Kuilema was not otherwise charged with duties regarding church governance, supervising of a religious order, or supervising or participating in religious and ritual worship.

18. Kuilema's duties did not have religious significance. He did not teach religion, he was not involved in planning church outings or prayers, he did not prepare students for any religious functions, and he did not incorporate religious teaching into his courses.

19. Kuilema further did not teach religion or religious texts for any purpose of spreading religious teachings, nor did he lead his students in prayer, take students to any form of Christian church services, or incorporate devotional exercises or church services into his course or lesson plans.

20. Rather, Kuilema used to his courses to teach students about different faiths and belief systems. Kuilema not only operated in this manner for the entire duration of his time

teaching at Calvin, but he was often met with praise from students and other colleagues who also valued the acknowledgment and teaching of differing viewpoints, particularly when it came to important topics such as faith and intersectional identities such as race and sexual orientation.

21. Calvin also did not require Kuilema to pray or attend church services or Chapel with his students.

22. Kuilema did not hold an inherently, primarily, or exclusively religious position, or even a position related to religion or religious purposes.

23. Kuilema's position did not entail proselytizing on behalf of Calvin.

24. Kuilema held the title of Assistant Professor of Social Work.

25. Kuilema's title did not reflect any degree of religious training that would set him apart from other individuals.

26. Kuilema also did not perform any important religious functions for Calvin.

27. Throughout his time at Calvin, Kuilema received above average evaluation scores for his teaching and advising, scoring higher than departmental and university wide averages.

28. Kuilema excelled in his position as a professor and advisor in the social work department. His accomplishments have been well documented by the formal praise which he has received from his students and others.

29. Over the course of his career, Kuilema addressed the CRC's perspective on certain issues. However, in these situations, Kuilema did not *teach* the CRC's perspective in a way which furthered its influence on students. Rather he was bluntly honest and vocal with his students, fellow faculty, and fellow Calvin community members whenever he disagreed with the CRC's position, particularly in regard to its positions regarding LGBTQ+ persons.

30. Kuilema routinely and openly expressed concerns about Calvin's treatment of and toward LGBTQ+ persons.

31. For instance, in 2016, Kuilema began preparing a piece regarding the history of terminations of LGBTQ+ employees at Calvin (the "Article"), with hopes of publishing such piece in Chimes—Calvin's student newspaper. The Article was an unequivocal denouncement of Christian Reform's, and inherently Calvin's, practiced treatment of persons belonging to and associated with the LGBTQ+ community.

32. Kuilema worked on the Article within the confines of Calvin processes, even forwarding the Article for review to then-Academic Dean Elizabeth Vander Lei and then-Provost Cheryl Brandsen. This was done in the interest of "high trust practices" at Calvin.

33. Kuilema wrote the Article because he believed that silence was a tool of oppression, and he did not want to contribute to the oppression already facing the LGBTQ+ community. He specifically made the decision to speak out so as to not be tenured under false pretenses.

34. Unsurprisingly, Kuilema was refused authority to publish the Article.

35. In an attempt to salvage the piece and prevent the suppression of its offered support to the LGBTQ+ community, Kuilema appealed the publication denial through Calvin's administrative processes.

36. Kuilema forwarded the Article to Calvin's Board of Trustees (the "Board") with an explanation of why he would like it published, and requested support to publish the piece. He was denied.

37. The Professional Status Committee (the "PSC") also reviewed the Article.

38. In 2017, Kuilema began preparing his dossier for tenure appointment at Calvin.

39. When Kuilema began preparing his documents for tenure appointment, he again expressed concerns with Calvin administration about Calvin's treatment of and toward LGBTQ+ individuals.

40. Kuilema expressed that, if his public support of LGBTQ+ individuals would cause Calvin to terminate him, he would want to know sooner rather than later to avoid going through a tenure process that was designed to be unfruitful.

41. Kuilema particularly voiced these concerns to then-Provost Cheryl Brandsen and Kevin Dulk, a member of PSC.

42. Tenured members of the Sociology and Social Work Department unanimously recommended Kuilema for tenure in Fall 2017.

43. Academic Dean Vander Lei also agreed with the unanimous recommendation to appoint Kuilema to tenure at Calvin.

44. The PSC also reviewed Kuilema's dossier and unanimously voted in favor of appointing Kuilema to tenure at Calvin.

45. Consistent with Calvin processes, Kuilema had received the necessary votes in his favor to be appointed as a tenured professor at Calvin.

46. Kuilema was also interviewed by the Academic Affairs sub-committee of the board, who also endorsed him for tenure. In February 2018, despite the unanimous recommendations for Kuilema's tenure, the Board deviated from its usual practices and procedures to abide by unanimous recommendations from individual academic Departments, the Academic Affairs Committee, Academic Deans, and the PSC, and instead denied Kuilema tenure.

47. Between and around the time of two meetings regarding whether to grant Kuilema tenure, the Board had become aware that Kuilema had officiated a wedding between LGBTQ+ persons.

48. In denying Kuilema tenure, the Board stated that Kuilema's "tone and strategy" in disagreeing with the CRC's position that "[s]exual abstinence is the biblically prescribed course of conduct for homosexual persons," caused the Board to conclude that Kuilema should not be granted tenure.

49. This determination was based on the CRC's interpretation of scripture to require sexual abstinence for gay people. This position, however, was an unofficial view based on pastoral guidance, rather than a binding issue of confessional status.

50. The Board's decision not to grant tenure also acknowledged that disagreements with the CRC have "occurred throughout the history of Calvin College" and that there was freedom to disagree with Synod (the annual decision-making meeting of the CRC), known as "ecclesiastical freedom." (**Exhibit 2**, February 5, 2018 Denial Letter).

51. Still, despite Kuilema's freedom to disagree with a position of the CRC, the Board denied Kuilema tenure, reasoning that his "tone and strategy" needed to demonstrate a commitment to working within college policies and procedures in the manner expected of faculty.

52. By "tone and strategy," Calvin was referring to Kuilema's longstanding and continued advocacy, support, advisement, and mentorship of members of the LGBTQ+ community and individuals who had been marginalized based on race.

53. Indeed, Kuilema expressed several times to Calvin administration throughout his career at Calvin, that Calvin was wronging LGBTQ+ people.

54. Kuilema adamantly voiced his opinions in opposition to the CRC's position on same-sex marriage.

55. Kuilema also assisted in organizing a department sponsored LGBTQ+ teach-in.

56. Despite Kuilema's "tone and strategy" surrounding LGTBQ+ issues, the Board reappointed Kuilema to a two-year term, which could be renewed indefinitely and did not preclude later consideration for tenure.

57. The same day that the Board denied Kuilema tenure, Provost Brandsen wrote to Kuilema to help ensure that his "tone and strategy" met with Calvin's expectations moving forward.

58. Provost Brandsen informed Kuilema that she would work with him within the next month to clarify expectations over the course of Kuilema's two-year reappointment.

59. In March 2018, Kuilema circled back with Provost Brandsen regarding his expectations, but he never received a response.

60. A week later, Kuilema again reached out to Provost Brandsen regarding his expectations, but Provost Brandsen again did not provide any response.

61. Then, after engaging in "high trust processes/procedures" for over a year while attempting to publish the Article in the Chimes, the PSC rejected Kuilema's efforts to publish the Article.

62. The PSC's rejection of Kuilema's request to publish the Article came after Kuilema's tenure denial and after Kuilema had engaged in high trust procedures for months before he submitted his tenure dossier.

63. Despite everything that had happened, over the course of 2018 and 2019, Kuilema worked on his “tone and strategy” to meet behavioral expectations of Calvin to become tenured faculty.

64. In 2019, Provost Brandsen informed Kuilema that he would not be put up for tenure and instead would be reappointed for another two-year term to allow the Board to reconsider tenure in two years.

65. Kuilema continued to work on his “tone and strategy” to conform to Calvin’s expectations.

66. In September 2020, a former student of Kuilema asked Kuilema to officiate their wedding. At the time of the wedding, the former student, who is a transgender man, identified as a queer individual, and was identified as female in government-issued documents. The former student’s spouse also identified as a queer individual, and was at the time of the wedding, and is currently, identified as female in legal, government-issued documents.

67. This former student was also a former Calvin employee who worked at Calvin during these relevant time periods.

68. Kuilema was honored and delighted to officiate the wedding and agreed to so officiate. The wedding was set for October 2021.

69. Prior to agreeing to officiate, however, Kuilema consulted his pastor, church council and even his Department Chair and colleagues to ensure that this was not in opposition to the Christian Reform faith or the values of Calvin. Kuilema received unanimous support that officiating the wedding was consistent with such beliefs.

70. In June 2021, Provost Brandsen again informed Kuilema that he would not be appointed for tenure and again reappointed Kuilema to a two-year term.

71. At the time this tenure denial, Provost Brandsen concluded that tenure would be inappropriate because the Synod had not come to any conclusions about the “report on human sexuality” and that, because Calvin knew Kuilema’s views, it was in both Calvin’s and Kuilema’s best interests to not move forward with tenure consideration at that time.

72. In October 2021, Kuilema officiated the wedding.

73. Then, in December 2021, newly appointed Provost Noah Toly received “evidence” of Kuilema officiating the wedding— photographs of Kuilema and the couple on their wedding day. Kuilema was never shown this “evidence” or permitted an opportunity to authenticate it.

74. Despite the PSC and then-Dean already recommending Kuilema’s appointment, his reappointment was then placed on hold after Calvin decided to revisit the decision in light of the new “evidence” – effectively changing their decision.

75. According to Calvin’s established policies and procedures, concerns of this nature are typically addressed in the disciplinary process, which is reserved for concerns regarding a faculty member’s conduct or performance – not the reappointment process.

76. Yet, instead of being addressed through Calvin’s disciplinary process, Kuilema’s matter was brought before the Professional Status Committee (PSC), which is a task force that Calvin uses to make determinations about “Controversial Topics.”

77. If the concerns over Kuilema’s officiating of the wedding had been addressed within the disciplinary process under Calvin’s own established policies and procedures, Kuilema would have been afforded faculty representation within these deliberations. However, because Calvin determined contrary to its regular practices, that the concerns regarding Kuilema should be addressed in a reappointment process instead, Kuilema was not afforded the same protections he would have received in the disciplinary process before a faculty panel comprised of individuals,

who pertinently, would have been most knowledgeable regarding his professional conduct and job performance.

78. In addition to being struck of the safeguards of the disciplinary process, the panel that participated in PSC determinations regarding Kuilema's matter was comprised of individuals with whom Kuilema has had substantial disagreements and/or tension. Particularly, Kuilema had recently objected to the showing of a faculty selected film, "*How Jack Became Black*," because it perpetuated racist views and harmful stereotypes against Black individuals.

79. In opposing the showing of the film, "*How Jack Became Black*", Kuilema specifically urged his colleagues to consider the impact this may have on our students of color, many of whom already experience Calvin as a hostile and racist place.

80. Two faculty members with which Kuilema strongly disagreed regarding the showing of the film, were coincidentally included on the PSC panel.

81. Further, one of the individuals, in particular, who disagreed with Kuilema over the film showing, the then Dean for Academic Administration Laura DeHaan, an individual who was publicly known to be critical of Kuilema, was chosen to replace a known and outspoken supportive faculty member on the PSC panel, Professor Emily Helder.

82. Calvin has failed to provide a legitimate explanation as to why two individuals who were publicly known to be especially unfavorable to Kuilema, and therefore biased, were appointed to the PSC panel to deliberate regarding his reappointment process. Calvin has further failed to provide any evidence that it even considered or inquired into the effect of bias and the clear detrimental impact on Kuilema's reappointment process caused by the appointment of the two individuals.

83. Further, Kuilema's opposition to the showing of the film, "*How Jack Became Black*" due to its perpetuation of racist views and harmful stereotypes against Black individuals, and his concern for the impact showing the film would have on students of color, was specifically discussed and considered during the PSC panel deliberations, in which the PSC determined that Kuilema should not be reappointed to his position with Calvin.

84. Then, in a memo dated December 13, 2021, Provost Toly indicated that the "evidence" of Kuilema officiating a wedding "may relate to various reappointment criteria." (**Exhibit 3**, December 13, 2021 Memo).

85. In meetings and "investigations" over the next several weeks, Kuilema answered all questions asked of him thoroughly and earnestly.

86. One of the individuals who Kuilema officiated the wedding for, who was employed by Calvin at the time, was also questioned by Calvin administration during the investigation of Kuilema.

87. Kuilema specifically raised concerns with Calvin administration regarding the questioning toward the individual as discriminatory and creating a hostile work environment.

88. Kuilema's decision to officiate a civil marriage ceremony was not contrary to the official position of the CRC, because the report on human sexuality about confessional status concerned sex, not marriage. Further, the topic of sex between persons of the same gender had not even been voted on by Synod yet.

89. Furthermore, at the time of officiating the wedding, Calvin did not have an official position on civil marriage, but only sexual relations.

90. Kuilema also officiated the wedding as a private citizen, as permitted under Calvin's Faculty Handbook, and not in any capacity as a Calvin faculty member.

91. As aforementioned, Kuilema consulted people in authority at both Calvin and his church regarding his officiating, all of whom concluded that the marriage fell under ecclesial authority and not Calvin authority. Kuilema also received confirmation from his church elders that officiating the wedding was not just consistent with the CRC's and Calvin's positions on sexual relations, but that Kuilema had ecclesial freedom to do so.

92. Moreover, the Faculty Handbook did not define marriage, and the Staff Handbook plainly excluded its applicability from "those with faculty rank."

93. Considering all this, Kuilema had officiated the wedding in accordance with Calvin policies, the CRC doctrine, and his Christian Reformed Church's approval.

94. Notwithstanding, the PSC recommended not to appoint Kuilema for another reappointment at Calvin and terminated his employment effective August 2022. (**Exhibit 4**, Reappointment Denial).

95. Dean Benita Wolters-Fredlund recommended that Kuilema not be appointed because of "his failure to consult with me (his Dean), the Provost, or the President about his decision to officiate at the wedding of a Calvin employee was problematic." (**Exhibit 5**, Dossier Summary).

96. In April 2022, Kuilema appealed the decision of the Board and PSC not to reappoint him.

97. PSC and the Board ultimately denied Kuilema's appeal.

98. The Dossier Summary, final PSC Discussion Summary, and the final letter from the Chair of the Board denying Kuilema's appeal all confirm that the decision not to reappoint him was because he failed to meet the "expectation" that he consult on the "controversial matter" of his involvement in the wedding. (**Exhibit 6**, PSC Discussion Summary).

99. Calvin's stated reasoning for not reappointing and effectively terminating Kuilema, unequivocally establishes that it had to do with his officiating the wedding.

100. Calvin incorrectly believed that officiating the wedding was contrary to the CRC's position regarding same sex relationships and terminated Kuilema for that mistaken belief.

101. The wedding was in fact a queer wedding between a lesbian woman and transgender man – though all of Calvin's actions stemmed from their mistaken belief that the wedding was between two lesbian women.

102. Then, in the Summer of 2022, Synod met to discuss its views on same sex relationships, which it calls "homosexual relationships," by reviewing the report of the Committee to Articulate a Foundation-laying Biblical Theology of Human Sexuality (HSR).

103. Before this meeting, the CRC's position on "homosexual sex" had the status of a synodical decision, but its views on the topic were deemed a matter of pastoral advice.

104. Because the CRC's position on "homosexual sex" was only a matter of pastoral advice prior to the Synod meeting in the Summer of 2022, prior to that meeting, members of the CRC who disagreed with Synod's views on "homosexual sex" were publicly allowed to do so, including Christian Reformed ministers. Indeed, prior to the Synod meeting in Summer of 2022, CRC ministers officiated religious same-sex marriages without losing their credentials.

105. However, in the Summer of 2022, Synod raised its views on "homosexual sex" from pastoral advice to an interpretation of the confessions.

106. Confessional status binds those who hold church offices, confessing members, and professors at denominational schools, like Calvin.

107. Confessional status also requires teachings to be upheld by professors at denominational schools, and those who publicly speak against a confessional teaching may be

disciplined. This means that individuals can no longer publicly or even privately disagree with Synod regarding “homosexual relations.” Any Calvin employee who disagrees with Synod, is required to submit a document called a “gravamen” to their church and to Calvin indicating that they have this disagreement.

108. Calvin’s decision to terminate Kuilema for officiating the wedding came before Synod’s 2022 decision.

109. Further, after Synod’s 2022 decision, a group of numerous faculty members at Calvin filed their dissent from the Synod decision, which at the time the Synod’s decision was made, would have required Calvin to terminate all faculty members who publicly disagreed with the Synod decision.

110. Not wanting to terminate all the faculty members who had filed dissenting documents, the Board indicated that it would instead “revise” its professors’ guidelines on how to continue their work in a way that respects the authority of the Synod while also protecting their academic freedom.

111. Kuilema did not receive the same treatment and was terminated even before the Synod raised its views on homosexual relations from a synodical decision that was deemed a matter of pastoral advice, to confessional status.

112. And Synod’s decision, as well as Calvin’s policies and guidelines at all relevant times, make clear that the issue lies in “homosexual sex,” not marriage.

113. Therefore, Kuilema’s decision to officiate the wedding was not even contrary to Synod’s after-the-fact decision, or Calvin’s policies.

114. Calvin's decision to terminate Kuilema based on his association with LGBTQ+ individuals constituted retaliation and associational discrimination in violation of the Michigan Elliott-Larsen Civil Rights Act, MCL 37.2101, *et seq.* ("ELCRA").

COUNT I
Associational Discrimination Under the Michigan Elliott-Larsen Civil Rights Act

115. Plaintiff incorporates by reference all preceding paragraphs as if fully restated here.

116. The purpose of the ELCRA is to prevent discrimination against persons based on their membership in a certain class and to eliminate the effects of offensive or demeaning stereotypes, prejudices, and biases. *Bryant v Automatic Data Processing, Inc.*, 151 Mich App 424; 390 NW2d 732 (1986).

117. The certain classes enumerated in the ELCRA include religion, race, color, national origin, sex, height, weight, or marital status. MCL 37.2202(1)(a).

118. The ELCRA prohibits discrimination based upon affiliation and association with protected classes of people. *Graham v Ford*, 237 Mich App 670, 677; 604 NW2d 713, 717 (1999).

119. At all times relevant to this Complaint, "sex" as used within the ELCRA, included both sexual orientation and gender identity. *Bostock v Clayton County, Georgia*, 140 S Ct 1731; 207 L Ed 2d 218 (2020); *Rouch World, LLC v Dep't of Civil Rights*, 510 Mich 398; __ NW2d __ (July 28, 2022) (**Exhibit 7**).¹

120. Calvin terminated Kuilema on the basis of his association with individuals who were gay, and/or perceived to be gay, and/or were transgender.

¹ Additionally, on March 16, 2023, upon being passed in both the Michigan House of Representatives and Senate, Governor Gretchen Whitmer signed legislation amending the statutory language of the ELCRA to identify both sexual orientation and gender identity as protected classes under the Act. This amendment is effective 91 days after adjournment of the 2023 regular session *sine die*.

121. Calvin terminated Kuilema because he officiated the queer wedding.

122. Kuilema's association with LGBTQ+ individuals and/or his officiating of the wedding was a motivating factor in Calvin's termination of Kuilema.

123. Calvin discriminated against Kuilema because of his association with persons belonging to a protected class under the ELCRA.

124. Calvin's decision to terminate Kuilema and its basis for doing so violates the ELCRA and Kuilema's civil rights.

125. As a result of Calvin's violations of the ELCRA and Kuilema's civil rights, Kuilema was unable to become tenured faculty at Calvin.

126. As a result of Calvin's violations of the ELCRA and Kuilema's civil rights, Kuilema was not reappointed to his position at Calvin.

127. Calvin's decision not to reappoint Kuilema operated as a termination of his employment.

128. As a proximate result of Calvin's violations of its duties under the ELCRA described above, Kuilema suffered economic damages, violation of civil rights, emotional and mental distress, humiliation, embarrassment, and other direct and consequential damages.

WHEREFORE, Plaintiff respectfully requests that this Court enter judgment in his favor against Calvin for all compensatory damages, exemplary damages, punitive damages, and equitable and injunctive relief to which the Court finds him entitled, together with costs, interest, and attorney fees as provided by the ELCRA.

COUNT II

Retaliation Under the Michigan Elliott-Larsen Civil Rights Act

129. Plaintiff incorporates by reference all preceding paragraphs as if fully restated here.

130. The ELCRA prohibits persons, including corporations, from retaliating against a person because the person has opposed a violation of the ELCRA. MCL 37.2701(a).

131. During Calvin's investigation into Kuilema's officiating of the wedding, Calvin administration also questioned and investigated his former student.

132. Kuilema advised Calvin that such questioning and investigation was discriminatory and created a hostile work environment for the individual.

133. Kuilema in good faith believed that Calvin's questioning and investigating one of the individuals in the wedding he officiated amounted to unlawful discrimination based upon sexual orientation and/or gender identity.

134. Kuilema had a good faith belief that Calvin's Administration was engaging in unlawful employment practices.

135. Kuilema expressly notified Calvin of his good faith belief of its unlawful practices and particularly its discriminatory behavior in his appeal to his denial of tenure.

136. In his appeal, Kuilema explained his belief that Calvin had acted discriminatorily in its denial of tenure based upon his advocacy and association with LGBTQ+ persons.

137. Kuilema's complaints of discriminatory conduct during the investigation raised the specter of a discrimination complaint.

138. Soon after Kuilema complained of the discriminatory and hostile nature of Calvin's investigation into the individual from the marriage, Calvin decided not to reappoint Kuilema and terminated Kuilema.

139. Kuilema's advising and complaints of the discriminatory nature of Calvin's investigation, were significant and/or motivating factors in Calvin's adverse employment decisions against Kuilema.

140. Kuilema's opposition to the showing of the film *"How Jack Became Black"* also raised the specter of a discrimination complaint under ELCRA, which recognizes and declares "the full and equal utilization of . . . educational facilities without discrimination because of . . . race [and/or] color" to be a civil right, MCL 37.2102(1), and provides that an educational institution shall not discriminate against "an individual in the full utilization of or benefit from the institution or services, activities, or programs provided by the institution" because of "race" or "color," and "shall not discriminate against a student in the terms, conditions, or privileges of the institution" because of "race" or "color[.]" MCL 37.2402(a)-(b).

141. Kuilema's urging of his colleagues, who shortly thereafter participated in the decision not to reappoint him, to consider the impact that the film *"How Jack Became Black"* could have on Calvin's students of color, and his opposition to showing the film due to its perpetuation of racism against Black individuals, was a significant and/or motivating factor in Calvin's adverse employment decisions against Kuilema.

142. Calvin's decisions not to reappoint Kuilema and to terminate him took place directly after Kuilema officiated the wedding and engaged in protected activities of opposing violations of the ELCRA he in good faith believed were unlawful.

143. Calvin's decision not to reappoint Kuilema and its termination of Kuilema also took place directly after Kuilema's colleagues on the PSC panel specifically discussed his concerns and complaints regarding the showing of the film *"How Jack Became Black."*

144. Calvin's decision to not reappoint Kuilema and to subsequently terminate Kuilema was done out of retaliation against Kuilema, such that Calvin's decision to terminate Kuilema for associating with LGBTQ+ individuals, and for opposing violations of ELCRA, well might have dissuaded a reasonable worker from engaging in protected activity under the ELCRA.

145. Calvin owed Kuilema duties under the ELCRA, which included a duty not to retaliate against Kuilema for opposing a violation of the ELCRA based upon treatment of or actions against individuals who were gay, and/or perceived to be gay, and/or transgender.

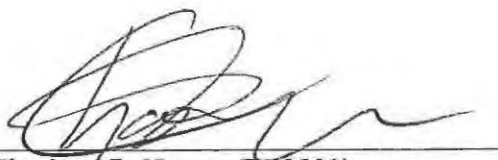
146. Calvin owed Kuilema duties under the ELCRA, which included a duty not to retaliate against Kuilema for opposing a violation of the ELCRA based upon treatment of or actions against students of color.

147. Calvin violated its duties to Kuilema under the ELCRA.

148. As a proximate result of Calvin's violations of its duties under the ELCRA, Kuilema suffered wage loss, violation of civil rights, emotional and mental distress, humiliation, embarrassment, and other direct and consequential damages.

WHEREFORE, Plaintiff respectfully requests that this Court enter judgment in his favor against Calvin for all compensatory damages, exemplary damages, punitive damages, and equitable and injunctive relief to which the Court finds him entitled, together with costs, interest, and attorney fees as provided by the ELCRA.

Date: April 14, 2023

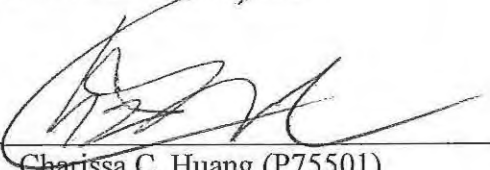
By: 

Charissa C. Huang (P75501)
Lauren M. Ayoub (P85669)
SMITH HAUGHEY RICE & ROEGGE
Attorneys for Plaintiff Joseph Kuilema
100 Monroe Center, N.W.
Grand Rapids, MI 49503
616-774-8000
616-774-2461 (fax)
chuang@shrr.com
layoub@shrr.com

JURY DEMAND

NOW COMES Plaintiff, Joseph Kuilema, by and through his attorneys, Smith Haughey Rice and Roegge, and hereby demands a trial by jury of the issues in this case.

Date: April 14, 2023

By: 

Charissa C. Huang (P75501)

Lauren M. Ayoub (P85669)

SMITH HAUGHEY RICE & ROEGGE

Attorneys for Plaintiff Joseph Kuilema

100 Monroe Center, N.W.

Grand Rapids, MI 49503

616-774-8000

616-774-2461 (fax)

chuang@shrr.com

layoub@shrr.com

EXHIBIT 1

285,502

FILED

747-622

RECEIVED
 914EN0415 DEC 08 1991 1209 DRCM \$27.50

DEC 10 1991

**ARTICLES OF INCORPORATION
 OF CALVIN COLLEGE**

MICHIGAN DEPT. OF COMMERCE

Administrator
 MICHIGAN DEPARTMENT OF COMMERCE
 Corporation & Securities Bureau

The following Articles of Incorporation are executed by the undersigned for the purpose of forming a nonprofit corporation pursuant to the provisions of the Michigan Nonprofit Corporation Act, as amended.

ARTICLE I

The name of the corporation is: Calvin College. ✓

ARTICLE II

The purpose or purposes for which the corporation is organized, either directly or indirectly, are as follows:

1. To provide students courses in the liberal arts including, but not limited to, the sciences, history, philosophy, professional, and pre-professional disciplines, and in theology and religion, which are of a positively Reformed character entirely in accord with the doctrinal standards of the Christian Reformed Church in North America;
2. To enrich the education experiences of its students by offering exposure to a variety of disciplines, all from a distinctly Reformed perspective;
3. To grant to students Bachelor of Arts, Bachelor of Science, Bachelor of Fine Arts in Art, Bachelor of Science in Recreation, Bachelor of Science in Nursing, Bachelor of Science in Accountancy, Bachelor of Science in Engineering, Master of Arts in Teaching, Bachelor of Science in Education, cooperative Bachelor of Science Degrees and other undergraduate and graduate degrees based upon completion of the requirements as shall be determined by the Board of Trustees;
4. To grant such other certificates or diplomas for less than four years training as are appropriate to like instruction;
5. To do all things necessary or incidental to or usually done by similar types of institutions;
6. The corporation shall not discriminate on the basis of race, color, sex, age, national or ethnic origin, or disability.

083067

22.50
 52.00

ack CR

ARTICLE III

The corporation is organized on a non-stock, directorship basis.

ARTICLE IV

The address of the registered office is 3201 Burton Street, Grand Rapids, Michigan 49506. The name of the registered agent at the registered office is William J. Boer.

ARTICLE V

The term of the corporate existence is perpetual.

ARTICLE VI

These Articles of Incorporation shall not be amended without the approval of the Synod of the Christian Reformed Church in North America.

ARTICLE VII

The members of the Board of Trustees of the corporation shall be selected by the Synod of the Christian Reformed Church in North America in accordance with the Bylaws of this corporation.

ARTICLE VIII

The corporation shall not merge or consolidate with another corporation, or sell, lease, exchange, or otherwise dispose of all or substantially all of its assets other than in the usual and regular course of its business, or voluntarily dissolve and liquidate its assets without the approval of the Synod of the Christian Reformed Church in North America.

ARTICLE IX

No person who is a member of the Board of Trustees of the corporation shall be personally liable to the corporation or its members for monetary damages for a breach of his or her fiduciary duty as a trustee. However, this Article shall not eliminate or limit the liability of a trustee for any breach of duty, act or omission for which the elimination or limitation of liability is not permitted by the Michigan Nonprofit Corporation Act, as amended from time to time. No amendment, alteration, repeal or modification of this Article or adoption of any other provisions in these Articles of Incorporation inconsistent with this Article shall have any effect to increase the liability of any trustee of

the corporation with respect to any act or omission of such trustee occurring prior to such amendment, alteration, repeal, modification or adoption.

As used in this Article, the term "trustee" means "volunteer director" as defined in Section 110 of the Michigan Nonprofit Corporation Act, as amended.

ARTICLE X

The corporation assumes all liability to any person other than the corporation or its trustees for all acts or omissions of a person who is a member of the Board of Trustees of the corporation occurring on or after the date this Article becomes a part of the Articles of Incorporation of the corporation. No claim for monetary damages for a breach of a trustee's duty to any such person shall be brought or maintained against a trustee. No amendment, alteration, repeal or modification of this Article or adoption of any other provisions in these Articles of Incorporation inconsistent with this Article shall have any effect to increase the liability of any trustee of the corporation with respect to any act or omission of such trustee occurring prior to such amendment, alteration, repeal, modification or adoption.

As used in this Article, the term "trustee" means "volunteer director" as defined in Section 110 of the Michigan Nonprofit Corporation Act, as amended.

ARTICLE XI

Trustees and officers of the corporation shall be indemnified as of right to the fullest extent now or hereafter permitted by law in connection with any actual or threatened civil, criminal, administrative or investigative action, suit or proceeding (whether brought by or in the name of the corporation, a subsidiary or otherwise) in which a trustee or officer is a witness or which is brought against a trustee or officer in his or her capacity as a trustee, officer, employee, agent or fiduciary of the corporation or of any corporation, partnership, joint venture, trust, employee benefit plan or other enterprise which the trustee or officer was serving at the request of the corporation. Persons who are not trustees or officers of the corporation may be similarly indemnified in respect of such service to the extent authorized at any time by the Board of Trustees of the corporation.

The corporation may purchase and maintain insurance to protect itself and any such trustee, officer, or other person against any liability asserted against him or her and incurred by him or her

in respect of such service whether or not the corporation would have the power to indemnify him or her against such liability by law or under the provisions of this Article.

The provisions of this Article shall be applicable to actions, suits or proceedings, whether arising from acts or omissions occurring before or after the adoption hereof, and to trustees, officers and other persons who have ceased to render such service, and shall inure to the benefit of the heirs, personal representatives, executors and administrators of the trustees, officers and other persons referred to in this Article.

The right of indemnification provided pursuant to this Article shall not be exclusive and the corporation may provide indemnification to any person, by agreement or otherwise, on such terms and conditions as the Board of Trustees may approve. Any agreement for indemnification of any trustee, officer or other person may provide indemnification rights which are broader or otherwise different from those set forth in, or provided pursuant to, or in accordance with, this Article. Any amendment, alteration, modification, repeal or adoption of any provision in these Articles of Incorporation inconsistent with this Article shall not adversely affect any indemnification right or protection of a trustee, officer or other person existing at the time of such amendment, alteration, modification, repeal or adoption.

ARTICLE XII

No part of the earnings of the corporation shall inure to the benefit of any shareholder, director, officer of the corporation, or any private individual (except that reasonable compensation may be paid for services rendered to or for the corporation effecting one or more of its purposes) and no shareholder, director, officer of the corporation, or any private individual shall be entitled to share in the distribution of any of the corporate assets on dissolution of the corporation. In the event of dissolution, all assets of the corporation, real and personal, shall be distributed to the Christian Reformed Church in North America, or if the Christian Reformed Church in North America is no longer in existence, then to such organizations as are qualified as tax exempt under Section 501(c)(3) of the Internal Revenue Code of 1986, as amended, or the corresponding provisions of a future United States revenue law.

ARTICLE XIII

The Incorporators of this corporation and their addresses are as follows:

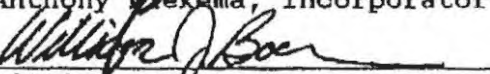
Anthony Diekema
Calvin College
3201 Burton, S.E.
Grand Rapids, MI 49506

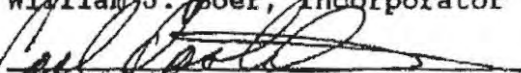
Carl Oosterhouse
Varnum, Riddering, Schmidt
& Howlett
Suite 800
171 Monroe Ave., N.W.
Grand Rapids, MI 49503

William J. Boer
Calvin College
3201 Burton, S.E.
Grand Rapids, MI 49506

IN WITNESS WHEREOF, the Incorporators of the corporation have executed these Articles of Incorporation on this 21st day of August, 1991.


Anthony Diekema, Incorporator


William J. Boer, Incorporator


Carl Oosterhouse, Incorporator

N03710G.065

DOCUMENT WILL BE RETURNED TO NAME AND MAILING ADDRESS
INDICATED IN THE BOX BELOW. Include name, street and number
(or P.O. box), city, state and ZIP code.

Vannum, Ridderung et al
171 MONROE AVE STE 800
GRAND RAPIDS, MI 49503

EXHIBIT 2

February 5, 2018

Dear Professor Kuilema,

The Board of Trustees met on Calvin's campus from January 31 through February 2, 2018. On Friday afternoon the Board took up the recommendation to reappoint you with tenure. The Board of Trustees voted not to reappoint you with tenure at this time but rather to reappoint you to a two-year term as described in Section 3.6.3.1 of the *Handbook for Teaching Faculty*. The Board of Trustees acknowledged that a reappointment under this section could be renewed indefinitely and does not preclude later consideration for tenure.

The Articles of Incorporation of Calvin College state in Article II that one of the purposes of the College is:

To provide students courses in the liberal arts... and in theology, which are of a positively Reformed character and **entirely in accord with the doctrinal standards of the Christian Reformed Church in North America....** (bold added)

The Board has a fiduciary obligation to assure that the College is operated in accordance with its corporate purposes.

The Christian Reformed Church in North America interprets Scripture to require sexual abstinence for homosexual people. Report 42 of the 1973 Committee to Study Homosexuality states this position on page 630 as follows:

Because Scripture does not allow exceptions to moral demands for reasons of personal relief and satisfaction, it would appear that no exception to the law of chastity may be made in the case of homosexuals who "marry," even though we can sympathize with the desire of them to effect such a partnership on account of the fulfillment such an arrangement might bring.

The *Homosexuality and the Calvin College Community* document, which was approved by the Board of Trustees in 2012, summarized the Christian Reformed Church's position on page 16, noting in part that the CRC's position is: "Sexual abstinence is the biblically prescribed course of conduct for homosexual persons."

The Board understands that you disagree with the CRC's position on this point. More specifically, we understand that you do not believe it is appropriate to interpret the chastity standards in the confessions to prohibit faithful, covenantal same-sex marriage.

February 5, 2018
 Professor Kuilema
 Page 2

Disagreements of this type have occurred throughout the history of Calvin College. The booklet entitled *Confessional Commitment and Academic Freedom* (approved by the College's Faculty Senate and Board of Trustees in 2010) recognizes this fact on page 36, stating:

Throughout the history of the CRC, there has been a strong tradition of what might be called "ecclesiastical freedom"—the freedom to disagree with positions of the CRC, and the freedom to challenge interpretations of the confessions, and even to challenge the confessions themselves....

Synod itself has noted this freedom by commenting, in response to an academic freedom case at Calvin College, that Article 29 of the CRC Church Order "does not preclude faculty discussion, debate, or disagreement with the substance of a synodical decision or position taken"(Acts of Synod 1996, p. 528).

However, when exercising freedom to disagree with a position of the CRC, tone and strategy are very important. The *Confessional Commitment and Academic Freedom* booklet acknowledges this on page 37 and 38 where it states in part:

At minimum, the Covenant for Faculty Members points us to an appropriate tone and strategy for expressions of ecclesiastical freedom. It suggests a strategy that begins by consulting with those in authority, and a tone of humility that cares enough about the confessions to raise difficult issues and, at the same time, is willing to submit to the judgment of the church.

Your communication tone and strategy caused the Board to conclude that it would not be appropriate to grant you tenure at this time. The PSC, in a memo from its January 18, 2018 meeting, addressed the question of its confidence in your judgment to work through this issue in the spirit expected of faculty. Although the PSC concluded that they were more confident than not in your judgment, they also noted:

At the same time, the PSC observed that in some of his writing and in some informal conversations, Professor Kuilema can sound arrogant (e.g. Prof. Kuilema's compliance statement; conversations with college administrators post-October 2017) and flippant (e.g. some parts of Prof. Kuilema's Facebook post). His writings are sometimes inaccurate (e.g. Prof. Kuilema's follow-up emails to college administrators after the October 2017 board meeting) and sometimes lack awareness of audience in his tone (e.g., Prof. Kuilema's Chimes response to the Calvin students supporting the Nashville Statement). Some of Prof. Kuilema's comments

February 5, 2018
Professor Kuilema
Page 3

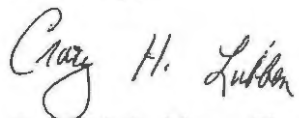
and emails following the October 2017 board meeting gave evidence of Prof. Kuilema's misapprehension of various situations (e.g., In spite of several reassurances from college administrators to the contrary, Prof. Kuilema frequently misconstrued that a tabled motion was a negative decision and that the reasons for a tabled motion had to do with his LGBTQ views).

The Board concluded that before reappointing you with tenure, the Board needs more evidence that you are committed to working within college policies and procedures in the manner expected of faculty members as set forth in the *Handbook for Teaching Faculty*. In particular, the Board needs more evidence that your communications, whether written or spoken, formal or informal, serve to strengthen the college and the broader Christian community in constructive and transparent ways.

Provost Brandsen will work with you on a plan that supports you and clarifies expectations for this next reappointment. We recognize that this decision is likely to be disappointing news, but we hope that you will work closely with the college to develop the evidence that would alleviate the Board's concerns.

Per Section 3.6.3.3 in the *Handbook for Teaching Faculty*, you may, if you wish, request reconsideration by the Board of Trustees and submit evidence you believe will be helpful toward an adequate resolution. The provost's communication (soon to follow) will elaborate on this option.

Sincerely,



Craig H. Lubben, Chair
Calvin College Board of Trustees

EXHIBIT 3

To: Dr. Joe Kuilema, Assistant Professor of Social Work
From: Dr. Noah Toly, Provost
Cc: Dr. Jonathan Hill, Chair of Sociology & Social Work
 Dr. Rachel Venema, Social Work Program Director
 Dr. Benita Wolters-Fredlund, Dean of Humanities, Arts, & Social Sciences
Subj: Request for additional information pertinent to reappointment process
Date: December 13, 2021

Thank you for joining a meeting earlier today to discuss the emergence of additional information that may have bearing upon and complicate your ongoing reappointment process. I am grateful that we were able to meet in-person, outline some foundational matters related to new information that may bear upon and complicate your reappointment process, and discuss the path forward.

This memo summarizes a limited number of points from that meeting and invites your written response to specific questions. It would be preferable to receive your response by 8:00 a.m. on Thursday, December 16, 2021, and I would welcome it even earlier.

New information

On Friday, December 10, 2021, I received two photos that appear to show you officiating the wedding ceremony of Annica Steen and Nicole Sweda on October 15, 2021. This evidence may relate to various reappointment criteria, including multiple aspects of the university's expectations for faculty and other employees and several concerns already highlighted in your most recent previous reappointment processes and noted in memos from former board chair Craig Lubben (February 5, 2018) and former provost Cheryl Brandsen (February 5, 2018 and June 15, 2021, among other communications) and in your PSC discussion of December 21, 2017, among other communications.

Actions taken

In addition to our meeting this morning, I have taken the following two actions:

- Pursuant to Section 3.6.2.4 ("Additional Evidence") of the *Calvin University Handbook for Teaching Faculty*,¹ I have scheduled a meeting of PSC to consider whether and how this may have bearing upon your reappointment. I have taken this action (1) consistent with the university's emphasis on high-trust processes in which no one person decides a matter like this one and (2) without prejudice as to the outcome of renewed PSC deliberations or trustee consideration.
- Also pursuant to Section 3.6.2.4 of the *Calvin University Handbook for Teaching Faculty*, I am exercising what latitude I am afforded as provost to delay the originally scheduled December 15 delivery of the PSC summary of the earlier discussion related to your

¹ There are a number of handbook sections – not to mention sections of other documents – that may bear upon this process. PSC and others may consider various expectations articulated in Section 3 or elsewhere as this process unfolds.

dossier. I take this step in order to relieve some of the immediate pressure on our timeline and provide everyone involved with additional time for deliberation, reflection, and decision.

Questions

As discussed in our meeting, I am inviting your response, which will be shared with PSC, to the following questions. I would prefer to receive your material by 8:00 a.m. on Thursday, December 16, 2021. An earlier submission will allow PSC members additional time to read and discuss your response.

- Did you officiate the wedding ceremony of Annica Steen and Nicole Sweda on October 15, 2021 (or another date thereabout)?
- If you did officiate the wedding...
 - Please help me understand the context and rationale for your decision to officiate, which would be contrary to the official position of the university and the Christian Reformed Church.
 - Does the decision to officiate the wedding honor Calvin University's faculty expectations and reflect judgment and strategy that "meet the [university's] expectations for faculty communication and engagement with difficult issues" (Brandsen, 2018)? Is it "consistent with the college's foundational documents (i.e., the *Confessional Commitment and Academic Freedom* document, the *Handbook for Teaching Faculty*, and the *Homosexuality and Community Life* [documents])" (Brandsen, 2018)?
 - Does the decision serve "to strengthen the university and broader Christian community in constructive and transparent ways" (Lubben, 2018; Brandsen, 2021) and also "minimize unnecessary and unhealthy consequences" ("PSC Discussion Transcript," 2017).
 - Lubben's 2018 letter refers to pages 37-38 of *Confessional Commitment and Academic Freedom*:

"At a minimum, the Covenant for Faculty members points us to an appropriate tone and strategy for expressions of ecclesiastical freedom. It suggests a strategy that begins by consulting with those in authority, and a tone of humility that cares enough about the confessions to raise difficult issues and, at the same time, is willing to submit to the judgment of the church."

Please explain how a decision to officiate this wedding involved consulting with those in authority and submitting to the judgment of the church.

- How does the decision "promote confessional integrity, due process, mutual trust and the kind of constructive engagement with difficult issues that will serve the Christian community at large" ("PSC Discussion Transcript," 2017)?

I will look forward to reading your written responses later this week. In the meantime, I hope that you will join me in prayer for these next steps as they move forward.

EXHIBIT 4

Office of the Provost
Spoelhof Center
3201 Burton St. SE
Grand Rapids, MI 49546-4388



April 18, 2022

Professor Joseph Kuilema
Department of Sociology & Social Work

Dear Joe,

The Professional Status Committee (PSC) has considered your reappointment dossier, the recommendation from the faculty of your department, the recommendation from the dean of Humanities, Arts, & Social Sciences, and additional evidence that has been under consideration since December 2021. I must tell you that the PSC decided not to recommend your reappointment to the faculty of Calvin University. Your contract will conclude in August 2022. (The final paycheck will be disbursed on August 15, 2022.)

In order to help you understand the content of the conversation occasioned by your review, I want to share with you the two enclosed memos. The first memo is the summary of your reappointment dossier; the second memo is a summary of the PSC's final discussion regarding your reappointment.

You are entitled, per the Handbook for Teaching Faculty, to appeal this decision to the president. If you choose to do this, I ask that you do this within 10 business days of receipt of this communication (May 2, 2022).

I know this is not the outcome you were hoping for, Joe. Please let me know if you have questions or wish to discuss.

Sincerely,

A handwritten signature in black ink, appearing to read "Noah J. Toly", written over a white background.

Noah J. Toly, Ph.D.
Provost

cc: Benita Wolters-Fredlund, dean
Jon Hill, chair
Rachel Venema, program director
file

EXHIBIT 5

Dean's Dossier Summary (Revised)

To: Professional Status Committee and President Le Roy
 From: Benita Wolters-Fredlund, Dean, School of Humanities, Arts, and Social Sciences
 Date: March 22, 2022
 Re: Reappointment of Joseph Kuilema

History

Prof. Kuilema began teaching at Calvin in 2008 and had three successful pre-tenure reviews before earning a doctorate in 2016. His bid for tenure in Fall 2017 was supported by his department, his dean, the PSC, and the Academic Affairs Committee of the Board of Trustees, but was ultimately denied by the full Board of Trustees, who cited concerns around his tone and strategy with regard to controversial theological topics and LGBTQ+ advocacy in particular. In the wake of this decision, the provost recommended him for a two-year appointment (FY2019 and FY2020). This was followed, at the recommendation of his Dean and the Provost, by another two-year appointment (FY 2021 and FY 2022). In June 2021, Provost Brandsen authorized that Prof. Kuilema be given a two-year renewable term appointment pending a full review in fall 2021. After reviewing Prof. Kuilema's dossier in October and November 2021, I recommended that he be given a two-year, renewable-term appointment. The PSC voted to affirm this recommendation on December 2, 2021.

On December 10, 2021, Provost Toly received photos that appeared to show Prof. Kuilema officiating a same-sex wedding. Using the provision outlined in Faculty Handbook section 3.6.2.4,¹ Provost Toly extended the timeline of the reappointment process and prepared to bring the case back to the PSC for reconsideration. Provost Toly asked Prof. Kuilema to confirm whether or not he had officiated, and, if he had, to explain his rationale for doing so to the PSC. In a written response, Prof. Kuilema confirmed that he had officiated at an LGBTQ+ civil marriage ceremony in October 2021 and gave a 17-page explanation of his rationale for doing so.

In a memo to the PSC on January 5, 2022, the PSC chair President Le Roy laid out a process for carefully reviewing this new material in the case, acknowledging that Prof. Kuilema's dual office-bearing roles (as elder at Sherman Street Church and as university professor) added a layer of complexity and ambiguity to this new material and noting that it "clearly falls into the overlapping space between the church and the university." That process included asking the PSC both to review relevant Synodical documents and to engage in conversations with Sherman Street Church leadership and the Executive Committee of Classis Grand Rapids East. The PSC followed this process over several weeks in January, February, and March of 2022.

As this process was unfolding, on January 19, 2022, Provost Toly learned that one of people who was married by Prof. Kuilema was an employee of the university. In a follow-up meeting, Prof. Kuilema confirmed that he knew that this person was an employee of the university when he officiated (and that he had assumed we knew this fact).

Recommendation

Because of the unique history of this case, I have been obliged to consider a far wider body of evidence than is typical for a reappointment process. In his February 5, 2018 letter to Prof. Kuilema explaining the Board's decision to deny him tenure, Board chair Craig Lubben makes it clear that while Prof. Kuilema has the "freedom to disagree with a position of the CRC," the Board has concerns over how this disagreement has been expressed. As Lubben explains, "before reappointing you with tenure, the Board needs more evidence that you are committed to working within college policies and procedures," referencing the *Handbook for Teaching Faculty, Homosexuality and the Calvin College Community*, and *Confessional Commitments and Academic Freedom* (CCAF) as guides. Lubben voices concerns over Prof. Kuilema's tone and strategy in particular; he quotes a

¹ Section 3.6.2.4 reads, in part, "If negative evidence arises after the PSC's decision but before final action by the board of trustees, the PSC may be reconvened by the provost to examine the new evidence and, if warranted, the committee may change its recommendation to the board of trustees. When new evidence arises during the course of a tenure and/or promotion review, or where circumstances warrant, the provost, in consultation with the PSC, may extend time period and deadlines to ensure a full and fair review process."

section of CCAF to make clear that Prof. Kuilema is expected to use “a strategy that begins by consulting with those in authority” and “a tone of humility that cares enough about the confessions to raise difficult issues and, at the same time, is willing to submit to the judgement of the church.” In her follow-up letter, Provost Brandsen explains that “we all hope you are able to do the things you need to do to earn tenure” and offers advice intended to help Prof. Kuilema “ensure that [his] judgement, tone, and strategy meet the college’s expectations for faculty communication and engagement with difficult issues.”

These letters to Prof. Kuilema clearly establish the expectation that his reappointment is contingent on his ability to provide evidence that during his two-year appointment (which was then stretched to another 2-year appointment) he had used good judgement and abided by university expectations around tone and strategy in relation to his LGBTQ+ advocacy. Thus, in addition to reviewing Prof. Kuilema’s Reformed Christian commitment, teaching, scholarship, and service, which is routine for all reappointments, my appraisal also carries the added burden of evaluating whether Prof. Kuilema has successfully addressed the Board’s concerns in his behavior during the last four years.

As I explain in greater detail below, while there is substantial evidence to suggest that during the last four years Prof. Kuilema worked in good faith to improve his tone and strategy around LGBTQ+ advocacy and regularly sought and took advice from those in authority, his failure to consult with me (his Dean), the Provost, or the President about his decision to officiate at the wedding of a Calvin employee was problematic. Moreover, given both the university’s and the CRC’s stated policies, positions, and pastoral advice on LGBTQ+ matters, I consider the decision to officiate itself to be a serious lapse in judgement. Consequently, I do not feel I can report in good conscience that he has lived up to the expectations set for him by the Board and Provost Brandsen in February 2018. Thus, despite Prof. Kuilema’s stellar record in the areas of Reformed Christian commitment, teaching, scholarship, and service, and in contradiction with the unanimous recommendation of the tenured faculty in the Sociology and Social Work Department, I am unable to recommend that Prof. Kuilema be reappointed.

Rationale – Reformed Christian Commitment, Teaching, Scholarship, Service

Reformed Christian Commitment. Prof. Kuilema is a member of Sherman Street Church, where he served as an elder and member of the Pastoral Support Committee. Prof. Kuilema was raised in the Reformed tradition and writes that he is “grateful for the creeds and confessions that guide [his] work and life.” At the same time, he has been transparent about the fact that he would like to see both the church and Calvin deepen their commitments to diversity, equity, and inclusion. He has written pieces of public scholarship inviting us to repent from instances of racism in our Christian and Reformed past, and, believing that references to “chastity” in Lords Day 41 of the Heidelberg Catechism do not exclude monogamous same-sex unions, has worked in his home church council to move towards declaring their congregation affirming and inclusive to LGBTQ+ people. To be clear, when Prof. Kuilema signed the Covenant for Faculty Members he did so in good faith, believing that his views were consistent with the creeds and confessions therein. When he works on these potentially controversial issues he does so in the spirit of continuing to reform a tradition that he is deeply imbedded in and committed to. In doing so, he joins a long list of current and former Calvin faculty who have worked to respectfully challenge a tradition they love and consider their spiritual home. Calvin’s *Confessional Commitments and Academic Freedom* document supports such work when “nurtured by high-trust methods of communication and accountability,” and encourages faculty to bring efforts for change to their local congregations.

It is worth noting that Prof. Kuilema’s dossier includes letters from 7 departmental colleagues and 14 non-departmental colleagues (drawn from 13 departments) who enthusiastically support his reappointment, almost all of whom name as a key reason for their support his deep knowledge of, passion about, and commitment to Reformed theology and to Calvin’s mission. Some examples of the articulation of this support include:

- “Joe is relentless in his integration of faith and his profession in every way,”
- “His understanding of Reformed theology is profound, and he pushes all of us to understand and apply our faith to current social issues and the role of believers in the world more rigorously,”
- “Joe is not only knowledgeable ‘about’ the Reformed tradition, but his life is also lived within the Reformed Christian tradition. He lives his life as a tool to be used to further God’s Kingdom here on earth,”

- "His defense of his views is always expressed in terms of his serious and heartfelt commitment to Reformed theology. He puts most other faculty members to shame in this regard. In this way, he is helping to keep the Reformed tradition vibrant at an institution where the tendency is too often to reduce it to little more than a few well-worn talking points." and
- "[Prof. Kuilema] embodies [our] mission more passionately than anyone I know."

Teaching. Prof. Kuilema is deeply appreciated by his students, who describe learning from him as a transformational experience. He receives high student evaluation scores, meeting or exceeding departmental and university-wide averages for most categories; he also won the 2019 Professor of the Year Award voted on by students. Students highlight as particular strengths his enthusiastic and intellectually robust lectures that make use of audio-visual supplements, and his use of guest lecturers and group discussion. They consistently use words like "engaging," "amazing," and "excellent," to describe his teaching. They also emphasize how consistently faith is embedded in his classes, remarking, for example, that "Christian themes were intertwined with every topic that was discussed" and "He has a justice-oriented Christian perspective that we need more of." Alumni are equally positive in their assessment; many identify him as the best teacher they had at Calvin and point to the formative role he played in their lives both inside and outside of the classroom. In one instance, a student was brought back to the faith while taking a class with him. Colleagues also praise his teaching, noting that his courses are popular for all the right reasons: "His lectures are content heavy, his assignments challenging, and his feedback detailed. He does this all in the context of knowing and caring for his students as whole persons, not simply 'consumers' of information." Prof. Kuilema exceeds expectations in this area.

Scholarship. Since his last review, at which time Prof. Kuilema was deemed to have met the scholarship requirements for tenure by his department and by the PSC, he has had two of his publications selected to be chapters in a book of collected essays, published two peer-reviewed articles, seven pieces for a general audience (including works for *The Chimes* and *The Banner*), seven conference presentations, and a handful of workshops and invited talks. His scholarly work is in alignment with the department's scholarship statement, which encourages an emphasis on the plight of those who are oppressed and the engagement of multiple audiences. He meets expectations in this area.

Service. Colleagues from both inside the Sociology and Social Work department and outside it describe Prof. Kuilema's service as commendable. In addition to his work advising, mentoring, and welcoming students in the Social Work program (regularly hosting welcome gatherings at his home for new majors), he also embodies an "all-university citizen" approach in the way he so regularly gives his time to cross-departmental initiatives. In recent years Prof. Kuilema has served on the Global Development Studies advisory group and advised for that program, he has led a semester-long off-campus experience in Ghana, and he has taught in the Honors program and the Calvin Prison Initiative (including one instance of teaching an honors course to prisoners). He has been a leader on campus in helping us strive toward our anti-racism goals, not only by addressing issues of race in his coursework and scholarship but also by leading trainings and workshops for departments and faculty, hosting events for UNLearn week, and being interviewed for Prof. Dykstra-Pruim's *Diversity and Inclusion For All* podcast. He also currently serves as a Core Fellow, helping to develop the Diversity & Difference tag in our new Core curriculum. Finally, Prof. Kuilema goes out of his way to be a welcoming presence to students who are marginalized; students describe him as a safe and welcoming presence on campus. He exceeds expectations in this area.

Rationale – Judgement, Tone, and Strategy

There is considerable evidence to suggest that in the wake of Mr. Lubben's 2018 letter Prof. Kuilema was actively addressing issues of tone and strategy with regard to his LGBTQ+ advocacy. I saw evidence of him checking in with me and with other colleagues to make sure that he was communicating appropriately and effectively, and, more importantly perhaps, evidence that he often accepted and incorporated feedback given to him. Many of the colleagues who wrote in support of him addressed this issue in their letters as well. Prof. Kuilema's colleagues, both inside and outside his department, believed that, as his chair put it, "Although there has been hurt and confusion from past events, I can attest that Joe is committed to working within the structures of this institution, no matter how frustrating he finds them sometimes." Colleagues gave as further evidence of

improved tone and strategy the respectful way he has engaged his detractors. Given this history of careful behavior, I was surprised to learn that he had decided to officiate at the wedding of an employee without consulting me.

In his letter to PSC outlining his rationale for accepting the invitation to officiate at an LGBTQ+ wedding, Prof. Kuilema argued that the wedding he officiated was not a religious ceremony, but a civil one, and since it was not connected to his teaching, scholarship, or service, it should be considered "private citizenship activity" that did not have the same demand for consultation as his professional activities would. Even so, Prof. Kuilema did consult with his chair and program director as well as with his fellow elders, his pastors, and his chair of council, and explained his rationale to them. While I do not believe these consultations met the high bar set for Calvin faculty working in controversial areas or the specific expectations set for Prof. Kuilema by the Board in 2018, it should be noted that in each of these consultations he was supported in his decision to officiate at the wedding.

One of the difficult problems in evaluating Prof. Kuilema's decisions and behavior in this case is that the advice he received in these consultations seems to be in conflict with the official pastoral advice endorsed by Synod 2016 when it adopted the minority report of the Committee on Pastoral Guidance on Same-Sex Marriage (also cited in a *Church Order* supplement on marriage), as well as the university policies that align with the denomination's position. This has raised the thorny question about who a Calvin professor is accountable to on such matters and in what context. It is far outside the scope of this dossier summary to try to settle this complex question. Suffice it to say that the PSC's discussions with Sherman Street leadership and the executive of Classis Grand Rapids East have made it clear that this is a point about which reasonable, faithful people in the denomination may disagree.

However, while this question of authority is uncertain and nuanced in a case where the people being married are not affiliated with the CRC or with Calvin, there is far more certainty and less nuance in the present case, where one of the people being married was a Calvin employee. This is because both employees were clearly and unambiguously accountable to Calvin's staff handbook, which only condones sexual relations within the confines of a marriage between one man and one woman. Prof. Kuilema's act of officiating a fellow employee's LGBTQ+ wedding strongly suggests that he condones behavior out of step with stated policies and could furthermore easily be interpreted by outsiders as Calvin condoning such behavior, regardless of Prof. Kuilema's intent. In short, because an employee was involved, Prof. Kuilema's actions threatened Calvin's institutional integrity and reputation in a way that might not have been the case if an employee were not involved.

The fact that one employee was officiating for another and that both are accountable to Calvin's staff handbook policies, as well as the fact that LGBTQ+ issues are currently highly controversial in CRC circles, should have been considerations in Prof. Kuilema's strategizing around who to consult about his decision to officiate. Not only should he have brought this question above the level of program director and chair, he should have taken care to consult with people who held a different opinion than him on the core theological issue.

All of this assumes that Prof. Kuilema would have heeded negative advice on this matter; he has been transparent in multiple follow-up conversations with me and others that if I had counseled him against officiating he would have done it anyway. This is because he felt that the request he received to officiate was a test from God and that as a matter of personal integrity he had to accept. While I admire his conviction, knowing that he would not have taken my advice seriously on this important matter I do not see how either he or I can claim that in the future he would be able to live up to the expectation, expressed in CCAF and referenced by the Board chair in his 2018 letter, that he use "a strategy that begins by consulting with those in authority."

Closing Thoughts

There are many other aspects of Prof. Kuilema's decision and rationale in this case that are open to discussion and debate. In conversations and written exchanges with Prof. Kuilema and his colleagues, and in discussions with the PSC, we have collectively wrestled with the different status of civil vs. religious marriages, the weight of

Synodical pastoral advice, the role of dissent in prompting institutional change, the difference between dissenting in belief vs. action, the potentially inappropriate reach of university policies into personal and family lives, the distinction between policies about sex vs. marriage, and more. While space does not permit me to engage these complex and important questions here, I will say that I feel deep regret about the fact that if my recommendation is adopted Prof. Kuilema will no longer be engaging in discussing and debating them “in house” with us, since I believe his passionate and faithful voice on these issues has been a blessing to our community.

This sentiment was echoed in the letters of support he received for his reappointment file. Many of his colleagues have pointed to the fact that we have professors with a wide range of perspectives along the conservative-progressive spectrum as a signature quality of Calvin’s ethos and education: “I believe that Calvin remains uniquely positioned among Christian colleges and universities to foster a healthy community of discourse and a vibrant learning environment, in large part because of the presence of thoughtful and expert faculty members such as Joe.” In a similar vein, one of Prof. Kuilema’s conservative colleagues writes the following:

On a host of important and contested issues Joe and I see things rather differently. Nevertheless, I believe we both share a commitment to Calvin being the sort of place where Christians can disagree on important matters. . . . To be clear, I would not want Calvin to change in some of the ways Joe thinks it should. But I think if Calvin is confident enough to move forward in a contested cultural moment while holding to key convictions rooted in scripture and Christian tradition, then Calvin should be confident enough to keep a place for those who we have invited to be here for years and, on some issues at least though not the whole, act as the “loyal opposition....” Even though I think he’s wrong (and he me), he has an integrity that speaks well of him.

Finally, his colleagues express the view that Calvin is a better place with Prof. Kuilema among us: “we are impoverished without him.”

EXHIBIT 6

PSC Discussion Summary (Revised)

To: President LeRoy and members of the Professional Status Committee
 From: Benita Wolters-Fredlund, Dean, School of Humanities, Arts, and Social Sciences
 Date: April 4, 2022
 Re: PSC Discussion of Professor Joseph Kuilema's reappointment

The Professional Status Committee evaluated the reappointment dossier for Professor Joseph Kuilema in light of new information that surfaced in December 2021 and January 2022 that Prof. Kuilema had officiated at the LGBTQ+ wedding of a fellow employee after consulting with his chair, program director, pastors, and church council chair, but without consulting with his Dean, Provost, or President. The PSC also considered reports that summarized discussions that had taken place with a contingent of the PSC and Sherman Street CRC leadership and the executive of Classis Grand Rapids East about Prof. Kuilema's consultations with his local consistory and the role of Synodical and pastoral advice more generally. While the PSC's previous positive evaluation of Prof. Kuilema's Reformed Christian commitment, teaching, scholarship, and service did not change in view of this new information, the committee decided that this information provided evidence that Prof. Kuilema had not met the high standard for consultation set for all faculty, or those communicated specifically to him by the Board and Provost Brandsen in 2018, and that, as a result, they could not recommend his reappointment.

In their discussion of this case, PSC members affirmed the right of all faculty, including Prof. Kuilema, to disagree in principle with Calvin policies and denominational pastoral advice on LGBTQ+ matters, as long as such disagreement is done according to guidelines laid out in *Confessional Commitments and Academic Freedom*, *Handbook for Teaching Faculty*, and *Homosexuality and the Calvin College Community*. These documents emphasize high-trust communication patterns, the principle that good decisions are made in community with others, and the expectation that before faculty engage in conduct that may cause public controversy, they consult with their divisional vice president. In light of these expectations, as well as the clear expectations set for Prof. Kuilema by the Board and Provost Brandsen in 2018, the PSC was troubled by Prof. Kuilema's lack of transparency with the university about his decision to officiate at an LGBTQ+ wedding in October 2021. Members of the PSC felt that such a decision should have been made with more forthright communication and consultation with Calvin administrative leadership, including Prof. Kuilema's Dean and Provost. Members were also troubled by a lack of adherence to the commitments Prof. Kuilema made as a Calvin faculty member to live within institutional guidelines, noting that many other faculty who would like to see institutional and denomination change around LGBTQ+ affirmation shape their advocacy within the bounds of these expectations and guidelines.

Prof. Kuilema's many positive contributions to the community made this difficult decision a heavy one. The PSC ultimately decided that since that Prof. Kuilema's post-2018 appointments were *de facto* a probationary period during which his ability to adhere to the university's guidance and conditions with regard to his LGBTQ+ advocacy were under scrutiny, his behavior and decisions around officiating an LGBTQ+ wedding in October 2021 represented a failure to meet the expectations placed on him during this period.

510 Mich. 398
Supreme Court of Michigan.

ROUCH WORLD, LLC, and Uprooted
Electrolysis, LLC, Plaintiffs-Appellees,

v.

DEPARTMENT OF CIVIL RIGHTS
and Director of the Department of
Civil Rights, Defendants-Appellants.

No. 162482

|
Argued March 2, 2022

|
Decided July 28, 2022

Synopsis

Background: Event center operator and hair removal business, which allegedly denied services to customers based upon sexual orientation or gender identity, brought action against Michigan Department of Civil Rights (MDCR) and its director, seeking declaratory judgment that sexual orientation and gender identity were not encompassed by Elliott-Larsen Civil Rights Act's (ELCRA's) prohibition of sex discrimination in places of public accommodation, and an injunction prohibiting continued investigation of customers' complaints filed against operator and business. The Court of Claims, granted in part and denied in part customers' motion for summary disposition, finding that ELCRA's prohibition of sex discrimination did not encompass sexual orientation, but did encompass gender-identity discrimination. Customers filed interlocutory application for leave to appeal, and later filed bypass application to the Supreme Court, which was granted to address whether the prohibition on discrimination "because of sex" in the ELCRA applied to discrimination based on sexual orientation.

Holdings: The Supreme Court, Clement, J., held that:

[1] denial of the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation or public service on the basis of sexual orientation constitutes discrimination because of sex and, therefore, constitutes a

violation of the ELCRA; overruling *Barbour v. Dep't of Social Servs.*, 198 Mich. App. 183, 497 N.W.2d 216, and

[2] event center operator's denial of female customer's request for services related to her same-sex wedding constituted discrimination because of sex, and thus was prohibited under the ELCRA.

Reversed and remanded.

Zahra, J., dissented and filed opinion.

Viviano, J., dissented and filed opinion.

West Headnotes (21)

[1] **Appeal and Error** ⇌ Statutory or legislative law

Appeal and Error ⇌ De novo review

The Supreme Court reviews de novo both the denial of a motion for summary disposition and questions of statutory interpretation.

1 Case that cites this headnote

[2] **Statutes** ⇌ Intent

When interpreting a statute, the Supreme Court's primary goal is to ascertain and give effect to the Legislature's intent.

[3] **Statutes** ⇌ Language and intent, will, purpose, or policy

Statutes ⇌ Plain Language; Plain, Ordinary, or Common Meaning

The most reliable evidence of the Legislature's intent is the plain language of the statute.

1 Case that cites this headnote

[4] **Statutes** ⇌ Giving effect to statute or language; construction as written

Statutes ⇌ Clarity and ambiguity; multiple meanings

If the statute's language is clear and unambiguous, courts assume that the Legislature intended its plain meaning, and courts enforce the statute as written.

1 Case that cites this headnote

- [5] **Statutes** ⇌ Plain, literal, or clear meaning; ambiguity

If the statute's language is ambiguous, the Supreme Court may refer to the legislative history underlying the legislation.

1 Case that cites this headnote

- [6] **Statutes** ⇌ Superfluosness

In interpreting a statute, courts must attempt to avoid any construction that would render portions of a statute surplusage or nugatory.

- [7] **Civil Rights** ⇌ Public Accommodations

Civil Rights ⇌ Public Services, Programs, and Benefits

The operative phrase "because of," in Elliott-Larsen Civil Rights Act's (ELCRA's) prohibition on denial of full and equal enjoyment in goods, services, facilities, privileges, advantages or accommodations of a place of public accommodation or public service "because of" sex, establishes a but-for causation standard. Mich. Comp. Laws Ann. § 37.2302(a).

- [8] **Civil Rights** ⇌ Particular cases and contexts

Under the but-for causation standard of the Elliott-Larsen Civil Rights Act's (ELCRA's) prohibition on discrimination because of sex, causation is satisfied where sex is a determining factor in the discriminatory action. Mich. Comp. Laws Ann. § 37.2302(a).

1 Case that cites this headnote

- [9] **Civil Rights** ⇌ Particular cases and contexts

But-for causation, as required to establish discrimination because of sex under Elliott-

Larsen Civil Rights Act (ELCRA) is established where the discriminatory action would not have occurred but for the sex of the complainant. Mich. Comp. Laws Ann. § 37.2302(a).

- [10] **Civil Rights** ⇌ Sexual orientation or identity
Discrimination on the basis of sexual orientation necessarily involves discrimination because of sex in violation of the Elliott-Larsen Civil Rights Act. Mich. Comp. Laws Ann. § 37.2302(a).

2 Cases that cite this headnote

- [11] **Civil Rights** ⇌ Sexual orientation or identity
Sexual orientation is inextricably bound up with sex, for purposes of determining whether discrimination based on sexual orientation is discrimination because of sex as prohibited by Elliott-Larsen Civil Rights Act (ELCRA), because a person's sexual orientation is generally determined by reference to their own sex.

3 Cases that cite this headnote

- [12] **Civil Rights** ⇌ Sexual orientation or identity
To discriminate on the basis of sexual orientation also requires the discriminator to intentionally treat individuals differently because of their sex.

2 Cases that cite this headnote

- [13] **Civil Rights** ⇌ Place of business or public resort

Event center operator's denial of female customer's request for services related to her same-sex wedding constituted discrimination because of sex, and thus was prohibited under Elliott-Larsen Civil Rights act (ELCRA); had female customer been male, event center operator would not have denied its services, and but for female customer's sex, operator would have rendered its services. Mich. Comp. Laws Ann. § 37.2302(a).

- [14] **Civil Rights** ⇌ Sex

Where the discriminator tolerates certain characteristics in one sex but not the other, discrimination on the basis of sex has occurred.

1 Case that cites this headnote

[15] **Civil Rights** ⇌ Sexual orientation or identity

A person's sexual orientation necessarily implies conclusions about their sex, and so it is impossible to discriminate against a person for their sexual orientation without discriminating against that individual based on sex.

1 Case that cites this headnote

[16] **Civil Rights** ⇌ Particular cases and contexts

Prohibition of sex discrimination under Elliott-Larsen Civil Rights Act (ELCRA) requires a determination whether a specific individual was treated worse than a member of the opposite sex would have been; it does not ask how one sex-based group is treated as compared to another sex-based group; it is, therefore, no defense for a discriminator to say it discriminates against both men and women because of sex, instead, this practice doubles rather than dissolves liability because the ELCRA's focus is on individuals rather than groups. Mich. Comp. Laws Ann. § 37.2302(a).

[17] **Statutes** ⇌ Plain, literal, or clear meaning; ambiguity

The legislative history of a statute is relevant to the statute's meaning only where the statute is ambiguous.

1 Case that cites this headnote

[18] **Statutes** ⇌ Plain language; plain, ordinary, common, or literal meaning

When the statute's language is clear, courts rely on that plain language as the best evidence of its meaning.

[19] **Statutes** ⇌ Purpose

Statutes ⇌ Motives, Opinions, and Statements of Legislators

Statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of laws, rather than the principal concerns of legislators, which govern.

[20] **Statutes** ⇌ Language

Statutes ⇌ Motives, Opinions, and Statements of Legislators

Statutes ⇌ Power to amend

Should legislature disapprove of an application of a statute's enacted language, legislature remains free to amend statute; however, Supreme Court is bound by language that legislature has enacted, not what parties or amici believe legislature should have enacted or what any individual representative believed was enacted.

1 Case that cites this headnote

[21] **Civil Rights** ⇌ Sexual orientation or identity

The denial of the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation or public service on the basis of sexual orientation constitutes discrimination because of sex and, therefore, constitutes a violation of the Elliott-Larsen Civil Rights Act (ELCRA); overruling *Barbour v. Dep't of Social Servs.*, 198 Mich. App. 183, 497 N.W.2d 216. Mich. Comp. Laws Ann. § 37.2302(a).

Christopher M. Murray, J.

Attorneys and Law Firms

Great Lakes Justice Center (by David A. Kallman, William R. Wagner, Lansing, Stephen P. Kallman, Erin Mersino, Ann Arbor, and Jack C. Jordan, Lansing), for plaintiffs.

Dana Nessel, Attorney General, Fadwa A. Hammoud, Solicitor General, and Tonya Celeste Jeter, Ron Robinson,

and Kyla Barranco, Assistant Attorneys General, for defendants.

Leah M. Litman, Daniel T. Deacon, Jay D. Kaplan, Livonia, and Daniel S. Korobkin, for the American Civil Liberties Union of Michigan and others, amici curiae.

Gwinn Legal PLLC (by Daniel A. Gwinn, Troy, and Laura K. Bradshaw-Tucker), for the Corktown Health Center, amicus curiae.

Linus Banghart-Linn, Assistant Solicitor General, for Governor Gretchen Whitmer, amicus curiae.

McClelland & Anderson, LLP (by Melissa A. Hagen and Gail A. Anderson, Lansing), for Michigan Realtors, amicus curiae.

Freid, Gallagher, Taylor & Associates (by Debra A. Freid, Lansing) and Gafkay Law, PLC (by Julie A. Gafkay, Saginaw), for the Michigan Association for Justice, amicus curiae.

Eli Savit, Washtenaw County Prosecutor (by Eli Savit, Victoria Burton-Harris, and Christina Hines); Robert Steinhoff, Alger County Prosecutor; David Leyton, Genesee County Prosecutor; Carol A. Siemon, Ingham County Prosecutor; Jeffrey S. Getting, Kalamazoo County Prosecutor; Matt J. Wiese, Marquette County Prosecutor; Karen McDonald, Oakland County Prosecutor; and Kym Worthy, Wayne County Prosecutor, amici curiae.

Bodman PLC (by Thomas Van Dusen, Troy, Thomas J. Rheame, Jr., Detroit, and Gordon J. Kangas, Ann Arbor), for the Michigan Catholic Conference, amicus curiae.

Schiff Hardin LLP (by Jessica A. Sprovtsoff, Jacob K. Danziger, and Elise H. Yu, Ann Arbor) for various Michigan business, organizations, and Chambers of Commerce, and FGI (by Rami D. Fakhoury), for Dow, Inc, amici curiae.

Angie Martell, Ann Arbor, Amanda J. Shelton, Royal Oak, S. Kerene Moore, Donald C. Wheaton, Jr., Saint Clair Shores, Christine A. Yared, and Alanah M. Haskin, for the LGBTQA Section of the State Bar of Michigan, amicus curiae.

John J. Bursch, Caledonia, for Alliance Defending Freedom and Michigan Family Forum, amicus curiae.

BEFORE THE ENTIRE BENCH

OPINION

Clement, J.

***4 *404** At issue for our consideration is whether the prohibition of discrimination “because of ... sex” in the Elliott-Larsen Civil Rights Act (the ELCRA), MCL 37.2101 *et seq.*, encompasses discrimination on the basis of sexual orientation. We hold that it does. Accordingly, we overrule the Court of Appeals decision in *Barbour v Dep’t of Social Servs.*, 198 Mich App 183, 185, 497 N.W.2d 216 (1993), and reverse in part the Court of Claims decision below.

I. LEGAL BACKGROUND

This case concerns acts of alleged discrimination investigated by defendant, the Michigan Department of Civil Rights (the MDCR). The MDCR is an administrative agency that serves as the operational arm of the Michigan Civil Rights Commission (the MCRC). ***405** See MCL 16.575 through MCL 16.577. The MCRC is a constitutional body whose purpose is to secure constitutional and statutory guarantees against discrimination and investigate allegations that those guarantees have been violated. Const 1963, art. 5, § 29.

Among the legal guarantees against discrimination enforced by the MCRC is the statutory guarantee against discrimination provided by the ELCRA. The ELCRA recognizes 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 religion, race, color, national origin, age, sex, height, weight, familial status, or marital status” MCL 37.2102(1). Through the recognition and protection of this civil right, the ELCRA seeks to dismantle “the prejudices and biases borne against persons because of their membership in a certain class, and seeks to eliminate the effects of offensive or demeaning stereotypes, prejudices, and biases.” *Miller v C A Muer Corp.*, 420 Mich. 355, 363, 362 N.W.2d 650 (1984) (quotation marks and citations omitted).

The ELCRA specifically protects against discrimination in public accommodations¹ as follows:

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 *406 public service because of religion, race, color, national origin, age, sex, or marital status. [MCL 37.2302.]

Pursuant to its role in enforcing the ELCRA, the MCRC in May 2018 offered to the public for guidance its nonbinding interpretation of the practices prohibited by this statutory provision.² Specifically, Interpretive Statement 2018-1 opines that the prohibition of discrimination in places of public accommodation “because of ... sex” in MCL 37.2302(a) includes a prohibition of discrimination on the basis of sexual orientation and gender identity. The MCRC reasoned “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.”³ Pursuant to this interpretation of MCL 37.2302(a), the MCRC through the MDCR *407 has since investigated complaints alleging discrimination on account of gender identity and sexual orientation.

II. FACTUAL AND PROCEDURAL BACKGROUND

**5 This case involves two acts of alleged sex-based discrimination investigated by the MDCR pursuant to Interpretive Statement 2018-1. The first involves plaintiff Rouch World, LLC, which operates an event center in Sturgis, Michigan. In April 2019, Natalie Johnson and Megan Oswalt approached Rouch World regarding hosting their same-sex wedding at its facility. Rouch World declined. Its owners, Ben and Jamey Rouch, explained that hosting and participating in a same-sex wedding ceremony would violate their sincerely held religious belief that marriage is a sacred act of worship between one man and one woman. Johnson and Oswalt thereafter filed complaints with the MDCR, wherein they alleged that Rouch World discriminated against them on the basis of sex in violation of the ELCRA.

The second alleged act of sex-based discrimination occurred when plaintiff Uprooted Electrolysis, LLC, denied hair-removal services to Marissa Wolfe, a transgender woman. Sheri Curtice-Young, the owner of Uprooted Electrolysis, perceived the requested services to be centrally connected to Wolfe's transgender identity and asserted that delivering these services would violate her sincerely held religious belief

that sex is an immutable gift from God. Wolfe thereafter filed a complaint with the MDCR alleging that Uprooted Electrolysis had discriminated against her on the basis of sex in violation of the ELCRA.

Pursuant to the MCRC's Interpretive Statement 2018-1, the MDCR opened investigations into both of *408 these incidents. But the investigations were stayed when plaintiffs jointly sued the MDCR and its then director, seeking declaratory and injunctive relief. Specifically, plaintiffs sought a declaratory judgment that sexual orientation and gender identity are not encompassed by the ELCRA's prohibition of sex discrimination in places of public accommodation and an injunction prohibiting the continued investigation of the complaints filed against plaintiffs and the MDCR's continued adherence to Interpretive Statement 2018-1.

Defendants moved for summary disposition pursuant to MCR 2.116(C)(8)⁴ regarding the interpretation of the ELCRA, and the Court of Claims denied the motion in part and granted it in part. Regarding whether sexual orientation is encompassed by the ELCRA, the Court of Claims determined that it was bound to follow the Court of Appeals decision in *Barbour*, 198 Mich App 183, 497 N.W.2d 216. In *Barbour*, relying largely on then-current federal precedent regarding analogous provisions of Title VII of the Civil Rights Act of 1964, 42 USC 2000e *et seq.*, the Court of Appeals concluded that the ELCRA's discrimination prohibition did not encompass sexual orientation. *Id.* at 185, 497 N.W.2d 216. Acknowledging itself bound by this determination from *Barbour*, the Court of Claims here denied defendants' motion for summary disposition as applied to plaintiff Rouch World's arguments.

However, because *Barbour* did not concern gender-identity discrimination, the Court of Claims determined that it was not bound by *Barbour* in regard to plaintiff Uprooted Electrolysis's arguments. The Court of Claims considered the issue and determined that *409 when a person discriminates against “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” as prohibited under the ELCRA. In so concluding, the Court of Claims relied in part on the recent United States Supreme Court decision in *Bostock v Clayton Co*, 590 U.S. —, —; — U.S. —, 140 S Ct 1731, 1741, 207 L Ed 2d 218 (2020), wherein the Court held that an employer violates Title VII when it intentionally fires a person on the basis

of their homosexuality or transgender identity because “it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.” Accordingly, the Court of Claims granted defendants’ motion for summary disposition as to plaintiff Uprooted Electrolysis’s arguments.

****6** Defendants subsequently filed an interlocutory application for leave to appeal in the Court of Appeals, challenging the rejection of summary disposition as to plaintiff Rouch World’s sexual-orientation arguments. Shortly thereafter, defendants filed a bypass application in this Court. This Court granted the bypass application to address “whether the prohibition on discrimination ‘because of ... sex’ in the [ELCRA] applies to discrimination based on sexual orientation.” *Rouch World, LLC v Dep’t of Civil Rights*, 507 Mich. 999, 999, 961 N.W.2d 153 (2021). Notably, plaintiffs did not cross-appeal the Court of Claims’ determination that gender identity is encompassed by the ELCRA—the basis of the complaint against Uprooted Electrolysis—and so that issue is not currently before this Court.⁵

*410 III. ANALYSIS

[1] [2] [3] [4] [5] [6] We review de novo both the denial of a motion for summary disposition and questions of statutory interpretation. *Maiden v Rozwood*, 461 Mich. 109, 118, 597 N.W.2d 817 (1999); *Eggleston v Bio-Med. Applications of Detroit, Inc.*, 468 Mich. 29, 32, 658 N.W.2d 139 (2003). When interpreting a statute, this Court’s “primary goal is to ascertain and give effect to the Legislature’s intent.” *Tomecek v Bavas*, 482 Mich. 484, 495-496, 759 N.W.2d 178 (2008). “[T]he most reliable evidence of that intent is the plain language of the statute.” *South Dearborn Environmental Improvement Ass’n, Inc v Dep’t of Environmental Quality*, 502 Mich. 349, 360-361, 917 N.W.2d 603 (2018). “If the statute’s language is clear and unambiguous, we assume that the Legislature intended its plain meaning, and we enforce the statute as written.” *South Haven v Van Buren Co. Bd of Comm’rs*, 478 Mich. 518, 528, 734 N.W.2d 533 (2007) (quotation marks and citations omitted). However, if the statute’s language is ambiguous, this Court “may refer to the history of the legislation in order to determine the underlying intent of the Legislature.” *Luttrell v Dep’t of Corrections*, 421 Mich. 93, 103, 365 N.W.2d 74 (1984). This Court must attempt to avoid any construction that would render portions of a statute ***411** surplusage or nugatory. *South Dearborn*, 502 Mich. at 361, 917 N.W.2d 603. Finally, in interpreting

the ELCRA specifically, this Court has encouraged using as guidance federal precedent interpreting Title VII of the federal Civil Rights Act, the statute on which the ELCRA was based.⁶ See *Radtko v Everett*, 442 Mich. 368, 381, 501 N.W.2d 155 (1993); *Rasheed v Chrysler Corp.*, 445 Mich. 109, 124 n 20, 517 N.W.2d 19 (1994) (noting that the ELCRA was “clearly modeled” after Title VII).

A. APPLICABLE CASELAW

****7** Today, this Court is asked to determine whether the ELCRA’s prohibition of discrimination “because of ... sex,” MCL 37.2302(a), encompasses discrimination based on sexual orientation. As the Court of Claims recognized, the Court of Appeals previously answered this question in the negative in *Barbour*, 198 Mich App 183, 497 N.W.2d 216. In *Barbour*, the plaintiff was subject to harassment in his workplace on the basis of his perceived sexual orientation. *Id.* at 184, 497 N.W.2d 216. On appeal, the Court of Appeals summarily affirmed the trial court’s determination that the ELCRA did not encompass sexual-orientation discrimination on the basis of federal precedent holding the same with regard to Title VII, i.e., *DeSantis v Pacific Tel. & Tel Co.*, 608 F.2d 327 (CA 9, 1979), overruled in part by *Nichols v Azteca Restaurant Enterprises, Inc.*, 256 F.3d 864 (CA 9, 2001); *Williamson v A G Edwards & Sons, Inc.*, 876 F.2d 69 (CA 8, 1989), overruled by ***412** *Horton v Midwest Geriatric Mgt.*, 963 F.3d 844 (CA 8, 2020); and *DeCintio v Westchester Co. Med. Ctr.*, 807 F.2d 304 (CA 2, 1986). *Barbour*, 198 Mich App at 185-186, 497 N.W.2d 216. In those cases, the federal circuits reasoned that Congress’s intent in enacting Title VII—and specifically, its reference to “sex”—was “to place women on an equal footing with men,” rather than to regulate discrimination based on sexual orientation. *DeSantis*, 608 F.2d at 329 (quotation marks and citation omitted). See also *DeCintio*, 807 F.2d at 306. *Barbour* adopted the conclusion of these federal circuits without engaging in its own analysis of the issue under the ELCRA.⁷

Barbour, as a published, post-1990 Court of Appeals opinion, has precedential effect, and the Court of Claims properly recognized below that it was bound by that decision. MCR 7.215(C)(1) and (J)(1). However, this Court is not so bound, and developments in the law since *Barbour* have called into question its validity. Specifically, since the Court of Appeals decision in *Barbour*, the cases on which that Court relied were overturned in *Bostock*, 590 U.S. —; — U.S. —, 140 S Ct 1731, 207 L.Ed.2d 218. In *Bostock*, the United

States Supreme Court considered whether the employee plaintiffs terminated for their sexual orientation or gender identity brought cognizable claims of unlawful discrimination under Title VII.⁸ *Id.* at —; 140 S Ct at 1737-1738. Specifically at *413 issue was whether discrimination based on sexual orientation or gender identity is encompassed by Title VII's prohibition of employee discharge "because of such individual's ... sex." *Id.* at —; 140 S Ct at 1738.

To begin, the majority examined three distinct portions of the statutory text at hand: the term "sex," the phrase "because of," and the provision's subsequent catchall phrase "or otherwise to discriminate." With regard to defining the term "sex," the employers proposed a definition of "sex" as "status as either male or female [as] determined by reproductive biology," as the term allegedly would have been understood by Congress in 1964 when Title VII was enacted. *Id.* at —; 140 S Ct at 1739. The employees, on the other hand, argued for a broader definition of the term "sex" that encompassed "at least some norms concerning gender identity and sexual orientation." *Id.* However, "[b]ecause nothing in [the majority's] approach to these cases turn[ed] on the outcome of the parties' debate, and because the employees concede[d] the point for argument's sake," the majority proceeded on the assumption that "sex" referred "only to biological distinctions between male and female." *Id.*

**8 Next, the majority considered the operative phrase of the statute—"because of." The majority noted that it had previously defined this phrase as meaning "by reason of" or "on account of" and as establishing a *414 but-for standard of causation. *Id.* (quotation marks and citation omitted). Under this standard, "causation is established whenever a particular outcome would not have happened 'but for' the purported cause." *Id.* The majority acknowledged the breadth of this standard, as multiple but-for causes may exist for any single event, but noted that Congress had chosen this specific language rather than the more limiting language it had used for causation in other statutes. *Id.* Accordingly, this chosen causation standard would prevent an employer from avoiding liability for discriminatory action by merely citing some other, nondiscriminatory factor that contributed to the employment action. *Id.*

The majority next assessed the catchall phrase "or otherwise ... discriminate against," which appears at the conclusion of the statute's list of prohibited actions. *Id.* at —; 140 S Ct at 1740. The employers argued that the inclusion of this phrase meant that Title VII prohibits

employee discharge only when it involves both a protected characteristic and discrimination. *Id.* The majority again accepted this premise for argument's sake and went on to define "discrimination" as "treating that individual worse than others who are similarly situated." *Id.* In so doing, the majority specifically eschewed a definition of discrimination that would require a group-focused analysis that compares the employer's differential treatment of employees grouped by protected characteristic rather than individual employees themselves. *Id.* The eschewed perspective was seen as inconsistent with Title VII's repeated references to "individuals" rather than groups—i.e., " 'discharge any individual,' " " 'otherwise ... discriminate against any individual,' " and " 'because of such individual's' " protected characteristic. *Id.*, quoting 42 USC 2000e-2(a)(1) (emphasis *415 added). Given that individual focus, the majority concluded that the relevant inquiry under Title VII is whether the specific employee was treated differently, not whether the employer treats different groups of persons differently. *Bostock*, 590 U.S. at —; 140 S Ct at 1740.

From these textual assessments, the majority deduced that "[a]n employer violates Title VII when it intentionally fires an individual employee based in part on sex." *Id.* at —; 140 S Ct at 1741. Applying this principle to discrimination on the basis of sexual orientation and gender identity, the majority concluded:

[I]t is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex. Consider, for example, an employer with two employees, both of whom are attracted to men. The two individuals are, to the employer's mind, materially identical in all respects, except that one is a man and the other a woman. If the employer fires the male employee for no reason other than the fact he is attracted to men, the employer discriminates against him for traits or actions it tolerates in his female colleague. Put differently, the employer intentionally singles out an employee to fire based in part on the employee's sex, and the affected employee's sex is a but-for cause of his discharge. Or take an employer who fires a transgender person who was identified as a male at birth but who now identifies as a female. If the employer retains an otherwise identical employee who was identified as female at birth, the employer intentionally penalizes a person identified as a male at birth for traits or actions that it tolerates in an employee identified as female at birth. Again, the individual employee's sex plays an unmistakable

and impermissible role in the discharge decision. [*Id.* at —; 140 S Ct at 1741-1742.]

****9 *416** In sum, the majority held that discrimination based on sexual orientation or gender identity is necessarily encompassed within discrimination because of sex. See *id.*

The majority further acknowledged that when discrimination on the basis of sexual orientation is at issue, there may be two contributing factors to that discrimination: the individual's sex and the sex to which that individual is attracted. *Id.* at —; 140 S Ct at 1742. But the fact that the individual's sex is one of the causes of the discrimination—that “but for” the individual's sex, the action would not have occurred—is sufficient to satisfy Title VII; the existence of an additional but-for cause does not eliminate liability. *Id.* Similarly, the fact that the employer may have intended to discriminate on the basis of sexual orientation but not sex does not evade liability because “an employer who discriminates on th[is] ground[] inescapably intends to rely on sex in its decisionmaking” because sexual orientation is “inextricably bound up with sex.” *Id.* Finally, the majority also rejected the premise that an employer's willingness to discriminate against both male and female employees on the basis of sexual orientation removed Title VII liability. *Id.* Because Title VII requires an individual-based analysis rather than a group-based analysis, its liability is not limited to only employers who treat different groups of employees differently. *Id.* Accordingly, discriminating against individuals of different protected characteristic groups similarly “doubles rather than eliminates Title VII liability.” *Id.* at —; 140 S Ct at 1742-1743.

Bostock was not a unanimous opinion; Justices Alito, Thomas, and Kavanaugh dissented. The dissenting justices argued that the majority had usurped the authority of Congress by essentially rewriting Title VII ***417** to encompass discrimination based on sexual orientation and gender identity. *Id.* at —; 140 S Ct at 1754-1755 (Alito, J., dissenting); *id.* at —; 140 S Ct at 1822 (Kavanaugh, J., dissenting). They reasoned that, had Congress intended for sexual orientation and gender identity to be protected by Title VII, it would have used those terms specifically when it enacted the statute. *Id.* at —; 140 S Ct at 1829-1830 (Kavanaugh, J., dissenting). Instead, however, Congress used the term “sex,” which they opined was nearly universally understood in 1964 to refer to biological or anatomical distinctions between male and female and would not have been expected to include sexual orientation or gender identity. *Id.* at —, —; 140 S Ct at 1767, 1772

(Alito, J., dissenting). Further, the dissenting justices noted that repeated attempts to amend Title VII to include the specific terms sexual orientation and gender identity had proved unsuccessful. *Id.* at —; 140 S Ct at 1777-1778 (Alito, J., dissenting); *id.* at —; 140 S Ct at 1823-1824 (Kavanaugh, J., dissenting). Finally, the dissenting justices challenged the majority's conclusion that discrimination based on sexual orientation and gender identity necessarily entails discrimination based on sex, arguing that sex is distinct from these concepts and that employers who discriminate on the basis of sexual orientation and gender identity may not necessarily intend to discriminate on the basis of sex. *Id.* at —; 140 S Ct at 1758-1760 (Alito, J., dissenting); *id.* at —; 140 S Ct at 1828-1829 (Kavanaugh, J., dissenting).

****10** In response, the majority reiterated its position that although sexual orientation and gender identity are distinct concepts from sex, discrimination on the basis of the former two concepts necessarily entails discrimination on the basis of the latter. *Id.* at —; 140 S Ct at 1747 (majority opinion). Accordingly, the majority asserted ***418** that it was not redefining “sex” to include sexual orientation and gender identity but instead finding that the concepts are inextricably linked. *Id.* That Congress may not have anticipated this exact application of Title VII's prohibition of discrimination on the basis of sex does not prevent that application of unambiguous statutory text.⁹ *Id.* at —, —; 140 S Ct at 1747, 1750-1751. Demonstrating this principle in exercise, the majority referred to its decision in *Pennsylvania Dep't of Corrections v. Yeskey*, 524 U.S. 206, 208, 118 S Ct 1952, 141 L Ed 2d 215 (1998), wherein it determined that the directive in the Americans with Disabilities Act (the ADA) that prohibits public entities from discrimination against disabled individuals applied to prisons, despite Pennsylvania's argument that Congress had not predicted that the ADA would apply to prisoners with disabilities when it enacted the ADA. *Id.* at —, 140 S Ct at 1751. See also *id.* at —, —; 140 S Ct at 1747, 1752 (noting with regard to Title VII specifically that its accepted but likely unanticipated applications include sexual harassment and motherhood discrimination). The majority explained that the application of protective legislation to politically unpopular groups may not have been foreseen by the specific enacting Congress, but refusing to apply a statute on this ground “would not only require us to abandon our role as interpreters of statutes; it would tilt the scales of justice in favor of the strong or popular and neglect the promise that all persons are entitled to ***419** the benefit of the law's terms.” *Id.* at —; 140 S Ct at 1751. Further, to the extent that the dissenting

justices argued that Congress's failure to enact amendments to Title VII that would specifically include sexual orientation and gender identity was probative of Congress's intent that "sex" did not include these concepts, the majority noted that "no authoritative evidence" exists explaining why Congress failed to adopt such amendments here. *Id.* at —; 140 S Ct at 1747.¹⁰ Without such evidence, only speculation remains, and "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." *Id.*, quoting *Pension Benefit Guaranty Corp v LTV Corp*, 496 U.S. 633, 650, 110 S Ct 2668, 110 L Ed 2d 579 (1990).

In sum, *Bostock* held that Title VII's prohibition of employee discharge "because of such individual's ... sex" necessarily encompasses discriminatory employer action on the basis of sexual orientation and gender identity. In so holding, *Bostock* overruled lower federal precedent that had previously held to the contrary, including *DeSantis*, *Williamson*, and *DeCintio*—the cases on which the Michigan Court of Appeals relied in *Barbour*.

*420 B. ELCRA ANALYSIS

Given *Barbour*'s limited independent analysis and the overruling of the federal precedent it relied on in *Bostock*, as well as the new rule of federal law adopted in *Bostock*, we find it appropriate to now consider whether the ELCRA encompasses discrimination on the basis of sexual orientation.

[7] [8] [9] Section 302 of the ELCRA prohibits the denial of "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 ... sex" MCL 37.2302(a). This Court has previously held that the operative phrase "because of" in the ELCRA establishes a but-for causation standard. *Hecht v Nat'l Heritage Academies, Inc*, 499 Mich. 586, 606, 886 N.W.2d 135 (2016). See also *The American Heritage Dictionary of the English Language* (5th ed.) (defining "because of" as "[o]n account of; by reason of"). Under this standard, causation is satisfied where sex is "a determining factor" in the discriminatory action. *Matras v Amoco Oil Co*, 424 Mich. 675, 682-683, 385 N.W.2d 586 (1986). In other words, causation is established where the discriminatory action would not have occurred but for the sex of the complainant. See *id.* See also *Radtke*, 442 Mich. at

379, 501 N.W.2d 155 ("[T]he essence of a sex discrimination civil rights suit is that similarly situated people have been treated differently because of their sex."). Accordingly, we must answer here whether complainants who were denied service because of their sexual orientation would not have been so denied but for their sex.

*11 *421 Like its federal counterpart, the ELCRA does not define the term "sex."¹¹ Drawing from contemporary and historical dictionaries, the parties and amici propose varying definitions of the term "sex" and encourage this Court to affirmatively endorse one definition or another. Plaintiff Rouch World and certain amici propose a narrower definition of "sex" that defines the word as "whether one is a biological male or biological female"; but defendants and other amici propose a more expansive definition that incorporates physiological, structural, and behavioral characteristics. However, like our counterparts at the United States Supreme Court, we conclude that choosing between these definitions is not necessary here because the result of our textual analysis is the same regardless of whether we adopt a narrower or more expansive definition of the term "sex." Accordingly, for the sake of argument, we use but do not affirmatively rule in favor of the more restrictive definition.

[10] [11] [12] Using this more restrictive definition of the term "sex" and applying the but-for causation standard to the provision at hand, we conclude that discrimination on the basis of sexual orientation necessarily involves discrimination because of sex in violation of the ELCRA. In so doing, we find persuasive *Bostock*'s application of Title VII's but-for standard. While we are encouraged but not bound to consider persuasive Title VII federal caselaw, *Radtke*, 442 Mich. at 381-382, 501 N.W.2d 155, we find that *Bostock* offers a straightforward analysis of *422 the plain meaning of analogous statutory language and we agree with its reasoning.¹² A discriminator's choice to "[d]eny an individual the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations," on the basis of that *423 individual's sexual orientation is action that is dependent upon the individual's sex under MCL 37.2302(a). Sexual orientation is "inextricably bound up with sex," because a person's sexual orientation is generally determined by reference to their own sex. *Bostock*, 590 U.S. at —; 140 S Ct at 1742. For example, attraction to females in a fellow female is considered homosexual, while the same trait in a male is considered heterosexual; the sex of the individual at issue is necessary to determine their sexual orientation.

To discriminate on the basis of sexual orientation, then, also requires the discriminator to intentionally treat individuals differently because of their sex.¹³

****12 *424 [13] [14] [15]** Here, plaintiff Rouch World denied female complainant Johnson's request for services related to her wedding with female complainant Oswalt. Had Johnson instead been a male, Rouch World would not have denied its services. In other words, but for Johnson's sex, Rouch World would have rendered its services to Johnson. Although Rouch World's motivation for its denial of services was based on Johnson's sexual orientation, it is nevertheless true that, holding all other facts constant (including the sex of the romantic partner involved), Rouch World discriminated against Johnson because of her sex.¹⁴ Where the discriminator tolerates certain characteristics in one sex but not the other, discrimination on the basis of sex has occurred. *Id.* at —; 140 S Ct at 1737 (“An employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have ***425** questioned in members of a different sex.”). In sum, a person's sexual orientation necessarily implies conclusions about their sex, and so “it is impossible to discriminate against a person” for their sexual orientation “without discriminating against that individual based on sex.” *Id.* at —; 140 S Ct at 1741.¹⁵

Plaintiff Rouch World disputes this conclusion, arguing that sex discrimination is not a necessary consequence of discrimination based on sexual orientation. It posits that a person or corporation could enact a blanket policy refusing services to persons of a particular sexual orientation without considering sex at all. Said policy would apply to all persons of that sexual orientation, regardless of whether they are male or female. But this assertion ignores the interdependent relationship between sexual orientation and sex. As the United States Supreme Court explained:

[Even if] an employer asked homosexual or transgender applicants to tick a box on its application form, ... the individual applicant's sex [would] still weigh[] as a factor in the employer's decision....

... There is no way for an applicant to decide whether to check the homosexual or transgender box without considering ***426** sex. To see why, imagine an applicant doesn't know what the words homosexual or transgender mean. Then try writing out instructions for who should check the box without using the words, man, woman, or sex (or some synonym). It can't be done. Likewise, there is no

way an employer can discriminate against those who check the homosexual or transgender box without discriminating in part because of an applicant's sex. By discriminating against homosexuals, the employer intentionally penalizes men for being attracted to men and women for being attracted to women.... Any way you slice it, the employer intentionally refuses to hire applicants in part because of the affected individual's sex [*Id.* at 1746.]

****13** See also *Hively v Ivy Tech Community College of Indiana*, 853 F.3d 339, 350 (CA 7, 2017) (“It would require considerable calisthenics to remove ‘sex’ from ‘sexual orientation.’”). Because one's sex is necessary to the identification of sexual orientation, discrimination on that basis is discrimination on the basis of sex. Incorporating an additional consideration—such as the sex preference of that individual—and retitling that pair of considerations does not remove the effect of sex from the equation. See *Bostock*, 590 U.S. at —; 140 S Ct at 1741 (“It doesn't matter if other factors besides the plaintiff's sex contributed to the decision.”). In other words, the determination of sexual orientation involves both the sex of the individual and the sex of their preferred partner; referring to these considerations jointly as “sexual orientation” does not remove sex from the calculation.¹⁶ Were this Court to follow the approach proposed by Rouch World and adopted by ***427** Justice Zahra in dissent, any individual “would be able to rebut a discrimination claim by merely characterizing their action using alternative terminology.” *Zarda v Altitude Express, Inc.*, 883 F.3d 100, 114 (CA 2, 2018).¹⁷

****14 *428 [16]** Further, plaintiff Rouch World's approach would also apply a group-based analysis to the ELCRA that is not supported by its text. Recall that MCL 37.2302(a) prohibits a person or corporation from “[d]eny[ing] *an individual* the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations” of certain places and services. (Emphasis added.) By using the term “individual” rather than “group,” the ELCRA penalizes discriminatory action as applied to individuals, eschewing an analysis that looks instead to the differential treatment of groups. See *Bostock*, 590 U.S. at —; 140 S Ct at 1740-1741. The ELCRA's prohibition of sex discrimination requires a determination whether a specific individual was treated worse than a member of the opposite sex would have been; it does not ask how one sex-based group is treated as compared to another sex-based group. It is, therefore, no defense for a discriminator “to say it discriminates against both men and women because of sex”—instead, this practice doubles rather than dissolves liability because the ELCRA's focus is

on individuals rather than groups. *Id.* at —; 140 S Ct at 1741 (“This statute works to protect individuals of both sexes from discrimination, and does so equally.”).¹⁸ *429 Were a business to discriminate against both a homosexual male and a homosexual female, the business would be subject to liability under the ELCRA for both because in both cases the business discriminated against the individual for traits it otherwise would have tolerated in a different sex. See *id.*

**15 [17] [18] [19] Plaintiff Rouch World, along with the dissent, also criticizes this conclusion as inconsistent with the intent of the 1976 Legislature that enacted the ELCRA. It argues that the ELCRA’s legislative history demonstrates that the Legislature intentionally chose to exclude protections from discrimination based on sexual orientation, both at the time of its enactment by declining to include the specific language and repeatedly thereafter by rejecting proposed amendments that would have added the specific language. However, the legislative history of a statute is relevant to the statute’s meaning only where the statute is ambiguous. See *Luttrell v Dep’t of Corrections*, 421 Mich. 93, 103, 365 N.W.2d 74 (1984). When the statute’s language is clear, as it is here, we rely on that plain language as the best evidence of its meaning. *Shinholster v Annapolis Hosp.*, 471 Mich. 540, 549, 685 N.W.2d 275 (2004).¹⁹ Further, Rouch World’s assertion that the *430 1976 Legislature that enacted ELCRA would not have *431 foreseen the application of its prohibition on discrimination “because of ... sex” to sexual orientation does not render the statute ambiguous. As recognized by the United States Supreme Court, “statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.” *Oncale v Sundowner Offshore Servs, Inc.*, 523 U.S. 75, 79, 118 S Ct 998, 140 L Ed 2d 201 (1998). So while the principal evil motivating the 1976 Legislature to prohibit discrimination on the basis of sex may have been the preferential treatment of males to the detriment of females, this motivation does not curtail other applications of the plain statutory language. See *Bostock*, 590 U.S. at —; 140 S Ct at 1747 (“Title VII prohibits all forms of discrimination because of sex, however they may manifest themselves or whatever other labels might attach to them.”). Notably, both the ELCRA and Title VII have been applied to circumstances likely unanticipated by the enacting Legislature, including pregnancy discrimination, sex-stereotyping cases, same-sex sexual harassment, and retirement accounts. See, e.g., *Robinson v Ford Motor Co.*, 277 Mich App 146, 153, 744 N.W.2d 363 (2007)

(allowing liability under the ELCRA for same-sex hostile-work-environment claims); *Price Waterhouse v Hopkins*, 490 U.S. 228, 256, 109 S Ct 1775, 104 L Ed 2d 268 (1989) (opinion of Brennan, J.; superseded by statute on other grounds) (allowing *432 liability under Title VII because the employer’s actions “were motivated by stereotypical notions about women’s proper deportment”); *Los Angeles Dep’t of Water & Power v Manhart*, 435 U.S. 702, 98 S Ct 1370, 55 L Ed 2d 657 (1978) (allowing liability under Title VII for requiring women to make larger pension fund contributions because of their statistically greater longevity). Again, the Legislature’s failure to foresee particular statutory applications does not prohibit these applications so long as they are consistent with the plain language of the statute.²⁰

[20] Should the Legislature disapprove of an application of a statute’s enacted language, the Legislature remains free to amend the statute. This Court, however, is bound by the language that the Legislature has *433 enacted, not what the parties or amici believe the Legislature should have enacted or what any individual representative believed was enacted. See *Oncale*, 523 U.S. at 79, 118 S.Ct. 998.

IV. CONCLUSION

[21] Discrimination on the basis of sexual orientation necessarily constitutes discrimination because of sex. Accordingly, the denial of “the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation or public service” on the basis of sexual orientation constitutes discrimination “because of ... sex” and, therefore, constitutes a violation of the ELCRA under MCL 37.2302(a). We reverse the Court of Claims’ decision to the contrary and remand this case for further proceedings consistent with this opinion.

McCormack, C.J., and Bernstein, Cavanagh, and Welch, JJ., concurred with Clement, J.

Zahra, J. (dissenting).

The Court’s majority opinion is a victory for a good many Michiganders who worked diligently and unyieldingly for sexual-orientation equality under the law since the enactment of the Elliott-Larsen Civil Rights Act (the ELCRA), MCL 37.2101 *et seq.*, more than 45 years ago.¹ I take no issue with the merits of the policy adopted today by a majority of this

Court. I also harbor no doubt that my *434 colleagues in the majority are acting in good faith, with pure hearts and the best of intentions.

Yet under the Michigan Constitution, the Legislature—the people through the exercise of direct democracy—bears the ultimate responsibility to write, amend, or repeal the laws of this state.² And this Court's duty is to say what the law is, not what it thinks the law ought to be.³ But this is exactly what a majority of this Court has done here. The majority opinion declares that the ELCRA's prohibition of discrimination “because of ... sex” precludes discrimination because of sexual orientation—an interpretation that eluded the Legislature, the courts, the Michigan Civil Rights Commission (the MCRC), the Michigan Department of Civil Rights (the MDCR), and the people of Michigan for the vast majority of the ELCRA's 45-year existence.⁴

****17 *435** I would affirm the Court of Claims' conclusion that sexual orientation is not a protected class under the ELCRA. The majority opinion declares that “because of ... sex” means something that nobody in 1976 thought it meant. In so doing, the majority opinion also declares that phrase to encompass something that the enacting Legislature specifically and explicitly considered including but ultimately chose not to embrace. Whatever one's personal views about what the ELCRA ought to prohibit, its language prohibiting discrimination “because of ... sex” does not prohibit sexual-orientation discrimination, and it is not within the constitutional power of this Court to alter that language. If we are to be faithful to our constitutional mandate to say what the law is, we simply cannot pretend that the ELCRA says something that it does not say. Because the majority opinion is inconsistent with these bedrock principles of Michigan's constitutional system, I must dissent.

I. APPLICABLE STANDARD OF REVIEW AND CORRESPONDING RULES OF STATUTORY INTERPRETATION

We review questions of statutory interpretation *de novo*.⁵ “ ‘The cardinal rule of statutory construction is *436 to discern and give effect to the intent of the Legislature.’ ”⁶ We begin our interpretive inquiry with the words of a statute because they provide the best evidence of the Legislature's intent and its policy choices.⁷ And those words “should be interpreted on the basis of their ordinary meaning and

the context within which they are used in the statute.”⁸ When statutory language is unambiguous, no further judicial construction is required or permitted because the Legislature is presumed to have intended the meaning it plainly expressed by the words it chose.⁹

Moreover, statutory interpretation involves the search for a statute's original public meaning, which is *437 the meaning that the relevant linguistic community (i.e., legislators, courts, agencies, and reasonably informed members of the public) understood it to possess at the time it was enacted into law. “[S]tatutes convey meaning only because members of a relevant linguistic community apply shared background conventions for understanding how particular words are used in particular contexts.”¹⁰ Thus, the core of the interpretive enterprise is discovering what the linguistic community's chosen words meant to that community at the time those words became law.¹¹

II. ANALYSIS

****18** This Court is constitutionally entrusted with the privilege of interpreting the duly enacted laws of Michigan. But the majority opinion's holding that the ELCRA has *always* prohibited sexual-orientation discrimination amounts to an exercise of legislative, not *438 judicial, power. The relevant evidence, all of which establishes the historical-linguistic context necessary for an accurate interpretation of the ELCRA, demonstrates that the best reading of the ELCRA is that it prohibits *sex* discrimination, i.e., differential, negative treatment of persons of one gender vis-à-vis persons of the other gender, not *sexual-orientation* discrimination.

A. THIS COURT IS NOT CONSTITUTIONALLY AUTHORIZED TO MAKE POLICY, AND FOR IT TO DO SO SERIOUSLY UNDERMINES MICHIGAN'S CONSTITUTIONAL ORDER

In 1963, the people of the state of Michigan, in whom “[a]ll political power is inherent,”¹² adopted our state's Constitution, which separates the legislative, executive, and judicial powers into three distinct branches: the Legislature, the Governor, and the courts.¹³ In so doing, the people of Michigan delegated to the Legislature “ ‘the legislative power of the State of Michigan[.]’ ”¹⁴ Put another way, Michigan's

Constitution vests in the Legislature “the power to make laws,”¹⁵ or “the rules by which the duties and rights of every citizen are to be regulated.”¹⁶ Michigan’s Constitution *439 also vests in the judicial branch of government the power to interpret and apply the law.¹⁷

The separation of powers is an indispensable part of our constitutional system, and its cultivation and preservation provides the context within which the exercise of liberty is made possible. “By separating the powers of government, the framers of the Michigan Constitution sought to disperse governmental power and thereby to limit its exercise. ‘[T]here [is] no liberty ... if the power of judging be not separated from the legislative and executive powers.’”¹⁸

The federal system also features the separation of powers, and by looking to that system, we can better comprehend the function and purpose of the separation of powers in Michigan.¹⁹ The Supreme Court of the United States has explained that the separation of powers is intended to preserve the constitutional system of “checks and balances ... built into the tripartite Federal Government as a self-executing safeguard *440 against the encroachment or aggrandizement of one branch at the expense of the other.”²⁰ The “first purpose” of the separation of powers is “to prevent an unnecessary and therefore dangerous concentration of power in one branch.”²¹ The separation of powers is also “intended, in part, to protect each branch of government from incursion by the others.”²²

**19 Pursuant to this constitutional structure, policymaking is fundamentally a legislative prerogative.²³ As between the Legislature and this Court, we have recognized that the Legislature is the superior institution for creating the public policy of this state:

*441 As a general rule, making social policy is a job for the Legislature, not the courts. This is especially true when the determination or resolution requires placing a premium on one societal interest at the expense of another: The responsibility for drawing lines in a society as complex as ours—of identifying priorities, weighing the relevant considerations and choosing between competing alternatives—is the Legislature’s, not the judiciary’s.^[24] Accordingly, courts are “not to second-guess [the Legislature’s] policy decisions or to change the words of a statute in order to reach a different result.”²⁵ And just

because legislation “appears undesirable, unfair, unjust or inhumane does not of itself empower a court to override the [L]egislature and substitute its own solution.”²⁶ “We do not sit as the ‘legislators in chief’ of this state,” standing at the ready to update the Legislature’s work product that we find “‘cumbersome,’ ‘impractical,’ or ‘inadequately precise.’”²⁷

*442 All this to say, this Court’s duty is “to interpret the statute as we find it. The wisdom of the provision in question in the form in which it was enacted is a matter of legislative responsibility with which courts may not interfere.”²⁸ In our system of government, this Court’s function is “to fairly interpret a statute as it then exists; it is not the function of the court to legislate.”²⁹ Thus, “[i]n accordance with the constitution’s separation of powers, this Court cannot revise, amend, deconstruct, or ignore [the Legislature’s] product and still be true to our responsibilities that give our branch only the judicial power.”³⁰ The foregoing principles, when taken together and adhered to, prevent “the judiciary from usurping the powers of the political branches,”³¹ which also serves to uphold the people’s chosen constitutional structure, under which the power and duty to write laws belongs to the Legislature, not this Court.

*443 B. THE ELCRA, AS WRITTEN, DOES NOT PROHIBIT SEXUAL-ORIENTATION DISCRIMINATION

**20 I would affirm the Court of Claims’ conclusion that sexual orientation is not a protected class under the ELCRA and, consequently, would also affirm the result in *Barbour*.³² The majority opinion fails to read “because of ... sex” in its proper context, as those words were understood in 1976, when the Legislature passed the ELCRA. Because the word “sex” is not expressly defined in the ELCRA, the Court may consult dictionary definitions to determine its meaning.³³ The relevant meaning is to be found in dictionaries that existed prior to the ELCRA’s enactment (or slightly after, given that “[d]ictionaries tend to lag behind linguistic realities”³⁴).

*444 The *American Heritage Dictionary* (1970) provides the following definitions for “sex”:

1. a. The property or quality by which organisms are classified according to their reproductive functions. b. Either of two divisions, designated *male* and *female*, of this classification.
2. Males or females collectively.
3. The

sexual urge or instinct as it manifests itself in behavior. 4.

Sexual intercourse.^[35]

Similarly, *Webster's New Collegiate Dictionary* (1976) defines "sex" as follows:

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: sexually motivated phenomena or behavior[;] b: SEXUAL INTERCOURSE[;] 4: GENITALIA[.]^[36]

Examples abound.³⁷

****21 *446** The litigants debate the breadth of the definition of "sex." As noted in the majority opinion, "[p]laintiff Rouch World and certain amici propose a narrower definition of 'sex' that defines the word as 'whether one is a biological male or biological female'; but defendants and other amici propose a more expansive definition that incorporates physiological, structural, and behavioral characteristics."³⁸ The majority opinion "use[s] but do[es] not affirmatively rule in favor of the more restrictive definition,"³⁹ concluding that defendants prevail even under this narrower definition.

Contrary to the position expressed by defendants and adopted arguendo by the majority opinion, I conclude that the ELCRA's use of "sex" refers to whether one is a biological male or a biological female, as illustrated by the definitions set forth earlier. But, contrary to the majority opinion, I conclude that defendants do not prevail under that narrower definition. This is so because no person familiar with the common usage of the English language in 1976 would have ***447** understood the ordinary meaning of "sex" to include "sexual orientation." Simply stated, if discrimination "because of ... sex" retains its original, plain, and single meaning of treating similarly situated biological women differently and worse than similarly situated biological men, and vice versa,⁴⁰ then defendants' argument ***448** that the ELCRA prohibits sexual-orientation discrimination on the basis of its prohibition of discrimination "because of ... sex" fails.⁴¹

****22** Defendants claim, and the majority opinion holds, that plaintiffs' refusal to participate in the celebration of complainants' homosexual marriage amounts to unlawful discrimination "because of ... sex" under the ELCRA, on the ground that plaintiff's refusal necessarily implicates sex. The

heart of defendants' argument is that "[b]ecause one cannot fully define a person's sexual orientation without identifying his or her sex, sexual orientation is a function of sex."⁴² But this logic embodies a false premise. Sex can, and does, exist and can be determined without reference to ***449** sexual orientation. That is, sexual orientation may depend on sex, but sex does not depend on sexual orientation. Thus, sex and sexual orientation are not equivalent terms. A person need not know anything about another person's biological sex in order to know if that person has a homosexual orientation. For example, if an employer receives a referral that he "should hire Sam, who happens to be a homosexual," the employer could refuse to hire Sam because of his or her sexual orientation without ever even knowing Sam's biological sex. Knowledge about another person's biological sex is not necessary to influence one's actions toward that other person on the basis of his or her sexual orientation. These two terms simply are not interchangeable.

Consider the following hypothetical scenario provided by plaintiffs:

A conference hall has four people request to use their facility on the same day at the same time. The conference hall only has two rooms available so the owner can only approve two of the four people to use the facility. The four people are a straight man, a gay man, a straight woman, and a gay woman. If the owner has a bias against the female "sex," then the owner will approve the requests of the straight man and the gay man. However, if the owner has a bias against a "sexual orientation," then the owner will approve the request of the straight man and the straight woman.⁴³

As plaintiffs conclude, this illustrates that sex and sexual orientation are distinct concepts. Clearly, a bias rooted in gender produces one result, whereas a bias rooted in sexual orientation produces an entirely different ***450** result.⁴⁴ Because the discriminatory results of these biases are different, it is abundantly clear that sex and sexual orientation are not the same.⁴⁵

****23** Defendants attempt to avoid this conflict by insisting on a cherry-picked, broader definition of sex, which they proffer contrary to statutory context. But they do not prevail even with that broader definition. Specifically, defendants rely on one of the possible meanings of "sex": "The sexual urge or instinct as it manifests ***451** itself in behavior."⁴⁶ It is entirely unsurprising that a dictionary includes within its

definition of “sex” the desire to engage in sexual activity. But this in no way proves that the ordinary meaning of the word “sex” in 1976, especially as that term was used in the ELCRA, included sexual orientation.

Instead of addressing the actual intent of the ELCRA's drafters, defendants inappropriately argue that the fact that there exists a definition for sex that has to do with sexual activity or behavior means that this meaning of the word must be included among the ELCRA's protections. However, there is no rule of construction suggesting that the Legislature must have intended all possible meanings of a word it used. On the contrary, statutory terms “must be interpreted on the basis of their ordinary meaning and the context in which they are used.”⁴⁷

The ELCRA was not enacted to protect the expression of sexual behavior or the act of sexual intercourse, which are possible meanings under defendants' preferred definition of sex. For example, no reasonable person would conclude that the ELCRA's prohibition on discrimination “because of ... sex” would protect a person from being fired from his or her job for having sexual intercourse while at work, even though that is a possible meaning of “sex.”⁴⁸ Context and intent matter ^{*452} when interpreting statutes.⁴⁹ Just because courts may consult dictionaries for assistance does not mean they must robotically and blindly follow any and all of their definitions. This Court has always recognized and enforced this commonsense rule.⁵⁰

^{**24} When read in context it becomes eminently clear that the plain and ordinary meaning of the word “sex” in 1976 did not include sexual orientation.⁵¹ This ^{*453} conclusion is bolstered by the ELCRA's prepassage history, which shows that the Legislature specifically and explicitly considered adding, but ultimately declined to add, sexual orientation as a protected class in the ELCRA. Before the ELCRA became law, the director of the Detroit Human Rights Department (the DHRD) sent a letter to Representative Perry Bullard, then the chair of the Michigan House of Representatives' Civil Rights Committee (the Committee).⁵² The DHRD's letter flagged what it took to be a flaw in the proposed language of the ELCRA (then House Bill 4055). Unlike the “Declaration of Rights” in the city of Detroit's new charter, HB 4055 did not include sexual orientation as a protected class. The East Lansing Human Relations Commission also sent a letter to Representative Bullard and the Committee, urging the addition of sexual orientation as a protected class. On June

5, 1975, the Committee held a roll-call vote on whether to include sexual orientation, and by a 5 to 3 vote, it declined to add that language. “On the day that the bill was scheduled to be voted out of committee,” the committee room was filled with “gay[] and lesbian[] ... advocates who ... claim[ed] that the proposed ^{*454} law, as drafted, was short sighted” because it did not protect gays and lesbians.⁵³ Their appeal fell on deaf ears. One of the bill's cosponsors, Representative Mel Larsen, later admitted that it was very unlikely that the ELCRA would have made it out of the House had it been amended to include sexual orientation as a protected class.⁵⁴ The Legislature therefore made a political choice to not extend the ELCRA to prohibit sexual-orientation discrimination, and it did so with the understanding that, by not including sexual orientation as a protected class, discrimination on that basis would not be prohibited by the ELCRA.⁵⁵

^{**25} ^{*455} Crucially, when discharging its interpretive responsibilities, this Court has recognized repeatedly that “where the Legislature has affirmatively rejected language that would support an interpretation of a statute, that rejection evidences a legislative intent toward a contrary construction.”⁵⁶ Again, this Court's interpretive lodestar is the Legislature's intent, best evidenced by the words it chose to comprise a statute, and the ^{*456} Court is “aided in discovering legislative intent ... by examining the proposed legislation [that the Legislature] considered and rejected, contrasted with the provisions as finally adopted.”⁵⁷ And, “[w]here the Legislature has considered certain language and rejected it in favor of other language, the resulting statutory language should not be held to explicitly authorize what the Legislature explicitly rejected.”⁵⁸ The Supreme Court of the United States has held similarly, explaining that a congressional committee's deletion of a provision from a bill under consideration strongly militates against a judgment that Congress intended a result it had expressly declined to enact.⁵⁹ Relatedly, “[f]ew principles of statutory construction are more compelling than the proposition that [the Legislature] does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language.”⁶⁰

^{*457} As this Court has explained, the highest quality legislative history

include[s] actions of the Legislature intended to repudiate the judicial construction of a statute, see, e.g., *Detroit v*

Walker, 445 Mich. 682, 697, 520 N.W.2d 135 (1994), or actions of the Legislature in considering various alternatives in language in statutory provisions before settling on the language actually enacted. See, e.g., [*Miles ex rel Kamferbeek*, 223 Mich. at 558, 194 N.W. 605]. From the former, a court may be able to draw reasonable inferences about the Legislature's intent, even when the Legislature has failed to unambiguously express that intent. From the latter, by comparing alternative legislative drafts, a court may be able to discern the intended meaning for the language actually enacted.^[61]

These principles of statutory interpretation are dispositive for properly interpreting the ELCRA, and the majority opinion errs by ignoring them in favor of a myopic focus on an erroneous understanding of the original meaning of the ELCRA's text, taken without *458 due consideration of the historical-linguistic context from which the phrase at issue arose.⁶²

**26 My interpretation of the ELCRA is not a novel one. Neither the MCRC nor the MDCR, the institutional actors entrusted with enforcing the ELCRA and who *459 have a natural, vested interest in pursuing more expansive, aggressive interpretations of it,⁶³ understood the ELCRA to prohibit sexual-orientation discrimination until 2018. In 1977, the same year that the ELCRA became effective, the MCRC published a "Sexual Orientation Report and Recommendations."⁶⁴ In a 2013 report, the MCRC, discussing that 1977 report, stated that "[p]erhaps the most significant conclusion reached in [the 1977] report was the [MCRC's] statement that the [MDCR] would not handle sexual orientation discrimination cases. The [MCRC] cited a lack of jurisdiction until the State legislature specifically authorized such an addition to its powers under ELCRA."⁶⁵ In 1983, the MCRC issued *460 a statement saying that the ELCRA should be amended to prohibit sexual-orientation discrimination.⁶⁶ And in 2013, the MCRC issued the aforementioned "Report on LGBT Inclusion Under Michigan Law with Recommendations for Action," which reaffirmed the MCRC's original, longstanding position, held since the ELCRA became effective in 1977, that the ELCRA does not prohibit sexual-orientation discrimination.⁶⁷ While an agency's interpretation of a statute is, of course, not binding on us,⁶⁸ we should not treat it, as the majority opinion does, as though it is no evidence at all of a statute's meaning.⁶⁹ Defendants cannot admit that, for more than 40 years, the MCRC openly acknowledged that it did not understand "sex"

*461 to include sexual orientation,⁷⁰ and then in the same breath argue that it is suddenly plain and obvious that it does—indeed, that it always has.⁷¹

**27 *463 Finally, by consulting the Corpus of Historical American English (the COHA),⁷² we have strong evidence that the 1970s public understood that the ELCRA would prohibit sex discrimination—differential, negative treatment of members of one sex vis-à-vis members of the other sex⁷³—not sexual-orientation discrimination. Availing ourselves of a relatively new tool of statutory interpretation, corpus linguistics,⁷⁴ and performing a search for "sex discrimination"—which is what the ELCRA declares unlawful—we note that every single one of the 20 search results generated for the decade preceding the ELCRA's passage into law (i.e., 1966–1976) pertains to differential, negative treatment of persons in terms of gender. There are no *464 references to sexual-orientation discrimination in any of those COHA search results. Not even a hint.

For these reasons, it is a clear violation of the Michigan Constitution's separation of powers for this Court to add by judicial fiat a category to the ELCRA that was specifically rejected by the enacting Legislature and understood for more than 40 years to not exist in the ELCRA by the governmental institutions principally charged with enforcing it, not to mention a former governor, numerous legislators, and informed members of the public.⁷⁵ Consequently, we should not read the ELCRA to accomplish something that it plainly and indisputably would have accomplished had sexual orientation been expressly included in it, especially when we know that the Legislature knew how to *465 achieve that goal if it had wanted to achieve it, given that it has done so in other statutes.⁷⁶

**28 That the Legislature considered adding sexual orientation to the ELCRA but ultimately chose not to do so materially distinguishes this case from *Bostock*, on which the majority opinion is patterned,⁷⁷ thereby requiring a different outcome. Unlike the 88th Congress (1963–1965) that passed Title VII, our Legislature, in its 78th legislative session (1975–1976), is known to have explicitly considered, but ultimately rejected, adding sexual orientation as a protected class under the ELCRA. Why it did not include sexual orientation, even if such information could be known with confidence, is irrelevant. When the Legislature "has considered certain language and rejected it in favor of other

language, *the resulting statutory language should not be held to explicitly authorize what the Legislature explicitly rejected.*⁷⁸ That is precisely the situation here. Thus, this Court should not read the ELCRA to cover something that the Legislature specifically and explicitly did not craft it to cover.⁷⁹ To *466 hold otherwise runs afoul of the people's right to govern themselves through their elected representatives in the Legislature.

III. CONCLUSION

****29** This Court's function is to interpret and apply the laws that the Legislature writes. That is not what the majority opinion has done. Instead, it analyzes the words of the ELCRA in a vacuum, stripped from their *467 relevant and critical historical-linguistic context—context that is necessary to make them fully intelligible and to preserve Michiganders' right to self-government and the constitutional separation of powers. Seizing on the words of the ELCRA in isolation, the majority opinion is thereby able to declare them to mean something that nobody for more than 40 years seriously believed that they meant. The best interpretation of the ELCRA, in light of the available evidence about its original public meaning, is that its prohibition on discrimination in public accommodations “because of ... sex” does not encompass a prohibition on sexual-orientation discrimination. This is all the more obvious given that the Legislature specifically and explicitly considered including sexual orientation as a protected class under the ELCRA but ultimately did not. Though I take no issue with today's outcome, because I do not recognize the manner in which it has been achieved by the majority opinion to be faithful to the judicial role, I dissent.

Viviano, J. (dissenting).

Justice Zahra's thorough dissent cogently explains why the original public meaning of “sex” when the Elliott-Larsen Civil Rights Act (the ELCRA), MCL 37.2101 *et seq.*, was passed did not and could not encompass “sexual orientation.” I agree with the conclusion he reaches. I write separately, however, to explain how the majority mangles another aspect of the ELCRA. The relevant statutory provision, MCL 37.2302(a), prohibits certain discriminatory actions taken “because of ... sex,” among other things. Properly interpreted, this requires that the defendant maintain some prejudice, bias, animus, or belief about “sex” or the other

characteristics protected by the statute. In other words, when someone discriminates against another person “because of” that person's *468 “sex,” the discrimination results from a belief about or animus against that person's sex. Only once this threshold element is satisfied does one need to consider the degree to which that belief or animus motivated the defendant, e.g., whether the discriminatory motive must be a but-for cause.

Here, that threshold is not satisfied: discrimination on the basis of one's sexual orientation is not discrimination because of some prejudice, bias, animus, or belief about the male sex or the female sex. Consequently, we need not decide whether to adopt a but-for standard. But even if that standard applied, the majority still reaches the wrong outcome. A proper application of the but-for test takes into account the defendant's motive. That means where, as here, no belief or animus about biological sex has been shown, “sex” cannot be a but-for cause of discriminatory actions. Accordingly, I dissent.

I. THE TEXT REQUIRES A DISCRIMINATORY MOTIVE

The ELCRA's general provision states:

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 37.2102(1).]

Other sections more fully implement this provision. The section that Rouch World allegedly violated is MCL 37.2302:

Except where permitted by law, a person shall not:

***469** (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.^[1]

The relevant inquiry is whether an individual is subject to certain adverse actions “because of” his or her “sex.” MCL 37.2302(a).

****30** I believe that the majority's decision today, by myopically focusing on the term “because of,” fails to adequately account for the original meaning of the full text

of MCL 37.2302(a). The statute requires a link between the specified discriminatory actions and a specified protected class or characteristic. When the entire section is considered, it is clear that the connection must be the defendant's discriminatory motive or intent, i.e., he or she must take the discriminatory action because of some belief or animus with regard to the protected characteristic. The but-for test might *470 still fit within this framework, explaining the degree to which the belief or animus must motivate the defendant. But it is unnecessary to decide whether the but-for test or some alternative standard (such as the motivating-factor test, discussed below) applies when a discriminatory motive or intent has not been established. Put differently, to run afoul of the statute, a defendant must have some belief or prejudice about the protected characteristic that prompts him or her to act. Only then is it appropriate to ask how much of a role this motivation played in the action.

A. TEXTUAL ANALYSIS

The majority today eschews any focus on intent and, in doing so, departs from the ordinary meaning of the statute. Following the lead of the United States Supreme Court, the majority here finally adopts the but-for gloss on “because of.” The centerpiece of this analysis comes from *Bostock v. Clayton Co.*, 590 US —, —; — U.S. —, 140 S Ct 1731, 1739, 207 L Ed 2d 218 (2020):

And, as this Court has previously explained, “the ordinary meaning of ‘because of’ is ‘by reason of’ or ‘on account of.’ ” *University of Tex. Southwestern Medical Center v. Nassar*, 570 U. S. 338, 350, [133 S Ct 2517, 186 L Ed 2d 503] (2013) (citing *Gross v. FBL Financial Services, Inc.*, 557 U. S. 167, 176, [129 S Ct 2343, 174 L Ed 2d 119] (2009); quotation altered). In the language of law, this means that Title VII’s “because of” test incorporates the “‘simple’ ” and “‘traditional’ ” standard of but-for causation. *Nassar*, 570 U. S. at 346, 360, 133 S.Ct. 2517. That form of causation is established whenever a particular outcome would not have happened “but for” the purported cause. See *Gross*, 557 U. S. at 176, 129 S.Ct. 2343. In other words, a but-for test directs us to change one thing at a time and see if the outcome changes. If it does, we have found a but-for cause.

*471 This can be a sweeping standard. Often, events have multiple but-for causes. So, for example, if a car accident occurred *both* because the defendant ran a red light *and* because the plaintiff failed to signal his turn at

the intersection, we might call each a but-for cause of the collision. Cf. *Burrage v. United States*, 571 U. S. 204, 211–212, [134 S Ct 881, 187 L Ed 2d 715] (2014). When it comes to Title VII, the adoption of the traditional but-for causation standard means a defendant cannot avoid liability just by citing some *other* factor that contributed to its challenged employment decision. So long as the plaintiff’s sex was one but-for cause of that decision, that is enough to trigger the law. See *ibid.*; *Nassar*, 570 U. S. at 350, 133 S.Ct. 2517.

The first term to consider in MCL 37.2302(a) is “because of.” The dictionary definition of that term is “by reason of; on account of.” *American Heritage Dictionary* (2d college ed, 1982), p. 166. See also *Webster’s New Collegiate Dictionary* (1976), p. 98 (same); *The Random House Dictionary of the English Language: Second Unabridged Edition* (1987) (defining “because of” as “by reason of; due to”), p. 184; *The Oxford English Dictionary* (2d ed, 1989), p. 41 (defining “because of” as, relevantly, “[b]y reason of, on account of”). “Reason” is relevantly defined as “a basis or cause, as for some belief, action, fact, event, etc....” *The Random House Dictionary of the English Language: Second Unabridged Edition* (1987). Thus, a person can be said to take an action “because of” sex when sex was a “cause” or “basis” of the person’s act.

The words “cause” and “basis” do a lot of work here. “Cause” is defined as “the reason or motive for some human action[.]” *Id.* Put differently, it is “[a] fact, condition of matters, or consideration, moving a person to action; ground of action; reason for action, motive.” *The Oxford English Dictionary* (2d ed, 1989). Thus, based purely on dictionary definitions, sex is a “cause” when it is the reason, motive, or intent behind the *472 person’s action—when it is the fact or consideration that leads a person to take an action. “Basis” is similarly defined as “the groundwork or first principle; that which supports; foundation” *Webster’s New Twentieth Century Dictionary: Unabridged* (2d ed, 1977). Sex is the “basis” for an act, then, when it supports or provides a foundation for the act—thus, when the act is discriminatory, sex is the basis when the actor has a prejudice, bias, animus, or belief with regard to a person’s sex.

**31 That the motive or intent must constitute a prejudice, bias, or animus against the protected characteristic is readily apparent from the broader statutory context. Although the ELCRA does not contain the phrase “discriminate against”—which is found in the federal counterpart, 42 USC

2000e-2(a)(1)—the requirement of discriminatory animus is inherent in MCL 37.2302(a).² Indeed, the general ELCRA provision, MCL 37.2102(1), expressly prohibits “discrimination because of” various protected characteristics. MCL 37.2302(a) effectuates this prohibition with regard to certain public accommodations. As noted, this provision states that a person shall not “[d]eny an individual the full and equal enjoyment of” certain services, goods, or accommodations. MCL 37.2302(a). To “discriminate” means “to make a distinction in favor of or against a person or thing on the basis of the group, class, or category to which the person or thing belongs rather than according to actual merit; show partiality[.]” *The Random House Dictionary of the English Language: Second Unabridged Edition* (1987), p. 564. To deny someone access to the goods, services, or *473 accommodations on the basis of his or her sex is obviously a form of discrimination, i.e., it is making a distinction against the person on the basis of the person's sex. Therefore, while MCL 37.2302(a) lacks the phrase “discriminate against,” the statute's language means essentially the same thing but is stated more specifically with regard to how the discrimination would occur, i.e., the denial of the good, service, or accommodation.³

Discrimination naturally requires a prejudice, bias, animus, or some belief about a protected class or characteristic. As one scholar has noted, the term “discriminate” is often used with “prejudice,” demonstrating a semantic link between the two words. Phillips, *The Overlooked Textual Evidence in the Title VII Cases: The Linguistic (and Therefore Textualist) Principle of Compositionality* (May 11, 2020) (unpublished manuscript), p. 5, available at <https://www.supremecourt.gov/opinions/URLs_Cited/OT2019/17-1618/17-1618-3.pdf> (accessed July 24, 2022). Dictionaries from the relevant period frequently defined “discriminate against” in a manner that “refers to mistreatment based on *prejudice directed at* members of a discrete group.”⁴ Thus, discrimination *474 against a person “because of ... sex,” the scholar concluded, “refers only to adverse treatment that rests on *prejudice (or bias)—i.e., loose generalizations or other unfair beliefs, attitudes (indifference, discounting of interests, distaste, antipathy, etc.)—directed at some or all men, or at some or all women.*” *Id.* at 3.

**32 Accordingly, the ELCRA focuses on the motives and beliefs of the defendant with regard to the characteristic at issue. The question in a sex-discrimination case, then, is “whether the defendant employer took a particular adverse employment action against a particular female employee

because she is a woman or against a particular male employee because he is a man.” *Hively v Ivy Tech Community College of Indiana*, 853 F.3d 339, 365 (CA 7, 2017) (Sykes, J., dissenting).

B. CASELAW

Our caselaw provides ample support for the conclusion that the ELCRA requires the defendant to maintain a discriminatory motive concerning the characteristics protected by the statute. This motive represents a prejudice, bias, animus, or belief concerning the characteristic itself or people with the characteristic. *475 As this Court has observed, the ELCRA and similar statutes “are addressed to ‘the prejudices and biases’ one race, sex, or religion bears against another.” *Boscaglia v Mich Bell Tel Co*, 420 Mich. 308, 316, 362 N.W.2d 642 (1984) (citation omitted). We have similarly observed that the ELCRA “seeks to eliminate the effects of offensive or demeaning stereotypes, prejudices, and biases.” *Miller v C A Muer Corp*, 420 Mich. 355, 363, 362 N.W.2d 650 (1984).

These prejudices and biases are necessarily aimed at the protected characteristics and statuses listed in the statute. In holding that “[t]he clear, unambiguous language of [the ELCRA] protects status, not conduct,” we have explained that the statute requires “evidence of discrimination based on one of the protected characteristics” or some “link between the conduct [the plaintiff engaged in] and a protected status.” *Veenstra v Washtenaw Country Club*, 466 Mich. 155, 160, 165-166, 645 N.W.2d 643 (2002). Elaborating, we described the “direct function of the words ‘because of’ ” as follows: the ELCRA “merely prohibits actions that are taken *with regard* to certain types of statuses, ‘*because of* these characteristics. *It does not prohibit actions that are legitimately taken for any other reason.*” *Id.* at 165, 645 N.W.2d 643 n 7 (some emphasis added). Thus, the statute proscribes discrimination that arises from prejudices or biases against one of the listed characteristics or statuses.

In keeping with this understanding, our caselaw has, until today, always stressed that the discriminatory action must be causally linked to the defendant's motives and intent. This is true even though we have—again, until today—never finally settled on a test for determining the degree to which those motives must explain (i.e., be causally related to) the discriminatory *476 action. We have sometimes favored a but-for test and sometimes a motivating-factor test. See

Hrapkiewicz v Wayne State Univ Bd of Governors, 501 Mich. 1067, 1067-1069, 910 N.W.2d 654 (2018) (Markman, C.J., dissenting) (discussing the caselaw).

It appears that our first case to mention the but-for standard was *Matras v Amoco Oil Co*, 424 Mich. 675, 385 N.W.2d 586 (1986). That age-discrimination case was originally brought under the ELCRA's predecessor (which lacked a provision on sex discrimination), the Fair Employment Practices Act (FEPA), MCL 423.301 *et seq.*⁵ As *Matras* demonstrates, we have long understood that discrimination cases require discriminatory motive:

A jury can find that the discharge was “because of age” even if age was not the sole factor. As accurately expressed in the Michigan Standard Jury Instruction, “[age] does not have to be the only reason, or even the main reason, but it does have to be one of the reasons which made a difference in determining whether or not to [discharge] the plaintiff.” *Another formulation would be that age is a determining factor when the unlawful adverse action would not have occurred without age discrimination.* Alternative expressions of the determining factor concept are “but for causation” or “causation in fact.”

****33** *In the instant case, the question therefore becomes whether there was sufficient evidence, when the evidence and inferences therefrom are viewed in a light most favorable to Matras, for reasonable jurors to conclude that age discrimination was a determining factor in the decision to discharge him.* [*Matras*, 424 Mich. at 682-683, 385 N.W.2d 586 (emphasis added; citations omitted; alterations in original).]

***477** We offered varying formulations of the test—“made a difference,” “determining factor,” and “but-for causation”—but embedded in each was the notion that discriminatory motive is critical.

Other cases applying a but-for test likewise indicate that the defendants’ motives are a key element. In *Radtke v Everett*, 442 Mich. 368, 383-384, 501 N.W.2d 155 (1993), for example, the plaintiff alleged sexual “harassment on the basis of sex” when her employer allegedly held her down and tried to kiss her. The defendant argued that his conduct was not sexual but romantic. Rejecting this, we stated that “plaintiff need only show that ‘but for the fact of her sex, she would not have been the object of harassment.’ ” *Id.* at 383, 501 N.W.2d 155 (citation omitted). In concluding that she had made this showing, we stated, “The overtures at issue were certainly inferentially sexually motivated: but for her

womanhood, Everett would not have held plaintiff down and attempted to solicit romance, if not sex, from her.” *Id.* at 384, 501 N.W.2d 155. While this applies the but-for test, it shows that the test cannot be used without consideration of the defendant’s motivation.

More recently, in *Hecht v Nat’l Heritage Academies, Inc.*, we stated: “The ultimate question in an employment discrimination case is whether the plaintiff was the victim of intentional discrimination. In our caselaw, we have interpreted the CRA to require ‘ “but for causation” or “causation in fact.” ’ ” We reaffirm that construction here.” *Hecht*, 499 Mich. 586, 606, 886 N.W.2d 135 (2016), quoting *Matras*, 424 Mich. at 682, 385 N.W.2d 586 (citation omitted). As in *Radtke*, we seemed to understand the but-for test as a tool for measuring whether the discriminatory intent was a sufficient cause of the adverse employment action. Again, we stated, “The ultimate question in an employment discrimination ***478** case is whether the plaintiff was the victim of intentional discrimination.” *Hecht*, 499 Mich. at 606, 886 N.W.2d 135, citing *Reeves v Sanderson Plumbing Prod, Inc.*, 530 U.S. 133, 153, 120 S Ct 2097, 147 L Ed 2d 105 (2000) (“The ultimate question in every employment discrimination case involving a claim of disparate treatment is whether the plaintiff was the victim of intentional discrimination.”).

Our cases have also indicated that the term “because of” in the ELCRA requires a showing that consideration of the protected characteristic was a motivating factor in the defendant’s decision. In *Hazle v Ford Motor Co*, 464 Mich. 456, 462, 628 N.W.2d 515 (2001), we explained that if direct evidence of the prohibited “bias” is produced, the case can proceed as in any other civil matter. “Direct evidence,” we said, is “ ‘evidence which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer’s actions.’ ” *Id.* (citation omitted). If such evidence is unavailable, then a burden-shifting test applies, under which a rebuttable presumption arises if the plaintiff presents a prima facie case of discrimination: “evidence that (1) she belongs to a protected class, (2) she suffered an adverse employment action, (3) she was qualified for the position, and (4) the job was given to another person under circumstances giving rise to an inference of unlawful discrimination.” *Id.* at 463, 628 N.W.2d 515. This raises a presumption of discrimination which can be rebutted by evidence of a legitimate, nondiscriminatory reason for its decision. *Id.* at 464, 628 N.W.2d 515. If this is shown, then the plaintiff must demonstrate the evidence could lead a

reasonable trier of fact to believe that “discrimination was a motivating *479 factor for the adverse action” *Id.* at 465, 628 N.W.2d 515 (quotation marks and citation omitted).⁶

****34** The burden-shifting test demonstrates that discriminatory motives are at the heart of the analysis. The test is geared toward determining whether a discriminatory motivation prompted the challenged action. This, in turn, requires deciding whether any nondiscriminatory rationales were mere pretexts. Indeed, in *Hazle*, we went on to say that the “ultimate factual inquiry made by the jury[] [is] whether consideration of a protected characteristic was a motivating factor, namely, whether it *made a difference* in the contested employment decision.” *Hazle*, 464 Mich. at 466, 628 N.W.2d 515 (emphasis added).

Likewise, in *Sniecinski v Blue Cross & Blue Shield of Mich.*, 469 Mich. 124, 134-135, 666 N.W.2d 186 (2003), we confirmed that discriminatory intent must be shown:

Under either the direct evidence test or the [burden-shifting] test, a plaintiff must establish a causal link between the discriminatory animus and the adverse employment decision.... Under the direct evidence test, a plaintiff must present direct proof that the discriminatory animus was causally related to the adverse employment decision.

***480** The opinion plainly refers to the central requirement of “discriminatory animus” that must be causally related to the discriminatory act. *Id.*

Consequently, although our Court has used both the motivating-factor and but-for tests, we have always treated the defendant's intent or motivation as the lodestar of the analysis. See *Lytle v Malady*, 456 Mich. 1, 33, 566 N.W.2d 582 (1997) (“The bottom line is that there must always be evidence upon which reasonable minds could conclude that discrimination was the true motive for the decision.”), vacated in part on other grounds 458 Mich. 153, 579 N.W.2d 906 (1998); *Town v Mich. Bell Tel. Co.*, 455 Mich. 688, 704, 568 N.W.2d 64 (1997) (“[T]he factual dispute at issue [in a sex-discrimination action] is whether discriminatory animus motivated the employer” (citation omitted)). That is, we have always looked to what actually motivated the defendant in taking a discriminatory action. And we have likewise indicated that the statute covers discrimination based on prejudice, bias, animus, or beliefs about a certain characteristic.

Others, including the United States Supreme Court, have endorsed this view in cases addressing similar statutory language.⁷ Although the Supreme Court in *Gross*, 557 U.S. at 176, 129 S.Ct. 2343, indicated that the phrase “because of” entailed a but-for analysis, it also went on to express its statutory interpretation in the language of the dictionary, stating that “the ordinary meaning of the [Age Discrimination in Employment Act's] requirement that an employer took adverse action ‘because of’ *481 age is that age was the ‘reason’ that the employer decided to act.” Elsewhere, the Supreme Court relied on this portion of *Gross* to conclude “that Title VII retaliation claims require proof that the *desire* to retaliate was the but-for cause of the challenged employment action.” *Nassar*, 570 U.S. at 352, 133 S.Ct. 2517 (emphasis added). In other words, in the context of an anti-retaliation provision of Title VII, the Court focused on the defendant's desire or intent. See generally Epstein, *Forbidden Grounds: The Case Against Employment Discrimination Laws* (Cambridge: Harvard University Press, 1995), p. 160 (noting that in disparate treatment cases, the issue is whether “the defendant's conduct was actuated by some illegitimate motive”).

****35** Justice Alito has also taken this approach. See *Texas Dep't of Housing & Community Affairs v Inclusive Communities Project, Inc.*, 576 U.S. 519, 560, 135 S Ct 2507, 192 L Ed 2d 514 (2015) (Alito, J., dissenting). “What ‘because of’ means is no mystery,” Justice Alito wrote, pointing to *Gross*'s use of the ordinary dictionary definition. *Id.* “Nor is this understanding of ‘because of’ an arcane feature of legal usage. When English speakers say that someone did something ‘because of’ a factor, what they mean is that the factor was a reason for what was done.” *Id.* “Put another way, ‘the terms [after] the “because of” clauses in the [Fair Housing Act (FHA)] supply the prohibited motivations for the intentional acts ... that the Act makes unlawful.’ ” *Id.* at 561, 135 S Ct 2507 (citation omitted). Thus, “[u]nder a statute like the FHA that prohibits actions taken ‘because of’ protected characteristics, intent makes all the difference.” *Id.* at 561-562, 135 S Ct 2507.

In a similar context, the Supreme Court has further described how discrimination operates with regard to the relationship between intent and a protected characteristic. ***482** In *Bray v Alexandria Women's Health Clinic*, 506 U.S. 263, 113 S Ct 753, 122 L Ed 2d 34 (1993), the Court examined 42 USC 1985(3), which prohibits private conspiracies that “depriv[e] ... any person or class of persons of the equal protection of the laws” This language, the Court explained,

required showing (among other things) “that ‘some racial, or perhaps otherwise class-based, invidiously discriminatory animus [lay] behind the conspirators’ action’” *Bray*, 506 U.S. at 268, 113 S.Ct. 753, quoting *Griffin v Breckenridge*, 403 U.S. 88, 102, 91 S Ct 1790, 29 L Ed 2d 338 (1971). The prohibition centered on “ ‘invidiously discriminatory motivation’ ” *Bray*, 506 U.S. at 268, 113 S.Ct. 753, quoting *Griffin*, 403 U.S. at 102, 91 S.Ct. 1790. The question in *Bray* was whether this statute “provide[d] a federal cause of action against persons obstructing access to abortion clinics.” *Bray*, 506 U.S. at 266, 113 S.Ct. 753.

The Court first rejected the argument that the relevant “class” was “women seeking abortion,” as such a group merely consisted of individuals desiring to engage in certain conduct. *Id.* at 269, 113 S Ct 753. The more central argument in favor of finding a cause of action was that efforts to prevent women from accessing abortion clinics amounted to class-based discrimination against “women in general.” *Id.* The Court acknowledged that the “animus” requirement was not limited to behavior that constituted “maliciously motivated, as opposed to assertedly benign (though objectively invidious), discrimination against women.” *Id.* at 270, 113 S Ct 753. In other words, the animus (or prejudice or bias) did not have to be malicious, but it did need to be invidious. Moreover, and critically, the motivation had to center on the protected characteristic itself. Discriminatory animus “does demand ... at least a purpose that focuses upon women *by reason of their sex*—for example (to use an illustration of assertedly benign discrimination), the *483 purpose of ‘saving’ women *because they are women* from a combative, aggressive profession such as the practice of law.” *Id.*

In *Bray*, there was no record evidence that the defendants had such an intent. *Id.* The Court thus went on to analyze the only other theories under which defendants might still be liable: (1) if opposition to abortion necessarily evinced a sex-based intent, or (2) “intent is irrelevant, and a class-based animus can be determined solely by effect.” *Id.* Both theories were wrong. Perhaps, the Court acknowledged, opposition to some activities would be so irrational that it could only be explained by the fact that the activity “happen[s] to be engaged in exclusively or predominantly by a particular class of people” *Id.* In such circumstances, “an intent to disfavor that class can readily be presumed.” *Id.* But opposition to abortion claimed “common and respectable reasons” aside from hatred or condescension toward women as a class. *Id.* With regard to the need for intent, rather than simply effects, the Court noted that “ ‘[d]iscriminatory purpose’ ... implies

that the decisionmaker ... selected or reaffirmed a particular course of action at least in part “because of,” not merely “in spite of,” its adverse effects upon an identifiable group.’ ” *Id.* at 271-272, 113 S Ct 753, quoting *Personnel Administrator of Massachusetts v Feeney*, 442 U.S. 256, 279, 99 S Ct 2282, 60 L Ed 2d 870 (1979). Opposition to abortion, therefore, was not “*ipso facto* sex discrimination.” *Bray*, 506 U.S. at 273, 113 S.Ct. 753.

****36** *Bray* demonstrates that discrimination “because of” of a characteristic requires some prejudice, bias, animus, or belief about the protected characteristic. A belief about some other characteristic or conduct—like opposition to a particular sexual orientation—does not suffice. Even if only women engage in some conduct, *484 opposition to that conduct does not necessarily stem from some belief about the female sex. The mere effect on individuals in a protected status is not enough without discriminatory intent related to that status. This is simply how discrimination works. “Discrimination against persons ... is necessarily oriented toward them based on their membership in a certain type of social group.” Stanford Encyclopedia of Philosophy, *Discrimination* (April 2020), § 1.1 <<https://plato.stanford.edu/entries/discrimination/>> (accessed July 24, 2022) [<https://perma.cc/YK2Q-J3WE>]. Put differently, discrimination relates to the protected characteristic rather than some other characteristic or conduct that is sometimes associated with the protected characteristic.

Thus, the ordinary meaning of MCL 37.2302, focusing on the defendant’s motivations, captures this commonsense view of discrimination. As two scholars recently wrote of the nearly identical language in Title VII, “The statute proscribes employer conduct based on the reasons that caused or explained the conduct (i.e., based on the employer’s motivation), and not on other non-reason-based cases.” Berman & Krishnamurthi, *Bostock Was Bogus: Textualism, Pluralism, and Title VII*, 97 Notre Dame L Rev 67, 99 (2021). It is true that, in some contexts, “because of” can mean something other than “motivated by.” *Id.* at 100 n 166, citing Zatz, *The Many Meanings of “Because Of”*: *A Comment on Inclusive Communities Project*, 68 Stan L Rev Online 68, 75 (2015) (a brief comment arguing that motivation is not always necessary to the causal concepts embedded in the term “because of”). But the scholars note that the other meanings are motivated by nontextualist purposes, and they contend that “the communicative content of ‘because of’ in relevantly similar utterances [to that in Title VII]—say, contexts concerning *485 the wrongfulness or

permissibility of acts undertaken by an agent—is most often motivational, making the motivational reading the statute's ‘ordinary meaning.’ ” *Id.*

C. MOTIVE CANNOT BE REMOVED FROM THE ANALYSIS

When motive is removed from the equation, causal statements about discrimination make little sense. An example shows how this is true:

Suppose Libby intends to dine one evening at Riley's Restaurant. En route to Riley's, Libby, a member of the local Libertarian Party, stops at the Party's office for a short organizational meeting. When arriving at Riley's, Libby is chagrined to learn that the restaurant's last table was taken minutes earlier and that it will be accommodating no more diners that evening. Libby's political affiliation was a but-for cause of Riley's declining to serve Libby: if Libby hadn't been a member of the Libertarian Party, they'd have arrived at Riley's ten minutes earlier, in plenty of time to secure the last table. But Riley's did not decline to serve Libby “because of” Libby's political affiliation: that Libby is a Libertarian was unknown to Riley's or any of its agents and was no part of its decisional calculus. Were Libby to sue Riley's, alleging forbidden political-affiliation discrimination, they'd be laughed out of court (twice over). The example generalizes: a fact or event can be a “but-for cause” of some agent's doing something without it being the case that the agent did that thing “because of” that fact or event. (Here, to repeat, Libby's Libertarianism might have been a but-for cause of Riley's not seating them, without it being the case that Riley didn't seat Libby “because of” Libby's Libertarianism.) To gloss the statutory phrase “because of” X to mean “by reason of” or “on account of” is to affirm this critical point. [*Bostock Was Bogus*, 97 Notre Dame L Rev at 99-100.]

^{*486} One of the main problems in this example is that Libby's libertarianism is not sufficient to explain the result. That is, the fact that Libby is a Libertarian cannot adequately explain why the restaurant declined to serve her—there are other more immediate factors that fully explain the result, none of which involves any discriminatory motive. No one would say that the restaurant denied Libby public accommodations because of her partisan affiliation. The restaurant does not appear to care about that at all.

^{**37} In a like manner, defendants who refuse accommodations or employment to someone “because of” that person's sexual orientation do not necessarily care about that person's biological sex. In fact, as in the restaurant example, such defendants need not even know the person's biological sex. See *Bostock*, 590 U.S. at —; 140 S Ct at 1758 (Alito, J., dissenting) (“Contrary to the Court's contention, discrimination because of sexual orientation or gender identity does not in and of itself entail discrimination because of sex. We can see this because it is quite possible for an employer to discriminate on those grounds without taking the sex of an individual applicant or employee into account. An employer can have a policy that says: “We do not hire gays, lesbians, or transgender individuals.” And an employer can implement this policy without paying any attention to or even knowing the biological sex of gay, lesbian, and transgender applicants.”). How can a defendant discriminate against a man *because* he is a man—or a woman *because* she is a woman—without knowing that the target of the discrimination is actually a man? Such a conclusion can be reached only if the threshold requirement for discriminatory motive or intent is thrown out the window. Because otherwise, in these circumstances, the defendants cannot possibly be ^{*487} acting out of an animus against or any belief about the male (or female) biological sex.

In response to this observation, the majority appears to accept the proposition that sexual orientation is so innately tied to biological sex that one cannot discriminate against the former without also discriminating against the latter. The gist of the contention appears to be that “[i]f a putative non-protected basis for discrimination conceptually depends on the protected characteristics of the plaintiff, then the basis for discrimination is ‘because of’ the relevant protected category as a matter of ordinary language.” *Bostock Was Bogus*, 97 Notre Dame L Rev at 88 (quotation marks and citation omitted). Justice Zahra fully reveals the fallacy of this argument.⁸ I would add that the argument is also incorrect because, without the ^{*488} requirement of discriminatory motive regarding a protected characteristic, this mode of analysis is hopelessly reductive. Consider the following example:

Suppose A shoots B, a police officer, out of anti-police animus. In this case, competent English speakers would agree that “A shot B because B is a police officer.” Plausibly if roughly, a police officer is a person whose job is to enforce the law, including by investigating crimes and making arrests. But even if the concept of police officer

depends upon and incorporates the concept of a person, competent English speakers would firmly deny that “A shot B because B is a person.” [*Id.*]

One cannot be a police officer without being a person, yet no one believes that the shooter targeted the officer because he or she was a person. This is because the shooter had no general animus against people—the animus was against police officers. These are different things, just as an animus against a certain sexual orientation is not the same thing as an animus against a particular sex.⁹

****38** All this shows that without some anchoring in a discriminatory motive that is linked to a protected characteristic, the but-for test fails to place any meaningful limitations on the analysis. But-for causation ***489** (also known as counterfactual causation) is transitive, such that it can stretch back to the big bang: “if [event] *e* counterfactually depends on *d* (so *d* causes *e*), and *d* counterfactually depends on *c* (so *c* caused *d*), then *c* causes *e*. This means that the number of causes for any given event *e* is staggeringly large, in each case reaching back to the big bang that apparently began this whole show.” Moore, *For What Must We Pay? Causation and Counterfactual Baselines*, 40 San Diego L Rev 1181, 1220 (2003). One might say in all seriousness, “But for the big bang, I would not have spilled this pasta sauce on my shirt.” But no one would say that I spilled the sauce “because of” the big bang.¹⁰

***490 D. CONCLUSION AND RESPONSIVE ARGUMENTS**

Consequently, I believe that, regardless of whether MCL 37.2302 involves a but-for causation test, there is a threshold requirement that the majority ignores: discriminatory motive or intent. The statute applies only if the defendant takes a prohibited action as a result of a prejudice, bias, animus, or belief with regard to the particular protected characteristic. For example, a man is discriminated against “because of” his sex if the defendant acted because of the defendant’s bias, prejudice, animus, or belief with regard to men.¹¹

****39 *491** My interpretation does not disturb the potential application of the ELCRA to interracial marriage or sex stereotypes. One argument that has been put forward to justify the result reached by the majority is that any other view of the statute would preclude the ELCRA from prohibiting discriminatory actions because of interracial marriage.

Amicus American Civil Liberties Union (ACLU) says that an employer would violate the ELCRA by discriminating against employees in interracial marriages because such discrimination would be “because of ... race.” This is true, the ACLU states, even though such a policy applies equally to all races (just as a policy against homosexuals applies to members of both sexes). See also *Bostock*, 590 U.S. at —; 140 S Ct at 1765 (Alito, J., dissenting) (noting the argument: “So if an employer is happy to employ whites and blacks but will not employ any employee in an interracial relationship, how can it be said that the employer is discriminating against either whites or blacks ‘because of such individual’s race’? This employer would be applying the same rule to all its employees regardless of their race.”). One immediate distinction between the present case and interracial marriage, however, is the historical roots of the latter: “[H]istory tells us,” Justice Alito observed, that discrimination on the basis of an interracial relationship “is a core form of race discrimination.” *Id.*

***492** Under my interpretation, the distinction between the two cases goes deeper. The motivation in each situation is different. In the interracial-marriage context, the motivation “has nothing to do with marriage, and everything to do with race: racism and white supremacy. But opposition to same-sex marriage has nothing to do with sexism or male (or female) supremacy.” Anderson, *On the Basis of Identity: Redefining “Sex” in Civil Rights Law and Faulty Accounts of “Discrimination”*, 43 Harv J L & Pub Pol’y 387, 416-417 (2020). Any animus against same-sex relationships does not similarly flow to one sex or the other. See *Hively*, 853 F.3d at 368 (Sykes, J., dissenting) (“[M]iscegenation laws are inherently racist. They are premised on invidious ideas about white superiority and use racial classifications toward the end of racial purity and white supremacy. Sexual-orientation discrimination, on the other hand, is not inherently sexist. No one argues that sexual-orientation discrimination aims to promote or perpetuate the supremacy of one sex.”); cf. Anderson, *Disagreement Is Not Always Discrimination: On Masterpiece Cakeshop and the Analogy to Interracial Marriage*, 16 Geo. J. Law & Pub. Pol’y 123, 124 (2018) (rejecting the argument that individuals holding the view that marriage should be between one man and one woman are motivated by animus rather than “traditions [that] teach that there is a distinct value in the one-flesh union that only man and woman can form, and in the kinship ties that such union offers children”).

In addition, my interpretation would not have any effect on the potential applicability of the ELCRA to *493 sex stereotypes.¹² The ACLU argues here that discrimination on the basis of sexual orientation amounts to sex stereotyping because it punishes an individual for failing to conform to sex-based expectations about his or her behavior. Justice Alito responded to this very argument in his *Bostock* dissent, noting that perhaps in some cases there are traits associated with homosexuals (that would be tolerated or welcomed in a member of the opposite sex) that lead to discrimination. *Bostock*, 590 U.S. at —; 140 S Ct at 1764 (Alito, J., dissenting). That is not the case where the discrimination stems directly from sexual orientation itself, rather than from traits associated with that orientation. When defendants discriminate on the basis of sexual orientation, they are not discriminating based on a trait solely related to men or to women. Thus, a policy based on sexual orientation does not have a discernable effect on or aim against one biological sex over the other. Neither sex is being “exposed to” adverse actions “to which members of the other sex are not exposed.” *Harris v Forklift Sys, Inc.*, 510 U.S. 17, 25, 114 S Ct 367, 126 L Ed 2d 295 (1993) (Ginsburg, J., concurring) (“The critical issue, Title VII’s text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.”).

**40 Consider, too, that if the ACLU’s argument is correct, it is hard to see how discrimination against heterosexuals would be covered by the statute. The United States Court of Appeals for the Seventh Circuit has stated, “Viewed through the lens of the gender non-conformity line of cases, *Hively* [the plaintiff] *494 represents the ultimate case of failure to conform to the female stereotype (at least as understood in a place such as modern America, which views heterosexuality as the norm and other forms of sexuality as exceptional): she is not heterosexual.” *Hively*, 853 F.3d at 346. If *Hively*’s logic is correct, what happens if a homosexual employer fires an employee for being heterosexual and not homosexual? If heterosexuality is a stereotype of men and women, then homosexuality is not—as a result, discrimination against an employee for not being homosexual (i.e., for being heterosexual) would not punish that employee for failing to adhere to sex stereotypes. The ELCRA would therefore protect discrimination “because of” sexual orientation only in favor of homosexuality.

Accordingly, MCL 37.2302(a) does not prohibit discrimination “because of” sexual orientation. Such

discrimination is not encompassed by the statute’s prohibition of sex discrimination. Applying this interpretation in cases like the present is simple.¹³ No one contends that plaintiffs here are motivated by any prejudice, bias, or animus against, or belief about, men qua men or women qua women. They are not accused of misogyny or misandry. Instead, they hold certain views—prejudices, biases, animas, or beliefs—concerning homosexuality. These beliefs—and not anything *495 related to a view on biological sex—are at the center of their policies. The statute simply does not extend this far.

II. THE MAJORITY MISAPPLIES THE BUT-FOR TEST

By reading the motive requirement out of the statute, the majority sets itself up for failure in applying the but-for test. This is because the factual scenarios the majority compares under that test lack the fact most critical to plaintiffs’ mind in the present case: sexual orientation. Without that fact in the analysis, the majority is able to reach the result it desires. But to do so, the majority must ignore the statutory requirements explained above and, indeed, common sense about what it means to discriminate against a person based on a protected characteristic.

As the Supreme Court has explained, “a but-for test directs us to change one thing at a time and see if the outcome changes. If it does, we have found a but-for cause.” *Bostock*, 590 U.S. at —; 140 S Ct at 1739. As one scholar has argued, “counterfactuals by their nature are difficult to prove with any degree of certainty, for they require the factfinder to speculate what would have happened if the defendant had not done what he did.” See Moore, *Causation and Responsibility: An Essay in Law, Morals, and Metaphysics* (New York: Oxford University Press, 2009), p. 84.¹⁴ To reduce the *496 uncertainties inherent in the analysis, the hypothetical world must be the one “most similar to ours” Pearl & Mackenzie, *The Book of Why: The New Science of Cause and Effect* (New York: Basic Books, 2018), p. 104 (on the science of causation); Robertson, *Metaphysical Truth vs. Workable Tort Law: Adverse Ambitions?*, 88 Tex L Rev 1053, 1061 (2010) (“Traditional tort law has an accepted answer to [Moore’s criticism from *Causation and Responsibility*], one that blunts [Moore’s] ‘indeterminacy’ criticism. The imagined counterfactual world must be the same as the actual world as shown by the evidence in the case in all respects save one: the defendant’s wrongful conduct must be corrected to the extent necessary to make the conduct acceptable under plaintiff’s theory of the case.”). The “imagined correction of

the defendant's conduct is the only allowable change, and this change must be done in an intellectually conservative way, employing as little creativity as possible." *Metaphysical Truth*, 88 Tex L Rev at 1061.

****41** On these terms, which the majority appears to adopt, the test is not met here. The core analysis underlying the majority's reasoning comes from an example offered in *Bostock*:

[I]t is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex. Consider, for example, an employer with two employees, both of whom are ***497** attracted to men. The two individuals are, to the employer's mind, materially identical in all respects, except that one is a man and the other a woman. If the employer fires the male employee for no reason other than the fact he is attracted to men, the employer discriminates against him for traits or actions it tolerates in his female colleague. Put differently, the employer intentionally singles out an employee to fire based in part on the employee's sex, and the affected employee's sex is a but-for cause of his discharge. [*Bostock*, 590 U.S. at —; 140 S Ct at 1741.]

But the but-for test allows changing only one aspect of the real world to create the counterfactual world. And, according to the example, there are only two relevant facts: in the real world the employee is (1) a man, and (2) attracted to men, whereas the comparator (i.e., the counterfactual example) employee is (1) a woman, and (2) attracted to men.

Here is the problem: "This is screamingly false to the facts as stipulated: *to the employer's mind*, the two employees are *not* materially identical in all respects except that one is a man and the other a woman; they are also non-identical in the respect that one is gay and the other straight." *Bostock was Bogus*, 97 Notre Dame L Rev at 106. That fact—the sexual orientation—is dropped out completely from the example despite its being, by all evidence and stipulation, the critical distinction that motivated the employer. In other words, the hypothetical does not "hold[] *everything* constant except the plaintiff's sex" because it also changes the plaintiff's sexual orientation. *Hively*, 853 F.3d at 366 (Sykes, J., dissenting) (emphasis altered).

Consequently, in the real world and under the statute (as properly interpreted), there are three relevant facts: "the employee is (1) a man, (2) attracted to men, and (3) gay. The comparator is (1) a woman, (2) attracted to men, and (3) *heterosexual*." Krishnamurthi, ***498** *Not the Standard You're*

Looking For: But-For Causation in Anti-Discrimination Law, 108 Va L Rev Online 1, 7 (2022). The majority's but-for analysis changes *two* of these facts, not just one.¹⁵ A woman who is attracted to men is straight. True, she would not get fired. But a woman who is attracted to women is gay, and she presumably would get fired. Each comparator (a straight woman attracted to men or a gay woman attracted to women) has two facts that have been changed. "The majority opinion [in *Bostock*] doesn't provide a principled reason why we should choose one comparator over the other." *Id.* As such, even assuming the statute requires but-for causation, plaintiffs would prevail here, as "sex" is not a but-for cause of a discriminatory action when the defendant is motivated by beliefs concerning sexual orientation.¹⁶

****42 *499** Consider another oddity in the majority's analysis, one that does not even require adding a fact to the but-for test: it fails for bisexuals. Put a fired bisexual employee into the framework above: Employee A is (1) a man, and (2) attracted to both men and women. The employer has a policy against bisexuals. Employee A is fired. The comparator is: Employee B is (1) a woman, and (2) attracted to both men and women. Employee B would also be fired. See *Not the Standard*, 108 Va L Rev Online at 11-12. Therefore, sex is not a but-for cause in these circumstances. The majority's test is thus underinclusive to the extent it attempts to prove that discrimination on the basis of sexual orientation necessarily involves discrimination on the basis of sex.

If the test does not cover all of what the majority promises, it nonetheless portends to cover a great deal else. Suppose an employer asks about an applicant's race in the application paperwork. The applicant lies, thinking it will give him an advantage. He gets hired and, after some time, admits to the lie. A manager learns of this and fires the employee. "[I]t's intuitively clear that if the employer fires the employee for lying on the hiring paperwork about their race, that isn't and shouldn't be actionable discrimination under Title VII as race discrimination. But that is precisely the conclusion we might draw" from the majority's test. *Id.* at 21. A but-for analysis would proceed as follows: the employee (1) is white, and (2) said he was black on his paperwork. He gets fired for saying he was black. The comparator (1) is black, and (2) said he was black on his paperwork. He does not get fired. *Id.* Thus, race is a but-for cause and the firing is actionable. This cannot possibly be the law.

*500 Consequently, even if some version of the but-for test is the right interpretation of the ELCRA, the majority applies it the wrong way. Plaintiffs' conduct does not satisfy the but-for test.

III. CONCLUSION

The effect of the majority's decision, as Justice Zahra explains, is to expand the ELCRA by judicial fiat to cover discrimination "because of" sexual orientation. To do so, the majority has twisted the meaning of the statute by adopting the logic of the but-for test without the need for the defendant to have any discriminatory intent. This does not reflect the ordinary meaning of the statute or the nature of discrimination. Unintentional discrimination would seem to be an oxymoron, but the majority today endorses it. As a result, the majority has misapplied its own test.¹⁷

**43 *501 The results will be significant for Michigan, as the scope of the ELCRA extends far beyond the statute at issue in *Bostock*. The ELCRA, for example, covers all employers, whereas Title VII applies to employers with 15 or more employees.¹⁸ Title VII also contains exemptions for

religious organizations, see 42 USC 2000e-1(a), 2000e-2(e); and other federal statutes offer protections for religious liberty that supersede Title VII's requirements, see *Bostock*, 590 U.S. at —; 140 S Ct at 1754 (discussing the Religious Freedom Restoration Act of 1993, 42 USC 2000bb *et seq.*). It does not appear that there are any such statutory provisions applicable to the ELCRA. In this regard, too, the majority has reached its interpretation today without any concern for whether that interpretation violates constitutional protections of religious liberty. This departs from the *502 normal principle that courts will first consider whether an interpretation raises grave constitutional doubts before adopting that interpretation. See *Sole v Mich Economic Dev Corp*, — Mich —, —; — NW2d — (2022) (Docket No. 161598); slip op. at 11. Various amici have raised strong arguments that the majority's interpretation trenches on constitutional liberties. Those concerns should have been considered before the Court reached its interpretation here.¹⁹

For these reasons, I dissent.

All Citations

--- N.W.2d ----, 510 Mich. 398, 2022 WL 3007805

Footnotes

1 MCL 37.2301(a) defines a "place of public accommodation" as

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.

2 Interpretive statements issued by the MCRC do not have the force of law. MCL 24.207(h); *Mich Farm Bureau v Bureau of Workmen's Compensation*, 408 Mich. 141, 149-150, 289 N.W.2d 699 (1980). Sometimes referred to as "interpretive rules," these "are statements as to what the agency thinks a statute or regulation means; they are statements issued to advise the public of the agency's construction of the law it administers." *Clonlara, Inc v State Bd of Ed*, 442 Mich. 230, 243-244, 501 N.W.2d 88 (1993) (quotation marks and citation omitted). "The 'pragmatic consequences' of interpretive 'rules' is that they are published as 'declaration[s]' of the proper interpretation of the law, and those affected will normally conform, since the regulation provides a practical guide as to how the office representing the public interest in enforcing the law will apply it." *Id.* at 244, 501 N.W.2d 88, quoting Schwartz, *Administrative Law* (2d ed.), § 4.6, pp. 159-160.

3 Interpretive Statement 2018-1, p. 1, available at <<https://www.michigan.gov/-/media/Project/Websites/mdcr/mcra/interpretive-statements/2018/meaning-of-sex.pdf?rev=c5ef0e9276a44504b857435423cb887c>> (accessed June 23, 2022) [<https://perma.cc/RX8Y-D2K8>].

4 MCR 2.116(C)(8) provides that a trial court may grant relief to a moving party where "[t]he opposing party has failed to state a claim on which relief can be granted."

- 5 Whether enforcement under the ELCRA for sexual-orientation and gender-identity discrimination would violate plaintiffs' federal and state constitutional religious liberty protections has not yet been adjudicated below and, accordingly, is also not currently before this Court.

Further, this appeal arises from plaintiffs' lawsuit challenging the scope of the protected class of "sex" under the ELCRA, which was filed in response to the MDCR investigation into plaintiffs' alleged denial of a public accommodation. This is not an appeal from the currently stayed investigations of plaintiffs' conduct or any enforcement action that might result from those investigations. Accordingly, the issue before this Court also does not encompass what the MDCR must prove to demonstrate that discrimination on the basis of a protected characteristic was the cause of a denial of a public accommodation or whether the MDCR can carry this burden of proof.

- 6 The two statutes share similar language. Specifically, Title VII prohibits an employer from discriminating against an individual "because of such individual's race, color, religion, sex, or national origin[.]" 42 USC 2000e-2(a)(1). Compare MCL 37.2302(a) (prohibiting discrimination in a place of public accommodation or public service "because of religion, race, color, national origin, age, sex, or marital status").

- 7 *Barbour* also did not consider whether a later United States Supreme Court decision—*Price Waterhouse v Hopkins*, 490 U.S. 228, 109 S Ct 1775, 104 L Ed 2d 268 (1989) (opinion of Brennan, J.; superseded by statute on other grounds), which held that sex stereotyping falls under Title VII's prohibition of sex discrimination—undermined the analysis employed by the *DeSantis* and *DeCintio* courts.

- 8 *Bostock* consolidated three separate Title VII claims. First, Gerald Bostock, a longtime child welfare advocate for Clayton County, Georgia, was terminated for conduct unbecoming a county employee shortly after he began participating in a gay softball league and after community members made disparaging comments about his involvement in the league and his sexual orientation. *Id.* at —; 140 S Ct at 1737-1738. Second, Donald Zarda, who had worked for several seasons as a skydiving instructor at Altitude Express in New York, was terminated days after mentioning that he was gay. *Id.* at —; 140 S Ct at 1738. Finally, Aimee Stephens was terminated after informing her employer, R.G. & G.R. Harris Funeral Homes in Garden City, Michigan, that she intended to "live and work full-time as a woman" upon her return from an upcoming vacation. *Id.* Stephens had initially presented as male when she began work with Harris Funeral Homes six years earlier. *Id.*

- 9 The majority also expressed skepticism regarding whether this assertion was true, noting that discrimination claims related to sexual orientation and gender identity were filed nearly immediately after Title VII's passage and that there was public discourse within 10 years of Title VII's passage regarding whether the analogous language of the proposed Equal Rights Amendment would afford protections to homosexual persons. *Id.* at —; 140 S Ct at 1750-1751.

- 10 The majority provided multiple reasons why subsequent Congresses might have failed to enact such amendments:

Maybe some in the later legislatures understood the impact Title VII's broad language already promised for cases like ours and didn't think a revision needed. Maybe others knew about its impact but hoped no one else would notice. Maybe still others, occupied by other concerns, didn't consider the issue at all. [*Id.*]

- 11 The ELCRA does specify that "[d]iscrimination because of sex includes sexual harassment," MCL 37.2103(i), and that the term "sex" "includes, but is not limited to, pregnancy, childbirth, or a medical condition related to pregnancy or childbirth that does not include nontherapeutic abortion not intended to save the life of the mother," MCL 37.2201(d). But neither of these provisions offers an exclusive definition of the term "sex."

- 12 Plaintiff Rouch World emphasizes that this Court is not bound to interpret the ELCRA in the same manner as the United States Supreme Court has interpreted Title VII, and that this Court has, in fact, previously criticized such reliance. For example, in *Haynie v Dep't of State Police*, 468 Mich. 302, 320, 664 N.W.2d 129 (2003), this Court applied the ELCRA's prohibition of sexual harassment differently than United States Supreme Court precedent regarding the prohibition of sexual harassment under Title VII. In so doing, this Court opined that "[w]e cannot agree that any time the Michigan Legislature creates a law that is 'similar' to a federal law, it must be made identical, and the two laws must be interpreted to mean exactly the same thing." *Id.* We further recognized that "the Michigan Legislature is allowed to determine for itself the extent to which it wishes to track the language of the federal law" and that differences between the statutory

language may counsel against applying Title VII precedent to our state law. *Id.* As applied in *Haynie*, the fact that the ELCRA specifically provides a statutory definition of sexual harassment merited a divergence from federal precedent concerning Title VII, whose prohibition of sexual harassment is derived from its general prohibition of sex discrimination. *Id.* at 321-322, 664 N.W.2d 129.

Our agreement with *Bostock* today is not at odds with *Haynie* or *Haynie's* criticism of blindly applying federal caselaw to state statutory provisions. Unlike the statutory language at issue in *Haynie*, the Michigan Legislature here chose to enact language nearly identical to that in Title VII. Compare 42 USC 2000e-2(a)(1) (prohibiting an employer from discriminating against an individual "because of such individual's race, color, religion, sex, or national origin") with MCL 37.2302(a) (prohibiting discrimination in a place of public accommodation "because of religion, race, color, national origin, age, sex, or marital status"). To the extent that the ELCRA encompasses more activity than Title VII in that it applies to discrimination in public accommodations generally rather than solely in employment, nothing about this breadth of application changes the meaning of the operative words "because of ... sex" that are found in both statutes. The Michigan Legislature's choice to use the language of Title VII counsels in favor of the persuasive value of that caselaw, and, as expressed earlier, we find this caselaw consistent with our own plain-language interpretation of the ELCRA.

- 13 Moreover, discrimination on the basis of sexual orientation also necessarily entails discrimination on the basis of sexual stereotypes. As the United States Court of Appeals for the Second Circuit explained, "stereotypes about homosexuality are directly related to our stereotypes about the proper roles of men and women.... The gender stereotype at work here is that 'real' men should date women, and not other men[.]" *Zarda v Altitude Express, Inc.*, 883 F.3d 100, 121 (CA 2, 2018) (quotation marks and citation omitted). See also *Equal Employment Opportunity Comm v R G & G R Harris Funeral Homes*, 884 F.3d 560, 576 (CA 6, 2018); *Hively*, 853 F.3d at 346-347 (noting that homosexual women "represent[] the ultimate case of failure to conform to the female stereotype (at least as understood in a place such as modern America, which views heterosexuality as the norm and other forms of sexuality as exceptional): [they are] not heterosexual"). Accordingly, discrimination on the basis of sexual orientation signals that individuals who transgress stereotypes associated with their sex are not welcome in the public square. In a plurality opinion, the United States Supreme Court recognized that this type of discrimination also runs afoul of Title VII, reasoning that

we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for " '[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.' " [*Price Waterhouse*, 490 U.S. at 251, 109 S.Ct. 1775, quoting *Los Angeles Dep't of Water & Power v Manhart*, 435 U.S. 702, 707 & n 13, 98 S Ct 1370, 55 L Ed 2d 657 (1978) (citation omitted).]

Various federal courts have since followed *Price Waterhouse* in recognizing that sex discrimination occurs when an employee suffers an adverse employment action because they defy the socially constructed gender norms. See, e.g., *R G & G R Harris Funeral Homes*, 884 F.3d at 576; *Zarda*, 883 F.3d at 120-121; *Hively*, 853 F.3d at 347.

In considering this line of federal caselaw as applied to Michigan's ELCRA, we agree that discrimination on the basis of sexual orientation necessarily involves discrimination on the basis of sexual stereotypes, and we believe that this theory could serve as an alternate basis for holding that sex discrimination occurred in this case.

- 14 In dissent, Justice Viviano argues that there are actually three factors at hand in this but-for analysis. In addition to sex and sex preference, he argues that sexual orientation is a third relevant fact. According to this approach, our but-for analysis changes both sex and sexual orientation rather than one single factor. This approach ignores that sexual orientation in this context is simply a helpful shorthand for the combination of sex and sex preference; it is not an independent factor. The but-for test cannot, and should not, be evaded through reference to a third, dependent variable that necessarily changes when the protected characteristic also changes.
- 15 We note that our conclusion would not change were the sexual orientation at issue bisexual rather than homosexual. A discriminator cannot escape liability for sex discrimination on the basis that the individual discriminated against has a sexual orientation that the discriminator *does* find acceptable in addition to the sexual orientation that the discriminator *does not* find acceptable. For example, had the complainant in the present case been bisexual rather than homosexual, plaintiff Rouch World's denial of services would still constitute sex discrimination because it would be based in a trait—sexual attraction to women—that would have been accepted had the hypothetical complainant been a bisexual or

heterosexual man. That one form of expression of the hypothetical complainant's sexual orientation would have been acceptable to the discriminator in each scenario is of no legal consequence.

- 16 Justice Zahra's assertion that "sex" and "sexual orientation" are not equivalent terms is correct, but irrelevant to the analysis. The narrow reading of "sex" that his dissent offers fails to recognize that when Rouch World discriminates against a person "because she is (A) a woman who is (B) sexually attracted to women, then it is motivated, in part, by an enumerated trait: the employee's sex." *Hively*, 853 F.3d at 359 (Flaum, J., concurring). "Sexual orientation" does not have to be synonymous with "sex" for the discrimination to be, inherently, sex-based.
- 17 Justice Viviano agrees that a blanket policy of sexual-orientation discrimination would not run afoul of the ELCRA's prohibition of sex discrimination. He reasons, in part, that the but-for causation standard, as it has been applied in the context of the ELCRA, contains some requirement of a showing of motivation or intent to discriminate on the basis of the protected characteristic at hand. And because the discriminator in this scenario intends to discriminate regarding the individual's sexual orientation and not their sex, the but-for causation standard is not met.

We do not, and need not, take a position on Justice Viviano's assertion that the but-for causation standard requires some proof of intent to discriminate. The only issue before this Court is whether discrimination on the basis of sexual orientation is included within the ELCRA's prohibition of discrimination because of sex. This is the first step in any discrimination analysis under the ELCRA. See, e.g., *Haynes v Neshewat*, 477 Mich. 29, 35, 729 N.W.2d 488 (2007) (holding that "[i]n order to state a claim under MCL 37.2302(a), [a] plaintiff must establish four elements: (1) discrimination based on a protected characteristic (2) by a person, (3) resulting in the denial of the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations (4) of a place of public accommodation"); *Hazle v Ford Motor Co*, 464 Mich. 456, 463, 628 N.W.2d 515 (2001) (holding that in the employment context, to establish a prima facie case of discrimination a complainant must "present evidence that (1) she belongs to a protected class, (2) she suffered an adverse employment action, (3) she was qualified for the position, and (4) the job was given to another person under circumstances giving rise to an inference of unlawful discrimination"). Our opinion should not be read as altering precedent governing subsequent steps in a discrimination analysis, such as what evidence is necessary to prove causation in an enforcement action brought under the ELCRA, and it is unclear why the dissent believes we have done so.

Even if such an intent requirement existed, it would likely be met here given the facts that plaintiffs alleged in their complaint. As discussed earlier, sex is an intrinsic component of sexual orientation. Accordingly, an individual's intent to discriminate on the basis of sexual orientation is sufficient to fulfill any requirement that the individual intended to discriminate on the basis of sex. In the present case, Rouch World asserts that it denied services to the complainants on the basis of their homosexuality. Because sexual orientation is intrinsically linked to sex, this action constitutes sex discrimination. Further, the discriminatory intent evidenced by Rouch World is sufficient to satisfy any motivational requirement possibly encompassed by the but-for causation standard.

- 18 Our courts have rejected a similar argument made in the context of applying the ELCRA's prohibition of race discrimination to interracial associations. Specifically, the Court of Appeals rejected an employer's argument that its blanket policy prohibiting interracial marriage did not violate the ELCRA because it discriminated equally against employees of all races. See *Bryant v Automatic Data Processing, Inc*, 151 Mich App 424, 430, 390 N.W.2d 732 (1986) ("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 the spouse is a motivating factor. Thus, it must be concluded that the employee in such a case is discriminated against 'because of race'"). See also *Graham v Ford*, 237 Mich App 670, 677-678, 604 N.W.2d 713 (1999) (applying *Bryant*).
- 19 Even if the rules of construction encouraged consideration of legislative history under the present circumstances, there are often practical difficulties with discerning legislative intent from legislative history, and those difficulties abound here. Examination of legislative history is necessarily difficult, as "dozens if not hundreds of legislators have their own subjective views on the minutiae of bills they are voting on—or perhaps no views at all because they are wholly unaware of the minutiae." Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* (St. Paul: Thomson/West, 2012), p. 392. Discerning a single intent from these hundreds of subjective views is difficult, and Rouch World's and amici's offering of news articles reflecting the opinions of single legislators does little to ease that difficulty. Even sources like bill analyses, committee reports, and floor debate, which may reflect the views of some group of legislators, are of dubious value. See *id.*

at 376 (noting that floor statements can be delivered to small or no amount of other legislators and that committee reports are drafted by committee staff and not legislators); *In re Certified Question from the US Court of Appeals for the Sixth Circuit*, 468 Mich. 109, 115 n 5, 659 N.W.2d 597 (2003) (specifically critiquing legislative analyses on the grounds that "(1) such analyses are not an official form of legislative record in Michigan, (2) such analyses do not purport to represent the views of legislators, individually or collectively, but merely to set forth the views of professional staff offices situated within the legislative branch, and (3) such analyses are produced outside the boundaries of the legislative process as defined in the Michigan Constitution").

As noted earlier, there are any number of potential explanations why sexual orientation was not explicitly included in the ELCRA in 1976. Perhaps some legislators believed that sexual-orientation discrimination was necessarily included through the prohibition on sex discrimination and so did not seek its explicit inclusion. Perhaps other legislators believed the opposite. Or perhaps, as plaintiff and some amici also argue, the Legislature did not anticipate that the ELCRA could or would be applied in this manner. See *Bostock*, 590 U.S. at —; 140 S Ct at 1750-1751. The legislative history is more unclear than Rouch World represents.

As for subsequent legislatures that considered but did not adopt proposed amendments that would add sexual orientation explicitly, "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *United States v Price*, 361 U.S. 304, 313, 80 S Ct 326, 4 L Ed 2d 334 (1960). The rejection of subsequent proposed amendments runs into the same difficulties expressed earlier with regard to the statute's initial enactment: there are any number of reasons supporting the rejection of amendments, and the legislative history generally fails to provide a cogent, entity-wide reasoning for that action. See *Bostock*, 590 U.S. at —; 140 S Ct at 1747. Further, the amendments proposed do not appear to have been brought before the entirety of the Legislature, and so it is especially dubious that their rejection represents rejection by the Legislature as a whole. See *In re Certified Question*, 468 Mich. at 115 n 5, 659 N.W.2d 597.

Again, given the lack of ambiguity in the statute's language, this Court need not and should not attempt to decipher the statute's meaning from this varied and enigmatic legislative history. See *id.* ("Legislative history cannot be used to create an ambiguity where one does not otherwise exist.").

- 20 In dissent, Justice Zahra argues that this concept does not apply here because this opinion "reads into the ELCRA something that the Legislature expressly considered but rejected" *Post* at 20 n 51. In support of this assertion, Justice Zahra notes that the Civil Rights Committee held a roll-call vote on whether to include sexual orientation in the ELCRA and that the Committee declined to do so by a 5 to 3 vote. He further notes that, on the day the bill was scheduled to be voted out of committee, the committee room was filled with advocates protesting the bill's failure to include an explicit prohibition of sexual-orientation discrimination. But these observations do not demonstrate the intent of the Legislature as a whole. At best, they establish that eight legislators were aware of the bill's failure to include sexual-orientation discrimination specifically and that a majority of those legislators approved of this lack of inclusion. This does not necessarily establish that this majority intended and understood that the ELCRA would not protect against sexual-orientation discrimination—as described earlier, some legislators may have believed it was already included through the prohibition on sex discrimination. And even if the legislative history *did* establish that, it cannot do the same for the remainder of the more than one hundred other legislators that ultimately voted on the ELCRA. See *Reading Law*, p. 392. Unlike other cases wherein we have found legislative history to be relevant to the Legislature's intent, the legislative history here does not include changes or alternatives contemplated by the entirety or even the majority of the Legislature. See, e.g., *In re MCI Telecom Complaint*, 460 Mich. 396, 415, 596 N.W.2d 164 (1999).
- 1 The ELCRA was drafted, introduced, voted out of both houses of our Legislature, and signed by the Governor in Michigan's 78th legislative session (1975–1976). The ELCRA became effective in 1977, at the expiration of 90 days after the Legislature adjourned *sine die*. See Const 1963, art. 4, § 27.
- 2 See Const 1963, art. 4, § 1 (vesting the legislative power in the Michigan Legislature); Const 1963, art. 4, § 33 (setting forth the process by which "[e]very bill passed by the legislature ... becomes law"); Const 1963, art. 2, § 9 (recognizing the power of the people "to propose laws and to enact and reject laws, called the initiative, and the power to approve or reject laws enacted by the legislature, called the referendum").
- 3 As aptly stated by Justice Kavanaugh in his dissenting opinion in *Bostock v Clayton Co*, 590 U.S. —, —; — U.S. —, 140 S Ct 1731, 1836, 207 L Ed 2d 218 (2020), "when this Court usurps the role of [the Legislature], as it does

today, the public understandably becomes confused about who the policymakers really are in our system of separated powers, and inevitably becomes cynical about the oft-repeated aspiration that judges base their decisions on law rather than on personal preference."

- 4 How this case wound up before us should not be lost on anyone. The MCRC is charged with investigating alleged discrimination prohibited under Michigan law. Const 1963, art. 5, § 29. The MCRC does this via the MDCR. See MCL 16.575; MCL 16.577. For more than 40 years, from the enactment of the ELCRA in 1976 until 2018, the MCRC repeatedly and explicitly took the position that sexual-orientation discrimination was *not* prohibited under Michigan law. This understanding was consistent with Michigan caselaw addressing the question. See, e.g., *Barbour v Dep't of Social Servs*, 198 Mich App 183, 497 N.W.2d 216 (1993). For years, the MCRC tried unsuccessfully to get the Legislature to amend the ELCRA to include sexual orientation as a protected class. These efforts apparently exhausted the MCRC, and, in 2018, it elected to end-run the Legislature by declaring in Interpretive Statement 2018-1 that the ELCRA has always prohibited sexual-orientation discrimination (as well as gender-identity discrimination). The MCRC directed the MDCR to enforce the ELCRA accordingly. In this way, the MCRC invaded both the law-making power exclusively assigned to the Legislature and the judicial power to interpret law exclusively assigned to Michigan's courts.
- 5 *American Civil Liberties Union of Mich v Calhoun Co Sheriff's Office*, — Mich —, —; — NW2d — (2022) (Docket No. 163235) (*ACLU of Mich*); slip op. at 5; *Dep't of Talent & Economic Dev/Unemployment Ins. Agency v Great Oaks Country Club, Inc.*, 507 Mich. 212, 226, 968 N.W.2d 336 (2021).
- 6 *People v Dowdy*, 489 Mich. 373, 379, 802 N.W.2d 239 (2011), quoting *Drouillard v Stroh Brewery Co*, 449 Mich. 293, 302, 536 N.W.2d 530 (1995). See also *City of Lansing v Lansing Twp*, 356 Mich. 641, 648, 97 N.W.2d 804 (1959).
- 7 *People v Harris*, 499 Mich. 332, 345, 885 N.W.2d 832 (2016), citing *White v Ann Arbor*, 406 Mich. 554, 562, 281 N.W.2d 283 (1979). See also *ACLU of Mich*, — Mich at —; slip op. at 5 ("The primary goal of statutory interpretation is to ascertain the legislative intent that may reasonably be inferred from the statutory language.") (quotation marks and citation omitted); *Dep't of Talent & Economic Development/Unemployment Ins Agency*, 507 Mich. at 226, 968 N.W.2d 336 (same principle); *Lash v Traverse City*, 479 Mich. 180, 187, 735 N.W.2d 628 (2007) ("When interpreting a statute, our primary obligation is to ascertain and effectuate the intent of the Legislature. To do so, we begin with the language of the statute, ascertaining the intent that may reasonably be inferred from its language.") (citations omitted).
- 8 *People v Zajackowski*, 493 Mich. 6, 13, 825 N.W.2d 554 (2012), citing *People v Morey*, 461 Mich. 325, 330, 603 N.W.2d 250 (1999).
- 9 *ACLU of Mich*, — Mich at —; slip op. at 5, citing *2 Crooked Creek, LLC v Cass Co Treasurer*, 507 Mich. 1, 9, 967 N.W.2d 577 (2021) ("When the statutory language is clear and unambiguous, judicial construction is not permitted and the statute is enforced as written.") (quotation marks and citation omitted).
- 10 Manning, *The Absurdity Doctrine*, 116 Harv L Rev 2387, 2457 (2003); see also *id.* at 2392-2393 (explaining that proper statutory interpretation asks "how a reasonable person, conversant with the relevant social and linguistic conventions, would read the text in context. This approach recognizes that the literal or dictionary definitions of words will often fail to account for settled nuances or background conventions that qualify the literal meaning of language and, in particular, of legal language").
- 11 See Solum, *Cooley's Constitutional Limitations and Constitutional Originalism*, 18 Geo J L & Pub Pol'y 49, 63 (2020), quoting Cooley, *Constitutional Limitations* (1st ed.), p. 38 n 1 ("Interpretation is the act of finding out the true sense of any form of words, that is, the sense which their author intended to convey, and of enabling others to derive from them the same idea which the author intended to convey") (quotation marks and citation omitted). See also Manning, *What Divides Textualists from Purposivists?*, 106 Colum L Rev 70, 79-80 (2006) ("Because one can make sense of others' communications only by placing them in their appropriate social and linguistic context, textualists further acknowledge that '[i]n textual interpretation, context is everything.'") (citation omitted).
- 12 Const 1963, art. 1, § 1.
- 13 Const 1963, art. 3, § 2.

- 14 *Coalition of State Employee Unions v Michigan*, 498 Mich. 312, 332, 870 N.W.2d 275 (2015), citing Const 1963, art. 4, § 1; see also *Cameron v Auto Club Ins Ass'n*, 476 Mich. 55, 65, 718 N.W.2d 784 (2006) ("It is the legislators who establish the statutory law because the legislative power is exclusively theirs."), overruled on other grounds by *Regents of Univ of Mich v Titan Ins Co*, 487 Mich. 289, 791 N.W.2d 897 (2010); *In re Complaint of Rovas Against SBC Mich*, 482 Mich. 90, 98 n 18, 117, 754 N.W.2d 259 (2008).
- 15 *In re Complaint of Rovas*, 482 Mich. at 98, 754 N.W.2d 259.
- 16 The Federalist No. 78 (Hamilton) (Rossiter ed., 1961), p. 465.
- 17 See *Johnson v Kramer Bros Freight Lines, Inc*, 357 Mich. 254, 258, 98 N.W.2d 586 (1959), quoting 16 CJS, Constitutional Law, § 144, p. 687 ("The primary functions of the judiciary are to declare what the law is and to determine the rights of parties conformably thereto."). See also *Marbury v Madison*, 5 US (1 Cranch) 137, 177, 2 L Ed 60 (1803) (stating that "[i]t is emphatically the province and duty of the judicial department to say what the law is").
- 18 *Nat'l Wildlife Federation v Cleveland Cliffs Iron Co*, 471 Mich. 608, 613, 684 N.W.2d 800 (2004), quoting The Federalist No. 47 (Madison) (Rossiter ed., 1961), p. 299 (alterations in *Nat'l Wildlife Federation*), overruled on other grounds by *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich. 349, 792 N.W.2d 686 (2010).
- 19 See *Nat'l Wildlife Federation*, 471 Mich. at 613 n 5, 684 N.W.2d 800, quoting *Schwartz v Flint*, 426 Mich. 295, 306, 395 N.W.2d 678 (1986) ("The separation of powers provision in [the Michigan Constitution] is 'in harmony with American political theory, the State government [being] divided into the three historic departments, the legislative, executive, and judicial'").
- 20 *Buckley v Valeo*, 424 U.S. 1, 122, 96 S Ct 612, 46 L Ed 2d 659 (1976), relying on The Federalist No. 51 (Madison) (Putnam's Sons ed, 1908), pp. 323-324. See also *Consumer Energy Council of America v Fed. Energy Regulatory Comm*, 218 US App DC 34, 80, 673 F.2d 425 (1982) ("The fundamental purpose of [the separation of powers] is to check the extent of power exercisable by any one branch of Government in order to protect the people from oppression."), relying on *Buckley*, 424 U.S. at 122, 96 S.Ct. 612, *aff'd sub nom Process Gas Consumers Group v Consumer Energy Council of Am*, 463 U.S. 1216, 103 S.Ct. 3556, 77 L.Ed.2d 1402, 77 L.Ed.2d 1403, 77 L.Ed.2d 1413 (1983). Accord The Federalist No. 47 (Madison) (Rossiter ed., 1961), p. 301 ("The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, selfappointed, or elective, may justly be pronounced the very definition of tyranny.").
- 21 *Chadha v Immigration & Naturalization Serv*, 634 F.2d 408, 422 (CA 9, 1980), *aff'd* 462 U.S. 919, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983).
- 22 *Bond v United States*, 564 U.S. 211, 222, 131 S Ct 2355, 180 L Ed 2d 269 (2011). The separation of powers does more than just restrain the branches. See *Gundy v United States*, 588 U.S. —, —; — U.S. —, 139 S Ct 2116, 2135, 204 L Ed 2d 522 (2019) (Gorsuch, J., dissenting) (explaining that "enforcing the separation of powers" is also about "safeguarding a structure designed to protect [the people's] liberties, minority rights, fair notice, and the rule of law").
- 23 *Blank v Dep't of Corrections*, 462 Mich. 103, 116, 611 N.W.2d 530 (2000); *American States Ins. Co v Detroit Auto. Inter-Ins. Exch.*, 117 Mich App 361, 367, 323 N.W.2d 705 (1982).
- 24 *Woodman v Kera LLC*, 486 Mich. 228, 245-246, 785 N.W.2d 1 (2010) (quotation marks and citations omitted). Accord *Terrien v Zwit*, 467 Mich. 56, 67, 648 N.W.2d 602 (2002), citing *Van v Zahorik*, 460 Mich. 320, 327, 597 N.W.2d 15 (1999).
- 25 *Harris*, 499 Mich. at 345, 885 N.W.2d 832. See also *Pontiac Sch. Dist v Pontiac*, 262 Mich. 338, 353, 247 N.W. 474 (1933) ("The constitutional duty of courts is to interpret and apply the law, not to enact laws."), abrogated on other grounds by *Citizens Protecting Michigan's Constitution v Secretary of State*, 503 Mich. 42, 921 N.W.2d 247 (2018).
- 26 *Doe v Dep't of Social Servs*, 439 Mich. 650, 681, 487 N.W.2d 166 (1992) (quotation marks and citation omitted). See also *Johnson v Recca*, 492 Mich. 169, 187, 821 N.W.2d 520 (2012), quoting *Robertson v DaimlerChrysler Corp*, 465 Mich. 732, 759, 641 N.W.2d 567 (2002) (holding that "our judicial role 'precludes imposing different policy choices than those

- selected by the Legislature' " and, therefore, "the judicial branch cannot amend [a statute] to make it 'better' " because "[t]hat is an authority reserved solely to the Legislature") (quotation marks and citation omitted).
- 27 See *People v Dunbar*, 499 Mich. 60, 71-72, 879 N.W.2d 229 (2016), citing *Lansing Mayor v Pub. Serv. Comm.*, 470 Mich. 154, 163-164, 680 N.W.2d 840 (2004), superseded by statute as stated in *South Dearborn Environmental Improvement Ass'n v Dep't of Environmental Quality*, 502 Mich. 349, 363-365, 917 N.W.2d 603 (2018).
- 28 *City of Lansing*, 356 Mich. at 648, 97 N.W.2d 804 (quotation marks and citation omitted). Accord *People v Detroit, G.H. & M. R. Co.*, 228 Mich. 596, 612, 200 N.W. 536 (1924) ("[C]ourts cannot make laws; they can but interpret them in conformity with the legislative intent."). See also *Dunbar*, 499 Mich. at 71-72, 879 N.W.2d 229 (explaining that the authority to rewrite statutes rests with the Legislature, not this Court).
- 29 *Roosevelt Oil Co v Secretary of State*, 339 Mich. 679, 694, 64 N.W.2d 582 (1954).
- 30 *In re Complaint of Rovas*, 482 Mich. at 98, 754 N.W.2d 259 (quotation marks and citation omitted; brackets in original). Accord *People v Steanhouse*, 500 Mich. 453, 489, 902 N.W.2d 327 (2017) (Markman, C.J., concurring in part and dissenting in part).
- 31 *Mich. Chiropractic Council v Comm'r of Office of Fin. and Ins. Servs.*, 475 Mich. 363, 374, 716 N.W.2d 561 (2006) (opinion of Young, J.); *id.* at 387, 716 N.W.2d 561 (Markman, J., concurring in part), overruled on other grounds by *Lansing Sch Ed Ass'n*, 487 Mich. 349, 792 N.W.2d 686.
- 32 *Barbour*, 198 Mich App at 185, 497 N.W.2d 216 (holding that "harassment or discrimination based upon a person's sexual orientation is not an activity proscribed by the [ELCRA]"). As the majority opinion notes, *Barbour* adopted, without independent analysis, the conclusion of various federal circuit courts, which held decades ago that Title VII of the Civil Rights Act of 1964, 42 USC 2000e *et seq.*, does not prohibit sexual-orientation discrimination. Those cases were overruled by *Bostock*. But I can, and would, affirm *Barbour's* result because my opinion does not rely on and is not controlled by the reasoning of *Bostock*.
- 33 *People v Denio*, 454 Mich. 691, 699, 564 N.W.2d 13 (1997) (stating that "when terms are not expressly defined by a statute, a court may consult dictionary definitions"). To avail ourselves of dictionaries is consistent with the Legislature's command in MCL 8.3a that "[a]ll words and phrases shall be construed and understood according to the common and approved usage of the language; but technical words and phrases, and such as may have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to such peculiar and appropriate meaning."
- 34 *People v Wood*, 506 Mich. 114, 123 n 7, 954 N.W.2d 494 (2020), quoting Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* (St. Paul: Thomson/West, 2012), p. 419.
- 35 *American Heritage Dictionary* (1970) (boldface omitted).
- 36 *Webster's New Collegiate Dictionary* (1976) (boldface omitted).
- 37 Every dictionary published before 1977 that I examined lists biological sex—the distinction between male and female—as its focal definition of "sex." See, e.g., *Webster's Third New International Dictionary* (1966) ("1: one of the two divisions of organic esp. human beings respectively designated male or female[;] 2: the sum of the morphological, physiological, and behavioral peculiarities of living beings that subserves biparental reproduction with its concomitant genetic segregation and recombination which underlie most evolutionary change, that in its typical dichotomous occurrence is usu. genetically controlled and associated with special sex chromosomes, and that is typically manifested as maleness and femaleness with one or the other of these being present in most higher animals though both may occur in the same individual in many plants and some invertebrates and though no such distinction can be made in many lower forms (as some fungi, protozoans, and possibly bacteria and viruses) either because males and females are replaced by mating types or because the participants in sexual reproduction are indistinguishable[;] 3: the sphere of interpersonal behavior esp. between male and female most directly associated with, leading up to, substituting for, or resulting from genital union[;] 4: the phenomenon of sexual instincts and their manifestations") (usage examples omitted); *Webster's Seventh New Collegiate Dictionary* (1969) ("1: either of two divisions of organisms distinguished respectively as male or female[;] 2: the sum of the structural, functional, and behavioral peculiarities of living beings that subserve reproduction by two

interacting parents and distinguish males and females[;] **3 a:** sexually motivated phenomena or behavior[;] **b:** SEXUAL INTERCOURSE"; *The Random House Dictionary* (1971) (1. the fact or character of being either male or female. 2. either of the two groups of persons exhibiting this character. 3. 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. 4. the instinct or attraction drawing one sex toward another, or its manifestation in life and conduct. 5. coitus. 6. to have sex, *informal*, to engage in sexual intercourse. 7. to ascertain the sex of, esp. of newly-hatched chicks. 8. sex it up, slang. to neck passionately. 9. sex up, *informal*. a. to arouse sexually. b. to increase the appeal of; to make more interesting, attractive, or exciting.") (usage examples omitted); *Webster's New World Dictionary of the English Language* (2d college ed, 1974) ("1. either of the two divisions, male or female, into which persons, animals, or plants are divided, with reference to their reproductive functions[;] 2. the character of being male or female; all the attributes by which males and females are distinguished[;] 3. anything connected with sexual gratification or reproduction or the urge for these; esp., the attraction of those of one sex for those of the other[;] 4. sexual intercourse").

The same is true of a dictionary published slightly after the ELCRA's enactment into law, which is appropriate to consult given that "[d]ictionaries tend to lag behind linguistic realities," *Wood*, 506 Mich. at 123 n 7, 954 N.W.2d 494, quoting *Reading Law*, p. 419. See *Webster's New Twentieth Century Dictionary* (1983) (defining "sex" as "1. either of the two divisions of organisms distinguished as male or female; males or females (especially men or women) collectively. 2. the character of being male or female; all of the things which distinguish a male from a female. 3. anything connected with sexual gratification or reproduction or the urge for these, especially the attraction of individuals of one sex for those of the other. 4. the female sex; women: with the article *the*. *sex appeal*, sex attraction, or the quality or qualities of an individual that are attractive to a member of the opposite sex. *the fair* (or *gentle*, *weaker*) *sex*; women. *the sterner* (or *stronger*) *sex*; men"). See also *American Heritage Dictionary* (1979) (entry for "sex" identical to *American Heritage Dictionary* (1970)).

Finally, the definition of "sex" in *Webster's Third* (1966) is particularly notable because the publication of that dictionary accompanied "a new era" for dictionaries as a whole: "one in which describing how people use language became more important than showing them how to do so properly." King, *The Draconian Dictionary Is Back*, *The Atlantic* (August 5, 2018) <<https://www.theatlantic.com/technology/archive/2018/08/the-draconian-dictionary-is-back/566660/>> (accessed July 23, 2022) [<https://perma.cc/LBT8-JQKM>]. That is, *Webster's Third* is a "descriptivist" dictionary, and "[d]escriptivist lexicographers, steeped in linguistic theory, eschew value judgements about so-called correct English and instead describe how people are using the language." *Id.* That the focal definition of "sex" in *Webster's Third* is the male-female distinction is therefore good evidence that biological sex is what was meant by the ELCRA's drafters when they included sex as a protected class.

38 *Ante* at 17-18.

39 *Ante* at 18.

40 This Court has held that, under the ELCRA, "the essence of a sex discrimination civil rights suit is that similarly situated people have been treated differently because of their sex." *Radtke v Everett*, 442 Mich. 368, 379, 501 N.W.2d 155 (1993). See also *Diamond v Witherspoon*, 265 Mich App 673, 683, 696 N.W.2d 770 (2005) (same). The Supreme Court of the United States has joined us in the context of Title VII, on which the ELCRA was "clearly modeled." *Rasheed v Chrysler Corp.*, 445 Mich. 109, 123 n 20, 517 N.W.2d 19 (1994). In *Oncale v Sundowner Offshore Servs, Inc.*, 523 U.S. 75, 118 S Ct 998, 140 L Ed 2d 201 (1998), the Court unanimously adopted Justice Ginsburg's understanding of sex discrimination, stating that it occurs for purposes of Title VII when "members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed." *Id.* at 80, 118 S Ct 998, quoting *Harris v Forklift Sys, Inc.*, 510 U.S. 17, 25, 114 S Ct 367, 126 L Ed 2d 295 (1993) (Ginsburg, J., concurring). In other words, the ELCRA's prohibition of discrimination "because of ... sex" prohibits "double standards for men and women—policies that disfavor at least some individuals of one sex compared with similarly situated members of the other." Anderson, *On the Basis of Identity: Redefining "Sex" in Civil Rights Law and Faulty Accounts of "Discrimination,"* 43 Harv J L & Pub Pol'y 387, 390 (2020).

A clear example that showcases what sex discrimination is comes from a case argued by then-advocate Ginsburg herself: *Weinberger v Wiesenfeld*, 420 U.S. 636, 95 S Ct 1225, 43 L Ed 2d 514 (1975). In *Weinberger*, the Supreme Court of the United States held that a sex-based distinction in the disbursement of Social Security survivor's benefits violated the

Fifth Amendment's Due Process Clause. *Id.* at 654, 95 S Ct 1225. Prior to *Weinberger*, a widow (and her children) could receive Social Security survivor's benefits, but only a widower's *children* could receive them, *not the widower himself. Id.* The Court held that the sex discrimination consisted in the fact that male surviving spouses were treated differently and worse than their female counterparts, on account of, or by reason of, or because of, their sex; had they been women (widows), they would have received the surviving-spouse benefits, but because they were men (widowers), they were ineligible for those benefits. That is, male surviving spouses were subjected to a "double standard[]" that "disfavor[ed] at least some individuals of one sex compared with similarly situated members of the other." *On the Basis of Identity*, 43 Harv J L & Pub Pol'y at 390. Said another way, male surviving spouses were " 'exposed to disadvantageous terms or conditions' " to which female surviving spouses were " 'not exposed.' " *Oncale*, 523 U.S. at 80, 118 S.Ct. 998, quoting *Harris*, 510 U.S. at 25, 114 S.Ct. 367 (Ginsburg, J., concurring). Said still another way, and borrowing this Court's own words, "similarly situated people [were] treated differently because of their sex." *Radtke*, 442 Mich. at 379, 501 N.W.2d 155; see also *Diamond*, 265 Mich App at 683, 696 N.W.2d 770.

- 41 While not directly applicable, this Court has previously stated that the ELCRA does not prohibit sexual-orientation discrimination:

[N]one of the exceptions where a suit is allowed against the government can be read to allow suit for sexual orientation discrimination. Likewise, no statute grants governmental agencies the authority to create an immunity exception for sexual orientation discrimination or waive immunity in the area of civil rights. *Notably, the [ELCRA], which makes a municipality liable for specific civil rights violations, neither provides a cause of action for sexual orientation discrimination nor grants municipalities the authority to create one.* MCL 37.2101 *et seq.* Moreover, the [ELCRA] limits complaints to causes of action for violations of the act itself[.] [*Mack v Detroit*, 467 Mich. 186, 196, 649 N.W.2d 47 (2002).]

- 42 Defendants-Appellants' Brief on Appeal (October 22, 2021) at 14, quoting *Zarda v Altitude Express, Inc.*, 883 F.3d 100, 113 (CA 2, 2018).

- 43 Plaintiffs-Appellees' Brief on Appeal (November 26, 2021) at 17.

- 44 The majority opinion attempts to respond by once again asserting, with different phrasing, that "when [someone] discriminates against a person 'because she is (A) a woman who is (B) sexually attracted to women, then it is motivated, in part, by an enumerated trait: the employee's sex.' " *Ante* at 23 n 16, quoting *Hively v Ivy Tech Community College of Indiana*, 853 F.3d 339, 359 (CA 7, 2017) (Flaum, J., concurring). On that basis, the majority opinion concludes that discrimination "because of ... sex" necessarily entails sexual-orientation discrimination. However, as I have shown, it is possible to make decisions based on sex alone and on sexual orientation alone, and that possibility fatally undermines the majority opinion's logic. See pages 14-17 of this opinion. More importantly, as I have explained at length, this Court's duty is *interpretation*: determining and then applying the meaning that the ELCRA possessed for the linguistic community that passed it into law. See pages 6-10 of this opinion. Nobody in 1976 thought that the ELCRA's prohibition of discrimination "because of ... sex" included a prohibition on discrimination because of sexual orientation. And yet, today, a majority of this Court, "rather than members of [the Legislature]," sees fit to "impos[e] on a [nearly] half-century-old statute a meaning of 'sex discrimination' that the [Legislature] that enacted it would not have accepted," *Hively*, 853 F.3d at 357 (Posner, J., concurring) (alterations added)—indeed, not only would not have accepted but *explicitly did not accept*. See pages 19-25 of this opinion for discussion of this point. Such an act is anathema to the judicial role and will seriously undermine Michigan's constitutional order if repeatedly indulged.

- 45 See *Bostock*, 590 U.S. at —; 140 S Ct at 1835 (Kavanaugh, J., dissenting) (observing that to discriminate on the basis of sex as opposed to sexual orientation "implicates two distinct societal concerns, reveals two distinct biases, imposes two distinct harms, and falls within two distinct statutory prohibitions").

- 46 *American Heritage Dictionary* (1970); see also *American Heritage Dictionary* (1979) (same).

- 47 *Zajackowski*, 493 Mich. at 13, 825 N.W.2d 554. See also *Absurdity Doctrine*, 116 Harv L Rev at 2392-2393, 2457; *What Divides Textualists from Purposivists?*, 106 Colum L Rev at 78, 79-80.

- 48 Rather, the ELCRA "is aimed at the prejudices and biases borne against persons because of their membership in a certain class, and seeks to eliminate the effects of offensive or demeaning stereotypes, prejudices, and biases." *Miller v C A Muer Corp*, 420 Mich. 355, 363, 362 N.W.2d 650 (1984) (quotation marks and citations omitted). Thus, that the ELCRA protects persons who engage in sexual activity while at work is simply not a reasonable interpretation.
- 49 *Zajackowski*, 493 Mich. at 13, 825 N.W.2d 554. See also *Absurdity Doctrine*, 116 Harv L Rev at 2392-2393, 2457; *What Divides Textualists from Purposivists?*, 106 Colum L Rev at 78, 79-80. Accord *Honigman Miller Schwartz & Cohn LLP v Detroit*, 505 Mich. 284, 307, 952 N.W.2d 358 (2020) ("[T]his Court will not extract words and phrases from within their context or otherwise defeat their import as drawn from such context. A statute should be interpreted in light of the overall statutory scheme, and although a phrase or a statement may mean one thing when read in isolation, it may mean something substantially different when read in context.") (quotation marks, citations, and brackets omitted).
- 50 See, e.g., *Dep't of Environmental Quality v Worth Twp.*, 491 Mich. 227, 238, 814 N.W.2d 646 (2012) ("When considering the correct interpretation, the statute must be read as a whole, unless something different was clearly intended. Individual words and phrases, while important, should be read in the context of the entire legislative scheme.").
- 51 The majority opinion finds it notable that the ELCRA has been applied to circumstances "likely unanticipated" by the enacting Legislature. The majority opinion claims that this proposition in regard to the ELCRA is supported by *Robinson v Ford Motor Co*, 277 Mich App 146, 153, 744 N.W.2d 363 (2007), which first greenlighted claims under the ELCRA for a same-sex hostile work environment. See Gordon, *A History of the Development of Sex Discrimination Law in Michigan*, 97 Mich B J 30, 33 (2018). *Robinson* concerned a defendant employee who repeatedly committed unwelcome and depraved sexual acts against a plaintiff employee of the same gender. Regardless of either employee's sexual orientation, *Robinson* addressed actual sexual harassment that the ELCRA was intended, or anticipated, to prohibit.

The majority opinion simply chooses to ignore the longstanding rule of statutory interpretation that this Court is "aided in discovering legislative intent ... by examining the proposed legislation [that the Legislature] considered and rejected, contrasted with the provisions as finally adopted." *Miller v State Farm Auto Ins Co*, 410 Mich. 538, 566, 302 N.W.2d 537 (1981). And where, as here, the Legislature considered certain language and rejected it, we should not, indeed we cannot, read the statute to include that which the Legislature expressly rejected. See notes 78 and 79 of this opinion and associated text. Because the majority opinion reads into the ELCRA something that the Legislature expressly considered but rejected, it can only be characterized as a brazen act of judicial overreach.

- 52 This document and related materials were submitted in the appendix to plaintiffs' brief on appeal.
- 53 Gubbins, *Legal Milestone Honors Elliot[L]-Larsen Civil Rights Act*, Oakland County Legal News (September 17, 2012) <<http://www.legalnews.com/oakland/1367237>> (accessed July 23, 2022) [<https://perma.cc/75K6-9NG3>].
- 54 Skubick, *Who is Elliott and Who is Larsen? Groundbreakers, That's Who*, MLive (November 23, 2014) <https://www.mlive.com/lansing-news/2014/11/tim_skubick_who_is_elliott_and.html> (accessed July 23, 2022) [<https://perma.cc/4HTQE9ZJ>] (Representative Larsen "recall[ed] the movement was focused on the African American community. Period.... [W]hen the bill did pass, it came down to practical political calculus. Put gays in the measure and the whole thing implodes. Leave them out, and the bill passes.").
- 55 Importantly, however, we know that the Legislature knows how to identify and protect sexual orientation when it wants to; but it did not do so, and to date has not done so, with the ELCRA. See MCL 28.257a (requiring "[t]he chief of police of each city or village, the chief of police of each township having a police department, and the sheriff of each county within this state" to "report to the department of state police, in a manner prescribed by the department, information specified under [MCL 28.251] related to crimes motivated by prejudice or bias based upon race, ethnic origin, religion, gender, or sexual orientation") (emphasis added). See also MCL 141.1361(10)(a) and (b) (prohibiting the board of directors of a regional convention facility authority created under MCL 141.1357 and the authority itself from discriminating against employees, applicants, or contractors "because of religion, race, color, national origin, age, sex, sexual orientation, height, weight, marital status, partisan considerations, or a disability or [certain] genetic information") (emphasis added). Such a linguistic difference—"sex" as opposed to "sexual orientation"—matters when it comes to discerning the Legislature's intended meaning. See *ACLU of Mich.*, — Mich at —; slip op. at 1-2, 12, 14 (unanimously holding that a statute, MCL 15.243(1)(d), that "exempt[s] from disclosure as a public record ... [r]ecords or information specifically described and

exempted from disclosure by statute" does not exempt from disclosure such records or information when the basis for that exemption is a *regulation* because "a regulation is not a statute," and the Legislature's "deliberate linguistic choice" to use "statute," which this Court was "bound to respect," matters and, indeed, was "dispositive").

Moreover, the Legislature knows how to expand, or clarify, what conduct constitutes discrimination "because of ... sex." Indeed, the Legislature has twice expressly done so. First, it amended the ELCRA to provide that employment-based discrimination "because of ... sex" includes discrimination because of pregnancy or childbirth, MCL 37.2201(d). And second, it amended the ELCRA to expressly state that discrimination because of sex includes sexual harassment, MCL 37.2103(i). Notably, it has not done so for sexual orientation.

- 56 *LaGuire v Kain*, 440 Mich. 367, 396-397 & n 21, 487 N.W.2d 389 (1992) (Boyle, J., concurring in part), citing *People v Petrella*, 424 Mich. 221, 243-244, 380 N.W.2d 11 (1985); *Miller*, 410 Mich. at 567, 302 N.W.2d 537; *Gen Teamsters Union v Uptown Cleaners & Hatters, Inc.*, 356 Mich. 204, 240, 97 N.W.2d 593 (1959); *People v Adamowski*, 340 Mich. 422, 429, 65 N.W.2d 753 (1954); and *Miles ex rel Kamferbeek v Fortney*, 223 Mich. 552, 564, 194 N.W. 605 (1923). See also *Wayne Co v Auditor General*, 250 Mich. 227, 235-236, 229 N.W. 911 (1930) (in construing an act for the distribution of highway funds, this Court stated: "The legislative history of the 1927 act reveals the fact that while it was pending in the legislature, a proposed amendment was rejected which, if embodied in the act, would have rendered it subject to plaintiff's interpretation and not to that of the defendant. Surely this gives rise to the inference that the legislature did not intend the act should be subject to the interpretation now urged by plaintiff") (citation omitted).
- 57 *Miller*, 410 Mich. at 566, 302 N.W.2d 537. Accord *Nation v W D E Electric Co*, 454 Mich. 489, 497, 563 N.W.2d 233 (1997) ("In light of the Legislature's rejection of an explicit provision requiring compound interest, we presume the Legislature's silence evidences an intent that courts continue to use simple interest.").
- 58 *In re MCI Telecom Complaint*, 460 Mich. 396, 415, 596 N.W.2d 164 (1999), citing *Jennings v Southwood*, 446 Mich. 125, 142, 521 N.W.2d 230 (1994). Accord *Bush v Shabahang*, 484 Mich. 156, 173-174, 772 N.W.2d 272 (2009). See also *Univ. Med. Affiliates, P.C. v Wayne Co. Executive*, 142 Mich App 135, 140, 369 N.W.2d 277 (1985) (holding that the legislative history of a statute may be considered, and if it can be shown that certain language was affirmatively rejected, a court should not give the statute a construction that the Legislature plainly refused to give it); *Elliott v Genesee Co*, 166 Mich App 11, 17, 419 N.W.2d 762 (1988).
- 59 *Gulf Oil Corp v Copp Paving Co, Inc.*, 419 U.S. 186, 200, 95 S Ct 392, 42 L Ed 2d 378 (1974).
- 60 *Immigration & Naturalization Serv v Cardoza-Fonseca*, 480 U.S. 421, 442-443, 107 S Ct 1207, 94 L Ed 2d 434 (1987) (quotation marks and citation omitted).
- 61 *In re Certified Question from the United States Court of Appeals for the Sixth Circuit*, 468 Mich. 109, 115 n 5, 659 N.W.2d 597 (2003) (emphasis added). Just last year, this Court unanimously held that reviewing such statutory history is extremely valuable. See *Dep't of Talent & Economic Dev/Unemployment Ins. Agency*, 507 Mich. at 227, 968 N.W.2d 336 ("A statute's history—the narrative of the statutes repealed or amended by the statute under consideration—properly form[s] part of [its] context.") (quotation marks and citations omitted). See also *Bush*, 484 Mich. at 173-174, 772 N.W.2d 272 ("[W]here the Legislature has considered certain language and rejected it in favor of other language, the resulting statutory language should not be held to authorize what the Legislature explicitly rejected.") (emphasis added; quotation marks and citation omitted).

For purposes of this dissent, there is no meaningful distinction between the kind of legislative history I am considering, on the one hand, and statutory history, on the other. Whatever labels we might apply to the Committee's consideration but ultimate rejection of including sexual orientation as a protected class in the ELCRA, there can be no doubt that we can—and indeed must, if we are faithfully to interpret the ELCRA consistently with the Legislature's intent—consider it.

- 62 Justice Viviano persuasively demonstrates that the majority opinion's but-for causation test is inapplicable because the threshold requirement of discriminatory animus has not been met, and, in the alternative, even if the test is appropriate, the majority opinion misapplies it. To his thorough analysis, I would add the following. The majority opinion makes much ado about the role played by "because of" in its interpretation of the ELCRA. The majority opinion holds that "the operative phrase 'because of' in the ELCRA establishes a but-for causation standard," just as the Supreme Court of the United

States held "because of" does in Title VII when it decided *Bostock*. *Ante* at 17. "[A] but-for test directs us to change one thing at a time and see if the outcome changes. If it does, we have found a but-for cause." *Bostock*, 590 U.S. at ____; 140 S Ct at 1739. Thus, for the majority opinion, the ELCRA prohibits, and always has prohibited, sexual-orientation discrimination because "a person's sexual orientation necessarily implies conclusions about their sex, and so 'it is impossible to discriminate against a person' for their sexual orientation 'without discriminating against that individual based on sex.'" *Ante* at 21, quoting *Bostock*, 590 U.S. at ____; 140 S Ct at 1741.

Ordinarily, that "because of" means but-for causation would not be terribly controversial; that is a reasonable, but not a necessary, construction of the phrase. See *Hrapkiewicz v Wayne State Univ Bd of Governors*, 501 Mich. 1067, 1067, 1069, 910 N.W.2d 654 (2018) (Markman, C.J., dissenting) (explaining that because this Court's caselaw has produced "inconsistent" interpretations of the ELCRA's causation standard, the Court should "grant leave to appeal to address whether the 'because of' language in MCL 37.2202(1)(a) [of the ELCRA] should be interpreted" as imposing but-for causation); *Price Waterhouse v Hopkins*, 490 U.S. 228, 240, 109 S Ct 1775, 104 L Ed 2d 268 (1989) (plurality opinion; superseded by statute on other grounds) ("To construe the words 'because of' as colloquial shorthand for 'but-for causation' ... is to misunderstand them.") (comma omitted). But, as discussed earlier, the ELCRA's prepassage history directs us to read "because of" consistently with the Legislature's intent not to include sexual orientation as a protected class under the ELCRA. That prepassage history limits the scope of "because of"—a limit that this Court must respect as an interpretive, not a legislative, body.

- 63 See *Chadha*, 634 F.2d at 422-423 (observing that the separation of powers' "goal of preventing undue concentrations of power is furthered by the natural tendency of each center of power [i.e., branch of government] to compete to enlarge or maintain its own influence" and that "[a]n undue concentration of authority in one branch inevitably causes structural decomposition of the other branches, along with a dispersion of their original powers"). See also *The Federalist* No. 51 (Madison) (Rossiter ed., 1961), pp. 318-319 (explaining how to prevent each branch, which naturally "wants" to dominate its cobranches, from doing so: "But the great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place").
- 64 See Appendix to Plaintiffs-Appellees' Brief on Appeal at 83a (discussing that 1977 report).
- 65 MDCR, *Report on LGBT Inclusion under Michigan Law with Recommendations for Action* (January 28, 2013), p. 5, available at <<https://www.michigan.gov/-/media/ProjectWebsites/mdcr/mcra/reports/2013/lgbt-inclusion.pdf?rev=2f4b1e824b%1Fe04de7b2d0b%1Fec9a607%1Fb6bf>> (accessed July 24, 2022) [<https://perma.cc/HL6P-S8NJ>].
- 66 *Id.*
- 67 *Id.* at ii ("While ELCRA prohibits employment, public accommodations, public services, education, and housing discrimination based on race, religion, color, national origin, sex, age, marital status, height, weight, and arrest record, *it does not currently prohibit discrimination based on sexual orientation or gender identity/expression.*") (emphasis added).
- 68 *In re Complaint of Rovas*, 482 Mich. at 100, 754 N.W.2d 259 (stating that agencies cannot "assume this Court's constitutional role as the final arbiter of the meaning of a statute").
- 69 See *id.* at 103, quoting *Boyer-Campbell Co v Fry*, 271 Mich. 282, 296-297, 260 N.W. 165 (1935) (explaining this Court's approach to an agency's interpretation of a statute: " 'the construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration and ought not to be overruled without cogent reasons. However, these are not binding on the courts, and [w]hile not controlling, *the practical construction given to doubtful or obscure laws in their administration by public officers and departments with a duty to perform under them is taken note of by the courts as an aiding element to be given weight in construing such laws and is sometimes deferred to when not in conflict with the indicated spirit and purpose of the legislature* ' ") (emphasis added; alteration in *Rovas*).
- 70 In addition to the actions of the MCRC, those of former Governor Jennifer Granholm are instructive because they demonstrate the widespread, commonsense understanding that discrimination based on sex is not the same as

discrimination based on sexual orientation. As Governor Gretchen Whitmer stated in Executive Order No. 2019-09, "[d]iscrimination based on sexual orientation was prohibited in state employment for the first time by Executive Directive 2003-24." Former Governor Granholm promulgated Executive Directive No. 2003-24, which explicitly enumerates sexual orientation as a protected class. See *id.* (prohibiting discrimination "because of religion, race, color, national origin, age, sex, sexual orientation, height, weight, marital status, partisan considerations, or a disability or [certain] genetic information") (emphasis added). In 2004, "[t]his prohibition was incorporated by the Civil Service Commission in its Rule 1-8.1 on prohibited discrimination" EO 2019-09, citing Civ. Serv. R. 1-8.1, p. 5.

Executive Directive No. 2003-24 and Civil Service Rule 1-8.1 expressly added sexual orientation as a new, separately prohibited form of discrimination. In promulgating those executive actions, Governor Granholm's administration did not assert that language prohibiting discrimination "because of ... sex" in prior executive actions "already banned, or henceforth would be deemed to ban, sexual orientation discrimination[.]" *Zarda*, 883 F.3d at 152 n 22 (Lynch, J., dissenting). Instead, her administration deployed the phrase explicitly to accomplish her goal of prohibiting sexual-orientation discrimination in state employment. This shows that Michigan's executive branch, like our Legislature, has, consistently with my interpretation of the ELCRA, "long understood sexual orientation discrimination to be distinct from, and not a form of, sex discrimination." *Bostock*, 590 U.S. at ____; 140 S Ct at 1831 (Kavanaugh, J., dissenting).

71 Historically, Michigan legislators have been on the same page as defendants in their understanding that the ELCRA does not prohibit sexual-orientation discrimination. Since the ELCRA became effective in 1977, there have been numerous proposals to amend it to include sexual orientation. In 1980, just a few years after the ELCRA was enacted, Representative David Evans organized a statewide citizens' task force to discuss amending the ELCRA to include that language. See *MDCR Report on LGBT Inclusion* at 5. A few years after that, in 1983, Representative James Dressel introduced a bill—the "Dressel Amendment" (HB 5000)—to amend the ELCRA to include sexual orientation. See Lindstrom, *Remembering a Pioneering Moment in Gay Rights in the Legislature*, Gongwer (March 7, 2013) <<https://www.gongwer.com/blog/?postid=6001>> (accessed July 24, 2022) [<https://perma.cc/D9NY-4GFC>]. In 2005, Representative Chris Kolb introduced a bill to amend the ELCRA to prohibit both sexual-orientation and gender-identity discrimination. See Miller, *Once Promising, Kolb's LGBT Bills Fizzle*, *The Michigan Daily* (February 14, 2006) <<https://www.michigandaily.com/uncategorized/once-promising-kolbs-lgbt-bills-fizzle/>> (accessed July 24, 2022) [<https://perma.cc/P926-8RH9>]. A similar effort was made in 2014, when Representative Frank Foster introduced a bill that would have added sexual orientation to the ELCRA. See Oosting, *'Historic' Gay Rights Hearing Ends Without Vote on Michigan Anti-Discrimination Proposals*, *MLive* (December 3, 2014) <https://www.mlive.com/lansing-news/2014/12/historic_hearing_on_gay_rights.html> (accessed July 24, 2022) [<https://perma.cc/L93S-BXGJ>] (quoting Foster acknowledging that some states "already have this type of legislation, some as far back as the 1970s") (emphasis added). All told, since 1990, the Legislature has considered, and rejected, 22 bills that would have added sexual orientation to the ELCRA. See 2021 SB 208, 2021 HB 4297, 2019 SB 351, 2019 HB 4997, 2017 SB 424, 2017 HB 4689, 2015 SB 0315, 2015 HB 4538, 2014 SB 1053, 2014 HB 5959, 2014 HB 5804, 2012 SB 1063, 2009 HB 4192, 2007 HB 4160, 2005 SB 787, 2005 HB 4956, 2003 SB 609, 2003 HB 4850, 2001 HB 4661, 1999 HB 5107, 1992 HB 6222, and 1990 HB 5993.

While the majority opinion correctly notes that there are myriad reasons why legislators might have wanted to amend the ELCRA, we cannot and should not rule out the most obvious and straightforward explanation: as competent users of the English language, they fully believed that, as written, the ELCRA did not prohibit what they wanted it to prohibit, which is precisely why they tried to amend it. This postenactment history is not dispositive as to the ELCRA's original public meaning, but it is certainly not, per the majority opinion's characterization, evidence that is hopelessly inscrutable.

Moreover, the public has not understood the ELCRA to prohibit sexual-orientation discrimination. In 2020, some Michiganders launched a ballot initiative that would have extended the ELCRA's protections to cover sexual orientation and gender identity. See Knoppow, *New Coalition Seeks to Amend ELCRA via Citizen Initiative*, *PrideSource* (January 16, 2020) <<https://pridesource.com/article/new-organization-seeks-to-amend-elcra-via-citizen-initiative/>> (accessed July 24, 2022) [<https://perma.cc/R4C7-QWMQ>]. This ballot-initiative effort failed. See *Fair & Equal Mich v Bd of State Canvassers*, 508 Mich. 967, 965 N.W.2d 535 (2021) (denying the plaintiff's complaint for mandamus, sought in response to the Board of State Canvassers' unanimous conclusion that the plaintiff's petition to add sexual orientation and gender identity to the ELCRA did not garner sufficient signatures to be placed on the ballot). Even so, like the legislators who attempted to amend the ELCRA to include sexual orientation after it became law, the most obvious and straightforward explanation

for why these citizens started a ballot initiative to amend the ELCRA is that they believed that the ELCRA did not prohibit what they wanted it to prohibit: sexual-orientation discrimination.

- 72 The COHA is a database of nearly 406 million words and around 107,000 English texts—newspapers, popular magazines, fiction and nonfiction books—published between 1810 and 2009. See Alatrash et al., *CCOHA: Clean Corpus of Historical American English*, Proceedings of the 12th Conference on Language Resources and Evaluation (May 2020), pp. 6958-6959, available at <<https://aclanthology.org/2020.lrec-1.859.pdf>> (accessed July 24, 2022) [<https://perma.cc/XFR3-CQ6Z>].
- 73 See note 40 of this opinion (citing and discussing *Radtke*, 442 Mich. at 379, 501 N.W.2d 155; *Diamond*, 265 Mich App at 683, 696 N.W.2d 770; *Oncale*, 523 U.S. at 80, 118 S.Ct. 998, quoting *Harris*, 510 U.S. at 25, 114 S.Ct. 367 (Ginsburg, J., concurring); *On the Basis of Identity*, 43 Harv. J. L. Pub. Policy at 390; *Weinberger*, 420 U.S. at 654, 95 S.Ct. 1225).
- 74 This Court has used this method previously. See *Harris*, 499 Mich. at 347-349, 885 N.W.2d 832.
- 75 The majority opinion relies on *Oncale*, 523 U.S. at 79, 118 S.Ct. 998, for its expansive reading of the ELCRA. But this reliance is misplaced. *Oncale* stated that “statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils” and that “it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.” *Id.* It is unremarkable that a statutory provision might cover circumstances that its enactors did not clearly foresee would arise or even ones that they did not specifically intend for it to cover. For example, given the social conditions of the historical moment in which the ELCRA was passed, most legislators probably thought that the ELCRA’s prohibition on discrimination “because of ... sex” would help (only) women, at least as a practical matter. But that does not change the reality that the reasonable import of the ELCRA’s words also obviously applies to men, and we cannot limit their scope based on what legislators thought they were accomplishing because the plain and reasonable meaning of those words covers men as well as women. But that is not the case with sexual orientation. As I have been at pains to demonstrate, to discriminate based on sex as opposed sexual orientation “implicates two distinct societal concerns, reveals two distinct biases, imposes two distinct harms, and falls within two distinct statutory prohibitions.” *Bostock*, 590 U.S. at —; 140 S Ct at 1835 (Kavanaugh, J., dissenting). Thus, the two forms of discrimination are not “reasonably comparable evils,” *Oncale*, 523 U.S. at 79, 118 S.Ct. 998, in the same way that discrimination based on sex—regardless of which sex it is perpetrated against—is.
- 76 See MCL 28.257a; MCL 141.1361(10)(a) and (b).
- 77 See *ante* at 18 (stating that *Bostock* “offers a straightforward analysis of the plain meaning of analogous statutory language” and “agree[ing] with its reasoning”); see also *id.* at 18, 114 S Ct 367 n 12 (further defending its reliance on *Bostock*).
- 78 *In re MCI Telecom Complaint*, 460 Mich. at 415, 596 N.W.2d 164 (emphasis added).
- 79 The majority opinion takes the position that because only a subset of the Legislature—the Committee, not a majority of the Legislature or the entire Legislature—made the choice to exclude sexual orientation as a protected class under the ELCRA, its exclusion by the Committee has no bearing on a proper interpretation of the ELCRA. This is incorrect. For one thing, the 1975–1976 Legislature itself chose the committee system as its decisionmaking mechanism. We should not ignore that choice, especially when we have relied on less compelling evidence than we have here to inform our understanding of a statute’s meaning. See *People v Arnold*, 502 Mich. 438, 460-462, 468, 918 N.W.2d 164 (2018) (in deciding whether to construe the phrase “1 day to life” in MCL 750.335a(2)(c) as a mandatory or as an optional alternative, the Court looked to how the phrase was understood by the “Governor’s Study Commission on the Deviated Criminal Sex Offender,” which in 1949 was appointed by then Governor G. Mennen Williams to offer recommendations to amend the second Goodrich Act, 1939 PA 165, some of which the Legislature adopted).

Moreover, it is absurd to say that because only the Committee’s eight members explicitly voted on whether to include sexual orientation in the ELCRA, we therefore cannot know what any other legislators thought of the phrase’s resulting absence in the bill. The Committee is not hermetically sealed off from the rest of the Legislature; its members’ actions are known to the other legislators. The Committee’s decision not to include sexual orientation in the ELCRA, therefore, would have been common knowledge to the rest of the Legislature, whose members are competent users of the English

language. For the reasons I have explained, the choice to exclude sexual orientation strongly militates against reading the ELCRA to cover it. See *LaGuire*, 440 Mich. at 396-397, 487 N.W.2d 389 (Boyle, J., concurring in part) ("[W]here the Legislature has affirmatively rejected language that would support an interpretation of a statute, that rejection evidences a legislative intent toward a contrary construction."); *id.* at 397 n 21 (collecting cases in support); *Miller*, 410 Mich. at 566, 302 N.W.2d 537 (explaining that the Court is "aided in discovering legislative intent ... by examining the proposed legislation [that the Legislature] considered and rejected, contrasted with the provisions as finally adopted"); *In re MCI Telecom Complaint*, 460 Mich. at 415, 596 N.W.2d 164 ("Where the Legislature has considered certain language and rejected it in favor of other language, the resulting statutory language should not be held to explicitly authorize what the Legislature explicitly rejected."). See also *Bush*, 484 Mich. at 173-174, 772 N.W.2d 272; *Univ. Med. Affiliates, P.C.*, 142 Mich App at 140, 369 N.W.2d 277; *Elliott*, 166 Mich App at 17, 419 N.W.2d 762.

- 1 Another section contains similar language against employer discrimination:

An employer shall not do any of the following:

(a) Fail or refuse to hire or recruit, discharge, or otherwise discriminate against an individual with respect to employment, compensation, or a term, condition, or privilege of employment, because of religion, race, color, national origin, age, sex, height, weight, or marital status.

(b) Limit, segregate, or classify an employee or applicant for employment in a way that deprives or tends to deprive the employee or applicant of an employment opportunity, or otherwise adversely affects the status of an employee or applicant because of religion, race, color, national origin, age, sex, height, weight, or marital status.

(c) Segregate, classify, or otherwise discriminate against a person on the basis of sex with respect to a term, condition, or privilege of employment, including, but not limited to, a benefit plan or system. [MCL 37.2202(1).]

- 2 The federal statute makes it unlawful to "discriminate against any individual with respect to [employment matters] ... because of such individual's ... sex[.]" 42 USC 2000e-2(a)(1).

- 3 This conclusion is further supported by MCL 37.2103(i), which is part of the general definitions section applicable to all of ELCRA. That provision states, "[d]iscrimination because of sex includes sexual harassment" "Sexual harassment" is defined to include conduct that "substantially interfere[s] with an individual's ... public accommodations or public services" MCL 37.2103(i)(iii). In this light, then, the definitional section, MCL 37.2103(i), indicates that the actions prohibited by MCL 37.2302(a) constitute discrimination against a person.

- 4 *Id.* at 5. As Phillips states:

For instance, Funk & Wagnalls Standard College Dictionary (10th ed. 1963) defines *discriminate* as "[t]o act toward someone or something with partiality or prejudice: to *discriminate against* a minority; to discriminate in favor of one's friends." Likewise, Webster's New World Dictionary (1960), defines the relevant sense of *discriminate* as "to make distinctions in treatment; show partiality (*in favor of*) or *prejudice (against)*." The idea of prejudice or bias against members of a certain group is also present in dictionary definitions emphasizing that discrimination involves action based on someone's membership in a group "rather than according to actual merit." *Id.* at 5-6, quoting *The Random House Dictionary* (1966-1973).]

Phillips further notes that *Webster's Third International Dictionary* (1961) defines "discriminate" as "'to make a difference in treatment or favor on a class or categorical basis in disregard of individual merit ([discriminate] in favor of your friends) (habitually [*discriminate*] against a certain nationality).'" *Id.* at 6 n 19.

- 5 "The FEPA was repealed upon passage of the [ELCRA], 1976 PA 453, effective March 31, 1977[.]" *Dep't of Civil Rights ex rel Parks v Gen Motors Corp*, 93 Mich App 366, 287 N.W.2d 240 (1979).

- 6 It is generally understood that the but-for test is more rigorous and requires a higher showing than the so-called "motivating factor" standard, in which "a plaintiff [can] prevail merely by showing that a protected trait like sex was a 'motivating factor' in a defendant's challenged employment practice.... Under this more forgiving standard, liability can sometimes follow even if sex wasn't a but-for cause of the employer's challenged decision." *Bostock*, 590 U.S. at —; 140 S Ct at

1739-1740; see also *Hrapkiewicz*, 501 Mich. at 1068, 910 N.W.2d 654 (Markman, C.J., dissenting) (stating that the but-for test "imposes a considerably higher causation standard than" the motivating-factor test).

7 Federal precedent "may often be useful as guidance in this Court's interpretation of laws with federal analogues" *Garg v Macomb Co Comm Mental Health Servs*, 472 Mich. 263, 283, 696 N.W.2d 646 (2005), amended 473 Mich. 1205, 699 N.W.2d 697 (2005). But "federal precedent remains only as persuasive as the quality of its analysis." *Id.*

8 As Justice Zahra has also ably demonstrated, no one at the time the ELCRA was passed understood the meaning of the term "sex" to encompass sexual orientation. Further proof of this is that, when the ELCRA was enacted, Michigan had a statute on the books criminalizing sodomy. MCL 750.158. When the ELCRA passed in 1976, SCOTUS had not yet rendered unconstitutional laws that made it a crime for same-sex couples to engage in sodomy. See *Lawrence v Texas*, 539 U.S. 558, 123 S Ct 2472, 156 L Ed 2d 508 (2003). Thus, if defendant is correct here, that would mean that when the ELCRA passed, a reasonable reader would have known that it prohibited discrimination against same-sex couples despite the fact that it was then a crime for those same-sex couples to have sexual relations. That cannot be correct. "When the meaning of a term is questionable, ... courts should 'construe it to contain that permissible meaning which fits most logically and comfortably into the body of both previously and subsequently enacted law.' ... This is 'because it is our role to make sense rather than nonsense out of the *corpus juris*.'" *In re Certified Questions from the US Dist Court, Western Dist of Mich*, 506 Mich. 332, 404, 958 N.W.2d 1 (2020) (Viviano, J., concurring in part, dissenting in part), quoting *West Virginia Univ Hosps, Inc v Casey*, 499 U.S. 83, 100-101, 111 S Ct 1138, 113 L Ed 2d 68 (1991), superseded by statute on other grounds. In light of this broader legal context, it is nonsensical to believe that the public understood the ELCRA to protect sexual orientation.

9 Professor Cass Sunstein also explains it well:

[I]magine if an English speaker, now or in 1964, says the following: "I am opposed to discrimination because of sex. I am also opposed to discrimination because of sexual orientation." Does the speaker not understand the English language? Is she being redundant? (The answer to both questions is "no.") Or suppose that an English speaker, now or in 1964, says the following: "I am opposed to discrimination because of sex. But I am *not* opposed to discrimination because of sexual orientation." Is the speaker contradicting himself? Is he making some sort of logical error? Does he not understand the language? (The answer to all three questions is "no.") [Sunstein, *Textualism and the Duck-Rabbit Illusion*, 11 Cal L Rev Online 463, 475 (2020).]

10 Despite the fact that this Court has stated that the "ultimate question" in discrimination cases is whether "*intentional* discrimination" has occurred, *Hecht*, 499 Mich. at 606, 886 N.W.2d 135 (emphasis added), the majority now declines to decide whether intent has anything to do with an ELCRA claim. The notion that intent could be disregarded in a disparate treatment claim—which is the type of claim at issue in the underlying proceeding—represents a fundamental misunderstanding of discrimination law. As I have discussed at some length, our cases have long held that disparate treatment claims require proof of discriminatory motive or intent. See generally *Forbidden Grounds*, p. 160.

There is another theory that permits discrimination claims based on effects alone: disparate impact. These claims "allow courts to infer unlawful discrimination, wholly without evidence of improper motive, and solely from the (perceived) disparate consequences" of the challenged action. *Id.* As one scholar has noted, "the disparate impact theory begins where intentional discrimination ends" See Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L Rev 701, 706 (2006). Disparate impact "has always been contrasted with racial animus and motive, and despite the familiar refrains regarding how discrimination has become more subtle over time, we continue to define intentional discrimination in the context of animus and consciously impermissible motives." *Id.* Unsurprisingly, this theory is controversial, arguably resting on the assumption either that any disparity in outcome results from discrimination (even if from past practices long discarded) or that the focus on outcomes is necessary to "correct for imbalances that do not result from any unlawful conduct" *Inclusive Communities Project, Inc*, 576 U.S. at 555, 135 S.Ct. 2507 (Thomas, J., dissenting). It is not apparent that we have ever embraced this theory in circumstances like the present. Regardless, the sort of claim at issue here involves disparate treatment, which requires discriminatory intent. Yet the majority has decoupled intent from the statute. In some ways this is more radical, even, than a disparate impact theory, which at least requires what it says—a disparate impact upon a protected class. See *Int'l Brotherhood of Teamsters v United States*, 431 U.S. 324, 336 n 15, 97 S Ct 1843, 52 L Ed 2d 396 (1977) (noting that disparate impact claims "involve employment practices that are

facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity"). Here, there is no such discernable disparate impact on males as a class or females as a class.

11 It might be contended that by focusing on a defendant's view of a particular group, this interpretation unduly focuses on a defendant's treatment of groups rather than individuals, whereas the statute protects individuals. The Supreme Court in *Bostock*, 590 U.S. at —; 140 S Ct at 1740, made such an argument, noting that the statute focused on the defendant's treatment of the individual plaintiff rather than its treatment of a group of which the plaintiff is a member. Thus, according to *Bostock*, it is no defense for an employer who "fires a woman for refusing his sexual advances" that "while he treated that individual woman worse than he would have treated a man, he gives preferential treatment to female employees overall." *Id.* at —; 140 S Ct at 1741. This is true, but irrelevant. In the example, the employer made the sexual advances on the employee *because* she was a woman and the employer is sexually attracted to women. See Semeraro, *We're All Originalists Now ... Or Are We?: Bostock's Misperceived Quest To Distinguish Title VII's Meaning from the Public's Expectations*, 49 Hofstra L Rev 377, 407 (2021) ("[F]inding a heterosexual man's romantic advances unwelcome ... [is] only [a] problem[] to the employer if the employee is a woman."). "Nor is it a defense," *Bostock* stated, for an employer to say it discriminates against both men and women because of sex." *Bostock*, 590 U.S. at —; 140 S Ct at 1741. Again, this is true but irrelevant. If the employer is misanthropic and hates women for being women and men for being men—or perhaps is attracted to both men and women and makes sexual advances to both—then his actions are taken on the basis of prejudices or biases about individuals based on their protected traits (shared by groups).

12 I do not mean to take any position on whether the ELCRA otherwise covers stereotyping claims—my intent is only to show that such claims would not be precluded by my interpretation of "because of."

13 To be sure, questions of motivation and belief are not always easily adjudicated. In cases where there is a dual motive, determining which motive predominated can prove challenging. See *Forbidden Grounds*, pp. 169-170. Cases like the present, by contrast, generally present a clear picture of motive: an individual was discriminated against because of the defendant's prejudice, bias, or animus related to sexual orientation. There is generally no evidence the defendant had any such beliefs regarding either the male or the female sex.

14 He provides a useful example of this uncertainty:

Suppose a defendant culpably destroys a life-preserver on a sea-going tug. When a crewman falls overboard and drowns, was a necessary condition of his death the act of the defendant in destroying the life-preserver? If the life-preserver had been there, would [the life have been saved]?

... [There is] an indeterminacy of meaning in the [but-for] test There is a great vagueness in counterfactual judgments. The vagueness lies in specifying the possible world in which we are to test the counterfactual. When we say "but for the defendant's act of destroying the life-preserver" what world are we imagining? We know we are to eliminate the defendant's act, but what are we to replace it with: a life-preserver that was alternatively destroyed by the heavy seas; a defendant who did not destroy the life-preserver because he had already pushed the victim overboard when no one else was around to throw the life-preserver to the victim; etc, etc? [*Id.* at 84-85.]

15 Justice Alito in *Bostock* criticized the majority on this point, noting that it tried to frame sex as the only distinction between the employees because both employees are "attracted to men." *Bostock*, 590 U.S. at —; 140 S Ct at 1762 (Alito, J., dissenting). Justice Alito noted that the employer himself would say the objection is not to sex but sexual orientation. This might seem like a "battle of labels" (i.e., calling the employee homosexual versus saying he is attracted to men), but Justice Alito says that "[s]omething that is *not* sex discrimination cannot be converted into sex discrimination by slapping on that label." *Id.*

16 The majority contends that the third factor is duplicative of the first two factors, as "sexual orientation in this context is simply a helpful shorthand for the combination of sex and sex preference" The framing matters, however. As discussed, the ELCRA focuses on the defendant's discriminatory intent. From this perspective, *the critical factor* is sexual orientation—which plaintiffs claim motivated their decision in this case. To the extent any factor could drop out as duplicative, it would be the "attracted to men" factor. In that case, the employee would be (a) a man, and (2) homosexual. The comparator would be (a) a woman, and (2) homosexual. Both would be fired and thus the difference in sex would not be a but-

for cause. The majority does not explain why its second factor—attraction to men—should be chosen over the “sexual orientation” factor.

- 17 Strangely, in an opinion that adopts the but-for test as controlling for purposes of the ELCRA, the majority claims that “the issue before this Court also does not encompass what the [Michigan Department of Civil Rights (MDCR)] must prove to demonstrate that discrimination on the basis of a protected characteristic was the cause of a denial of a public accommodation” *Ante* at 7 n 5. Elsewhere in the opinion, however, the majority explains that “the operative phrase ‘because of’ in the ELCRA establishes a but-for causation standard” and that “[a]ccordingly, we must answer here whether complainants who were denied service because of their sexual orientation would not have been so denied but for their sex.” *Ante* at 17. See also *ante* at 18 (“Using this more restrictive definition of the term ‘sex’ and *applying the but-for causation standard to the provision at hand*, we conclude that discrimination on the basis of sexual orientation necessarily involves discrimination because of sex in violation of the ELCRA.”) (emphasis added). No doubt what the majority means to say is that they are not determining whether the particular plaintiff business owners here violated the ELCRA. That may be true, but it is a superficial point based purely on the procedural posture of this case—plaintiffs have brought the action to stop the MDCR’s investigation of alleged violations of the ELCRA. On the substance, the majority has clearly decided that if plaintiffs discriminated because of sexual orientation, then they have discriminated because of sex. If this does not demonstrate what must be proved to sustain a claim under the ELCRA, then I am at a complete loss to understand what the majority opinion is about.

The majority indicates that it is instead focused on the “first step in any discrimination analysis under the ELCRA,” *ante* at 23 n 17, which requires the plaintiff to establish, among other things, “discrimination based on a protected characteristic” that “result[s] in the denial of the full and equal enjoyment of the goods, services, privileges, advantages, or accommodations ... of a place of public accommodation,” *Haynes v Neshewat*, 477 Mich. 29, 35, 729 N.W.2d 488 (2007). It is unclear what the majority means by the “first step” in the analysis. Since the majority has used the but-for causation test to smuggle sexual orientation into the statute, it is hard to understand the point of the majority opinion if it is not to allow discrimination claims to proceed based on this novel theory. But alas, I will accept the majority opinion at its word that it gives no guidance on what must be proved to establish an ELCRA claim.

- 18 Compare MCL 37.2201(a) (“‘Employer’ means a person who has 1 or more employees, and includes an agent of that person.”), with 42 USC 2000e(b) (“The term ‘employer’ means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person”).
- 19 Plaintiffs have raised religious-liberty arguments that are pending in the Court of Claims and will likely be addressed *after* this opinion.

End of Document

© 2023 Thomson Reuters. No claim to original U.S. Government Works.

EXHIBIT

2

2011 WL 1600499

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK
COURT RULES BEFORE CITING.UNPUBLISHED
Court of Appeals of Michigan.

Bradley PRUITT, Plaintiff–Appellant,

v.

MICHIGAN STATE UNIVERSITY, Erica Bracamontes,
Frances Chames, Margaret Thompson, Mary Nettleman
and Marsha Rappley, Defendants–Appellees.

Docket No. 295957.

|

April 28, 2011.

Ingham Circuit Court; LC No. 08–001682–NZ.

Before: [METER](#), P.J., and [SAAD](#) and RONAYNE KRAUSE,
JJ.**Opinion**

PER CURIAM.

***1** Plaintiff appeals a trial court order that granted summary disposition to defendants. For the reasons set forth below, we affirm.

I. FACTS AND PROCEEDINGS

Plaintiff attended Michigan State University's College of Human Medicine. In the fall of 2005, Erica Bracamontes acted as plaintiff's instructor and evaluator during a clerkship rotation. On December 24, 2005, plaintiff received a written evaluation drafted by Bracamontes, in which she stated that plaintiff engaged in inappropriate physical contact with her and that she considered the contact to be disrespectful. Plaintiff complained about the evaluation to clerkship director Dr. Frances Chames, and to assistant dean Dr. Kent Bottles. In January 2006, Dr. Bottles wrote a letter to plaintiff in which he observed that the allegation against plaintiff was very serious and that plaintiff must change his "attitude and behavior." Dr. Bottles warned that if plaintiff engaged in further unprofessional conduct, he would be subject to a formal disciplinary hearing and Dr. Bottles would

include the information in plaintiff's dean's letter, which is a comprehensive performance evaluation submitted to residency programs to which the medical student has applied. Dr. Bottles further stated that "any comments from your clerkship final grade letters, including preceptor evaluations, may be included in your dean's letter."

Dr. Chames included Bracamontes's comments in the final grade memorandum for plaintiff's clerkship. According to plaintiff, he complained to Dr. Chames numerous times about her inclusion of the comments, she agreed to rewrite the letter but, with each rewrite, she included Bracamontes's comments about plaintiff's conduct. Dr. Chames set up a meeting with the clerkship directors so that plaintiff could appeal the inclusion of the comments in his final grade. However, plaintiff maintains that Dr. Chames did not tell him when the meeting would take place, and this resulted in the denial of his appeal.

Because Dr. Bottles left Michigan State in 2006, plaintiff's dean's letter was drafted by Dr. Margaret Thompson, assistant dean of the College of Human Medicine. Dr. Thompson included Bracamontes's comments in the letter. Plaintiff appealed the matter to the chairperson of internal medicine, Mary Nettleman, and she denied the appeal in January 2007. Plaintiff then filed a grievance to the College of Human Medicine Hearing Panel. The panel concluded that plaintiff should have been given feedback right away about his touching of Bracamontes so that he could correct his behavior or otherwise respond to Bracamontes's concerns. The panel also found that Dr. Chames should have notified plaintiff about when the clerkship directors would meet to discuss his initial appeal. The panel passed the matter on to Dean Marsha Rappley, who removed Bracamontes's comments from plaintiff's dean's letter. Plaintiff received a designation of "Very Good" in the dean's letter and the letter contains primarily positive comments about plaintiff's medical school performance. However, plaintiff complains that Dean Rappley should have removed other negative comments about plaintiff and should not have added a remark that "there have been faculty and administrator concerns about communication."

***2** Plaintiff filed his complaint on December 23, 2008, and he amended the complaint twice thereafter. Plaintiff alleged that Michigan State and its employees Bracamontes, Chames, Thompson, Nettleman and Rappley discriminated against him on the basis of his gender, in violation of the Civil Rights Act (CRA), [MCL 37.2101](#), [et seq.](#) He specifically claimed

that, because they are biased against males, defendants acted individually and in concert to violate the rules and procedures of the medical school in evaluating plaintiff and that they did so in order to give plaintiff a negative evaluation. Plaintiff also alleged that defendants treated him differently than similarly situated females and that they retaliated against him for raising allegations of gender bias.

The trial court granted summary disposition to defendants in an opinion and order filed on December 21, 2009. Specifically, the trial court ruled that plaintiff failed to establish a genuine issue of material fact that he was subject to a materially adverse action, that any actions were taken by defendants because plaintiff is male, or that defendants treated similarly situated female students differently.

II. ANALYSIS

A. STANDARD OF REVIEW AND APPLICABLE LAW

The trial court did not specify the subrule on which it relied in granting defendants' motion, but the court's opinion shows that it considered documentary evidence outside of the pleadings. Therefore, we review the decision under MCR 2.116(C)(10). As this Court explained in *Campbell v. Human Services Dep't*, 286 Mich.App. 230, 234–235, 780 N.W.2d 586 (2009):

This Court reviews de novo a trial court's decision regarding a motion for summary disposition. *Kuznar v. Raksha Corp.*, 481 Mich. 169, 175, 750 N.W.2d 121 (2008). Summary disposition of all or part of a claim may be granted under MCR 2.116(C)(10) when, “[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment ... as a matter of law.” “A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint.” *Corley v. Detroit Bd. of Ed.*, 470 Mich. 274, 278, 681 N.W.2d 342 (2004) (citation and quotation marks omitted). The moving party must specifically identify the matters that allegedly have no disputed factual issues, and the nonmoving party must support its position that a disputed factual issue does exist by using affidavits, depositions, admissions, or other documentary evidence. MCR 2.116(G)(4); *Coblentz v. City of Novi*, 475 Mich. 558, 569, 719 N.W.2d 73 (2006).

Plaintiff brought his claim pursuant to MCL 37.2402 of the CRA, which provides, in relevant part:

An educational institution shall not do any of the following:

(a) Discriminate against an individual in the full utilization of or benefit from the institution, or the services, activities, or programs provided by the institution because of religion, race, color, national origin, or sex.

*3 (b) Exclude, expel, limit, or otherwise discriminate against an individual seeking admission as a student or an individual enrolled as a student in the terms, conditions, or privileges of the institution, because of religion, race, color, national origin, or sex.

“The CRA also prohibits employers from retaliating against a person ‘because the person has opposed a violation of this act, or because the person has made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing under this act.’” *Chen v. Wayne State Univ.*, 284 Mich.App. 172, 201, 771 N.W.2d 820 (2009), quoting MCL 37.2701(a).

The education provisions in MCL 37.2402 have rarely been addressed by our courts. As this Court explained in *Fonseca v. Michigan State University*, 214 Mich.App. 28, 30, 542 N.W.2d 273 (1995), “[b]ecause the educational provisions of the act have received little judicial interpretation and because the statutory language employs terms of art used and judicially interpreted extensively in the specialized but extensive field of employment discrimination, we look to these decisions to help us interpret and apply the law to the facts.” Plaintiff does not dispute that he lacks direct evidence of gender bias. Accordingly, he was required to present a prima facie case of discrimination under the burden-shifting approach set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). *Hazle v. Ford Motor Co.*, 464 Mich. 456, 462, 628 N.W.2d 515 (2001). Borrowing from the employment context, this approach required plaintiff to show that he belongs to a protected class, he suffered an adverse action, he was otherwise qualified, and the adverse action occurred under circumstances giving rise to an inference of unlawful discrimination. See *Sniecinski v. Blue Cross and Blue Shield of Mich.*, 469 Mich. 124, 134, 666 N.W.2d 186 (2003).

B. DISCUSSION

Plaintiff complains that defendants failed to adequately support their motion for summary disposition and, therefore, it was error for the trial court grant the motion. [MCR 2.116\(G\)](#) states that, when judgment is sought under [MCR 2.116\(C\)\(10\)](#), the moving party must submit documentary evidence in support. [MCR 2.116\(G\)](#) provides, in relevant part:

(4) A motion under subrule (C)(10) must specifically identify the issues as to which the moving party believes there is no genuine issue as to any material fact. When a motion under subrule (C)(10) is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his or her pleading, but must, by affidavits or as otherwise provided in this rule, set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, judgment, if appropriate, shall be entered against him or her.

Defendants submitted documents to support their motion for summary disposition, including a copy of the student handbook, a copy of medical student rights and responsibilities, the findings of the hearing committee, a letter from Dr. Bottles to plaintiff, an affidavit of Dr. Bottles, an affidavit of Dr. Thompson, and plaintiff's revised dean's letter. Defendants relied on the evidence to support their argument that there is no genuine issue of material fact that plaintiff ever suffered a materially adverse action, that defendants were predisposed to discriminate against males, or that they treated plaintiff differently as a male in this case. We hold that, contrary to plaintiff's assertions, defendants supported their arguments as required by the court rule. In response, plaintiff failed to submit documentary evidence setting forth specific facts to establish that there is a genuine issue for trial. Accordingly, the trial court correctly granted summary disposition to defendants.

*4 We agree with the trial court that plaintiff failed to establish that he suffered an adverse action. To establish this element, plaintiff had to show that he suffered more than a minor inconvenience or change. In the employment context, materially adverse actions would include termination,

demotion, salary cut, change to a lesser job title, or a significant loss of benefits. [Chen v. Wayne State Univ.](#), 284 Mich.App. 172, 202, 771 N.W.2d 820 (2009). Here, plaintiff failed to present any evidence to establish that he suffered a similar action that would qualify as actionable under the CRA. It is undisputed that Bracamontes's comments about plaintiff's improper physical contact were removed from plaintiff's dean's letter. Further, Dean Rappley's comment that "there have been faculty and administrator concerns about communication" does not constitute a materially adverse action against plaintiff. If plaintiff had alleged or shown that, for example, he was dismissed from the medical school or he received a lower graduating designation for reasons related to gender bias, this may have amounted to an adverse action. But plaintiff made no such allegation, he received a "Very Good" designation in the dean's letter, and the letter contains overwhelmingly positive comments about his medical school performance.

If plaintiff had shown that the comments in the dean's letter constituted an adverse action by defendants, he was also required to show that the action was motivated by an intent to discriminate based on gender. "A plaintiff who claims a decision was discriminatorily motivated must produce some facts from which a factfinder could reasonably infer unlawful motivation." [Fonseca](#), 214 Mich.App. at 31, 542 N.W.2d 273. Plaintiff has produced no facts to establish that defendants, individually or in concert, had any unlawful motivation in recording plaintiff's unprofessional conduct. While the hearing panel concluded that Bracamontes should have talked to plaintiff about his unwanted physical contact, no evidence suggests that her failure to do so or any subsequent reporting of the incidents was motivated by plaintiff's gender. Moreover, plaintiff has made no factual showing to refute the accuracy or relevance of any of the comments contained in the dean's letter and he has not presented evidence to support his allegation that defendants intentionally, and with discriminatory motive, engaged in an effort to give him a negative evaluation.

Plaintiff contends that defendants treated Bracamontes more favorably because she is female. Specifically, he asserts that Bracamontes was never disciplined for failing to talk to plaintiff about his unwanted physical contact, but he was punished through the inclusion of this information in his reviews and dean's letter. Again, referring to the employment context, "[t]o avoid summary disposition under the disparate treatment theory, the plaintiff must present sufficient evidence to permit a reasonable juror to find that for the same or similar

conduct the plaintiff was treated differently from a similarly situated male [or female] employee.” *Duranceau v. Alpena Power Co.*, 250 Mich.App. 179, 182, 646 N.W.2d 872 (2002). To establish that another is similarly situated, plaintiff had to show that all relevant aspects of Bracamontes's situation were “nearly identical” to his situation. See *Town v. Michigan Bell Telephone Co.*, 455 Mich. 688, 700, 568 N.W.2d 64 (1997). It is undisputed that Bracamontes was a resident instructor in the clerkship program and that she was charged with instructing plaintiff and evaluating his performance in his student medical rotation. Plaintiff and Bracamontes were not similarly situated. Moreover, unlike plaintiff, there is no allegation that Bracamontes engaged in unwanted physical contact with a student, so plaintiff simply cannot establish that he was treated differently “for the same or similar conduct....” *Duranceau*, 250 Mich.App. at 182, 646 N.W.2d 872.

*5 Plaintiff asserts that defendants retaliated against him because he made allegations of gender bias. Our courts have ruled that, in an employment context, to establish a prima facie case of retaliation under the CRA, a plaintiff must show: “ ‘(1) that he engaged in a protected activity; (2) that this was known by the defendant; (3) that the defendant took an employment action adverse to the plaintiff; and (4) that there was a causal connection between the protected activity and the adverse employment action.’ ” *Garg v. Macomb County Community Mental Health Services*, 472 Mich. 263, 273, 696 N.W.2d 646 (2005), quoting *DeFlaviis v. Lord & Taylor, Inc.*, 223 Mich.App. 432, 436, 566 N.W.2d 661 (1997). Plaintiff claims he raised the issue of sexual bias during the grievance

process and that he was punished when defendants referenced his unprofessional conduct in his dean's letter. However, the reference to Bracamontes's complaint was removed from plaintiff's letter, there is no evidence of an adverse action against plaintiff and, even if a negative comment in the letter could amount to an adverse action, plaintiff has failed to allege or document any facts to establish a causal connection between his allegation of sexual bias and any comments in the letter. Therefore, plaintiff failed to establish a claim for retaliation and the trial court correctly granted summary disposition to defendant.

Plaintiff also complains that discovery was not complete when the trial court granted summary disposition to defendants. The scheduling order in the lower court file shows that the discovery cut-off date was December 31, 2009. The trial court granted summary disposition to defendants on December 21, 2009, after the case was pending for a year. Further, in light of plaintiff's failure to even allege sufficient facts to support his claims, it does not appear that further discovery would uncover factual support to oppose defendants' motion for summary disposition. *State Treasurer v. Sheko*, 218 Mich.App. 185, 190, 553 N.W.2d 654 (1996). Accordingly, plaintiff's claim is without merit.

Affirmed.

All Citations

Not Reported in N.W.2d, 2011 WL 1600499

End of Document

© 2023 Thomson Reuters. No claim to original U.S. Government Works.

EXHIBIT

3

2019 WL 2502733

United States District Court, E.D.
Michigan, Southern Division.

Mark HIGBEE, Plaintiff,

v.

EASTERN MICHIGAN
UNIVERSITY, et al., Defendant.

Case No. 18-13761

I

Signed 06/17/2019

Attorneys and Law Firms[Glen N. Lenhoff](#), Law Office of Glen N. Lenhoff, Grand Blanc, MI, for Plaintiff.[James F. Hermon](#), [Ryan J. VanOver](#), Dykema Gossett, Detroit, MI, [Jill M. Wheaton](#), Dykema Gossett, Ann Arbor, MI, for Defendant.**OPINION AND ORDER GRANTING
INSTITUTIONAL DEFENDANTS'
MOTION TO DISMISS (ECF No. 28)**[Sean F. Cox](#), United States District Judge

*1 In September 2016, racist graffiti appeared on the campus of Eastern Michigan University. Students protested, and the University instituted disciplinary actions against the protestors. Almost a year later, a former student was arrested for the vandalism. In the arrest's aftermath, Plaintiff—a history professor at the University—posted a message in a public Facebook group, criticizing the University's response to the graffiti and referring to African American administrators as “‘HN in C’ functionaries.” The University interpreted this phrase as a racial slur and suspended Plaintiff, without pay, for one semester. Plaintiff filed a grievance through his union, and an arbitrator reversed his suspension.

On December 4, 2018, Plaintiff filed this lawsuit, alleging two sets of claims. First, Plaintiff brings retaliatory discharge claims under Michigan's Elliott-Larsen Civil Rights Act (“ELCRA”) against the University and its Board of Regents (“the Institutional Defendants”). Second, Plaintiff brings First Amendment retaliation claims, under 42 U.S.C. § 1983, against the individual Regents and other administrators

who decided to punish him for the post (“the Individual Defendants”).¹

On February 14, 2019, the Institutional Defendants filed a motion to dismiss the ELCRA claims. (ECF No. 28).² For the reasons below, the Court will grant the Institutional Defendants' motion and dismiss the ELCRA claims.

BACKGROUND

Plaintiff Mark Higbee is a Professor of American History at Eastern Michigan University. Defs. Stat. of Material Facts ¶ 1. (ECF No. 27, PageID 94). Higbee teaches courses on African American History. *Id.* at ¶ 2.

In September 2016, racist messages were spray-painted on a residence hall at the University. *Id.* at ¶ 13; Ex. 3 (ECF No. 27-4). More racist graffiti appeared the next month. *Id.* Students protested the graffiti by organizing a peaceful sit-in at a University building. *Id.* After the protesters refused to leave the building at closing time, the University disciplined them by issuing formal reprimands and deferred suspensions. *Id.* The University later dropped all disciplinary action against the protesters. *Id.* Pl.'s Counter-Stat. Of Material Facts ¶ 15. (ECF No. 35, PageID 584).

More than a year after the first act of vandalism, an African American former student of the University was arraigned on criminal charges for creating the graffiti. Defs. Stat. of Material Facts. ¶ 16. In the aftermath of the arraignment, Higbee wrote the following post in “EMUTalk,” a public Facebook group:

EMU administrators, a small group of well paid white guys in suits (plus one woman and a few lower level “HN in C” functionaries), lacked the insight to imagine that they could ever, possibly, be remotely seen as responsible for institutional racist practices. And so they continued to act as the aggrieved party, needlessly alienating students who objected to racism. Why EMU officials, earning six figures or more, took this stance can only be explained by a combination of 1. ignorance about what racism is, 2. overconfidence that they are the good guys, 3. a lack of knowledge of EMU specifically and of higher education generally.

Compl. ¶ 26.

*2 In their motion to dismiss, the Institutional Defendants argue that “HN in C” is commonly understood to stand for “Head Nigger in Charge.” Institutional Defs.’ Br. 4, n.5 (ECF No. 28, PageID 142) (collecting cases in which a court has noted this meaning). In response, Higbee contends that, among scholars of the African American experience, “HN in C” is commonly understood to mean “Head Negro in Charge.” Higbee Aff. ¶ 5. (ECF No. 34, PageID 524-525).³

On December 13, 2017, the University suspended Higbee, without pay, for one semester and required him to attend and complete a one-on-one training session with a professional consultant. Compl. at ¶ 27. The University also banned Higbee from campus and from using its email system. *Id.*

As a member of the University’s Chapter of the American Association of University Professors, Higbee grieved his suspension and discipline. *Id.* at ¶ 29. On July 23, 2018 arbitrator Barry Goldman reversed the University’s sanctions. *Id.* at ¶ 31.

On December 4, 2018, Higbee filed his seventeen-count complaint in this action. In the first two counts, Higbee alleges state-law claims of retaliatory discharge against the Institutional Defendants.

On February 14, 2019, the Institutional Defendants filed the pending motion to dismiss (ECF No. 28), wherein they argue that Higbee’s Facebook post is not “protected activity” under the ECLRA’s prohibition against retaliation. Higbee filed a response to this motion. (ECF No. 31). The Court heard oral argument on this motion on May 30, 2019.

ANALYSIS

I. Applicable Standard

Federal Rule of Civil Procedure 12(b)(6) provides for the dismissal of a case where the complaint fails to state a claim upon which relief can be granted. The Court must construe the complaint in the light most favorable to the plaintiff and accept its allegations as true. *DirectTV, Inc. v. Treesh*, 487 F.3d 471, 476 (6th Cir. 2007). To survive a motion to dismiss, the complaint must offer sufficient factual allegations that make the asserted claims plausible on their face. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Legal conclusions couched as factual allegations will not suffice. *Rondigo, LLC v. Township of Richmond*, 641 F.3d 673, 670 (6th Cir. 2011). Rather, “[a] claim has facial plausibility when

the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

In addition to the allegations in the complaint, the Court may also consider “other materials that are integral to the complaint, are public records, or are otherwise appropriate for the taking of judicial notice.” *Ashland, Inc. v. Oppenheimer & Co., Inc.*, 648 F.3d 461, 467 (6th Cir. 2011).⁴

II. The Institutional Defendants’ Motion

*3 In Counts I and II, Higbee alleges claims under the ELCRA against the Institutional Defendants. In these counts, Higbee contends that his Facebook post was activity protected under the ELCRA. *See M.C.L.A. § 37.2701*. In the Institutional Defendants’ motion, they argue that Higbee’s post was too vague to constitute protected conduct.

The ELCRA provides that “a person shall not ... [r]etaliat[e] or discriminate against a person because the person has opposed a violation of this act, or because the person has made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceedings, or hearing under this act.” *MacDonald v. United Parcel Svs.*, 430 F. App’x. 453, 464 (6th Cir. 2011) (quoting *M.C.L.A. § 37.2701(a)*). The statute is commonly understood as having two clauses: the “opposition clause” and the “participation clause.” *See e.g. Seals v. Bridgeport Spaulding School District*, 2018 WL 4829475 at *6 (E.D. Mich. 2018). At oral argument, Higbee asserted that he is bringing his ELCRA claims under both the opposition and participation clause.

A. Opposition

Higbee argues that his statement “oppose[d] two sections of the ELCRA: *MCLA § 37.2402* and *MCLA § 37.2701* itself.” Pl.’s Res. 12-13. (ECF No. 32, PageID 377-378).

M.C.L.A. 37.2402(a) provides “an educational institution shall not ... discriminate against an individual in the full utilization of or benefit from the institution, or the services, activities, or programs provided by the institution because of religion, race, color, national origin, or sex.” Higbee argues that his post specifically complains that the University “failed to give students the full utilization or benefit of the institution by failing to recognize that black [] students were the subject of a racist attack and threat.” Pl.’s Resp 16. But the text of the post does not support this argument. Construing the post

—as quoted in the Complaint—in Higbee's favor, the only arguably discriminatory act that the University was alleged to have performed was “needlessly alienating students who objected to racism.” Compl. ¶ 26. Even if this act could be fairly described as denying the full utilization or benefit of the university, people who objected to racism are not a class protected by M.C.L.A. 37.2402(a). Thus, the Complaint does not contain sufficient factual allegations to state a plausible claim that Higbee was opposing M.C.L.A. § 37.2402(a). See *Booker v. Brown & Williamson Tobacco Co.*, 879 F.2d 1304, 1312-1313 (6th Cir. 1989) (an employee opposing a discriminatory practice must have a “good faith belief that the practice is unlawful.”).

To the extent Higbee's post could be understood as opposing “institutional racist practices” as a violation of M.C.L.A. § 37.2402(a), this argument also fails because there is no indication that these alleged practices deny individuals the full utilization of or benefit from the institution.

Next, Higbee advances an “opposition to retaliation for opposition” argument; he argues that his post was opposition to the University retaliating against the protesters for opposing the racist graffiti. But, to accept this argument, the Complaint would need to contain factual allegations to support the conclusion that the graffiti, itself, could be fairly understood to be a violation of the ELCRA. *Id.*

Thus, the Court concludes that Higbee's complaint does not contain factual allegations sufficient to conclude that Higbee's post was protected opposition activity.

B. Participation

*4 At the outset, the parties disagree about what standard should control the Court's analysis under the participation clause. Defendants argue that the Sixth Circuit's decision in *Booker*, 879 F.2d at 1313, which requires “the instigation of proceedings leading to the filing of a complaint or a charge,” should control. On the other hand, Higbee argues that the Michigan Court of Appeals' decision in *McElmore v. Detroit Receiving Hosp. and U. Med. Ctr.*, 196 Mich.App. 391 (1993) should control.

At least one other court in this district has confronted this precise issue. In *Gjokaj v. Crossmark, Inc.*, 2008 WL 1701532 (E.D. Mich. 2008), *aff'd* 362 Fed.App'x 450 (6th Cir. 2010), the Hon. Nancy Edmunds concluded that *McElmore* had “expressly rejected” the high standard announced in *Booker*, and that *McElmore* was applicable:

Defendant cites *Booker* for the proposition that “the instigation of proceedings leading to the filing of a complaint or charge ... is a prerequisite to protection under the participation clause.” *Booker*, 879 F.2d at 1313. This approach was expressly rejected by the Michigan Court of Appeals in *McLemore v. Detroit Receiving Hospital & University Medical Center*, 196 Mich.App. 391, 493 N.W.2d 441, 443 (Mich. Ct. App. 1993). The *McLemore* court held that, “[r]egardless of the vagueness of the charge or the lack of formal invocation of the protection of the act, if an employer's decision to terminate or otherwise adversely effect [sic] an employee is a result of that employee raising the specter of a discrimination complaint, retaliation prohibited by the act occurs.” *Id.* Defendant suggests that the Court should ignore *McLemore* because it expressly rejects *Booker*. (Def.'s Reply at 3 n. 1.) Defendant's suggestion is contrary to Sixth Circuit precedent, which holds that “this court is bound by decisions of the state's intermediate appellate courts unless convinced that the Michigan Supreme Court would decide the question differently.” *United of Omaha Life Ins. Co. v. Rex Roto Corp.*, 126 F.3d 785, 789 (6th Cir. 1997). Given that *McLemore* expressly rejected the Sixth Circuit's interpretation of Michigan law, and given that the Michigan Supreme Court declined to hear an appeal in the case, 506 N.W.2d 877 (1993), this Court is not convinced that the Michigan Supreme Court would decide the question differently than did the *McLemore* court. Accordingly, the Court will use the *McLemore* standard to assess Plaintiff's claim under the “participation clause.”

Gjokaj, 2008 WL 1701532 at *6.

The Court agrees with Judge Edmunds's analysis in *Gjokaj*, and will examine Higbee's participation clause claim under the *McLemore* standard.

Under *McLemore*, participation activity is protected if it “rais[es] the spectre of a discrimination complaint.” 196 Mich.App. at 396. However, “an employee must do more than generally assert unfair treatment.” *Barrett v. Kirtland Community College*, 628 N.W.2d 63, 72 (Mich. Ct. App. 2001). Instead, the “charge must clearly convey to an objective employer that the employee is raising the specter of a claim of unlawful discrimination pursuant to [ELCRA].” *Id.*

Higbee's post does not raise the specter of a claim of unlawful racial discrimination because his vague reference to “institutional racist practices” does not clearly convey

the possibility that he would, or even could, assert a claim under the ELCRA. The University could not possibly have discerned which “institutional racist practices” Higbee was referring to in his post and, although an employee need not specifically invoke the ELCRA, Higbee's post did not even imply that the alleged practices could be fairly understood as violations of the ELCRA. *See Stevens v. Estes Exp. Lines*, 833 F.Supp.2d 729, 736 (E.D. Mich. 2011) (applying Michigan law and concluding that disclosure of a suggestive note to an employer was not participation activity when it did “not demonstrate actionable sexual harassment”). At most, the post generally alleged unfair treatment to third parties. Thus, it is not protected activity under the participation clause.

CONCLUSION

*5 For the reasons above, the Court **GRANTS** the Institutional Defendants' Motion to Dismiss Count I and Count II (ECF No. 28). Accordingly, the Court **DISMISSES** Eastern Michigan University and its Board of Regents from this action.

IT IS SO ORDERED.

All Citations

Not Reported in Fed. Supp., 2019 WL 2502733, 2019 Fair Empl.Prac.Cas. (BNA) 222,320

Footnotes

- 1 The Court has supplemental jurisdiction over Higbee's ELCRA claims because they are so related to Higbee's jurisdiction-invoking § 1983 claims that they form part of the same case or controversy. 28 U.S.C. § 1367(a).
- 2 The Individual Defendants also filed a motion to dismiss the First Amendment retaliation claims, asserting qualified immunity. The Court will issue a separate Opinion and Order on the Individual Defendants' motion.
- 3 At the motion-to-dismiss stage, the Court's analysis is limited to the facts outlined in the complaint. However, the Court includes the parties' positions regarding the meaning of “HN in C” to provide context, and to fully summarize the arguments raised in the parties' briefing.
- 4 Higbee asks the Court to consider his affidavit and the arbitrator's opinion in making its analysis. Because this is a motion to dismiss, considering these materials—which are not incorporated into the complaint—would be inappropriate. The Court will confine its analysis to the factual allegations in the complaint and the facts that the parties have agreed the Court can consider.

EXHIBIT

4



KeyCite Yellow Flag - Negative Treatment

Distinguished by *DeWeese-Boyd v. Gordon College*, Mass., March 5, 2021

KeyCite Overruling Risk - Negative Treatment

Overruling Risk *Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.*, U.S., January 11, 2012

2010 WL 2803077

Only the Westlaw citation is currently available.

United States District Court,
N.D. Indiana,
South Bend Division.

Janice B. ADAMS, Plaintiff,

v.

INDIANA WESLEYAN UNIVERSITY, Defendant.

Cause No. 3:09-CV-468.

|

July 15, 2010.

Attorneys and Law Firms

Adam Lenkowsky, Kenneth T. Roberts, Roberts and Bishop,
Indianapolis, IN, for Plaintiff.

Andrew B. Murphy, Edward E. Hollis, Baker & Daniels,
South Bend, IN, for Defendant.

OPINION AND ORDER

WILLIAM C. LEE, District Judge.

*1 This matter is before the court on the motion to dismiss filed by the defendant, Indiana Wesleyan University ("the University") on February 18, 2010 (docket at 18). On that same date, the University filed a Brief in Support of its Motion to Dismiss (docket at 19) as well as an Index of Exhibits (docket at 20). After moving for and receiving an extension of time in which to do so, plaintiff Janice B. Adams ("Adams") filed a Response in Opposition to Defendant's Motion to Dismiss on April 5, 2010 (docket at 23) and the University filed a reply brief on May 4, 2010 (docket at 24). For the reasons discussed herein, the motion to dismiss is GRANTED.

STANDARD OF REVIEW

Federal Rule of Civil Procedure 12(b)(1) "requires a court to dismiss an action when it lacks subject matter jurisdiction." *Durst v. Ill. Farmers Ins. Co.*, 2005 WL 2007221, at *1 (N.D.Ill. Aug.16, 2005) (citing *United Phosphorus, Ltd. v. Angus Chem. Co.*, 322 F.3d 942, 945 (7th Cir.2003)). "Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." *United States v. Tittjung*, 235 F.3d 330, 339 (7th Cir.2000). If there is no statutory basis for its subject matter jurisdiction, "a district court, which is a court of limited jurisdiction, should proceed no further than determining whether to dismiss or transfer the case." *Baker v. Kingsley*, 387 F.3d 649, 656 (7th Cir.2004). In considering a motion to dismiss for lack of subject matter jurisdiction, a court "must accept the complaint's well-pleaded factual allegations as true and draw reasonable inferences from those allegations in the plaintiff's favor." *United Transportation Union v. Gateway Western Railway Co.*, 78 F.3d 1208, 1210 (7th Cir.1996). See also, *Indiana ex rel. Naylor v. Indiana State Teachers Ass'n*, 2010 WL 1737914 (S.D.Ind. April 28, 2010).

DISCUSSION

Adams filed this lawsuit on October 5, 2009, alleging that the University, her former employer, discriminated against her in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* and 42 U.S.C. § 1981. Complaint, docket at 1. After obtaining leave of court to do so, Adams filed an Amended Complaint on February 10, 2010 (docket at 16) and it is this Amended Complaint that now controls this case. Adams, who worked for the University from 1992 until 2009 as a professor and Chair of the Social Work Department, claims that she "was repeatedly exposed to discriminatory acts and harassed on account of her race by the defendant." Amended Complaint, p. 2. Adams claims that the discrimination she was subjected to was "severe and pervasive" and that as a result she "resigned on June 20, 2009." *Id.* By way of her lawsuit, Adams seeks declaratory and injunctive relief, damages, and attorneys' fees from the University.

*2 In its motion to dismiss, the University contends that this court lacks subject matter jurisdiction over this case and

that it should be dismissed pursuant to Fed.R.Civ.P. 12(b)(1). Motion to Dismiss, p. 1. Alternatively, the University seeks dismissal pursuant to Fed.R.Civ.P. 12(c) based on “the ministerial exception and, with respect to several of Adams’ Title VII claims, because Adams failed to properly exhaust her administrative remedies.” *Id.*¹

The ministerial exception is an important but very narrow doctrine, and turns on the specific facts of a case. More specifically, its application is dependent on the duties of the employee or former employee who is bringing a lawsuit against a church or other ecclesiastical body. In this case, the University contends that Adams was much more than a teacher and that “the spiritual significance of Adams’ position divests this Court of subject matter jurisdiction over her claims under the ‘ministerial exception’ to federal employment laws.” Defendant’s Memorandum, p. 1. The University explains that it “is one of the largest evangelical Christian universities in the United States[.]”; that it “operate[s] under the auspices of the Wesleyan Church’s governing body, the General Conference[.]”; that “its Board of Trustees ... is charged with operating the University in accordance with the Church’s policies and educational mission[.]”; and that the University is “an ‘arm’ of the Church’s ministry to Christ.” *Id.*, p. 2. Adams does not dispute that Indiana Wesleyan is an institution of higher learning operated by the Wesleyan Church.

The University argues that Adams’ duties as a professor were much different than those of a professor at a secular institution. The University claims that “[t]he central mission of the Church’s educational ministry is to redeem all persons by revealing God as ‘the source and center of all truth[.]’ ”; that “[t]he Church’s educational institutions use the Bible to ‘relate learning to God and His plan for the universe.’ ” *Id.* (quoting Defendant’s Exhibit B, docket at 20–1, Standards of the Wesleyan Church for Educational Institutions, § GB–1112). In keeping with that mission, the University states, its “faculty members are, as a matter of necessity and belief, stewards of the Wesleyan faith ...” and they are required to “ ‘affirm their adherence to the doctrine of the entire sanctification and other doctrines of The Wesleyan Church .’ ” *Id.*, p. 3 (*Id.* at GB–1342). Applying this doctrine directly to Adams, the University contends that “Adams’ principal responsibility was to apply Wesleyan doctrine and integrate the truths of the Bible with the Social Work curriculum.” *Id.*, p. 5. The University dedicates many pages of its memorandum in support of its motion to dismiss discussing the details of Adams’ employment history in an attempt to

demonstrate that her job duties were rooted firmly in Church doctrine, meaning in turn that her claims fall within the parameters of the ministerial exception to this court’s subject matter jurisdiction. *Id.*, generally. For example, the University claims that at times during the 1990s, Dr. Glenn Martin, “who was Chair of the University’s Division of Social sciences and Adams’ supervisor ...” counseled her on ways she could incorporate Church doctrine into her classroom activities and, at that time, praised her efforts to do just that. *Id.*, pp. 6–7. This involved Adams “ ‘frequently us[ing] scriptural principles to reinforce or to illustrate an idea.’ ” *Id.*, p. 7 (quoting Defendant’s Exhibit G).

*3 In 2001, Adams was promoted from Assistant to Associate professor (effective at the beginning of the 2002–2003 academic year). *Id.*, p. 8. Prior to that, in a 1999 employment evaluation, Dr. Martin noted that Adams was “ ‘a spiritual leader in the classroom and in the local community and is very active in the church.’ ” *Id.* (quoting Defendant’s Exhibit J, Faculty Evaluation). The University also points out that many of Adams’ student, in evaluations they filled out concerning their classroom experiences with Adams, stated that she had “amazing passion for the topics discussed and also for Christ ...”; that Adams’ in-class “devotions were uplifting ...”; and that Adams was “very influential in my spiritual life.” *Id.*, pp. 8–9 (citations to record omitted). The University claims that “[t]he Social Work Program that Adams directed has only two stated goals. The first is to prepare students to complete entry-level social work.... The second is to “ ‘provide opportunities for the integration of Christian principles within the context of professional social work and ethics.’ ” *Id.*, p. 9 (citations to record omitted). All of this factual presentation and argument is the University’s attempt to demonstrate that Adams’ employment was ministerial in nature to such an extent that the ministerial exception precludes her from pursuing this employment discrimination case in federal court.

The University contends that shortly after her promotion to Associate Professor, “Adams began to clash with Dr. Betty Fratzke, who remained Adams’ supervisor, and other members of the Social Work Department ... over a variety of issues related to the Department’s management.” *Id.*, p. 10. These alleged issues included, according to the University, Adams’ insistence on asking prospective students during admissions interviews “whether they had ever been involved in a romantic relationship with an African–American.” *Id.* (Adams is African–American.) The University contends that “questions of such an intimate nature were contrary

to the University's Christian mission.” *Id.* Another issue arose regarding a Department secretary named Michelle Gerig. According to the University, “Adams shared Gerig as a secretary with several other faculty members.” The University states as follows:

Throughout the first half of 2009, Adams complained to Dr. Fratzke that, among other things, Gerig was not completing the work Adams assigned to her in a timely manner, was following other Department members' instructions, but not Adams' instructions, and was not effectively managing her time. The situation between Adams and Gerig became so intense that in spring 2009 Adams told Dr. Fratzke that she was going to resign if Gerig was not removed as her secretary.

Id., p. 11. The University states that Dr. Fratzke arranged a meeting with Adams and “several other Department members to resolve the situation.... Dr. Fratzke arranged for this meeting specifically to fulfill the directive of Matthew 18:15, upon which the University's conflict resolution practices are based, to reconcile conflict by meeting with the disputing parties.” *Id.* The University states that “Dr. Fratzke explicitly stated that she was directing Adams and the others to engage in this [reconciliation] conduct based on Christian principles.” *Id.* Several days after the meeting, according to the University, Adams challenged Dr. Fratzke by writing a responsive e-mail “in which she rejected Dr. Fratzke's assertion that her recommended course of action was justified by the scriptures” and taking “aim at Dr. Fratzke's interpretation of the Book of Matthew ...” *Id.*, p. 12. Then, “[o]n June 24, 2009, just over a week after sending this email, Adams resigned her position as Director of the Social Work Program, citing a ‘lack of Administrative and staff support.’ ... Six days later, on June 30, 2009, she resigned her position as Associate Professor and ended her employment with the University.” *Id.* (citations to the record omitted).

*4 Because of all this, the University contends that “Adams' Amended Complaint should be dismissed because the Court does not have subject matter jurisdiction over her claims.... Adams worked for the University in a ministerial capacity,

and the ministerial exception to federal employment claims created by the First Amendment operates as a jurisdictional bar to this action.” *Id.*, pp. 13–14. The University summarizes its argument as follows:

Courts derived the “ministerial exception,” which bars ministerial employees from asserting claims against religious institutions under federal employment discrimination laws” from [the establishment clause and the free-exercise clause of the First Amendment]. *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036, 1039–40 (7th Cir.2006) ... The ministerial exception is “founded upon the principle that ‘perpetuation of a church's existence may depend upon those whom it selects to preach its values, teach its message, and interpret its doctrines both to its own membership and to the world at large.’” *Alicea-Hernandez v. Catholic Bishop of Chicago*, 320 F.3d 698, 704 (7th Cir.2003) (quoting *Rayburn v. Gen. 'I Conf. of Seventh-Day Adventists*, 772 F.2d 1164, 1168 (4th Cir.1985)).... Because court review of a religious institution's employment decisions respecting its ministers is an “inherently coercive” intrusion into a matter of religious governance, the ministerial exception operates as a complete bar to employment claims based on federal law. *Tomic*, 442 F.3d at 1039.

Id., pp. 14–15.

The University's statement of the law concerning the ministerial exception is correct. The issue in this case is whether Adams, in her capacity as a department head and professor, fits into that exception. Obviously, the University argues that she does. Adams, however, disagrees.² In her response brief, Adams states that “the designated material shows that Adams' position was not functionally equivalent to a minister and adjudicating her claims would not require the court to engage in an analysis of church doctrine, as prohibited by the ‘Ministerial Exception’ to anti-discrimination laws. Moreover, Adams' Amended Complaint cites [42 U.S.C.] Section 1981 as a basis for jurisdiction. This allows her to allege claims outside of the EEOC Charge of Discrimination.” Plaintiff's Response, p. 1. While Adams does not contest the fact that Indiana Wesleyan is an arm of the Church and is governed according to Church doctrine, she argues that the “social work program is designed to integrate students' pre-existing faiths into ‘one's ability to be of service to fellow human beings.’” *Id.*, p. 2 (citing Defendant's Exhibit O, Indiana Wesleyan Social Work Student Handbook, p. 3). She also points out that the program “is not designed to ‘spread the faith’ but has eight identified secular purposes:

a. Applying knowledge and skills of *generalist* social work practice;

*5 b. Evaluating the practice of social work as it exists;

c. Professional development and growth;

d. Applying critical thinking skills within a *diverse* population;

e. Understanding the past and present of social work;

f. Understanding the conditions and strategies to advance socio-economic justice; [and]

g. Understanding how certain variables effect interpretation among individuals and social systems.” *Id.*, p. 2 (quoting Defendant's Exhibit O).³ Adams argues that the University is attempting to mischaracterize her employment position as ministerial in nature, thereby fitting it into the ministerial exception. *Id.*, generally. In response, she argues that “the University has many distinct disciplines, most of which are not directly related to religion. Adams' position as a professor of social work did not require her to ‘spread the faith.’ Instead, she was simply integrating faith into a curriculum containing students who already believed the faith. The program had stated secular purposes. Moreover, [Adams] was allowed to discuss competing truths as well as whether church doctrine was correct.” *Id.*, pp. 3–4. Finally, Adams contends that the cases cited by the University in support of its argument that the ministerial exception bars her lawsuit are not on point. *Id.*, p. 4. For these reasons, Adams argues that her suit should not be dismissed.⁴

The Seventh Circuit Court of Appeals provided a thorough discussion of the ministerial exception in the *Tomic* case, cited by both parties in this case. In *Tomic*, the court of appeals explained as follows:

A suit to remove a priest on the ground that he is a heretic, or to reinstate a parishioner who has been excommunicated, thus has never been justiciable in the federal courts. E.g., *Serbian Eastern Orthodox Diocese v. Milivojevich*, *supra*, 426 U.S. at 698, 96 S.Ct. 2372, 49 L.Ed.2d 151; *Bouldin v. Alexander*, 82 U.S. (15 Wall.) 131, 139–40, 21 L.Ed. 69 (1872); cf. *Montano v. Hedgepeth*, 120 F.3d 844, 850–51 (8th Cir.1997). Even if the suit does not involve an issue of religious doctrine, but concerns merely the governance structure of the church, the courts will not assume jurisdiction if doing so would interfere with the

church's management. *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 116, 73 S.Ct. 143, 97 L.Ed. 120 (1952); *Young v. Northern Illinois Conference of United Methodist Church*, 21 F.3d 184, 187 (7th Cir.1994); *Combs v. Central Texas Annual Conference of United Methodist Church*, 173 F.3d 343, 350 (5th Cir.1999); *EEOC v. Catholic University of America*, 83 F.3d 455, 462–63 (D.C.Cir.1996). These cases “affirm the fundamental right of churches to ‘decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine’.” *Id.* at 462, citing *Kedroff*; see also *Gellington v. Christian Methodist Episcopal Church, Inc.*, 203 F.3d 1299, 1304 (11th Cir.2000). Also pertinent is *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 99 S.Ct. 1313, 59 L.Ed.2d 533 (1979). The issue in that case was whether the National Labor Relations Act applied to lay teachers in Catholic schools. The Court held not, because “the resolution of [unfair labor] charges by the [National Labor Relations Board], in many instances, will necessarily involve inquiry into the good faith of the position asserted by the clergy-administrators and its relationship to the school's religious mission. It is not only the conclusions that may be reached by the Board which may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions.” *Id.* at 502, 440 U.S. 490, 99 S.Ct. 1313, 59 L.Ed.2d 533.

*6 Thus “the First Amendment concerns [with assuming jurisdiction in ecclesiastical cases] are two-fold. The first concern is that secular authorities would be involved in evaluating or interpreting religious doctrine. The second quite independent concern is that in investigating employment discrimination claims by ministers against their church, secular authorities would necessarily intrude into church governance in a manner that would be inherently coercive, even if the alleged discrimination were purely nondoctrinal.” *Combs v. Central Texas Annual Conference of United Methodist Church*, *supra*, 173 F.3d at 350 (citations omitted). This second aspect of the internal-affairs doctrine is called the “ministerial exception” to the exercise of federal jurisdiction. E.g., *Alicea-Hernandez v. Catholic Bishop of Chicago*, 320 F.3d 698, 702–03 (7th Cir.2003).

Both aspects govern decision even when-in fact most commonly when-the complaint is not based on and does not refer to religious doctrine or church management (as in most Title VII and other employment-discrimination suits) but it is apparent that a controversy over either may erupt in the course of adjudication. E.g., *id.*; *EEOC v.*

Roman Catholic Diocese of Raleigh, 213 F.3d 795, 801 (4th Cir.2000).

Tomic v. Catholic Diocese of Peoria, 442 F.3d at 1038–1039. In light of this discussion, the issues in the present case are whether Adams' job as a Department head and professor truly was ministerial in nature and whether the exercise of jurisdiction over her claims by this court would “intrude into church governance.” The University contends that the nature of Adams' teaching duties, and the very fact of her employment in a church operated school, bring her claims within the parameters of the ministerial exception to this court's subject-matter jurisdiction, while she contends that the University is simply “spinning” the facts for the purpose of pigeonholing her into the exception. This court must also be mindful of the fact that this matter is before it on a motion to dismiss. As stated above, when ruling on a motion to dismiss for lack of subject matter jurisdiction, the court “must accept the complaint's well-pleaded factual allegations as true and draw reasonable inferences from those allegations in the plaintiff's favor.” *United Transportation Union v. Gateway Western Railway Co.*, 78 F.3d 1208, 1210 (7th Cir.1996). In this case, Adams has asserted claims against the University pursuant to Title VII and § 1981. Docket at 16. Her Amended Complaint reveals that her allegations of discriminatory treatment are not rooted in the doctrine of the Wesleyan Church. Instead, she has set forth claims of discriminatory treatment on the basis of her race, notwithstanding any church doctrine, philosophy or system of governance. *Id.* But this does not save her case. The applicable case law discussing and analyzing the ministerial exception to federal court jurisdiction makes this clear.

*7 In *Alicea–Hernandez*, the plaintiff brought a Title VII action against her employer, the Catholic Bishop of Chicago. Plaintiff was a press secretary whose duties included dissemination of the Church's message. The Seventh Circuit held that the ministerial exception applied to bar plaintiff's claims. The court wrote that “the rationale for the ministerial exception is founded upon the principle that ‘perpetuation of a church's existence may depend upon whom it selects to preach its values, *teach its message*, and interpret its doctrines *both to its own membership and to the world at large.*’” *Alicea–Hernandez*, 320 F.3d at 704 (italics added). In that case, plaintiff argued that her claims of gender and national origin discrimination were wholly unrelated to church doctrine or to her job duties and, therefore, the exception should not apply. The court rejected this argument, found that the ministerial exception applied, and offered the following detailed analysis of the exception:

We turn next to the argument that Alicea–Hernandez's particular position bars the federal courts from deciding her Title VII claims. Here the Church has the stronger argument. As the Fifth Circuit first articulated in *McClure v. The Salvation Army*, 460 F.2d 553, 560 (5th Cir.1972), “application of the provisions of Title VII to the employment relationship existing between ... a church and its minister would result in an encroachment by the state into an area of religious freedom which it is forbidden to enter by the principles of the free exercise clause of the First Amendment.” This rule, often referred to as “the ministerial exception,” was further developed by the Fourth Circuit in *Rayburn v. General Conference of Seventh–Day Adventists*, 772 F.2d 1164 (4th Cir.1985), and adopted by this circuit in *Young v. The Northern Illinois Conference of United Methodist Church*, 21 F.3d 184 (7th Cir.1994). The court in *Rayburn*, recognizing tensions between freedom of religion on the one hand and the attempt to eradicate discrimination on the other, concluded that in the context of Title VII claims brought against a church by its ministers the “balance weighs in favor of free exercise of religion.” 772 F.2d at 1168. The court explained that the “right to choose ministers without government restriction underlies the well-being of religious community.” *Id.* at 1167. While this ruling may seem in tension with Title VII, we concur with the Fourth Circuit when it stated: “While an unfettered church choice may create minimal infidelity to the objectives of Title VII, it provides maximum protection of the First Amendment right to free exercise of religious beliefs.” *Id.* at 1169.

In determining whether an employee is considered a minister for the purposes of applying this exception, we do not look to ordination but instead to the function of the position. *Young*, 21 F.3d at 186; see also *EEOC v. Roman Catholic Diocese*, 213 F.3d 795, 801 (4th Cir.2000) (“Our inquiry thus focuses on ‘the function of the position’ at issue and not on categorical notions of who is or is not a ‘minister.’”). The question for us to answer therefore is whether AliceaHernandez's position as Hispanic Communications Manager can functionally be classified as ministerial. Alicea–Hernandez suggests that we also need to look to the nature of her claims and whether the discrimination in question was exclusively secular. Here she is mistaken. The “ministerial exception” applies without regard to the type of claims being brought. This was explained by the Fourth Circuit in *EEOC v. Roman Catholic Diocese*:

*8 [T]he ministerial exception to [Title VII](#) is robust where it applies.... The exception precludes any inquiry whatsoever into the reasons behind a church's ministerial employment decision. The church need not, for example, proffer any religious justification for its decision, for the Free Exercise Clause “protects the act of a decision rather than a motivation behind it.”

[213 F.3d at 802](#) (quoting [Rayburn](#), [772 F.2d at 1169](#)). To rule otherwise would enmesh the court in endless inquiries as to whether each discriminatory act was based in Church doctrine or simply secular animus. The Fifth Circuit has provided the following rationale for this rule:

[A]n investigation and review of such matters of church administration and government as a minister's salary, his place of assignment and his duty, which involve a person at the heart of any religious organization, could only produce by its coercive effect the very opposite of that separation of church and State contemplated by the First Amendment.

[McClure](#), [460 F.2d at 560](#).

It is therefore not our role to determine whether the Church had a secular or religious reason for the alleged mistreatment of Alicea–Hernandez. The only question is that of the appropriate characterization of her position.

Id. at 702–703. The court determined that Alicea–Hernandez's duties “included composing media releases and correspondence as well as developing a working relationship with various constituencies of the Hispanic community and composing articles to be published in the Church media.... The role of the press secretary is critical in message dissemination, a church's message, of course, is of singular importance.” *Id.* at 703–704. Based on these facts, the court held that the ministerial exception applied.

In the present case, Adams argues that as a professor she was not charged with the responsibility of disseminating the message or doctrine of the Wesleyan Church. Instead, she claims that her “job responsibilities were closer to those of a lay employee.... Adams took her students as she found them. She worked [their] beliefs into her curriculum, yet she did not teach the faith, nor was she prevented from discussing the nature and correctness of certain truths.” Plaintiff's Memorandum, p. 5. Adams also argues that “adjudicating Adams' claims does not risk excessive entanglement. This case involves Adams' allegation that she was forced to resign

as a result of racial harassment.” *Id.* In short, Adams contends that she was not responsible for “spreading the word” of the Wesleyan Church and that her claims are secular and in no way related to any principles or doctrine of the Wesleyan Church.

Adams' argument ignores the fact that the ministerial exception is “robust where it applies” and “precludes any inquiry whatsoever into the reasons behind a church's ministerial employment decision.” [Alicea–Hernandez](#), [320 F.3d at 703](#). It is not the court's duty “to determine whether the Church had a secular or religious reason for the alleged mistreatment of [the plaintiff]. The only question is that of the appropriate characterization of her position.” *Id.* In the present case, while Adams may very well have been free to present and discuss secular topics and issues in her classroom, it is also true that she was charged with incorporating the doctrine of the Wesleyan Church into her curriculum. Eventually, Adams clashed with certain members of the University administration. Meetings were held to address the issues between the parties and resolve them. In the end, Adams concluded that she could no longer bear to work at the University and resigned her position. The fact that she claims she was forced to resign as a result of pervasive racial harassment as opposed to any sort of doctrinal or theological dispute does not take this case outside the parameters of the ministerial exception.

*9 The ministerial exception to federal court jurisdiction is a crucially important legal doctrine, designed to prevent the federal courts from becoming entangled in the internal affairs of a church. The ministerial exception serves a vitally important purpose by protecting a church's ability to establish its own doctrinal foundation, to communicate its theology to its members and the public at large, and to manage its internal affairs, all free from any intervention from the federal courts. Furthermore, case law makes it clear that the ministerial exception can, and often does, apply to teachers who instruct students in church-run and operated schools. As the University points out, “courts in both the Seventh Circuit and elsewhere have found that the ministerial exception applies where teachers, like Adams, are required to integrate church doctrine into their teaching.” Defendant's Reply, p. 7 (citing [Stately v. Indian Cmty. Sch. of Milwaukee, Inc.](#), [351 F.Supp.2d 858, 870 \(E.D.Wisc.2004\)](#)) (applying ministerial exception where school required teachers to incorporate religion into classes). *See also*, [Clapper v. Chesapeake Conference of Seventh–Day Adventists](#), [1998 WL 904528 \(4th Cir. Dec.29, 1998\)](#) (applying ministerial exception to bar former church

elementary teacher from bringing claims of discrimination against church where his duties included incorporating church doctrine into his classroom activities and acting as a spiritual mentor to students).⁵ This court concludes that the nature and character of Adams' duties as a department head and professor at Indiana Wesleyan University were ministerial in nature so as to invoke the ministerial exception to this court's subject matter jurisdiction.

CONCLUSION

For the reasons discussed above, the motion to dismiss filed by defendant, Indiana Wesleyan University is GRANTED.

All Citations

Not Reported in F.Supp.2d, 2010 WL 2803077, 109 Fair Empl.Prac.Cas. (BNA) 1559

Footnotes

- 1 Because the court finds that this case must be dismissed for lack of subject matter jurisdiction, and because the ministerial exception applies with equal force to all of Adams' claims-whether they are brought under [Title VII](#) or [§ 1981](#)—the University's alternate theory that some of Adams' claims are barred due to her failure to exhaust administrative remedies need not be addressed in this Opinion and Order.
- 2 The fact that Adams was a professor, as opposed to an ordained minister, is not dispositive. As the University points out, “[b]ecause the analysis focuses on the duties performed, the ministerial exception applies even if the employee is not ordained or otherwise labeled a ‘minister.’ ” *Id.*, p. 15 (citing [Alicia-Hernandez](#), 320 F.3d at 704, n. 4).
- 3 It is true that the Indiana Wesleyan Social Work Student Handbook contains this listing. However, Adams neglects to point out that the Handbook also clearly states that one of the objectives of the University's Social Work Program is “[t]o provide opportunities for the integration of Christian principles within the context of professional social work values and ethics.” This is significant, as will become clearer later in this Opinion.
- 4 In its reply brief, the University essentially restates the arguments presented in its supporting memorandum. Defendant's Reply, generally. The University does, however, add a few arguments, including a claim that “teaching is spiritually significant to Wesleyans and that teachers in schools run by the Church “participate in [its] ministry and extol God's design [and therefore] exercise a divinely authorized stewardship over the natural world.” *Id.*, p. 4. The University also states that “[i]n revealing God's truth, Adams and other faculty members must understand secular topics and relate them to Wesleyan doctrine. But the fact that Adams had to instruct her students on secular topics does not undermine the spiritual significance of her position.” *Id.*
- 5 The ministerial exception to federal court subject matter jurisdiction also has been extended to other, more seemingly peripheral employees of religious based institutions. See, e.g., [Nat'l Labor Relations Board v. Catholic Bishop of Chicago](#), 440 U.S. 490, 501, 99 S.Ct. 1313, 59 L.Ed.2d 533 (1979) (NLRB could not exercise jurisdiction over non-ordained teachers charged with spreading the church's message to students in church-run schools); [Tomic v. Catholic Diocese of Peoria](#), 442 F.3d 1036, 1040 (7th Cir.2006) (non-ordained musical director performed “ministerial function” by selecting what music to play during mass); [Schleicher v. The Salvation Army](#), 518 F.3d 472 (7th Cir.2008) (employees who helped run adult rehabilitation center, led prayer and worship singing, and sold goods in thrift shop were considered ministers since their duties had a “spiritual dimension” under the Salvation Army's religious tenets).

End of Document

© 2023 Thomson Reuters. No claim to original U.S. Government Works.

RECEIVED by MSC 8/22/2025 12:25:41 PM

STATE OF MICHIGAN
IN THE KENT COUNTY CIRCUIT COURT

JOSEPH KUILEMA,

Plaintiff,

v

CALVIN UNIVERSITY,

Defendant.

Case No. 23-03561-CZ

Hon. Christina Elmore

Charissa C. Huang (P75501)
Lauren M. Ayoub (P85669)
SMITH HAUGHEY RICE & ROEGGE
Attorneys for Plaintiff
100 Monroe Center, NW
Grand Rapids, MI 49503
616.774.8000
chaung@shrr.com

Stephen J. van Stempvoort (P79828)
Jacob L. Carlton (P84859)
MILLER JOHNSON
Attorneys for Defendant
45 Ottawa Avenue, SW - Suite 1100
Grand Rapids, MI 49503
616.831.1700
vanstempvoorts@millerjohnson.com
carltonj@millerjohnson.com

**Calvin University's Unopposed Motion for
Leave to File Brief in Excess of 20 Pages**

Defendant Calvin University ("Calvin") moves under MCR 2.119(A)(2)(a) for leave to file a brief in support of its Motion to Dismiss under MCR 2.116(C)(8) in excess of the 20-page limit that ordinarily applies under MCR 2.119(A)(2)(a).

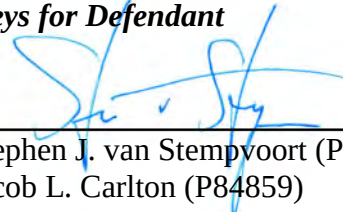
Calvin's motion presents substantial issues pertaining to the interpretation of the Elliott-Larsen Civil Rights Act and to the application of the First Amendment to the claims asserted in the Plaintiff's complaint. An enlargement of the page limit ordinarily applicable to dispositive motions is necessary for Calvin to thoroughly present and brief the issues for this Court.

Counsel for the Plaintiff has indicated that Plaintiff does not oppose Calvin's motion for leave to file a brief in excess of the ordinary page limit.

Calvin therefore respectfully requests that the Court grant its motion for leave to file a brief in excess of the ordinary 20-page limit.

MILLER JOHNSON
Attorneys for Defendant

Dated: May 26, 2023

By 

Stephen J. van Stempvoort (P79828)
Jacob L. Carlton (P84859)
45 Ottawa Avenue SW, Suite 1100
Grand Rapids, MI 49503
616.831.1700
vanstempvoorts@millerjohnson.com
carltonj@millerjohnson.com

STATE OF MICHIGAN
IN THE KENT COUNTY CIRCUIT COURT

JOSEPH KUILEMA,

Plaintiff,

v

CALVIN UNIVERSITY,

Defendant.

Case No. 23-03561-CZ

Hon. Christina Elmore

Charissa C. Huang (P75501)
Lauren M. Ayoub (P85669)
SMITH HAUGHEY RICE & ROEGGE
Attorneys for Plaintiff
100 Monroe Center, NW
Grand Rapids, MI 49503
616.774.8000
chaung@shrr.com

Stephen J. van Stempvoort (P79828)
Jacob L. Carlton (P84859)
MILLER JOHNSON
Attorneys for Defendant
45 Ottawa Avenue, SW - Suite 1100
Grand Rapids, MI 49503
616.831.1700
vanstempvoorts@millerjohnson.com
carltonj@millerjohnson.com

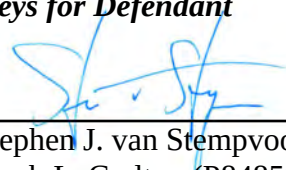
Notice of Hearing

PLEASE TAKE NOTICE that Calvin University's Motion to Dismiss Under MCR 2.116(C)(8) will be brought on for hearing before the Honorable Christina Elmore at the Kent County Courthouse on Friday, July 14, 2023, at 8:30 a.m., or as soon thereafter as counsel may be heard.

MILLER JOHNSON
Attorneys for Defendant

Dated: May 26, 2023

By



Stephen J. van Stempvoort (P79828)
Jacob L. Carlton (P84859)
45 Ottawa Avenue SW, Suite 1100
Grand Rapids, MI 49503
616.831.1700
vanstempvoorts@millerjohnson.com
carltonj@millerjohnson.com

STATE OF MICHIGAN
IN THE KENT COUNTY CIRCUIT COURT

JOSEPH KUILEMA,

Plaintiff,

v

CALVIN UNIVERSITY,

Defendant.

Case No. 23-03561-CZ

Hon. Christina Elmore

Charissa C. Huang (P75501)
Lauren M. Ayoub (P85669)
SMITH HAUGHEY RICE & ROEGGE
Attorneys for Plaintiff
100 Monroe Center, NW
Grand Rapids, MI 49503
616.774.8000
chaung@shrr.com

Stephen J. van Stempvoort (P79828)
Jacob L. Carlton (P84859)
MILLER JOHNSON
Attorneys for Defendant
45 Ottawa Avenue, SW - Suite 1100
Grand Rapids, MI 49503
616.831.1700
vanstempvoorts@millerjohnson.com
carltonj@millerjohnson.com

Proof of Service

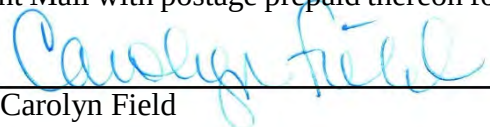
Carolyn Field states that she is an employee of Miller Johnson and that on the 26th day of May, 2023, she served a copy of:

1. Calvin University's Motion to Dismiss Under MCR 2.116(C)(8);
2. Brief in Support of Calvin University's Motion to Dismiss Under MCR 2.116(C)(8);
3. Calvin University's Unopposed Motion to File Brief in Excess of 20 Pages; and
4. Notice of Hearing

on:

Charissa C. Huang
SMITH HAUGHEY RICE & ROEGGE
100 Monroe Center, NW
Grand Rapids, MI 49503
chaung@shrr.com

via Email and by placing same in the U.S. Government Mail with postage prepaid thereon for first-class delivery.


Carolyn Field