STATE OF MICHIGAN
IN THE SUPREME COURT
Appeal prior to decision by the Court of Appeals

ROUCH WORLD, LLC, and UPROOTED ELECTROLYSIS, LLC,

Plaintiffs-Appellees,

v

DEPARTMENT OF CIVIL RIGHTS and DIRECTOR OF THE DEPARTMENT OF CIVIL RIGHTS,

Defendants-Appellants.
_____/

Supreme Court No. 162482

Court of Appeals No. 355868

Court of Claims No. 20-000145-MZ

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

BRIEF ON APPEAL OF AMICUS CURIAE MICHIGAN GOVERNOR GRETCHEN WHITMER

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INTEREST OF AMICUS CURIAE

Under the Michigan Constitution, the executive power of the state is vested in the Governor, who has control over the executive branch and the power and duty to supervise the administrative agencies and ensure faithful execution of the law.

One agency is the defendant–appellant Michigan Department of Civil Rights ("the Department"), which has the investigative and enforcement authority to resolve discrimination complaints, including those arising under the Elliot-Larsen Civil Rights Act (ELCRA), MCL 37.2101 *et seq*. It serves as the operational arm of the Michigan Civil Rights Commission ("the Commission") established by Article V, section 29 of the Michigan constitution. The Governor appoints the Commissioners with the advice and consent of the Senate. The Executive Director of the Department, whom the Commission selects, is a member of the Governor's cabinet.

Considering her constitutional role as the state's chief executive with the duty to supervise administrative agencies, as well as her relationship to the Commission and the Department, the Governor has a unique interest in maintaining the Department's ability to receive, investigate, and conciliate complaints alleging discrimination on the basis of sex in violation of the ELCRA. For this reason, the Governor submits this brief amicus curiae to ensure the Department is permitted to properly interpret and enforce Michigan law.

STATUTE INVOLVED

Section 302 of the Elliott-Larsen Civil Rights Act, MCL 37.2302, provides in part:

> Except where permitted by law, a person shall not:
>
> (a) Deny an individual the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation or public service because of religion, race, color, national origin, age, sex, or marital status.

INTRODUCTION

Some instances of sex discrimination might be hard to detect. But when a business denies customers a service and openly admits that, if the customers' sexes were different, they would have provided the service to those customers, there is no difficulty. It is hard to construct a more blatant violation of the plain language of the Elliott-Larsen Civil Rights Act. And so, when plaintiff Rouch World did exactly this, refusing services to two women that they would have provided to a man and a woman, the defendant Michigan Department of Civil Rights correctly sought to enforce the ELCRA through investigating the complaint. This action was consistent with the Department's understanding, expressed in an interpretive statement adopted by the Commission, that discrimination based on sexual orientation *is* discrimination based on sex.

Unfortunately, the court below was prevented from agreeing with the Department because it was bound by *Barbour v Department of Social Services*, 198 Mich App 183 (1993), a near-thirty-year-old Michigan Court of Appeals decision that was wrong when it was decided and is wrong now. The cursory analysis in *Barbour* was based on analogous federal decisions interpreting Title VII of the Civil Rights Act of 1964. Those decisions were also wrong, as the U.S. Supreme Court recently held in *Bostock v Clayton County, Georgia*, 140 S Ct 1731 (2020).

This Court must now discard *Barbour*, like the federal cases it relied on, as a relic of an era when discrimination based on sexual orientation, gender identity, and transgender status was not only common, but indeed so acceptable that courts tolerated it *even though it violated the plain language of the anti-discrimination*

statute. Contrary to plaintiffs' arguments, neither the Department nor the Commission is seeking to rewrite the statute. Rather, the Court of Appeals rewrote the statute long ago, improperly inserting a judicially crafted exception, interpreting the ELCRA to bar sex discrimination except when it took the form of sexual orientation discrimination. This case presents the opportunity for this Court to correct this improper judicial amendment of the statute and hold that the ELCRA bars *all* sex discrimination, even sex discrimination that was broadly tolerated decades ago.

Plaintiffs raise several meritless arguments as to why their conduct is not prohibited by the ELCRA. But their arguments neither meaningfully address the plain language of the statute nor explain how their refusal of services based on their customers' sex is not sex discrimination. Instead, they rely on the unsupported holding in *Barbour*, which does not bind this Court. They argue about the definition of "sex" in the ELCRA, which is not necessary, or even helpful, to the resolution of this case. And they attempt to distract this Court with arguments about the Commission's interpretive statement, which they argue was "unlawful." But an agency must always be permitted to interpret a statute and, as plaintiffs themselves point out, the Commission's interpretation does not even have the force of law. It is the Department's action to investigate the ELCRA complaints, not the Department or Commission's interpretation, that is properly before this Court.

Amicus respectfully requests that this Court reverse the Court of Claims' holding with respect to Plaintiff Rouch World. It should overrule *Barbour* and hold

that there was nothing improper about the Commission's interpretive statement, and remand to the Court of Claims for further proceedings.

ARGUMENT

I. It is impossible to discriminate on the basis of sexual orientation, gender identity, or gender expression without discriminating on the basis of sex, which is expressly forbidden by the Elliott-Larsen Civil Rights Act.

Section 302 of the Elliott-Larsen Civil Rights Act forbids in plain terms the denial of services because of sex. MCL 37.2302(a). When Natalie Johnson and Megan Oswalt sought to have their marriage at Rouch World, the business denied services because they were two women. Rouch World has stated that one of its religious beliefs is that marriage is only between one man and one woman. It is hard to imagine a clearer case of discrimination on the basis of sex than a case in which service is denied but if the sexes of the customers were different, it would not have been denied. And that is what happened here—if Johnson and Oswalt had been a man and a woman, they would have been served, but because they were two women, they were not.

Amicus therefore joins defendant in requesting that this Court reject plaintiffs' arguments and reverse the Court of Claims' decision with respect to Rouch World.[1]

[1] This brief does not address plaintiffs' First Amendment claims, which were not decided by the Court of Claims and are therefore not properly part of this appeal.

A. This Court should reject plaintiffs' attempt to reframe the question as being about the definition of "sex" in the ELCRA.

Throughout their pleadings, plaintiffs frame this case as being about whether the word "sex" in ELCRA includes "sexual orientation." That is not what this case is about. The definition of "sex" does not need to include "sexual orientation" for it to be true that discrimination on the basis of sexual orientation necessarily constitutes discrimination on the basis of sex.

The effects of this error in framing the question can be seen in the two opinions issued by the Michigan Court of Appeals in *People v Rogers*. In that case, Deonton Rogers was charged with several counts, including ethnic intimidation, after he assaulted a transgender woman. *People v Rogers*, __ Mich App __, __, 2021 WL 3435544, at *1–2 (2021)(*Rogers III*). The ethnic intimidation statute criminalizes certain assaultive and threatening acts if they are done with the intent to intimidate or harass another person based on one of several enumerated categories, including gender. MCL 750.147b(1). Rogers moved to quash the charge, and the circuit court granted the motion in part because the term "gender" in the ethnic intimidation statute does not encompass transgender people. *Id.* at *2. The People appealed, and a divided court of appeals panel affirmed based on the same erroneous framing—focusing almost exclusively on the definition of "gender," both now and when the statute was enacted. *People v Rogers*, 331 Mich App 12, 22–29 (2020) (*Rogers I*).

After the *Rogers I* opinion, the U.S. Supreme Court issued its landmark opinion in *Bostock v Clayton County, Georgia*, holding that "[a]n employer who fires

an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex," and thus violates the prohibition on sex discrimination provided in Title VII of the Civil Rights Act of 1964. 140 S Ct 1731, 1737 (2020). This Court then vacated *Rogers I* and remanded to the Court of Appeals for reconsideration in light of *Bostock*. *People v Rogers*, 506 Mich 949, 949 (2020) (*Rogers II*).

On remand, the Court of Appeals again discussed the definition of "gender" but ultimately arrived at the correct conclusion that "we need not reach the question whether the statute's use of the term gender in 1988 was intended to include the term transgender." *Rogers III*, 2021 WL 3435544, at *6. Rather, because the defendant's assault of the victim was based on the victim's gender under any definition of the term, the charge was appropriate:

> Applying the term "gender" in any sense, whether it is interpreted as equating with "sex" or given a broader meaning, defendant engaged in harassment and intimidation of the complainant based on her gender. . . . A plain reading of the statute would dictate that, whenever a complainant's gender was the impetus for the intimidation or harassing behavior, the conduct falls within the ethnic-intimidation statute. We conclude that recognizing that the complainant here was targeted because of her gender effectuates the Legislature's intent. [*Id.* at *7.]

The analysis should be the same here. It does not make sense to look at this case and ask whether Johnson and Oswalt's "sex" includes their sexual orientation. Even if it does not, the plaintiffs have discriminated *on the basis of* sex. If Johnson or Oswalt were a man, then Rouch World would provide them services. Because neither is, Rouch World denied them services. It does not matter how one defines

sex—under any reasonable definition, it was sex that motivated Rouch World's refusal to serve Johnson and Oswalt.[2]

B. The Michigan Civil Rights Commission legitimately exercised its authority to interpret the meaning of the ELCRA.

Plaintiffs also dedicate a portion of their argument—both here and below—to attacking the Commission and the Department for adopting and applying an interpretive statement reflecting the Commission's understanding of the correct meaning of the phrase "discrimination because of . . . sex." This attack is unavailing for several reasons. To start with, plaintiffs misdescribe the interpretive statement as one that "redefine[s] the word 'sex' to include 'sexual orientation.' " It does not. In reality, the interpretive statement does not redefine anything, nor does it interpret the definition of the word "sex" in the ELCRA. Rather, the interpretive statement focused on the meaning of the phrase "discrimination because of . . . sex." As discussed in the previous section, this Court should resist the attempt to misframe the argument as being about the definition of "sex." It is not.

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[2] The gist of amicus's (and defendant's) argument is that Rouch World discriminated on the basis of sex because it discriminated on the basis of sexual orientation. It could also be argued that Rouch World discriminated on the basis of sex *and not* sexual orientation. In the unlikely event that two heterosexual women sought to marry each other at Rouch World, presumably Rouch World would refuse. And in the unlikely event that a gay man and a lesbian sought to marry each other at Rouch World, presumably they would be allowed to. Rouch World's declaration of their religious belief does not mention orientation—it does not say that marriage is between a straight man and a straight woman, but between a man and a woman. And so, although Rouch World's discrimination obviously has an impact on gay and lesbian couples, the mechanism of discrimination is not by sexual orientation at all, but by sex alone.

A second weakness in plaintiffs' argument is that their focus on the Commission's interpretive statement is a red herring in this case. As the Court of Claims correctly pointed out, "whether defendants are seeking to apply the term 'sex' under the ELCRA through an Interpretive Statement or a rule is ultimately not the controlling concern. Instead, . . . the ultimate question is whether defendants' *enforcement of the ELCRA* is consistent with the law." (12/7/20 Op & Order, p 3 (emphasis added).) Importantly, the Court of Claims recognized that the Department is enforcing the ELCRA, not the Commission's interpretive statement.

Because it focuses on the interpretive statement rather than the Department's investigation, the upshot of plaintiffs' argument is not only that the Department's effort to enforce the ELCRA should fail, but also that, in light of *Barbour*, the Department should not even be allowed to *attempt* to enforce the ELCRA as written.

If the courts were to accept that argument, it would have the effect of calcifying the law, preventing any development or correction of erroneous decisions. When a case is wrongly decided, as *Barbour* was, one remedy is for future litigants to bring challenges to that holding in future cases, allowing future courts to correct the mistaken holdings. But this process requires permitting litigants to bring cases that challenge those mistaken holdings—i.e., raising claims and defenses that run contrary to the status quo. The court rules explicitly recognize this, permitting litigants to raise not only those claims and defenses that are "warranted by existing

law," but also those warranted by "a good-faith argument for the extension, modification, or reversal of existing law." MCR 1.109(E)(5)(b).

If the Commission were not permitted to interpret the statute contrary to the *Barbour* court's misreading of it and the Department could not even attempt to enforce the ELCRA as written, then there would be no way for the courts to *ever* undo the judicial rewrite of the ELCRA that *Barbour* effected.

For this reason, this Court should hold, as the Court of Claims held, that the propriety of the interpretive statement is not before it, but only the question whether the ELCRA may be properly enforced here. There was nothing improper, much less "unlawful," about the Commission interpreting the statute.

C. The underpinnings of *Barbour* have been thoroughly eroded and the case is ripe for overruling.

The Court of Claims rejected defendants' arguments with respect to Rouch World solely in reliance on the Court of Appeals' binding published decision in *Barbour v Dep't of Social Svcs*, 198 Mich App 183 (1993). In that brief per curiam opinion, the court relied almost entirely on federal precedent applying Title VII of the federal Civil Rights Act of 1964 to conclude that sexual orientation discrimination does not violate the ELCRA.

This decision was wrong at the time it was entered, and it is wrong now. The Legislature did not include an exception for sexual orientation discrimination or transgender discrimination in the ELCRA. But the *Barbour* court relied on erroneous and irrelevant federal cases to craft a judicial exception to the categorical

bar on sex discrimination that the Legislature actually passed. Amicus therefore requests that this Court undo *Barbour*'s judicial amendment of the ELCRA and restore it to an interpretation consistent with the plain language the Legislature chose to enact. Discrimination based on sexual orientation or transgender status would not happen but for the sex of the person discriminated against—regardless of how "sex" is defined. Such discrimination is therefore barred by the plain language of the ELCRA.

Whatever minimal persuasive value *Barbour* might have had has now been eroded, making the decision to overrule the case an easy one.[3] As discussed below, two of the cases it relied on have been overruled by *Bostock*, and two are irrelevant to the question.

The first federal case *Barbour* cited was *Henson v City of Dundee*, 682 F2d 897 (CA 11, 1982). But that case had nothing to do with the issue of sexual

[3] Even if *Barbour* had been a decision of this Court, stare decisis should not stand in the way of overturning it. As this Court has held, stare decisis interests are at their nadir when a court has misinterpreted a statute:

> [S]hould a court confound . . . legitimate citizen expectations by misreading or misconstruing a statute, it is that court that has disrupted the reliance interest. When that happens, a subsequent court, rather than holding to the distorted reading because of the doctrine of stare decisis, should overrule the earlier court's misconstruction. The reason for this is that the court in distorting the statute was engaged in a form of judicial usurpation that runs counter to the bedrock principle of American constitutionalism, i.e., that the lawmaking power is reposed in the people as reflected in the work of the Legislature, and, absent a constitutional violation, the courts have no legitimacy in overruling or nullifying the people's representatives. [*Robinson v City of Detroit*, 462 Mich 439, 467 (2000).]

orientation discrimination. It was a case of sex discrimination based on sexual harassment. And the unremarkable holding was that, to prove discrimination, the plaintiff would need to show that she was harassed because she was a woman—that is, if the supervisor harassed men and women equally, the claim for discrimination would not lie.

The second federal case *Barbour* relied on was *DeSantis v Pacific Telephone and Telegraph Company*, 608 F2d 327 (CA 9, 1979). That case did indeed hold that Title VII's protections against sex discrimination did not extend to prohibit discrimination against sexual orientation. *Id.* at 329–330. But four years later (and ten years before *Barbour*), the U.S. Supreme Court issued an opinion in *Price Waterhouse v Hopkins*, 490 US 228 (1989), holding that Title VII's protections were not that narrow. In *Price Waterhouse*, the Court held that a plaintiff could make out a claim of discrimination on the basis of sex by showing that discrimination was based on sex stereotyping: "In the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender." *Id.* at 250. In other words, the plaintiff need not show that she was passed over for a partnership simply because she was a woman—if she was passed over because of traits she possessed as a woman that would have been acceptable in a man, that discrimination is sex discrimination.

If the *Barbour* court had done a broader survey of Title VII cases, it might have recognized that *Price Waterhouse* and *DeSantis* were incompatible and that

Price Waterhouse controlled, effectively overruling *DeSantis*. See *Nichols v Azteca Restaurant Enterprises*, 256 F3d 864, 875 (CA9, 2001) ("To the extent it conflicts with *Price Waterhouse*, as we hold it does, *DeSantis* is no longer good law.")

Barbour also relied on *Williamson v AG Edwards & Sons*, 876 F2d 69 (CA 8, 1989), which contained no analysis, only a reliance on *DeSantis*. And it inexplicably cited *DeCintio v Westchester County Medical Center*, 807 F2d 304 (1986), which had nothing to do with sexual orientation discrimination.

In sum, two of the federal cases *Barbour* relied on have been effectively overruled by the U.S. Supreme Court. And the other two have nothing to do with the question in *Barbour* or the question in this case. *Barbour*'s holding now stands on nothing at all, and its persuasive value to this Court should be nil. This Court should not hesitate to overrule *Barbour* and apply the ELCRA as written to allow the Department to enforce the statute against plaintiffs' blatant acts of sex discrimination.

CONCLUSION AND RELIEF REQUESTED

When plaintiffs refused services to potential customers based on their sexes, they discriminated on the basis of sex. The Commission properly interpreted the ELCRA as barring this discrimination, in spite of a mistaken holding of the Court of Appeals to the contrary.

This Court should hold that there was nothing improper about the Commission's interpretive statement or the Department's investigations. It should also overrule *Barbour*'s erroneous holding, reverse the Court of Claims with respect to Rouch World, and remand for further proceedings.

Respectfully submitted,

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