

IN THE MICHIGAN SUPREME COURT
Appeal from the Michigan Court of Claims

ROUGH WORLD, LLC and
UPROOTED ELECTROLYSIS, LLC,

Plaintiffs-Appellees,

COC No. 20-000145-MZ
Court of Appeals No. 355868
Supreme Court No. 162482

v

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

Defendants-Appellants.

**BRIEF OF MICHIGAN BUSINESSES, ORGANIZATIONS, AND CHAMBERS OF
COMMERCE AS *AMICI CURIAE* IN SUPPORT OF DEFENDANT-APPELLANTS**

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STATEMENT OF INTEREST OF AMICI CURIAE¹

Amici are businesses and an organization headquartered and doing business in the state of Michigan and chambers of commerce representing businesses and lesbian, gay, bisexual and transgender (“LGBT”) interests across the state. Amici are private employers, large and small, in all industries, committed to creating equitable and diverse workplaces that protect LGBT employees from unlawful discrimination and afford them the opportunity to excel in their professions and be free from discrimination in places of public accommodation. Amici support workplaces in which no one should be passed over for a job, treated unfairly at work, paid less, fired, or subject to harassment or discrimination based on their sexual orientation. Amici believe that when workplaces are diverse and equitable, everyone can do their best work and both employees and employers benefit. Amici further support protections for their LGBT employees and customers to be protected from discrimination in places of public accommodation – protections necessary to ensure that everyone has equal and unfettered access to goods and services. The businesses, organizations, and chambers of commerce joining this brief are:

- Bridgewater Interiors
- Brkthru Digital, LLC
- Cisco Systems Inc.
- Clear Estimates, Inc
- Consumers Energy
- Cooper Standard
- Detroit Regional Chamber
- Detroit Regional LGBT Chamber of Commerce
- Doner Partners LLC
- Dow, Inc.
- DTE Energy
- Farmers Insurance
- FCA US LLC
- Ford Motor Company
- General Motors Company
- LinkedIn
- MGM Grand Detroit
- No Thai!
- PADNOS
- Quikly
- Shinola
- The Bar at 327 Braun Court
- W.K. Kellogg Foundation
- Zingerman’s Community of Businesses

¹ Pursuant to MCR 7.312(H)(4), amici state that no counsel for a party authored this brief in whole or in part, nor did anyone, other than amici or their counsel, make a monetary contribution intended to fund the preparation of the brief.

STATEMENT OF BASIS OF JURISDICTION

Amici adopt by reference the Statement of Jurisdiction of Appellants Michigan Department of Civil Rights and Director of the Michigan Department of Civil Rights.

STATEMENT OF QUESTIONS PRESENTED

Amici adopt by reference the Statement of Questions Presented of Appellants Michigan Department of Civil Rights and Director of the Michigan Department of Civil Rights.

STATUTES INVOLVED

Amici adopt by reference the list of Statutes Involved of Appellants Michigan Department of Civil Rights and Director of the Michigan Department of Civil Rights.

STATEMENT OF FACTS AND MATERIAL PROCEEDINGS

Amici adopt by reference the Statement of Facts and Material Proceedings presented in the brief of Appellants Michigan Department of Civil Rights and Director of the Michigan Department of Civil Rights.

STANDARD OF REVIEW

Amici adopt by reference the Standard of Review presented in the brief of Appellants Michigan Department of Civil Rights and Director of the Michigan Department of Civil Rights.

INTRODUCTION

The issue before this Court is whether the Elliott Larsen Civil Rights Act (“ELCRA”) protects against discrimination on the basis of sexual orientation. Answering that question, “yes” is not only consistent with federal law in (*Bostock v Clayton County, Georgia*, 590 US ___; 140 S Ct 1731 (2020)), but it is also consistent with the values and policies of amici, a collection of private businesses that are committed to equitable and diverse work places, free of discrimination on the basis of sexual orientation and that believe that places of public accommodation are and should be open to all. Amici’s experience – supported by many research studies – confirm that there is significant upside for employees and employers when workplaces are free of discrimination. In contrast, when discrimination is not prohibited, there are attended significant costs. Employees want to work for employers who protect all employees from discrimination and who support all employees coming to work as they are, sharing their diverse experiences. Amici are employers who are working to attract and retain employees – a competitive gambit in the current economy. In order to make Michigan more attractive to workers looking for inclusive work environments and robust anti-discrimination protections under state law, amici ask this Court to hold (as the U.S. Supreme Court did in *Bostock* in respect to federal law) that Michigan law prohibits discrimination on the

basis of sexual orientation.

Interpreting ELCRA to include sexual orientation would not be unreasonably costly or burdensome for Michigan's businesses. All of the amici have policies protecting their employees from adverse employment actions based on sexual orientation; adding that protection to state law would further amici's diversity goals and commitments – goals that they have already expressed and commitments that they have already made to their employees. Strengthening anti-discrimination protections would help Michigan businesses attract and retain top talent, which in turn would expand the diversity of viewpoints and increase productivity among employees who are valued and respected in their workplace. Moreover, Michigan's businesses benefit from protections against discrimination in places of public accommodation because all people are free to access the goods and services amici offer and no one can be turned away on the basis of their sexual orientation.

Amici and their employees benefit from a uniform interpretation of federal and state anti-discrimination statutes. Now that the U.S. Supreme Court has confirmed that federal law protects against discrimination for sexual orientation, the same protection under ELCRA should similarly be confirmed. Confirming that individuals cannot be discriminated against based on their sexual orientation in Michigan—either at work or in places of public accommodation—will ensure fair treatment, making Michigan a continued beacon for economic growth.

ARGUMENT

I. Including Sexual Orientation in ELCRA's Protections for Sex Discrimination Supports Michigan's Business Interests

Amici are businesses across sectors of the national, state, and local economies that value diversity, inclusion, and equality and are committed to fostering work environments that reflect those values. Promoting cultures that are free from discrimination on the basis of sexual

orientation is a key component of the diverse workforces of amici. Michigan's economy is stronger when *all* employees are protected from discrimination in the workplace and in places of public accommodation. This Court's failure to recognize that ELCRA protects LGBT people in Michigan from sex based discrimination would interfere with amici's ability to compete with businesses in other states and would ultimately harm Michigan's economy. Conversely, if this Court recognizes that LGBT workers are protected from sex discrimination by ELCRA, amici and other Michigan businesses will be put on equal footing with employers in other states that protect LGBT people from discrimination in the workplace and places of public accommodation.

A. Michigan's Economy Benefits from a Diverse Workforce

Diversity's benefits are well documented. Diversity drives innovation and diverse teams outperform homogenous ones.² Indeed, "[t]he most diverse companies are now more likely than ever to outperform less diverse peers on profitability"³ and diversity can "unlock[] innovation by creating an environment where 'outside the box' ideas are heard."⁴ LGBT individuals bring valuable perspectives from their varied backgrounds and lived experience, which enriches the conversations and decision making taking place in all businesses. Inclusion and engagement of LGBT people has a financial upside as well – a close correlation has been found between economic development and LGBT inclusion.⁵

Better financial outcomes, increased productivity of all employees, and enhanced ability to

² See Sylvia Ann Hewlett, et al., *How Diversity Can Drive Innovation*, Harv Bus Rev 30, 30 (Dec. 2013).

³ Sundiatu Dixon-Fyle, Kevin Dolan, Vivian Hunt, and Sara Prince, *Diversity Wins*, available at <<https://www.mckinsey.com/featured-insights/diversity-and-inclusion/diversity-wins-how-inclusion-matters>> (accessed December 16, 2021).

⁴ See Hewlett, et al., *supra* note 2.

⁵ See Jon Miller & Lucy Parker, *Open For Business: The Economic and Business Case for Global LGB&T Inclusion* (2015), available at <<https://drive.google.com/file/d/1o3cy98lk02yXOlrZMGqzETpxBIPyhvsu/view>> (accessed December 16, 2021).

recruit talent are results of LGBT-inclusive workplaces. Companies with strong LGBT inclusion practices saw their stock outperform in terms of financial performance and stock price.⁶

Workplaces where LGBT employees feel safe to show their true selves enhances productivity among all employees.⁷ Companies report increased success in recruiting and retaining the best employees because of their LGBT-inclusive practices.⁸

Recognizing that ELCRA protects LGBT people would enhance the inclusion efforts of amici and other businesses in Michigan, and Michigan's economy will benefit from improved financial results of private businesses, increased productivity, and attracting and retaining the best talent.

B. Excluding Sexual Orientation from ELCRA's Prohibition on Sex Discrimination Would Undermine Diverse and Inclusive Workplaces

LGBT employees have reported widespread discrimination in the workplace, resulting in negative impacts on the employees' health and well-being and a reduction in job commitment and satisfaction.⁹ "Over 40% of LGBT workers (45.5%) reported experiencing unfair treatment at work, including being fired, not hired, or harassed because of their sexual orientation or gender identity. This discrimination and harassment is ongoing: nearly one-third (31.1%) of LGBT respondents reported that they experienced discrimination or harassment within the past five

⁶ Credit Suisse, *Strong Diversity and Inclusion Practices are Good For Business* (April 2020), available at <<https://www.credit-suisse.com/about-us-news/en/articles/news-and-expertise/strong-diversity-and-inclusion-practices-are-good-for-business-202012.html>> (accessed December 16, 2021).

⁷ Crosby Burns, *The Costly Business of Discrimination*, Ctr For Am Progress 34 (2012).

⁸ US Chamber of Commerce Foundation, *Business Success and Growth Through LGBT—Inclusive Culture*, 23 (2019), available at <<https://www.uschamberfoundation.org/sites/default/files/media-uploads/Chamber-Incorporating-Inclusion-Final.pdf>> (accessed December 16, 2021).

⁹ *LGBT People's Experiences of Workplace Discrimination and Harassment*, Sept 2021 available at <<https://williamsinstitute.law.ucla.edu/publications/lgbt-workplace-discrimination/>> (accessed December 16, 2021).

years.”¹⁰ The impacts on individual employees manifest in harmful effects on employers such as decreased productivity, increased employee attrition, and, ultimately, negative impacts to businesses’ financial results.¹¹ Recognizing sexual orientation in ELCRA’s definition of sex discrimination would strengthen the protections for LGBT workers and reduce the negative impacts that discrimination has on Michigan employees and the economy.

Amici support and promote their employees being their authentic selves at work. Without legal protections in state law against discrimination based on sexual orientation, employees are less likely to feel comfortable being out at work. Research shows that rates of discrimination were higher for LGBT persons who did not hide their sexual orientation or gender identity at work, with harassment being the most common reported form of discrimination.¹² Unfortunately, because protections for sexual orientation have not been formalized, at least one result is that discrimination based on sexual orientation is carried out openly – a third of heterosexual respondents to a survey reported having witnessed anti-gay discrimination at the workplace.¹³

Although many companies expressly prohibit sexual orientation in their non-discrimination

¹⁰ *Id.*

¹¹ See, e.g., Human Rights Campaign Foundation, *A Workplace Divided: Understanding the Climate for LGBTQ Workers Nationwide* (June 2018) available at <<https://tinyurl.com/ycy6coo4>> (accessed December 16, 2021); Jennifer C. Pizer, et al., *Evidence of Persistent and Pervasive Workplace Discrimination Against LGBT People: The Need for Federal Legislation Prohibiting Discrimination and Providing for Equal Employment Benefits*, 45 Loy LA L Rev 715, 720-22 (2012).

¹² Christy Mallory & Brad Sears, *Discrimination, Diversity, and Development: The Legal and Economic Implications of North Carolina’s HB2*, The Williams Inst 2 (May 2016) available at <<https://williamsinstitute.law.ucla.edu/publications/legal-economic-implications-hb2/>> (accessed December 16, 2021); see also Pew Research Center, *A Survey of LGBT Americans: Attitudes, Experiences and Values in Changing Times* 42 (June 2013).

¹³ Pizer, et al., *supra* note 11 at 720-22.

policies,¹⁴ almost half (46%) of LGBT employees are closeted at work.¹⁵ The number of LGBT employees out at work has increased only slightly in over a decade – about five percentage points¹⁶ – despite significant progress in the recognition of LGBT rights, e.g. recognition of marriage equality. Further research suggests one possible reason why: nearly half of LGBT employees feel that they cannot always rely on the enforcement of a non-discrimination policy, but rather their treatment might depend on their supervisor’s own feelings towards LGBT individuals.¹⁷ These workers believe that legal protections are essential for LGBT workers who face discrimination in the workplace.

Fear of discrimination has been shown to exact a significant toll on employees, including: negative attitudes about their careers; increased stress; difficulty trusting colleagues; and experiences of isolation, frustration, anxiety, depression and low self-esteem.¹⁸ Moreover, dissatisfaction and unfair treatment at work leads to resignations and businesses having to replace employees who leave. One study concluded that businesses “risk[ed] losing \$8,800 on average for each LGBT employee that leaves the state or changes jobs because of the negative environment.”¹⁹ Legally protecting LGBT employees from discrimination will increase the likelihood that employees will feel comfortable and secure being themselves at work – increasing workplace

¹⁴ US Chamber of Commerce Foundation, *Business Success and Growth Through LGBT—Inclusive Culture*, 4 (2019), available at <<https://www.uschamberfoundation.org/sites/default/files/media-uploads/Chamber-Incorporating-Inclusion-Final.pdf>> (accessed December 16, 2021).

¹⁵ See *A Workplace Divided*, *supra* note 11, at 6.

¹⁶ See *Degrees of Equality: A National Study Examining Workplace Climate for LGBT Employees*, Human Rights Campaign Foundation 11 (2008) (discussing LGBT workers who are closeted or out to only a few coworkers), available at <https://assets2.hrc.org/files/assets/resources/DegreesOfEquality_2009.pdf?_ga=2.171975779.1726670172.1561215138-1243720071.1560984368> (accessed December 16, 2021).

¹⁷ See *A Workplace Divided*, *supra* note 11, at 7.

¹⁸ Pizer, et al., *supra* note 11, at 736-37, 740-41.

¹⁹ Mallory & Sears, *supra* note 12 at 2.

cohesiveness and reducing attrition costs.

“Laws are perhaps the strongest of social structures that uphold and enforce stigma,”²⁰ and including LGBT persons in the legal protections against sex discrimination works to redefine the social structures and remove stigma. Excluding sexual orientation and gender identity from sex discrimination protections has a stigmatizing effect on LGBT employees, resulting in negative consequences for employee health and productivity.²¹ This Court has the opportunity, in this case, to define the law to be inclusive of LGBT persons and clearly state that discrimination against LGBT persons is illegal in Michigan.

II. **Interpreting Federal and State Discrimination Statutes Similarly is Necessary to Provide Businesses and Employees with Consistency and Certainty**

Laws prohibiting discrimination of a class of people sends a powerful message about who is included in society and who is excluded from society. State and local governments have expanded their civil rights and anti-discrimination statutes to reflect their values and strongly signal that the state or city is a welcoming, inclusive place for all people. That is the message that amici want to send to potential employees and customers: Michigan is a welcoming and inclusive state and will protect its citizens from discrimination for being their true selves at work and in places of public accommodation. Title VII’s nationwide, established sex discrimination prohibition

²⁰ *Perry v Schwarzenegger*, 704 F Supp 2d 921, 974 (ND Cal 2010).

²¹ See, e.g., Mark L. Hatzenbuehler, et al., *Stigma as a Fundamental Cause of Population Health Inequalities*, 103 Am J Pub Health 813, 816 (2013) (noting the corrosive impact of stigma on physical and mental health, social relationships, and self-esteem); Ilan H. Meyer, *Prejudice, Social Stress, and Mental Health in Lesbian, Gay, and Bisexual Populations: Conceptual Issues and Research Evidence*, 129 Psych Bull 674, 679-85 (2003) (summarizing empirical evidence of “minority stress” in LGBT populations and health consequences); Vickie M. Mays & Susan D. Cochran, *Mental Health Correlates of Perceived Discrimination Among Lesbian, Gay, and Bisexual Adults in the United States*, 91 Am J Pub Health 1869, 1874 (2001) (finding “robust association between experiences of discrimination and indicators of psychiatric morbidity” and noting that “social factors, such as discrimination against gay individuals, function as important risk factors for psychiatric morbidity”).

including sexual orientation is a big step in the right direction; aligning Michigan's civil rights statute to reflect the federal law and Michigan's values would be the logical next step.

Confirmation that ELCRA prohibits sexual orientation discrimination would benefit amici, their employees, and their customers across the state beyond any private or local efforts.

Businesses and their employees benefit from the clarity, predictability, reliability and efficiency that comes from the uniform application of anti-discrimination laws and aligning state and federal law. Title VII only applies to employers with 15 or more employees. Including sexual orientation in the definition of sex discrimination would expand protections to the many people who work in Michigan's small businesses – who are currently out of scope of the federal anti-discrimination statute – and would create a uniform anti-discrimination landscape for Michigan's employers.

Businesses operating in places that offer lesser or no protections for sexual orientation are disadvantaged in recruiting from the most diverse pool of employees for operations in those jurisdictions, harming their ability to perform and compete. Amici's LGBT employees (and employees who choose to work in places where discrimination is prohibited) are less willing to move to or work in locations where such discrimination is permitted. In this way, excluding sexual orientation and gender identity from ELCRA's sex discrimination protections undermines businesses' efforts to recruit, promote, and retain talent.

Although many companies have voluntarily implemented their own policies to prohibit discrimination based on sexual orientation or gender identity, voluntary company initiatives are not a substitute for the force of law. Empirical research confirms that anti-discrimination laws make a difference: sexual orientation discrimination tends to be higher in jurisdictions without non-discrimination laws.²² In addition, workplace discrimination tends to decrease in response to

²² See Tilcsik, Andrés, *Pride and Prejudice: Employment Discrimination Against Openly Gay*

legal rules against it.²³ Only 23 states and the District of Columbia expressly prohibit employment discrimination based on sexual orientation and/or gender identity.²⁴ This Court should make Michigan the 24th state to prohibit discrimination based on sexual orientation and align this state's laws with Title VII and the voluntary policies amici have enacted. Amici cannot create equality in the workplace alone; Michigan's ELCRA plays an important role in protecting employees' civil rights. Because businesses benefit from clear, administrable rules and a diverse workforce and customer base free from discrimination, this Court should hold that ELCRA's prohibition of discrimination "because of ... sex" necessarily includes discrimination based upon sexual orientation.

CONCLUSION

Amici respectfully request that the Court rule in favor of Defendants-Appellants and reverse the portion of the Court of Claims' opinion and order denying Defendants' motion for summary disposition and hold that, contrary to *Barbour v Dep't of Social Services*, 198 Mich App 183 (1998), ELCRA prohibits discrimination based on sexual orientation.

Men in the United States, 117 Am J Soc 586, 614-15 (2011).

²³ *Id.*

²⁴ *Equality Maps: State Non-Discrimination Laws*, Movement Advancement Project, available at <https://www.lgbtmap.org/equality-maps/employment_non_discrimination_laws> (accessed December 16, 2021).

Respectfully submitted,

Dated: December 17, 2021

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