STATE OF MICHIGAN
IN THE SUPREME COURT

On Application for Leave to Appeal from the Court of Appeals
(Gadola, P.J., and Servitto and Redford, JJ.)

THE PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

DEONTON AUTEZ ROGERS,

Defendant-Appellee.

_____/

Supreme Court No. 161034

Court of Appeals No. 346348

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

AMICUS BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION OF MICHIGAN AND THE AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF THE PEOPLE OF THE STATE OF MICHIGAN'S APPLICATION FOR LEAVE TO APPEAL

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TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Legislation and Statutes

Rules

Other Authorities

STATEMENT OF INTEREST OF AMICI CURIAE[1]

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

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

[1] Pursuant to MCR 7.312(H)(4), amici state that no counsel for a party authored this brief in whole or in part, nor did any such counsel or a party make a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici, their members, or their counsel made such a monetary contribution.

unjust and insupportable means of narrowing the scope of this state's criminal justice system and could have harmful consequences for LGBT persons who seek protection under civil rights laws for discrimination.

STATEMENT OF QUESTION PRESENTED

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

Appellant's answer: Yes

Appellee's answer: No

District court's answer: Yes

Trial court's answer: No

Court of appeals' answer: No

Amici's answer: Yes

STATUTE INVOLVED

MCL 750.147b, provides, in pertinent part:

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

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

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

INTRODUCTION

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

Mr. Rogers was charged under the ethnic intimidation statute, MCL 750.147b, for maliciously intimidating or harassing Ms. Steuball because of her gender. The court of appeals, however, concluded that intimidation of someone for being transgender did not take place on the basis of gender. In doing so, it interpreted "gender" to be the same as "sex." It erred, however, in ignoring the fact that "sex" comprises much more than a person's sex assigned at birth, but instead covers the full range of ways in which gender is expressed through appearance and behavior.

It also failed to properly apply even its own narrow definition of sex to the circumstances of this case. A violation of the statute does not require a showing that the intimidation was motivated by a person's gender alone or a showing that it was motivated by animus towards all women or all men. And because it is impossible to intimidate someone because they are transgender without acting at least in part because of the victim's sex assigned at birth, anti-transgender intimidation is necessarily based on the person's gender and therefore violates the statute.

The central flaw in the court of appeals' analysis was its decision to rely on assumptions about legislative intent rather than simply applying the language of the statute. It compounded that flaw by drawing unjustified conclusions about the legislature's intentions from the statute's legislative history.

This case raises important questions about the meaning of the words "gender" and "sex" and the scope of the application of the word "gender," not only in the ethnic intimidation statute, but also in other Michigan statutes that use those words, such as the Elliott-Larsen Civil Rights Act, MCL 37.2101 *et seq*. Additionally, the court of appeals' reasoning in this case conflicts with that of the United States Supreme Court as recently announced in *Bostock v Clayton Co, Ga*, 140 S Ct 1731 (2020). This Court should grant leave to appeal or, in lieu of granting leave, reverse.

STATEMENT OF FACTS AND PROCEEDINGS

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

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

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

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

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

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

coverage for transgender persons on the ground that intimidation and harassment directed at someone because they are transgender was not based on their sex or gender. *Id.*, slip op at 10.

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

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

It was error, according to the dissent, for the majority to rely on *Barbour*, since that case addressed a different question from the one in the present case, and to rely on legislative history, rather than simply applying the plain meaning of the statute. *Id.*, slip op at 2–3. Mr. Rogers's "conduct and words cannot be seen as

motivated by and centered upon anything but the sex (gender) of the victim." *Id.*, slip op at 4.

STANDARD OF REVIEW

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

ARGUMENT

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

Even if "gender" in the ethnic discrimination statute is defined to be the same as "sex," intimidation directed against someone because they are transgender, in combination with the predicate acts of malicious physical contact, property damage, or threats of contact or damage combined with a reasonable cause to believe these acts will occur, falls within the scope of the statute. This is true both because the term "sex" in 1988 included more than the narrow definition of sex given it by the court of appeals, and also because even if narrowly defined in this way, discrimination against someone because they are transgender is based at least in part on their sex.[2]

[2] The court of appeals uses the terminology "biological sex" in its interpretation of the word "gender" in the statute and its description of Ms. Steuball's sex assigned at birth. Such terminology is, however, an inaccurate way to describe a person's sex assigned at birth, since there are a number of biological components of sex, "including chromosomal, anatomical, hormonal, and reproductive elements, some of which could be ambiguous or in conflict within an individual." *Radtke v Misc Drivers & Helpers Union*, 867 F Supp 2d 1023, 1032 (D Minn, 2012). Additionally, there is a significant body of scientific research finding that gender identity is biologically based. See Levasseur, *Gender Identity Defines Sex: Updating the Law to Reflect Modern Medical Science Is Key to Transgender Rights*, 39 Vt L Rev 943, 984 (2015) (citing research). For that reason, a transgender individual's gender identity is "the single most important *biological* determinant of [the person's] sex." *Id.* at 1004.

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

The court of appeals erred by interpreting the word "sex" narrowly to deny protection to transgender people under the statute for intimidation or harassment on the basis of "gender." It did so by relying on only selected portions of contemporary dictionary definitions, but also by ignoring the legal precedents determining that discrimination on the basis of "sex" includes conduct based on a person's expression of their gender through their appearance or behavior. It further erred in relying on the decision in *Barbour*, 198 Mich App 183, to support its narrow definition for "sex," given that the case relied on superseded federal precedent and applied to a different question than the one at issue in this case.

At the time the statute was passed, contemporary definitions of "sex" included more than simply a person's sex assigned at birth[3] (or what the court of appeals labeled as "biological sex"), but also included the behavioral aspects of sex. The court of appeals cited *Webster's Ninth New Collegiate Dictionary*, published in 1990, as providing that "sex" means "either of two divisions of organisms distinguished respectively as male or female." *Rogers*, __ Mich App at __; slip op at 6. However, *Webster's Ninth* further defines "sex" as "the sum of the *structural, functional, and behavioral characteristics* of living beings that subserve

[3] A person's sex assigned at birth refers to the designation of male or female that an infant is given at birth typically based on external reproductive anatomy. Hembree et al, *Endocrine Treatment of Gender-Dysphoric/Gender-Incongruent Persons: An Endocrine Society Clinical Practice Guideline*, 102 J Clin Endocrinol Metab 3869, 3875 (2017).

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

Court decisions provide additional support for the broader understanding of "sex." In interpreting Title VII of the Civil Rights Act of 1964, the U.S. Supreme Court concluded that "'[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.'" *Los Angeles Dep't of Water & Power v Manhart*, 435 US 702, 707 n 13; 98 S Ct 1370; 55 L Ed 2d 657 (1978) (internal quotation marks and citation omitted). That means "that gender must be irrelevant to employment decisions." *Price Waterhouse v Hopkins*, 490 US 228, 240; 109 S Ct 1775; 104 L Ed 2d 268 (1989). Therefore, in *Price Waterhouse*, the Court held that Title VII bars not only discrimination against someone because of their sex assigned at birth, but also because of their failure to look or behave like their assigned sex. *Id.* at 250–251.

The Sixth Circuit, in *Smith v Salem*, 378 F3d 566 (CA 6, 2004), applied this reasoning to those who face discrimination because of their "gender non-conforming

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

The district court in *Smith* had relied on the same narrow definition of sex relied upon by the court of appeals below in concluding that transgender individuals were denied coverage under Title VII. Applying the reasoning of *Ulane v Eastern Airlines, Inc*, 742 F2d 1081 (CA 7, 1984), it concluded that "Congress 'had a narrow view of sex in mind' and 'never considered nor intended that this 1964 legislation apply to anything other than the traditional concept of sex.'" *Smith v Salem*, unpublished opinion of the United States District Court for the Northern District of Ohio, issued February 26, 2003 (Case No. 4:02CV1405); 2003 WL 25720984, at *2, quoting *Ulane*, 742 F2d at 1085. Past federal appellate courts had interpreted "sex" narrowly to refer to someone's "anatomical and biological characteristics," but not to "'gender' (referring to socially-constructed norms associated with a person's sex)." *Smith*, 378 F3d at 573, citing *Ulane,* 742 F2d at 1084; *Sommers v Budget Mktg, Inc,*

667 F2d 748, 750 (CA 8, 1982); and *Holloway v Arthur Andersen & Co*, 566 F2d 659, 661–663 (CA 9, 1977). However, narrowly defining sex to deny transgender people protection under Title VII, as the *Holloway, Sommers*, and *Ulane* courts had done, was an approach that had "been eviscerated by *Price Waterhouse*." *Smith*, 378 F3d at 573; see also *Schwenk v Hartford,* 204 F3d 1187, 1201 (CA 9, 2000) ("The initial judicial approach taken in cases such as *Holloway* [and *Ulane*] has been overruled by the logic and language of *Price Waterhouse*.").

It was also error for the court of appeals to rely on *Barbour* as additional support for its conclusion that intimidation of transgender people is not gender-based, for two reasons. First, *Barbour* relied on the flawed reasoning of pre-*Price Waterhouse* federal appellate court decisions interpreting "sex" narrowly, see, e.g. *DiSantis v Pacific Tel & Tel Co, Inc,* 608 F2d 327 (CA 9, 1979), abrogated by *Nichols v Azteca Rest Enterprises, Inc*, 256 F3d 864, 875 (CA 9, 2001) (finding that *DeSantis's* "holding [ ] predates and conflicts with the Supreme Court's decision in *Price Waterhouse*"). Second, discrimination on the basis of transgender status and sexual orientation are different legal questions. See *RG & GR Harris Funeral Homes, Inc*, 884 F3d at 579–580.

The court of appeals' unduly narrow interpretation of the word "sex" resulted in its decision to exclude transgender people from the protections accorded to non-transgender people from intimidation in violation of the ethnic intimidation statute.

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

The court of appeals erred in concluding that Mr. Rogers's conduct fell outside of the statute's "ambit," because he "did not target the victim because she is biologically male," but because "she is a transgender person." *Rogers*, __ Mich App at __; slip op at 10. The ethnic intimidation statute requires only that gender be *a* reason for the intimidation or harassment, and not the *sole* reason. Nor is there a requirement under the statute to prove class-based discrimination such as animus towards all women or all men, but only that an individual was subjected to intimidation because of their gender. And because discrimination against someone for being transgender is necessarily motivated at least in part by their sex assigned at birth, Mr. Rogers's conduct was motivated by Ms. Steuball's sex. The U.S. Supreme Court recently applied the same reasoning in *Bostock*, to conclude that firing someone for being transgender violates Title VII's prohibition on workplace discrimination "because of sex." *Bostock,* 140 S Ct at 1737.

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

The ethnic intimidation statute is violated when a "person maliciously, and with specific intent to intimidate or harass another person because of that person's race, color, religion, gender, or national origin," commits one of the listed predicate acts. MCL 705.147b. There is no requirement that the protected characteristic be the *sole* basis for the intimidation or harassment, but only that it be one of the

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

There is likewise no requirement in the statute for a showing that the intimidation was motivated by animus towards *all* women or *all* men. Under the statute's requirement to show intimidation against a person "because of *that* person's race, color, religion, gender, or national origin," MCL 750.147b (emphasis

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

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

Had Ms. Steuball "carried herself" as a woman and been assigned female at birth, Mr. Rogers would not have intimidated her. Accordingly, her male sex assigned at birth is a "but for" cause of the intimidation she experienced. The district court concluded that Mr. Rogers intimidated Ms. Steuball because she is transgender. (9/6/18 Dist Ct Op & Order, pp 1–2.) In other words, Mr. Rogers acted

because of the mismatch between Ms. Steuball's male sex assigned at birth and her living openly, and identifying herself, as a woman. Her sex assigned at birth was therefore a but for cause of the intimidation, since Mr. Rogers would not have acted as he did had Ms. Steuball been assigned female at birth.

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

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

"[S]ex plays an unmistakable and impermissible role" when an "employer retains an otherwise identical employee who was identified as female at birth," *id.* at 1741–1742, but "intentionally penalizes a person identified as male at birth for

traits or actions that it tolerates in an employee identified as female at birth." *Id.* at 1741. The employer may claim that it fired the employee for another reason, such as the fact that they are transgender, or openly express themselves as a different gender than their sex assigned at birth, but "it is impossible to discriminate against a person for being . . . transgender without discriminating against that individual based on sex." *Id.*

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

The *Bostock* reasoning commands the same result in this case. Like Title VII, the ethnic intimidation statute requires only that sex be one of the causes of the intimidation, rather than the sole cause, and requires only a showing that an individual faced intimidation because of that specific individual's gender, or other protected characteristic. And it is equally impossible for someone to intimidate "a person for being . . . transgender without [intimidating] that individual based on sex," *id.* at 1741, as it is for an employer to discriminate against an employee for being transgender without acting because of sex. Applying the straightforward rule—whether an individual has been subjected to discrimination "based in part on

sex"—to someone who is subjected to intimidation or job loss because they are transgender leads to the same result. Both necessarily occurred because of sex.

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

Part of the court of appeals' rationale for concluding that transgender people are excluded from the protections of the ethnic intimidation statute was its assumption that a 1988 legislature "cannot reasonably be thought to have intended . . . to criminalize conduct based on a person being transgender, a term that was not in use at that time in the jurisprudence of our State and had only recently emerged in the media." *Rogers*, __ Mich App at __; slip op at 8. The court's reasoning should be rejected, because courts are directed to apply the plain language of a statute without making assumptions about the legislature's intentions or expectations in passing it. Moreover, the court's supposition that there was no public knowledge of transgender persons at the time was plainly incorrect. Finally, the court erred by relying on legislative history to override the language of the statute itself. *Id.*

A. Application of the Plain Language of the Statute, Rather Than Speculation About Legislative Intent, Results in Protection of Transgender People from Gender-Based Intimidation.

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

only recently emerged in the media." *Id.* "[G]ender would [not] have been understood to encompass one who is a transgender person . . . in 1988," the court concluded. *Id.*, slip op at 7. This was error, both because the conclusion is based on assumptions about whether the legislature was thinking about how the statute would apply to a specific type of gender-based discrimination, and because its conclusion that there was no public knowledge of transgender people at the time this statute was enacted is unsupported and inaccurate.

This Court interprets statutes based on their plain meaning and has consistently rejected statutory interpretation based on "unstated legislative intent." *People v Williams*, 491 Mich 164, 178; 814 NW2d 270 (2012). As explained in Section I, intimidation of someone because they are transgender is based on gender, even if "gender" is narrowly defined. This may well be one of those times when a "statute's application . . . reaches 'beyond the principal evil' legislators may have intended or expected to address." *Bostock*, 140 S Ct at 1749, quoting *Oncale v Sundowner Offshore Servs, Inc*, 523 US 75, 79; 118 S Ct 998; 140 L Ed 201 (1998). However, it was error for the court of appeals to narrow the scope of the statute based on its assumptions about legislative expectations. "'[I]t is ultimately the provisions of' those legislative commands 'rather than the principal concerns of our legislators by which we are governed.'" *Id.*, quoting *Oncale*, 523 US at 79; see also *Robinson v Ford Motor Co*, 277 Mich App 146, 153; 744 NW2d 363 (2007) (citing *Oncale* favorably and concluding that same-sex sexual harassment is covered by the Elliott-Larsen Civil Rights Act, MCL 37.2101 *et seq.*).

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

The public as well as the courts had been exposed to the lives of transgender people for many years prior to 1988, such as Christine Jorgensen's transition in the 1950s, Brief of Law & History Professors as Amici Curiae in Support of Respondent Aimee Stephens, *RG & GR Harris Funeral Homes, Inc. v Equal Employment Opportunity Commission*, 140 S Ct 1731 (2020) (No. 18-107); 2019 WL 3027048, at *12–13, attention in the public and the courts in the 1970s to the expanding availability of surgical treatments for transgender people, including courts deciding that transgender individuals are entitled to Medicaid coverage for such treatment,

id. at *17–21, as well as Renee Richards' much publicized legal challenge to the United States Tennis Association's refusal to let her compete as a woman, *id.* at *21–22. This public attention both nationally and in Michigan continued into the 1980s. See, e.g., Corry, *HBO's "What Sex am I?"*, New York Times (April 18, 1985) <https://www.nytimes.com/1985/04/18/movies/hbo-s-what-sex-am-i.html> (accessed July 28, 2020); *Michigan Transsexual Runs for Congress*, Greensboro Daily News, (January 13, 1980) p A10 <http://transascity.org/files/news/1980_01_13_Greensboro_NC_Daily_News_A10.jpg> (accessed July 28, 2020).

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

B. The Legislative History Behind the Passage of the Ethnic Intimidation Statute Fails to Evidence Any Intent to Exclude Transgender People from Its Statutory Protections.

The court of appeals erroneously relied upon the legislative history of the ethnic intimidation statute to support its conclusion that transgender victims fell outside its scope. The Michigan House had introduced a bill including the words

[4] The court of appeals drew a distinction between "transgender" and "transsexual" individuals, *Rogers*, __ Mich App at __ n 6; slip op at 7 n 6, but failed to explain why public knowledge of transgender people described by that specific term was required in order to find that transgender people qualify for protection from gender-based intimidation. The term "transsexual" has largely been outdated and replaced by "transgender." See American Psychological Association, *Transgender People, Gender Identity, and Gender Expression, What Does Transgender Mean?* <https://www.apa.org/topics/lgbt/transgender> (accessed July 28, 2020).

"sexual orientation" but not either "gender" or "sex," while the Senate version which was enacted into law replaced "sexual orientation" with "gender." The court of appeals concluded that this history meant that the legislature was "unwilling to criminalize behavior motivated by the sexual orientation of the victim" and further speculated that the legislature cannot "reasonably be thought to have intended instead to criminalize conduct based on a person being transgender." *Rogers*, __ Mich App at __; slip op at 8.

However, where a "statute is clear, there is no ambiguity that would permit or justify looking outside the plain words of the statute." *In re Certified Question from U.S. Court of Appeals for Sixth Circuit*, 468 Mich 109, 116–117; 659 NW2d 597 (2003) (citations omitted). Legislative history should not be used "to cloud a statutory text that is clear." *Id.*; see also *Bostock*, 140 S Ct at 1750 ("legislative history can never defeat unambiguous statutory text"). The court of appeals defended its resort to legislative history on the grounds that there is "uncertainty" over whether transgender people are protected due to "competing definitions of the term gender." *Rogers*, __ Mich App at __ n 7; slip op at 7 n 7. However, interpreting the plain language of a statute through the use of contemporary dictionary definitions does not constitute textual ambiguity. *In re Certified Question*, 468 Mich at 113–117 (relying on dictionary definition for the word "intentional" to reject good faith defense to recovery of double damages and rejecting use of legislative history because statutory text is clear); see also *Bostock*, 140 S Ct at 1749 (finding there is

no ambiguity in the application of the language of Title VII's prohibition on sex discrimination to discrimination against someone because they are transgender).

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

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

CONCLUSION

The court of appeals erred in refusing to apply the plain language of the ethnic intimidation statute to the intimidation, harassment, and violence Ms. Steuball experienced because she is a transgender woman. Properly construed under this Court's precedents, intimidation or harassment of someone because they are transgender is based on gender and may constitute a violation of the ethnic intimidation statute. For these reasons, the Court should grant leave to appeal or, in lieu of granting leave, reverse.

Respectfully submitted,

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