

STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Court of Claims

ROUCH WORLD, LLC, and UPROOTED
ELECTROLYSIS, LLC,
Plaintiffs-Appellees,

Supreme Court No. 162482

v

Court of Appeals No. 355868

DEPARTMENT OF CIVIL RIGHTS and
DIRECTOR OF THE DEPARTMENT OF
CIVIL RIGHTS,
Defendants-Appellants.

Ct of Claims: 20-000145-MZ

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MOTION FOR PERMISSION TO FILE BRIEF *AMICI CURIAE* ON BEHALF OF THE PROSECUTING ATTORNEYS OF WASHTENAW, ALGER, GENESEE, INGHAM, KALAMAZOO, MARQUETTE, OAKLAND AND WAYNE COUNTIES IN SUPPORT OF DEFENDANTS-APPELLANTS

Amici Curiae, the Prosecuting Attorneys in Washtenaw, Alger, Genesee, Ingham, Kalamazoo, Marquette, Oakland and Wayne counties move this Court pursuant to MCR 7.312 (H) and MCR 7.316, for leave to file an *Amicus Curiae* Brief in the above-captioned case. In support of this motion, *Amici* state:

1. *Amici* are the chief law-enforcement officers in a diverse set of counties across the State of Michigan.
2. In this case, the Court is considering the following limited issue:
 - 1) Whether the prohibition on discrimination “because of . . . sex” in the Elliot-Larsen Civil Rights Act (ELCRA), MCL 37.2101 *et seq.*, applies to discrimination based on sexual orientation.
3. The issue under consideration relates directly to public safety and therefore is of great importance to *amici*.
4. Lesbian, gay, and bisexual individuals face discrimination in their personal lives, the public sphere, the workplace, housing, policing, and healthcare.
5. This experience of discrimination leads to many adverse consequences for their financial, mental, and physical well-being.
6. These vulnerabilities also lead to a higher risk being victims of crime.
7. Interpreting the ELCRA to encompass sexual orientation would have significant public-safety benefits.
8. In accordance with MCR 7.312(H) and MCR 7.316, *amici* respectfully request leave to file an *Amicus Curiae* Brief setting forth its views on these issues.

RELIEF REQUESTED

WHEREFORE, the Prosecuting Attorneys of Washtenaw, Alger, Genesee, Ingham, Kalamazoo, Marquette, Oakland, and Wayne Counties respectfully ask this Court to grant their motion for permission to file the accompanying *Amicus Curiae* Brief in support of Defendants-Appellants.

Respectfully submitted,

Dated: 12/17/2021

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PROOF OF SERVICE

I hereby certify that, on December 17, 2021, I filed the foregoing Motion of *Amici Curiae*, the Prosecuting Attorneys for Washtenaw, Alger, Genesee, Ingham, Kalamazoo, Marquette, Oakland, and Wayne Counties for Leave to File an *Amicus Curiae* Brief with the Clerk of Court using the electronic filing system which will serve all parties of record.

/s/ Christina Hines
Christina Hines

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**BRIEF OF THE PROSECUTING ATTORNEYS OF WASHTENAW, ALGER,
GENESEE, INGHAM, KALAMAZOO, MARQUETTE, OAKLAND, AND
WAYNE COUNTIES AS *AMICI CURIAE* IN SUPPORT OF DEFENDANTS-
APPELLANTS**

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STATEMENT OF QUESTION PRESENTED

Does the prohibition on discrimination “because of . . . sex” in the Elliott-Larsen Civil Rights Act, MCL 37.2101, et seq., apply to discrimination based on sexual orientation?

Amici’s answer: “Yes.”

Defendants-Appellants’ answer: “Yes.”

Plaintiffs-Appellees’ answer: “No.”

Court of Appeals’ answer: Has not answered.

Court of Claims’ answer: “No.”

INTRODUCTION AND INTEREST OF *AMICI CURIAE*

Amici are the chief law-enforcement officers in a diverse set of counties from across the State of Michigan.¹ Prosecutors, by statute, are charged with appearing in “all prosecutions, suits, applications and motions, whether civil or criminal, in which the state or county may be a party or interested.” MCL 49.153. Prosecutors frequently work with members of the LGBTQ community, because LGBTQ people are four times more likely to be victims of violent crime than the general population. Andrew R. Flores, *et al.*, *Victimization Rates and Traits of Sexual and Gender Minorities in the United States*, 6 *Science Advances* 40 (Oct. 2020), <http://rb.gy/dofmmd>. Studies have shown that this high rate of victimization is at least partially a result of discrimination on the basis of sexual orientation.

The scope of the Elliott-Larsen Civil Rights Act—and its application to discrimination on the basis of sexual orientation—is thus of critical importance to *amici*. That is true for three reasons.

First, as the chief law-enforcement officers in their respective counties, *amici* have an especial interest in ensuring enforcement of the “law as it is written.” *Layzell v. J.H. Somers Coal Co.*, 156 Mich. 268, 280, 120 N.W. 996, 998 (1909). As written, Elliott-Larsen unambiguously prohibits discrimination on the basis of sexual orientation. The law bars discrimination “because of . . . sex.” MCL 37.2102(1). It is impossible to discriminate against someone based on their same-sex (or opposite-sex)

¹ No party, nor counsel for a party, has authored this brief in whole or in part, and no one other than amici curiae, their members, or their counsel has made any monetary contributions intended to fund the preparation or submission of this brief.

attraction without discriminating against that person “because of” sex. Indeed, the United States Supreme Court has held that discrimination on the basis of sexual orientation “necessarily entails discrimination based on sex.” *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1747 (2020). The “law as it is written” thus squarely prohibits discrimination on the basis of sexual orientation. See *Layzell*, 156 Mich. at 280, 120 N.W. at 998. Elliott-Larsen should be enforced as such.

Second, as the county officers primarily responsible for prosecuting criminal-law violations, *amici* have a pronounced interest in public safety. Discrimination in housing, public accommodations, public service, and education significantly undermines public safety. For example: inability to access housing makes it significantly more likely that a person will be physically assaulted, sexually assaulted, or forced into prostitution. Unequal access to medical services – which are a “public accommodation” squarely covered by Elliott-Larsen, *Moon v. Michigan Reprod. & IVF Ctr*, 294 Mich. App. 582, 592; 810 N.W.2d 919, 925 (2011)—makes it difficult for people to address mental-health or substance-use issues. Further, discrimination and hostile treatment in education can disrupt a young person’s educational trajectory. That, in turn, increases the risk of high school noncompletion. And studies have repeatedly demonstrated that those who do not complete high school are far more likely to be involved in criminal activity.

Public safety thus demands that *all* persons be able to access housing, public services, and public accommodations free from discrimination. But discrimination on the basis of sexual orientation can have particularly deleterious effects. Research

consistently demonstrates that LGBTQ persons are especially vulnerable to crime when they lack access to housing, education, or medical care. That vulnerability is even more pronounced among LGBTQ youth. Indeed, on the education front, a “hostile school environment” is *the* leading reason that LGBTQ youth drop out of school. Clarifying that Elliott-Larsen applies to sexual-orientation discrimination would help to alleviate these dynamics.

Third, a significant amount of sexual-orientation discrimination has historically occurred within law-enforcement, and within the criminal legal system. Towards that end, it bears emphasis that Elliott-Larsen prohibits discrimination not just in the private sector, but with respect to “public services” as well. MCL 37.2302(a); *see also, e.g., Diamond v. Witherspoon*, 265 Mich. App. 673, 690, 696 N.W.2d 770, 780 (2005) (Elliott-Larsen precludes “disparate treatment” by the police “on the basis of sex”).

Much has been done in recent years to ensure fair treatment of LGBTQ Michiganders in our criminal legal system. Clarifying that Elliott-Larsen applies to sexual-orientation discrimination would bolster those efforts. It would send an unmistakable message that discrimination and harassment by those who enforce the law is intolerable. Such a ruling would help to rebuild the LGBTQ community’s confidence in law-enforcement, and in our criminal legal system. In turn, that will make it more likely that crime will be reported, and that victims and witnesses will opt to participate in criminal legal proceedings. And in the final analysis, that will make our communities safer for everyone.

ARGUMENT

I. **Sexual-Orientation Discrimination is Discrimination “Because of . . . Sex.”**

The Elliott-Larsen Civil Rights Act prohibits discrimination “because of . . . sex.” It grants Michiganders a right “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 . . . sex.” MCL 37.2102(1). And it specifically prohibits discrimination “because of . . . sex” in educational institutions, *id.* 37.2402(a), public accommodations or public services, *id.* 37.2302(a), housing, *id.* 37.501 *et seq.*, and employment, *id.* 37.2202(1)(a).

The Act’s prohibition on discrimination “because of . . . sex” necessarily prohibits discrimination on the basis of sexual orientation. It is impossible to engage in sexual-orientation discrimination without discriminating “because of sex.” If a woman suffers adverse treatment because she is attracted to women—but a man attracted to women would not receive the same treatment—the woman has suffered discrimination “because of” her female sex. Or, in the words of the United States Supreme Court: “[i]f 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.” *Bostock*, 140 S. Ct. at 1741.

“Any way you slice it,” *id.* at 1746, discrimination on the basis of sexual orientation is therefore discrimination “because of . . . sex.” Because the Act’s language is “clear and unambiguous,” that should end the inquiry. *Lorencz v. Ford Motor Co.*, 439 Mich. 370, 376, 483 N.W.2d 844, 847 (1992) (“When a statute is clear

and unambiguous, judicial construction or interpretation is unnecessary and therefore, precluded.”).

Indeed, the Act’s “broad language” has long been recognized to encompass situations where a protected classification (like race or sex) is a motivating factor in discrimination. *Bryant v. Automatic Data Processing, Inc.*, 151 Mich. App. 424, 430, 390 N.W.2d 732, 735 (1986). Thirty-five years ago, for example, the Court of Appeals held that Elliott-Larsen’s prohibition on discrimination “because of . . . race” necessarily encompasses discrimination against employees in interracial marriages. After all, the court reasoned, when a white woman is fired for being married to a Black man—but a Black woman married to a Black man would not have been fired—“the race of both the employee and the spouse is a motivating factor” in the discrimination. *Id.* Thus, “it must be concluded that the employee in such a case is discriminated against ‘because of race’ and the civil rights act is applicable.” *Id.*

The same is true here. It is impossible to discriminate against a person for being in an interracial marriage without discriminating “because of race.” *Id.* It is likewise impossible to discriminate against a person for their same-sex (or opposite-sex) attraction without discriminating “because of . . . sex.” The plain text of Elliott-Larsen thus compels the conclusion that the Act prohibits sexual-orientation discrimination.

II. Discrimination on the Basis of Sexual Orientation Undermines Public Safety

That “clear and unambiguous” reading of Elliott-Larsen, *Lorencz*, 439 Mich. at 376, 483 N.W.2d at 847, also coheres with the statute’s well-established purposes.

Elliott-Larsen “seeks to eliminate the effects of offensive or demeaning stereotypes, prejudices, and biases” because of a person’s “membership in a certain class.” *Miller v. C.A. Muer Corp.*, 420 Mich. 355, 363, 362 N.W.2d 650, 653–54 (1984) (cleaned up). Discrimination against same-sex-attracted people “represents the ultimate case of failure to conform to” a sex-based “stereotype.” *Hively v. Ivy Tech Cmty. Coll. of Indiana*, 853 F.3d 339, 346 (7th Cir. 2017). A lesbian woman who was discriminated against for her sexual orientation, for example, has necessarily been discriminated against for “failure to conform to the female stereotype” of being attracted to men. *Id.*

The “effects” of the sex-based “stereotypes” that undergird sexual-orientation discrimination are far-reaching—and squarely impact public safety. *See Miller*, 420 Mich. at 363, 362 N.W.2d at 653–54. As outlined below, inability to equally access housing, medical care, or education places same-sex attracted persons at particular risk of being victimized by crime, or otherwise getting caught up in the criminal legal system.

A. Housing

Housing discrimination, by its very terms, makes it difficult for certain classes of people “to obtain or maintain housing.” National Women’s Law Center & National Low Income Housing Coalition, *Gender & Racial Justice in Housing* at 5 (Feb. 2021), <http://rb.gy/hkevs5>. When people are unable to maintain housing, they are significantly more likely to be victims of crime. For young people in particular, “[h]omelessness increases the risk of victimization.” Hollywood Homeless Youth Partnership, *No Way Home* at 7 (Nov. 2010) (“No Way Home”), <http://rb.gy/572cgh>.

According to one study, some 25% of homeless youth have been “robbed or threatened by a weapon while homeless.” *Id.* Another thirteen percent “had been victims of sexual assault.” *Id.*

Homelessness, moreover, increases the risk that a person will be cited or jailed for low-level offenses like “camping, loitering, and public urination”—which “people wouldn’t have to endure if they had a place to call home.” Urban Institute, *Five Charts that Explain the Homelessness-Jail Cycle—and How to Break It* (Sept. 16, 2020) (“Urb. Institute”), <http://rb.gy/9n6kqa>. On average, people experiencing unsheltered homelessness have 21 contacts with the police every six months. *Id.* Homeless people are significantly more likely than sheltered people to spend at least one night in jail. *See id.* And these effects are particularly pronounced among homeless youth. Sixty-nine percent of homeless youth have had “some involvement with the juvenile or criminal justice systems, including arrest, probation, and/or incarceration.” No Way Home at 8.

Those adverse effects are especially pronounced among LGBTQ individuals. Homeless LGBTQ youth are at a high risk of being victimized by crime. Thirty-eight percent of homeless LGBTQ youth report being “forced to have sex,” as compared to 15% of homeless non-LGBTQ youth. Chapin Hall at the University of Chicago, *Missed Opportunities: LGBTQ Youth Homelessness in America* at 9 (“Chapin Hall”), <http://rb.gy/dkmjlp>. Twenty-seven percent of homeless LGBTQ youth have “exchanged sex for basic needs (as opposed to 9% of homeless non-LGBTQ youth).” *Id.* A staggering 62% of homeless LGBTQ youth report being “physically harmed by

others,” compared to 47% of homeless non-LGBTQ youth. *Id.* And “[o]nce homeless and with few resources at hand, LGBTQ youth are pushed towards criminalized behaviors . . . which increase their risk of arrest and detainment.” Daiana Griffith, *LGBTQ Youth Are At Greater Risk of Homelessness and Incarceration*, Prison Policy Initiative (Jan. 22, 2019), <http://rb.gy/hzypos>.

To be sure, many studies of youth homelessness lump together sexual orientation and gender identity under the broad “LGBTQ” umbrella.² But studies that focus specifically on sexual orientation indicate that gay, lesbian, and bisexual homeless youth are at particular risk of victimization. “Homeless young men who have sex with men” are “over five times more likely to have been forced to have sex” than homeless young men who do not have sex with men. No Way Home at 23. Homeless young men who have sex with men were also significantly more likely than other homeless young men to report that they had been forced into prostitution (22% vs. 6%). *Id.*

In short, lesbian, gay, and bisexual homeless people are at a pronounced “risk of violence, trafficking, mental health issues, and emotional or physical abuse.” National Network for Youth, *LGBTQ+ Youth Homelessness*, <http://rb.gy/itlfs5>. And—owing in part to housing discrimination—lesbian, gay, and bisexual people are significantly more likely to experience housing insecurity in the first place. LGBTQ

² It is the position of *amici* that discrimination on the basis of gender identity also qualifies as discrimination “because of sex,” for the reasons provided in the Court of Claims’ decision below and in the United States Supreme Court’s decision in *Bostock v. Clayton County*, 140 S. Ct. 1731, 1741-47. *Amici* are cognizant, however, that the question presented in this case is limited to sexual-orientation discrimination.

people “have a 120% higher risk of experiencing some form of homelessness” than the general population. *Id.* LGBTQ youth are 2.2 times more likely to experience homelessness than their non-LGBTQ peers. Chapin Hall at 7.

There is little doubt that discrimination on the basis of sexual orientation remains a driver of LGBTQ housing insecurity. A federal study demonstrated that rental-property owners favor heterosexual couples over same-sex couples by a margin of 16%. Human Rights Campaign, *Fair and Equal Housing Act* (Oct. 8, 2021), <http://rb.gy/xwdqrij>. In states that prohibit housing discrimination on the basis of sexual orientation, moreover, the rates of discrimination complaints based on “sexual orientation . . . are similar to rates of complaints based on race and sex discrimination.” Christy Mallory & Brad Sears, *Evidence of Housing Discrimination Based on Sexual Orientation and Gender Identity*, The Williams Institute at UCLA (Feb. 2016), <http://rb.gy/olkgtu>.

Clarifying that Elliott-Larsen precludes housing discrimination on the basis of sexual orientation will not, of course, end LGBTQ homelessness. But a ruling that the “law as it is written” applies to sexual-orientation discrimination, *Layzell*, 156 Mich. at 280, 120 N.W. at 998, will help to alleviate the dynamics that exacerbate LGBTQ homelessness. That will place fewer LGBTQ people—youth in particular—at risk of victimization. And it will meaningfully bolster public safety.

B. Medical Care

Access to healthcare—including substance-use and mental-health treatment—is an effective (and cost-effective) public-safety intervention. Elliott-Larsen’s “public

accommodations” prong bolsters healthcare availability by requiring doctors and medical providers to provide healthcare in a nondiscriminatory fashion. *Moon*, 294 Mich. App. at 592, 810 N.W.2d at 925 (Elliott-Larsen “certainly serves to prohibit doctors and medical facilities from refusing to form a doctor-patient relationship based solely on the patient's protected status [and] a doctor may only deny his or her consent to enter into a doctor-patient relationship with a potential patient based on legally permissible, nondiscriminatory reasons.”). Clarifying that Elliott-Larsen prohibits sexual-orientation discrimination will bolster access to healthcare. Again, that will meaningfully improve public safety.

On a macro level, multiple studies have demonstrated that access to healthcare is associated with reductions in crime. States that expanded access to Medicaid through the federal Affordable Care Act have significantly lower rates of crime than states that did not. Qiwei He & Scott Barkowski, *The Effect of Health Insurance on Crime: Evidence from the Affordable Care Act Medicaid Expansion*, 29 Health Econ. 261 (Jan. 2020). Medicaid expansion is associated with a 10.4% reduction in motor vehicle theft, an 8.13% reduction in homicides, and a 6.33% reduction in robbery. *Id.* at 262. The estimated decrease in crime amounts to a national annual cost savings of \$4 billion. Jacob Vogler, *Access to Healthcare and Criminal Behavior: Evidence from the ACA Medicaid Expansions*, 39 J. Policy Analysis & Management 1166, 1167 (Jul. 2020).

That data is in many ways unsurprising. After all, access to healthcare can help people address mental-health and substance-use issues that are often the root

causes of criminal activity. Indeed, counties with greater access to substance-use and mental-health treatment regularly enjoy decreased crime rates. S.R. Bondurant *et al.*, *Substance Abuse Treatment Centers and Local Crime*, 104 *Journal of Urb. Economics* 124-133 (2018); Monica Deza *et al.*, *Local Access to Mental Healthcare and Crime*, National Bureau of Economic Research, Working Paper 27619 (Jul. 2020), <http://rb.gy/dj4zmx>.

In addition, people who are struggling with mental-health issues are significantly more likely to be victimized by crime. Annually, more than one quarter of persons with severe mental-health issues are the victims of violent crime, “a rate more than 11 times higher than the general population rates even after controlling for demographic differences.” Linda A. Teplin *et al.*, *Crime Victimization in Adults with Severe Mental Illness*, 62 *Arch. Gen. Psychiatry* 8, 911-921 (2005). Not only are people with significant mental-health issues more likely to be victimized by crime in the first instance, mental-health issues among victims can make it more difficult to investigate cases and prove those cases at trial.

Providing nondiscriminatory access to healthcare is thus a highly effective crime-prevention intervention. Access to healthcare can alleviate underlying mental-health or substance-use issues that can cause someone to run afoul of the criminal legal system. Early and effective mental-health treatment also can significantly decrease the likelihood that a person will be the victim of a crime.

There is a particular need for healthcare to be accessible to members of the LGBTQ community. Owing to pervasive societal stigma, members of the LGBTQ

community are significantly more likely to experience mental-health issues such as depression and suicidal ideation. Human Rights Campaign, *Mental Health and the LGBTQ Community* (Jul. 2017), <http://rb.gy/l08q3l>. Gay, lesbian, and bisexual adults are also more likely than other adults to engage in substance use. Substance Abuse and Mental Health Services Administration, *Sexual Orientation and Estimates of Adult Substance Use and Mental Health: Results from the 2015 National Survey on Drug Use and Health* (Oct. 2016), <http://rb.gy/spxw3m>.

Yet discrimination in the healthcare field leaves many members of LGBTQ community unable to access mental-health or substance-use treatment. There is a long—and disturbing—history of healthcare providers overtly discriminating against patients on the basis of sexual orientation. As late as the 1980s, 40% of physicians reported being “uncomfortable” providing care to lesbian or gay patients. National Institutes of Health, *The Health of Lesbian, Gay, Bisexual, and Transgender People* (2011), <http://rb.gy/opjbmV>. And though “levels of sexual prejudice among health care providers ha[s] declined substantially,” *id.*, lesbian, gay, and bisexual people continue to “face a number of barriers to accessing health care.” *Id.* Those barriers include “outright denial of care,” as well as the “delivery of inadequate care.” *Id.* LGBTQ individuals are significantly more likely than non-LGBTQ individuals to experience “refusal of treatment by health care staff, verbal abuse, and disrespectful behavior, as well as many other forms of failure to provide adequate care.” *See id.*

The outright denial of healthcare on the basis of sexual orientation can, of course, prevent people from accessing the mental-health or substance-use treatment

that is so crucial to ensuring public safety. What is more, even a single experience with a disrespectful, abusive, or hostile healthcare provider can dissuade same-sex attracted persons from seeking medical care. As the National Institutes of Health concluded, “[f]ear of stigmatization or previous negative experiences in the health care system may lead LGBT individuals to delay seeking care.” *Id.*

Public safety demands that *all* people have access to quality healthcare, including mental-health and substance-use treatment. Clarifying that Elliott-Larsen prohibits medical discrimination on the basis of sexual orientation will thus lead to healthier—and safer—communities.

C. Education

Education is perhaps the most effective tool for reducing crime. Young people who fail to complete high school are 3.5 times more likely than high school graduates to be arrested, and more than eight times as likely to be incarcerated. Fight Crime: Invest in Kids, *School or the Streets: Crime and America’s Dropout Crisis* (2008), <http://rb.gy/b28sgj>. High school dropouts are also “far more likely to be victims of crime” than young people who graduate from high school. District Attorney Crime Prevention Foundation, *SARB Program* (2020), <http://rb.gy/1bqgyt>.

That is unsurprising. High school dropouts “face extremely bleak economic and social prospects.” American Psychological Ass’n, *Poverty and High School Dropouts* (May 2013), <http://rb.gy/exmi3l>. They are “more likely to be poor and to suffer from a variety of adverse health outcomes.” *Id.* Poverty and desperation makes high-school

dropouts more likely to “engage in crime.” *Id.* And that same vulnerability makes it more likely that high-school dropouts will become the victims of crime.

Elliott-Larsen helps to ensure equal access to education by prohibiting discrimination in educational institutions. MCL 37.2402(a). In addition to prohibiting discriminatory denial of educational services, Elliott-Larsen prohibits the maintenance of a hostile educational environment. *See C.R. v. Novi Cmty. Sch. Dist.*, No. 14-14531, 2017 WL 528264, at *17 (E.D. Mich. Feb. 9, 2017).³

Clarifying that Elliott-Larsen’s protections apply to sexual-orientation discrimination will help stem a dropout crisis among lesbian, gay, and bisexual youth—and ultimately make our communities safer. By some estimates, almost a third of LGBTQ students drop out of high school, “more than triple the national rate.” American Psychological Ass’n, *Facing the School Dropout Dilemma* at 5 (2012), <http://rb.gy/yrijk2>. Nationwide, a “hostile school climate” is the “main cause of dropout among LGBT high school students.” *Id.* at 6.

Michigan is no exception. In Michigan schools, LGBTQ students “are targets of physical violence and experience a hostile school environment more frequently

³ *Amici* are aware that this Court has yet to determine whether Elliott-Larsen “recognizes a claim for hostile work environment based on anything other than sexual harassment.” *Haynie v. State*, 468 Mich. 302, 318–19, 664 N.W.2d 129, 138 (2003). The same is presumably true for hostile *educational* environment claims. The Court of Appeals has already held that same-sex sexual harassment violates Elliott-Larsen, *Barbour v. Dep’t of Soc. Servs.*, 198 Mich. App. 183, 186, 497 N.W.2d 216, 218 (1993), and a decision by this Court that discrimination “because of . . . sex” encompasses sexual-harassment discrimination will solidify that ruling.

Whether Elliott-Larsen covers hostile-environment claims *absent* sexual harassment is not before this Court. But whatever this Court ultimately concludes about hostile-environment claims, hostile work or educational environments targeting a person’s sexual orientation should be treated identically to hostile-environment claims based on any other protected classification.

than non-LGBTQ peers.” Memorandum from State Superintendent Brian J. Whiston to State Board of Education at 2 (Feb. 23, 2016), <http://rb.gy/mol3e2>. Specifically, Michigan “students who identify as lesbian, gay, or bisexual . . . are 2.3 times more likely to be threatened or injured with a weapon on school property,” and are “2.3 times more likely to skip school because they feel unsafe.” *Id.* These missed school days can disrupt a student’s educational trajectory and put them at increased risk of dropping out.

As a result of bullying, lesbian, gay, and bisexual students are more likely to be involved in physical fights while at school. S.T. Russell, *et al*, *Indicators of Victimization and Sexual Orientation Among Adolescents*, 104 J. Public Health 255-261 (2014). Such students are also “more likely to experience harsh disciplinary treatment,” even though “higher rates of punishment” for same-sex attracted students “do not correlate with higher rates of misbehavior.” Preston Mitchum & Aisha Moodie-Mills, *Beyond Bullying: How Hostile School Climate Perpetuates the School-to-Prison Pipeline for LGBT Youth*, Center for American Progress at 2 (Feb. 2014), <http://rb.gy/uq8rut>. In addition to disrupting a student’s educational trajectory, these factors “cycle . . . LGBT youth . . . into the juvenile system at alarming rates.” *Id.* at 1. From a public-safety standpoint, a toxic mishmash of bullying, discipline, school absences, and justice-involvement is wholly counterproductive. “[M]any LGBT youth drop out of school to avoid a hostile school climate,” increasing the risk of homelessness, poverty, and future justice-involvement. *Id.* at 9.

Under Elliott-Larsen, educational institutions may not deny students “the full utilization of or benefit from” educational services “because of . . . sex.” MCL 37.2402(a). They may not “[e]xclude, expel, limit, or otherwise discriminate against” students “because of . . . sex.” *Id.* at 37.2402(b). For the reasons outlined above, discrimination against same-sex attracted students is discrimination “because of . . . sex.” Clarifying that basic principle will help ensure that all students in Michigan have access to educational opportunity—rendering them less likely to become justice-involved or to become victims of crime.

III. Clarifying that Elliott-Larsen Prohibits Sexual-Orientation Discrimination will Ensure a Fairer Justice System, and Rebuild Trust in the LGBTQ Community

In submitting this brief, *amici* are well-aware of the long history of sexual-orientation discrimination within the criminal legal system. For much of American history, same-sex relationships were criminalized—and prosecuted. As late as 1961, all 50 U.S. states maintained laws prohibiting same-sex relationships. *Lawrence v. Texas*, 539 U.S. 558, 572 (2003). It was not until 2003 that such laws were ruled unconstitutional. *See id.*

Gay, lesbian, and bisexual people also have historically suffered discrimination and mistreatment at the hands of law-enforcement. The modern gay-rights movement has its origins in the Stonewall Uprising, a rebellion against “raids and police brutality” targeting gay bars in New York City. Library of Congress, *Stonewall Era and Uprising*, <http://rb.gy/mk92zy>. In more recent years, there have been instances “of LGBTQ persons being humiliated, beaten, and even raped by

officers.” Michael D. Braunstein, *The Five Stages of LGBTQ Discrimination and Its Effects on Mass Incarceration*, 7 U. Miami Race & Soc. Just. L. Rev. 1, 9–10 (2017). A 2012 survey by Lambda Legal found that 14% of LGBTQ respondents with police contact in the past five years had been verbally assaulted by police. Lambda Legal, *Protected and Served?* at 5 (2012), <http://rb.gy/zv2mew>. Another 3% reported being sexually assaulted, and 2% had been physically assaulted. *Id.* at 6.

The historic legacy of discrimination within the criminal system has undermined public safety. “Violent crime and other hate incidents against lesbian, gay, [and] bisexual . . . Americans are consistently not reported and prosecuted.” Emma Keith & Katie Gagliano, *Lack of Trust in Law Enforcement Hinders Reporting of LGBTQ Crimes*, Center for Public Integrity (Aug. 24, 2018) (“Keith & Gagliano”), <http://rb.gy/d9zjbp>. In large part, that non-reporting is due to the “chronic distrust” same-sex attracted people have in the criminal legal system. *Id.* Distrust is particularly pronounced among older gay, lesbian, and bisexual Americans, who for years were forced to “conceal[] their orientation to avoid criminalization and prosecution.” *Id.*

In recent years, many law-enforcement offices have taken affirmative steps to rebuild trust among LGBTQ communities. The Detroit Police Department—recognizing law enforcement’s “historically troubled relationship with the LGBTQ community”—has maintained a dedicated LGBTQ liaison since 2013. Julie Compton, *OutFront: Lesbian Officer Builds Community Bridges in Detroit*, NBC News (Nov. 10, 2016), <http://rb.gy/ugcp7j>. So, too, have police departments serving a diverse array of

cities across Michigan, including Ann Arbor⁴, Traverse City⁵, Grand Rapids⁶, and Sterling Heights.⁷ The prosecutor’s offices in Wayne, Ingham, Washtenaw and Oakland Counties have partnered with Fair Michigan to prioritize prosecution of crimes targeting members of the LGBTQ community. See Fair Michigan, Press – In the News, <http://rb.gy/3vmaeb>. As part of that partnership, prosecutors work with specialized victim advocates who are attuned to the needs of LGBTQ persons. See Fair Michigan, Justice Project, <http://rb.gy/ang4yy>. There is, in short, a growing (and long overdue) law-enforcement consensus around the urgent need to build trust in LGBTQ communities.

Clarifying that Elliott-Larsen prohibits sexual-orientation discrimination will bolster those efforts. Elliott-Larsen prohibits discrimination in “public service.” MCL 37.2302(a). Pursuant to that provision, Elliott-Larsen bars “disparate treatment” by law-enforcement “on the basis of sex.” *Diamond*, 265 Mich. App. at 690, 696 N.W.2d at 780. Indeed, in ruling that law-enforcement may not engage in “disparate treatment . . . on the basis of sex,” the Court of Appeals emphasized that “stereotypes and biases . . . on the basis of sex in the provision of public services . . . is exactly what [Elliott-Larsen] is intended to address and prevent.” *Id.*

The same logic applies equally to sexual orientation. All Michiganders are “entitled” to equal access to “public services *without regard to sex or sexuality.*”

⁴ City of Ann Arbor, Human Rights Commission, <http://rb.gy/x90zgg>.

⁵ UpNorthLive Newsroom, *Traverse City Police Department Appoints LGBTQ Liaison* (Oct. 11, 2021), <http://rb.gy/wd2cza>.

⁶ Michael Kransz, *Grand Rapids Police Officers, Firefighters Undergo Additional LGBTQ Training*, Mlive.com (Apr. 14, 2021), <http://rb.gy/bolewq>.

⁷ City of Sterling Heights, *LGBTQ Liaison*, <http://rb.gy/lzocou>.

Id. at 688, 779 (emphasis added). Wherever people are treated differently by criminal-justice actors because of their sexual orientation, it is necessarily a manifestation of “stereotypes and biases . . . on the basis of sex.” *Id.* at 690, 780. Again: a gay man who is treated differently by the criminal legal system because of his sexual orientation has suffered “the ultimate” sex-based “stereotype.” *Hively*, 853 F.3d at 346. He has suffered “disparate treatment” for failing to conform to the stereotype that men should be attracted only to women. *See id.*

As applied to the criminal legal system, the “effects” of those “offensive or demeaning stereotypes” are profound. *Miller*, 420 Mich. at 363, 362 N.W.2d 653–54 (Elliott-Larsen is intended to eliminate the “effects of offensive or demeaning stereotypes, prejudices, and biases” because of a person’s “membership in a certain class”). When same-sex attracted people believe that reporting a crime will subject them to ridicule, harassment, disbelief, or even assault, they are less likely to report that crime. *See Keith & Gagliano*. That leads to more victims, fewer prosecutions, and ultimately makes entire communities less safe.

And lest there be any doubt: what the law says matters. When states adopt laws prohibiting hate crimes on the basis of sexual orientation, the probability that such crimes will be reported and prosecuted increases. *Id.* That is presumably because an explicit prohibition on LGBTQ hate crimes people sends a clear message that the government values the lives, safety, and wellbeing of same-sex attracted persons.

So too here. A clear and unequivocal ruling by this Court that Elliott-Larsen prohibits sexual-orientation discrimination will help to mend the historic distrust LGBTQ communities maintain in the criminal legal system. It will facilitate the reporting of crimes. And, in the final analysis, it will keep our communities safer.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully request that the Court reverse the decision of the Court of Claims, and hold that Elliott-Larsen’s prohibition on discrimination “because of . . . sex” applies to discrimination based on sexual orientation.

Respectfully submitted,

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