STATE OF MICHIGAN

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CONST 1963, ART 5, § 29:

CIVIL RIGHTS COMMISSION:

ELLIOTT-LARSEN CIVIL RIGHTS ACT:

Validity of interpretative statement interpreting term "sex" as used in Elliott-Larsen Civil Rights Act.

The Michigan Civil Rights Commission's Interpretative Statement 2018-1, which concludes that the term "sex" as used in the Elliott-Larsen Civil Rights Act includes sexual orientation and gender identity, is invalid because it conflicts with the original intent of the Legislature as expressed in the plain language of the Act, and as interpreted by Michigan's courts.

Opinion No. 7305

July 20, 2018

The Honorable Arlan B. Meekhof
State Senator
The Capitol
Lansing, MI 48909

The Honorable Tom Leonard
State Representative
The Capitol
Lansing, MI 48909

You have asked whether the Michigan Civil Rights Commission is authorized to interpret the term "sex" in the Elliott-Larsen Civil Rights Act to include sexual orientation and gender identity.

Michigan's Constitution entrusts the Legislature, and not executive agencies or commissions, with the authority to change, extend, or narrow statutes. 1963 Const, art 4, § 1. Such changes to the law must be signed by the Governor (or passed with enough support to override a veto by the Governor). 1963 Const, art 4, § 33. And under certain procedures, the people themselves may change the law.

1963 Const, art 2, § 9. Agencies are bound by those laws; any authority they have to interpret a statute cannot be used to change the statute or to enforce the statute in a way that conflicts with the law's plain meaning. For example, the Michigan Transportation Commission, a six-member executive agency appointed by the Governor (similar to the Michigan Civil Rights Commission), cannot modify the road-funding allocations set out in law. No, only the Legislature may modify highway funding allocations. See 1951 PA 51; MCL 247.660. As another example, the Michigan Commission on Agriculture and Rural Development, a five-member executive agency appointed by the Governor, may recommend land-use policies but cannot change what counts as "agricultural land" under the Michigan Zoning Enabling Act. MCL 125.3102(a). Under Michigan law, agencies and commissions have limited authority to interpret the statutes they administer, and their interpretations are entitled to respectful consideration, but an agency interpretation is invalid if it conflicts with the plain language of the statute.

Here, the Commission's interpretation conflicts with the Act's plain language: ELCRA's text prohibits discrimination based on sex but does not cover distinctions based on sexual orientation or gender identity. Because the Commission's interpretation is inconsistent with ELCRA, its interpretive statement is invalid, and the Commission may not rely on it to enforce ELCRA. Although ELCRA expressly defines discrimination based on sex to include sexual harassment that occurs in the context of employment, public accommodations, public services,

education, or housing, ELCRA does not define discrimination based on sex to include sexual orientation or gender identity.

I. Consistent with Michigan's Constitution, the Legislature enacted ELCRA.

The Elliott-Larsen Civil Rights Act was enacted in 1976, 1976 PA 453, and it bans discrimination (in employment, housing, public accommodations, public service, and educational facilities) based on ten enumerated categories: "religion, race, color, national origin, age, sex, height, weight, familial status, or marital status as prohibited by this act, is recognized and declared to be a civil right." MCL 37.2102(1); see also, Const 1963, art 1, § 2. The Act does not define the word "sex," but it was amended, first in 1978 and then in 1980, to specify that two types of conduct count as discrimination based on sex. 1978 PA 153; 1980 PA 202. First, with respect to employment, it provides that " 'sex' includes, but is not limited to, pregnancy, childbirth, or a medical condition related to pregnancy or childbirth that does not include nontherapeutic abortion not intended to save the life of the mother." MCL 37.2201(d); see also MCL 37.2202(d) (identifying prohibited acts). Second, it provides that "[d]iscrimination because of sex includes sexual harassment." MCL 37.2103(i). "Sexual harassment means unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct or communication of a sexual nature . . . ." *Id.*

The Michigan Civil Rights Commission is the executive agency charged in Michigan's Constitution with "investigat[ing] alleged discrimination against any

person because of religion, race, color or national origin in the enjoyment of the civil rights guaranteed by law and by this constitution . . . ." Const 1963, art 5, § 29. In addition to those four categories listed in the Constitution, the Commission is also authorized by ELCRA to issue orders addressing violations of ELCRA. MCL 37.2605(1).

On May 21, 2018, the Commission issued an interpretive statement asserting that the language "because of . . . sex" in ELCRA is "ambiguous." Interpretive Statement 2018-1 (Attachment A). The Commission based this finding of ambiguity on its belief that "the definition of 'discrimination because of . . . sex' under Michigan law has to date been interpreted to be less inclusive than the definitions of other protected classes, and in a way that is contrary to the plain meaning of the language in this context." *Id.* As a result, the Commission stated that "as used in the Elliott Larsen Civil Rights Act 'discrimination because of . . . sex' includes discrimination because of gender identity and discrimination because of sexual orientation." *Id.* The Commission then said that it would "process all complaints alleging discrimination on account of gender identity and sexual orientation as complaints because of sex" and therefore prohibited by the Act. *Id.*[1]

[1] The Civil Rights Commission was invited to provide comments regarding this opinion request and did so. Comments were also received from Representative Sam Singh and Senator Jim Ananich on behalf of the Michigan House and Senate Democratic Caucuses, and from Mr. Jay Kaplan on behalf of the American Civil Liberties Union of Michigan.

II. ELCRA covers discrimination based on sex, not based on sexual orientation or gender identity.

The starting point for answering your question is ELCRA's plain language, because the Commission's authority extends only to enforcing civil rights guaranteed by the Constitution or by law, and not to creating new civil rights. The Commission's authority to consider complaints relating to sexual orientation or gender identity therefore depends on whether ELCRA covers those categories.

Michigan law governing statutory interpretation focuses on the plain and ordinary meaning of the statutory text. MCL 8.3a ("All words and phrases shall be construed and understood according to the common and approved usage of the language . . . ."); *Jesperson v Auto Club Ins Ass'n*, 499 Mich 29, 34 (2016) ("When interpreting statutory language, we begin with the plain language of the statute. We must give effect to the Legislature's intent, and the best indicator of the Legislature's intent is the words used.") (citations and quotation marks omitted). "When the plain and ordinary meaning of statutory language is clear, judicial construction is neither necessary nor permitted." *Pace v Edel-Harrelson*, 499 Mich 1, 7 (2016).

The fact that a word is undefined does not make it ambiguous. *Terrien v Zwit*, 467 Mich 56, 75–76 (2002) (rejecting as "remarkable" the proposition "that the lack of an explicit internal definition of a term somehow equates to ambiguity"). Instead, "[w]hen a statute does not expressly define a term, courts may consult dictionary definitions to ascertain its ordinary and generally accepted meaning."

Pace, 499 Mich at 7. And because the goal is to " 'ascertain the original meaning' " of the statute, "it is best to consult a dictionary from the era in which the legislation was enacted." *In re Certified Question from United States Court of Appeals for Ninth Circuit (Deacon v Pandora Media, Inc)*, 499 Mich 477, 484–85 (2016), quoting *Cain v Waste Mgt, Inc (After Remand)*, 472 Mich 236, 247 (2005).

A. The word "sex" refers to the biological difference between males and females and not to the distinct concepts of sexual orientation or gender identity.

The word "sex" was understood in 1976, when ELCRA was enacted, to refer to the biological differences between males and females, not to refer to the concepts of sexual orientation or gender identity. For example, the 1969 edition of the *American Heritage Dictionary* defined "sex" as "[t]he property or quality by which organisms are classified according to their reproductive functions," and as "[e]ither of two divisions, designated *male* and *female*, of this classification." Similarly, the 1975 edition of *Webster's New Collegiate Dictionary* defined "sex" as "either of two divisions of organism distinguished respectively as male or female," and as "the sum of the structural, functional, and behavioral characteristics of living beings that subserve reproduction by two interacting parents and that distinguish males and females." Those definitions are unambiguous and did not include the concepts of sexual orientation or of gender identity; indeed, common dictionaries from 1976 or earlier (such as the two cited above) typically did not include entries for those concepts. E.g., *Hively v Ivy Tech Community College of Indiana*, 853 F3d 339, 350 n 5 (CA 7, 2017) (en banc) ("[T]he term 'sexual orientation' was not defined in the

dictionary around the time of Title VII's enactment [in 1964]."); accord *id.* at 357 (Posner, J, concurring) (" 'Sex' in 1964 meant gender, not sexual orientation."). In short, the contemporaneous understanding of the word "sex" was that it referred to the reproductive functions of organisms (i.e., to biological distinctions between males and females).

In fact, the words "sex," "sexual orientation," and "gender identity" continue, in 2018, to express different concepts. Compare Dictionary.com (defining "sex" as "either the male or female division of a species, especially as differentiated with reference to the reproductive functions" and as "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"), with Dictionary.com (defining "sexual orientation" as "one's natural preference in sexual partners"), and Dictionary.com (defining "gender identity" as "a person's inner sense of being male or female") (all web pages last visited June 11, 2018); see also merriam-webster.com (similar definitions); ahdictionary.com (American Heritage Dictionary, with similar definitions). These definitional distinctions confirm that prohibiting discrimination because of "sex" (i.e., because of status as a male or female of a species) conveys a different idea than prohibiting discrimination because of "sexual orientation" or because of "gender identity."

B. Numerous contemporaneous interpretations of the word "sex" confirm that it was originally understood to refer to biological sex, not to sexual orientation or gender identity.

Michigan law also considers contemporaneous interpretation of words as shedding light on their original meaning. See *People v Pickens*, 446 Mich 298, 319 (1994) ("Strong deference is due contemporaneous and longstanding interpretations of the constitution because they most likely reflect its original understanding."); see also *McPherson v Blacker*, 92 Mich 377, 383 (1892). Twenty-five years ago, the Michigan Court of Appeals considered the meaning of the word "sex," and did so in the specific context of the Elliott-Larsen Civil Rights Act. In *Barbour v Department of Social Services*, 198 Mich App 183 (1993), a plaintiff asserted that harassment based on his sexual orientation violated the Act. The Michigan Court of Appeals rejected that conclusion, holding instead that "harassment or discrimination based on a person's sexual orientation is not an activity proscribed by the act." *Id.* at 185. The court thus did not read the phrase "because of sex" in the Act to mean because of sexual orientation or because of gender identity. *Id.* at 184 n 1 (emphasizing the word "sex" in the statutory text); see also *Robinson v Ford Motor Co*, 277 Mich App 146, 156–57 (2007) (" '[S]ex,' is most commonly defined as, 'either the female or male division of the species, esp. as differentiated with reference to the reproductive functions' and 'the sum of the structural and functional differences by which the female and male are distinguished, or the phenomena or behavior dependent on these differences.' ").

Barbour's interpretation remains binding law in Michigan, as the Sixth Circuit has recognized, *Kalich v AT & T Mobility, LLC*, 679 F3d 464, 470 (CA 6, 2012) (quoting *Barbour* for the proposition that "[h]arassment or discrimination because of a person's sexual orientation or perceived sexual orientation is not prohibited conduct under ELCRA"), and so it binds the Civil Rights Commission. MCR 7.215(C)(2); MCR 7.215(J)(1). In addition, the Michigan Supreme Court, which is very familiar with the plain language of ELCRA, has observed that "the [EL]CRA" "neither provides a cause of action for sexual orientation discrimination nor grants municipalities the authority to create one." *Mack v City of Detroit*, 467 Mich 186, 196 (2002); *see also id.* at 196–197 ("No [ ] legislative act has recognized sexual orientation discrimination claims."); *id.* at 196 n 10 ("[EL]CRA does not recognize sexual orientation discrimination"). These statements further confirm that ELCRA's plain language is clear and that it does not include sexual orientation as a protected class.

The Court of Appeals' interpretation in *Barbour* and the Supreme Court's interpretation in *Mack* are not outliers. To the contrary, every federal regional circuit asked to read nearly identical language in the federal Title VII statute—language prohibiting discrimination "based on sex"—interpreted that same word in the same way when it first (i.e., most contemporaneously) examined the issue. 42 USC 2000e-2 (addressing discriminating in employment). Each concluded that Title VII's prohibition on discrimination based on "sex" did not cover discrimination based on sexual orientation:

- *DeSantis v Pac Tel & Tel Co, Inc*, 608 F2d 327, 329–30 (CA 9, 1979) ("Title VII's prohibition of 'sex' discrimination applies only to discrimination on the basis of gender and should not be judicially extended to include sexual [orientation.]") (footnote omitted);

- *Blum v Gulf Oil Corp*, 597 F2d 936, 938 (CA 5, 1979) (per curiam) ("Discharge for [sexual orientation] is not prohibited by Title VII.");

- *Williamson v AG Edwards & Sons, Inc*, 876 F2d 69, 70 (CA 8, 1989) ("Title VII does not prohibit discrimination against [gays].");

- *Wrightson v Pizza Hut of Am, Inc*, 99 F3d 138, 143 (CA 4, 1996) ("Title VII does not afford a cause of action for discrimination based upon sexual orientation");

- *Fredette v BVP Mgt Assoc*, 112 F3d 1503, 1510 (CA 11, 1997) ("We do not hold that discrimination because of sexual orientation is actionable.");

- *Higgins v New Balance Athletic Shoe, Inc*, 194 F3d 252, 259 (CA 1, 1999) ("Title VII does not proscribe harassment simply because of sexual orientation.");

- *Simonton v Runyon*, 232 F3d 33, 35 (CA 2, 2000) ("The law is well-settled in this circuit and in all others to have reached the question that Simonton has no cause of action under Title VII because Title VII does not prohibit harassment or discrimination because of sexual orientation.");

- *Hamner v St Vincent Hosp & Health Care Ctr, Inc*, 224 F3d 701, 704 (CA 7, 2000) ("[H]arassment based solely upon a person's sexual preference or orientation (and not on one's sex) is not an unlawful employment practice under Title VII.");

- *Bibby v Philadelphia Coca Cola Bottling Co*, 260 F3d 257, 261 (CA 3, 2001) ("Title VII does not prohibit discrimination based on sexual orientation.");

- *Medina v Income Support Div, New Mexico*, 413 F3d 1131, 1135 (CA 10, 2005) ("We construe Ms. Medina's argument as alleging she was discriminated against because she is a heterosexual. Title VII's protections, however, do not extend to harassment due to a person's sexuality.");

- *Vickers v Fairfield Med Ctr*, 453 F3d 757, 762 (CA 6, 2006) ("As is evident from the above-quoted language, sexual orientation is not a prohibited basis for discriminatory acts under Title VII.").

As these decisions show, courts consistently understood, from the 1970s to the 2000s, that there is a difference between classifying someone based on sex and classifying based on sexual orientation.

The same is true with regard to gender identity. For more than 50 years after the inclusion of "sex" in Title VII (i.e., from 1964 to 2017), every federal circuit to directly address whether "based on sex" meant "based on gender identity" held that Title VII does not prohibit discrimination based on gender identity. See *Holloway v Arthur Andersen & Co*, 566 F2d 659, 662 (CA 9, 1977) (rejecting the argument that "that 'sex" as used [in Title VII] is [synonymous] with 'gender,' and gender would encompass transsexuals" because, "[g]iving the statute its plain meaning, this court concludes that Congress had only the traditional notions of 'sex' in mind"); *Sommers v Budget Marketing, Inc*, 667 F2d 748, 750 (CA 8, 1982) (per curiam) (in light of "the plain meaning" of the term "sex," Title VII does not "include transsexualism"); *Ulane v E Airlines, Inc*, 742 F2d 1081, 1084–1085 (CA 7, 1984) (rejecting holding that "sex" as used in Title VII covers "sexual identity" and prohibits discrimination against a transsexual, and stating, "The phrase in Title VII prohibiting discrimination based on sex, in its plain meaning, implies that it is unlawful to discriminate against women because they are women and against men because they are men.").

To be sure, two federal circuits reversed course this year (more than half a century after Title VII's enactment) on the issue of sexual orientation. E.g., *Zarda v Altitude Express, Inc*, 883 F3d 100, 114 (CA 2, 2018) (en banc) (holding that Title

VII bars discrimination based on sexual orientation); *Hively v Ivy Tech Community College of Indiana*, 853 F3d 339 (CA 7, 2018) (en banc) (holding that Title VII covers discrimination based on sexual orientation). And the Sixth Circuit has held "that discrimination on the basis of transgender and transitioning status violates Title VII." *Equal Employment Opportunity Comm v RG & GR Harris Funeral Homes, Inc*, 884 F3d 560, 574–75 (CA 6, 2018). But those interpretations were less contemporaneous, and so less persuasive as to the original meaning of the word "sex" in 1964 (or 1976). As the Michigan Supreme Court has explained, courts are expected to "ascertain the original meaning . . . when the statute was enacted," *Cain*, 472 Mich at 247, so it is the older cases, not the newer ones, that offer the most insight into the original public meaning of the word "sex."

C. Recent federal cases expanding on the meaning of the word "sex" under federal law are not consistent with Michigan's principles of statutory interpretation.

More fundamentally, these newer federal decisions interpreting Title VII do not follow Michigan's principles of statutory interpretation. And "[w]hile federal precedent may often be useful as guidance in this Court's interpretation of laws with federal analogues, such precedent cannot be allowed to rewrite Michigan law." *Garg v Macomb Co Cmty Mental Health Services*, 472 Mich 263, 283 (2005), opinion amended on denial of rehearing (July 18, 2005). Michigan law remains rooted in the original statutory text. E.g., MCL 8.3a; *Jesperson*, 499 Mich at 34 (" 'We must give effect to the Legislature's intent, and the best indicator of the Legislature's intent is the words used.' "); *People v McKinley*, 496 Mich 410, 415 (2014) ("If the

statutory language is unambiguous, no further judicial construction is required or permitted.").

This interpretive approach recognizes that it is the Legislature that is authorized to enact and change laws, not the other branches of government. But these recent federal decisions do not rely on legislative intent or contend that the word "sex" would have been understood to mean "sexual orientation" or "gender identity" at the time of enactment. Rather, as Judge Posner acknowledged in *Hively*, those interpretations are instances where "judges rather than members of Congress[] are imposing on a half-century-old statute a meaning of 'sex discrimination' that the Congress that enacted it would not have accepted." 853 F3d at 357 (Posner, J, concurring); see also *id.* at 353 (calling this process "judicial interpretive updating"). As he acknowledged, "Title VII does not mention discrimination on the basis of sexual orientation, and so an explanation is needed for how 53 years later the meaning of the statute has changed and the word 'sex' in it now connotes both gender and sexual orientation." *Id.* The explanation that he offers is that "[w]e understand the words of Title VII differently . . . because we live in a different era, a different culture." *Id.* at 357 (emphasis removed). Similarly, the Second Circuit majority did not deny the contention "that it is not 'even remotely plausible that in 1964, when Title VII was adopted, a reasonable person competent in the English language would have understood that a law banning employment discrimination 'because of sex' also banned discrimination because of sexual orientation[.]' " *Zarda*, 883 F3d at 114, quoting *Hively*, 853 F3d at 362

(Sykes, J., dissenting). Instead, these circuit decisions relied on the premise that "legal doctrine evolves." *Zarda*, 883 at 113; *Hively*, 853 F3d at 340–341 (accepting invitation "to take a fresh look at our position" in light of two decades of legal developments); *EEOC v RG & GR Harris Funeral Homes*, 884 F3d at 573 (distinguishing a 1977 circuit precedent because it did not "anticipat[e]" an evolution in legal doctrine).

But under Michigan law, the mechanism for evolution in statutory law is through legislation. Const 1963, art 4, § 1; *id.,* art 2, § 9; see also, e.g., *Barrett v Kirtland Cmty Coll*, 245 Mich App 306, 322 (2001) (declining to extend the prohibition of discrimination based on sex to discrimination based on romantic jealousy, explaining that "[h]ad our Legislature intended the [EL]CRA to protect against discrimination based on romantic jealousy, it could have expressly stated that intent within its statutory definitions"). It is not the role of the Civil Rights Commission to "update" a statute; rather, " '[i]t is the legislators who establish the statutory law because the legislative power is exclusively theirs.' " *Coalition of State Emp Unions v State*, 498 Mich 312, 330 n 40 (2015), quoting *Cameron v Auto Club Ins Ass'n*, 476 Mich 55, 65 (2006); see also *Robertson v DaimlerChrysler Corp*, 465 Mich 732, 761 (2002) (refusing to treat words as if they were "written on water" and rejecting the view "that courts may correct laws that they view as inadequate" because "[i]t is only by interpretations of the law that are in accord with the words of the lawmaker—that is, interpretations in which judges look *outside* themselves

for a source of law—that the decisions of courts are truly removed from the realm of politics and policymaking").

Moreover, Michigan courts interpreting ELCRA have not expanded the meaning of "sex" in the way that a few federal courts interpreting Title VII have. The evolving legal doctrine that these circuits relied on stems largely from the U.S. Supreme Court's plurality opinion in *Price Waterhouse v Hopkins*, 490 US 228 (1989), in which four justices concluded that "[i]n the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender." *Id.* at 250 (plurality opinion). The plurality further concluded that "stereotyped remarks can certainly be *evidence* that gender played a part." *Id.* at 251 (plurality opinion).

Michigan courts have cited *Price Waterhouse*, but have not extended it to reach the issues of sexual orientation or gender identity. For example, Michigan courts have cited it for analysis on how to approach cases where an employer has both valid reasons and discriminatory reasons for adverse employment actions, e.g., *Harrison v Olde Fin Corp*, 225 Mich App 601, 612 (1997), and for what constitutes direct evidence, *DeBrow v Century 21 Great Lakes, Inc*, 463 Mich 534, 541 (2001) (per curiam) (citing Justice O'Connor's concurrence). But the Michigan cases that have cited *Price Waterhouse* have not extended ELCRA to require treating discrimination based sexual orientation or gender identity as discrimination based on sex. As a result, Michigan law on the meaning of discrimination based on sex has not evolved in the way that federal law may be evolving.

To be clear, ELCRA protects everyone, regardless of sex, sexual orientation, or gender identity, from sexual harassment. ELCRA specifically states that "[d]iscrimination because of sex includes sexual harassment," and specifically forbids unwelcome sexual advances, requests for sexual favors, and other conduct or communication of a sexual nature in the context of employment, public accommodations, public services, education, or housing. MCL 37.2103(i); see also *Barbour*, 198 Mich App at 186 (allowing a claim based on unwelcome sexual advances to proceed); *Robinson*, 277 Mich App at 153 ("The language of the [EL]CRA does not exclude same-gender harassment claims."). But this language also shows that the Legislature knows how to expand what should be included as discrimination because of sex. Indeed, the Legislature has twice expressly adopted such expansions: first, it amended ELCRA to provide that employment-based discrimination because of sex includes discrimination because of pregnancy or childbirth, MCL 37.2201(d), and second, it amended ELCRA to expressly state that discrimination because of sex includes sexual harassment, MCL 37.2103(i).

The Legislature may, if it chooses, add the new categories of sexual orientation and gender identity to the statute. But as noted in your request, legislation addressing this precise issue has been introduced every year for the past 15 years, and each year the Legislature has declined the invitation to add sexual orientation and gender identity to protected categories under ELCRA. See also *Bibby*, 260 F3d at 261 ("Congress has repeatedly rejected legislation that would have extended Title VII to cover sexual orientation."). And the Legislature's

rejection of these proposals cannot be because the Legislature thinks those categories are already protected; *Barbour* specifically holds that sexual orientation is not protected, and no binding Michigan case holds that gender identity is protected. The fact that the branch of our government with the authority to enact laws has declined to extend ELCRA's coverage to reach sexual orientation and gender identity means that an executive agency (i.e., the Civil Rights Commission) necessarily lacks the authority to achieve that extension through its limited authority to enforce the law, not to make it.

III. The Civil Rights Commission's statement is invalid because it is contrary to ELCRA's plain language.

The Civil Rights Commission is authorized to interpret ELCRA, *Clonlara, Inc v State Bd of Ed*, 442 Mich 230, 240 (1993), and generally its interpretation is entitled to "respectful consideration." *In re Complaint of Rovas Against SBC Michigan*, 482 Mich 90, 103 (2008). But an agency's interpretation "cannot conflict with the Legislature's intent as expressed in the language of the statute at issue." *Id.* As the Michigan Supreme Court has explained, "[a]n interpretation not supported by the enabling act is an invalid interpretation, not a rule." *Clonlara, Inc*, 442 Mich at 243. "'Interpretive 'rules' are invalid," the Court explained, "if they extend or modify the statute . . . ." *Id.* at 243 n 26; see also *Schinzel v Dep't of Corr*, 124 Mich App 217, 221 (1983) (explaining that a policy directive "cannot be deemed an interpretive statement" of what a word means if "it changes that term's very definition"). Thus, even though interpretive statements by definition do "not have

the force and effect of law," MCL 24.207(h) (excluding interpretive statements and guidelines from the APA's definition of a "rule"); *Faircloth v Family Indep Agency*, 232 Mich App 391, 404 (1998) ("an interpretive statement is not, by definition, a rule under the APA"), they are invalid if, as here, they are not supported by the underlying statute or if they attempt to modify that statute.

As explained above, neither the plain text of ELCRA nor Michigan case law supports the Commission's interpretive statement. That statement therefore is invalid. See, e.g., *Michigan Dep't of Civil Rights v General Motors, Corp*, 93 Mich App 366, 373 (1979) (stating that the Civil Rights Commission "cannot legislate or impose substantive duties or penalties beyond the scope of the legislative enactment authorizing it to prohibit religious discrimination").

The significance of the issues addressed in this opinion to the Commission and many Michigan residents is not lost on this office. But again, the power to change Michigan law lies only with the Legislature, 1963 Const, art 4, § 1, or the people themselves through initiative, 1963 Const, art 2, § 9, and not with Executive branch agencies like the Commission, Const 1963, art 3, 2. As an analogy, many people would encourage the Michigan Transportation Commission to expand and modify PA 51 road funding allocation to various urban or rural communities or might encourage the Michigan Commission of Agriculture and Rural Development to expand state laws relating to zoning. But – again, only the Legislature (or the people themselves, by initiative) may do so. And, without a doubt the issues of

sexual orientation, gender identity, and the role of the Michigan Civil Rights Commission are significant issues of public policy.

However, it is my opinion that the Michigan Civil Rights Commission's Interpretative Statement 2018-1, which concludes that the term "sex" as used in the Elliott-Larsen Civil Rights Act includes sexual orientation and gender identity, is invalid because it conflicts with the original intent of the Legislature as expressed in the plain language of the Act, and as interpreted by Michigan's courts.

Sincerely,

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