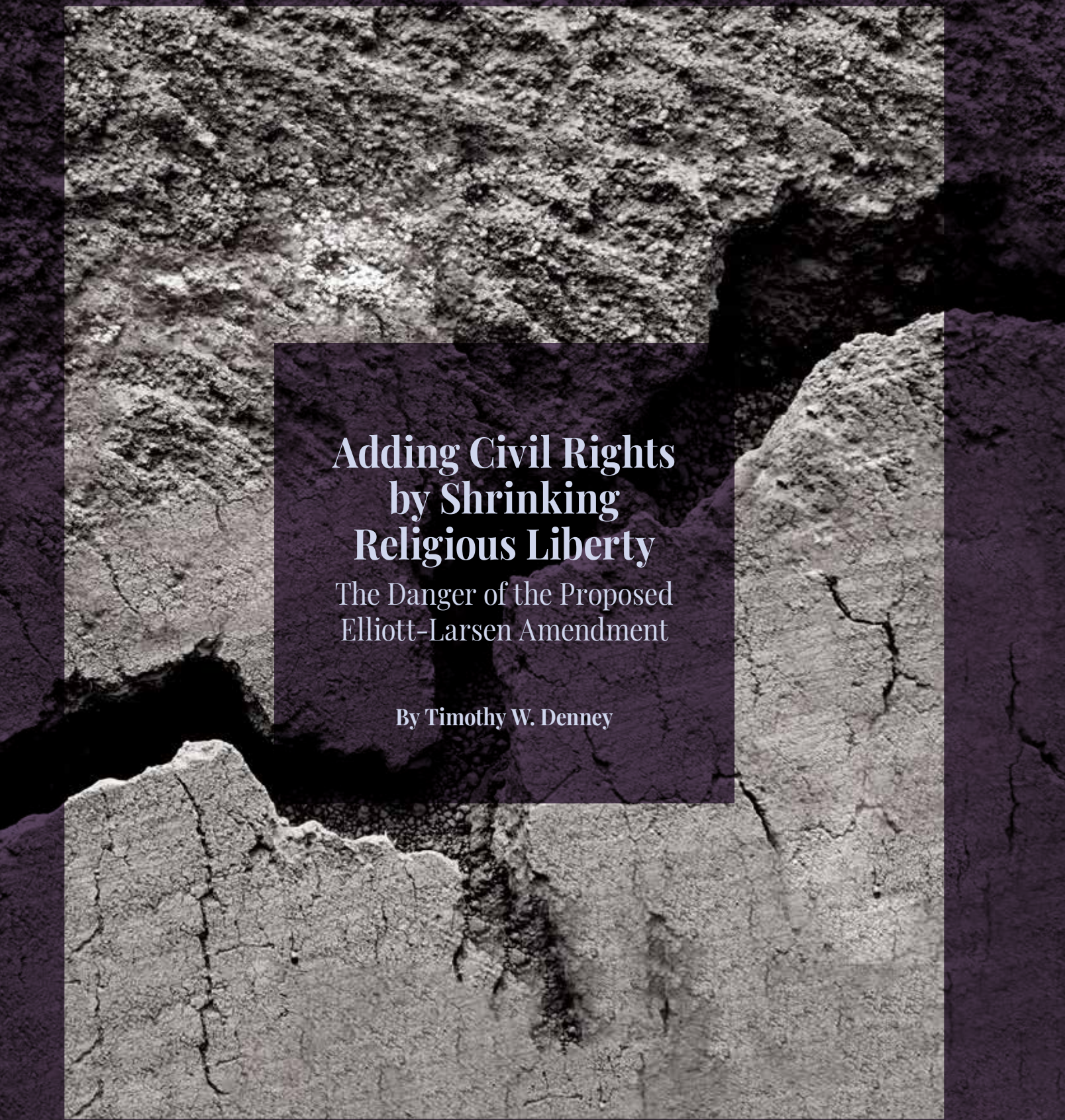

Adding Civil Rights by Shrinking Religious Liberty

The Danger of the Proposed Elliott-Larsen Amendment

By Timothy W. Denney

When is it wrong for the government to broaden the civil rights of its citizens? When the government seeks to take away the civil rights of others to do so.

That is the case with respect to a proposal that seeks to amend Michigan's Elliott-Larsen Civil Rights Act by defining the term "religion" and adding civil rights prohibiting discrimination based on sexual orientation, gender identity, and gender expression, all of which arguably conflict with religious liberty.

Michigan's history of religious liberty protection

The protection of religious liberty has always held a prominent place in the legal history of Michigan and our nation. From Michigan's creation as a territory, which arose out of the adoption of the Northwest Ordinance of 1787, it was recognized that religion and morality were "necessary to good government and to the happiness of mankind."[1] Congress considered religious liberty so important that the Northwest Ordinance states that "the fundamental principles of civil and religious liberty…form the basis whereon those republics, their laws and constitutions, are erected."[2] Unsurprisingly, the ordinance's very first article was dedicated solely to the protection of religious liberty.[3]

Michigan continued its high regard for religious liberty by expressly enshrining its protection in the constitution of 1963.[4] The preamble to the constitution indicates that its drafting arose from the Michigan people being "grateful to Almighty God for the blessings of freedom, and desiring to secure these blessings undiminished to ourselves and our posterity."[5] In the 1970s, the significance of religious liberty was again recognized in the Elliott-Larsen Civil Rights Act, which included religion as one of the original list of protected classes.[6]

The Michigan Supreme Court has also strongly emphasized the importance of religious liberty protections:

> The prominence of religious liberty's protection in the Bill of Rights is no historical anomaly, but the consequence of America's vigorous clashes regarding religious freedom. The First Amendment's protection of religious liberty was born from the fires of persecution, forged by the minds of the Founding Fathers, and tempered in the struggle for freedom in America.
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> The Founders understood that this zealous protection of religious liberty was essential to the "preservation of a free government."
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> The Founding Fathers then reserved special protection for religious liberty as a fundamental freedom in the First Amendment of the constitution. This fortification of the right to the free exercise of religion was heralded as one of the Bill of Rights' most important achievements.[7]

The initiative proposal

A proposal filed with the Michigan Board of Canvassers last year seeks to amend the Elliott-Larsen Civil Rights Act in two ways.[8] First, it would define "religion" to state that it "includes the religious beliefs of an individual" and second, it would add sexual orientation, gender identity, and gender expression as new grounds of protection.[9] Signed petitions have been submitted to the Michigan Board of Canvassers, which has not yet formally certified them. If the signatures are certified, the petition will be submitted to the legislature; if it declines to adopt it, the initiative will be placed on the 2022 ballot for voters to decide.[10]

The shrinking definition of religion

Defining religion in a civil rights law as including religious beliefs may seem harmless at first, but further analysis reveals otherwise. The narrowness of the new proposal's definition of religion is made starkly evident by contrasting it to the broad definition of religion contained in Title VII of the Civil Rights Act of 1964, as codified at 42 USC 2000e(j) which states:

> The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

Thus, Title VII defines religion to include protection of both religious beliefs and religious observances and practices. Other states in our region broadly define religion in their civil rights laws to protect both religious beliefs and religious observances and practices.[11] Civil rights laws that protect only religious beliefs are conspicuously ineffective. So why would proponents of a proposal that seeks to protect sexual orientation, gender

At a Glance

A proposal that seeks to amend Michigan's Elliott-Larsen Civil Rights Act by defining the term "religion" and prohibiting discrimination based on sexual orientation, gender identity, and gender expression arguably conflicts with religious liberty.

identity, and gender expression at the same time define religion to protect only religious beliefs and not religious observances and practices?

The effort to define religion to protect only religious beliefs may be in recognition of the conflict that might result from proposed protections for sexual orientation, gender identity, and gender expression and a broader definition of religion. Given the express protection of religious observances and practices as well as beliefs in Title VII, the initiative's absence of any reference to protection for religious conduct in its proposed definition for religion is glaring. This omission runs directly contrary to the nation and state's historically strong legal protections for religious liberty.

The direct conflict problem

A fundamental problem with the initiative is that it proposes to add protections for sexual orientation, gender identity, and gender expression that conflict with existing rights of religious liberty. For example, many religious individuals and religious groups believe that same-sex sexual conduct is contrary to their sincerely held religious beliefs. As a result, the addition of sexual orientation to the bases of proscribed discrimination under Elliott-Larsen would compel religious employers, religious educational institutions, and other institutions subject to the act to — in the view of the religious organizations — affirm conduct which violates their religious beliefs. As noted below, a similar direct conflict exists with laws concerning gender identity and gender expression.

Undermining religious liberty

Unfortunately, civil rights laws and policies in other states protecting sexual orientation, gender identity, and gender expression have been used as a sword against religious organizations and individuals. For example, Atlanta Fire Chief Kelvin Cochran was fired after authoring a book in which he expressed a traditional Christian viewpoint on same-sex sexual conduct.[12] There was no allegation that Cochran ever discriminated against employees based on sexual orientation; a federal court found that the city's rules for pre-clearance of outside publications violated constitutional standards.[13]

In another example, the state of Colorado attempted to use its civil rights law protecting sexual orientation to punish baker Jack Phillips, who declined to create a custom cake to celebrate a same-sex marriage ceremony that was contrary to his religious beliefs. In that case, the U.S. Supreme Court found that Colorado's enforcement effort violated the First Amendment because of its anti-religious hostility.[14] Following his victory, Phillips has been subjected to similar suits under the same civil rights law, suggesting a concerted effort to drive him out of business due solely to his sincerely held religious beliefs.[15]

In cases across the country, sexual orientation protections have been used to interfere with the free exercise of religion, including religious business owners involved in the creation or provision of creative expression products or services, including a photographer[16] and florist.[17] Unfortunately, these laws are a weapon of choice to punish religious groups and individuals that refuse, from their perspective, to affirm same-sex sexual conduct.

Michigan is no stranger to cases like this. Country Mill Farm in Eaton County, owned by Stephen Tennes, declined for religious reasons to host weddings between same-sex couples. After expressing his position on social media, Country Mill was excluded from the nearby East Lansing farmers' market based on sexual orientation protections of the city's civil rights ordinance. The U.S. District Court for the Western District of Michigan granted an injunction against the city based on the likelihood of a First Amendment violation, requiring that Country Mill Farm be reinstated into the farmers' market.[18]

State civil rights laws providing special legal protection based on gender identity and gender expression have also been wielded in a manner that would pose a threat to faith-based ministries. In *Downtown Soup Kitchen d/b/a Hope Center v Municipality of Anchorage*, a transgender woman used a gender identity provision in a local civil rights ordinance to try to insist on staying in a faith-based shelter occupied mostly by women escaping from sex trafficking or being battered by men.[19]

If gender identity and gender expression are given protection, religious ministries and businesses with religious owners will be pressured to allow transgender women to share female restrooms, locker rooms, and showers.[20] This could include schools as well. For many religious individuals, employers, schools, and other organizations, this practice would violate fundamental religious principles of modesty, personal dignity, and respect for gender — which is considered by them to be a matter of the creator's choice, not individual choice. Given judicial decisions in other jurisdictions holding that schools could be forced to permit transgender women to use female restrooms, the potential threat to religious liberty is real and dangerous.[21] The Michigan Court of Appeals has already concluded that female gym members have no protection under Elliott-Larsen against being forced to share locker rooms with transgender women.[22]

Despite *Bostock* ruling, issue not moot

Some might think this issue is moot after the U.S. Supreme Court in June 2020 ruled in *Bostock v. Clayton County* (and its companion cases) that the term "sex" in Title VII also included protection against employment termination based on sexual orientation or transgender status.[23] That is not so.

The Michigan Supreme Court has already ruled that the Elliott-Larsen Civil Rights Act does not include protection

Federal and state courts have ruled that the First Amendment requires a constitutional exemption from state employment laws for religious employers with respect to so-called ministerial employees, which includes religious ministers and others employed by religious organizations to communicate their message.

based on sexual orientation.[24] That ruling reflects the highest controlling authority on the interpretation of state law, an interpretation that cannot be overruled by federal courts.[25]

Moreover, interpreting the word "sex" in the state's civil rights law as protecting sexual orientation, gender identity, and gender expression would impose a much greater burden on religious liberty than the *Bostock* case for a few reasons. First, Title VII only applies to employers with 15 or more employees[26] while Michigan's civil rights law applies to *all* employers.[27] In Michigan, more than 200,000 employers have fewer than 15 employees,[28] so hundreds of thousands of additional employers would be impacted if Michigan's law were interpreted to include sexual orientation, gender identity, and gender expression. Second, Title VII has a broader exemption for religious employers making employment decisions based on their religious convictions.[29] In sharp contrast, Elliott-Larsen has no exemption for religiously based employment decisions, meaning that absent a constitutionally required exemption, all religious employers could be burdened.[30] This could mean religious organizations would be forced to hire or retain employees who openly espouse and promote beliefs contrary to the organization's beliefs.

Federal and state courts have ruled that the First Amendment requires a constitutional exemption from state employment laws for religious employers with respect to so-called ministerial employees, which includes religious ministers and others employed by religious organizations to communicate their message.[31] However, the parameters of the ministerial exception are highly uncertain and it is enormously burdensome for religious organizations to secure and defend such exemptions on a case-by-case basis. It is also irresponsible to amend the state's civil rights law in a way that is, on its face, unconstitutional.

Third, the *Bostock* ruling only applies to employment cases.[32] Interpreting or amending Michigan's civil rights law to include sexual orientation, gender identity, and gender expression would extend such laws not just to employers, but also to public accommodations, educational institutions, and housing providers. The move would have a much more detrimental impact on religious liberties across a broad spectrum of life in Michigan. Additionally, the *Bostock* Court expressly refused to extend the impact of its ruling to public accommodation contexts such as "bathrooms, locker rooms, or anything else of the kind."[33]

Recent Michigan Court of Claims ruling

In December 2020, the Michigan Court of Claims ruled that the term "sex" in Elliott-Larsen law provided protection based on gender identity, but not protection based on sexual orientation.[34] As to gender status, the Court of Claims ruling rests on an incomplete analysis. It fails to analyze the unique wording of Elliott-Larsen law, which has its own definitions of "sex" not found in Title VII. That unique wording does not lend itself to the conclusion reached in the *Bostock* case. The Court of Claims ruling is also being appealed. The Michigan Court of Claims is a trial-level court and its rulings are not binding precedent on other Michigan courts.[35] Notwithstanding that, if the Court of Claims ruling is upheld by Michigan appellate courts, it will render the initiative petition moot and unnecessary as to gender identity protection.

Consistency with laws in other states

Unless the Michigan Court of Claims' ruling is upheld on appeal, declining to add sexual orientation, gender identity, and gender expression to Elliot-Larsen would keep the state's civil rights laws consistent with civil rights laws in most states, a majority of which do not provide special statutory protection based on sexual orientation or gender identity.[36] No state within the Sixth Circuit (which includes Kentucky, Michigan, Ohio, and Tennessee) currently provides special

legal protection for sexual orientation or gender identity. However, one federal court construed the term "sex" in Ohio's law to include transgender protection and, as noted above, the Michigan court of claims reached the same conclusion as to Michigan's law.[37]

Conclusion

Civil rights in Michigan should not become a zero-sum game where new rights are added by shrinking existing ones. The edifice of civil rights protections should not be expanded by means of weakening the bedrock fundamental freedom of religious liberty. Michigan's historically strong legal protection for religious liberty should be preserved by declining to adopt this initiative. ■

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ENDNOTES

1. Northwest Ordinance, Art III (1787).
2. *Id.* at Section 13.
3. Northwest Ordinance, Art I (1787) ("No person, demeaning himself in a peaceable and orderly manner, shall ever be molested on account of his mode of worship or religious sentiments…").
4. Const 1963, art I, § 4.
5. Const 1963, Preamble.
6. MCL 37.2202, MCL 37.2204, MCL 37.2302, MCL 37.2402, and MCL 37.2502.
7. *People v Dejonge*, 442 Mich 266, 275–276, 278; 501 NW2d 127 (1993).
8. *Deadline Established for Public Comments Regarding Petition Summary, Statewide Ballot Proposal Sponsored By Fair And Equal Michigan*, Bureau of Elections, Dept of State (January 7, 2020), available at <https://www.michigan.gov/documents/sos/Deadline_Established_for_Public_Comments_Fair_and_Equal_MI_676013_7.pdf> [https://perma.cc/RMG4-B5EE]. All websites cited in this article were accessed March 16, 2021.
9. *Id.*
10. *Fair and Equal Michigan secures endorsement from Business Leaders for Michigan*, Fair and Equal Michigan (July 20, 2020) <https://www.fairandequalmichigan.com/fair-and-equal-michigan-secures-endorsement-from-business-leaders-for-michigan> [https://perma.cc/FYM5-VXYH].
11. E.g., Ky Rev Stat Ann 344.030(7) (religion defined as all aspects of observance and practice as well as belief) and 775 Ill Comp Stat Ann 5/2-102(E)-(E-5) (religion defined as all aspects of religion and observance and practice, as well as belief).
12. *Cochran v City of Atlanta*, 150 F Supp 3d 1305 (ND Ga, 2015).
13. *Id.*
14. *Masterpiece Cakeshop v Colorado Civil Rights Comm*, 138 S Ct 1719, 1729; 201 L Ed 2d 35 (2018).
15. *Baker who refused to make wedding cake for a same-sex couple in court again*, USA Today (March 23, 2021) <https://www.usatoday.com/story/news/nation/2021/03/23/colorado-baker-jack-phillips-court-again-over-alleged-lgbtq-bias/6971770002/> [https://perma.cc/FPA9-P5GV].
16. *Elane Photography v Willock*, 309 P3d 53 (2013).
17. *State v Arlene's Flowers, Inc*, 193 Wash 2d 469; 441 P3d 1203 (2019).
18. *Country Mills Farm, LLC v City of East Lansing*, unpublished opinion and order of the United States District Court for the Western District of Michigan, issued September 15, 2017 (No 1:17-cv-487) and *Country Mill Farms, LLC v City of East Lansing*, 280 F Supp 3d 1029 (WD Mich, 2017).
19. *Downtown Soup Kitchen v Municipality of Anchorage*, 406 F Supp 3d 776, 781 (D Alaska, 2019).
20. E.g., *Wood v Superior Court of San Diego County*, 46 Cal App 5th 562, 259 Cal Rptr 3rd 798 (2020).
21. E.g., *AH v Minersville Area School Dist*, 408 F Supp 3d 536 (D Penn, 2019).
22. *Cormier v PF Fitness-Midland, LLC*, unpublished per curiam opinion of the Court of Appeals, issued June 1, 2017 (Docket No 331286).
23. *Bostock v Clayton County*, 140 S Ct 1731, 1754; 207 L Ed 2d 218 (2020).
24. *Mack v City of Detroit*, 467 Mich 186, 196; 649 NW2d 47 (2002).
25. *Wardius v Oregon*, 412 US 470, 477; 93 S Ct 2208; 37 L Ed 2d 82 (1973). The Michigan Court of Claims is a trial-level court and its rulings are not binding precedent on other Michigan courts.
26. 42 USC 2000e(b).
27. MCL 37.2201(a).
28. *Employment by Firm Size (Second Quarter 2020)*, DTMB, State of Michigan, available at <https://milmi.org/datasearch/firmsize> [https://perma.cc/Q2PZ-5HGH].
29. *Corp of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v Amos*, 483 US 327, 329; 107 S Ct 2862; 97 L Ed 2d 273 (1987).
30. MCL 37.2101 *et seq.*
31. *Our Lady of Guadalupe v Morrissey-Berru*, 140 S Ct 2049, 2060–2066; 207 L Ed 2d 870 (2020) and *Assemany v Archdiocese of Detroit*, 173 Mich App 752; 434 NW2d 233 (1988).
32. *Bostock*, 140 S Ct at 1737, 1753.
33. *Id.*
34. *Rouch World, LLC v Mich Dep't of Civil Rights*, unpublished opinion of the Court of Claims, issued December 2, 2020 (Docket No 20-000145-MZ).
35. *City of Detroit v Qualls*, 434 Mich 340, 359–360, n 35; 454 NW2d 374 (1990).
36. "Public Accommodation Nondiscrimination Laws (50 States and District of Columbia)," Alliance Defending Freedom, available at <https://twdpclaw.com/wp-content/uploads/2021/04/Public-Accommodation-Nondiscrimination-Law.pdf> [https://perma.cc/5CQT-56AU].
37. MCL 37.2101 *et seq.*; Ohio Rev Code Ann 4112.01 *et seq.* (but see *Parker v Strawser Construction*, 307 F Supp 3d 744 (SD Ohio, 2018)); Ky Rev Stat Ann 344.010 *et seq.*; Tenn Code Ann 4-21-101 *et seq.*; and *Rouch World*.