In the
Supreme Court of Maryland

September Term, 2022

Misc. No. 28

JOHN DOE,

Petitioner,

v.

CATHOLIC RELIEF SERVICES,

Respondent.

On Certified Questions from the
United States District Court for the District of Maryland
(The Honorable Catherine C. Blake)

Brief of *Amici Curiae* ACLU of Maryland, FreeState Justice, GLBTQ Legal Advocates and Defenders, Lambda Legal Defense and Education Fund, Inc., Metropolitan Washington Employment Lawyers Association, National Center for Lesbian Rights, National Employment Law Project, and Public Justice Center, in support of John Doe (Filed with All Parties' Consent)

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TABLE OF CONTENTS

Table of Authorities ii

Statement of Interest 1

Argument 6

I. The General Assembly Has Consistently Prohibited Various Forms of Discrimination Against LGBTQ+ People. 6

II. The MFEPA's and the MEPEWA's Prohibitions on Sex Discrimination Include Sexual-Orientation Discrimination. 10

A. Courts Have Come to Recognize that Sexual-Orientation Discrimination Is a Form of Sex Discrimination. 10

B. By Prohibiting Sex Discrimination, the MFEPA and MEPEWA Prohibit Sexual-Orientation Discrimination. 15

C. Sister States' Approaches Since *Bostock* Reinforce This Conclusion. 21

Conclusion 25

TABLE OF AUTHORITIES

Cases

Amaya v. DGS Constr., LLC, 479 Md. 515 (2022) 4

Bostock v. Clayton Cnty., Georgia, 140 S. Ct. 1731 (2020) .....passim

Boswell v. Boswell, 352 Md. 204 (1998) 9

City of L.A. Dep't of Water and Power v. Manhart, 435 U.S. 702 (1978) 10

Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media, 140 S. Ct. 1009 (2020) 11

Commonwealth v. Carter, 488 Mass. 191 (2021)..... 23

Conaway v. Deane, 401 Md. 219 (2007) 5

Donlon v. Montgomery Cnty. Pub. Schs., 460 Md. 62 (2018)..... 20

Eller v. Prince George's Cnty. Pub. Schs., 580 F. Supp. 3d 154 (D. Md. 2022). 3

Ellingsworth v. Hartford Fire Ins. Co., 247 F. Supp. 3d 546 (E.D. Pa. 2017) 15

Evans v. Ga. Reg'l Hosp., 850 F.3d 1248 (11th Cir. 2017)..... 15

Friolo v. Frankel, 438 Md. 304 (2014)..... 4

Haas v. Lockheed Martin Corp., 396 Md. 469 (2007)..... 16, 17, 20

Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339 (7th Cir. 2017) 3, 11

Hobby Lobby Stores, Inc. v. Sommerville, 186 N.E.3d 67 (App. Ct. Ill. 2021) 23

Jarrell v. Hardy Cellular Tel., No. 2:20-cv-00289, 2020 WL 4208533 (S.D. W. Va. July 22, 2020) 22

Lockshin v. Semsker, 412 Md. 257 (2010)..... 18

M.E. v. T.J., 275 N.C. App. 528 (2020), *aff'd as modified*, 380 N.C. 539..... 23

Macauley v. Mass. Comm'n Against Discrimination, 379 Mass. 279 (1979).. 11

Marshall v. Safeway, Inc., 437 Md. 542 (2014) 4

Md.-Nat'l Cap. Park and Plan. Comm'n v. Crawford, 307 Md. 1 (1986)..... 17

Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57 (1986) 10

Molesworth v. Brandon, 341 Md. 621 (1996)..... 6, 17, 21

N.H. v. Anoka-Hennepin Sch. Dist. No. 11, 950 N.W.2d 553 (Minn. Ct. App. 2020) 23

North v. North, 102 Md. App. 1 (1994) 9

Obergefell v. Hodges, 576 U.S. 644 (2015)..... 7

Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75 (1998)..... 12

Parks v. Alpharma, Inc., 421 Md. 59 (2011)..... 4

People v. Rogers, 338 Mich. App. 312 (2021) 24

Peters v. Early Healthcare Giver, Inc., 439 Md. 646 (2014)..... 4

Pidgeon v. Turner, 625 S.W.3d 583 (Tex. Ct. App. 2021) 22

Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) 11, 14

Prowel v. Wise Bus. Forms, Inc., 579 F.3d 285 (3d Cir. 2009)..... 15

Rand v. Rand, 280 Md. 508 (1977) 7

Romer v. Evans, 517 U.S. 620 (1996)..... 18

Rouch World, LLC v. Dep't of C.R., 510 Mich. 398 (2022)..... 21

Schochet v. State, 320 Md. 714 (1990) 9

Scutt v. Carbonaro CPAs n Mgmt. Grp., No. 20-00362 JMS-RT, 2020 WL 5880715 (D. Haw. Oct. 2, 2020)..... 23

See Conover v. Conover, 450 Md. 51 (2016)..... 9

State v. DiGennaro, 415 Md. 551 (2010)..... 20

Taking Offense v. State, 281 Cal. Rptr. 3d 298 (Cal. Ct. App. 2021) 23

Tarrant Cnty. Coll. Dist. v. Sims, 621 S.W.3d 323 (Tex. Ct. App. 2021) 22

Tyma v. Montgomery Cnty., 369 Md. 497 (2002) 5

Ruffin Hotel Corp. of Maryland, Inc v. Gasper, 418 Md. 594 (2011) 17

United Parcel Serv. v. Strothers, 482 Md. 198 (2022) 15

Williams v. Glendening, No. 98036031/CL-1059, 1998 WL 965992 (Md. Cir. Ct. Oct. 15, 1998) 9

Wittmer v. Phillips 66 Co., 915 F.3d 328 (5th Cir. 2019) 3

Zarda v. Altitude Express, Inc., 883 F.3d 100 (2d Cir. 2018) (en banc), *aff'd sub nom.* 140 S. Ct. 1731 (2020) 3, 11

Statutes

42 U.S.C. § 2000e-2(a)(1) 10, 16

Antidiscrimination Act of 2001, ch. 340, 3 Md. Laws 2112 (2001) 7

Civil Marriage Protection Act, ch. 2, 1 Md. Laws 9 (2012) 7

Civil Rights Act of 1991, Pub. L. No. 102-166, § 107, 105 Stat. 1075 (1991) . 11

Crim. L. § 10-304 8

Crimes—Mitigation and Defense—Race, Color, National Origin, Sex, Gender Identity, or Sexual Orientation, ch. 369, 2021 Md. Laws 9

Criminal Law—Hate Crimes—Protected Groups and Penalties, ch. 385, 2021 Md. Laws 8

Fairness for All Marylanders Act of 2014, ch. 474, 4 Md. Laws 3123 (2014) ... 7

Hate Crimes Penalties Act ch. 571, 5 Md. Laws 3242 (2005) 8

Labor and Employment—Equal Pay for Equal Work, ch. 557, 8 Md. Laws 6633 (2016) 8

Md. Code Ann., Lab. & Emp. § 3-304 ..... 8, 16, 19, 20

Md. Code Ann., State Gov't § 20-606 ..... 7, 16

Trans Health Equity Act, H.D. 283, 2023 Leg., 445th Sess. (Md. 2023) 5, 8

Vital Records—New Certificates of Birth—Sex Change or Diagnosis of an Intersex Condition, ch. 485, 4 Md. Laws 2547 (2015) 8

Youth Mental Health Protection Act, ch. 685, 2018 Md. Laws 8

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Henry J. Cordes, *State Agency Applies U.S. Supreme Court Ruling on LGBT Job Rights to Housing Cases*, Omaha World Herald (Aug. 12, 2020), https://tinyurl.com/yc2dd8ts 22

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Md. Bd. Of Elections, *2012 Presidential General Election Results* (Nov. 28, 2012), https://tinyurl.com/2x6nujek 7

N.D. Lab. & Hum. Rights, *NDDOLHR Now Accepting and Investigating Charges of Discrimination Based on Sexual Orientation and Gender Identity*, https://tinyurl.com/55tjbduv (last visited Apr. 26, 2023) 22

STATEMENT OF INTEREST

American Civil Liberties Union of Maryland

The American Civil Liberties Union of Maryland ("ACLU of Maryland"), the state affiliate of the ACLU, is a non-profit, non-partisan membership organization founded in 1931 to protect and advance civil liberties in Maryland. It has approximately 30,000 members throughout the state. From its inception, the ACLU of Maryland has consistently sought to protect Marylanders' right to be free from invidious discrimination, including on the basis of sex and sexual orientation. It has represented many complainants bringing charges of discrimination on the basis of sex and sexual orientation, and has participated, either as counsel or as *amicus curiae*, in many cases in Maryland's appellate courts concerning state statutory and constitutional protections against discriminatory treatment. The ACLU of Maryland was also instrumental in the passage of Maryland's statutory prohibition against discrimination on the basis of sexual orientation and Maryland's legislation granting same-sex couples the right to marry.

FreeState Justice

FreeState Justice is Maryland's only statewide direct legal services and civil rights advocacy organization that specifically serves its lesbian, gay, bisexual, transgender, queer, intersex, and asexual (LGBTQIA+) community. Our mission is to promote justice, equality, and equity for our clients and

community. In pursuit of those goals, FreeState provides pro bono legal services each year to hundreds of LGBTQIA+ Marylanders who could not otherwise afford an attorney. FreeState also advocates more broadly on behalf of the LGBTQIA+ community, working with legislators and community leaders to develop and implement policies in accordance with our mission. We have seen firsthand how the detrimental impacts of anti-LGBTQIA+ discrimination can upend people's lives and leave them with lasting damage. Thus, FreeState has a significant interest in the outcome of this case and, for the reasons set forth in this brief, urges the Court to protect the rights and dignity of our clients and community.

GLBTQ Legal Advocates and Defenders

Through strategic litigation, public policy advocacy, and education, GLBTQ Legal Advocates & Defenders ("GLAD") works in New England and nationally to create a just society free of discrimination based on gender identity and expression, HIV status, and sexual orientation. GLAD litigates in both state and federal courts in all areas of the law, including under state and federal antidiscrimination laws, to protect and advance the rights of lesbians, gay men, bisexuals, transgender individuals, and people living with HIV and AIDS. GLAD has an enduring interest in ensuring that employees receive full and complete redress for violation of their civil rights in the workplace.

Lambda Legal Defense and Education Fund, Inc.

For 50 years, Lambda Legal Defense and Education Fund, Inc. ("Lambda Legal") has striven to ensure that courts recognize and enforce the employment protections of LGBTQ workers under existing federal and state law. Of special relevance here, Lambda Legal was not only an *amicus curiae* in *Bostock v. Clayton Cnty., Georgia*, 140 S. Ct. 1731 (2020), it also successfully represented the plaintiff-appellant in *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339 (7th Cir. 2017) (en banc) and argued as *amicus curiae* in both *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018) (en banc), *aff'd sub nom.* 140 S. Ct. 1731 (2020) and *Wittmer v. Phillips 66 Co.*, 915 F.3d 328 (5th Cir. 2019). Most recently, Lambda Legal served as counsel for a transgender teacher asserting employment *sex* discrimination claims under *both* Title VII of the Civil Rights Act of 1964 *and* the Maryland Fair Employment Practices Act ("MFEPA"). *See Eller v. Prince George's Cnty. Pub. Schs.*, 580 F. Supp. 3d 154 (D. Md. 2022). Thus, the issues before the Court are of acute concern to Lambda Legal and the community it represents, who stand to be directly affected by the Court's ruling.

Metropolitan Washington Employment Lawyers Association

The Metropolitan Washington Employment Lawyers Association ("MWELA") is a local affiliate of the National Employment Lawyers Association, a national organization of attorneys who represent employees in

employment and civil rights disputes. MWELA has over 300 members who represent and protect the interests of employees under state and federal law. The purpose of MWELA is to bring into close association employee advocates and attorneys to promote the efficiency of the legal system and fair and equal treatment under the law. MWELA has frequently participated as *amicus curiae* in cases of interest to its members, including the following cases in this Court in recent years: *Amaya v. DGS Constr., LLC*, 479 Md. 515 (2022); *Peters v. Early Healthcare Giver, Inc.*, 439 Md. 646 (2014); *Friolo v. Frankel*, 438 Md. 304 (2014); *Marshall v. Safeway, Inc.*, 437 Md. 542 (2014); and *Parks v. Alpharma, Inc.*, 421 Md. 59 (2011). MWELA has significant interest in this case to ensure that Maryland courts construe LGBTQ+ protections for Maryland employees consistent with the remedial purpose that was intended by the state legislature.

National Center for Lesbian Rights

The National Center for Lesbian Rights ("NCLR") is a national non-profit legal organization dedicated to protecting and advancing the civil rights of lesbian, gay, bisexual, transgender, and queer people and their families through litigation, public policy advocacy, and public education. Since its founding in 1977, NCLR has played a leading role in securing fair and equal treatment for all LGBTQ people and their families in cases across the country involving statutory, constitutional, and civil rights. NCLR has represented

individuals and organizations in numerous cases seeking to vindicate the rights of LGBTQ persons under federal and state antidiscrimination statutes.

National Employment Law Project

The National Employment Law Project ("NELP") is a non-profit legal organization with over 50 years of experience advocating for the employment and labor rights of low-wage and unemployed workers. NELP seeks to ensure that all employees, and especially the most vulnerable ones, receive the full protection of labor and employment laws, including protections against discrimination at work. NELP has litigated and participated as *amicus curiae* in numerous cases in federal circuit courts, state courts, and the U.S. Supreme Court, addressing the importance of equal access to labor and employment protections for all workers.

Public Justice Center

The Public Justice Center ("PJC"), a non-profit civil rights and anti-poverty legal services organization founded in 1985, has a longstanding commitment to combating discrimination, including discrimination against LGBTQ+ individuals. *See, e.g.*, *Conaway v. Deane*, 401 Md. 219 (2007); *Tyma v. Montgomery Cnty.*, 369 Md. 497 (2002); Trans Health Equity Act, H.D. 283, 2023 Leg., 445th Sess. (Md. 2023). PJC's programs include its Appellate Advocacy Project, which seeks to improve the representation of indigent and disadvantaged persons and their interests before state and federal appellate

courts. The PJC has an interest in this case because of its commitment to ensuring that the interplay of federal and state statutes protects the rights of LGBTQ+ Marylanders.

All parties have consented to the filing of this brief.

ARGUMENT

The path toward legal equality for LGBTQ+ individuals has not been a straight line, and it is far from complete. Nevertheless, the law has made notable strides toward this goal, and the General Assembly, in particular, has made concerted progress to enshrine LGBTQ+ protections in Maryland law. The statutes at issue here are a clear continuation of those legislative efforts, and the Court should answer the Certified Questions in favor of John Doe. Our arguments address Certified Questions 1 and 3.

I. THE GENERAL ASSEMBLY HAS CONSISTENTLY PROHIBITED VARIOUS FORMS OF DISCRIMINATION AGAINST LGBTQ+ PEOPLE.

The elimination of sex-based discrimination is a long-established aspect of black-letter Maryland law. As this Court described it nearly thirty years ago: "Maryland's public policy against sex discrimination is ubiquitous. . . . [A]t least thirty-four statutes, one executive order, and one constitutional amendment in Maryland . . . prohibit[] discrimination based on sex in certain circumstances." *Molesworth v. Brandon*, 341 Md. 621, 613–14 (1996). Indeed, as this Court has previously acknowledged, "[t]he adoption of the [Equal Rights

Amendment to the Maryland Declaration of Rights] was intended to, and did, drastically alter traditional views of the validity of sex-based classifications." *Rand v. Rand*, 280 Md. 508, 515–16 (1977).

Since then, the General Assembly has progressed steadily toward the goal of LGBTQ+ equality. In 2001, it enacted legislation to prohibit discrimination on the basis of sexual orientation in public accommodations, housing, and employment. Antidiscrimination Act of 2001, ch. 340, 3 Md. Laws 2112 (2001). (This involved additions to the Maryland Fair Employment Practices Act ("MFEPA"), including the prohibition codified at State Government § 20-606, which is the subject of Certified Question #1.) In 2012—three years before the U.S. Supreme Court's decision in *Obergefell v. Hodges*, 576 U.S. 644 (2015)—the Legislature modified the Family Law Article to recognize marriage for same-sex couples, and voters upheld that measure when it was put to a referendum. Civil Marriage Protection Act, ch. 2, 1 Md. Laws 9 (2012); Md. Bd. of Elections, *2012 Presidential General Election Results* (Nov. 28, 2012), https://tinyurl.com/2x6nujek.

The Legislature further strengthened anti-discrimination laws in 2014 by adding "gender identity" to the list of prohibited grounds for discrimination in public accommodations, housing, and employment. Fairness for All Marylanders Act of 2014, ch. 474, 4 Md. Laws 3123 (2014). (These changes included the MFEPA's language codified at State Government § 20-606.) In

2016, it did the same with respect to Maryland's long-standing prohibition against wage discrimination. Labor and Employment—Equal Pay for Equal Work , ch. 557, 8 Md. Laws 6633 (2016). (Wage discrimination is addressed by the Equal Pay for Equal Work Act ("MEPEWA") and includes the prohibition codified at Labor and Employment § 3-304, which is the subject of Certified Question #3.)

Around the same time, the General Assembly addressed lingering stigmas against LGBTQ+ people, including by passing legislation allowing people to obtain new, accurate birth certificates that are congruent with their gender identities. Vital Records—New Certificates of Birth—Sex Change or Diagnosis of an Intersex Condition, ch. 485, 4 Md. Laws 2547 (2015). In 2018, the General Assembly outlawed conversion therapy for minors. Youth Mental Health Protection Act, ch. 685, 2018 Md. Laws. And legislation enacted this past session will require the Maryland Medical Assistance Program to provide gender-affirming treatment, beginning on January 1, 2024. Trans Health Equity Act.

Maryland criminal law reflects a similar progression toward protecting LGBTQ+ people, like other minorities. The General Assembly amended the State's hate crime law in 2005 to include sexual orientation as a protected category, and again in 2021 to add gender identity. Hate Crimes Penalties Act ch. 571, 5 Md. Laws 3242 (2005) (amending Crim. L. § 10-304); Criminal Law—

Hate Crimes—Protected Groups and Penalties, ch. 385, 2021 Md. Laws (same). Also in 2021, the General Assembly outlawed the so-called "gay panic" defense, thus proclaiming that fear of someone's sexual orientation or gender identity is not adequate provocation to mitigate a killing from murder to manslaughter. Crimes—Mitigation and Defense—Race, Color, National Origin, Sex, Gender Identity, or Sexual Orientation, ch. 369, 2021 Md. Laws.

These developments show a clear and undeniable desire by the General Assembly to include LGBTQ+ people within important legal protections. Courts must ensure that those legal protections are given effect.[1]

[1] Maryland courts have independently contributed to the development of legal protections for LGBTQ+ individuals. Though primarily occurring in the constitutional realm, the courts' check on anti-LGBTQ+ bias is broadly applicable. *See, e.g.*, *Conover v. Conover*, 450 Md. 51, 78, 84–85 (2016) (recognizing the doctrine of *de facto* parentage because "gays and lesbians are particularly 'ill-served by rigid definitions of parenthood'"); *Boswell v. Boswell*, 352 Md. 204, 238 (1998) (reversing custody determination where trial was "seemingly influenced by its own biases and belief that [the same-sex] relationship . . . was 'inappropriate'"); *North v. North*, 102 Md. App. 1, 11, 12 n.2, 16 (1994) (holding that parental visitation cannot be restricted based on a parent's HIV status or "the perceived harm arising from exposure of . . . children to [a] 'homosexual lifestyle'"); *Williams v. Glendening*, No. 98036031/CL-1059, 1998 WL 965992, at *7 (Md. Cir. Ct. Oct. 15, 1998) (extending reasoning in *Schochet v. State*, 320 Md. 714, 725 (1990) to hold that anti-sodomy law could not be applied to consensual, noncommercial, non-heterosexual activity).

II. THE MFEPA'S AND THE MEPEWA'S PROHIBITIONS ON SEX DISCRIMINATION INCLUDE SEXUAL-ORIENTATION DISCRIMINATION.

Sexual-orientation discrimination is—and always has been—a form of sex discrimination, even if it has taken time to recognize this reality. The MFEPA and MEPEWA prohibit sex discrimination and therefore prohibit sexual-orientation discrimination.[2] This conclusion is supported by the statutes' plain text and is consistent with the reasoning of numerous other courts to consider the question.

A. Courts Have Come to Recognize that Sexual-Orientation Discrimination Is a Form of Sex Discrimination.

When interpreting Title VII of the Civil Rights Act of 1964—which prohibits "'discriminat[ion] . . . because of . . . sex" in the workplace, 42 U.S.C. § 2000e-2(a)(1)—the U.S. Supreme Court and other federal courts have routinely held that such language is not limited to archetypal examples of employers discriminating because of sex. *See, e.g.*, *City of L.A. Dep't of Water and Power v. Manhart*, 435 U.S. 702, 709 (1978) (invalidating a government pension plan that required women to make larger contributions than men based on actuarial data that women tended to live longer); *Meritor Sav. Bank,*

[2] Because the certified questions only concern sexual orientation, this brief focuses on that issue; however, for the same reasons set forth, the statutes' prohibitions on sex discrimination should also encompass discrimination based on gender identity.

FSB v. Vinson, 477 U.S. 57, 64 (1986) (recognizing that sexual harassment constitutes impermissible sex discrimination under Title VII); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (plurality opinion) (recognizing discrimination based on sex stereotyping as unlawful because "'Congress intended to strike at the entire spectrum of disparate treatment of men and women'"), *superseded by statute on other grounds,* Civil Rights Act of 1991, Pub. L. No. 102-166, § 107, 105 Stat. 1075 (1991), *as recognized in Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media*, 140 S. Ct. 1009, 1017 (2020). *See also Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339 351–52 (7th Cir. 2017) (en banc) (holding that an employee "who alleges that she experienced employment discrimination on the basis of her sexual orientation has put forth [a] case of sex discrimination for Title VII purposes"); *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 112 (2d Cir. 2018) (en banc), *aff'd sub nom.* 140 S. Ct. 1731 (2020) ("We now conclude that sexual orientation discrimination is motivated, at least in part, by sex and is thus a subset of sex discrimination.").

But numerous courts did not immediately recognize that sexual-orientation discrimination is, equally, a type of sex discrimination. For example, even while acknowledging sexual-orientation discrimination as "sex-linked" in 1979, the Massachusetts high court held that sexual-orientation discrimination was unprotected under state antidiscrimination laws. *Macauley*

v. Mass. Comm'n Against Discrimination, 379 Mass. 279, 281 (1979) (acknowledging that "[a]s a matter of literal meaning, discrimination against homosexuals could be treated as a species of discrimination because of sex," but declining to so hold); *see also* Anthony Michael Kreis, *Dead Hand Vogue*, 54 U. Rich. L. Rev. 705, 710 (2020) (recounting history of unsuccessful early sexual-orientation and gender-identity discrimination claims).

Over time, however, courts have come to the correct understanding that Title VII's bar on sex discrimination includes discrimination based on sexual orientation. In *Oncale v. Sundowner Offshore Servs., Inc.*, the U.S. Supreme Court laid the foundation for this understanding: "[S]tatutory prohibitions often go beyond the principal evil to cover reasonably comparable evils," and "it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." 523 U.S. 75, 79 (1998). The Court reasoned that there is "no justification in the statutory language or our precedents for a categorical rule excluding same-sex harassment claims from the coverage of Title VII." *Id.* Same-sex harassment claims are cognizable under Title VII because a person can experience harassing behavior from someone who is the same sex. *Id.* at 80–81.

Over two decades later, the U.S. Supreme Court followed the text of Title VII, the logic of *Oncale* and the other cases noted above, and common-sense reasoning to acknowledge what was true all along: Sexual-orientation

discrimination is a form of sex discrimination because "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex." *Bostock,* 140 S. Ct. at 1741. Justice Gorsuch's majority opinion rests on simple, yet sound, logic: Because sex is inherent to sexual orientation, sexual-orientation discrimination is sex discrimination under the text of Title VII. Put another way, "discrimination based on homosexuality or transgender status necessarily entails discrimination based on sex; the first cannot happen without the second." *Id.* at 1747.

Conducting an analysis of the plain meaning of "sex," the Court observed: "Title VII prohibits all forms of discrimination because of sex, however they may manifest themselves or whatever other labels might attach to them." *Id.* at 1747. Given the nature of being gay or transgender, this necessarily includes sexual orientation and gender identity. *See id.* To illustrate this logic, the Court envisioned two employees "who[] are attracted to men" and "materially identical in all respects, except that one is a man and the other a woman." *Id.* at 1741. If the employer fires the man, the Court held, it "discriminates against him for traits or actions it tolerates in his female colleague."[3] *Id.* The Court

[3] This language is also consistent with the understanding that sexual-orientation discrimination is a kind of sex stereotyping—a well-established

then dispensed with the argument that an employer who "is equally happy to fire male *and* female employees who are homosexual or transgender" does not violate Title VII, noting that such action "doubles rather than eliminates Title VII liability." *Id.* at 1742–43.

The *Bostock* Court's reasoning was based not only on the plain meaning of "sex" but also on the plain meaning of "because of." Noting that the phrase incorporates but-for causation and is unmodified by words like "'solely'" or "'primarily,'" the Court repudiated the notion "that sex must be the sole or primary cause of an adverse employment action for Title VII liability to follow." *Id.* at 1739, 1748. "When an employer fires an employee because she is homosexual or transgender, two causal factors may be in play . . . . [b]ut Title VII doesn't care." *Id.* at 1742. "[D]eploying a stricter causation test for use only in cases involving discrimination based on sexual orientation or transgender status . . . . would create a curious discontinuity in our case law," for which "Title VII's text can offer no answer." *Id.* at 1749. In other words, failing to recognize sexual-orientation discrimination as a form of sex discrimination is logically unsound and would lead to untenable results.[4]

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form of sex discrimination. *See, e.g.*, *Price Waterhouse*, 490 U.S. at 251; cases cited *infra* note 4.

[4] Lower-court cases likewise illustrate that attempts to extricate sexual orientation from sex-based stereotyping are unworkable—often because

B. By Prohibiting Sex Discrimination, the MFEPA and MEPEWA Prohibit Sexual-Orientation Discrimination.

The reasoning of *Bostock* applies just as forcefully to other statutes that prohibit sex discrimination through a but-for causation standard. The MFEPA and MEPEWA do precisely that. Thus, standard tools of statutory construction yield the conclusion that those statutes' bars on sex discrimination include sexual-orientation discrimination.

"'One of the first tenets of statutory construction is to accord language its ordinary meaning.'" *United Parcel Serv. v. Strothers*, 482 Md. 198, 212 (2022). Here, the relevant portion of the MFEPA provides that:

> An employer may not . . . fail or refuse to hire, discharge, or otherwise ***discriminate*** against any individual with respect to the individual's compensation, terms, conditions, or privileges of employment ***because of*** . . . the individual's race, color, religion, ***sex***, age, national origin, marital status, sexual orientation, gender identity, genetic information, or disability unrelated in nature and extent so as to reasonably preclude performance of the employment . . . .

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they flow from the same conduct. *See, e.g.*, *Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285, 291 (3d Cir. 2009) (noting, in reversing the lower court's grant of summary judgment to the employer, the "difficult question" of whether the plaintiff's harassment "was because of his homosexuality, his effeminacy, or both" and submitting that question to the jury); *Evans v. Ga. Reg'l Hosp.*, 850 F.3d 1248,1255 (11th Cir. 2017) (allowing lesbian plaintiff to allege discrimination based on gender-nonconformity); *Ellingsworth v. Hartford Fire Ins. Co.*, 247 F. Supp. 3d 546, 553 (E.D. Pa. 2017) (finding that heterosexual plaintiff "repeatedly called a 'dyke' . . . because of how she dressed and looked" could plausibly state a "'gender stereotyping'" claim under Title VII).

Md. Code Ann., State Gov't § 20-606(a)(1) (emphasis added). Similarly, the MEPEWA specifies that:

> An employer may not ***discriminate*** between employees in any occupation ***by***: (i) paying a wage to employees of one sex or gender identity at a rate less than the rate paid to employees of another ***sex*** or gender identity if both employees work in the same establishment and perform work of comparable character or work on the same operation, in the same business, or of the same type; ***or*** (ii) providing less favorable employment opportunities ***based on sex*** or gender identity.

Md. Code Ann., Lab. & Emp. § 3-304(b)(1) (emphasis added).

Under both statutes' unambiguous terms, sex discrimination necessarily encompasses sexual-orientation discrimination. *Bostock* is particularly instructive as to the MFEPA because Title VII and the MFEPA contain *identical* language that prohibits employers from "discriminat[ing] against any individual . . . because of . . . sex." *Compare* 42 U.S.C. § 2000e-2(a)(1), *with* Md. Code Ann., State Gov't § 20-606. Though consideration of "federal law similar to [Maryland's own] . . . should not be a substitute for the pre-eminent plain meaning inquiry of the statutory language under examination," it can aid interpretation. *Haas v. Lockheed Martin Corp.*, 396 Md. 469, 492 (2007). Here, in the context of employment discrimination, Title VII cases "are relevant

authorities because [Maryland] courts traditionally seek guidance from federal cases in interpreting Maryland's [civil rights statutes]."[5] *Id.* at 482.

Because the MFEPA uses the same language as Title VII and that language has the same ordinary meaning, sex discrimination under the MFEPA includes sexual-orientation discrimination. The fact that the MFEPA sets forth a longer list of expressly prohibited forms of discrimination, including "sexual orientation," does not negate this truth, nor does it reflect a desire to carve out "sexual orientation" from "sex." As *Bostock* reminds us, the plain meaning of an unambiguous term in a statute is controlling, and without "authoritative evidence" of legislative intent, "speculation . . . offers a 'particularly dangerous' basis on which to rest an interpretation of an existing

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[5] When Maryland courts have deviated from interpretations of federal analogs, they have adopted a more protective construction. *See Ruffin Hotel Corp. of Md., Inc v. Gasper*, 418 Md. 594, 610 (2011) (recognizing that the less stringent motivating-factor standard, not Title VII's heightened but-for test, applies to wrongful discharge claims under Maryland law); *Haas*, 396 Md. at 494 (holding that, unlike Title VII, under Maryland law, "a 'discharge' occurs upon the actual termination of an employee, rather than upon notification that such a termination is to take effect at some future date"); *Molesworth*, 341 Md. at 628 (recognizing that the Maryland Fair Employment Practices Act, unlike Title VII, applies to small businesses with fewer than fifteen employees); *Md. Nat'l Cap. Park & Plan. Comm'n v. Crawford*, 307 Md. 1, 30–31 (1986) (departing from Title VII's exhaustion requirements by not requiring a State employee bringing a race discrimination claim to first file a claim with the Maryland Commission on Human Relations).

law." 140 S. Ct. at 1747. Rather, the text controls. *Lockshin v. Semsker*, 412 Md. 257, 275 (2010) ("If the language of the statute is unambiguous and clearly consistent with the statute's apparent purpose, our inquiry as to legislative intent ends ordinarily and we apply the statute as written, without resort to other rules of construction."); *see also Bostock*, 140 S. Ct. at 1754 ("Ours is a society of written laws. Judges are not free to overlook plain statutory commands on the strength of nothing more than suppositions about intentions or guesswork about expectations.").

Expressly including both sex and sexual orientation in the MFEPA could reflect the General Assembly's desire to strengthen the statute against the argument that "sex" does not cover sexual orientation, or to provide clear notice to employers that such forms do indeed violate the law, or to call attention to sexual orientation and gender identity as particularly pervasive or controversial forms of discrimination, or to make a powerful and clear statement of principle regarding the equal place of LGBTQ+ people in the workplace. *See Romer v. Evans*, 517 U.S. 620, 628 (1996) ("Enumeration is the essential device used to make the duty not to discriminate concrete and to provide guidance for those who must comply."). Indeed, "[l]egislators repeat key terms or phrases in order to reinforce their meaning and importance—and in the process signal their emphasis to relevant public audiences." Ethan J. Leib & James J. Brudney, *The Belt-and-Suspenders Canon*, 105 Iowa L. Rev.

735, 742 (2020). The MFEPA's enumeration could therefore reflect legislative intent to take a "belts and suspenders" approach to remedy the problem of anti-LGBTQ+ discrimination. *Id.* at 737; *see also id.* at 739 (noting recent data that well over half of congressional staffers aware of the rule against superfluities think it should apply rarely or only sometimes in legislative drafting).

Simply put, any number of reasons could have motivated the General Assembly to expressly include both "sexual orientation" and "gender identity" in MFEPA, but speculation about that intent cannot alter the plain language of the statute.

Similarly, the MEPEWA's enumeration of sex and gender identity, but *not* sexual orientation, does not somehow eject sexual-orientation discrimination from that statute. Because sexual-orientation discrimination necessarily constitutes sex discrimination, silence about one manifestation of sex discrimination—even though another manifestation is included—cannot negate the statutes' core prohibition of all forms of sex discrimination.

The MEPEWA protects against sex discrimination in a similarly broad fashion as Title VII and the MFEPA. It prohibits certain adverse actions if "based on" sex, Md. Code Ann., Lab. & Emp. § 3-304(b)(1)(ii)—language that is construed similarly to "because of," *see, e.g.*, *Bostock*, 140 S. Ct. at 1741, 1742, 1744, 1745–46, 1747, 1749. And it specifically protects against wage discrimination by spelling out exactly what that looks like—i.e., paying an

employee of one sex a lower rate than an employee of another sex, *id.* at § 3-304(b)(1)(i)—thereby obviating the need for any causal language.

The doctrine of *in pari materia* further supports reading the MEPEWA's prohibition on sex discrimination as encompassing sexual orientation. "Two statutes which deal with the same subject matter are *in pari materia*, [and] should [therefore] be construed together and, to the extent possible, harmonized." *State v. DiGennaro*, 415 Md. 551, 563 (2010) (internal quotation marks and citations omitted)).

> The underlying goal of *in pari materia* is to construe two common schemed statutes harmoniously to give full effect to each enactment. . . . Statutes do not need to have been enacted at the same time, or necessarily refer to each other to be construed *in pari materia*.

Donlon v. Montgomery Cnty. Pub. Schs., 460 Md. 62, 98 (2018) (internal quotation marks and citations omitted). This doctrine has particular purchase in the context of remedial statutes, like the MFEPA and the MEPEWA. *See Haas*, 396 Md. at 495 (2007) (emphasizing that "a remedial statute . . . should be construed liberally in favor of claimants seeking its protection").

Recognizing that the MFEPA and the MEPEWA's prohibitions on sex discrimination necessarily bar sexual-orientation discrimination will ensure harmony in Maryland's scheme of antidiscrimination protections and give full effect to the Legislature's efforts to provide the full measure of antidiscrimination protections based on "sex," including its manifestations as

"sexual orientation" discrimination. "[W]here a public policy is as pervasive as Maryland's policy against sex discrimination, we presume the legislature does not intend to allow violations of that policy, absent some indication of a contrary intent." *Molesworth*, 341 Md. at 632. Thus, holding that both the MFEPA and the MEPEWA prohibit discrimination based on sexual orientation is consistent with sound principles of statutory construction as well as principles of equality that are well established in Maryland law.

C. Sister States' Approaches Since *Bostock* Reinforce This Conclusion.

Courts of other states have applied *Bostock*'s reasoning to hold that state laws barring discrimination based on sex necessarily prohibit discrimination based on sexual orientation and gender identity. The Supreme Court of Michigan's approach is illustrative. Finding that "*Bostock* offers a straightforward analysis of the plain meaning of analogous statutory language" and "agree[ing] with [that Court's] reasoning," the court held that discriminating "on the basis of [an] individual's sexual orientation is action that is dependent upon the individual's sex." *Rouch World, LLC v. Dep't of C.R.*, 510 Mich. 398, 421–23 (2022). "Because one's sex is necessary to the identification of sexual orientation, discrimination on that basis is discrimination on the basis of sex." *Id.* at 426. "[T]he determination of sexual orientation involves both the sex of the individual and the sex of their preferred

partner; referring to these considerations jointly as 'sexual orientation' does not remove sex from the calculation." *Id.*

Other state courts and agencies have adopted a similar approach, applying the principles articulated in *Bostock* to find that prohibitions on sex discrimination in their state analogs to Title VII include sexual-orientation discrimination. *See Tarrant Cnty. Coll. Dist. v. Sims*, 621 S.W.3d 323, 329 (Tex. Ct. App. 2021); *Jarrell v. Hardy Cellular Tel.*, No. 2:20-cv-00289, 2020 WL 4208533, at *2 (S.D. W. Va. July 22, 2020); Fla. Comm'n on Hum. Rels., *Sexual Discrimination*, https://fchr.myflorida.com/sexual-discrimination (last visited Apr. 24, 2023); *Kansas Human Rights Commission Concurs with the U.S. Supreme Court's Bostock Decision*, Kan. Hum. Rights Comm'n (Aug. 21, 2020), https://tinyurl.com/yckfrys; Henry J. Cordes, *State Agency Applies U.S. Supreme Court Ruling on LGBT Job Rights to Housing Cases*, Omaha World Herald (Aug. 12, 2020), https://tinyurl.com/yc2dd8ts; N.D. Lab. & Hum. Rights, *NDDOLHR Now Accepting and Investigating Charges of Discrimination Based on Sexual Orientation and Gender Identity*, https://tinyurl.com/55tjbduv (last visited Apr. 26, 2023).

Courts elsewhere have also applied *Bostock* outside of their Title VII analogs, reinforcing that *Bostocks*'s reasoning should apply to the MEPEWA. *See Pidgeon v. Turner*, 625 S.W.3d 583, 604 (Tex. Ct. App. 2021) (holding, in a challenge to provision of employment benefits for city employees, that "there

can be no uncertainty as to the propriety and legality of affording spousal benefits equally to all married City employees"); *Scutt v. Carbonaro CPAs n Mgmt. Grp.*, No. 20-00362 JMS-RT, 2020 WL 5880715, at *11 (D. Haw. Oct. 2, 2020) (allowing plaintiff's claim under the federal Equal Pay Act to proceed where she "allege[d] that she was paid less than a person with the same qualifications but with a different sexual orientation or gender identity"); *N.H. v. Anoka-Hennepin Sch. Dist. No. 11*, 950 N.W.2d 553, 570 (Minn. Ct. App. 2020) (citing to *Bostock* and federal cases interpreting Title IX for the proposition that Minnesota's Human Rights Act provides relief for sexual-orientation discrimination); *M.E. v. T.J.,* 275 N.C. App. 528, 573 (2020), *aff'd as modified*, 380 N.C. 539 (holding that North Carolina's protective order statutes must apply to both heterosexual and same-sex couples because "the definition of 'sex' in *Bostock* should apply equally to any law denying protections or benefits to people based upon sexual orientation or gender identity"); *Commonwealth v. Carter*, 488 Mass. 191, 202 (2021) (holding that a prospective juror's sexual orientation was "'inextricably bound up with sex'" and constituted a protected status for purposes of *Batson* challenge); *Hobby Lobby Stores, Inc. v. Sommerville*, 186 N.E.3d 67, 80 (App. Ct. Ill. 2021) (holding that "under Illinois law, an individual's gender identity is an accepted basis for determining that individual's legal 'sex'"); *Taking Offense v. State*, 281 Cal. Rptr. 3d 298, 298, 317 (Cal. Ct. App. 2021) (applying *Bostock* to free speech

and equal protection challenges to a statute prohibiting staff in long-term care facilities from "willfully and repeatedly" referring to residents by other than their preferred name and pronoun); *People v. Rogers*, 338 Mich. App. 312, 331 (2021) (holding that the defendant's alleged harassment of the plaintiff due to her status as a transgender woman was harassment on the basis of gender). This Court should follow the sound approach of sister states and find that, consistent with the meaning of sex discrimination under the MFEPA, the MEPEWA's prohibition on sex discrimination includes sexual-orientation discrimination.

* * *

Statutes that prohibit sex discrimination, like Title VII, the MFEPA, and the MEPEWA, necessarily also bar discrimination because of sexual orientation. Already, courts of sister states have recognized and applied this conclusion. Affirming sexual-orientation and gender-identity discrimination as forms of sex discrimination was essential to safeguarding the workability of Title VII's test and honoring its plain text. So too here: Acknowledging that the MFEPA's and the MEPEWA's prohibitions on sex discrimination cover discrimination based on sexual orientation is essential to promoting consistent, logical, and just application of their clear terms and purposes. In keeping with Maryland's legacy as a leader on these issues, this Court should recognize that

the MFEPA's and MEPEWA's prohibitions on sex discrimination also bar discrimination based on sexual orientation.

CONCLUSION

The Court should answer Certified Questions 1 and 3 in the affirmative.

May 5, 2023

Respectfully submitted,

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CERTIFICATION OF WORD COUNT AND COMPLIANCE WITH RULE 8-112

1. This brief contains 5,646 words, excluding the parts of the brief exempted from the word count by Rule 8-503. This brief is typeset in 13-point Century Schoolbook font.

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/s/ *John R. Grimm*
John R. Grimm

RULE 1-313 CERTIFICATION

Pursuant to Md. Rule 1-313, I hereby certify that although I do not maintain an office for the practice of law in Maryland, I am admitted to practice law in this State.

/s/ *John R. Grimm*
John R. Grimm

CERTIFICATE OF SERVICE

Pursuant to Maryland Rules 20-201(g)(3) and 20-405(b), I certify that on this day, May 5, 2023, I electronically filed the foregoing using the MDEC system, which sent electronic notification of filing to all persons entitled to service. Counsel for both parties waived the requirement for paper copies. This document does not contain confidential or restricted information as defined by Maryland Rule 20-101(s).

/s/ *John R. Grimm*
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