Prepared Testimony of
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Before the Michigan House of Representatives
the Judiciary Committee
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Distinguished Chair and Distinguished Members of the Committee: Thank you for providing me the opportunity to provide testimony on House Bill 4003.

INTRODUCTION

My name is William Wagner and I hold the academic rank of Distinguished Professor Emeritus (Law). I served on the faculty at the University of Florida and Western Michigan University Cooley Law School, where I taught Constitutional Law and Ethics. I currently hold the Faith and Freedom Center Distinguished Chair at Spring Arbor University. Before joining academia, I served as a federal judge in the United States Courts, as Senior Assistant United States Attorney in the Department of Justice, and as a Legal Counsel in the United States Senate. I am also the Founder and President Emeritus of the Great Lakes Justice Center.

I am here to testify in my personal capacity before you today and share some thoughts and concerns about House Bill 4003, opposing passage as currently written.

GOOD GOVERNANCE AND THE CONSTITUTIONAL SEPARATION OF POWERS

Article IV, Section 1 of the Michigan Constitution provides "[t]he legislative power of the State of Michigan is vested in a senate and a house of representatives." Nonetheless, the Michigan Supreme Court handed down a decree recently amending the Elliott-Larsen Civil Rights Act to add sexual orientation to the list of classifications covered by the law. The judicial edict wrongly usurped the constitutional lawmaking authority held by this institution, the Michigan Legislature. As did the Executive Branch when the unelected Michigan Civil Rights Commission likewise did much the same thing.

When the Michigan Legislature enacted our civil rights act in 1976, the relevant committee considered and voted to not add sexual orientation to the list of classifications covered. Through the years thereafter, the Legislature considered and rejected legislation to add the classification 11 times. Nonetheless, both the Executive Branch and the Michigan Supreme Court handed down decrees amending the Elliott-Larsen Civil Rights Act to add sexual orientation to the list of classifications covered by the law.

Knowing this truth, advocates for amending the statute recently launched an unsuccessful petition drive to change the law. Incredibly, even with all this evidence, the court's majority opinion concluded "there are any number of potential explanations why sexual orientation was not explicitly included. … Perhaps some legislators believed that sexual-orientation discrimination was necessarily included through the prohibition on sex discrimination and so did not seek its explicit inclusion."

Thus, an activist faction of Michigan's Supreme Court legislated those preferences from their bench. When Supreme Court justices usurp the role of the Legislature it undermines government of the people, because it denies participation by the people. Such usurpation destabilizes constitutional good governance and the rule of law, ultimately destroying the institutional legitimacy of our judicial institutions. At least those on the losing side of a legislative battle accept the loss because the process allowed them to fully participate.

Divisive preferential classifications in so-called anti-discrimination statutes evoke passionate viewpoints and debate. Public policy decisions of this importance ought to allow for input from all Michigan citizens, not just a few lawyers wearing robes using the ink in their pens to promulgate their personal political policy preferences. Those on the losing side of judicial activism see the judicial policymaking as illegitimate and an abuse of power, diminishing trust in

judiciary. And so, I commend this body for returning the debate to the people's branch of the Michigan government. If you care about the Michigan legislature as an institution, if you care about good governance, it would be helpful to acknowledge that truth, as the next time the court does your work for you, you may disagree with the policy they decree.

SERIOUS POLICY CONCERNS

That all being said, HB 4003 is bad public policy that is going to cost this state millions of dollars in lawsuits it will lose when the law is inevitably unconstitutionally applied.

State and local governments frequently wield so-called anti-discrimination initiatives as a weapon to oppress religious people. The exponential expansion of government actions interfering with an individual's exercise of sincere religious conscience is especially prevalent in cases involving small and family-owned businesses. Recent cases against bakers, printers and bed and breakfast proprietors illustrate the point.

Amending Elliott-Larsen as currently proposed will inevitably collide with the constitutionally protected conscience held by many religious people who acknowledge the inviolable differences between men and women. People of the Abrahamic faiths, for example, recognize that differences in sex reflect God's nature and that this difference is inherent to our status as being made in the image of God: "So God created mankind in his own image, in the image of God he created them; male and female he created them." *Genesis 1:27*. Under the proposal, people of conscience would have to open bathrooms, locker rooms, housing accommodations, sports teams, and any other sex-separated program or offering to the opposite [biological] sex, if an individual simply claims or identifies their sex accordingly. For people of faith, the "Imago Dei" is the source of the inherent worth and dignity of all persons. It is *not* invidious discrimination, therefore, to protect one's privacy in a bathroom or shower. Nor

is it an oppressive social construct in need of deconstruction. Likewise, for these same reasons, people of faith do not engage in sexual harassment when, grounded in their sincere religious conscience, they express biologically accurate personal pronouns and refuse to lie. Chromosomes are not a social construct.

If enacted, HB 4003 will likely result in government actions against Christian and other religious people in ways that violate: 1) the fundamental constitutional right of parents to control and direct the upbringing of their children; 2) the First Amendment constitutional freedoms of citizens (whose valid religious, moral, political, and cultural views necessarily conflict with a political agenda that denies biology, ignores Biblical teaching, and diminishes personal privacy); and 3) the fundamental constitutional liberty and equal protection interests judicially recognized by the U.S. Supreme Court in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (i.e., the personal identity rights of citizens who find their personal identity not in their sexuality but in Jesus Christ or other faith orientation).

CONCLUSION

For these reasons, I recommend you table this bill until it can be rewritten in a way that accommodates the fundamental constitutional rights of all citizens, and not just those encouraging its passage.