

STATE OF MICHIGAN
IN THE COURT OF APPEALS

JOHN DOES et al,

Plaintiffs-Appellees,

Court of Appeals No. 321013

v.

Washtenaw Circuit Case No. 13-1196-CZ

MICHIGAN DEPARTMENT OF
CORRECTIONS et al,

Hon. Carol Kuhnke

Defendants-Appellants.

JOHN DOES et al,

Plaintiffs-Appellees,

Court of Appeals No. 321756

v.

Washtenaw Circuit Case No. 13-1196-CZ

MICHIGAN DEPARTMENT OF
CORRECTIONS et al,

Hon. Carol Kuhnke

Defendants-Appellants.

**PLAINTIFFS/APPELLEES' RESPONSE TO DEFENDANTS/APPELLANTS'
BRIEF ON LEAVE IN CASE NO. 321756**

ORAL ARGUMENT REQUESTED

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COUNTER-STATEMENT OF QUESTION PRESENTED

1. Did the Circuit Court correctly conclude that a final declaratory judgment on the merits in a prior state court proceeding had preclusive effect in a subsequent state court proceeding involving the same issue and same state defendants?

Appellees' answer: Yes

Appellants' answer: No

Trial Court's answer: Yes

2. Did the Elliott-Larsen Civil Rights Act's definition of "public service" include prisons prior to the 2000 amendment?

Appellees' answer: Yes

Appellants' answer: No

Trial Court's answer: Yes

3. Did the Circuit Court correctly conclude that the 2000 amendment to the Elliott-Larsen Civil Rights Act is an unconstitutional violation of equal protection under the Michigan and United States Constitutions?

Appellees' answer: Yes

Appellants' answer: No

Trial Court's answer: Yes

4. Did Plaintiffs properly plead each element required to establish a claim for a sexually hostile prison under ELCRA including that allegations that Defendants had actual and/or constructive notice of the sexually hostile environment?

Appellees' answer: Yes

Appellants' answer: No

Trial Court did not reach this question

STATEMENT OF JURISDICTION

Plaintiffs-Appellees do not contest this Court's jurisdiction pursuant to MCR 7.205(A)(1).

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INTRODUCTION

Michigan is in the small minority of states that incarcerates its youth in adult prisons.¹ The rationale for not placing children under the age of 18 into adult prisons is well documented. Youth in adult facilities are over eight times as likely as adults to have a substantiated incident of sexual violence and twice as likely to be harmed by custodial staff.² The 2003 Prison Rape Elimination Act (PREA) and the 2012 federal standards, promulgated thereunder, address the increased risk to youth under 18 in adult prisons by requiring sight and sound separation from adult prisoners in states that continued to house youth in adult prisons. 28 CFR 115, 115.14 (2012) (“A youthful inmate shall not be placed in a housing unit in which the youthful inmate will have sight, sound, or physical contact with any adult inmate through use of a shared dayroom or other common space, shower area, or sleeping quarters” and “outside of housing units,” states shall “maintain sight and sound separation between youthful inmates and adult inmates.”)³

Michigan’s failure to properly separate youths from adults in prison and provide care, treatment and supervision consistent with their age and the resultant harm is the subject of this class action filed on December 9, 2013. (See Complaint, **Ex. 1**) Plaintiffs’ complaint, filed on behalf of youth imprisoned in adult prisons who have been subjected to a sexually hostile

¹ While the majority of states allow for children to be charged and/or sentenced as adults, they are not transferred to adult prisons until they reach a minimum age of 18. Michigan is the rare state that places children as young as 13, directly in adult prisons. Consequently, it has one of the highest youth populations in adult prisons in the nation.

² U.S. Dept. of Justice, Bureau of Justice Statistics, Sexual Violence Reported by Correctional Authorities, 2006-2007, available at <http://www.bjs.gov/content/pub/pdf/svrca06.pdf>; Prison Rape Elimination Act, Federal Bi-Partisan Commission Report (2009) available at <http://cybercemetery.unt.edu/archive/nprec/20090820154841/http://nprec.us/publication/report/>; 77 Fed Reg 37, 106, 37, 108 (June 20, 2012); available at <http://www.gpo.gov/fdsys/pkg/FR-2012-06-20/pdf/2012-12427.pdf>.

³ Additional regulations address and restrict the use of solitary confinement for youths, staff abuse and education requirements.

environment and discriminatory treatment, alleges violations of the Elliott-Larsen Civil Rights Act (ELCRA), MCL 37.2101 et seq. (See **Ex. 1**, ¶¶ 134-160).

Defendants moved to dismiss Plaintiffs' complaint, relying upon a 2000 amendment to the ELCRA, eliminating prisoners from ELCRA protection by modifying the definition of a "public service" to exclude "actions and decisions regarding an individual serving a sentence of imprisonment." MCL 37.2301(b).⁴ This amendment was struck down as unconstitutional by a federal court in 2007. (*Mason v Granholm*, 2007 WL 201008 (ED Mich 2007), **Ex. 2**) As a result of its adherence to this decision as well as its own independent finding that the amendment violated Plaintiffs' equal protection rights, the Circuit Court denied Defendants' Motion to Dismiss Plaintiffs' Complaint and denied Defendants' Motion to Stay All Proceedings Pending Leave to Appeal. This court also denied Defendants' application for leave to appeal on June 17, 2014. (COA No 321013, Order 6/17/2014). Defendants filed an application for leave to appeal the decision with the Michigan Supreme Court and, again, sought a stay of all proceedings. The Supreme Court remanded the issue to this court for a decision but denied the Defendants' request to stay proceedings. (S. Ct. Nos, 149592 & 149593, Order 10/22/2104) Defendants again unsuccessfully sought a stay of all proceedings on remand. (COA 321013 & 321756, Order Denying Stay, 11/18/14).

The invalidation of the 2000 amendment to ELCRA follows from a simple principle contained in the language of the equal protection clauses of the Fourteenth Amendment of the United States Constitution and Michigan's Constitution, Art. I § 2: No state may carve a single class of citizens entirely out of a basic remedy for unconstitutional discrimination. Art. XIV §1;

⁴ Although only raised in its application to this Court in a footnote, Defendants now also argue that the pre-amendment ELCRA did not protect prisoners from discrimination by the State.

Art. I § 2.⁵ At a minimum, such equal protection requires that state laws protect all citizens equally from state officials' unconstitutional discrimination based on race, gender, or other grounds recognized as invidious by well-established precedent.

This constitutional mandate does not limit the state's substantial discretion to tailor its judicial remedies for the peculiar circumstances of incarcerated citizens. See, e.g., *Hadix v Johnson*, 230 F 3d 840, 845-46 (6th Cir 2000) (upholding Prison Litigation Reform Act's caps on attorneys' fees as a means for discouraging prisoners from filing "marginal or trivial lawsuits" on theory that prisoners have excessive incentives to litigate). However, there is a limit to the state government's exercise of discretion at which point it becomes violative of the constitutional guarantees of equal protection. If state law provides a general remedy for official misconduct which state law itself declares to be the basic method for implementing its own state constitution's principles of equal protection, then no single class of citizens can be excluded from such basic protections. Exclusion of any class of persons from such basic remedies constitutes a form of outlawry inconsistent with the plain text of the Equal Protection Clause. *Romer v Evans* 517 US 620 (1996).

The ELCRA Amendment, eliminating protection for all prisoners, constitutes precisely such a rare and, indeed, unprecedented form of unconstitutional outlawry. The ELCRA Amendment deprives incarcerated citizens alone of what the Michigan courts have themselves declared to be a basic remedy for unconstitutional discrimination required by the Michigan Constitution. Both the federal court which declared the amendment to be unconstitutional in 2007 and the trial court correctly recognized this deprivation in ruling that the amendment to

⁵The Equal Protection Clauses of Michigan's Constitution and the United States Constitution are coextensive, with a unitary analysis. *Crego v Coleman*, 463 Mich 248, 258; 615 NW2d 218 (2000) (our "equal protection provision is coextensive with the Equal Protection Clause of the Federal Constitution.")

ELCRA violated the Equal Protection clause. In addition to finding the federal court decision preclusive on this issue, the trial court also independently recognized that to exclude an entire class of individuals from the protection of the state's civil rights laws was to deny plaintiffs equal protection of the laws at the most basic level.

Defendants propound several arguments in seeking reversal of the trial court's decision. None withstands scrutiny. First Defendants challenge the trial court's reliance on the federal district court's decision in *Mason*, declaring the amendment to ELCRA to be unconstitutional. The federal court found the 2000 amendment to ELCRA to be unconstitutional, on its face, in a final decision on the merits in 2007. This unenforceability of a state statute that a federal court has ruled upon is a basic tenet of federalism and neither Defendants nor the courts are free to simply disregard this ruling. Nor are Defendants free to re-litigate this issue anew in a different forum. The court applied the applicable federal law which holds that a prior federal judgment in a case involving Defendants and the same issue, i.e. whether the amendment to ELCRA is an unconstitutional violation of the equal protection rights of prisoners, is binding on the same Defendants and related parties in a subsequent case. Since the Defendants had a full and fair opportunity to litigate in the federal case and did litigate the issue to a final judgment on the merits, Defendants are estopped from re-litigating the same issue in State Court.

Defendants also argue that prisoners are not entitled to protection from discrimination under Elliott-Larsen because they are not members of the "public." For this argument, Defendants erroneously rely on statutes from other states which contain different language and do not constitute their state's mechanism for enforcing constitutional provisions against discrimination as well as Michigan cases interpreting the public building exception in tort law. These provisions provide no relevant guidance in interpreting ELCRA or determining whether

the exclusion of prisoners from ELCRA coverage violates the Equal Protection clause of the Michigan and United States constitution.

As their last argument, Defendants argue that the Plaintiffs' complaint fails to state a claim because Defendants cannot be held liable for the criminal conduct of prisoners and staff under a respondent superior liability theory. However, the principles stated by Defendants are not applicable here as Plaintiffs have alleged direct not vicarious liability against Defendants for the creation of and refusal to remedy a sexually hostile environment despite notice of that environment. That claim is actionable and was properly pled. Thus, Defendants have not identified a single error in the court's order denying summary disposition. Therefore, the decision should be affirmed by this court.

STATEMENT OF FACTS AND PROCEEDINGS

The Plaintiffs' class representatives are seven youthful prisoners who were incarcerated in Michigan's adult prisons while under the age of 18 and subjected to sexual and physical abuse by adult prisoners and custodial staff. Plaintiffs Does 1 -7,⁶ filed this class action⁷ on December 9, 2013, in Washtenaw County Circuit Court, on behalf of themselves and all children confined in prisons operated by Defendant Department of Corrections who have or will be subjected to sexual and physical abuse, sexual harassment and degrading treatment from adult prisoners and staff. Plaintiffs have alleged that Defendants Snyder and MDOC officials violated their civil rights under the Elliott-Larsen Civil Rights Act, MCL 37.2101 et seq. (ELCRA) by failing to provide adequate protection and proper treatment for this vulnerable group of youth. (See **Ex. 1**, Complaint)

Defendants filed a Notice to Transfer the case to the Court of Claims, on February 7, 2014. However, the Court of Claims transferred the case back to the Circuit Court holding that "it was wholly unnecessary, and ultimately inappropriate [for Defendants] to have transferred this matter from Washtenaw Circuit Court to the Court of Claims in the first instance." (Court of Claims Opinion and Order, 2/7/14, p 3, **Ex. 3**).

On March 25, 2014, Defendants filed a motion for summary disposition⁸, arguing that the 2000 amendment to ELCRA barred Plaintiffs' claims and alternatively that if that amendment was unconstitutional, the pre-amendment ELCRA did not provide a basis for Plaintiffs' claims.

⁶ The Court granted, without opposition from Defendants, the right to proceed anonymously in light of their minor status, the nature of the claims of sexual abuse by adult prisoners and custodial staff, and their vulnerability due to their current custodial status under Defendants' control.

⁷ The Plaintiffs' motion for class certification was granted on October 29, 2014. Defendants' application for leave to appeal that order was denied on January 16, 2015. COA No. 324602.

⁸ The Defendants have filed a series of motions for summary disposition in this case. This motion was the fourth failed attempt by Defendants to have the case dismissed.

In response to Defendants' alternative argument, that ELCRA, pre-amendment, was not intended to protect prisoners, the trial court recognized that this Court has already decided that the pre-amendment ELCRA was intended to and did protect prisoners from discriminatory treatment and that correctional facilities were places of public service under MCL 37.2301. *Doe v Dept of Corrections*, 240 Mich App 199; 611 NW2d 1 (1999) *lv den* 467 Mich 857; 649 NW2d 82 (2002); *Neal v Dept of Corrections*, 232 Mich App 730, 737-8; 699 NW2d 206 (1998) *lv den* 467 Mich 877; 649 NW2d 82 (2002) ("under the plain language of subsection 301(b) the MDOC clearly falls within the broad statutory definition of a "public service").

The trial court also recognized that the constitutionality of the 2000 ELCRA amendment had already been addressed and declared to be an unconstitutional violation of prisoners' rights to equal protection in a case fully litigated by Defendants to a final ruling on the merits. *Mason v Granholm*, 2007 WL 201008 (ED Mich 2007). In that case, the federal court held that the amendment to ELCRA unconstitutionally discriminated against prisoners by depriving them of Michigan's basic remedies for official discrimination available to every other citizen. The Court concluded that "there is no rational basis for denying all prisoners (including those who have been released) – and no one else- the ability to seek redress for illegal discrimination that occurred in prison." *Mason, supra* at p. 4. The trial court held the federal court's ruling to be both preclusive and persuasive. Finally, Defendants argued that Plaintiffs had failed to state a claim under the ELCRA, by attacking Plaintiffs' factual allegations in the context of a C (8) motion. The trial court properly denied Defendants' Motion to Dismiss in its entirety.

Defendants filed an application for leave to appeal the trial court decision and sought a stay of proceedings in the Court of Appeals. On June 17, 2014, this Court denied the stay and the application for leave to appeal "for failure to persuade the Court of the need for immediate appellate review." (Court of Appeals order, 321013). The Defendants then filed an application

for leave to appeal this court's denial of leave and denial of a stay to the Supreme Court. In lieu of granting the application, the Supreme Court remanded the issue to this court for decision but refused to grant Defendants' request for a stay of proceedings pending a decision on these appeals.⁹

Upon remand, Defendants again sought a stay of proceedings from this Court, which was denied on November 18, 2014. *Id.* Defendants' motion to expedite these appeals and shorten the briefing schedule was also denied on November 18, 2014. (COA Nos. 321013 & 321756, Order, 11/18/14) Defendants submitted their brief on appeal on December 17, 2014, to which Plaintiffs now respond.

⁹ In addition to this issue, the Supreme Court also remanded for decision the trial court's decision denying the Defendants' motion to dismiss for Plaintiffs' failure to comply with the provisions for claims of indigency. The Court consolidated the two appeals. Consistent with Defendants' briefing, Plaintiffs will also respond to these issues in two separate briefs.

STANDARD OF REVIEW

This Court reviews *de novo* an order denying summary disposition. *Corley v Detroit Board of Education*, 470 Mich 274, 277; 681 NW2d 342 (2004). Defendants brought their motion to dismiss the ELCRA claim pursuant to MCR 2.116 (C)(8). A motion under 2.116(C)(8) tests the legal sufficiency of the complaint by examining the pleadings alone. All well pled allegations and reasonable conclusions must be accepted as true. Only when a plaintiff's claim on the pleadings is so clearly unenforceable as a matter of law that no factual development can possibly justify a right to recovery is summary disposition appropriate. *Id.*

ARGUMENT

I. THE PRIOR FEDERAL COURT PROCEEDING HAS PRECLUSIVE EFFECT IN A SUBSEQUENT STATE PROCEEDING INVOLVING THE SAME ISSUE AND STATE DEFENDANTS.

The Circuit Court properly ruled that the federal district court's decision in *Mason v Granholm*, holding that the ELCRA amendment at issue in this case violated the Equal Protection Clause, is preclusive, both because the ruling is binding and Defendants are collaterally estopped from litigating this same issue a second time in this case. *Mason v Granholm*, 2007 WL 201008 (ED Mich 2007). Such preclusion is required because this Court has long held that: 1) a federal court's determination of facial unconstitutionality of a state statute which is a final ruling on the issue is binding on the state; and 2) when a final judgment from a federal court on a federal claim exists, federal collateral estoppel law applies to determine whether the federal court judgment is preclusive.

A. *Mason v. Granholm* already decided the legal issue that is the subject of this litigation.

Mason, supra, involved a proposed class of adult and minor female prisoners alleging custodial sexual abuse in Michigan's prisons. Plaintiffs sued the Governor and the Director of the Michigan Department of Corrections (MDOC) for declaratory relief, injunctive relief, and damages. In 2006, Plaintiffs moved for summary judgment on their claim that the 2000 amendment to ELCRA was an unconstitutional infringement on Plaintiffs' rights to equal protection under the law. The *Mason* court thus considered the same issue raised by the same Defendants here, *i.e.* the constitutionality of the 2000 amendment to ELCRA which excludes prisoners from protection from discrimination under the Act. The *Mason* court recognized that far from being an ordinary piece of legislation, the ELCRA was the constitutionally required remedy for violations of the state constitution:

The ELCRA is Michigan's exclusive statutory mechanism for enforcing the Michigan Constitution's guarantee of equal protection of the laws:

No person shall be denied the equal protection of the laws; nor shall any person be denied enjoyment of his civil or political rights or be discriminated against in the exercise thereof because of religion, race, color or national origin. The legislature shall implement this section by appropriate legislation.

Mich. Const. of 1963, art. I, § 2. By its terms, this constitutional provision requires the Michigan legislature to provide legislation that will redress discrimination. The ELCRA is that legislation.

Mason v Granholm, at *2.

The *Mason* court analyzed Defendants' defense of the amendment and held that the ELCRA amendment was too broad to be rationally related to any of Defendants' purported legitimate state interests. Contrasting the ELCRA amendment to sections of the Prison Litigation Reform Act (PLRA), the court held:

In contrast to the PLRA provisions upheld in Hampton and other cases, the ELCRA amendment paints with a much broader brush. Rather than placing some limits on prisoner litigation and deterring frivolous suits, the ELCRA amendment completely precludes prisoners from challenging the conditions of their confinement or the discriminatory practices of the MDOC under the ELCRA, while they are incarcerated or after their release, and whether their claims are meritorious or not. The amendment does not, like the PLRA amendments, essentially place prisoners in the same position with respect to filing suit as other citizens. Rather, the amendment forecloses the vindication of prisoners' equal protection rights under Michigan law.

Id. at *4.

Concluding that the ELCRA amendment essentially permits the state to discriminate against prisoners without fear of accountability under Michigan's civil rights laws the *Mason* court held the amendment violated prisoners' equal protection rights. *Id.*

The State Defendants sought an interlocutory appeal and stay of the decision, which was denied by the Sixth Circuit. Defendants, in their pleadings filed in the Sixth Circuit, acknowledged the preclusive effect of the *Mason* court's ruling that the ELCRA Amendment

was unconstitutional, stating: “[a]n untold number of prison officials will now be open to being sued in future lawsuits. The District Court’s decision has removed a valid defense that prison officials had to lawsuits under the ELCRA.” (Ex. 4: *Mason v Granholm*, Sixth Circuit No. 07-114; Dfs.’ Motion to Stay Proceedings Pending Appeal; 3/19/07)¹⁰ ; (See Pls.’ Rsp. To Ds.’ Motion for Summary Disposition, p. 19-23; Ds.’ Reply Brf., p. 6-9; and see Summary Disposition Hearing TR. p. 17-20). Defendants thus previously acknowledged, in pleadings in the federal case, that the Court’s ruling *would* bind the state in subsequent actions.

The remaining claims in the *Mason* case were settled in 2009 with the parties carving out this ruling from the settlement, stipulating to a final declaratory judgment allowing Defendants the right to appeal this one issue. Defendants ultimately did not appeal, rendering the ruling a final judgment on the merits. (Ex. 5: *Mason, et al v Granholm, et al*, No. 05-73943, Dkt. 432 9/28/2009).

B. The statutory amendment to the ELCRA, having been declared unconstitutional on its face, is void, and cannot be used as a basis for dismissing plaintiff’s claims.

The federal court found the amendment to the ELCRA to be unconstitutional on its face. It is a well settled and longstanding principle of constitutional jurisprudence that a statute that has been declared unconstitutional on its face is void. See *Norton v Shelby Cnty*, 118 US 425, 442 (1886) (overruled on other grounds). Thus, it is simply unenforceable in any case and not merely void in the case in which its constitutionality was initially challenged.

¹⁰ The Sixth Circuit denied Defendants’ appeal and motion to stay the non-final interlocutory ruling, stating that, in the then procedural posture of the case, Defendants were no different from other litigants who lost a partial summary judgment motion and were thus enjoined from presenting an issue to a jury. Defendants’ attempt to convert this language into an order or statement regarding the non-preclusive effect of the subsequent final judgment is without support.

The unenforceability of a statute that a federal court has ruled is unconstitutional on its face was recently addressed in *Dascola v City of Ann Arbor*, 2014 WL 2095362 (ED Mich May 20, 2014), which held that:

If a law is unconstitutional it is a void and of no effect, and it cannot alter an otherwise valid obligation to a citizen . . . [it] imposes no duties, confers no rights . . . and justifies no acts performed under it . . . Once a statute is determined to be unconstitutional, no private citizen or division of the state may take any further action pursuant to its provision.

Dascola, at *5-6(quotations omitted).

As a matter of law, an unconstitutional statute is considered “void ab initio.” *Stanton v Lloyd Hammond Produce Farms*, 400 Mich 135, 144; 253 NW2d 114 (1977) (“[a]n unconstitutional statute, though having the form and name of law, is in reality no law, but is wholly void, and ineffective for any purpose . . . as inoperative as if it had never been passed”); *Adsit v Secretary of State*, 84 Mich 420, 429; 48 NW2d 31 (1891) (“[A]n unconstitutional law is no law, and in no case can it be made a justification in law for any action or non-action. Nor can any person or persons be deprived of any rights or privileges because such a law has been apparently legally enacted and appears in the body of our laws.”) For this reason, it cannot be enforced against Plaintiffs.

Defendants appear to argue that, because the *Mason* case involved a declaratory judgment, the law should be applied differently. As the *Dascola* court ruled, in rejecting a similar attempt to exempt a declaratory judgment ruling from the well-settled law that an unconstitutional statute may not be enforced, “The [cases declaring the statute unconstitutional] however, give no indication whatsoever that the district court considered the Declaratory Judgment Act in determining the charter provision at issue were unconstitutional and void.” *Dascola* at *7.

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The *Mason* court considered Plaintiffs' motion for summary judgment and ruled upon Plaintiffs' equal protection claim. The Declaratory Judgment Act has no bearing in this matter. Further, the *Dascola* court rejected Defendants' argument that a declaratory judgment ruling should be treated differently, stating:

Defendants are essentially arguing that any federal court ruling on constitutionality is confined only to the Plaintiff(s) in that case. This would mean that every single person affected by an unconstitutional law would have to challenge that law in federal court before a state or municipality would be compelled to stop enforcing that law against that individual. Such an "individual challenge" requirement is completely inappropriate to the basic principles of the federal judicial system: "[i]t is emphatically the promise and duty of the judicial department to say what the law is." *Marbury v Madison*, 1 Cranch 137, 5 US 137, 177, 2 L Ed (1803). Defendants' argument seeks to destroy this pillar of the legal system by confining this duty in constitutional cases to only those Plaintiffs bringing suit while allowing municipalities to say "what the law is."

Dascola at *7.

Moreover, the cases relied on by Defendants do not support their proposition. Defendants cite *Tesmer v Granholm*, 333 F 3d 683 (6th Cir 2003), for the proposition that a declaratory judgment is effective only as to the plaintiffs who obtain it and that the state is otherwise not bound by it. The *Tesmer* court, however, did not address the question of whether the state was precluded by an earlier federal judgment issued against the state itself but rather an entirely distinct question of whether an injunction issued against particular judicial officers could be broadened to enjoin "non-party judicial officers." Based on the principles that "injunctive relief should be no broader than necessary to remedy the harm at issue" and that "enjoining a judge is a serious matter," *Tesmer* held that a declaratory judgment against specific judicial officers could not be the basis for an injunction against a state judge who was not a party to the original lawsuit. *Tesmer*, *supra* at 702. This case, by contrast, involves preclusion of a non-judicial entity, the State of Michigan, that was a *party* to the earlier litigation on which the

preclusion was based. See also *Caspar v Snyder* 2015 US Dist LEXIS 4644, *66-7 (ED Mich 2015) in which Judge Goldsmith similarly rejected the Defendants' reliance on *Tesmer* because as here the order recognizing same-sex marriages performed prior to the issuance of the stay would only operate against the party defendants and those who act with concert with them.

Moreover, *Tesmer* unlike *Mason*, did not involve a ruling that a statute was facially unconstitutional. Rather, *Tesmer* held that a statute was unconstitutional as applied to the particular parties before the court based on specific facts and circumstances. *Tesmer, supra*, 333 F 3d at 701 ("As applied, the statute violates the due process provision of the Fourteenth Amendment to the United States Constitution, and is thus unconstitutional.") Lastly, the ruling never became a final ruling on the merits. *Kowalski v Tesmer*, 543 US 125 (2004) (rev'd on other grounds).

Similarly, in *Steffel v Thomas*, 415 US 452 (1974), the Supreme Court did not hold that declaratory judgments are only persuasive and not preclusive authority. To the contrary, *Steffel* had nothing whatsoever to do with the preclusive effect of prior federal judgments. Instead *Steffel* held that, absent a pending state criminal prosecution enforcing a state law in state court, federal courts were not barred from issuing a declaration that such a state law was unconstitutional by the principles of abstention announced in *Younger v Harris* 401 US 37 (1971) and *Samuels v Mckell* 401 US 66 (1971).

In the course of explaining why a federal court's declaratory judgment that a state statute was unconstitutional in whole or in part did not violate any principles of comity or federalism when no state criminal prosecution was pending in state court, *Steffel* noted that declaratory judgments were less intrusive into state judicial processes than federal injunctions of ongoing state criminal prosecutions. *Steffel*, 415 US at 469-471. In particular, *Steffel* noted that "if a declaration of partial unconstitutionality is affirmed by this Court, the implication is...that if the

statute is narrowly construed by the state courts, it will not be incapable of constitutional applications” such that “the declaration does not necessarily bar prosecutions under the statute, as a broad injunction would,” because “it may well be open to a state prosecutor, after the federal court decision, to bring a prosecution under the statute if he reasonably believes that the defendant’s conduct is not constitutionally protected and that the state courts may give the statute a construction so as to yield a constitutionally valid conviction.” *Id.* at 470 (emphasis added). These observations about the limits of a federal declaratory judgment’s holding of “partial unconstitutionality” have no relevance to a federal judgment declaring a state statute to be unconstitutional on its face, *in toto*. As *Steffel* made perfectly plain, such a judgment would have “the force and effect of a final judgment.” *Id.* at 471.¹¹

This case involves a final declaratory ruling on the constitutionality of a state statute issued against State Defendants, declaring that the state statute was facially unconstitutional and therefore has no constitutional applications that would not run afoul of the earlier judgment. The State Defendants cannot simply ignore this ruling and attempt to enforce the unconstitutional statute to preclude Plaintiffs from redress for Defendants’ discriminatory and abusive actions.

C. Federal preclusion law determines whether a federal judgment on a federal claim is preclusive in Michigan state courts.

In their application to this Court, Defendants contend that the trial court’s ruling regarding the preclusive effect of the *Mason* decision was incorrect. In fact, the trial court applied the correct law and reached the correct result with regard to the preclusive nature of the *Mason* decision. As the trial court ruled, the federal court’s final declaratory judgment that the ELCRA amendment violated the Equal Protection Clause of the United States Constitution

¹¹ Likewise, in *Doran v Salem Inn, Inc.*, 422 US 922 (1975) the Supreme Court only addressed whether a court could issue an injunction or declaratory judgment once state criminal proceedings commenced. The preclusive effect of a declaratory judgment was neither raised nor addressed by the Court.

constitutes binding (i.e., preclusive) authority on the Court due to collateral estoppel.¹² This is because the preclusive effect of a federal court judgment in a subsequent Michigan state case is determined by applying federal preclusion doctrine. See *Pierson Sand & Gravel, Inc v Keeler Brass Co*, 460 Mich 372, 380-81; 596 NW2d 153 (1999).

Collateral estoppel, which is also called issue preclusion, is a doctrine which “imports a final determination from one case into a subsequent case requiring determination on that same issue.” *People v. Wilson*, 2014 Mich. Lexis 1081, *3 (June 18, 2014)¹³. In *Pierson Sand*, *supra*, the Michigan Supreme Court quoted and endorsed the following well accepted rule regarding re-litigating in state court issues previously litigated in federal court:

If a plaintiff has litigated a claim in federal court, the federal judgment precludes re-litigation of the same claim in state court based on issues that were or could have been raised in the federal action, including any theories of liability based on state law. **The state courts must apply federal claim-preclusion law in determining the preclusive effect of a prior federal judgment.**

¹² In asserting that the trial court erred by referring to the *Mason* decision as “binding” on the Court, the Defendants have intentionally misconstrued the trial court’s statement. The Circuit Court used the term “binding” in the same manner that Defendants used binding – “Plaintiffs argue that the *Mason* decision is binding because the state courts must apply federal claim preclusion law.” (Ds.’ Reply Brf., p. 6; see also Order Denying Defendants’ Motion for Stay, (“Defendants failed to demonstrate likelihood of success on appeal of this Court’s ruling on the preclusive effect of *Mason v Granholm*.”)). It merely means that the federal judgment precludes a state action on the same issue. Thus, the Defendants’ analysis of the binding effect of federal court decisions on state cases is wholly irrelevant. The issue here is whether collateral estoppel applies to a final judgment issued by a federal court against the same defendants precluding re-litigation of the constitutionality of the 2000 amendment to ELCRA.

¹³ The Defendants continue to misunderstand the difference between precedence and preclusion and thereby place reliance on irrelevant cases. For example, Defendants cite *People v Vandenberg* 2014 Mich App LEXIS 1854 (2014) and *People v Coleman* 2000 Mich App LEXIS 1227 (2000) in support of their argument that the *Mason* case does not have preclusive effect here. In both cases, the courts acknowledged that prior court decisions had some precedential impact on the holding of the case. Neither case faced, considered or decided, as the court did here, the preclusive effect of a final judgment of a federal court declaring a state statute unconstitutional as a matter of first impression.

Pierson Sand, 460 Mich 372, 380-81 (quoting Moore, Federal Practice, § 131.21(3)(d), p 131-50) (emphasis added); *see also Taylor v Sturgell*, 553 US 880, 891; 128 S Ct 2161, 2171 (2008) (there is no dispute that the preclusive effect of a federal court judgment is determined by federal common law); *Hagen v Utah*, 510 US 399, 409; 114 S Ct 958, 964 (1994)(preclusive effect of federal court judgment in state court is an issue of federal common law).

Under federal common law, four requirements must be met in order to apply collateral estoppel:

(1) the precise issue raised in the present case must have been raised and actually litigated in the prior proceeding; (2) determination of the issue must have been necessary to the outcome of the prior proceeding; (3) the prior proceeding must have resulted in a final judgment on the merits; and (4) the party against whom estoppel is sought must have had a full and fair opportunity to litigate the issue in the prior proceeding.

Hamilton's Bogarts Inc. v Michigan, 501 F 3d 644, 650 (6th Cir. 2007) (citing *NAACP, Detroit Branch v. Detroit Police officers Ass'n (DPOA)*, 821 F.2d 328, 330 (6th Cir. 1987). Defendants clearly meet each element; thus, under federal claim preclusion law, Defendants are collaterally estopped from re-litigating this issue.

To avoid this result, Defendants argue that Michigan preclusion law should apply to this case. According to Defendants, Michigan preclusion law requires mutuality of parties in order for a prior ruling to constitute a binding decision in a subsequent case. As Plaintiffs in the instant case are not the same as the *Mason* Plaintiffs, under Defendants' hypothetical, Michigan collateral estoppel would not preclude the re-litigation of this same issue.

Defendants are incorrect for two reasons. First, it is settled law that this Court must apply *federal* common law in determining the preclusive effect of a prior *federal* judgment and application of federal law of preclusion requires the conclusion that *Mason* is binding. *Pierson Sand & Gravel, Inc v Keeler Brass Co*, 460 Mich 372, 380-81; 596 NW2d 153 (1999) (federal

judgment precludes re-litigation of the same claim in state court based on issues that were or could have been raised in the federal action, including state law theories); *Venture Global Engineering, LLC v Satyam Computer Services, Ltd*, 730 F 3d 580 (6th Cir 2013) (federal preclusion law applies when the prior judgment issued from a federal court); *Hamilton's Bogarts Inc v Michigan*, 501 F 3d 644, 651 (6th 2007) (preclusion applies to privies of the party in first suit, including employees who share interest in the litigation with employer); *Parklane Hosiery Co, Inc. v Shore*, 439 US 322, 331 (1979) (there is no reason to require mutuality of parties in a subsequent case against the party who fully litigated the issue in the prior case and lost).

Under federal preclusion law, the application of offensive collateral estoppel (where a plaintiff seeks to bind a defendant to a prior judgment against that defendant) is limited only in cases where its application would be unfair to defendants who did not have a full opportunity to litigate in the prior case. *Parklane Hosiery Co*, 439 US at 331 (“[I]n cases where a plaintiff could easily have joined in the earlier action or where . . . the application of offensive estoppel would be unfair to a defendant, a trial judge should not allow the use of offensive collateral estoppel.”). There is no showing that it would be unfair to bind these Defendants to the federal court’s ruling.

Defendants in *Mason* fully, fairly, and vigorously litigated the issue of the constitutionality of the amendment to the ELCRA in the prior federal case of *Mason*, which also involved a proposed class of prisoners.¹⁴ Plaintiffs in this case could not have joined with the plaintiffs in the *Mason* case, who initiated their litigation in 2005, when the Plaintiffs in this case

¹⁴ Defendants claim that collateral estoppel should not apply because the *Mason* defendants had no incentive to litigate that case. (Defendants’ Brief, p 34). To the contrary, the *Mason* case was vigorously litigated. Defendants took an interlocutory appeal after denial of a summary judgment motion and even preserved their right to appeal as part of the settlement. Defendants admitted to being highly incentivized to defend the *Mason* case because if Plaintiffs prevailed, the decision would “remove a valid defense” and allow an “untold number” of lawsuits against prison officials.

were between the ages of 6 and 8, and had no cause of action. And the issue before the federal court was identical to the issue before this Court: whether the ELCRA amendment is valid under the Equal Protection Clause of the United States Constitution which is interpreted as coextensive with Michigan's Constitution.

Second, even if state law applied to define the preclusive effect of a prior federal judgment, Michigan cases applying state law have recognized the unfairness of a strict mutuality requirement where a party had a prior full and fair opportunity to litigate the issue. See *Knoblauch v Kenyan*, 163 Mich App 712, 719; 415 NW2d 286 (1987) (recognizing the federal abrogation of the mutuality requirement and stating “we too find little satisfaction in strict adherence to the mutuality requirement where . . . the plaintiff has had a full and fair opportunity to litigate the question in his prior case”); *Monat v State Farm Ins Co*, 469 Mich 679, 687-88; 677 NW2d 843(2004) (recognizing “modern trend” of “exceptions to the mutuality requirement”); see also 1 Restatement Judgments, 2d, ch 3 § 29, p 291, (“A party who has had a full and fair opportunity to litigate an issue has been accorded the elements of due process. There is no good reason for refusing to treat the issue as settled so far as he is concerned other than that of making the burden of litigation risk and expense symmetrical between him and his adversaries.”) The application of federal preclusion law, which does not require complete mutuality, is not unfair to Defendants.

Defendants also argue that *United States v Mendoza*, 464 US 154 (1984), which carves out an exception¹⁵ to non-mutual offensive collateral estoppel for the United States Government,

¹⁵ The Defendants also claim that an exception to preclusion identified in *Montana v United States* 440 US 147 (1979) should be applied here. In *Montana*, the court suggested that an exception to preclusion might be applicable if the issue in the successive cases involved “unrelated subject matter.” That exception has no applicability here since the subject matter at issue is not simply related or similar but is actually identical. The legal issue in both cases was

should relieve these Defendants of the preclusive effect of the *Mason* ruling. *Mendoza*, however, applies uniquely to the United States government and has no relevance to the State of Michigan. The United States was excepted in *Mendoza* because it is a party in more than 36% of all cases in various federal district courts handled by separate offices across the country, and more than 30% of civil appeals. *Id.* at 159-60. The Supreme Court found dispositive that the United States Government litigates across the country and must consider conflicts between circuits that could not develop if the very first decision could be used to estop the government in all future litigation.

The State and its agencies are radically smaller and less complex than the federal government and thus enjoy a far greater capacity to monitor litigation against the state. The policy concerns underlying *Mendoza*, therefore, have limited relevance to federal judgments against state governments. *In re Stevenson*, 40 A3d 1212, 1222 n. 8 (PA 2012) (refusing to apply *Mendoza* to the State of Pennsylvania); *State v United Cook Inlet Drift Ass'n*, 895 P 2d 947 (Alaska 1995) (policy concerns raised in *Mendoza* not applicable to the states as the attorney general litigates in a single jurisdiction and has a smaller volume than the solicitor general); *Benjamin v Coughlin*, 905 F 2d 571(2nd Cir 1990). There are not multiple courts of appeals in Michigan to develop issues of law. The state does not have to litigate in different regions of the country where the law may be different. Additionally, there are no cases in Michigan or this Circuit applying the *Mendoza* exception to Michigan or state agencies.¹⁶

the constitutionality of the 2000 amendment to ELCRA which excluded prisoners from protection from discriminatory treatment.

¹⁶ Cases relied on by the Defendants are also distinguishable. For example, in *Hercules Carriers Inc v Claimant Florida*, 768 F 2d 1558 (11th Cir 1985) the court refused to apply collateral estoppel because the litigation involved two different and unrelated agencies of the state, the department of professional regulation and the department of transportation. Here, the MDOC and the Governor are Defendants in both cases, so giving preclusive effect to the *Mason* decision is appropriate.

II. THE ELCRA AMENDMENT DEPRIVES PRISONERS OF EQUAL PROTECTION BY DEPRIVING ONLY PRISONERS OF STATUTORY REMEDIES THAT PROTECT ALL OTHER PERSONS IN MICHIGAN FROM UNCONSTITUTIONAL DISCRIMINATION.

In addition to finding that the judgment entered by the federal district court in *Mason* was preclusive, the trial court also conducted an independent analysis of the constitutionality of the ELCRA amendment. Based on that analysis, the court concluded that the Amendment was unconstitutional as it deprives prisoners of equal protection of the law. Defendants have not set forth any plausible justification for this Court to reverse that decision.

A. The ELCRA Amendment unconstitutionally deprives Plaintiffs of Equal Protection from Discrimination by Prison Officials.

ELCRA provides in relevant part that “the full and equal utilization of public accommodation, public service and education facilities without discrimination because of 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). Prior to 2000, state courts had construed this language to provide inmates of correctional facilities with a remedy for unconstitutional discrimination.

On March 10, 2000, the Michigan legislature redefined “public service” to exclude “a state or county correctional facility with respect to actions and decisions regarding an individual serving a sentence of imprisonment.” MCL 37.2302. The Amendment barred claims under ELCRA to the extent that they challenge actions and decisions regarding current or former prisoners. Prison staff, volunteers, independent contractors and visitors could still bring actions under ELCRA to challenge prison officials and decisions that discriminate against them on account of race, sex, age or disability. The sole purpose of the ELCRA Amendment was to ensure that current and formerly incarcerated individuals would not enjoy the same protections

from state and prison staff abuse and discriminatory treatment under the ELCRA that any other person in the state enjoys.

1. ELCRA provides the generally applicable and constitutionally required remedy for official discrimination that violates the Michigan Constitution.

To understand the gravity of the burden imposed by the ELCRA Amendment, it is important to understand the central role that ELCRA plays in the vindication of state constitutional rights in Michigan. Art. I, § 2 of the Michigan Constitution provides that:

No person shall be denied the equal protection of the laws; nor shall any person be denied the enjoyment of his civil or political rights or be discriminated against in the exercise thereof because of religion, race, color or national origin. The legislature shall implement this section by appropriate legislation.

The first clause forbids arbitrary discrimination generally. The second clause prohibits specified types of discrimination which does not include age or gender discrimination. The third clause requires the state legislature to provide remedies for both types of illegal discrimination. It is through the implementing legislation that the prohibition of age and gender discrimination is recognized. *Michigan Dept of Civil Rights v Michigan Department of Civil Service*, 101 Mich App 295; 301 NW2d 12 (1981). Thus, ELCRA is crucial for both its delineation of the prohibition against age discrimination and sexual harassment and for the provision of a remedy that is the sole basis for redress against the state for violation of the State Constitution. See *Lewis v Michigan*, 464 Mich 781, 786-87; 629 NW2d 868 (2001).

ELCRA's importance as the critical remedy for state constitutional violations is underscored by the state court's observation that Article I, §2 "not only authorizes but *demand*s" legislation such as ELCRA to insure "suitable statutory remedies for persons claiming to have been the victims of discrimination." *Marsh v Dept of Civil Service*, 142 Mich App 557, 568; 370 NW2d 613(1985). See also *Smith v Dept of Public Health*, 428 Mich 549, 632; 410 NW2d 749

(1987) (per Brickley, C.J.) (“the Equal Protection Clause of the 1963 Constitution *requires* the Legislature to create the rights and remedies available under Const. 1963, Art. 1, § 2”) (emphasis added).

ELCRA’s damages remedy is important not only because it is a critical part of Michigan’s constitutional system but also because many deprivations of equal protection can be effectively remedied only through damages. When a prisoner has been raped, sexually abused by a prison guard or other prisoners due to a deliberate indifference to their safety, for instance, an injunction on future incidents can obviously not make the victim whole. Likewise, it is a familiar point that damages are an important remedy for insuring the complete vindication of constitutional rights. *Butz v Economou*, 438 US 478, 505-06 (1978) (denying absolute immunity to federal officials because such immunity from damages would “seriously erode the protection provided by basic constitutional guarantees” and noting that “an action for damages against the responsible official can be an important means of vindicating constitutional guarantees”).

In sum, ELCRA provides the basic remedies for unconstitutional discrimination under Michigan law. These remedies are basic not only because the Michigan Constitution itself regards them as the necessary implementation of Article I, §2, but also because they are often the only means by which basic constitutional rights can be vindicated.

2. Because ELCRA’s Amendment unequally deprives inmates of basic protection against unconstitutional discrimination, it cannot be subject to deferential judicial review.

The 2000 amendment to ELCRA stripped all and only prisoners of any of ELCRA’s remedies for unquestionably unconstitutional discrimination based on age, race, and gender. The amendment excludes prisoners from protection against discrimination by the state in all aspects of provision of housing, treatment, punishment, education and rehabilitation services, food, education, access to family, medical treatment – indeed all aspects of life. Moreover, there can

be no doubt that this sweeping and comprehensive elimination of remedies for unequal treatment was deliberately designed to target prisoners alone. The clear intent of the amendment to exclude prisoners alone from ELCRA's protection is stated in the enacting section of the amendment which provides:

Enacting section 1. This amendatory act is curative and intended to correct any misinterpretation of legislative intent in the court of appeals decision *Neal v Department of Corrections*, 232 Mich App 730 (1998). This legislation further expresses the original intent of the legislature that *an individual serving a sentence of imprisonment in a state or county correctional facility is not within the purview of this act.*

MCL 37.2301 (emphasis added).

By so unequally singling out prisoners alone for a draconian loss of remedies from unconstitutional state action, the ELCRA Amendment deprived prisoners of "equal protection of the laws in the most literal sense." *Romer v Evans*, 517 US 620, 634 (1996) ("A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense.") As the U.S. Supreme Court held in *Romer v. Evans*, the identification of persons by single trait – "an individual serving a sentence of imprisonment" – and the denial of protection under the state's most important remedies for unconstitutional official discrimination to all and only such persons "across the board" imposes a special injury on the targets of the denial that cannot be judged under the usual deferential standard of review for ordinary legislative classifications.

In fact, the ELCRA Amendment constitutes such a rare instance of a *per se* deprivation of equal protection of the laws, because it imposes "a broad and undifferentiated disability on a single named group," a type of enactment that *Romer v. Evans* held to be "an exceptional and ... invalid form of legislation." *Romer*, 517 US at 632 (emphasis added). Such state laws that fall within *Romer's* "literal violations of equal protection principles" do not get the benefit of the

normal deference extended by the “rational basis” test and are subject to a heightened scrutiny. *Equality Foundation v Cincinnati*, 128 F 3d 289, 297 (6th Cir 1997).

The ELCRA Amendment bears a striking resemblance to Amendment 2, the state constitutional amendment struck down in *Romer v. Evans*. In holding that Amendment 2 was invalid, the *Romer* Court emphasized the “sheer breadth” of Amendment 2’s elimination of all protection from discrimination based on gay, lesbian, or bisexual orientation. Such a “sweeping and comprehensive” elimination of protection from discrimination that others in Colorado could seek suggested that the amendment was “inexplicable by anything but animus toward the class that it affects; it lacks rational relationship to legitimate state interest.” *Id.* In relying on the breadth of the measure to invalidate Amendment 2, *Romer* held that Amendment 2 “is at once too narrow and too broad. It identifies persons by a single trait and then denies them protection *across the board*.” *Romer*, 517 US at 632 (emphasis added). The Court maintained that this “disqualification of a class of persons from the right to seek specific protection from the law is unprecedented in our jurisprudence” and therefore held that the usual “rational basis test would not be used to evaluate the law.”

The same description is applicable to the ELCRA amendments at issue here. Indeed, the amendments are *more* sweeping than Amendment 2 in one critical respect. Amendment 2 did not purport to deprive gay and lesbian persons of protection under anti-discrimination laws that barred discrimination based on race, gender, disability, or other characteristics aside from sexual orientation. Instead, Amendment 2 barred *all* persons from taking advantage of only one narrow type of anti-discrimination laws – namely, laws creating claims of discrimination based on “homosexual, lesbian or bisexual orientation, conduct, practices or relationships.” By contrast, the amendments here deprive inmates of statutory protection from *any* sort of discrimination, whether based on gender, race, disability, marital status, etc. This is far more “sweeping” than

Amendment 2, because it allows the state to discriminate against inmates based on characteristics that have nothing whatsoever to do with their status as inmates or the efficient administration of prisons.

The civil rights amendment is analogous to Amendment 2 in a second respect: it "singl[es] out a certain class of persons for disfavored legal status or general hardships." *Romer*, 517 US at 633. The amendment does not exempt prisons and jails as such from coverage under the civil rights act but instead exempts from coverage only prisons' and jails' "actions and decisions regarding an individual serving a sentence of imprisonment." Thus, if a prison guard were to sexually harass a visitor or a prison employee, such harassment would still be actionable under the Act. By contrast, if the prison guard were to turn his attention to an inmate, then, simply by virtue of the different target, the action falls outside the coverage of the Act. In effect, the status of the victim determines the legal remedy.

The Defendant argues that, because prisoners are not "similarly situated" to non-prisoners, this sweeping and comprehensive deprivation of remedies against admittedly unconstitutional discrimination is consistent with the Fourteenth Amendment's equal protection clause. This reasoning, however, misunderstands the analysis required by the *Romer* decision. There are, of course, many ways in which prisoners can be subject to classifications and disabilities different from the rules to which non-prisoners are subject. Legitimate penological objectives require that prisoners be deprived of basic liberties that others take for granted. *Romer*, however, holds that no group can be deprived entirely of basic protections against unconstitutional discrimination. ELCRA imposes this rare form of total deprivation of such a basic remedy. While "inmates" as such is not a suspect classification, discrimination based on age, race disability, or gender concededly has no place anywhere in state government -- even in prison or jail. A prison official who sexually harasses minor inmates, refuses medical or

education services to an inmate with a disability, or places only African-American inmates in solitary confinement cannot claim that these forms of discrimination bear bore some rational relationship to any legitimate penal goal.

The ELCRA Amendment, however, imposes precisely such a total deprivation of a basic remedy against admittedly unconstitutional discrimination. By removing prisoners alone from the scope of Michigan’s basic remedial scheme for deprivations of equal protection, the ELCRA amendment insulates such admittedly unconstitutional harassment and discrimination from what are often the only effective state-law remedies – remedies that, as explained above, Article I, section 2 of the Michigan Constitution itself deems to be constitutionally required. Whatever other burdens can be imposed on prisoners as a class, this uniquely onerous loss of equal protection from illegal discrimination is not one of them. With respect to such basic protections, *Romer* holds that prisoners *are* “similarly situated” to all other Michigan citizens.

The “similarly situated” analysis put forth by Defendants is not applicable here. The analysis is only applicable to claims of an individual, or “class of one” claims, where a plaintiff does not allege membership in an identifiable class or group as the basis for denial of equal protection rights. *Village of Willowbrook v Oleck*, 528 US 562, 564 (2000) (“our cases have recognized successful equal protection claims brought by a “class of one” where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and there is no rational basis for the difference in treatment.”). Defendants’ analysis is wholly inapplicable to the equal protection claim at issue in this case, which involves an amendment to the statute that, on its face, discriminates against a class by explicitly excluding them from the statute’s protection.¹⁷

¹⁷ In fact, the cases on which Defendants rely for the proposition that prisoners are not similarly situated to non-inmates were all equal protection challenges based on class of one, not facially

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The distinction between “class-of-one” cases and the case before the Court is that the latter involves a classification written into the text of a statute, whereas the former involves classifications that are only implicit customs and practices the existence of which defendants typically deny. In the latter situation, the plaintiff is obligated to show that the plaintiff is “similarly situated” to some other party that did not receive the disadvantageous treatment suffered by the plaintiff, because such a showing is necessary to prove the existence of an unconstitutional classification. Here, where the classification appears on the face of the challenged law, obviously such proof is unnecessary.

The Sixth Circuit recently explained the differences in analysis between arbitrary classification of an “identifiable group” and “class of one claims” where a plaintiff alleges he have been intentionally treated differently from others similarly situated and there is no rational basis for the difference in treatment. *Davis v Prison Heath Services*, 679 F 3d 433 (6th Cir 2012); *See also Engquist v Oregon Dept of Agr*, 553 US 591, 602 (2008) (equal protection typically is concerned with government classifications that “affect some groups of citizens differently than others” in contrast to “class of one” equal protection claims involving treating seemingly similarly situated individuals differently). The Circuit Court properly held the amendment unconstitutional because both the state and federal constitutions guarantee equal protection of the laws, the state cannot impose a disability on a single named group unless it can be said to advance a legitimate governmental interest. *Romer v Evans*, 517 US 620, 632 (the search for the link between the classification and objective gives substance to the equal protection clause).

discriminatory statutes. *See e.g. People v Maxson*, 181 Mich App 133; 449 NW2d 422 (1989) (defendant alleged violation of equal protection clause because he was charged with crime of possession of metallic knuckles while inmates at Jackson were not prosecuted).

Defendants attempt to diminish the scope of the amendment by asserting that the amendment does not prevent prisoners from claiming discrimination to “the extent Plaintiffs are denied public services provide by other public services, such as the secretary of state’s office.” This claim is meaningless. Where Defendants control all aspects of prisoners’ lives -- including any access, by letters or phone, to any other state agency -- it is practically meaningless to suggest that prisoners can seek redress from prisons’ unconstitutional actions by suing entities other than prisons and prison officials. Moreover, it is legally irrelevant that prisoners have some remedies against some agencies if those prisoners are deprived of *equal* remedies against abuses by prisons. *Romer*, at 634 (“The guarantee of equal protection of the laws is a pledge of the protection of equal laws”).

3. Because ELCRA’s Amendment cannot be justified by any legitimate requirement of prison administration, it violates the Equal Protection Clause of the Constitution even under the deferential standard of “rational basis” review.

Even under the most conventional equal protection analysis, the ELCRA Amendment at issue in this case cannot survive deferential “rational basis” scrutiny. The state cannot impose a disability on a single named group unless it can be said to advance a legitimate governmental interest. *Romer v Evans*, 517 US 620, 632 (noting that the search for the link between the classification and objective gives substance to the equal protection clause).

The appropriate analysis requires a determination of whether the amendment, by identifying a subset of people and denying them protections from unconstitutional discrimination deemed to be basic by the Michigan Constitution, can somehow rationally serve some legitimate penological purpose relevant to the safe confinement of inmates.¹⁸

¹⁸ Moreover, Defendants attempt to justify depriving prisoners of equal protection of the state’s civil rights act, because they have distinct characteristics from general members of the public could similarly be used to deny equal protection of the laws to any other such group as hospital

Defendants proffer several justifications for this sweeping forfeiture of basic protections. First, although not argued in the trial court, Defendants now contend that “maintaining prison order” is a legitimate state interest justifying the exclusion of prisoners from civil rights protection against discrimination by the MDOC. Defendants also argued to the federal court, the state court below, and again here, that the protection of the public fisc (by prevention of windfall awards), reduction of judicial intervention in the management of prisons, and deterrence of frivolous lawsuits by prisoners constitute legitimate interests justifying targeting prisoners for exclusion from the protections of the state’s Civil Rights Act. The federal court and trial court correctly found that these rationales do not justify the exclusion of prisoners from the protections of ELCRA.

While the maintenance of prison order is a valid interest, Defendants offer no explanation as to how this interest is related to or served by excluding prisoners from protection against discriminatory and abusive treatment by prison officials. Orderly incarceration never requires violations of equal protection among prisoners. It is well-settled that rights to the equal protection of the laws are not inconsistent with the legitimate needs of prison administrators. *Johnson v California*, 543 US 499, 510 (2005) (the right to be free from official racial discrimination is “not a right that need necessarily be compromised for the sake of proper prison administration.”). Exclusion from a basic protection against discrimination serves no legitimate goal of prison administration. There is no penological justification for prison officials to tolerate sexual abuse of child prisoners by prison staff, and Defendants cannot seriously argue that preventing the state courts from exercising their authority to enforce laws against discrimination in a prison context is a valid state goal or interest. Likewise, no court has ever suggested that

patients, university students, mental health commitments, public school students, public welfare recipients, etc.

inmates' rights to the equal protection of the laws are somehow inconsistent with the requirements of an orderly prison, and Defendants fail to proffer any support for this cursory and conclusory assertion. To the contrary, compliance with the Fourteenth Amendment's equal protection clause "is not only consistent with proper prison administration, but also bolsters the legitimacy of the entire criminal justice system." *Johnson* at 511.¹⁹

Defendants support their argument with references to cases upholding procedural requirements for prisoner litigation, set forth in the Prison Litigation Reform Act (PLRA), designed to deter frivolous lawsuits. These cases, as well as the others relied upon by Defendants, relied upon "skyrocketing numbers of claims filed by prisoners" and analyzed economic incentives that would prompt prisoners to "stop and think before filing a complaint." As the *Mason* court recognized: "In contrast [to the PLRA provisions], the ELCRA amendment paints with a much broader brush." Targeting only cases "with respect to actions and decisions regarding an individual serving a sentence of imprisonment" filed under ELCRA breaks any remaining rational link between Defendants' stated intent and the actual reach of the amendment.²⁰ While deterring frivolous litigation and saving the public fisc may be a valid goal,

¹⁹ Defendants also argue that Plaintiffs could sue for injunctive relief under the Constitution or perhaps for damages under federal law as support for the amendment's constitutionality. As the federal court recognized, this is irrelevant to the analysis of whether the amendment survives a rational basis challenge under equal protection. *Mason* at 4, fn 1. Nor do these limited alternatives satisfy a direct challenge to the denial of a fundamental right to equal access to the courts addressed below. ELCRA provides a right for damages against state and state officials, a right to a jury trial and attorney fees for successful litigation. Exempting prisoners from the protections of the civil rights act affects the fundamental rights of this group's access to the courts involving the violation of their Constitutional rights, and their basic equal protection rights. Mich Const, 1963, Art. 1, § 13 and Art. 1, § 14; *King v General Motors Corp.*, 136 Mich App 301; 356 NW2d 626 (1984); *Smith v U of D*, 145 Mich App 468; 378 NW2d 511, *lv app den* (1985).

²⁰ The amendment does not limit itself to cases filed by prisoners but rather prohibits challenging discrimination against prisoners. If there were problems with frivolous prisoner litigation under the Civil Rights Acts, there are other mechanisms for deterring it, such as motions to dismiss, or sanctions and costs.

these goals bear no rational relationship to legislation directed at only one group of people, seeking redress for one cause of action—discriminatory treatment and sexual abuse -- where there is absolutely no evidence of excess filings of frivolous claims of discrimination in correctional facilities, such that any restrictions are necessary.

Invidious age and gender discrimination are inherently serious claims, and there is no rational basis for believing that such claims are more likely to be frivolous than other claims by prisoners, and the only cases Defendants reference (*Doe* and *Neal*) were clearly not frivolous claims.²¹ *Rinaldi v Yeager*, 384 US 305 (1966) (rejecting deterring frivolous litigation by prisoners as a sufficient rationale for restricting filings, as “imposing a financial obligation only upon inmates of institutions, the statute inevitably burdens many whose appeals, though unsuccessful, were not frivolous and leaves untouched many whose appeals may have been frivolous indeed”).

The remaining bases proffered by Defendants as justifications for the ELCRA amendment are reducing judicial intervention in the management of prisons and preventing windfall awards. Neither reason, however, justifies this legislation. The first rationale is self-evidently over-inclusive: It is so broad that it could support the elimination of all laws in the prison setting, since there is always a potential for judicial intervention by court order whenever Defendants violate the laws protecting those people they are charged with supervising. This rationale would support denial of any and all access to the Courts or laws of this state. The second rationale directly contradicts the purported rationale of preventing frivolous lawsuits, and

²¹Indeed, the only evidence on this does not support Defendants proffered rationale—see the finding, by the Michigan Civil Rights Commission Task Force, assigned to review the ELCRA amendment, which concluded it did not believe that “inmate complaints about state civil rights violations are either excessive or frivolous.” (Department of Civil Rights letter to Governor John Engler, 04/06/01, p. 2; see Exh. 9 to Pl’s Response to Def’s App to Appeal, Ct of Appeals). Moreover, Defendants point to no such frivolous prisoner litigation under ELCRA either pre or following the striking down of the amendment as unconstitutional.

a desire to protect the public fisc cannot support legislation directed at only one group of people. Since Defendants have not presented any legitimate interest rationally related to the ELCRA amendment, the trial court properly found that the amendment was unconstitutional as it deprives prisoners of equal protection of the law.

The ELCRA does not merely provide one minor remedy among many for ordinary injuries that the state legislature is free to leave without remedied. The ELCRA is the fundamental and constitutionally required implementation of the Michigan Constitution's basic guarantee of equal protection. As *Mason* explained and as Defendants do not dispute, "the ELCRA is Michigan's exclusive statutory mechanism for enforcing the Michigan Constitution's guarantee of equal protection of the laws." Article 1, §2 of the Michigan Constitution not only provides that "[n]o person shall be denied the equal protection of the laws" but also requires that "[t]he legislature shall implement this section by appropriate legislation." ELCRA is that implementing legislation. ELCRA's coverage of "public services" in §302(a) was intended to satisfy this constitutional command that "the legislature shall implement this section by appropriate legislation." *Department of Civil Rights ex rel Forton v Waterford Twp Dept of Parks and Recreation*, 425 Mich 173, 188; 387 NW2d 8321 (1986).

By carving prisons and jails out of the ELCRA's definition of "public services," the ELCRA amendment struck down by *Mason* deprives prison and jail inmates of a basic and constitutionally required remedy for constitutional deprivations, a remedy available to all other Michigan citizens. The ELCRA amendment is, therefore, a deprivation of equal protection from unconstitutional discrimination in the most literal sense: Where Michigan law provides every other citizen with retrospective remedies for arbitrary discrimination, inmates of Michigan's prisons and jails must be satisfied solely with prospective remedies of declaratory judgment and injunction. Far from providing equal protection, this truncated set of remedies amounts to no

protection at all for violations that cannot be effectively remedied by purely prospective remedies. Prison officials could be deliberately indifferent to their staff's systematic and repeated rapes of prisoners, and those victims' only recourse, insofar as the state constitution is concerned, would be a judicial order stating that such conduct should not happen again in the future. Such a purely prospective order would not make the victim whole.

B. Prior to the 2000 Amendment, ELCRA provided Plaintiffs protection against discrimination as required by the Fourteenth Amendment's command that states provide plaintiffs with the equal protection of the laws.

Defendants also argue that, even if the 2000 amendment to the ELCRA is unconstitutional, the original statute should be interpreted to preclude Plaintiffs' claims, because correctional facilities do not provide "public services" to the inmates that they house, feed, and rehabilitate. This argument based on the Defendants' contorted interpretation of "public services" in the pre-amendment ELCRA is, however, both legally incorrect and legally irrelevant.

The argument is legally irrelevant, because, assuming *arguendo* that "public services" in ELCRA did not include correctional facilities' treatment of their inmates, such a narrow reading of the pre-amendment ELCRA would itself deprive prisoners of equal protection of the laws, rendering unconstitutional the implied limits on the pre-amendment statute.

The argument is incorrect, because Defendant's interpretation of "public services" is contrary to the precedent construing that language as well as the plain language itself. With respect to precedent, a total of ten Michigan Court of Appeals judges have held that the ELCRA was intended to provide protection for prisoners and construed the pre-amendment ELCRA to avoid the equal protection violation that the amendment created. In *Neal v Dept of Corrections*, 232 Mich App 730, 737-8; 699 NW2d 206 (1998) *lv den* 467 Mich 877; 649 NW2d 82 (2002,

the Court specifically held that the Civil Rights Act, MCL 37.2303(a), was intended to protect prisoners.) (“[u]nder the plain language of subsection 301(b), the MDOC clearly falls within the broad statutory definition of a ‘public service.’ Defendants essentially concede as such”). See also *Doe v Dept of Corrections*, 236 Mich App 810 (1999) (“because, as our Supreme Court has stated, the protections of subsection 302(a) of the Civil Rights Act were intended to be coextensive with the Equal Protection Clause of the Michigan Constitution, and because prisoners do not lose their right to equal protection by virtue of their status as inmates, we can only conclude that the legislature also intended all persons – including inmates – to be protected under subsection 302(a).”); *Doe v Dept of Corrections*, 240 Mich App 199, *lv den* 467 Mich 857 (1999).

Defendant MDOC appealed the decision of the Special Panel in *Doe* and in lieu of granting the application, the Supreme Court remanded to the panel of seven judges, to consider the impact of a new amendment to the Civil Rights Act, which purported to exclude prisoners from its protection. See *Doe v Dept of Corrections*, 463 Mich 982; 625 NW2d 750 (2001); *Doe v Dept of Corrections*, 249 Mich App 49; 641 NW2d 269, 55 (2001). The Special Panel concluded the legislative amendment would impair substantive rights and could not be applied retroactively.

These judicial precedents are supported by administrative interpretations.²² The Michigan Civil Rights Commission, charged with administering the Civil Rights statutes,²³ formed a task force to examine the effect of the amendment on the State of Michigan and its

²² Ignoring both the judicial precedent and administrative interpretations of the pre-amendment ELCRA, Defendants rely on the enacting language from the legislature which amended ELCRA to determine the reach of the pre-amendment statute. This is improper. A subsequent legislature cannot declare the intention of a prior session. Nor can the legislature construe one of its own enactments retroactively. *Presque Isle Twp Bd of Ed v Presque Isle Co Bd of Ed* 364 Mich 605, 612 (1961)

²³ Mich Const of 1963, Art 5 § 29.

citizens. In the context of this task, the Commission confirmed that prisoners were always included within the purview of the state's civil rights, noting that

[F]or decades, the Department of Corrections and the county jails have acquiesced in, and indeed cooperated with the jurisdiction exercised by the Michigan Civil Rights Commission and the Michigan Department of Civil Rights over inmate complaints.

See Department of Civil Rights letter to Governor John Engler, 04/06/01, at p. 3-4; *ACCO Ind v Treasury Dept*, 134 Mich App 316, 322; 350 NW2d 874 (1984), (“The construction given by those charged with administering a statute should be given deference and that construction should not be overturned unless clearly wrong or another construction is plainly required.”).²⁴

With respect to the plain language of the pre-amendment ELCRA, Defendants' arguments rest on importing terms and language into the statute which are simply not there. A “public service” is defined as a public facility, department, agency, board, or commission, owned, operated, or managed by or on behalf of the state, a political subdivision, or an agency thereof.” A public service also includes “a tax exempt private agency established to provide service to the public.” MCL 37.2301(b) (emphasis added). Clearly, prisons are established, maintained and operated as a public agency to provide a public service by the State.

The goals and objectives of the MDOC include to “provide meaningful opportunities for offenders to help themselves to improve their behavior and become law abiding and productive citizens through academics, vocational, work, recreational or religious programs.” Correctional facilities are obviously a public service, as a primary function of the government is to maintain

²⁴ This construction is consistent with the Commission testimony of Janet Cooper, the former Deputy Director of the Michigan Department of Civil Rights. Ms. Cooper testified that she was “astounded” to learn of an assertion that there was no original intent to include prisoners in the protections of the Civil Rights Act as there had been no question that the Commission had jurisdiction over prisoner treatment in jails and correctional institutions. (Michigan Civil Rights Commission, Civil Rights Legislative Task Force, October 25, 2000 Minutes, pp. 1, 8-9; see Exh. 9 to Pl's Response to Def's App to Appeal, Ct of Appeals).

penal institutions for purposes of public safety and to restore (through corrections and rehabilitative programming) individuals to full participatory citizenship. Prisons and the MDOC also provide services to the people that they confine, and there can be no serious dispute that resident inmates are members of the public, both in a general sense and as recipients of rehabilitation, recreational, medical and educational services provided by public agencies and departments. *Neal v Dept of Corrections*, 232 Mich App at 737-38; *Doe v Dept of Corrections*, 236 Mich App at 812 (“modern prisons provide inmates with many recreational activities, medical services, and education and vocational programs to benefit prisoners”) citing *Pennsylvania Dept of Corrections v Yeskey*, 524 US 206, 210 (1998) (state prisons fall squarely within the statutory definition of a “public entity”).

Defendant’s textual argument seems to turn on the assumption that the statutory phrase “established to provide service to the public” modifies both “public facility” and “private agency.” On this reading, a “public facility” must be “established to provide service to the public” in order to be covered under the ELCRA. However, it is clear from reading this definition that the phrase “established to provide service to the public” modifies only what immediately precedes it—which is “private agency.” Section 301(b) does not establish an additional requirement that each and every public facility, department, or agency also must be shown to have been established to provide service to the public. Rather all such organizations qualify as do those tax-exempt private agencies which have been established to provide service to the public.

To dispute the above conclusion, the Defendants cite a series of cases from other state courts which, they argue, support a determination that prisons are not “public accommodations” or “public facilities.” However, Defendants fail to show how the statutes in those cases have language similar to the language of the ELCRA, or that those cases interpret remedial statutes

that must be interpreted as broadly as the ELCRA. While some state courts have held that prisons do not constitute “public accommodations” under state statutes forbidding discrimination in public accommodations, see, e.g., *CHRO ex rel Vargas v State Dep’t of Corrections*, 2014 Conn Super LEXIS 118, *15; 2014 WL 564478 (Sup Ct Conn, 2014) (holding prison “is not an establishment that caters or offers its services, facilities or goods to the general public” under state law); *Livingston v. Beeman*, 408 SW3d 566, 579 (Tex App 2013)(in state statute, “public” refers “to accessibility and openness to the public, not government ownership”); *Castle v Eurofresh, Inc.*, 734 F Supp 2d 938, 945 (2010) (holding that program restricted to “inmate labor is not open to the public, and is not a public accommodation under state law); *Napier v. State*, 2002 Me Super LEXIS 223, *18; 2002 WL 32068249 (2002 Sup Ct Maine) (holding prison is not a place of public accommodation so state civil rights law did not apply); *Brown v. King Cnty Dep’t of Adult Corrections*, 1998 US Dist LEXIS 20152; 1998 WL 1120381 (WD Wash 1998) (holding prison was places of public accommodation under state law); *Skaff v. West Virginia Human Rights Commn*, 191 W.Va. 161, 444 S.E.2d 39 (1994) (holding that state human rights commission did not have jurisdiction over prison inmate’s race discrimination claim, because prisons were not “public accommodations” under state law); *Blizzard v. Floyd*, 149 Pa.Cmwlth. 503, 506-07, 613 A.2d 619, 621 (1992) (holding that state law regulating “public accommodations” does not forbid discrimination on account of age in state prisons).

These statutes from other states do not purport to be the basic remedy for enforcing the relevant states’ constitutions. Instead, such statutes are merely laws regulating primarily private vendors of goods and services such as hotels, theaters, and other businesses that solicit and accept the patronage of the public. *Blizzard* at 621. By contrast, the ELCRA constitutes the Michigan legislature’s mechanism for enforcing Article I, Sec. 1 of the Michigan Constitution. See *Neal*, at 739 (ELCRA’s “public services” provision is “essentially a codification of State

Constitution's Equal Protection and Antidiscrimination Clauses”). There is no indication that the state laws interpreted in the cases cited by Defendants are similar statutory enactments of state constitutional provisions.

In addition to cases from other jurisdictions, Defendants also rely on judicial interpretations of dissimilar statutory language contained in the public building exception to the governmental immunity statute. In *Brown v Genesee County* 464 Mich 430, 628 NW2d 471 (2001), the Michigan Supreme Court held only that prisoners are not “social invitees” as contemplated by the statute exempting public buildings from the state’s otherwise applicable defense of sovereign immunity and therefore cannot bring a claim for damages for personal injuries that occurred in areas of the prison not open for use by a “member of the public.”¹ *Brown v Genesee County*, 464 Mich 430; 628 NW2d 471 (2001). The interpretation of the completely different statutory language of the public building exception in tort law, has no relevance to ELCRA which protects “all persons” from discriminatory treatment in the provision of state services. *Brown* simply ruled that a prisoner was not a social invitee while incarcerated for purposes of the public building exception to governmental immunity. Unlike the amendment to ELCRA, the governmental immunity statute does not single out a single group of people and exclude them from the State’s protection against invidious discrimination by a public agency. The ECLRA amendment eliminates prisoners from the State’s constitutional and statutory guarantee to be free from discrimination in public services, a right guaranteed to all other Michigan citizens. The Court has no basis to rely upon these cases.

III. PLAINTIFFS HAVE PROPERLY PLED A VIABLE CLAIM AND EACH ELEMENT REQUIRED TO ESTABLISH A SEXUALLY HOSTILE ENVIRONMENT.

The Defendants also argued below that Plaintiffs failed to properly plead elements necessary to establish a valid claim of sexual harassment under ELCRA. The trial court did not

reach this issue. Specifically, Defendants contended that Plaintiff did not plead the Defendants had the requisite notice of a sexually hostile environment. While not decided by the trial court, the Defendants have again raised the argument in this forum.²⁵ Defendants have recast this argument based on a false premise that Plaintiffs are seeking to impose strict liability on them. However, a review of the allegations of the complaint in light of the applicable law clearly demonstrate that Plaintiffs properly pled a claim under MCL 37.2103(i).²⁶ Plaintiffs have alleged facts supporting each element of a hostile environment claim and have not sought to impose strict liability on the Defendants.

Plaintiffs have alleged, among other violations of ELCRA, that Defendants violated ELCRA by creating and failing to prevent and remedy a sexually hostile prison environment for children confined in adult prisons. Under ELCRA, discrimination on the basis of sex includes sexual harassment. MCL 37.2103(i). Michigan courts recognize two types of sexual harassment – (1) quid pro quo harassment, in which submission to or rejection of sexual conduct is used as a factor in the plaintiff’s treatment and (2) harassment which creates a hostile environment. MCL 37.2103(i)(i) – (iii). In this case, Plaintiffs allege that Defendants created, tolerated, and failed to prevent and remedy a hostile environment. As defined in ELCRA, a hostile work environment is defined as “conduct or communication [which] has the purpose or effect of substantially interfering with an individual’s employment, public accommodations or public services, education or housing, or creating an intimidating hostile or offensive employment, public accommodations, public services, educational or housing environment.” MCL 37.2103(i).

²⁵ Although the Defendants did not include this argument in their application for leave in the appeal filed in the Supreme Court, they are raising this argument again here.

²⁶ Since this Defendants brought this challenge in the context of a (c)(8) motion, all facts must accepted as true. Given this minimal burden, it is clear the Defendants’ attack on the pleadings is without merit.

Plaintiffs have pled sufficient facts to support each element required to establish a hostile environment claim.

To establish a claim of hostile prison environment, plaintiffs must demonstrate that:

- (1) The plaintiff belong to a protected group;
- (2) The plaintiff was subjected to communication or conduct on the basis of sex;
- (3) The plaintiff was subjected to unwelcome sexual conduct or communication;
- (4) The unwelcome sexual conduct or communication was intended to or in fact did substantially interfere with the plaintiff's use of the public services or created an intimidating hostile or offensive environment; and
- (5) The defendants had actual or constructive notice of the hostile environment and failed to take appropriate remedial action.

Radtke v Everett 442 Mich 368, 382 – 3 (1993); *Chambers v Tretco* 463 Mich 297, 311 (2000). See also *Slayton v Ohio Dept of Youth Services* 206 F3d 669 (6th Cir 2000). (A hostile environment created by inmates which is tolerated and not remedied is also actionable.)

Defendants only dispute Plaintiffs' pleading with regard to the actual or constructive notice requirement for a hostile environment claim. However, Plaintiffs have pled sufficient facts to establish notice. Defendants argue that Plaintiffs have failed to allege that the named Plaintiffs reported or grieved the hostile environment. Such an allegation of fact, however, is not required for purposes of demonstrating that Defendants had actual or constructive notice. For example, "If the harassment complained of is so open and pervasive that the [Defendants] should have known had it but opened its... eyes, it is unreasonable not have done so, and there is constructive notice." *Sharp v City of Houston*, 164 F3d 923, 930 (5th Cir 1999); See also *Jackson v Quanex*, 191 F3d 647, 663 (6th Cir 1999) (where harassment is pervasive, court may impute

constructive notice); *Sheridan v Forest Hills Pub Sch*, 247 Mich. App. 611, 627 (Mich Ct App 2001).

The pertinent inquiry is whether "the totality of the circumstances [was] such that a reasonable [defendant] would have been aware of a substantial probability that sexual harassment was occurring." *Chambers v Trettco Inc*, 463 Mich 297, 319 (2000) cited in *Neal v Dept of Corr*, 2009 WL 187813 (Mich App 2009). As outlined in the detailed statement of facts included in the complaint, and the pervasiveness of the sexual violence in Defendants' facilities, a reasonable defendant would have been aware of the probability that sexual abuse and harassment resulting in a hostile environment was occurring. This pleading is sufficient to defeat the Defendants' motion to dismiss.²⁷

Ignoring the body of law which specifically addresses a Defendants' liability for hostile environment sexual harassment, Defendants instead cite and rely on *Hamed v Wayne Co*, 490 Mich 1 (2011) which dealt only with quid pro quo sexual harassment, a claim not raised by Plaintiffs in this case. In *Hamed*, the plaintiff who was sexually assaulted while in custody, sought to hold the county vicariously liable for the quid pro quo harassment of a deputy sheriff who engaged in the criminal activity while an employee of the county.²⁸ The court concluded that "public service providers are not **vicariously** liable for **quid pro quo** sexual harassment or the unforeseeable criminal acts of their employees." *Id.* The *Hamed* case has no applicability here for several reasons. First, this is not a quid pro quo claim; it is a hostile environment claim.

²⁷ Again relying on *Hamed*, the Defendants cite the wrong notice standard. Plaintiffs need not establish that a particular employee engaged in prior criminal conduct and had a propensity to do so again. (Defendant's Brief, p 41). Rather Plaintiffs need only allege that the sexual harassment was so open that any reasonable person or entity with their eyes open would have been aware. With those allegations, the element of constructive notice is satisfied.

²⁸ In *Hamed*, the plaintiff had also alleged a hostile environment claim against the county. That claim was dismissed because of a finding that the county did not have notice of a hostile environment. *Hamed* did not appeal the dismissal of the hostile environment claim. *Id* at p. 8.

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In addition, in *Hamed*, the plaintiff sought to hold the defendant vicariously liable for the conduct of its employee. Here, Plaintiffs do not seek to hold Defendants vicariously liable for the actions of others. Defendants are liable for their own failures – creating, tolerating and failing to remedy a hostile environment. Finally, Plaintiffs have pled sufficient facts to support actual or constructive notice of the existence of the hostile environment.²⁹ (Pls.’ Comp., paras. 2-7, 27-29, 34-52, 55-133, 135-160.

Plaintiffs have sufficiently alleged facts³⁰ to support this claim that Defendants had actual and/or constructive notice of the hostile environment sufficient for them to have taken prompt and appropriate remedial action. Defendants’ motion to dismiss for failure to state a claim therefore was properly denied.

CONCLUSION AND RELIEF REQUESTED

The trial court correctly concluded that the amendment to ELCRA which eliminated prisoners from protection for discriminatory actions by the MDOC is an unconstitutional violation of the Equal Protection clause of the United States and Michigan constitutions because

²⁹ Defendants’ reliance on the unpublished case of *Bovee v Dept of Corrections*, 202 Mich App LEXIS 2091 (2002) is also misplaced. In that case, the plaintiff introduced evidence that she reported the sexual harassment to her immediate supervisor. This Court found that report was not sufficient notice because the plaintiff told her supervisor not to tell anyone because the plaintiff wanted to handle the situation herself. In addition, the court found that the immediate supervisor did not have sufficient authority over the offending employee to constitute higher management. These conclusions were also reached after a trial, not based on the pleadings. Here Plaintiffs are not relying on the pervasiveness of the hostile environment for these youth to establish constructive notice. In *Bovee*, there was no claim raised of constructive notice. To the contrary, *Bovee* attempted but failed to prove actual notice of the hostile environment.

³⁰ Rather than limiting the analysis to the pleadings as required by the Michigan Court Rules, Defendants take a statement made during oral argument on the class certification motion completely out of context in an effort to support its claim that Plaintiffs are seeking to impose strict liability. In that portion of the argument, Plaintiffs’ counsel described that the requirement of commonality was satisfied by the fact that a central issue in the case was the existence of the illegal intermixing policy. Ignored by Defendants was counsel’s statement later in the argument that Plaintiffs had alleged a hostile environment case and would have to prove all elements of that claim. (Tr, p 41).

it deprives prisoners of equal protection of the law. In reaching this result, the trial court properly found the final judgment entered by the federal district court in *Mason*, supra to be persuasive and preclusive. In addition, the Plaintiffs pled each and every element required to state a claim for sexual harassment due to creation and failure to prevent and remedy a sexually hostile environment. Therefore, Plaintiffs request that this Court affirm the decision of the trial court and remand this case for further proceedings and resolution on the merits.

Respectively submitted,

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Dated: January 21, 2015

PROOF OF SERVICE

The undersigned certifies that the foregoing instrument was filed with the Michigan Court of Appeals through the E-Filing system and that all parties to the above cause was served via the E-Filing system on January 21, 2015.

Signature: /s/ Regina Bell

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Exhibit 1

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW

JOHN DOE 1; JOHN DOE 2; JOHN DOE 3;
JOHN DOE 4; JOHN DOE 5; JOHN DOE 6;
and JOHN DOE 7, on behalf of themselves and
a class of all others similarly situated,

CLASS ACTION

Plaintiffs,

Case No. 13- 1196 -CZ

vs.

Hon. Carol Kuhnke

MICHIGAN DEPARTMENT OF CORRECTIONS ("MDOC");
RICK SNYDER, Governor of the State of Michigan;
DANIEL H. HEYNS, Director, Michigan Department of Corrections;
THOMAS FINCO, Deputy Director of MDOC Correctional Facilities Administration;
DENNIS STRAUB, former Deputy Director of MDOC Correctional Facilities Administration;
RANDY TREACHER, Chief Deputy Director of MDOC Correctional Facilities Administration;
WILLIE SMITH, Warden of Carson City Correctional Facility;
HEIDI WASHINGTON, Warden of Charles Egeler Reception and Guidance Center;
MARY BERGHUIS, Warden of Earnest C. Brooks Correctional Facility;
PAUL KLEE, Warden of Gus Harrison Correctional Facility;
JOHN PRELESNIK, Warden of Richard A. Handlon Correctional Facility;
CATHLEEN STODDARD, Warden of Richard A. Handlon Correctional Facility;
CINDI S. CURTIN, Warden of Oaks Correctional Facility;
DAVID BERGH, Warden of Thumb Correctional Facility;
JEFFREY WOODS, Warden of Chippewa Correctional Facility;
ROBERT NAPEL, Warden of Marquette Branch Prison; and
KENNETH MCKEE, Warden of Bellamy Creek Correctional Facility,
Jointly and severally,

Defendants

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A civil action between these parties or other parties arising out of the transaction or occurrence alleged in the complaint has been previously filed in this court, where it was given docket number 13-1049-CZ and was assigned to Judge Kuhnke. The action is no longer pending.

In addition, a civil action between these parties or other parties arising out of the transaction or occurrence alleged in the complaint has been previously filed in the Eastern District of Michigan and was assigned to Judge Cleland. The action remains pending.

COMPLAINT AND JURY DEMAND

Plaintiffs on behalf of themselves and all others similarly situated, allege as follows:

INTRODUCTORY STATEMENT

1. This proposed class action lawsuit is pursued on behalf of children confined in adult prisons operated by the Michigan Department of Corrections (MDOC). During the last three years, at least 500 children ranging in age from 14-17 ("youthful prisoners") have been incarcerated in MDOC's adult prisons for sentences of a year or more.

2. During their imprisonment, these youth have been housed in cells with adult prisoners, and have been forced to shower, eat, recreate and work with adult prisoners without

adequate supervision to ensure their safety and without regard to their status as children. Male youthful prisoners incarcerated in the adult prisons are also subject to body searches and viewing by female staff while showering and performing basic bodily functions.

3. MDOC is and was on notice that incarcerating youth in adult prisons without regard to their vulnerable child status subjects youthful prisoners to heightened and substantial risk of physical and sexual violence and abuse and sexual harassment at the hands of adult prisoners and prison staff.

4. Placing children in adult prisons without regard to their youthful status and vulnerability has resulted in increased punishment and degrading treatment through the use of tasers, solitary confinement and deprivation of rehabilitative programming and educational services.

5. Defendants' policy and practice of housing youthful and adult prisoners together without taking adequate steps to protect youth from a known harm constitutes deliberate indifference to their safety.

6. Congress enacted the Prison Rape Elimination Act (PREA) a decade ago after recognizing the harm to youth placed in adult facilities. PREA requires state prisons to keep any prisoners under the age of 18, who are housed in adult facilities, separate by sight and sound from adult prisoners.

7. As a result of Defendants' policies and practices, the proposed class, including Plaintiffs, have suffered and are at an imminent risk of suffering irreparable harm, including but not limited to physical injuries, sexual violence and abuse, severe emotional distress and mental trauma, degrading treatment, lengthened periods of incarceration, solitary confinement and deprivation of basic educational and rehabilitative services.

JURISDICTION AND VENUE

8. This action is brought pursuant to the Elliott-Larsen Civil Rights Act (ELCRA), MCL 37.2301 et seq. The amount in controversy exceeds twenty five thousand (\$25,000) dollars, excluding interest and costs.

9. This Court has personal jurisdiction over the Defendants named herein because each is a public official of the State of Michigan who is sued in his or her individual and/or official capacity in order to enforce the performance of his or her official duties, and the State consented to be sued for violations of ELCRA.

10. Venue is proper in this Court because MDOC operates facilities in Washtenaw County and several of the individual Defendants reside and/or do business in Washtenaw County.

PARTIES

A. PLAINTIFFS

11. Plaintiff representatives are citizens of the United States and at all relevant times were children imprisoned in facilities under the jurisdiction of the MDOC. Plaintiffs bring this action on behalf of themselves and a class of youthful prisoners who are, were, or will be confined in adult prisons in Michigan and who have been or will be subjected to sexual and physical assaults and abuse, sexual harassment, and degrading treatment from adult prisoners and staff as a result of incarceration in adult prisons without adequate supervision, separation from adult prisoners, or treatment consistent with their status as children. Plaintiffs seek relief for themselves and for members of the class.

B. DEFENDANTS

12. All individual defendants are sued in their individual and official capacities.

13. Defendant MDOC is a Department of the State of Michigan and with the Defendant Governor, is responsible for the care and custody of youthful prisoners incarcerated in prisons in the State of Michigan. Defendant MDOC and Defendant Governor have the responsibility, authority and ability to remedy current and future conditions at facilities housing youthful prisoners that have given rise to the sexual and physical abuse and assaults, degrading treatment and deprivation of rights as set forth in this complaint.

14. Defendant Rick Snyder is the Governor of the State of Michigan and is invested with executive power pursuant to Art. V, Section 1 of the Michigan Constitution. Defendant Snyder, with the management of the Michigan Department of Corrections, is responsible for the care and custody of youthful prisoners in the State of Michigan, and has the responsibility, authority and ability to remedy current and future conditions at facilities housing youthful prisoners that have given rise to and continue to pose a substantial risk of sexual and physical abuse and assaults, degrading treatment and deprivation of rights as set forth in this complaint.

15. Defendant Daniel H. Heyns, ("Heyns") is the Director of the Michigan Department of Corrections. His duties and responsibilities include a responsibility for developing and implementing policies and procedures for the operation and management of the Michigan Department of Corrections and its employees. He is responsible for the care, custody and protection of prisoners under the jurisdiction of the Michigan Department of Corrections.

16. Defendant Thomas Finco ("Finco") is the Deputy Director of the MDOC's Correctional Facilities Administration (CFA), and has served in that capacity since October 1, 2011. Defendant Finco's duties and responsibilities include the operation of all correctional

institutions in the MDOC system, including promulgating and administering MDOC's policies related to the placement and custody of individual prisoners at MDOC facilities.

17. Defendant Dennis Straub ("Straub") was the Deputy Director of the CFA before October 1, 2011. His duties and responsibilities included the promulgation and administration of MDOC policies, including custodial placement and the custody and protection of youthful prisoners at their respective facilities during his tenure.

18. Defendant Randy Treacher ("Treacher") is the Chief Deputy Director of the CFA. His duties and responsibilities include the supervision of Defendants Straub and Finco during their respective tenures.

19. Defendants MDOC, Governor Snyder, Heyns, Finco, Straub and Treacher are collectively referred to in this action as "Policymaker Defendants."

20. The individual Warden Defendants were, at all relevant times, wardens at MDOC facilities where the named Plaintiffs have been housed with adult prisoners and have been subject to the harm and injuries set forth herein. At all relevant times the Warden Defendants were responsible for the training, assignment and supervision of staff at their respective facilities, as follows:

a. WILLIE SMITH, Warden of Carson City Correctional Facility, was and is responsible for the unlawful treatment and conditions involving JOHN DOE 5.

b. HEIDI WASHINGTON, Warden of Charles Egeler Reception and Guidance Center, was and is responsible for the unlawful treatment and conditions involving JOHN DOES 3, 6 and 7.

c. MARY BERGHUIS, Warden of Earnest C. Brooks Correctional Facility, was and is responsible for the unlawful treatment and conditions involving JOHN DOE 5.

d. PAUL KLEE, Warden of Gus Harrison Correctional Facility, was and is responsible for the unlawful treatment and conditions involving JOHN DOE 6.

e. JOHN PRELESNIK, Warden of Richard A. Handlon Correctional Facility, was and is responsible for the unlawful treatment and conditions involving JOHN DOES 1 and 6.

f. CATHLEEN STODDARD, Warden of Richard A. Handlon Correctional Facility, was and is responsible for the unlawful treatment and conditions involving JOHN DOES 1 and 6.

g. CINDI S. CURTIN, Warden of Oaks Correctional Facility, was and is responsible for the unlawful treatment and conditions involving JOHN DOE 2.

h. DAVID BERGH, Warden of Thumb Correctional Facility, was and is responsible for the unlawful treatment and conditions involving JOHN DOES 2, 3, 4 and 5.

i. JEFFREY WOODS, Warden of Chippewa Correctional Facility, was and is responsible for the unlawful treatment and conditions involving JOHN DOES 3 and 5.

j. ROBERT NAPEL, Warden of Marquette Branch Prison, was and is responsible for the unlawful treatment and conditions involving JOHN DOE 6.

k. KENNETH MCKEE, Warden of Bellamy Creek Correctional Facility, was and is responsible for the unlawful treatment and conditions involving JOHN DOE 1.

21. The above-named wardens will be collectively referred to herein as the "Warden Defendants."

22. In their capacity as wardens, Warden Defendants' duties and responsibilities include the training, assignment, supervision, discipline and investigation of correctional officers and MDOC employees.

23. The Warden Defendants are also responsible for the custody, safety, protection, fair treatment and rehabilitation of the youthful prisoners in their facilities and for ensuring that

the facilities housing youthful prisoners are operated according to proper correctional standards, statutes and/or laws to ensure the safety and protection of vulnerable populations, including Plaintiffs.

24. The Warden Defendants are also responsible for developing procedures and implementing policies to prevent the sexual abuse and degrading treatment of youthful prisoners and are also responsible for ensuring an adequate and effective mechanism for the safe and effective reporting of sexual and physical assaults and sexual harassment experienced by prisoners housed at their facilities.

25. The Warden Defendants are responsible for ensuring that youthful prisoners under their care and supervision are not deprived of rehabilitative or educational opportunities or subjected to retaliation and/or increased punishment due to their vulnerable status as youth.

CLASS ACTION ALLEGATIONS

26. This action is properly brought as a class action pursuant to M.C.R. 3.501. This action is brought by the named Plaintiffs on behalf of youthful prisoners who, since October of 2010, have been, are now, or will be hereafter incarcerated in adult correctional facilities under the jurisdiction of the Michigan Department of Corrections and who have been subjected to physical and sexual abuse, assaults, harassment and/or other degrading treatment by adult prisoners and/or MDOC custodial staff.

27. The number of youth who have been subject to these violations of their rights while under the jurisdiction of the MDOC since 2010 exceeds one hundred children. The number of class members is sufficiently numerous to make class action status the most practical method for Plaintiffs to challenge the policies, procedures and practices of Defendants that are a proximate cause of their ongoing abuse.

28. There are questions of law and fact raised by the named Plaintiffs' claims common to, and typical of, those raised by the Class they seek to represent:

29. Questions of law or fact common to the Class, without limitation, include:

- a. Defendants' failure to properly house youthful prisoners, failure to separate youthful prisoners from adult prisoners in MDOC facilities, and failure to provide adequate supervision to safeguard this vulnerable population resulting in sexual abuse and physical violence by adult prisoners;
- b. Defendants' failure to properly supervise, train, monitor, discipline, and/or regulate prison staff and failure to properly house and protect this vulnerable population resulting in sexual abuse and physical violence by adult prisoners and prison staff;
- c. Defendants' ongoing failure to promulgate and implement proper policies and procedures to identify and house vulnerable youthful prisoners to safeguard their protection from harm from sexual abuse, solitary confinement and deprivation of rehabilitative opportunities;
- d. Defendants' failure to adequately protect youth from a known risk of sexual abuse from adult prisoners and properly supervise, train, and discipline prison staff in violation of Plaintiffs' rights.

30. The violations of law and resulting harms alleged by the named Plaintiffs are typical of the legal violations and harms suffered by all Class members.

31. Plaintiff Class representatives will fairly and adequately protect the interests of the Plaintiff class members. Plaintiffs' counsel know of no conflicts of interest between the class representatives and absent class members with respect to the matters at issue in this litigation; the

class representatives will vigorously prosecute the suit on behalf of the Class; and the class representatives are represented by experienced counsel. Plaintiffs are represented by attorneys with substantial experience and expertise in complex and class action litigation involving issues of children, sexual assault, and/or prison conditions. Plaintiffs' attorneys have identified and thoroughly investigated all claims in this action, and have committed sufficient resources to represent the Class.

32. The maintenance of the action as a class action will be superior to other available methods of adjudication and will promote the convenient administration of justice. Moreover, the prosecution of separate actions by individual members of the Class could result in inconsistent or varying adjudications with respect to individual members of the Class.

33. Defendants have acted or failed to act on grounds generally applicable to all Plaintiffs.

FACTS

34. The State of Michigan places children as young as fourteen years of age in adult prisons under the supervision of the MDOC.

35. The MDOC has failed to separate youth under the age of 18 from adult prisoners, despite their obvious and substantial vulnerability to harm from adult prisoners. The MDOC has maintained a policy and procedure of placing 17 year old youths directly in cells and housing units with adult prisoners, despite their obvious and substantial vulnerability to harm from adult prisoners.¹

¹ Plaintiffs' Counsel has learned that in the weeks preceding filing of this complaint, some MDOC facilities have started to separate 17-year-olds from the adult population in some settings. The extent and scope of these efforts throughout the MDOC system is unclear.

36. The MDOC has failed to adequately separate or supervise youth aged 14-17 incarcerated with adult prisoners despite the promulgation of standards under the Prison Rape Elimination Act (PREA) requiring site and sound separation of youth under the age of 18 from adults. 42 U.S.C. § 15601 et seq.; 28 CFR 115.14.

37. PREA is a federal statute designed to address findings that youth are eight times more likely to be subjected to sexual violence and that youthful prisoners are five times more likely to be sexually assaulted in adult rather than juvenile facilities. PREA requires that any youth under the age of 18 shall not be placed in a housing unit in which the youthful inmate will have sight, sound or physical contact with any adult prisoners or use of a shared day room or other common space, shower area, or sleeping quarters.

38. Independent of the requirements of PREA, Defendants have failed to adequately consider youth and their obvious vulnerability in determining the proper placement, transfer, supervision and treatment of youth under their supervision.

39. In contravention of PREA, MDOC's own policies, and/or standard correctional practices, Defendants have placed vulnerable youth, including Plaintiffs, in adult prisons without separation by sight and sound from adult prisoners, without adequate supervision during contact with adults, and without procedures to protect youth, including Plaintiffs, from sexual victimization so as to ensure their safety and well-being.

40. Defendants' practice of using solitary confinement for the placement of youth, including Plaintiffs, without ensuring humane treatment, have failed to adequately protect Plaintiffs and constitutes a punishment for their vulnerability and/or reporting of abuse.

41. Defendants, without adequate procedures, training or supervision, have subjected youth to cross-gender searches, pat-downs and viewings while showering and performing basic bodily functions without taking adequate steps to protect their safety, privacy and rights.

42. Defendants have created and continued policies that fail to separate youthful and adult prisoners in showers, yard, programming, or eating areas, and fail to provide them with adequate supervision to prevent sexual victimization and assault.

43. Defendants, despite their knowledge and the obvious and apparent risks of placing youth in adult prisons, have failed to implement and effectuate policies, procedures and mechanisms to deter sexual and physical abuse against Plaintiffs and other youth under their supervision.

44. As a result of Defendants' acts and omissions in failing to safeguard vulnerable youth, including Plaintiffs, the plaintiffs in this case have all experienced some combination of sexual and physical abuse, harassment, and/or related violence from adult prisoners and/or staff in MDOC facilities in the last three years.

45. Defendants have aided and abetted the sexual abuse and misconduct by adult prisoners and staff by failing to take adequate steps to prevent and deter the violations of Plaintiffs' rights, by, among other acts and omissions, failing to adequately train, supervise, investigate and discipline staff who violated Plaintiffs' rights. Defendants' acts and omissions regarding screening, training, supervision, investigation and discipline surrounding the placement of youth in adult prisons and the sexual and physical abuse of these youths permitted and ratified the abusive behavior by adult male prisoners and by MDOC staff.

46. Defendants also knew or should have known that the placement of children in adult prisons without adequate separation from adult prisoners or supervision together with a

failure to properly train, regulate, supervise, monitor, discipline and adequately investigate complaints about MDOC staff would lead to sexual assaults, sexual harassment and violence against youthful prisoners, including Plaintiffs, housed in MDOC adult prisons.

47. Defendants' mechanisms for addressing grievances through an administrative process are ineffective and futile for Plaintiffs' claims as Defendants do not provide an adequate or available system for Plaintiffs to exhaust their claims administratively.

48. Plaintiffs are not allowed to file grievances challenging policies, procedures, placement, housing or custody, and Defendants do not provide an alternative administrative mechanism to exhaust the claims set forth in this Complaint.

49. A grievance cannot be instituted except through a written form and Defendants and their agents have consistently failed to ensure that Plaintiffs are provided grievance forms; Defendants and their agents have routinely refused to process grievances; and/or Defendants and their agents have regularly failed to ensure responses to grievances, rendering any administrative process for Plaintiffs unavailable or futile.

50. At all relevant times Plaintiffs were advised that a precondition to filing a grievance was consultation with the individual who was being grieved. Since complying with this requirement in the context of Plaintiffs grieving staff and adult prisoners' criminal sexual conduct and abuse would place Plaintiffs in grave danger, Defendants' requirements have rendered the grievance system unavailable to Plaintiffs.

51. Defendants, by policy and practice, have created barriers to the grievance system rendering the administrative process effectively unavailable to youth, including Plaintiffs.

52. Moreover, Plaintiffs were and are routinely discouraged from using the grievance system as a mechanism for addressing individual assaults and mistreatments, by threats and

intimidation by MDOC staff and other prisoners and by virtue of MDOC's own policies regarding grievances. MDOC's requirements for exhaustion are non-compliant with the Prison Rape Elimination Act and each Defendant has been sufficiently on notice of the existence of sexual abuse, degrading treatment and retaliation against youth, including Plaintiffs, to allow Defendants the opportunity to take remedial actions prior to Plaintiffs filing this action.

53. Plaintiffs as a purported class of children, including non-prisoners and next friends, need not exhaust administrative remedies prior to bringing this action.

**STATEMENT OF FACTS RELATIVE TO
EACH NAMED PLAINTIFF AND CLASS REPRESENTATIVE**

A. JOHN DOE 1

54. John Doe 1 is currently a prisoner at an adult prison under the jurisdiction of the MDOC.

55. John Doe 1 was incarcerated in an adult MDOC prison in early 2012 at age 17. Since that time, he has been housed in the Charles Egeler Reception and Guidance Center ("RGC"), the Richard A. Handlon Correctional Facility ("MTU"), and Bellamy Creek Correctional Facility ("IBC").

56. MTU Warden Defendant and Policymaker Defendants failed to separate John Doe 1 from adult prisoners despite his obvious vulnerability or take adequate precautions to protect him from assault and abuse.

57. In the spring and summer of 2012, while at the Handlon facility, John Doe 1, on threat of physical violence, was repeatedly anally raped and forced to engage in oral sex with adult male prisoners. The rapes occurred in his cell and in the shower.

58. Over an extended period, corrections officers witnessed men cycling in and out of John Doe 1's cell, sexually assaulting him. Several of the officers knew that his cellmate was selling access to John Doe 1.

59. Adult prisoners exercised control over John Doe 1 by, among other things, forcing him to have sex with other adult prisoners.

60. The sexual abuse, forced sex, and trafficking abuse of John Doe 1 was open and obvious to MDOC staff and his attempts to get help were rejected.

61. John Doe 1 was also forced to provide sexual services to other prisoners in the showers, which were located next to the corrections officers' desk.

62. John Doe 1 reported to a prison official that he was receiving threats, but he was refused protective custody.

63. John Doe 1 was transferred to IBC after the assaults at Handlon. There, he continued to face sexual threats and pressures from adult prisoners.

64. On August 8, 2012, John Doe 1 was placed in solitary confinement. John Doe 1 continued to be sexually harassed and threatened while in solitary confinement.

65. John Doe 1 continues to be kept in a cell by himself, where he is deprived by the MDOC of access to necessary rehabilitative and educational programming and adequate medical and mental health treatment.

B. JOHN DOE 2

66. John Doe 2 is currently a prisoner at an adult prison under the jurisdiction of the MDOC.

67. John Doe 2 was incarcerated in an adult MDOC prison in early 2011, when he was 16 years old. Since that time, he has been housed in various facilities, including the Charles

Egeler Reception and Guidance Center ("RGC"), the Thumb Correctional Facility ("TCF"), and Oaks Correctional Facility ("ECF").

68. TCF Warden Defendant and Policymaker Defendants failed to separate John Doe 2 from adult prisoners or take adequate precautions to protect John Doe 2 from assaults and abuse.

69. Shortly after his arrival at TCF in the Spring of 2012, John Doe 2 was brutally beaten and raped by his adult cellmate.

70. After the rapes, John Doe 2 experienced rectal bleeding, which was noted by medical staff at TCF.

71. Despite the fact that MDOC prison officials at TCF knew or should have known of the rape and assault as evidenced by documented rectal bleeding, John Doe 2 was placed back in the same cell with his assailant.

72. An MDOC staff member at TCF facilitated the abuse and assault of John Doe 2 by opening John Doe 2's cell to allow an adult prisoner in the cell to assault him.

73. Despite the obvious vulnerability and sexual abuse of John Doe 2 at TCF at age 17, John Doe 2 was transferred without any protection or safeguards to another adult facility – ECF – and placed in a cell with an adult male prisoner.

74. ECF Warden Defendant and Policymaker Defendants failed to separate John Doe 2 from adult prisoners or take precautions to protect him from further assaults and abuse.

75. At ECF, John Doe 2's adult cellmate sexually abused and harassed him by, among other actions, forcing John Doe 2 to shower while he watched him and masturbated.

76. No precautions were taken by ECF staff to protect or ensure John Doe 2's safety, despite his obvious vulnerability and child status.

77. In November of 2012, John Doe 2 was transferred to another cell in ECF and again placed with an adult prisoner without safeguards or supervision.

78. There, John Doe 2 was physically assaulted and sexually harassed and abused. ECF staff, upon becoming aware of the assault, failed to protect John Doe 2 and punished him for reporting the abuse by issuing him a misconduct ticket and sending him to solitary confinement.

79. Upon his release from solitary confinement, John Doe 2 was physically assaulted again with a knife, resulting in a scar across the face and marking him as a victim and as an ongoing target for other prisoners.

80. After this incident, John Doe 2 was again placed in solitary confinement. As a result of transfers and placements in solitary confinement, John Doe 2 has been deprived of rehabilitative and educational programming and suffered extreme mental and physical distress.

81. Defendants have also failed to provide adequate medical and mental health treatment to John Doe 2.

C. JOHN DOE 3

82. John Doe 3 is currently a prisoner in an adult prison under the jurisdiction of MDOC.

83. John Doe 3 was incarcerated in an adult MDOC prison early in the fall of 2010, when he was 16 years old. He has also been housed in RGC, TCF, and Chippewa Correctional Facility ("URF").

84. During his initial stay at RGC, John Doe 3 was housed in a unit surrounded by adult prisoners, where he was sexually harassed and threatened with assault. The sexual

harassment was open and obvious to MDOC staff, who failed to take any steps to prevent the ongoing abuse.

85. John Doe 3 was transferred to the TCF without any safeguards to protect him from further abuse, despite his obvious vulnerability. TCF Warden Defendant and Policymaker Defendants failed to separate John Doe 3 from adult prisoners or take adequate precautions to protect him from assaults and abuse.

86. At TCF, John Doe 3 was not separated from adult prisoners and Defendants failed to take steps to ensure his safety. John Doe 3 was raped and sexually abused by adult male prisoners on at least three separate occasions at TCF.

87. The first assault occurred at TCF in or around the Winter of 2010/2011, when at the age of 16, adult prisoners came into John Doe 3's room and raped him. John Doe 3 was sexually assaulted and abused throughout his stay at TCF in his cell and in the bathroom.

88. MDOC female staff members at TCF grabbed and pulled John Doe 3's genitals and sexually abused and harassed John Doe 3 during body searches. They also sexually harassed him while he was showering and/or performing basic bodily functions.

89. MDOC staff at TCF repeatedly told John Doe 3 that he was going to get raped, and threatened to facilitate a rape as punishment for complaints.

90. At the age of 17, Defendants transferred John Doe 3 to the Chippewa Correctional Facility ("URF"), without any safeguards for his protection despite his prior abuse and obvious vulnerability.

91. URF Warden Defendant and Policymaker Defendants failed to separate John Doe 3 from adult prisoners or take adequate precautions to protect him from further assaults, abuse and harassment. While a prisoner at URF, John Doe 3 was routinely sexually and physically

assaulted by correctional staff by having his genitals grabbed and pulled on during body searches.

92. John Doe 3 was subjected to intense threatening and humiliating verbal sexual abuse by adult prisoners in the presence of MDOC staff at URF. The MDOC staff witnessing these verbal assaults failed to take any steps to prevent the abuse and ratified the abuse by failing to punish the offenders.

93. Defendants' failure to provide safe and secure housing to John Doe 3 and failure to provide adequate medical and mental health care has resulted in his loss of rehabilitative and educational programming, and severe emotional distress.

D. JOHN DOE 4

94. John Doe 4 is currently a prisoner in an adult prison under the jurisdiction of the MDOC.

95. John Doe 4 was 16 years old when he was incarcerated at TCF. TCF Warden Defendant and Policymaker Defendants failed to separate him from adult prisoners or take precautions to protect him from assaults or abuse or to protect his privacy.

96. John Doe 4 has been subjected to physical and sexual assaults and abuse by MDOC staff since his incarceration in an adult prison.

97. From late 2012 to early 2013, a female MDOC staff member repeatedly opened John Doe 4's cell for purposes of engaging in coerced sexual intercourse with him.

98. The coerced sexual intercourse with John Doe 4 occurred in a cleaning closet in the Essex Unit of TCF.

99. Female MDOC staff members have also grabbed and pulled on John Doe 4's genitals on multiple occasions.

100. During his first year in prison, John Doe 4 was imprisoned in solitary confinement for over 130 days, at times on food and water restrictions and without adequate provisions for his youthful status.

101. Defendants have failed and refused to provide a safe, secure and humane custodial environment, resulting in John Doe 4 being retained in solitary confinement because he fears for his safety. He has been deprived of rehabilitative and educational programming and subjected to increased length of incarceration.

E. JOHN DOE 5

102. John Doe 5 is currently a prisoner in an adult prison under the jurisdiction of the MDOC.

103. John Doe 5 was first incarcerated in an adult MDOC prison in September of 2011. Since that time, he has been housed in a number of facilities, including RGC, TCF, Earnest C. Brooks Correctional Facility ("LRF"), URF, and Carson City Correctional Facility ("DRF"). John Doe 5 was 16 years old when he was placed in an adult prison at TCF. The TCF Warden Defendant and Policymaker Defendants failed to separate John Doe 5 from adult prisoners or take precautions to protect him from assaults and abuse.

104. While incarcerated at TCF, John Doe 5 was sexually harassed, grabbed and had his buttocks and genitals slapped and groped by adult male prisoners.

105. John Doe 5 was placed in a cell with an adult prisoner at TCF. John Doe 5 was physically assaulted and anally raped by his adult cellmate.

106. John Doe 5 was also subjected to humiliating and extreme sexual harassment, comments and sexual touching and abuse by MDOC female staff at TCF.

107. A MDOC female staff member at TCF repeatedly performed body searches on John Doe 5 where she would grab his genitals in a sexual manner.

108. John Doe 5, at age 17, was transferred to the LRF without any safeguards or protection from further abuse. The LRF Warden and Policymaker Defendants failed to separate him from adult prisoners or take precautions to protect him from assaults and abuse despite the prior abuse and obvious vulnerability.

109. In the fall/early winter of 2012, John Doe 5 was repeatedly raped in his cell by adult prisoners at LRF. MDOC staff was aware of assaults and aware that adult male prisoners were paying John Doe 5's cellmate for access to John Doe 5 for purposes of sexually assaulting him. Defendants failed to take any action to discipline the offending adult prisoners or intervene to prevent the sexual trafficking of John Doe 5.

110. John Doe 5 requested protection at LRF but each request was ignored and/or denied.

111. John Doe 5 was transferred to another adult prison while he was still a child and without any safeguards or protection despite his pleas. While housed at URF, URF Warden Defendant and Policymaker Defendants again placed John Doe 5 in a cell with adult prisoners and failed to take adequate precautions to protect him from assaults and abuse.

112. John Doe 5 was repeatedly sexually abused and sexually harassed at URF and physically assaulted when he attempted to resist.

113. MDOC staff at URF were aware of the abusive conduct directed toward John Doe 5 by adult prisoners, refused to provide him with requested protective custody, and threatened him with disciplinary tickets.

114. Defendants were aware of the vulnerability and abuse of John Doe 5, yet they transferred him to DRF with no safeguards or precautions in place to protect him from further abuse.

115. At DRF, the DRF Warden and Policymaker Defendants failed to separate John Doe 5 from adult prisoners or take precautions to protect him from assaults and abuse.

116. After transfer to DRF, John Doe 5 was again sexually abused, assaulted and raped by two adult male prisoners on separate occasions in a shower area.

117. MDOC staff at DRF knew of the assaults and took no action to discipline the offending prisoners to protect John Doe 5 or provide medical or mental health treatment to him.

F. JOHN DOE 6

118. John Doe 6 is currently a prisoner in an adult prison under the jurisdiction of the MDOC.

119. John Doe 6 was incarcerated in an adult MDOC prison in September of 2012, at the age of 17. He has been housed in RGC, MTU, Gus Harrison Correctional Facility ("ARF"), and Marquette Branch Prison ("MBP").

120. Despite John Doe 6's obvious vulnerability and youth, the Warden and Policymaker Defendants at the various correctional facilities failed to separate John Doe 6 from adult prisoners or take precautions to protect him from assaults and abuse.

121. During his incarceration at RGC in the fall of 2012, John Doe 6 was repeatedly sexually harassed and threatened by adult male prisoners. The sexual harassment was open and obvious to MDOC staff.

122. Despite knowledge of the sexual harassment, threats and John Doe 6's vulnerability, Defendants transferred John Doe 6 to MTU without any safeguards or protection.

While at MTU, John Doe 6 repeatedly expressed concern to MDOC staff about sexual pressure and threats from other prisoners. He was then transferred to ARF.

123. Upon his transfer to ARF, John Doe 6 was placed in adult housing and in late winter of 2013, was raped by an adult male prisoner in the laundry room at ARF.

124. After he was transferred to MBP in the spring of 2013, John Doe 6 reported the rape occurring at ARF to MDOC officials.

125. MDOC staff failed to provide adequate protection, mental health and medical treatment to John Doe 6 and failed to take steps to provide a safe and humane environment despite their knowledge of his abuse.

126. At MBP, John Doe 6 has been housed for over five months in solitary confinement, where he continues to be sexually harassed, threatened, and told that he will be sold for sex in the yard. John Doe 6 has refused to go back to the general population out of fear of additional rapes and has been punished with misconduct tickets for refusing to leave his solitary cell and return to general population.

127. Defendants' failure to provide safe and secure housing to John Doe 6 has resulted in loss of rehabilitative and educational programming, severe emotional distress, and increased length of incarceration.

G. JOHN DOE 7

128. John Doe 7 is currently a prisoner in an adult prison under the jurisdiction of the MDOC.

129. John Doe 7 was first incarcerated in an adult MDOC prison in the summer of 2013.

130. John Doe 7 was 17 years old when he was incarcerated at RGC, where he was housed with adult male prisoners. The RGC Warden and Policymaker Defendants failed to separate John Doe 7 from adult prisoners or take precautions to protect him from assaults and abuse.

131. MDOC staff members acknowledged their awareness of his vulnerability and substantial risk of sexual assaults and abuse and yet took no steps to protect him or ensure his safety.

132. In July of 2013, an adult male prisoner entered John Doe 7's cell at RGC and sexually harassed and assaulted John Doe 7. When John Doe 7 called the RGC staff for help, he was further physically assaulted by the male prisoner.

133. John Doe 7 was so fearful of future sexual and physical assaults that he confined himself to his cell, resulting in loss of rehabilitative programming and severe emotional distress.

CLAIMS FOR RELIEF

COUNT I

(ELCRA² – Creating Sexually Hostile Prison Environment)

134. Plaintiffs incorporate by reference the foregoing paragraphs of this Complaint as though fully set forth herein.

135. The facilities operated by the Defendant Michigan Department of Corrections were and are public services under the ELCRA, MCL 37.2101 et seq. and MCL 37.2301.

136. Defendants' acts and omissions constitute sexual harassment and violate Plaintiffs' rights under the ELCRA, MCL 37.2103(h)(i)(ii)(iii) by subjecting Plaintiffs to unwelcome sexual advances and assaults and other conduct, both verbal and physical, of a sexual nature.

137. Defendants as the entity and individuals responsible for administering the prisons control every aspect of lower-level staff and adult prisoners' utilization of the prison or its services. Through the exercise of reasonable care, Defendants could have limited the accessibility of predatory adult prisoners and staff to the vulnerable youth prisoners.

138. By placing Plaintiffs in adult prisons, Defendants have created a sexually hostile prison environment, and they have created intimidating and abusive conditions that are severe or

² Prior to March 10, 2000, the facilities housing Plaintiffs were recognized as a "public service" facility within the meaning of the ELCRA, MCL 37.2301(b). *Neal, et al v. MDOC, et al.*, 232 Mich. App. 730 (1988). On December 20, 1999, the State of Michigan amended the ELCRA's definition of "public service" by excluding from the definition "a state or county correctional facility with respect to actions and decisions regarding an individual serving a sentence of imprisonment." Michigan Public Act No. 202 of 1999. The amendment took effect on March 10, 2000. The stated purpose of the amendment was to target Plaintiffs who were part of a class of prisoners in *Neal, et al. v. MDOC, et al.*, No. 96-6986-CZ. The amendment of the ELCRA deprives Plaintiffs, and all those similarly-situated, of equal protection of the laws in violation of the Michigan Constitution and of the Fourteenth Amendment of the United States Constitution, because the amendment targeted deprivation of a single class of persons (Michigan prisoners) for all state statutory protection from unconstitutional discrimination. This deprivation of protection lacks any rational relationship to any legitimate state purpose.

pervasive and do not meet a valid penological objective. Defendants' actions have deprived Plaintiffs of the full and equal enjoyment of the respective prison facilities.

139. Defendants' acts and omissions have resulted in harm to Plaintiffs including physical and emotional harm, Plaintiffs being denied privileges and opportunities that should be available to imprisoned youth, as well as longer terms of incarceration, harsher confinement and increased security levels in violation of MCL 37.2103 et seq.; MCL 37.2701(a)(f).

COUNT II

(ELCRA – Failing to Prevent and to Remedy Sexually Hostile Prison Environment)

140. Plaintiffs incorporate by reference the foregoing paragraphs of this Complaint as though fully set forth herein.

141. The facilities operated by the Defendant Michigan Department of Corrections were and are public services under ELCRA, MCL 37.2101 et seq. and MCL 37.2301.

142. Defendants' acts and omissions constitute sexual harassment and violate Plaintiffs' rights under the ELCRA, MCL 37.2103(h)(i)(ii)(iii) by subjecting Plaintiffs to unwelcome sexual advances and assaults and other conduct, both verbal and physical, of a sexual nature.

143. Defendants were aware, or should have been aware, that a sexually-hostile environment existed in the relevant prisons.

144. Defendants are liable under the ELCRA for the acts of their agents and adult prisoners under their control because MDOC was aware of the hostile and abusive prison environment created by its agents and employees and adult prisoners who have harmed plaintiffs and failed to take prompt and adequate remedial action.

145. Defendants' actions have deprived Plaintiffs of the full and equal enjoyment of the respective prison facilities.

146. Defendants' acts and omissions have resulted in harm to Plaintiffs including physical and emotional harm, Plaintiffs being denied privileges and opportunities that should be available to imprisoned youth, as well as longer terms of incarceration, harsher confinement and increased security levels in violation of MCL 37.2103 et seq.; MCL 37.2701(a)(f).

COUNT III
(ELCRA – Aiding and Abetting Violations of the Act)

147. Plaintiffs incorporate by reference the foregoing paragraphs of this Complaint as though fully set forth herein.

148. The facilities operated by the Defendant Michigan Department of Corrections were and are public services under ELCRA, MCL 37.2101 et seq. and MCL 37.2301.

149. Defendants as the entity and individuals responsible for administering the prisons control every aspect of lower-level staff and adult prisoners' utilization of the prison or its services. Through the exercise of reasonable care, Defendants could have limited the accessibility of predatory adult prisoners and staff to the vulnerable youth prisoners.

150. By creating an environment where adult prisoners and staff were allowed access to the vulnerable youth prisoners, Defendants aided and abetted other named defendants, as well as lower-level prison employees and other inmates in the creation of a hostile environment in violation of MCL 37.2701(b).

151. Defendants' actions have deprived Plaintiffs of the full and equal enjoyment of the respective prison facilities.

152. Defendants' acts and omissions have resulted in harm to Plaintiffs including physical and emotional harm, Plaintiffs being denied privileges and opportunities that should be

available to imprisoned youth, as well as longer terms of incarceration, harsher confinement and increased security levels in violation of MCL 37.2103 et seq.; MCL 37.2701(a)(f).

COUNT IV
(ELCRA – Age Discrimination)

153. Plaintiffs incorporate by reference the foregoing paragraphs of this Complaint as though fully set forth herein.

154. Plaintiffs and members of the Plaintiff Classes are members of a protected class pursuant to the Constitution of the State of Michigan and the ELCRA, MCL 37.2101 et seq. and MCL 37.2301.

155. The facilities operated by the Defendant Michigan Department of Corrections were and are public services under the ELCRA, MCL 37.2101 et seq. and MCL 37.2301.

156. Defendants' conduct and Defendants' treatment of Plaintiffs as set forth above also constitutes discriminatory treatment based on Plaintiffs' age. Based on the age of the Plaintiffs, they are subjected to sexual abuse and violence.

157. Defendants aided and abetted other named defendants, as well as lower-level prison officials and other inmates in denying Plaintiffs full and equal enjoyment of the respective prison facilities in violation of MCL 37.2701(b).

158. In addition, Defendants' failure to separate children from adult prisoners and the resulting sexual abuse and violence experienced by Plaintiffs also constitutes maintenance of an official policy, custom, pattern or practice that has a disparate impact on Plaintiffs based on their age.

159. Specifically, Defendants' policies and practices, including failure to properly screen prisoners for known vulnerabilities when making placement decisions, have a disparate

impact on Plaintiffs and the Plaintiff class by subjecting them to increased levels of sexual abuse, assault and other violence in prison than inmates in the general MDOC population.

160. Defendants' acts and omissions based upon Plaintiffs' age have resulted in harm to Plaintiffs including physical and emotional harm, Plaintiffs being denied privileges and opportunities that should be available to imprisoned youth, as well as longer terms of incarceration, harsher confinement and increased security levels in violation of MCL 37.2103 et seq.; MCL 37.2701(a)(f).

DAMAGES

161. Plaintiffs incorporate by reference the foregoing paragraphs of this Complaint as though fully set forth herein.

162. The acts and omissions of Defendants constituting violation of Plaintiffs' and Plaintiff class members' rights were and are a proximate cause of Plaintiffs' damages.

163. As a result of Defendants' acts and omissions, the Plaintiff class representatives and the Plaintiff class members, individually and as a class, have suffered severe emotional, psychological injuries, physical injuries and damages, loss of freedom and loss of education, employment and rehabilitation opportunities and privileges and income.

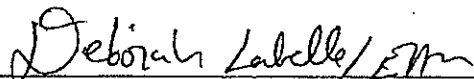
RELIEF REQUESTED

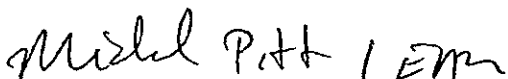
WHEREFORE, Plaintiffs respectfully request that this Court:

- A. Assert jurisdiction over this action;
- B. Certify this case as a class action pursuant to Rule 3.501 of the Michigan Court Rules on behalf of the proposed Plaintiff class and designate the harmed Plaintiffs as representatives of the class and their counsel of record as Class Counsel;

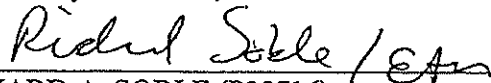
C. Award damages to Plaintiffs and Class Members for harm caused by Defendants' violations of law, including punitive and exemplary damages where appropriate.

D. Award the reasonable costs and expenses incurred in the prosecution of this action, including reasonable attorneys' fees and costs.


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Respectfully submitted,

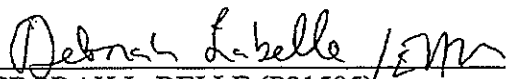

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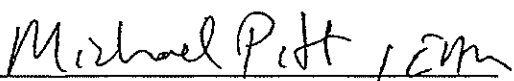

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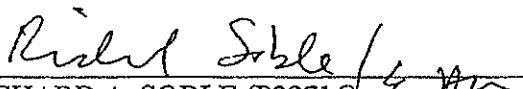
DEMAND FOR TRIAL BY JURY

NOW COME Plaintiffs, by and through their counsel, and hereby demands a trial by jury
as to all of those issues so triable as of right.

Respectfully submitted,


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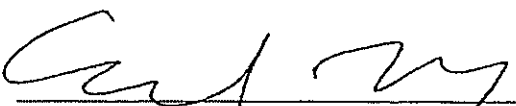

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Exhibit 2

Not Reported in F.Supp.2d, 2007 WL 201008 (E.D.Mich.)
(Cite as: 2007 WL 201008 (E.D.Mich.))

H

Only the Westlaw citation is currently available.

United States District Court,
E.D. Michigan,
Southern Division.
Natheauleen MASON, et al., Plaintiffs,
v.
Jennifer GRANHOLM, et al., Defendants.

No. 05-73943.
Jan. 23, 2007.

Cary S. McGehee, Michael L. Pitt, Pitt, Dowty, Royal Oak, MI, Deborah A. Labelle, Molly H. Reno, Patricia A. Streeter, Ann Arbor, MI, Dennis D. James, Ralph J. Sirlin, Ronald J. Reosti, Reosti, James, Pleasant Ridge, MI, for Plaintiffs.

OPINION AND ORDER GRANTING PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND DENYING DEFENDANTS'

MOTION FOR SUMMARY JUDGMENT

JOHN CORBETT O'MEARA, United States District Judge.

*1 Before the court are Plaintiffs' motion for partial summary judgment, filed July 14, 2006, and Defendants' cross-motion for summary judgment, filed August 4, 2006. Defendant Chapman filed a separate brief on August 9, 2006. With leave of the court, *amicus curiae*, the American Civil Liberties Union Fund of Michigan and Women Lawyers Association of Michigan, filed a brief in support of Plaintiffs' position on August 9, 2006. The court heard oral argument on August 31, 2006, and took the matter under advisement. For the reasons set forth below, the court GRANTS Plaintiffs' motion for partial summary judgment and DENIES Defendants' cross-motion.

BACKGROUND FACTS

Plaintiffs challenge an amendment to the Michigan Elliott-Larsen Civil Rights Act ("ELCRA") that excludes prisoners from protection from discrimination. The ELCRA provides, in part, that "the full and equal utilization of public accommodations, public service, and educational facilities without discrimination because of 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." M.C.L. § 37.2102(1). The statute also provides that a person shall not

Deny an individual the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation or public service because of religion, race, color, national origin, age, sex, or marital status.

M.C.L. § 37.2302(a).

In *Neal v. Michigan Dept. of Corrections*, 232 Mich.App. 730, 735, 592 N.W.2d 370 (1998), the Michigan Court of Appeals held that the ELCRA barred gender-based discrimination against prison inmates, because MDOC's correctional facilities are places of "public service" within the meaning the statute. The court rejected the MDOC's argument that the act was not intended to apply to prisoners: "Because, as our Supreme Court has stated, the protections of subsection 302(a) of the Civil Rights Act were intended to be coextensive with the Equal Protection and Antidiscrimination Clauses of the Michigan Constitution, and because prisoners do not lose their right to equal protection by virtue of their status as inmates, we can only conclude that the Legislature also intended all persons-including inmates-to be protected under subsection 302(a)." *Neal*, 232 Mich.App. at 739-40, 592 N.W.2d 370.

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In response to *Neal*, the Michigan legislature amended the ELCRA on March 10, 2000, providing that "public service does not include a state or county correctional facility with respect to actions and decisions regarding an individual serving a sentence of imprisonment." M.C.L. 37.2301(b). The legislature included an "enacting section," which provides:

Enacting section 1. This amendatory act is curative and intended to correct any misinterpretation of legislative intent in the court of appeals decision *Neal v. Department of Corrections*, 232 Mich.App. 730, 592 N.W.2d 370 (1998). This legislation further expresses the original intent of the legislature that an individual serving a sentence of imprisonment in a state or county correctional facility is not within the purview of this act.

*2 *Id.* Although the legislature identified the amendment as "curative," there is no evidence derived from the statutory language or legislative history suggesting that the legislature's original intent was in fact misinterpreted in *Neal*. See 1976 Journal of the House 3706-709 (Dec. 16, 1976); 1976 Journal of the Senate 2541-46 (Dec. 15, 1976).

The ELCRA is Michigan's exclusive statutory mechanism for enforcing the Michigan Constitution's guarantee of equal protection of the laws:

No person shall be denied the equal protection of the laws; nor shall any person be denied enjoyment of his civil or political rights or be discriminated against in the exercise thereof because of religion, race, color or national origin. The legislature shall implement this section by appropriate legislation.

Mich. Const. of 1963, art. I, § 2. By its terms, this constitutional provision requires the Michigan legislature to provide legislation that will redress discrimination. The ELCRA is that legislation. See *Depart-*

ment of Civil Rights ex rel Forton v. Waterford Twp. Dep't of Parks and Recreation, 425 Mich. 173, 188, 387 N.W.2d 821 (1986); *Neal*, 232 Mich.App. at 739, 592 N.W.2d 370 ("[I]nsofar as subsection 302(a) of the Civil Rights Act governs "public service," it is essentially a codification of the constitution's Equal Protection and Antidiscrimination Clauses, broadened to include categories not covered under the constitution, such as age, sex, and marital status .").

Plaintiffs assert that the ELCRA amendment deprives them of equal protection of the laws in violation of the Fourteenth Amendment to the United States Constitution. Plaintiffs have moved for partial summary judgment in their favor on this issue. In their complaint, Plaintiffs also challenge the ELCRA amendment as a bill of attainder and as violations of the International Covenant on Civil and Political Rights and the Convention against Torture. Defendants have filed a cross motion for summary judgment, contending that none of Plaintiffs' challenges to the ELCRA amendment have merit.

LAW AND ANALYSIS

I. Equal Protection

"The Fourteenth Amendment's promise that no person shall be denied the equal protection of the laws must coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons ." *Romer v. Evans*, 517 U.S. 620, 631, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996). "We have attempted to reconcile the principle with the reality by stating that, if a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end." *Id.*

In *Romer*, the Supreme Court struck down an amendment to the Colorado Constitution that prohibited legislative, executive, or judicial action at any level of state or local government designed to protect gays and lesbians. The court recognized that, under the

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“rational basis” level of scrutiny, “a law will be sustained if it can be said to advance a legitimate government interest, even if the law seems unwise or works to the disadvantage of a particular group, or if the rationale for it seems tenuous.” *Id.* at 632. Even under this deferential standard, the Court found the amendment to the Colorado Constitution violated the Equal Protection clause:

*3 Amendment 2 confounds this normal process of review. It is at once too narrow and too broad. It identifies persons by a single trait and then denies them protection across the board. The resulting disqualification of a class of persons from the right to seek specific protection from the law is unprecedented in our jurisprudence.

Romer, 517 U.S. at 633. The Court further explained:

It is not within our constitutional tradition to enact laws of this sort. Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance. “Equal protection of the laws is not achieved through indiscriminate imposition of inequalities.” Respect for this principle explains why laws singling out a certain class of citizens for disfavored legal status or general hardships are rare. A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense.

Id. (citations omitted).

The MDOC does not argue that the ELCRA amendment advances legitimate penological interests, such as maintaining prison order. *See generally Turner v. Safley*, 482 U.S. 78, 89, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987). Rather, the MDOC contends that

the ELCRA amendment “does advance legitimate interests such as protecting the public fisc, preventing windfall awards, reducing judicial intervention in the management of prisons, deterring frivolous lawsuits by prisoners and reducing trivial or inconsequential suits.” Defs.’ Br. at 6-7. In support of its argument that the ELCRA amendment is constitutional, MDOC cites to several Sixth Circuit cases upholding challenges to the federal Prison Litigation Reform Act, which placed some restrictions on prisoners’ ability to file civil rights claims. *See, e.g., Hampton v. Hobbs*, 106 F.3d 1281 (6th Cir.1997) (upholding fee provisions of the PLRA); *Wilson v. Yaklich*, 148 F.3d 596, 604 (6th Cir.1998) (upholding “three strikes” provision of the PLRA); *Hadix v. Johnson*, 230 F.3d 840 (6th Cir.2000) (upholding cap on attorney fees under PLRA).

In *Hampton*, for example, the Sixth Circuit found that the filing fee requirements of the PLRA had a rational relationship to a legitimate governmental interest:

The legislation was aimed at the skyrocketing numbers of claims filed by prisoners—many of which are meritless—and the corresponding burden those filings have placed on the federal courts. Thus, Congress sought to put in place economic incentives that would prompt prisoners to “stop and think” before filing a complaint.

Hampton, 106 F.3d at 1286-87. The court further noted that the “filing fee is small enough not to deter a prisoner with a meritorious claim, yet large enough to deter frivolous claims and multiple filings.” *Id.* The intent of the filing fee provisions of the PLRA was that “[p]risoners will have to make the same decision that law-abiding Americans must make: Is the lawsuit worth the price?” *Id.* (citing 141 Cong. Rec. S7526 (daily ed. May 25, 1995) (statement of Sen. Kyl)).

*4 In contrast to the PLRA provisions upheld in

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Hampton and other cases, the ELCRA amendment paints with a much broader brush. Rather than placing some limits on prisoner litigation and deterring frivolous suits, the ELCRA amendment completely precludes prisoners from challenging the conditions of their confinement or the discriminatory practices of the MDOC under the ELCRA, while they are incarcerated or after their release, and whether their claims are meritorious or not.^{FN1} The amendment does not, like the PLRA amendments, essentially place prisoners in the same position with respect to filing suit as other citizens. Rather, the amendment forecloses the vindication of prisoners' equal protection rights under Michigan law.^{FN2}

FN1. Prisoners may file claims under 42 U.S.C. § 1983 and state tort law. Defendants argue that as long as a judicial forum is available, prisoners' right of access to the courts has not been violated. *See Wilson v. Yaklich*, 148 F.3d 596, 605 (6th Cir.1998). This argument does not speak to the issue of whether the ELCRA amendment is rationally related to a legitimate government interest. *See id.* at 604-605. Because the court finds that the ELCRA amendment does not survive rational basis scrutiny, the court does not address Plaintiffs' other argument that prisoners' fundamental right of access to the courts has been infringed.

FN2. The Michigan Supreme Court has held that courts may not infer any damages remedy arising directly from Article I, Section Two of the Michigan Constitution, in the absence of statutory authority. *Lewis v. Michigan*, 464 Mich. 781, 786-87, 829 N.W.2d 868 (2001). However, it is well recognized that damages are in many cases the only way to effectively remedy constitutional violations. *See, e.g., Davis v. Passman*, 442 U.S. 228, 245, 99 S.Ct. 2264, 60 L.Ed.2d 846 (1979) ("Historically, damages have

been regarded as the ordinary remedy for an invasion of personal interests in liberty.") (citing *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 395-97, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971)).

Viewing the statute in the context of this case, the ELCRA amendment essentially permits the state to discriminate against female prisoners without fear of accountability under Michigan's civil rights law. Given the state's abhorrent and well-documented history of sexual and other abuse of female prisoners, the court finds this amendment particularly troubling. *See generally Everson v. MDOC*, 391 F.3d 737, 741 (6th Cir.2005) ("The problem of sexual abuse and other mistreatment of female inmates has long plagued the MDOC."). It appears that the state legislature has not attempted to deter frivolous lawsuits, but rather preclude meritorious ones.^{FN3}

FN3. In so concluding, the court does not intend to and has taken no position on the merits of Plaintiffs' claims here.

Moreover, while deterring frivolous suits and protecting the public treasury are legitimate government interests, the ELCRA amendment is too broad to be rationally related to these interests. *See Romer*, 517 U.S. at 635 (rejecting freedom of association and other justifications for Colorado's Amendment 2, stating that the "breadth of the amendment is so far removed from these particular justifications that we find it impossible to credit them"). The ELCRA amendment denies prisoners the basic protections against discrimination that all others are afforded under Michigan law, as required by Article I, Section Two of the Michigan Constitution, which provides that "The legislature shall implement this section by appropriate legislation." There is no rational basis for denying all prisoners (including those who have been released)-and no one else-the ability to seek redress for illegal discrimination that occurred in prison.^{FN4} As

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the *Romer* court explained, “[a] law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense.” *See also Hadix*, 230 F.3d at 843 (“[R]ational basis review is not a rubber stamp of all legislative action, as discrimination that can *only* be viewed as arbitrary and irrational *will* violate the Equal Protection Clause.”) (emphasis in original).

E.D.Mich.,2007.

Mason v. Granholm

Not Reported in F.Supp.2d, 2007 WL 201008
(E.D.Mich.)

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FN4. Other options exist for deterring frivolous filings by prisoners. *See, e.g.,* M.C.L. § 600.5501, *et seq.* (1999) (requiring, *inter alia*, exhaustion of administrative remedies and permitting courts to dismiss frivolous complaints *sua sponte*). *See also* 28 U.S.C. § 1915.

Accordingly, the court concludes that the ELCRA amendment violates prisoners' equal protection rights and is unconstitutional.

II. Bill of Attainder and Treaty Violations

*5 Plaintiffs also claim that the ELCRA amendment violates the constitutional provision against bills of attainder and that it violates the International Covenant on Civil and Political Rights and the Convention against Torture. Defendants seek summary judgment on these claims. Because the court has determined that the ELCRA amendment does not survive equal protection analysis, it is not necessary to address Plaintiffs' other challenges to this legislation.

ORDER

IT IS HEREBY ORDERED that Plaintiffs' July 14, 2006 motion for partial summary judgment is GRANTED.

IT IS FURTHER ORDERED that Defendants' August 4, 2006 cross-motion for summary judgment is DENIED.

Exhibit 3

State of Michigan
Court of Claims

JOHN DOE 1, *et al*,

Plaintiff,

v

MICHIGAN DEPARTMENT OF
CORRECTIONS, *et al*,

Defendant.

OPINION AND ORDER

Case No. 13-000165-MZ

Hon. AMY RONAYNE KRAUSE

At a session of said Court held in
the City of Lansing, Ingham County, Michigan,
on this 13th day of January, 2014.

The matter before the Court concerns a lawsuit that plaintiffs filed in Washtenaw Circuit Court in December of 2013, as case number 13-1196-CZ, seeking damages from defendants pursuant to the Elliot-Larson Civil Rights Act (ELCRA), MCL 37.2310 *et seq*. Generally, plaintiffs allege that they were subjected to a variety of extremely serious abuses while in the custody and under the jurisdiction of the MDOC. Pursuant to 2013 PA 164, which amended the jurisdiction of the Court of Claims, defendants transferred the case to this Court. Shortly thereafter, the Legislature enacted 2013 PA 205, the anticipated "trailer bill" to the aforementioned 2013 PA 164, which amended the same, *inter alia*, to preserve litigants' rights to a jury trial in circuit court. Plaintiffs contend that they are therefore entitled to have their claims for damages transferred back to the Washtenaw Circuit Court. Defendants contend that they have filed a counterclaim that must be resolved in this Court and that entitles them to complete dismissal of the case.

It is well established that courts are not bound by the labels parties affix to their pleadings or arguments; rather, courts look to the substance of what is before them rather than the artfulness of a party's drafting. *Maiden v Rozwood*, 461 Mich 109, 135; 597 NW2d 817 (1999); *Adams v Adams*, 276 Mich App 704, 710-711; 742 NW2d 399 (2007). Consequently, the fact that defendants have pleaded

something they *call* a "counterclaim for declaratory relief" does not necessarily mean that it truly *is* a counterclaim for declaratory relief, or indeed a counterclaim at all. The Court finds that, in fact, it is not.

It has long been established that a counterclaim is definitionally distinct from a defense to an action. *Jennison Hardware Co v Godkin*, 112 Mich 57, 62; 70 NW 428 (1897). "By definition, a counterclaim by a defendant seeks some sort of affirmative relief back against the plaintiff, whereas most other tactics used by a defendant do not..." *Drouillard v Metropolitan Life Ins Co*, 107 Mich App 608, 619 n 6; 310 NW2d 15 (1981), quoting 65 ALR3d 901, 907 (1975). Counterclaims are therefore essentially analogous to cross-appeals, which by definition seek to "enlarge the scope of the relief granted by" the court from which the cross-appeal is taken. See *Middlebrooks v Wayne Co*, 446 Mich 151, 166 n 41; 521 NW2d 774 (1994). The gravamen of a true counterclaim is that it seeks, ultimately, to obtain from the plaintiff some relief that would have the practical effect of going beyond merely prevailing in the underlying action.

Defendants' purported counterclaim does not. Defendants' purported counterclaim seeks to dismiss plaintiffs' underlying action on the same theory defendants advance in their motion for summary disposition: that the ELCRA is inapplicable to, and therefore unavailable to, plaintiffs on the facts alleged in this case. Were the Court to agree with that argument, defendants would obviously be entitled to prevail in the underlying action. However, the Court is unable to imagine what defendants could possibly gain *beyond* prevailing in the underlying action, and at oral argument, defendants were unable to articulate any discernible such additional relief. In light of the class-action nature of the underlying action, its dismissal with prejudice would have the same preclusive effect against the possibility of materially the same lawsuit being filed as would a declaratory judgment holding that no such lawsuit may be filed.

In short, the Court concludes that defendants' purported counterclaim is simply a motion for summary disposition on the merits of the underlying action, masquerading under a different label. The Court has not considered, and expresses no view regarding, the substantive merits of the underlying action. There is no dispute that in the absence of a genuine counterclaim, pursuant to the "trailer bill," this Court lacks jurisdiction to entertain plaintiffs' ELCRA action. The Court is therefore obligated to transfer the matter back to circuit court.

Defendants argue that this matter should be transferred to the Lapeer Circuit Court, or alternatively to the Ingham Circuit Court, rather than returned to the Washtenaw Circuit Court.

Pursuant to MCR 2.227(a)(1), a court in which a civil action is pending contrary to that court's subject-matter jurisdiction may transfer the action to "[an]other court in a place where venue would be proper." Similarly, MCL 600.6421(1), as amended by the "trailer bill," provides that a claim to which there is a right to a jury trial "may be heard and determined by a circuit, district, or probate court in the appropriate venue." Defendants assert that no part of plaintiffs' cause of action arose in Washtenaw County. Plaintiffs asserted that venue was proper there, in part because defendants operate facilities in the county; impliedly, although the individual plaintiffs may not have suffered an injury in Washtenaw County, members of the class may have. See *Angelucci v Dart Properties Inc*, 298 Mich App 592, 603-604; 828 NW2d 724 (2012), special panel convened and opinion reinstated 301 Mich App 209; 836 NW2d 219 (2013).

Ultimately, this appears to be one of the rare cases in which the "underlying facts relevant to the venue issue" are not easily resolvable on the facts presently before the Court. See *Gross v General Motors Corp*, 448 Mich 147, 156; 528 NW2d 707 (1995). In light of the Court's lack of subject matter jurisdiction, the Court declines to make any attempt to resolve the question of appropriate venue. A court with subject matter jurisdiction is the better place to resolve whether venue also lies there. Because it was wholly unnecessary, and ultimately inappropriate, to have transferred this matter from the Washtenaw Circuit Court to this Court, the Court orders that the matter shall be transferred back from whence it came.

AMY RONAYNE KRAUSE, Judge, orders: Plaintiffs' motion to transfer to Washtenaw Circuit Court is GRANTED. This order has immediate effect. This is a final order disposing of all the claims and adjudicating the rights and liabilities of all the parties. Because this Court now lacks jurisdiction, any motion for reconsideration must be directed to the Washtenaw Circuit Court. *Frankfurth v Detroit Medical Ctr*, 297 Mich App 654; 825 NW2d 353 (2012).

AMY RONAYNE KRAUSE



A true copy entered and certified by Jerome W. Zimmer Jr., Clerk, on

FEB 07 2014

Date

Jerome W. Zimmer Jr.
Clerk

Exhibit 4

07-1114
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NATHEAULEEN MASON, RENEE WILLIAMS, YOLANDA LIMMITT, HIELISHA BAILEY, TAMMY LACROSS, VELVET FARLEY-JOHNSON, EBONY BATES, KANDICE HALL, DAVONE WILSON, CHRISTINA SCHUSTER, DYANNA MCDADE, and JILL FLANDERS, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellees,

v

JENNIFER GRANHOLM, PATRICIA CARUSO, NANCY ZANG, CLARICE STOVALL, SUSAN DAVIS, JOAN YUKINS, SALLY LANGLEY, THOMAS DESANTIS, WILLIS CHAPMAN, JERRY HOWELL, FIRAS AWAD, JODY NUNN, CARLTON CARTER, ART LANCASTER, CROSBY TALLEY, KIRK TOLLZEIN, WILLIAM MERROW, and RODNEY MADDEN, jointly and severally.

Defendants-Appellants.

STATE DEFENDANTS'¹ MOTION TO STAY PROCEEDINGS
IN THE LOWER COURT PENDING THIS APPEAL

I. MCL 37.2301, which removed prisoners from the provisions of the Michigan's Elliott-Larsen Civil Rights Act (ELCRA), satisfies the rational basis standard required under the Equal Protection Clause of the Fourteenth Amendment. The District Court's finding is erroneous and the State Defendants are likely to prevail on the merits of their appeal. Should this Court stay all proceedings pending the appeal?

1. The State Defendants request this Court issue a stay of this entire case pending appeal.²
2. On January 23, 2007, the District Court determined that an amendment to Michigan's Elliott-Larsen Civil Rights Act (ELCRA) along with enacting section 1 was

¹ Granholm, Caruso, Zang, Stovall, Davis, Yukins, Langley, Desantis, Howell, Talley, Tollzein, Merrow, and Madden

² FRAP 18.

unconstitutional. (Docket No. 171).³ The State Defendants filed their Notice of Appeal on January 24, 2007. (Docket No. 174). The State Defendants submit that during the pendency of this appeal that this Court should stay all proceedings, including discovery.

3. The State Defendants filed a motion seeking a stay of all proceedings in the District Court on January 31, 2007. (Docket no. 180). The Plaintiffs filed a response on February 9, 2007. (Docket no. 186).

4. The District Court denied the State Defendants' motion on March 7, 2007. (Docket no. 195).

5. In determining whether to grant a stay, this Court considers the same four factors that are traditionally considered in evaluating the granting of a preliminary injunction.⁴ These factors are: (1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay.⁵ These factors are not prerequisites that must be met, but are interrelated considerations that must be balanced together.⁶ Generally, however, the balancing process applied to these factors is different when applied to a stay rather than an injunction. In effect, a party seeking a stay generally has a greater burden to demonstrate a likelihood of success on the merits.⁷ However, that too must be balanced in proportion to the irreparable injury that would result absent a stay. This Court describes that balancing process as follows⁸:

³ MCL 37.2301(b).

⁴ *Michigan Coalition of Radioactive Material Users, Inc v Griepentrog*, 945 F2d 150, 153 (CA 6, 1991); *Frisch's Restaurant, Inc. v Shoney's Inc.*, 759 F2d 1261, 1263 (CA 6, 1985).

⁵ *Michigan Coalition*, 945 F2d at 153; *Ohio ex rel. Celebrezze v Nuclear Regulatory Comm'n*, 812 F2d 288, 290 (CA 6, 1987).

⁶ *Michigan Coalition*, 945 F2d at 153; *In Re DeLorean Motor Car Co*, 755 F2d 1223, 1229 (CA 6, 1985).

⁷ *Michigan Coalition*, 945 F2d at 153.

⁸ *Michigan Coalition*, 945 F2d at 153.

To justify the granting of a stay, however, a movant need not always establish a high probability of success on the merits. *Ohio ex rel. Celebrezze*, 812 F2d at 290 (citing *Cuomo v. United States Nuclear Regul. Comm'n*, 772 F2d 972, 974 (DC Cir, 1985)). The probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury plaintiffs will suffer absent the stay. *Id.* Simply stated, more of one excuses less of the other.

6. State Defendants maintain that they meet the first factor in the analysis because they have established a substantial likelihood of success on appeal.

7. The change to the ELCRA easily meets the rational basis test set forth in *Romer v. Evans*.⁹ State Defendants cited numerous examples where the Sixth Circuit upheld far more egregious restrictions on prisoners under the rational basis standard. The change to the ELCRA neither impacts a fundamental right nor applies to a suspect class. Prisoners are not a suspect class.¹⁰ Thus, rational basis scrutiny is the proper benchmark. The District Court's decision is in conflict with a long line of decisions from this Court upholding restrictions on prisoners.¹¹

8. Michigan's Legislature had a rational basis for concluding that prisoners file more lawsuits than other citizens. In removing prisoners from the ELCRA, the Legislature sought to protect the public fisc, prevent windfall awards, and to reduce judicial intervention in management of prisoners. Previously, this Court has recognized all of those legitimate goals in upholding legislation under the rational basis test. In this case, the State Defendants set forth multiple reasons to uphold that legislation. In rejecting those reasons, the Court went against Supreme Court and Sixth Circuit precedents. Thus, State Defendants believe that they have demonstrated a substantial likelihood of success on appeal.

⁹ *Romer v. Evans*, 517 US 620 (1996).

¹⁰ *Hampton v. Hobbs*, 106 F3d 1281 (CA 6, 1997).

¹¹ *Wilson v. Yaklich*, 148 F3d 596 (CA 6, 1998); *Jackson v. Jamrog*, 411 F3d 615 (CA 6, 2005); *Harbin-Bey v. Rutter*, 420 F3d 571 (CA 6, 2005).

9. The District Court erred because it discounted the immediate harm caused to the State Defendants in this case and the potential harm to all employees of the Michigan Department of Corrections.

10. State Defendants in this case and other cases will suffer irreparable harm if this Court denies their motion for a stay.

11. Parties to this case and to similar pending cases in Washtenaw County will now potentially be subject to claims under the ELCRA.¹² The *Neal* case referenced below is a class action lawsuit with over 400 class members. On February 10, 2005, the Michigan Court of Appeals held that class members whose claims occurred after the effective date of the amendment could not bring a claim under the ELCRA.¹³ (Exhibit 1). The District Court's opinion overturned the decision of the Michigan Court of Appeals. Now all of those prisoners will be allowed to bring claims under the ELCRA. Moreover, an untold number of prison officials will now be open to being sued in future lawsuits. The District Court's decision has removed a valid defense that prison officials had to lawsuits under the ELCRA.

12. If the District Court's decision is not stayed, all corrections officials face the prospect of being sued under the ELCRA.

13. By issuing a stay, this Court will simply be preserving the status quo. From March 10, 2000 to the present, state prisoners could not bring claims under the ELCRA. The Michigan Court of Appeals has already held that claims arising after the enactment of the statute have no claim. Plaintiffs will not be harmed by allowing this Court to definitively resolve this issue. Plaintiffs will be in the same position as before the District Court's decision.

¹² *Neal, et al v MDOC, et al*, Washtenaw County Case no. 96-6986-cz; *LaCross, et al v Zang, et al*, Washtenaw County Case no. 05-944-cz; *Anderson, et al v MDOC, et al*, Washtenaw County Case no. 03-162-mz.

¹³ *Neal, et al v MDOC, et al*, unpublished opinion, *per curiam* of the Court of Appeals decided February 25, 2005 (Docket No. 253543).

14. This Court should grant a stay because doing so is in the public interest. The citizens of the State of Michigan have a strong interest in seeing the ELCRA amendment upheld.

15. Untold numbers of prison officials may now be subject to lawsuits as a result of this Court's decision. Prison officials should not have to go through the ordeal of being sued while awaiting a decision from this Court.

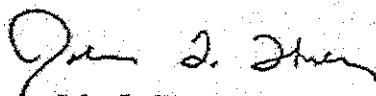
16. Since all four factors weigh in the State Defendants' favor, this Court should grant their request to stay all proceedings including discovery.

RELIEF

State Defendants request this Court to stay all proceedings in this matter until this appeal is resolved.

Respectfully submitted,

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Attorney General



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Dated: March 19, 2007

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PROOF OF SERVICE.

I hereby certify that on March 19, 2007, the foregoing paper was presented and uploaded to the United States District Court ECF System which will send notification of such filing to the attorneys of record listed herein and I hereby certify that a copy of this same document was mailed by US Postal Service the document to any involved non-participant.



Stephanie Gae
legal secretary

Exhibit 5

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MASON, et al., on behalf of themselves and all
others similarly situated,

Case No. 05-73943

Plaintiffs,

HON. JOHN CORBETT O'MEARA
MAG. JUDGE DONALD A. SCHEER

v

GRANHOLM, et al., jointly and severally,

Defendants.

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STIPULATION

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The parties stipulate that the District Court's January 23, 2007 Opinion and Order Granting Plaintiffs' Motion for Partial Summary Judgment and Denying Defendants' Motion for Summary Judgment, shall constitute a final declaratory judgment, which will be subject to an appeal of right.

The parties further stipulate that all remaining claims and all Defendants shall be dismissed with prejudice and without costs or attorney fees to any party.

Consistent with this stipulation, the parties have agreed to entry of the attached declaratory judgment and order dismissing remaining claims in this matter.

STIPULATED:

/s/Deborah LaBelle
DEBORAH LaBELLE (P31595)
Attorney for Plaintiffs

/s/John Thurber
JOHN THURBER (P44989)
Attorney for Defendants

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MASON, et al., on behalf of themselves and all
others similarly situated,

Case No. 05-73943

Plaintiffs,

HON. JOHN CORBETT O'MEARA
MAG. JUDGE DONALD A. SCHEER

v

GRANHOLM, et al., jointly and severally,

Defendants.

DEBORAH LaBELLE (P31595) Counsel for Plaintiffs 221 N. Main St., Ste. 300 Ann Arbor, MI 48104 734.996.5620	RONALD J. REOSTI (P19368) RALPH J. SIRLIN (P24635) Counsel for Plaintiffs 23880 Woodward Ave. Pleasant Ridge, MI 48069-1133 248.691.4200	DAVID A. KOTWICKI (P56070) Attorney for Defendant Carlton Carter 20 S. Main St., Ste. 115 Mt. Clemens, MI 48043 586.468.9850
RICHARD A. SOBLE (P20766) Counsel for Plaintiffs 221 N. Main St., Ste. 200 Ann Arbor, MI 48104 734.996.5600	PATRICIA A. STREETER (P30022) Counsel for Plaintiffs 221 N. Main St., Ste. 300 Ann Arbor, MI 48104 734.222.0088	J. RICHARD COLBECK (P12036) Attorney for Defendant Lancaster 53 E. Chicago Street Coldwater, MI 49036 517.279.8029
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MOLLY RENO (P28997) Counsel for Plaintiffs 221 N. Main St., Ste. 300 Ann Arbor, MI 48104 734.449.9883		

DECLARATORY JUDGMENT AND ORDER DISMISSING REMAINING CLAIMS

This matter having come before the Court upon the Stipulation of the parties:

IT IS HEREBY ORDERED that this Court's January 23, 2007 Opinion and Order

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Granting Plaintiffs' Motion for Partial Summary Judgment and Denying Defendants' Motion for Summary Judgment, is entered as a final declaratory judgment;

IT IS FURTHER ORDERED all other remaining claims and Defendants are
DISMISSED with prejudice and without costs to any party.

Date: September 28, 2009

s/John Corbett O'Meara
United States District Judge

Approved as to Form and Content:

/s/ Deborah LaBelle
DEBORAH LaBELLE (P31595)
Attorney for Plaintiffs

/s/John Thurber
JOHN THURBER (P44989)
Attorney for Defendants