IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA
DOCKET NO. 23-ICA-540

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JEREMIAH L. JONES,
***Petitioner*,**

vs.

TOWN OF LUMBERPORT, WEST VIRGINIA, a political subdivision of West Virginia,
***Respondent*.**

BRIEF OF PETITIONER JEREMIAH L. JONES

Appeal from a Dismissal Order of the
Circuit Court of Harrison County, West Virginia
in Civil Action No. 2023-C-75
(The Honorable Christopher J. McCarthy, Judge)

/s/ Cory B. Lowe
Todd S. Bailess (WVSB #10482)
Jodi R. Durham (WVSB #13393)
Cory B. Lowe (WVSB #13649)
BAILESS LAW FIRM PLLC
3501 MacCorkle Avenue, SE, #135
Charleston, WV 25304
Telephone: (304) 413-1400
Facsimile: (304) 413-1401
cory@bailesslawfirm.com

Samuel D. Madia (WVSB #10819)
Jonathan Wesley Prince (WVSB #13250)
SHAFFER MADIA LAW, PLLC
1056A Maple Drive
Morgantown, WV 26505
Telephone: (304) 622-1100
Facsimile: (304) 622-1145

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II. STATEMENT OF THE CASE

This case presents a critical issue of first impression in West Virginia regarding interpretation of the West Virginia Human Rights Act ("WVHRA"), W. Va. Code § 5-11-1, *et seq*. Make no mistake about it, the issue before this Court is **not** whether sexual orientation is a protected class under the WVHRA, as the Respondent and lower Court have erroneously framed it. [Appx. 0229]. Rather, this case presents the Court with the opportunity to decide whether the statutory language of the WVHRA, prohibiting discrimination in employment "***because of sex***," necessarily includes discrimination based on sexual orientation consistent with Title VII and the holding in *Bostock v. Clayton Cty*., 140 S.Ct. 731 (2020). To serve the purposes of the WVHRA and the fundamental right to equal opportunity in employment,[1] this Court must find in favor of the Petitioner.

Jeremiah L. Jones, ("Petitioner") worked for Respondent, Town of Lumberport, West Virginia ("Respondent") in the Public Works Department from April 6, 2021, until his constructive discharge on May 10, 2021. [Am. Compl., at ¶ 4, Appx. 0004]. During his employment, Petitioner

[1] *See Frank's Shoe Store v. West Va. Human Rights Comm'n*, 179 W. Va. 53, 59, 365 S.E.2d 251, 257 (1986) ("Recently, we have held that equal employment is a fundamental right.") (citing *Allen v. State Human Rights Commission*, 174 W. Va. 139, 324 S.E.2d 99 (1984)).

was subjected to a severe and/or pervasive work environment consisting of sex discrimination and retaliation in violation of the WVHRA and the West Virginia Whistle Blower Law ("WVWL"). [*See generally* Am. Compl., Appx., 0004-0016]. Ultimately, Respondent's failure to alleviate the hostile work environment forced Petitioner to quit his employment. [*Id*., at ¶ 21-23, Appx. 0006].

Petitioner reported the sex discrimination to Respondent's Mayor. [*Id*., at ¶ 12, Appx. 0005]. Following his report of sex discrimination and differential treatment, during a meeting with Respondent's Mayor, a Town Council member of Respondent made a gender specific, derogatory remark to Petitioner by calling him a "faggot" that needed to "grow up and be a man." [*Id*., at ¶¶ 13-15, Appx. 0005-0006].

Petitioner informed the town Mayor he would not return to work without assurances that the discriminatory and hostile work environment would be alleviated. [*Id*., at ¶ 21, Appx. 0006]. Unfortunately, Respondent failed to provide any assurances to Petitioner that the discriminatory and hostile work environment would be alleviated. [*Id*., at ¶ 22, Appx. 0006]. As a result, Petitioner was forced to quit his employment on May 10, 2021. [*Id*., at ¶ 23, Appx. 0006].

Petitioner filed his original *Complaint* in the Circuit Court of Harrison County on April 7, 2023. [Appx. 0001]. Petitioner's Complaint alleged *inter alia*, sex discrimination/hostile work environment and retaliation based upon the conduct of Respondent's supervisors/agents in the workplace and in violation of the WVHRA and the WVWL.[2] On July 19, 2023, prior to any responsive pleading being filed or served, Petitioner filed his *First Amended Complaint* pursuant to Rule 15(a) of the *West Virginia Rules of Civil Procedure*. [Appx. 0001]. On August 21, 2023, Respondent filed a *Motion to Dismiss Plaintiff's Claims Under the West Virginia Human Rights*

[2] *See generally* [Am. Compl., Appx. 0004-0016]. Petitioner's *Amended Complaint* did not substantively differ from his original *Complaint*.

Act and Answer to Plaintiff's Complaint. [Appx. 0001-0002].[3] Petitioner filed his *Response in Opposition to Defendant Town of Lumberport, West Virginia's Motion to Dismiss Plaintiff's Claims Under the West Virginia Human Rights Act* on September 28, 2023. [Appx. 0002, Appx. 0048-0151]. A Motion Hearing was held before the Honorable Christopher McCarthy on October 4, 2023. [Appx. 0002, Appx. 0152-0182]. Following the hearing, as directed by the Court, Petitioner and Respondent each filed competing *Proposed Findings of Fact and Conclusions of Law* on October 18, 2023. [Appx. 0002, Appx. 0183-0190, Appx. 0191-0224]. On November 3, 2023, the Circuit Court signed and entered Respondent's *Proposed Order* and dismissed Petitioner's claims under the WVHRA. [Appx. 0002, Appx. 0225-0258]. Petitioner filed his *Notice of Appeal* to this honorable Court on December 1, 2023. [Appx. 0259-0268].

III. SUMMARY OF ARGUMENT

The purpose of the WVHRA is simple and unambiguous. It derives, as many of the ideals of equality upon which our nation was founded, from the golden rule, "[i]n everything, do to others what you would have them do to you . . ." Matthew (7:12).[4] In enacting the WVHRA, the West Virginia Legislature has declared, in relevant part:

> It is the public policy of the state of West Virginia to provide ***all*** of its citizens equal opportunity for employment . . . Equal opportunity in the area of employment . . . is hereby declared to be a human right or civil right of all persons without regard to . . . sex . . .
>
> The denial of these rights to properly qualified persons by reason of . . . sex . . . is contrary to the principles of freedom and equality of opportunity and is destructive to a free and democratic society.

[3] Respondent inadvertently answered Petitioner's original *Complaint* despite the filing and service of a *First Amended Complaint*. Upon realization of the mistake, Respondent filed its *Motion to Dismiss Plaintiff's Claims Under the West Virginia Human Rights Act and Answer to Plaintiff's First Amended Complaint* on October 3, 2023. [Appx. 0002, Appx. 0017-0047].

[4] *See also*, Mark 12:31, "The second is this: 'You shall love your neighbor as yourself.' There is no other commandment greater than these."

See Pajak v. Under Armour, Inc., 246 W. Va. 387, 391, 873 S.E.2d 918, 923 (2022) (quoting W. Va. Code § 5-11-2 (eff. 1998) (emphasis added)). In the fifty-seven years since its enactment,[5] the West Virginia Supreme Court of Appeals has defined and shaped the protections afforded by the WVHRA through interpretation of its provisions.

The West Virginia Supreme Court has consistently interpreted the WVHRA by looking to "federal discrimination law dealing with Title VII of the Civil Rights Act of 1964 when interpreting provisions of our state's human rights statutes." *West Virginia Human Rights Comm'n v. Wilson Estates Inc.*, 202 W. Va. 152, 158, 503 S.E.2d 6, 12 (1998) (citing *Barefoot v. Sundale Nursing Home*, 193 W. Va. 475, 482, 457 S.E.2d 152, 159 (1995) (noting that "cases brought under the West Virginia Human Rights Act are governed by the same analytical framework and structures developed under Title VII, at least where our statute's language does not direct otherwise")); *see also Willis v. Wal-Mart Stores Inc.*, 202 W. Va. 413, 417, 504 S.E.2d 648, 652 (1998) ("Our '***longstanding practice*** of applying the same analytical framework used by federal courts when deciding cases arising under the Act' is particularly fitting when, as in this case, ***the critical language of our Act – 'because of sex' – parallels the federal legislation***.") (internal citations omitted) (emphasis added).

Here, the Circuit Court erred by dismissing Petitioner's claims under the WVHRA, finding Petitioner's claims fail "as a matter of law as sexual orientation is not a protected class." [Appx. 0229]. From the outset, the Circuit Court's Order misunderstood and misconstrued the issues presented by Petitioner's claims. The issue is **not** whether sexual orientation is a specifically enumerated protected class under the WVHRA. Rather, the issue is whether discrimination

[5] The WVHRA was enacted by the West Virginia Legislature in 1967, three years following the federal Civil Rights Act of 1964. *See West Va. Human Rights Comm'n v. Tenpin Lounge*, 158 W.Va. 349, 350-51, 211 S.E.2d 349, 351 (1974) ("The West Virginia Human Rights Act was enacted by the Legislature in 1967.").

"because of sex" necessarily includes discrimination because of sexual orientation, as held by the United States Supreme Court in *Bostock v. Clayton Cty.*, 140 S.Ct. 1731 (2020). *See Bostock*, 140 S.Ct. at 1741 (holding "it is impossible to discriminate against a person for being homosexual . . . without discriminating against that individual ***based on sex***.") (emphasis added); *see also* [Appx. 0065].

In misconstruing the issue from the outset of its Order, the Circuit Court erred by failing to acknowledge or address the West Virginia Supreme Court's "***longstanding practice*** of applying the same analytical framework used by federal courts when deciding cases arising under the [WVHRA]." *See West Virginia Human Rights Comm'n v. Wilson Estates*, 202 W. Va. 152, 158, 503 S.E.2d 6, 12 (1998). Indeed, the Circuit Court's Order does not state or acknowledge such precedent in its Order, nor does it ever mention the United States Supreme Court's decision in *Bostock v. Clayton Cty.*, 140 S.Ct. 1731 (2020). *See generally* [Appx. 0225-0258]. Had the Circuit Court endeavored to apply the West Virginia Supreme Court's precedent and the United States Supreme Court's decision in *Bostock*, *stare decisis* would have required the Court to deny Respondent's *Motion to Dismiss* and find sexual orientation discrimination creates legally cognizable claims under the WVHRA based on the protected characteristic of "sex."

Rather, the Circuit Court based its decision entirely upon speculation and conjecture as to the state of minds of our legislators, finding the failure to pass "Senate Bill 156"[6] conclusive of legislative intent to exclude sexual orientation from the protections of the WVHRA. *See generally* [Appx. 0208-0209].

Again, had the Circuit Court endeavored to apply *Bostock*, it would have found the same argument was advanced and wholly dispelled by the Court therein. *See Bostock*, 140 S.Ct., at 1747

[6] Senate Bill 156 was introduced on January 12, 2022, proposing various amendments to the WVHRA, including provisions defining "sexual orientation." [Appx. 0208, Appx. 0213-0224].

(finding "speculation about why a later Congress declined to adopt new legislation offers a 'particularly dangerous' basis on which to rest an interpretation of an existing law a different and earlier Congress did adopt.") (citing, in pertinent part, *Sullivan v. Finkelstein*, 496 U.S. 617, 632 (1990) (Scalia, J., concurring) ("***Arguments based on subsequent legislative history . . . should not be taken seriously, not even in a footnote***") (emphasis added)).

Accordingly, for the reasons set forth more fully below, Petitioner requests this Court apply the longstanding precedent of the West Virginia Supreme Court in looking to Title VII for interpretation of the WVHRA to find discrimination "because of sex" includes discrimination because of sexual orientation, and reverse and remand this matter to the Circuit Court of Harrison County for further proceedings.

IV. STANDARD OF REVIEW

The standard of review is *de novo*. A Circuit Court's order dismissing claims under Rule 12(b)(6) for failure "to state a claim upon which relief can be granted is a ruling of law" and is reviewed *de novo*. *See Mountaineer Fire & Rescue Equip., LLC v. City Nat'l Bank of W. Va.*, 244 W. Va. 508, 519, 854 S.E.2d 870, 881 (2020) (citing Syl. Pt. 2, *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W. Va. 770, 461 S.E.2d 516 (1995) ("Appellate review of a circuit court's order granting a motion to dismiss a complaint is *de novo*.")). Further, "[i]n determining . . . the existence of clear error as a matter of law . . ." a "*de novo* standard of review" is employed "as in matters in which purely legal issues are at issue." *State ex rel. W. Va. Mut. Ins. Co. v. Salango*, 246 W. Va. 9, 13, 866 S.E.2d 74, 78 (2021) (citing *State ex rel. Gessler v. Mazzone*, 212 W. Va. 368, 372, 572 S.E.2d 891, 895 (2002)).

V. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is necessary in this matter pursuant to the criteria contained in Rule 18(a) of the *West Virginia Rules of Appellate Procedure*. Because this matter involves an issue of first impression and fundamental public importance under Rule 20 of the *West Virginia Rules of Appellate Procedure*, Petitioner requests oral argument be set by the Court.

VI. ARGUMENT

A. The Circuit Court Erred Because Sexual Orientation is Included Within Prohibited Discrimination "Because of Sex" Under the WVHRA as Decided Under Title VII by the United States Supreme Court in *Bostock v. Clayton Cty*., 140 S.Ct. 731 (2020).

1. The History and Purpose of the WVHRA Supports Finding Discrimination Because of Sex Includes Discrimination Based On Sexual Orientation.

The United States of America was founded on the principle of equality as written unambiguously in our Declaration of Independence: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness. . ."[7] These ideals are rooted in the fundamental principle, "in everything, do to others what you would have them do to you . . ." Matthew (7:12).[8]

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[7] *See Declaration of Independence: A Transcription*, https://www.archives.gov/founding-docs/declaration-transcript (October 11, 2023). These "self-evident" truths were influenced, in part, on texts dating back over two thousand years to ancient Greece. *See* Common Notion No. 1, I *The Thirteen Books of Euclid's Elements* 155 (T. Heath trans. 2d ed. 1956) ("Things which are equal to the same thing are also equal to one another."); and Adam Kucharski, *Euclid as Founding Father: We hold these mathematics to be self evident* (October 7, 2016), https://nautil.us/euclid-as-founding-father.

[8] *See also*, Mark (12:31), "The second is this: 'You shall love your neighbor as yourself.' There is no other commandment greater than these."; and John Adams, *Letter to Charles Adams, 9 January 1794*, https://founders.archives.gov/documents/Adams/04-10-02-0007-0003 (last visited Feb. 21, 2024): "It is founded on that eternal and fundamental Principle of the Law of Nature, Do as you would be done by: and Love your Neighbour as yourself. Equality, Equality is the Element of Christianity. . . All Men are by Nature free and equal . . . I asserted it to be a fundamental elementary principle of the Law of Nature . . . it meant not a physical but a moral Equality. Common sense was sufficient to determine that it could not mean all Men were equal in fact, but in Right. Not all equally tall, strong, wise, handsome, active: but

It is with these ideals at heart that our country has, through the years, sought to procure and protect the equal rights of ***all*** our citizens before the law. These efforts brought about the Civil Rights Movement of the 1960's which saw the passing of the federal Civil Rights Act of 1964. During this time, Robert F. Kennedy observed:

> We must recognize the full human equality of all of our people – before God, before the law, and in the councils of government. We must do this, not because it is economically advantageous, although it is; not because the laws of God command it, although they do; not because people in other lands wish it so. We must do it for the single and fundamental reason that it is the right thing to do.

Robert F. Kennedy, Day of Affirmation (June 6, 1966), *in* RFK: HIS WORDS FOR OUR TIMES 259, 268 (Edwin O. Guthman & C. Richard Allen eds., 2018).

The West Virginia Legislature enacted the West Virginia Human Rights Act in 1967,[9] seeking to bring about equal opportunity and equality before the law for all our citizens. In enacting the WVHRA, the West Virginia Legislature declared, in relevant part:

> It is the public policy of the state of West Virginia to provide ***all*** of its citizens equal opportunity for employment . . . Equal opportunity in the area of employment . . . is hereby declared to be a human right or civil right of all persons without regard to . . . sex . . .
>
> The denial of these rights to properly qualified persons by reason of . . . sex . . . is contrary to the principles of freedom and equality of opportunity and is destructive to a free and democratic society.

See Pajak v. Under Armour, Inc., 246 W. Va. 387, 391, 873 S.E.2d 918, 923 (2022) (quoting W. Va. Code § 5-11-2 (eff. 1998) (emphasis added)). The WVHRA requires that it be liberally construed to accomplish its objectives and purposes. W. Va. Code § 5-11-15; Syl. Pt. 1, *Paxton v.*

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equally Men, of like Bodies and Minds, the Work of the Same Artist, Children of the Same Father, almighty. All equally in the same cases entitled to the same Justice."

[9] *See West Va. Human Rights Comm'n v. Tenpin Lounge*, 158 W.Va. 349, 350-51, 211 S.E.2d 349, 351 (1974) ("The West Virginia Human Rights Act was enacted by the Legislature in 1967.").

Crabtree, 184 W. Va. 237, 400 S.E.2d 245 (1990). Accordingly, the West Virginia Supreme Court of Appeals has "consistently interpreted the [WVHRA] broadly." *Shepherdstown Volunteer Fire Dep't v. State*, 172 W. Va. 627, 633, 309 S.E.2d 342, 348 (1983). In speaking to the purposes of the WVHRA, the West Virginia Supreme Court has stated:

> If our society and government seriously desire to stamp out the evil of unlawful discrimination which is symptomatic of unbridled bigotry, and we believe they do, then it is imperative that the duty of enforcement be accompanied by an effective and meaningful means of enforcement. The forceful language used by the Legislature mandates the eradication of unlawful discrimination.

State Human Rights Comm'n v. Pauley, 158 W. Va. 495, 499-500, 212 S.E.2d 77, 79 (1975). Further, the West Virginia Supreme Court has declared "equal employment is a fundamental right." *Frank's Shoe Store v. West Va. Human Rights Comm'n*, 179 W. Va. 53, 59, 365 S.E.2d 251, 257 (1986) ("Recently, we have held that equal employment is a fundamental right.") (citing *Allen v. State Human Rights Commission*, 174 W. Va. 139, 324 S.E.2d 99 (1984)).

Throughout its history, the West Virginia Supreme Court of Appeals has expanded the scope of the WVHRA to protect against many forms of discrimination now considered well-settled rights. *See*, *e.g.*, *Frank's Shoe Store v. Human Rights Commission*, 179 W. Va. 53, 59-60, 365 S.E.2d 251, 256-57 (1986) (citing Pregnancy Discrimination Act amendment to Title VII and United States Supreme Court decision interpreting that amendment as basis for holding that discrimination upon pregnancy constitutes illegal sex discrimination under the WVHRA despite recognizing the WVHRA does not "enumerate pregnancy among the specifications subject to its protective provisions"); *Westmoreland Coal Co. v. W. Va. Human Rights Comm'n*, 181 W. Va. 368, 372-73, 382 S.E.2d 562, 566-67 (1989) (adopting the United States Supreme Court's recognition of sexual harassment as an invidious form of discrimination and adopting the federal definition of "quid pro quo" sexual harassment for the WVHRA).

Here, the purpose of the WVHRA to provide ***all*** West Virginia citizens with equal opportunity in employment, eradicate unlawful discrimination, and the WVHRA's mandate for broad construction are all served by adopting the United States Supreme Court's decision in *Bostock* to find the WVHRA recognizes discrimination because of sexual orientation as a form of prohibited discrimination because of sex.

2. Long-Established Precedent of the West Virginia Supreme Court Requires Finding Discrimination Because of Sex Includes Discrimination Based On Sexual Orientation Under the WVHRA.

In the fifty-seven years since its enactment, the West Virginia Supreme Court of Appeals has defined and shaped the protections afforded by the WVHRA through interpretation of its provisions.

The West Virginia Supreme Court has consistently interpreted the WVHRA by looking to "federal discrimination law dealing with Title VII of the Civil Rights Act of 1964 when interpreting provisions of our state's human rights statutes." *West Virginia Human Rights Comm'n v. Wilson Estates Inc*., 202 W. Va. 152, 158, 503 S.E.2d 6, 12 (1998) (citing *Barefoot v. Sundale Nursing Home*, 193 W. Va. 475, 482, 457 S.E.2d 152, 159 (1995) (noting that "cases brought under the West Virginia Human Rights Act are governed by the same analytical framework and structures developed under Title VII, at least where our statute's language does not direct otherwise")); *see also Willis v. Wal-Mart Stores Inc*., 202 W. Va. 413, 417, 504 S.E.2d 648, 652 (1998) ("Our '***longstanding practice*** of applying the same analytical framework used by federal courts when deciding cases arising under the Act' is particularly fitting when, as in this case, ***the critical language of our Act – 'because of sex' – parallels the federal legislation***.") (internal citations omitted) (emphasis added); *West Virginia University v. Decker*, 191 W. Va. 567, 573-74, 447 S.E.2d 259, 265-66 (1994) (altering disparate impact test previously established based on 1991

amendments to Title VII which shifted burden of production and persuasion to employer to prove that particular employment practices or policy is "job related" and "consistent with business necessity"); *Slack v. Kanawha County Housing and Redevelopment Auth*., 188 W. Va. 144, 153-55, 423 S.E.2d 547, 555-58 (1992) (defining elements of constructive discharge cases by adopting majority view of federal decisions decided under both Title VII and Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq*.); *Frank's Shoe Store v. Human Rights Commission*, 179 W. Va. 53, 59-60, 365 S.E.2d 251, 256-57 (1986) (citing Pregnancy Discrimination Act amendment to Title VII and United States Supreme Court decision interpreting that amendment as basis for holding that discrimination upon pregnancy constitutes illegal sex discrimination under West Virginia Human Rights Act); *Paxton v. Crabtree*, 184 W. Va. 237, 250, 400 S.E.2d 245, 258 n.26 (1990) (observing that "we have adopted federal precedent where we believed it was compatible with our human rights statute").

Here, the same framework the West Virginia Supreme Court utilized in the cases above is dispositive in this matter. Specifically, the West Virginia Supreme Court's ruling in *Willis v. Wal-Mart Stores Inc*., is particularly instructive. As noted previously herein, in *Willis*, the West Virginia Supreme Court observed, "[o]ur '***longstanding practice*** of applying the same analytical framework used by federal courts when deciding cases arising under the [WVHRA]' is particularly fitting when, as in this case, ***the critical language of our Act – 'because of sex' – parallels the federal legislation***." 202 W. Va. 413, 417, 504 S.E.2d 648, 652 (1998) (internal citations omitted) (emphasis added). In *Willis*, the West Virginia Supreme Court looked to cases decided by the United States Supreme Court under Title VII of the Civil Rights Act of 1964,[10] to conclude that

[10] *See Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998).

the WVHRA permits a cause of action for "discrimination based upon same-gender sexual harassment." *Willis*, 202 W. Va. 413, at 417, 504 S.E.2d 648, at 652 (1998).

The same "critical language of our [WVHRA] – 'because of sex,'" is at issue here. *Id*. As a result, it is "particularly fitting" to apply the "same analytical framework used by federal courts" because the language of our Act "parallels the federal legislation." *Id*. When looking to Title VII here, the United States Supreme Court in *Bostock v. Clayton Cty.*, 140 S.Ct. 1731 (2020) clarified the definition of discrimination "based upon sex" under Title VII of the Civil Rights Act of 1964. The Court made clear that the protected class of "sex" included discrimination based upon gender identity and/or sexual orientation. Specifically, the *Bostock* Court held the following:

> [Title VII's] message for our cases is equally simple and momentous: an individual's homosexuality . . . is not relevant to employment decisions. ***That's because it is impossible to discriminate against a person for being homosexual . . . without discriminating against that individual based on sex.***

Bostock v. Clayton Cty., 140 S.Ct. 1731, 1741 (2020) (emphasis added). Indeed, following *Bostock*, the United States District Court for the Southern District of West Virginia adopted the reasoning in *Bostock* to the WVHRA in *Jarrell v. Hardy Cellular Tel. Co.*, No. 2:20-CV-00289, 2020 U.S. Dist. LEXIS 129436, (S.D.W. Va. July 22, 2020). The Honorable Irene Berger held that the *Bostock* decision applies to cases of employment discrimination based upon sex under the WVHRA, finding a claim of discrimination based on a same-sex relationship cognizable as sex discrimination under the WVHRA.

Specifically, Judge Berger relied upon the West Virginia Supreme Court's "long-established precedent stating that West Virginia courts consider federal Title VII precedent to interpret the WVHRA" and the holding in *Willis* discussed above, to find that "the Supreme Court's decision in *Bostock* is precisely on-point." *Jarrell*, 2020 U.S. Dist. LEXIS 129436, at *6. Finally, Judge Berger held that "[b]ecause interpretation of the WVHRA parallels interpretation

of Title VII, the Court finds the Plaintiff's allegations of discrimination based on their same-sex relationship state a claim for sex discrimination under the WVHRA." *Id.*, at *6.

Petitioner would further note the West Virginia Human Rights Commission, charged with enforcement of the WVHRA,[11] has also adopted the reasoning in *Bostock* based upon Judge Berger's decision and West Virginia's long-standing precedent of looking to Title VII. The Honorable Gregory Evers, Deputy Chief Administrative Law Judge for the West Virginia Human Rights Commission, utilized the reasoning in the *Bostock* and *Jarrell* cases to find that sexual orientation discrimination is actionable as sex discrimination under the WVHRA in the case of *Robb Livingood v. Public Defender Corporation, Fifth Judicial Circuit*, Docket No. ES-192-18 (2021). [Appx. 0134-0151].

Finally, states with similar "human rights" laws and precedent of looking to Title VII for interpretation, as West Virginia, have considered their provision of discrimination "because of sex" and adopted *Bostock*. *See, e.g.*, *Tarrant Cnty. Coll. Dist. v. Sims*, 621 W.W. 32 323 (Tex. App. 2021) (finding, "[i]n order to reconcile and conform the TCHRA with federal anti-discrimination and retaliation laws under Title VII, we conclude we must follow *Bostock* and read the TCHRA's prohibition on discrimination 'because of . . . sex' as prohibiting discrimination based on an individual's status as a homosexual . . . person."); and *Bruer v. State*, No. 1 CA-CV 21-0066, 2021 Ariz. App. Unpub. LEXIS 1075 (Ct. App. Oct. 28, 2021).[12]

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[11] *See State Human Rights Comm'n v. Pauley*, 158 W. Va. 495, 499-500, 212 S.E.2d 77, 79 (1975).

[12] At present, twenty-four (24) states, and Washington, D.C., have explicit state laws prohibiting discrimination in employment based upon sexual orientation, including Maine, New Hampshire, Vermont, New York, Massachusetts, Rhode Island, Connecticut, New Jersey, Delaware, Maryland, Virginia, Michigan, Illinois, Minnesota, Iowa, Colorado, New Mexico, Utah, Nevada, Washington, Oregon, and California. Notably, many of these states afforded protection explicitly to sexual orientation in their state laws *prior to* the decision in *Bostock*. Ten (10) states have interpreted the existing prohibition on *sex discrimination* to include sexual orientation, either through case law or by a pronouncement from their state's version of the Human Rights Commission. These include Pennsylvania, Ohio, Kentucky, Florida,

Accordingly, Petitioner respectfully requests this Court follow long-standing West Virginia precedent in looking to Title VII for interpretation of the WVHRA and adopt the United States Supreme Court's holding in *Bostock* to find the prohibition against sex discrimination in the WVHRA includes sexual orientation discrimination. Petitioner further requests this matter be reversed and remanded to the Circuit Court of Harrison County for further proceedings.

B. The Circuit Court Committed a Clear Error of Law Because the Court Failed to Analyze Clearly Established Precedent of the West Virginia Supreme Court in Looking to "Federal Discrimination Laws Dealing with Title VII of the Civil Rights Act of 1964 When Interpreting Provisions of Our State's Human Rights Statutes." *West Virginia Human Rights Comm'n v. Wilson Estates Inc*., 202 W. Va. 152, 158, 503 S.E.2d 6, 12 (1998) (citing *Barefoot v. Sundale Nursing Home*, 193 W. Va. 475, 482, 457 S.E.2d 152, 159 (1995).

1. The Circuit Court's Failure to Reconcile its Decision with West Virginia Supreme Court Precedent is a Clear Error of Law.

Here, the Circuit Court committed clear error by failing to analyze the West Virginia Supreme Court's long-standing precedent in looking to Title VII for interpretation of the WVHRA. The Circuit Court further erred by failing to address the *Bostock* decision and dismissing Petitioner's claims under the WVHRA. The Circuit Court found Petitioner's claims fail "as a matter of law as sexual orientation is not a protected class." [Appx. 0229].

From the outset, the Circuit Court's Order misunderstood and misconstrued the issues presented by Petitioner's claims. The issue is **not** whether sexual orientation is a specifically enumerated protected class under the WVHRA. Rather, the issue is whether discrimination "because of sex" necessarily includes discrimination because of sexual orientation, as held by the United States Supreme Court in *Bostock v. Clayton Cty.*, 140 S.Ct. 1731 (2020). *See Bostock*, 140

North Dakota, Nebraska, Kansas, Texas, Arizona, and Alaska. Meanwhile, sixteen states, including West Virginia, either have not made any ruling since *Bostock* or do not have explicit protections for discrimination based on sexual orientation in their state laws. *See Equality Maps: Employment Nondiscrimination Laws*, MOVEMENT ADVANCEMENT PROJECT (Feb. 6, 2024), https://www.lgbtmap.org/equality-maps/employment_non_discrimination_laws.

S.Ct. at 1741 (holding "it is impossible to discriminate against a person for being homosexual . . . without discriminating against that individual ***based on sex***.") (emphasis added); *see also* [Appx. 0065].

In misconstruing the issue from the outset of its Order, the Circuit Court erred by failing to acknowledge or address the West Virginia Supreme Court's "***longstanding practice*** of applying the same analytical framework used by federal courts when deciding cases arising under the [WVHRA]." *See West Virginia Human Rights Comm'n v. Wilson Estates*, 202 W. Va. 152, 158, 503 S.E.2d 6, 12 (1998). Indeed, the Circuit Court's Order does not state or acknowledge such precedent in its Order, nor does it ever mention the United States Supreme Court's decision in *Bostock v. Clayton Cty.*, 140 S.Ct. 1731 (2020). *See generally* [Appx. 0225-0258]. Had the Circuit Court endeavored to apply the West Virginia Supreme Court's precedent and the United States Supreme Court's decision in *Bostock*, *stare decisis* would have required the Court to deny Respondent's *Motion to Dismiss* and find sexual orientation discrimination creates legally cognizable claims under the WVHRA based on the protected characteristic of "sex."

Rather, the Circuit Court based its decision entirely upon speculation and conjecture as to the state of minds of our legislators, finding the failure to pass "Senate Bill 156" conclusive of legislative intent to exclude sexual orientation from the protections of the WVHRA. *See generally* [Appx. 0208-0209]. Such a conclusion is a logical fallacy as it finds *only one* possible explanation for the failure to pass Senate Bill 156.

As described in the Circuit Court's Order, Senate Bill 156 was introduced on January 12, 2022, proposing various amendments to the WVHRA, including provisions defining "sexual orientation." [Appx. 0208, Appx. 0213-0224]. The Circuit Court's Order forecloses the possibility that Senate Bill 156 was not taken to a vote because the West Virginia Supreme Court's precedent

of looking to Title VII and the United States Supreme Court's decision in *Bostock* rendered any amendment to the WVHRA to enumerate sexual orientation as moot. Again, had the Circuit Court endeavored to apply *Bostock*, it would have found the same argument was advanced and wholly dispelled by the Court therein. *See Bostock*, 140 S.Ct., at 1747 (finding "speculation about why a later Congress declined to adopt new legislation offers a 'particularly dangerous' basis on which to rest an interpretation of an existing law a different and earlier Congress did adopt.") (citing, in pertinent part, *Sullivan v. Finkelstein*, 496 U.S. 617, 632 (1990) (Scalia, J., concurring) ("***Arguments based on subsequent legislative history . . . should not be taken seriously, not even in a footnote***") (emphasis added)).

The Circuit Court's Order dismissing Plaintiff's claims under the WVHRA rested entirely upon "subsequent legislative history" and speculation as to the reasons for the Legislature not amending the WVHRA to specifically include sexual orientation as a protected class. However, as detailed above, based on this Court's precedent and the United States Supreme Court's decision in *Bostock*, such amendment is rendered moot as sexual orientation is included within the prohibition on sex discrimination because discrimination based on sexual orientation necessarily includes the protected characteristic of "sex" as a factor in the decision. *See generally Bostock v. Clayton Cty.*, 140 S.Ct. 1731 (2020). Nevertheless, the Circuit Court's failure to acknowledge West Virginia Supreme Court precedent, the decision in *Bostock*, and explain the reason for its departure from the same is a clear error of law.

VII. CONCLUSION

WHEREFORE, based upon the foregoing analysis, Petitioner respectfully requests this Court follow long-standing West Virginia precedent in looking to Title VII for interpretation of the WVHRA and adopt the United States Supreme Court's holding in *Bostock* to find the

prohibition against sex discrimination in the WVHRA includes sexual orientation discrimination. Petitioner further requests this matter be reversed and remanded to the Circuit Court of Harrison County for further proceedings.

COUNSEL FOR PETITIONER
JEREMIAH L. JONES

/s/ Cory B. Lowe
Todd S. Bailess (WVSB #10482)
Jodi R. Durham (WVSB #13393)
Cory B. Lowe (WVSB #13649)
BAILESS LAW FIRM PLLC
3501 MacCorkle Avenue, SE, #135
Charleston, WV 25304
Telephone: (304) 413-1400
Facsimile: (304) 413-1401
cory@bailesslawfirm.com

Samuel D. Madia (WVSB #10819)
Jonathan Wesley Prince (WVSB #13250)
SHAFFER MADIA LAW, PLLC
1056A Maple Drive
Morgantown, WV 26505
Telephone: (304) 622-1100
Facsimile: (304) 622-1145

IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA
DOCKET NO. 23-ICA-540

JEREMIAH L. JONES,
***Petitioner*,**

vs.

TOWN OF LUMBERPORT, WEST VIRGINIA, a political subdivision of West Virginia,
***Respondent*.**

CERTIFICATE OF SERVICE

Appeal from a Dismissal Order of the
Circuit Court of Harrison County, West Virginia
in Civil Action No. 2023-C-75
(The Honorable Christopher J. McCarthy, Judge)

I, Cory B. Lowe, counsel for the Petitioner, Jeremiah L. Jones, do hereby certify that, on March 1, 2024, the foregoing ***Brief of Petitioner Jeremiah L. Jones*** was filed through the applicable E-Filing system, which will send electronic notification for service of such filing to the following counsel of record for the Respondent, Town of Lumberport, West Virginia, a political subdivision of West Virginia:

Tiffany R. Durst (WVSB #7441)
PULLIN, FOWLER, FLANAGAN, BROWN & POE, PLLC
2414 Cranberry Square
Morgantown, WV 26508
Telephone: (304) 225-2200
Facsimile: (304) 225-2214

/s/ Cory B. Lowe
Todd S. Bailess (WVSB #10482)
Jodi R. Durham (WVSB #13393)
Cory B. Lowe (WVSB #13649)
BAILESS LAW FIRM PLLC
3501 MacCorkle Avenue, SE, #135
Charleston, WV 25304

Telephone: (304) 413-1400
Facsimile: (304) 413-1401
cory@bailesslawfirm.com

Samuel D. Madia (WVSB #10819)
Jonathan Wesley Prince (WVSB #13250)
SHAFFER MADIA LAW, PLLC
1056A Maple Drive
Morgantown, WV 26505
Telephone: (304) 622-1100
Facsimile: (304) 622-1145