IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

Docket No. 23-ICA-540

JEREMIAH L. JONES,

Petitioner,

v.

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

Respondent.

(On Appeal from the Circuit Court of Harrison County, West Virginia, Civil Action No. 23-C-75)

RESPONSE BRIEF ON BEHALF OF RESPONDENT, TOWN OF LUMBERPORT, WEST VIRGINIA

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II. STATEMENT OF THE CASE

In his Complaint, Petitioner, Jeremiah L. Jones (hereinafter "Petitioner") alleges that he was employed by Respondent, Town of Lumberport (hereinafter "Respondent" or the "Town")) from April 6, 2021 to May 10, 2021, when he claims to have been constructively discharged. *App. at 4, ¶ 4.* Petitioner asserts that he is married to Jackie Leonard (hereinafter "Mr. Leonard"). *App. at 4, ¶ 5.* In addition to his employment with the Town, Petitioner also asserts that his husband, Mr. Leonard, was an employee of the Town. *App. at 5, ¶ 6.*

During his employment, Petitioner claims that he was treated differently than the other employees of the Town based upon, in whole or in part, his "sexual orientation, and, inextricably, his sex." *App. at 2, ¶ 8.* As an example, Petitioner claims to have been "shunned from daily meetings and ignored" by his coworkers and his supervisor. *App. at 2, ¶¶ 7-8.* Petitioner also asserts that a Town Council member, in addressing a complaint Petitioner had raised regarding a poster of a nude female, stated, "[t]hat [f****t], you need to tell that boy to grow up and be a man." *App. at 5, ¶¶ 12, 15.*

Petitioner further alleges that no corrective action was ever taken against the Town Council member for the alleged discriminatory and derogatory remarks toward Petitioner and Mr. Leonard. *App. at 6, ¶ 21.* Petitioner asserts that he advised the then Mayor that he did not feel comfortable returning to work until after the investigation against the Town Council member (regarding the poster of a nude female) was completed and there were assurances Petitioner would not be returning to a discriminatory and hostile work environment. *App. at 6, ¶ 21.* Petitioner claims that the assurances were never provided and, thus, in light of the hostile work environment, he was constructively discharged, on May 10, 2021. *App. at 6, ¶¶ 22-23.*

In his First Cause of Action, Petitioner asserted a claim for "Sex Discrimination/Hostile Work Environment" in violation of the West Virginia Human Rights Act (hereinafter "WVHRA"), *W. Va. Code § 5-11-1, et seq.*[1] *App. at 7-8, ¶¶ 24-29*. Petitioner alleges that Respondent "exposed [Petitioner] to a severe and/or pervasive work environment consisting of sex discrimination" in violation of the WVHRA. *App. at 7, ¶ 25*. Petitioner alleges that Respondent knew or reasonably should have known of the alleged unlawful conduct and, by not taking prompt and meaningful corrective action to alleviate the sex discrimination/hostile work environment, Respondent expressly or impliedly authorized or ratified the conduct. *App. at 7, ¶ 27*. Petitioner also asserted that Respondent's actions and/or inactions constitute violations of the WVHRA for subjecting Petitioner to sex discrimination/hostile work environment. *App. at 7, ¶ 28*.

Petitioner's Second Cause of Action asserted a claim for "Harassment/Embarrassment/Degradation" pursuant to *W. Va. Code § 5-11-9(7)(A)*. In this claim, Petitioner asserts that he was the "subject of severe and/or pervasive sexual and/or other harassment based upon his sex" which he claims "created an abusive and/or hostile work environment that no reasonable could endure." *App. at 8, ¶ 32*. Petitioner further claims that "[u]pon learning of the sex discrimination and abuse Petitioner endured during his employment, [Respondent] failed to take prompt and corrective action to alleviate the hostile work environment." *App. at 9, ¶ 35*. Petitioner asserts that Respondent's communication of Petitioner's reports of sex discrimination/hostile work environment to his co-workers were retaliatory, including the alleged retaliatory suspension of Petitioner's husband. *App. at 9, ¶¶*

[1]Since the filing of Petitioner's Complaint, the West Virginia Legislature recodified the West Virginia Human Rights Act at *W. Va. Code §§ 16B-17-1, et seq.* However, all references to the WVHRA herein will be to the *W. Va. Code § 5-11-1, et seq.*, as the same was in effect at the time Petitioner filed his Complaint.

38-39. Each and every allegation contained within the Second Cause of Action stems from Petitioner alleged claim of discrimination on the basis of his sexual orientation. *App. at 8-9, ¶¶ 31-46*.

Petitioner's Amended Complaint included a Third Cause of Action for alleged "retaliation" in violation of *W. Va. Code § 5-11-9(7)(C)*. *App. at 10, §§ 47-58*. A review of the allegations contained within this claim also demonstrates that the claim stemmed from Petitioner's claims of discrimination on the basis of his sexual orientation. *App. at 10, ¶ 49* ("Petitioner engaged in a protected activity by reporting his opposition to conduct he reasonably and in good faith believe constituted sex discrimination and violated the WVHRA.").

The Amended Complaint asserted a Fourth Cause of Action for the alleged violation of West Virginia's Whistleblower Law, *W. Va. Code § 6C-1-3(a)*. *App at 12-13, ¶¶ 59-67*. The Fifth Cause of Action in the Amended Complaint alleged "Common Law Retaliatory Discharge." *App. at 10-11, ¶¶ 68-73.* Last, the Sixth Cause of Action in the Amended Complaint alleged that Petitioner was constructively discharged. *App. at 14-15, ¶¶ 76-82*.

Respondent filed its *Motion to Dismiss Plaintiff's Claims Under the West Virginia Human Rights Act and Answer to Plaintiff's First Amended Complaint* (hereinafter "Motion to Dismiss"). *App. at 17-31*. Therein, Respondent argued that Petitioner's claims under the WVHRA fail as a matter of law as sexual orientation is not a protected class.[2] Petitioner filed a response in opposition to Respondent's Motion to Dismiss, arguing that the WVHRA's prohibition on discrimination on the basis of "sex" also encompasses discrimination on the basis of "sexual orientation."

[2]Respondent denies that it discriminated against Petitioner on the basis of his sexual orientation. *App. at 28-32, ¶¶ 24-58*.

On October 4, 2023, the circuit court held oral argument on Respondent's Motion to Dismiss. On November 3, 2023, the circuit court entered its *Order Granting Defendant, Town of Lumberport, West Virginia's Motion to Dismiss Plaintiff's Claims Under the Human Rights Act* (hereinafter "Order"). *App. at 225-258.* The circuit court concluded that the WVHRA does not recognize sexual orientation as a protected class. *App. at 229, ¶ 6*. The circuit court noted that Senate Bill 156 was proposed on January 12, 2022 and would have amended the WVHRA to recognize "sexual orientation" and "gender identity" as protected classes under the WVHRA, but failed to pass. *App. at 230-231, ¶¶ 10-12*. Thus, the circuit court reasoned that "sexual orientation" was not a protected class under the WVHRA. *App. at 232, ¶ 15*. The circuit court also examined dictionary definitions of the terms "sex" and "sexual orientation" and concluded that sexual orientation is not a subset of sex, but is a different category altogether. *App. at 231-232, ¶¶ 13-15*. Furthermore, the circuit court relied upon the fact that the West Virginia Legislature has enacted statutes that specifically use the term "sexual orientation" when so intended. *App. at 233, ¶ 16*. Accordingly, the circuit court granted Respondent's Motion to Dismiss and dismissed the First, Second, and Third Causes of Action in the First Amended Complaint. *App. at 234*. It is this Order from which Petitioner appeals.

III. SUMMARY OF ARGUMENT

The dispute in this case is not whether citizens of the State of West Virginia should be able to live their lives free from discrimination on the basis of their sexual orientation. Respondent agrees that "gay and lesbian Americans 'cannot be treated as social outcasts or as inferior in dignity and worth.'" *Bostock v. Clayton Cnty., Georgia*, 590 U.S. 644, 780, 140 S. Ct. 1731, 1823, 207 L. Ed. 2d 218 (2020) (Kavanaugh, dissenting) (quoting *Masterpiece Cakeshop,*

Ltd. v. Colorado C.R. Comm'n, 584 U.S. 617, 631, 138 S. Ct. 1719, 1727, 201 L. Ed. 2d 35 (2018)).

Instead, the question is: Who decides? *Id.* Respondent contends, and the circuit court agreed, that it is the duty of the Legislature to amend the WVHRA to include sexual orientation as a protected class. On the other hand, Petitioner requests that the judiciary effectively amend the WVHRA through interpretation and construction. However, it is a fundament proposition that the judiciary "does not sit as a superlegislature, commissioned to pass upon the political, social, economic or scientific merits of statutes pertaining to proper subjects of legislation." Syl. Pt. 2, *in part*, *Huffman v. Goals Coal Co.*, 223 W.Va. 724, 679 S.E.2d 323 (2009). "In the face of the unsuccessful legislative efforts (so far) to prohibit sexual orientation discrimination, judges may not rewrite the law simply because of their own policy views. Judges may not update the law merely because they think that Congress does not have the votes or the fortitude. Judges may not predictively amend the law just because they believe that Congress is likely to do it soon anyway." *Bostock,* 590 U.S. at 782, 140 S. Ct. at 1824 (Kavanaugh, dissenting).

As detailed below, the circuit court correctly concluded that sexual orientation is not a protected class under the WVHRA. The WVHRA, by its plain language, does not recognize sexual orientation by its unambiguous terms. The ordinary meaning of the terms, as evidenced by various dictionary definitions, demonstrate that "sex" and "sexual orientations" are different terms and "sexual orientation" is not a subset of "sex." Moreover, the Legislature has specifically used the term "sexual orientation" when it intends to do so. The circuit court's conclusion in this regard is further supported by *State v. Butler*, 239 W. Va. 168, 799 S.E.2d 718 (2017). In *Butler*, the Court examined *W. Va. Code § 61-6-21(b)* and found that "based upon the

common and plain meaning of the word 'sex,' as well as the Legislature's clear intent, we are left with the ineluctable conclusion that the word 'sex' does not include 'sexual orientation.'" *Id.* at 171, 721.

Furthermore, the WVHRA has been in effect since 1967. In the fifty-seven (57) years since its enactment, the WVHRA has not been amended to add "sexual orientation" as a protected class. On January 12, 2022, Senate Bill 156 was proposed to amend the WVHRA to include "sexual orientation" and "gender identity" as protected classes. However, Senate Bill 156 did not advance beyond the Judiciary Committee. Had the Legislature believed that the term "sex" within the WVHRA included "sexual orientation," then S.B. 156 would have been wholly unnecessary.

The Court should reject Petitioner's request that the Court follow federal cases which have found that "sexual orientation" is encompassed within "sex" for purposes of Title VII claims. Although the Court, at times, looks to federal law when interpreting the WVHRA, it does not mechanically do so in all instances. Here, resorting to federal law is not necessary in light of the fact that the WVHRA is unambiguous on this point.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Respondent asserts that oral argument is unnecessary, pursuant to Rule 18(a) of the West Virginia Rules of Appellate Procedure, as the dispositive issues have been authoritatively decided and the facts and legal arguments are adequately presented in the briefs and record on appeal, and the decisional process would not be significantly aided by oral argument. However, if the Court believes oral argument is warranted, Respondent submits that any such argument would be appropriate, pursuant to Rule 19 of the West Virginia Rules of Appellate Procedure, as this case involves the application of settled law.

V. STANDARD OF REVIEW

This Court applies a *de novo* standard of review to a circuit court's order granting a motion to dismiss. *Savarese v. Allstate Ins. Co.*, 223 W. Va. 119, 123, 672 S.E.2d 255, 259 (2008) (citing Syl. Pt. 2, *State ex rel. McGraw v. Scott Runyan Pontiac–Buick, Inc.*, 194 W.Va. 770, 461 S.E.2d 516 (1995); *Elmore v. Triad Hospitals, Inc*., 220 W.Va. 154, 157–58, 640 S.E.2d 217, 220–21 (2006) (*per curiam*) (noting applicability of *de novo* standard of review to dismissal pursuant to Rule 12(b)(1) and 12(b)(6)).

VI. ARGUMENT

A. The circuit court correctly concluded that sexual orientation is not a protected class under the WVHRA.

The WVHRA provides, in pertinent part:

> It shall be an unlawful discriminatory practice, unless based upon a bona fide occupational qualification, or except where based upon applicable security regulations established by the United States or the State of West Virginia or its agencies or political subdivisions:
>
> (1) For any employer to discriminate against an individual with respect to compensation, hire, tenure, terms, conditions or privileges of employment if the individual is able and competent to perform the services required even if such individual is blind or disabled […]

W. Va. Code § 5-11-9(1).

The term "discriminate or "discrimination" is defined within the WVHRA as "to exclude from, or fail or refuse to extend to, a person equal opportunities because of race, religion, color, national origin, ancestry, sex, age, blindness, disability or familial status and includes to separate or segregate[.]" *W. Va. Code § 5-11-3(h).* Thus, the WVHRA by its plain language does not recognize sexual orientation as a protected class.

Petitioner begins by arguing that the purpose and history of the WVHRA support his position that discrimination "because of sex" includes discrimination based on sexual orientation. However, Petitioner fails to address the actual statutory language of the WVHRA. Because the unambiguous terms of the WVHRA are plain and unambiguous, the Court must apply the language as written and not interpret or construe the statute or resort to an examination of its purpose and history.[3]

Where a state is plain and unambiguous, it is the clear and unmistakable duty of the judiciary to merely apply the language. *State ex rel. Biafore v. Tomblin*, 236 W. Va. 528, 532, 782 S.E.2d 223, 227 (2016) (citing *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 251, 130 S.Ct. 2149, 176 L.Ed.2d 998 (2010); *Crockett v. Andrews*, 153 W.Va. 714, 172 S.E.2d 384 (1970); *Hood v. City of Wheeling*, 85 W.Va. 578, 102 S.E. 259 (1920); *Wellsburg and State Line R.R. Co. v. Panhandle Traction Co.*, 56 W.Va. 18, 48 S.E. 746 (1904)). "If the statutory text is clear and unambiguous, we must apply the statute according to its literal terms." *Id.* "Where the language of a statute is clear and without ambiguity the plain meaning is to be accepted without resorting to the rules of interpretation." Syl. Pt. 2, *State v. Elder*, 152 W.Va. 571, 165 S.E.2d 108 (1968).

The Supreme Court of Appeals of West Virginia has further expounded on these principles, stating:

> When a statute is clear and unambiguous, and the legislative intent is plain, the statute should not be interpreted by the courts. 50 Am.Jur., Statutes, Section 225. *See State ex rel. McLaughlin v. Morris*, 128 W.Va. 456, 37 S.E.2d 85. In such case the duty of the courts is not to construe but to apply the statute. In applying

[3]"[W]hen addressing the meaning of a given statute, legislative intent is the dominant consideration. [Where] that intent is expressed by clear and unambiguous language ... it is ... not necessary for us to rely on canons of statutory construction calling for liberal construction of remedial legislation to effectuate legislative intent." *Pajak v. Under Armour, Inc.*, 246 W. Va. 387, 392, 873 S.E.2d 918, 923 (2022) (citations omitted, some alterations in original).

> the statute its words should be given their ordinary acceptance and significance and the meaning commonly attributed to them. 50 Am. Jur., Section 225. *See Moran v. Leccony Smokeless Coal Co.*, 122 W.Va. 405, 10 S.E.2d 578, 136 A.L.R. 1007 (1940).

State of West Virginia v. Continental Casualty Co., 130 W.Va. 147, 42 S.E.2d 820 (1947). Moreover, courts must "presume that a legislature says in a statute what it means and means in a statute what it says there." *Biafore*, 236 W. Va at 533, 782 S.E.2d at 228 (quoting *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253–254, 112 S.Ct. 1146, 117 L.Ed.2d 391 (1992)). Furthermore, disagreement among the parties "as to the meaning or the applicability of [a statutory] provision does not of itself render [the] provision ambiguous or of doubtful, uncertain or unsure meaning." *Habursky v. Recht*, 180 W.Va. 128, 132, 375 S.E.2d 760, 764 (1988) (internal quotations and citations omitted).

As the circuit court properly concluded, dictionary definitions prove that "sex" and "sexual orientation" are different terms. Black's Law Dictionary has defined "sex" as the "sum of the peculiarities of structure and function that distinguish a male from a female organism" or "the character or being male or female." *Black's Law Dictionary 1541 (4th ed. Rev. 1968).* The Oxford English Dictionary offers a similar definition for the word "sex": "[e]ither of the two divisions of organic beings distinguished as male and female, respectively," determined by "those differences in the structure and function of the reproductive organs." *Oxford English Dictionary 107 (2d. ed. 2000).* The American Psychological Association's Dictionary of Psychology defines "sex" as the "physical and biological traits" that "distinguish between males and females." *American Psychological Association, Dictionary of Psychology 845 (1997).*[4]

On the contrary, "sexual orientation" is defined by Black's Law Dictionary as a "person's predisposition or inclination toward sexual activity or behavior with other males or

[4]*See also Bostock v. Clayton Cnty., Georgia,* 590 U.S. 644, 686, 140 S. Ct. 1731, 1756, 207 L. Ed. 2d 218 (2020) (Alito, dissenting) (collecting the definitions of the term "sex").

females," and a person's "heterosexuality, homosexuality, or bisexuality." *Black's Law Dictionary (10th ed. 2014)*.

Common usage of the terms also demonstrates that "sex" and "sexual orientation" are different terms and "sex" does not include "sexual orientation." As the circuit court recognized, when a parent says that an ultrasound revealed their baby's "sex," no one would interpret this as meaning that the ultrasound revealed whether the baby is (or would be) attracted to men, women, or both. *See Murrell B. v. Clarence R.*, 242 W. V10a. 358, 367, 836 S.E.2d 9, 18 (2019) ("Ordinarily, the language of the statute reflects the intent of the Legislature so the words of the statute are given their common usage."); *State ex rel. Frazier v. Meadows*, 193 W. Va. 20, 23, 454 S.E.2d 65, 68 (1994) ("Generally, words are given their common usage."); Syl. Pt. 6, in part, *State ex rel. Cohen v. Manchin*, 175 W.Va. 525, 336 S.E.2d 171 (1984) ("Undefined words and terms used in a legislative enactment will be given their common, ordinary and accepted meaning."); Syl. Pt. 4, in part, *State v. General Daniel Morgan Post No. 548, Veterans of Foreign Wars*, 144 W.Va. 137, 107 S.E.2d 353 (1959) ("Generally the words of a statute are to be given their ordinary and familiar significance and meaning[.]").

Moreover, when the Legislature intended that terms within the WVHRA be defined as other than their common, ordinary meaning, it specifically defined such terms. For example, as noted above, the WVHRA makes it unlawful to discriminate against a person on the basis of "age." The WVHRA then defines "age" as "the age of 40 or above[.]" On the other hand, the Legislature did not define the term "sex" thus, unlike "age," the term "sex" must be given its plain, ordinary meaning and not be redefined by the Court.

When the Legislature has enacted statutes which provide protections to a person on the basis of their sexual orientation, it has used the specific term "sexual orientation." *W. Va.*

Code 18-2-5h(e)(4) prohibits schools from collecting "[a]ny data concerning the sexual orientation or beliefs about sexual orientation of the student or any student's family member[.]" Thus, when the Legislature intends to provide protections based on "sexual orientation," it uses that specific phrase.

Various rules promulgated by the Supreme Court of Appeals of West Virginia also specifically use the terms "sex" or "sexual orientation" when so intended. For example, Rule 2.3 of the Code of Judicial Conduct provides:

> (B) A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, or engage in harassment, including but not limited to bias, prejudice, or harassment based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, and shall not permit court staff, court officials, or others subject to the judge's direction and control to do so.
>
> (C) A judge shall require lawyers in proceedings before the court to refrain from manifesting bias or prejudice, or engaging in harassment, based upon attributes including but not limited to race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, against parties, witnesses, lawyers, or others.

W. Va. R C.J.C. Rule 2.3 (emphasis added). In the same vein, Rule 3.6(a) of the Code of Judicial Conduct states that "[a] judge shall not hold membership in any organization that practices invidious discrimination on the basis of race, sex, gender, religion, national origin, ethnicity, or sexual orientation." *W. Va. R. C.J.C. Rule 3.6(a)* (emphasis added).

Rule 4.06 of the Trial Court Rules state, in pertinent part that "conduct and statements toward one another must be without bias with regard to such factors as gender, race, ethnicity, religion, handicap, age, and sexual orientation when such conduct or statements bear no reasonable relationship to a good faith effort to argue or present a position on the merits." *W. Va. T.C.R. 4.06* (emphasis added).

The state supreme court's decision in *Butler* is directly on point and further solidifies the conclusion that the term "sex" does not include the concept of "sexual orientation." In *Butler*, the defendant was charged with battery in violation of *W. Va. Code § 61-2-9(c)* (2014) and with violations of an individual's civil rights under *W. Va. Code § 61-6-21(b)*. *State v. Butler*, 239 W. Va. 168, 171, 799 S.E.2d 718, 721 (2017). *W. Va. Code § 61-6-21(b)* provided:

> If any person does by force or threat of force, willfully injure, intimidate or interfere with, or attempt to injure, intimidate or interfere with, or oppress or threaten any other person in the free exercise or enjoyment of any right or privilege secured to him or her by the Constitution or laws of the State of West Virginia or by the Constitution or laws of the United States, because of such other person's race, color, religion, ancestry, national origin, political affiliation or sex, he or she shall be guilty of a felony, and, upon conviction, shall be fined not more than five thousand dollars or imprisoned not more than ten years, or both.

Id. at n. 2 (emphasis added).

The issue before the *Butler* court was whether the phrase "because of […] sex" encompassed the concept of "sexual orientation[.]" The Court first compared dictionary definitions of the words "sex" and "sexual orientation" and found that such terms have a "distinctively different definition." *Id.* at 174-175, 724-725 ("These common definitions manifest that the words 'sex' and 'sexual orientation' have clearly distinct meanings and import.").

The Court next noted that its conclusion was buttressed by the Legislature's rejection of attempts to add the terms "sexual orientation" to the statute in the thirty (30) years since it was first enacted in 1987, which "is undoubtedly indicative of its intent not to include 'sexual orientation' therein." *Id.* Thus, the Court found that "based upon the common and plain

meaning of the word 'sex,' as well as the Legislature's clear intent, we are left with the ineluctable conclusion that the word 'sex' does not include 'sexual orientation.'"[5] *Id.*

Petitioner also relies on the fact that state supreme court has found that the WVHRA should be liberally construed to accomplish its objective and purpose. However, this principle does not apply when a statute is clear and unambiguous. *Pajak v. Under Armour, Inc.*, 246 W. Va. 387, 392, 873 S.E.2d 918, 923 (2022) ("[W]hen addressing the meaning of a given statute, "legislative intent is the dominant consideration. [Where] that intent is expressed by clear and unambiguous language ... it is ... not necessary for us to rely on canons of statutory construction calling for liberal construction of remedial legislation to effectuate legislative intent.") (citations omitted, some alterations in original).

To the extent Petitioner's invocation of the Declaration of Independence and the Bible passages could be construed as an appeal to public policy in requesting that the Court interpret "sex" so as to include "sexual orientation," this argument likewise fails. However, "unless the statute at issue is determined to be ambiguous, this Court is not permitted to engage in an examination of the public policy ramifications potentially resulting from its application or to comment upon the wisdom of the legislation as unambiguously expressed." *Biafore*, 236 W. Va at 533, 782 S.E.2d at 228. The Court should "not alter the text [of an umambiguous statute] to satisfy the policy preferences of the petitioners." *Id.* Statutes cannot be amended or re-written by the judiciary as "[p]reserving the separation of powers is one of this Court's most weighty

[5]In *Minshall*, the circuit court granted summary judgment in favor of the defendant with respect to the plaintiff's claim that her employer violated the WVHRA by discriminating on the basis of her sexual orientation. The circuit court found that the plaintiff's "claim that she was discharged on the basis of sex because she was a female homosexual fails as a matter of law." *Minshall v. Health Care & Ret. Corp. of Am.*, 208 W. Va. 4, 7, 537 S.E.2d 320, 323 (2000). However, on appeal, the plaintiff abandoned this argument and instead, argued that the plaintiff was discriminated on the basis of her gender. *Id.* On appeal, the Supreme Court of Appeals of West Virginia declined to address her claim of gender discrimination as it had not been raised at the circuit court level. *Id.*

responsibilities." *Id.* (citing *Wellness Int'l Network, Ltd. v. Sharif*, 575 U.S. 665, 696, 135 S. Ct. 1932, 1954, 191 L. Ed. 2d 911 (2015) (Roberts, C.J., dissenting)). The "Court does not sit as a superlegislature, commissioned to pass upon the political, social, economic or scientific merits of statutes pertaining to proper subjects of legislation." Syl. Pt. 2, in part, *Huffman v. Goals Coal Co.*, 223 W.Va. 724, 679 S.E.2d 323 (2009).

This case is directly analogous to *Butler*. Petitioner herein is requesting that the Court redefine the term "sex" to include "sexual orientation." The Court should reject this argument as the Supreme Court of Appeals of West Virginia did in *Butler* as the unambiguous terms of the WVHRA demonstrate that the term "sex" does not include the term "sexual orientation."[6]

1. Contrary to Petitioner's assertions, the history of the WVHRA supports the circuit court's conclusion that discrimination because of "sex" does not include discrimination based on "sexual orientation."

The WHRA was enacted by the Legislature in 1967. *W. Virginia Hum. Rts. Comm'n v. Tenpin Lounge, Inc.,* 158 W. Va. 349, 350, 211 S.E.2d 349, 351 (1975). Petitioner has cited no authority of any sort to indicate that when the WVHRA was enacted by the Legislature in 1967, the term "sex" was commonly used to also refer to "sexual orientation." In the fifty-seven (57) years since its enactment, the Legislature has not amended the WVHRA to add "sexual orientation" as a protected class, nor has it amended the definition of "sex" to include "sexual orientation."

In fact, on January 12, 2022, Senate Bill 156 (hereinafter "S.B. 156") was proposed to amend various provisions of the WVHRA, *inter alia*, "all relating to unlawful discriminatory practices in categories covered by the Human Rights Act and the Fair Housing

[6]Because the terms of the statute are clear and unambiguous, further analysis is unnecessary. However, Respondent addresses Petitioner's remaining arguments below.

Act, prohibiting discrimination based upon age and sexual orientation, or gender identity; and defining 'sexual orientation' and 'gender identity.'" *App. at 0247.* S.B. 156 would have expanded the definition of "discriminate" or "discrimination" to include sexual orientation as a protected class and defined "sexual orientation" as "heterosexuality, bisexuality, homosexuality, or gender identity or express, whether actual or perceived." *App. at 0248.* S.B. 156 was introduced in the Senate on January 12, 2022 and submitted to the Judiciary Committee on the same date. *App. at 0258.* However, S.B. 156 never advanced beyond the Judiciary Committee. *App. at 0258.*

Had the Legislature believed that the term "sex" within the WVHRA included "sexual orientation," then S.B. 156 would have been wholly unnecessary. In *Butler*, the Court found that the Legislature's refusal to amend the criminal statute at issue to include "sexual orientation" was "undoubtedly indicative of its intent not to include 'sexual orientation' therein." *Butler*, 238 W. Va. at 175-176, 725-726.

Moreover, West Virginia House Bill No. 4757 (hereinafter "H.B. 4757") was introduced on January 15, 2024. H.B. 4757 did not substantively changes the contents of the WVHRA but recodified the WVHRA from *§ 5-11-1*, *et. seq.*, to *§ 16B-17-1*, *et seq*. Despite having another opportunity to amend the WVHRA to prohibit discrimination because of "sexual orientation," the Legislature did not do so.

2. Contrary to Petitioner's argument, precedent from the Supreme Court of Appeals of West Virginia supports the circuit court's conclusion and runs contrary to Petitioner's arguments.

Petitioner spends the bulk of his argument asserting that this Court should follow in the footsteps of federal law which interprets Title VII as prohibiting discrimination based on sexual orientation. It is true that the Supreme Court of Appeals of West Virginia, at times, looks

to federal law interpreting Title VII when interpreting the WVHRA. However, the Court has also recognized that "the West Virginia Human Rights Act, as created by our Legislature and as applied by our courts and administrative agencies, represents an independent approach to the law of disability discrimination that is not mechanically tied to federal disability discrimination jurisprudence." *Stone v. St. Joseph's Hosp. of Parkersburg*, 208 W. Va. 91, 106, 538 S.E.2d 389, 404 (2000). Additionally, the state supreme court has observed, "this Court has often said that federal case law 'may be persuasive, but it is not binding or controlling' on the courts of this State." *Brooks v. Isinghood*, 213 W. Va. 675, 682, 584 S.E.2d 531, 538 (2003). While giving deference to federal case law when appropriate, the state supreme court has noted that this does not mean that its "legal analysis in this area should amount to ... Pavlovian responses to federal decisional law." *Mountaineer Fire & Rescue Equip., LLC v. City Nat'l Bank of W. Virginia*, 244 W. Va. 508, n. 4, 854 S.E.2d 870, n. 4 (2020)

However, resorting to federal case law is unnecessary when the statute at issue is unambiguous, as is the case here. As noted above, the Court in *Butler* found that the word "sex" to be "clear and unambiguous and to have a very different meaning and import than the term 'sexual orientation.'" *Butler*, 239 W. Va. at 174, 799 S.E.2d at 724. The Court rejected the State's attempt to rely on Title VII cases given that it found the term to be unambiguous:

> The parties and the amici devote a substantial portion of their respective briefs to arguments involving a legal analyses employed in West Virginia Human Rights Act and Title VII cases. Because we have found the word "sex" in West Virginia Code § 61-6-21(b) to be unambiguous, such interpretive analysis is inapplicable; rather, "its plain meaning is to be accepted and applied without resort to interpretation." *Crockett,* 153 W.Va. at 715, 172 S.E.2d at 385, syl. pt. 2, in part.

Butler, 239 W. Va. at 174, 799 S.E.2d at 724.

Thus, because the Supreme Court of Appeals of West Virginia has already found that the term "sex" to be unambiguous and different from "sexual orientation," an examination of federal law is unnecessary. Petitioner relies heavily on *Bostock*, in which the United States Supreme Court found that Title VII's prohibition on discrimination based on "sex" includes "sexual orientation." *Bostock v. Clayton Cnty., Georgia*, 590 U.S. 644, 140 S. Ct. 1731, 207 L. Ed. 2d 218 (2020). The Honorable Irene Berger relied upon the *Bostock* decision in *Jarrell v. Hardy Cellular Tel. Co.*, No. 2:20-CV-00289, 2020 WL 4208533 (S.D.W. Va. July 22, 2020). In *Jarrell*, the plaintiff filed a claim under the WVHRA alleging that she was discriminated against on the basis of her sexual orientation. The defendant argued that the WVHRA does not recognize sexual orientation as a protected class. In an unpublished decision, Judge Berger disregarded the *Butler* opinion, stating:

> The Defendants rely on a decision from the West Virginia Supreme Court of Appeals holding that "sex" and "sexual orientation" are distinct for purposes of the state criminal civil rights statute. State v. Butler, 799 S.E.2d 718, 724–25 (W. Va. 2017). The court found that the hate crimes statute, which specifically included "sex" as a category, did not reach crimes based on sexual orientation. Id. Much of the discussion focused on the rules of construction relevant to a criminal statute. The Court noted comparisons to Title VII and the WVHRA but found those analyses to be inapplicable. Id. at footnotes 8 & 11.

Id. at *2. However, as explained above, the *Butler* decision was not based purely on the fact that a criminal statute was being interpreted as opposed to a civil statute. Rather, the *Butler* decision found that the term "sex" was unambiguous in that it did not include "sexual orientation" and, therefore, resorting to canons of construction and federal case law was unnecessary. *Butler*, 239 W. Va. at 174, 799 S.E.2d at 724 ("Because we have found the word 'sex' in West Virginia Code § 61-6-21(b) to be unambiguous, such interpretive analysis is inapplicable; rather, 'its plain meaning is to be accepted and applied without resort to interpretation.'"). Instead of following *Butler*, Judge Berger elected to follow *Bostock*, relying on the general principle that the Supreme

Court of Appeals of West Virginia at times, looks to federal law interpreting Title VII when interpreting the WVHRA. *Id.*

However, as noted above, West Virginia appellate courts do not mechanically follow federal law like a Pavlovian dog. And the Court should decline Petitioner's invitation for the Court to do so here, where there is already established law from the Supreme Court of Appeals of West Virginia which has specifically found that the phrase "because of […] sex" does not include the concept of "sexual orientation."

Moreover, *Jarrell* was decided on July 22, 2020. S.B. 156 was not introduced for consideration at the Legislature until January 12, 2022. Thus, when *Jarrell* was decided, Judge Berger did not have the benefit of knowing that the Legislature attempted to amend the WVHRA to specifically add "sexual orientation" as a protected class, which would have been unnecessary if "sex" included "sexual orientation."

Petitioner's reliance on the West Virginia Human Rights Commission's decision in *Robb Livingood v. Public Defender Corporation, Fifth Judicial Circuit*, Docket No. ES-192-18 (2021) is also off target. Petitioner asserts that the Commission "utilized the reasoning in the *Bostock* and *Jarrell* decisions to find that sexual orientation discrimination is actionable under the WVHRA[.]" *Petitioner's Brief at 13.* However, the *Livingood* decision addressed whether the complainant's "gender identity, as transgender" was a protected status under the prohibition on discrimination on the basis of "sex" in WVHRA. *App. at 0138-0139.* Thus, *Livingood* did not address whether the prohibition on the basis of "sex" in the WVHRA encompassed discrimination based on "sexual orientation."

Other courts have refused to follow *Bostock* in interpreting their own non-discrimination statutes. In *Doe*, the Supreme Court of Maryland held that the prohibition against

discrimination based on "sex" in the Maryland Fair Employment Practices Act does not itself also prohibit discrimination based on "sexual orientation" which was separately covered under the Act.[7] *Doe v. Cath. Relief Servs*., 484 Md. 640, 653, 300 A.3d 116, 124 (2023). In support of its decision, the court relied, in part, on the fact that none of the dictionary definitions of the terms it reviewed signal that "sex" also includes "sexual orientation." *Id.* at 655, 125. The *Doe* decision also relied on the fact that while the Act initially only included "sex" it was later amended to also specifically prohibit discrimination based on "sexual orientation." *Id.* at 656-59, 125-28. Thus, the court declined to follow the reasoning of *Bostock*, despite the fact that Maryland law is generally interpreted in harmony with Title VII. *Id.* at 660, 128.

Additionally, the court went on to examine whether the Maryland Equal Pay for Equal Work Act's (hereinafter "MEPEWA") prohibition on discrimination based on "sex" and "gender identity" prohibited discrimination based on sexual orientation. The plaintiff argued that the logic of *Bostock* should apply and the prohibition on "sex" should be construed to encompass "sexual orientation." However, the court found that dictionary definitions of the term "sex" supported the conclusion that there was no ambiguity in the statute and declined to follow *Bostock*. *Id.* at 662, 129. The court noted that in 2016 the MEPEWA was amended to add the prohibition against pay disparities based on gender identity, but the General Assembly did not add sexual orientation as a protected category at that time. *Id.* at 663, 130.

The Court of Appeal of Louisiana, Fifth Circuit, has also declined to follow *Bostock*. In *Gauthreaux*, the plaintiff claimed that he was discriminated against on the basis of his sexual orientation when he was terminated and brought suit under Louisiana Employment

[7]Despite the fact that "sexual orientation" was already covered by the MFEPA, the question of whether "sex" included "sexual orientation" was at issue because "at the same time the General Assembly added sexual orientation as a protected category under MFEPA, it also amended MFEPA's religious entity exemption to add sexual orientation – but not sex – as a permissible basis for at least some discrimination by religious organizations." *Doe*, 484 Md. 640, 658–59, 300 A.3d 116, 127 (2023).

Discrimination Law, *La. Stat. Ann. § 23:301*, *et seq.* (hereinafter "LEDL"). Similar to the WVHRA, the LEDL makes it unlawful to discriminate against an individual "because of the individual's […] sex":

> A. It shall be unlawful discrimination in employment for an employer to engage in any of the following practices:
>
> (1) Intentionally fail or refuse to hire or to discharge any individual, or otherwise to intentionally discriminate against any individual with respect to compensation, or terms, conditions, or privileges of employment, because of the individual's race, color, religion, sex, national origin, or natural, protective, or cultural hairstyle.

Gauthreaux v. City of Gretna, 22-424 (La. App. 5 Cir. 3/29/23), 360 So. 3d 930, 934, *writ denied*, 2023-00606 (La. 6/21/23), 363 So. 3d 254 (quoting *La. Stat. Ann. § 23:301*, *et seq.*). The plaintiff argued that the court should follow *Bostock* and interpret the prohibition on sex discrimination to encompass sexual orientation discrimination.

The court rejected this argument, noting that the *Bostock* majority opinion stated that its holding did not apply to state laws that prohibit sex discrimination:

> While plaintiff argues that the trial court erred in not relying on *Bostock* in interpreting La. R.S. 23:332, the majority opinion in *Bostock* states that the only law it considered in rendering its opinion was Title VII, specifically stating that "none of these other [federal or state laws that prohibit sex discrimination] are before us ...." *Id*. at 1753. Thus, although persuasive, our state courts are not bound by Bostock's interpretation of Title VII in interpreting La. R.S. 23:332. As there is no binding federal or state law or jurisprudence on point, and because the legislature has not seen fit to amend La. R.S. 23:332 to specifically include protection from employment discrimination because of a person's sexual orientation,4 we decline to extend Bostock's reasoning to La. R.S. 23:332 to find that it allows for protection from employment discrimination because of a person's sexual orientation. As such, we find that plaintiff's petition fails to state a cause of action against the City of Gretna and Mayor Constant.

Id. 935–36.

B. The circuit court's decision is supported by precedent of the Supreme Court of Appeals of West Virginia.[8]

Petitioner argues that the circuit court "misunderstood and misconstrued" the issues, claiming that 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*[.]" *Petitioner's Brief at 14 (emphasis in original).* However, contrary to Petitioner's assertions, the circuit court considered this argument and rejected the same, finding that "sexual orientation is not a subset of sex, but is a different category all together" and "the word 'sex' in the WVHRA does not include 'sexual orientation.'" *App. at 232.*

Petitioner does not elaborate on this point but cites *Bostock* for the proposition that "it is impossible to discriminate against a person for being homosexual […] without discriminating against that individual ***based on sex***." *Petitioner's Brief at 15.* However, this logic is flawed for a number of reasons as discrimination based on sexual orientation does intrinsically include discrimination based on sex. Hypothetically, if an employer had a blanket policy against hiring gays, it could implement this policy without knowing the biological sex of any job applicants. In other words, if an employer can discriminate against individual applicants or employees without knowing whether they are male or female, it is impossible to argue that the employer intentionally discriminated because of sex.[9]

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[8]Although set forth under a separate argument heading, in Section VI.B., Petitioner largely repeats arguments set forth previously in his brief. To the extent necessary, Respondent incorporates by reference all arguments raised above to the extent applicable to Section VI.B.

[9]"[D]iscrimination because of sexual orientation or gender identity does not in and of itself entail discrimination because of sex. We can see this because it is quite possible for an employer to discriminate on those grounds without taking the sex of an individual applicant or employee into account. An employer can have a policy that says: 'We do not hire gays, lesbians, or transgender individuals.' And an

As Justice Kavanaugh observed in his dissent in *Bostock*:

> Consider the employer who has four employees but must fire two of them for financial reasons. Suppose the four employees are a straight man, a straight woman, a gay man, and a lesbian. The employer with animosity against women (animosity based on sex) will fire the two women. The employer with animosity against gays (animosity based on sexual orientation) will fire the gay man and the lesbian. Those are two distinct harms caused by two distinct biases that have two different outcomes. To treat one as a form of the other—as the majority opinion does—misapprehends common language, human psychology, and real life.

Id. at 790–91,1828 (Kavanaugh, dissenting) (citing *Hively v. Ivy Tech Community College of Ind.*, 853 F.3d 339, 363 (CA7 2017) (Sykes, J., dissenting)).

Petitioner argues that the circuit court's Order "rested entirely on 'subsequent legislative history'" in finding that sexual orientation is not a protected class under the WVHRA. However, this is simply not true. The circuit court also relied upon the unambiguous terms of the WVHRA itself, the dictionary definitions of the terms "sex" and "sexual orientation," the fact that the Legislature has used the term "sexual orientation" in other contexts when it intended to do so, and the general principle that it is role of the Legislature to amend the WVHRA and not the judiciary. *App. at 229-234.*

Petitioner further argues that the circuit court erred in relying on the failure of failed passage of S.B. 156 because subsequent legislative history is not relevant. However, this argument runs directly contrary to *Butler*. *Minshall* as explained above, in *Butler* the Court relied upon the fact that the Legislature had attempted, but failed, to amend to include "sexual orientation" to find that was "undoubtedly indicative of its intent not to include 'sexual orientation' therein." *Butler*, 239 W. Va. at 175, 799 S.E.2d at 725. Moreover, S.B. 156 reflects "the widespread usage of the English language in the United States: Sexual orientation

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employer can implement this policy without paying any attention to or even knowing the biological sex of gay, lesbian, and transgender applicants." *Bostock*, 590 U.S. at 690, 140 S. Ct. at 1758–59 (Alito, dissenting).

discrimination is distinct from, and not a form of, sex discrimination." *Bostock*, 590 U.S. at 793–94, 140 S. Ct. at 1830 (Kavanaugh, dissenting). Further, the Court has observed that post-enactment legislative history can, in certain circumstances, "provide significant insight as to legislative intent." *Appalachian Power Co. v. State Tax Dep't of W. Virginia*, 195 W. Va. 573, n. 14, 586, 466 S.E.2d 424, n. 14 (1995).

VII. CONCLUSION

The circuit court correctly concluded that sexual orientation is not a protected class under the WVHRA as the plain statutory language does not recognize sexual orientation by its unambiguous terms. The ordinary meaning of the terms, as evidenced by various dictionary definitions, demonstrate that "sex" and "sexual orientations" are different terms and "sexual orientation" is not a subset of "sex." Moreover, the Legislature has specifically used the term "sexual orientation" when it intends to do so.

Furthermore, the WVHRA has been in effect since 1967. In the fifty-seven (57) years since its enactment, the WVHRA has not been amended to add "sexual orientation" as a protected class. On January 12, 2022, Senate Bill 156 was proposed to amend the WVHRA to include "sexual orientation" and "gender identity" as protected classes. However, Senate Bill 156 did not advance beyond the Judiciary Committee. Had the Legislature believed that the term "sex" within the WVHRA included "sexual orientation," then S.B. 156 would have been wholly unnecessary.

This Honorable Court should reject Petitioner's request that the Court follow federal cases which have found that "sexual orientation" is encompassed within "sex" for purposes of Title VII claims. Although the Court, at times, looks to federal law when

interpreting the WVHRA, it does not mechanically do so in all instances. Here, resorting to federal law is not necessary in light of the fact that the WVHRA is unambiguous on this point.

Accordingly, for all the reasons set forth above, Respondent respectfully requests that the circuit court's decision dismissing the First, Second, and Third Causes of Action in the Amended Complaint be affirmed.

Dated this 15th day of April, 2024.

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IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

Docket No. 23-ICA-540

JEREMIAH L. JONES,

Petitioner,

v.

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

Respondent.

(On Appeal from the Circuit Court of Harrison County, West Virginia, Civil Action No. 23-C-75)

CERTIFICATE OF SERVICE

The undersigned, counsel of record for Respondent, Town of Lumberport, West Virginia, does hereby certify on this 15th day of April, 2024, that a true copy of the foregoing "***RESPONSE BRIEF ON BEHALF OF RESPONDENT, TOWN OF LUMBERPORT, WEST VIRGINIA***" was filed with the Clerk of Court using File & ServeXpress system, which will send notification of such filing to the following:

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