

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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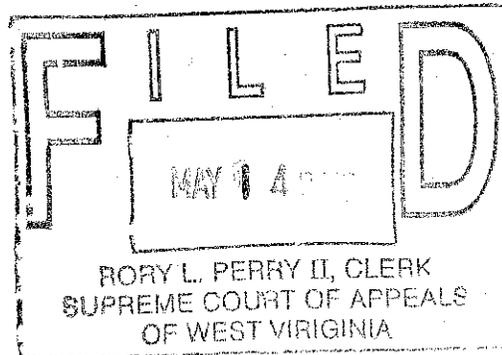
CHARLESTON TOWN CENTER COMPANY, LP,

Appellant

v.

STEVEN and CYNTHIA BUMPUS, on  
Behalf of STEVEN M. BUMPUS, a minor;  
AUGUSTA ROBINSON, on behalf of  
KEVIN STREETS, a minor; and the WEST  
VIRGINIA HUMAN RIGHTS COMMISSION,

Appellees



BRIEF OF AMICUS CURIAE  
AMERICAN CIVIL LIBERTIES UNION  
OF WEST VIRGINIA FOUNDATION

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**TABLE OF CONTENTS**

	<b>Page</b>
I. TABLE OF AUTHORITIES .....	ii
II. IDENTITY AND INTEREST OF AMICUS.....	1
III. INTRODUCTION.....	1
IV. ARGUMENT.....	4
A. Appellees were subjected to racial profiling when they were watched, followed, prevented from window shopping, ejected from the mall, and identified to police as trespassers.....	5
B. The majority opinion in <i>K-Mart v. W. Va. Human Rights Comm'n</i> relied upon by Appellant should be reconsidered because it denies people of color a remedy when they are subjected to racial profiling and because it is contrary to public policy.....	7
1. The holding in <i>K-Mart</i> leaves people of color without a remedy when they are targeted for “Shopping While Black” because it fails to recognize racial profiling as a factor in the denial of access to public accommodations.....	8
2. The holding in <i>K-Mart</i> produces outcomes that are contrary to public policy because it ignores the impact of racial profiling on its victims and because it is based on stereotyping rather than on articulable individualized suspicion of wrongdoing.....	9
V. CONCLUSION.....	13

## TABLE OF AUTHORITIES

### Cases

<i>Browning v. Slenderella Sys. of Seattle</i> , 341 P.2d 859 (1959).....	8, 9
<i>Green v. Dillard's, Inc.</i> , 483 F.3d 533 (8 <sup>th</sup> Cir. 2007).....	3
<i>K-Mart Corp. v. W.Va. Human Rights Comm'n</i> , 181 W.Va. 473, 383 S.E.2d 277 (1989).....	<i>passim</i>
<i>Morris v. Office Max Inc.</i> , 89 F.3d 411 (7 <sup>th</sup> Cir. 1996).....	3
<i>Strauder v. W.Va.</i> , 100 U.S. 303 (1879).....	11

### Statutes

W.Va. Code § 5-11-2 .....	4
W.Va. Code § 5-11-9(6)(A) .....	4
W.Va. Code § 5-11-10 .....	2
W.Va. Code § 30-29-10 .....	9
W.Va. Code § 30-29-10(b)(3) .....	9
W.Va. Code § 30-29-10(c) .....	9

### Other Authorities

P.G. Devine and A.J. Elliott, <i>Are Racial Stereotypes Really Fading?</i> 21 <i>Personality and Soc. Psychol. Bull.</i> , 1139-1150 (1995). <i>See</i> <a href="http://en.wikipedia.org/wiki/Stereotypes_of_blacks">http://en.wikipedia.org/wiki/Stereotypes_of_blacks</a> .....	11
Anne-Marie G. Harris, <i>Shopping While Black: Applying 42 U.S.C. § 1981 to Cases of Consumer Racial Profiling</i> , 1 <i>B.C. Third World L.J.</i> 1 (2003).....	3
Reginald T. Shuford, <i>Any Way You Slice It: Why Racial Profiling is Wrong</i> , XVIII <i>St. Louis U. Pub. L. Rev.</i> 371 (1999).....	6, 10
Lu-In Wang, <i>Race as Proxy: Situational Racism and Self-Fulfilling Stereotypes</i> , 53 <i>DePaul L. Rev.</i> 1013 (2004).....	10-11
<i>Holocaust victims remembered</i> , <i>The Charleston Gazette</i> , April 21, 2009, <a href="http://www.wvgazette.com/collections?build=yes&amp;id=200904210679">http://www.wvgazette.com/collections?build=yes&amp;id=200904210679</a> .....	12

*West Virginia Traffic Stop Study Final Report*, Crim. Just. Statistical Analysis Ctr,  
W. Va. Div. of Crim. Just. Serv., Feb. 2009..... 5

## **I. IDENTITY AND INTEREST OF AMICUS**

The American Civil Liberties Union of West Virginia (ACLUWV) is the state affiliate of the American Civil Liberties Union (ACLU). The ACLUWV, like its parent, the ACLU, is a nonprofit, nonpartisan membership organization dedicated to protecting and advancing civil liberties. The ACLUWV has more than 1400 members throughout West Virginia and a long history of legal advocacy for equal protection under the law for all citizens. Through its advocacy, the ACLU's national Racial Justice Program, and its statewide Campaign to End Racial Profiling, the ACLUWV has acquired a special understanding of the barriers still faced by people of color, and seeks to address problems such as the targeting of African Americans for "Driving While Black" and "Shopping While Black."

The issues presented by this appeal have significant implications for some of the most important civil rights of West Virginians of color: to access places of public accommodation without suffering discrimination, humiliation, and harassment based on their race.

## **II. INTRODUCTION**

Two African American teenagers, Stephen M. Bumpus and Kevin Streets, visited the Charleston Town Center Mall (CTCM) on the evening of April 22, 2006. During the evening, CTCM security staff harassed and humiliated them, ejected them from the Food Court, told them they had to "keep moving" when they attempted to window shop, and ultimately ejected them from the mall. Findings of Fact Nos. 1, 2, 4, 5, 6, 8, 10, 11. The youths were so distressed over being watched and followed by mall security officers that

one of them called his mother for advice. *Id.* No. 4. Unfortunately, her reasonable advice that if they were not doing anything wrong they had nothing to worry about proved to be mistaken. In fact, when the young men tried to ask the security guard why they were being bothered when they hadn't done anything, the guard interpreted their reasonable questions as threatening: they were "mouthing him." Their obedience to his order to leave the Food Court was also interpreted to comport with racial stereotypes: they "...stood up, you know, with force . . ." *Id.* No. 50

As the youths were being evicted from the mall, Kevin Streets called his aunt, Carol Johnson Cyrus, and reported that they had been asked to leave the Mall. *Id.* 17 Ms. Cyrus later spoke with a person in CTCM security who explained that "security doesn't just bother African Americans, they also get on Goths." *Id.* at 19

After they were ejected from CTCM, the two purchased a meal at Chili's, one of the mall's restaurants. *Id.* No. 22. When they exited Chili's and attempted to wait on the sidewalk outside for Steven's mother to give them a ride home, CTCM staff identified them to police as trespassers and they were arrested. *Id.* Nos. 23-43.

Steven Bumpus's parents and Kevin Street's grandmother both filed administrative complaints with the West Virginia Human Rights Commission. The Commission found probable cause that CTCM had violated the West Virginia Human Rights Act, W.Va. Code § 5-11-10. The case was heard by Administrative Law Judge Robert B. Wilson. After both parties submitted Proposed Findings of Fact and Conclusions of Law, the ALJ issued a Final Decision, finding that in each case CTCM had discriminated against the youth in violation of his rights under the West Virginia Human Rights Act.

Appellant, relying on the holding in a factually distinguishable case, *K-Mart Corp. v. W.Va. Human Rights Commission*, 181 W.Va. 473, 383 S.E.2d 277 (1989), now asks this Court to conclude that Appellees did not establish a prima facie case of discrimination. First, Appellant claims that because the youths did not make a retail purchase they did not attempt to avail themselves of the accommodations provided by CTCM.<sup>1</sup> Second, Appellant claims that even if Appellees did attempt to avail themselves of the mall's accommodations, advantages, facilities, privileges or services, undue attention and harassment on the part of the security guards is not enough to constitute a denial or refusal of services. Appellant goes so far as to argue that to hold CTCM accountable for discrimination by its security guards would be to undermine their ability to protect patrons.

Amicus first urges this Court to affirm the ruling of the Administrative Law Judge. The compelled removal of Steven and Kevin distinguishes the facts of this case from those in *K-Mart*. The actions of CTCM easily meet the test set out in *K-Mart* for a denial of services.

This appeal, however, raises a further and equally compelling issue that extends into the future and beyond the bounds of this case. Appellant's attempt to rely on *K-Mart* and its holding that persistent surveillance, harassment, embarrassment, and humiliation based on racial profiling cannot support a claim of discrimination under the West

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<sup>1</sup> Note that there is a line of cases alleging discrimination under 42 U.S.C. § 1981 in which plaintiffs have been expected to show they have made, or attempted to make, a purchase. *See, for example* *Morris v. Office Max, Inc.*, 89 F.3d 411 (7<sup>th</sup> Cir. 1996), and *Green v. Dillard's*, 483 F.3d 533, 538-540 (8<sup>th</sup> Cir. 2007). However, these cases are not applicable to the case at bar because the right protected by § 1981 is the right to *contract* on an equal footing with white citizens. In this case, the right protected by The West Virginia Human Rights Act is the right to *be present* in a place of public accommodation. *See generally* Anne-Marie G. Harris, *Shopping While Black: Applying 42 U.S.C. § 1981 to Cases of Consumer Racial Profiling*, 1 B.C. Third World Law Journal, 1 (2003).

Virginia Human Rights Act raises grave concerns about the ability of people of color in this state to win redress when they are effectively denied equal access to places of public accommodation.<sup>2</sup>

Thus, amicus asks the Court to reconsider the majority's holding in *K-Mart* and to adopt instead the opinion of the dissent. By doing so, it will both enhance the ability of West Virginia's citizens of color to seek vindication of their right to be free of blatant acts of discrimination and reach a result consistent State's public policy.<sup>3</sup>

### III. ARGUMENT

When *K-Mart* was decided nearly 20 years ago, the court acknowledged that it "[had] not yet had the opportunity to address in detail discrimination occurring in places of public accommodation" and developed a three-part test for establishing a prima facie case of such discrimination: (1) that the complainant is a member of a protected class, (2) that the complainant attempted to avail himself of the "accommodations, advantages, facilities, privileges or services" of a place of public accommodation; and (3) that the "accommodations, advantages, facilities, privileges or services" were withheld, denied, or refused to the complainant." 187 W.Va. at 477, 383 S.E. 2d at 281.

Applying that test in *K-Mart*, the court concluded that a Syrian family had no remedy when they were watched and followed both within and outside the store by store employees and police. Store employees believed the family fit the profile of a group of

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<sup>2</sup> W.Va. Code § 5-11-9(6)(A) makes it an unlawful discriminatory practice to "[r]efuse, withhold from or deny to any individual because of his or her race, religion, color, national origin, ancestry, sex, age, blindness or disability, either directly or indirectly, any of the accommodations, advantages, facilities, privileges or services of the place of public accommodations."

<sup>3</sup> W.Va. Code § 5-11-2 declares that "[i]t is the public policy of the state of West Virginia to provide all of its citizens equal opportunity for employment, equal access to places of public accommodations, and equal opportunity in the sale, purchase, lease, rental and financing of housing accommodations or real property," and "Equal opportunity in the areas of employment and public accommodations is . . . a human right or civil right of all persons . . ."

shoplifting “gypsies” about whom it had been warned. Despite the undue surveillance to which the family members were subjected, and despite fact that police had been summoned even *before* the family entered the store, apparently based on their appearance alone, and that a police officer later testified at a Human Rights Commission hearing that gypsies “were usually of darker skins, wore loose fitting clothes, and wore rancid perfume” (*Id.* at 474, 383 S.W. 2d at 278, N1), the court in *K-Mart* held that the family failed to establish a prima face case. Being watched and followed until they left the store without attempting to buy anything, even though they had intended to shop, did not constitute a denial or refusal of services.

Because the Baram family members were permitted to enter the store and walk around in it, and were not *made* to leave by store employees (they left because they were being watched and followed), the court gave little weight to evidence that the treatment to which they were subjected was based on the color of their skin. Twenty years later, more is known about racial profiling and its invidious effects.<sup>4</sup> This Court now has the opportunity to revisit *K-mart*, taking into account two decades of experience and the emerging understanding of racial profiling and its impact on its victims.

**A. Appellees were subjected to racial profiling when they were watched, followed, prevented from window shopping, ejected from the mall, and identified to police as trespassers.**

Racial profiling has been defined as “the consideration of race when developing a profile of suspected criminals; by extension, a form of racism involving police focus on

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<sup>4</sup> See, for example, *West Virginia Traffic Stop Study Final Report*, Crim. Just. Statistical Analysis Ctr., W.Va. Div. of Crim. Just. Serv. i (Feb. 2009), finding that at the state level black drivers were 1.64 times more likely to be stopped by law enforcement than white drivers. Once stopped, black drivers were 2.37 times more likely to be searched than white drivers. Despite the higher stop and search rates for blacks, however, the contraband hit rate was lower (43.11 for blacks, 47.17 for white drivers).

people of certain racial groups when seeking suspected criminals.”<sup>5</sup> It is not only police officers who engage in racial profiling, however, and although it is African American drivers who have brought the concept of “driving while black” to the public consciousness, black drivers are not the only people of color who are targeted and the streets and highways are not the only venues in which racial profiling occurs.

In the case at bar, the profilers are security guards, who followed, watched, harassed, and ejected Appellees from CTCM. As to racial profiling in venues other than the highway, “[t]here is . . . flying while black, walking while black, shopping while black, hailing (as in a cab) while black, swimming while black . . . and dining while black.”<sup>6</sup>

The facts indicate that CTCM engaged in racial profiling. In the City of Charleston, U.S. Census figures for the year 2000 indicate that just over 15 percent of the residents are black.<sup>7</sup> Yet Police Officer Coleman said that “when he receives calls to escort from the Mall they are commonly African Americans,” and “Police Officer Brown testified credibly that it was 100% of the time minorities or blacks being evicted or escorted from the Mall on the calls he participated in over the years.” Finding of Fact No. 52. No data were presented by CTCM to show that there were other officers who evicted only white people, or that the wildly unbalanced figures reported by the officers made sense based on the composition of the mall’s visitor population (that is, CTCM did not attempt to show that 100 percent of evictees were black because 100 percent of CTCM visitors were black or that only black people caused problems at the mall).

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<sup>5</sup> Webster's New Millennium™ Dictionary of English, Copyright © 2003-2009 Dictionary.com, LLC.

<sup>6</sup> Reginald T. Shuford, *Any Way You Slice It: Why Racial Profiling is Wrong*, XVIII St. Louis University Public Law Review 371 (1999)

<sup>7</sup> <http://quickfacts.census.gov/qfd/states/54/5414600.html>

Equally telling is Carol Johnson Cyrus's testimony that a person in Mall security told her that "security doesn't just bother African Americans, they also get on Goths." This statement clearly indicates that individuals from these groups are selected to be "gotten on" because of their membership in a group, rather than because of their individual characteristics.

Consistent with racial profiling, the security guards made no effort to distinguish between Appellees and the other African American males who had been involved in a confrontation with security guards. In fact, they dubbed them "guilty by association," ordered them to leave, and refused to listen to their attempt to explain that they were waiting for a ride with Steven's mother. *Id.* Nos. 26, 27, and 45.

Subjected to discriminatory treatment on the basis of their race, it is no wonder that people of color leave places of public accommodation where it is made clear to them that they are viewed as potential criminals. Nobody has to tell them to get out, to bar the door, or to force them to leave a place of public accommodation (Appellees in this case were well aware that they were not wanted even before they were ejected from the mall). They have only to look around them and compare their treatment to that of similarly situated white people to find evidence of racial discrimination.

**B. The majority opinion in *K-Mart v. W.Va. Human Rights Commission* relied upon by Appellant should be reconsidered because it denies people of color a remedy when they are subjected to racial profiling and because it is contrary to public policy.**

In his dissent in *K-Mart*, Justice Miller expressed his dismay at what he deemed "a rather straightforward act of discrimination." A "powerful disincentive" to shop "is created against a shopper when he encounters the police watching him as he goes into the store and is followed by the police and store personnel as he travels about the store." 181

W.Va. at 481, 383 S.E. 2d at 285. Under the majority's analysis, it might take a situation where "K-Mart had unleashed fire hoses or police dogs on the Barams or [] its personnel had stood in the doorway blocking access to the store" to qualify as an act of discrimination. *Id.* at 479, 383 S.W. 2d at 283.

Unless this Court reassesses the majority opinion in *K-Mart*, people of color who abandon their efforts to avail themselves of a place of public accommodation because of the humiliation and embarrassment engendered by racial profiling, discriminatory surveillance, and harassment will find it difficult if not impossible to establish a prima facie case.

1. The holding in *K-Mart* leaves people of color without a remedy when they are targeted for "Shopping While Black" because it fails to recognize racial profiling as a factor in the denial of access to public accommodations.

Justice Miller devoted the bulk of his dissent to explaining that "discrimination need not be overt" and insisting on individualized suspicion of wrongdoing rather than the presumption of group guilt based on "stereotypical profiles." *Id.* at 284-286, 383 S.E. 2d at 480-482. He was not the first to "get it right" with regard to the subtler forms of racial discrimination (subtler, that is, than the fire hose, the dogs, or outright rejection). Fifty years ago, a court recognized that "discrimination may rise just as surely through 'subtleties of conduct' as through an openly expressed refusal to serve." *Browning v. Slenderella Systems of Seattle*, 341 P.2d 859, 862 (1959). In *Slenderella Systems*, Mrs. Browning went to defendant's place of business for a courtesy demonstration of Slenderella's products. She waited more than two hours past her appointment time. When she asked whether she would be served she was told that the business only served Caucasians and she would not "be happy here." *Id.* at 861 "The plaintiff was not told in

so many words that she would not be served, or that she should leave; nor was any physical violence used or threatened. The defendant's employees were always courteous; however, one need not be obvious or forthright to effect a discrimination." *Id.* at 862.

Under *K-Mart*, despite the majority's misinterpretation of the facts of *Slenderella* (concluding that she was never denied service),<sup>8</sup> Mrs. Browning would have had no remedy. She left without availing herself of the business's services or accommodations because nobody *would* serve her. Justice Miller, in his dissent, rightly recognized that modern day racial animus, no longer written into law, is no less devastating in its effect on those who are targeted because of the color of their skin. These individuals, like Steven Bumpus and Kevin Streets, must be able to vindicate their rights to equal treatment in the courts of this state.

2. The holding in *K-Mart* produces outcomes that are contrary to public policy because it ignores the impact of racial profiling on its victims and because it is based on stereotyping rather than on articulable individualized suspicion of wrongdoing.

In matters involving access to public accommodations, this Court should follow the lead of the West Virginia Legislature and recognize that racial profiling is contrary to public policy. In W.Va. Code § 30-29-10(c) the Legislature prohibits law enforcement officers from engaging in racial profiling.<sup>9</sup> In §30-29-10, the Legislature finds that "[t]he reality or public perception of racial profiling alienates people from police, hinders community policing efforts, and causes law-enforcement officers and law-enforcement agencies to lose credibility and trust among the people law enforcement is sworn to

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<sup>8</sup> In fact, the *Slenderella* court thought there was "little difficulty" in finding that Mrs. Browning was subjected to discrimination because of her race or color. *Id.* at 862.

<sup>9</sup> W.Va. Code §30-29-10(b)(3) defines racial profiling as "the practice of a law-enforcement officer relying, to any degree, on race, ethnicity, or national origin in selecting which individuals to subject to routine investigatory activities or in deciding upon the scope and substance of law-enforcement activity following the initial routine investigatory activity."

protect and serve. Therefore, *the West Virginia Legislature declares that racial profiling is contrary to public policy* and should not be used as a law-enforcement investigative tactic.” Emphasis added.

This Court can recognize the pernicious nature of racial profiling and offer its victims a means of redress by interpreting the three-part prima facie case test to include not only physical denial of access to a place of public accommodation but also the more subtle but equally damaging effect of harassment, surveillance, and humiliation as bars to access to places of public accommodation for people of color.

In addition to its impact on policing, as stated by the Legislature, racial profiling and stereotyping has its own devastating impact on its innocent victims. Inconvenience is not the only penalty for driving, walking, or shopping while black. The experience of the victim of racial profiling can be “frightening, humiliating or even traumatic.”<sup>10</sup> Kevin Streets testified that he was so upset at the way he and Steven were being treated that he was near tears. Finding of Fact. No. 37

Racial profiling can create a self-fulfilling prophecy. According to the “perverse illogic” of racial profiling, “when people of color are targeted and searched at a grossly disproportionate rate, it is only logical that they will be arrested and incarcerated at a commensurately high rate,” thus not only confirming the stereotype of people of color as criminals, but also failing to target criminals who are not people of color.<sup>11</sup>

Lu-in Wang provides an extensive overview of the literature regarding racial stereotyping and its impact on people of color.<sup>12</sup> Wang explains how through

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<sup>10</sup> Shuford at 374.

<sup>11</sup> *Id.* at 378

<sup>12</sup> Lu-in Wang, *Race as Proxy: Situational Racism and Self-Fulfilling Stereotypes*, 53 DePaul L. Rev. 1013, 1013-1014 (2004),

stereotyping “[w]e often link color with undesirable personal qualities such as laziness, incompetence, and hostility.” But

[t]he association with perhaps the most far-reaching effects is that of race as a proxy for criminality and deviance, an association that carries into not just the criminal justice system through practices such as racial profiling in law enforcement, but also has implications for how people of color are treated in contexts as mundane as retail transactions and as consequential as health care. *Id.* at 1014-1015. References omitted.

The United States Supreme Court recognized the effects of racial stereotyping in 1879, holding that West Virginia’s exclusion of blacks from juries “because of their color . . . is practically a brand upon them, affixed by the law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others.” *Strauder v. West Virginia*, 100 U.S. 303, 308 (1879) (emphasis added).

Racial profiling can lead to outcomes that appear to confirm stereotypes already too prevalent in our society. If Kevin and Steven had objected to the actions of the CTCM guards who were hurrying them past the store windows and out of the mall, they would have risked being seen by the guards as fitting the stereotype of black people as “criminal” and “hostile.”<sup>13</sup> Indeed, the record shows that a security guard did interpret the actions of these young men as aggression, even when they were complying with his orders. He described their asking why he was bothering them when they weren’t doing anything wrong as “mouthing” him and when they left the Food Court he complained that they “. . . stood up, you know, with force . . .” Finding of Fact No. 50.

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<sup>13</sup> Devine, P.G. and A.J. Elliott (1995) “Are racial stereotypes really fading?” *Personality and Social Psychology Bulletin* 21 (11): 1139-1150, listing the top ten stereotypes of black Americans in 1995, reproduced at [http://en.wikipedia.org/wiki/Stereotypes\\_of\\_blacks](http://en.wikipedia.org/wiki/Stereotypes_of_blacks).

The stereotype of persons of color as dangerous also made an appearance in *K-Mart*. The plaintiff, Mr. Baram, realized that police were following him after he left the store. When he asked why he was being followed the officer, assuming that Mr. Baram was going to “jump me or something,” called for a back-up unit. 181 W.Va. at 474, 383 S.E. 2d at 278.

Applying the holding in *K-Mart* in public accommodations cases could require persons of color, and particularly male persons of color, to put themselves at risk in order to make a prima facie case of discrimination. (In the alternative, it could require them to read *K-Mart* before going shopping.)

Consider the application of *K-Mart* under different circumstances to see just how unreasonable the requirement of a retail purchase and direct refusal can be. An event was held at CTCM as part of the 16<sup>th</sup> annual Worldwide Commemoration of the Holocaust.<sup>14</sup> The event lasted from 10 a.m. until 5 p.m. and included the reading of the names of those killed in the Holocaust.

Under *K-Mart*, an anti-Semitic security guard could have singled out individuals who attended the Commemoration, followed them, harassed them, and kept them moving until they departed. The Commemoration attendees would have no recourse to the courts, for they could not establish a prima facie case unless they were willing to subject themselves to further harassment while they made, or attempted to make, a purchase and experienced a direct refusal and ejection from the mall.

Justice Miller, in his dissent in *K-Mart*, was right. West Virginians should not have to be subjected to “fire hoses or police dogs” or employees “blocking access to the store” in order to seek redress for blatant discrimination.

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<sup>14</sup> <http://www.wvgazette.com/collections?build=yes&id=200904210679>

## CONCLUSION

Amicus urges this honorable Court to affirm the ruling of the Administrative Law Judge. In addition, the Court should recognize racial profiling in the form of unwarranted surveillance, harassment, and humiliation based on race as elements of proof of a prima facie case by adopting the position of the dissent in *K-Mart*. West Virginians who have been subjected to discriminatory harassment and humiliation and whose avilment of the accommodations, advantages, facilities, privileges or services of places of public accommodation in this state has been constructively refused, withheld , or denied , will then have a remedy under the law.

Respectfully submitted,



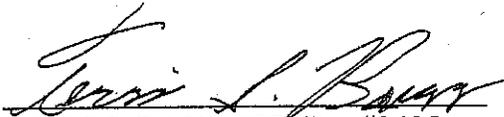
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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and correct copy of the foregoing *amicus curiae* brief was served upon counsel of record herein by placing true and correct copies thereof in properly addressed envelopes and by placing said envelopes in the regular course of the United States Mail on the 14th day of May, 2009, addressed as follows:

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