

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Nos. 34739 and 34740

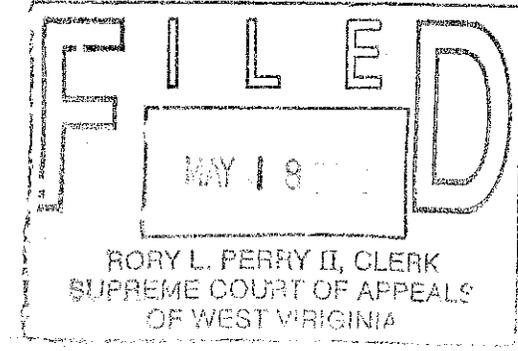
CHARLESTON TOWN CENTER
COMPANY, LP,

Appellant

v.

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

Appellees.



BRIEF OF AMICI CURIAE

**LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, THE MOUNTAIN
STATE BAR ASSOCIATION AND THE WEST VIRGINIA STATE CONFERENCE OF
THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED
PEOPLE**

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* Motion for admission *pro hac vice* pending

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I. INTEREST OF THE AMICI CURIAE

The Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee") is a tax-exempt, nonprofit civil rights organization that was founded in 1963 by the leaders of the American bar, at the request of President John F. Kennedy, in order to help defend the civil rights of minorities and the poor. Its Board of Trustees presently includes several past Presidents of the American Bar Association, past Attorneys General of the United States, law school deans and professors, and many of the nation's leading lawyers. Throughout its history, the Lawyers' Committee has been involved in cases examining the proper scope and coverage afforded to civil rights laws, including laws guaranteeing nondiscrimination in places of public accommodation. The Lawyers' Committee submits this brief in support of Appellees' argument that Charleston Town Center, a place of public accommodation, discriminated on the basis of race in violation of the West Virginia Human Rights Act.

The NAACP, West Virginia State Conference, is the state chapter of the national NAACP. The State Conference was formed to ensure the political, educational, social, and economic equality of rights of all persons and to eliminate racial hatred and discrimination. The State Conference seeks a society in which all individuals have equal rights and there is no racial hatred or racial discrimination. The State Conference is dedicated to the removal of all barriers of racial discrimination through democratic processes, the enactment and the enforcement of federal, state, and local laws securing civil rights, and taking all lawful action to secure the exercise of individual constitutional rights.

The Mountain State Bar Association is association of lawyers centered in West Virginia. It was formed approximately 75 years ago a group of black attorneys in Southern West Virginia under another name to provide an avenue for efforts to advance the cause of social justice and equality.

The organization was revitalized in 1972 as a multi-racial group of lawyers and friends of the legal community with the added mission of enhancing the number of minority lawyers practicing in West Virginia by providing fellowships to minority law students. It was formed in the early 1900s by a group of black attorneys in Southern West Virginia under another name to provide an avenue for efforts to advance the cause of social justice and equality. The organization was revitalized in 1972 as a multi-racial group of lawyers and friends of the legal community with the added mission of enhancing the number of minority lawyers practicing in West Virginia by providing fellowships to minority law students.

The Mountain State Bar seeks the advancement of the science of jurisprudence, the improvement of the administration of justice, and the preservation of the independence of the judiciary. The Mountain State Bar supports promotion of legislation that will improve the economic condition of all American citizens, regardless of race, sex, or creed in their efforts to secure a free uncontrolled use of the franchise guaranteed by the Constitution of the United States. Finally, the Mountain State Bar is dedicated to the protection of civil and political rights of the citizens and residents of the United States.

II. QUESTION PRESENTED

Did the West Virginia Human Relations Commission properly conclude that the Charleston Town Center Company discriminated on the basis of race in violation of the West Virginia Human Rights Act by denying to the African-American Complainants the facilities, accommodations, advantages, services and privileges of the common areas of the Mall?

III. STATEMENT OF THE CASE

Charleston Town Center Company, L.P., the entity that operates the Charleston Town Center Mall, (hereinafter sometimes referred to as "Town Center"), discriminated against Steven Bumpus and Kevin Streets, both young African American men, on the basis of race. On April 22,

2006, security guards, who were employed by the Mall, surveilled and followed the young men in the Mall, evicted them from the food court, intimidated the young men by exhorting them to keep moving when they stopped to window shop, and later escorted them out of the Mall. While the young men waited on the sidewalk to be picked up by Cynthia Bumpus, Steven Bumpus' mother, after eating at a restaurant connected to the Mall, the security guards attempted to have them ejected from the sidewalk and then gave distorted and inaccurate information to cause them to be arrested by the Charleston Police Department. All charges against the young men were later dropped without further proceedings.

This mistreatment by the Mall's security guards was not provoked. White patrons, including other youths, were not treated in such a hostile manner, were not told to leave the food court or the Mall, and were not arrested for standing on the sidewalk.

The parents of Mr. Bumpus and the grandmother of Mr. Streets filed administrative complaints on behalf of the minors with the West Virginia Human Rights Commission alleging discrimination in a place of public accommodation. The West Virginia Human Rights Commission issued letters of determination, finding probable cause to believe that the Charleston Town Center Mall violated the West Virginia Human Rights Act, W. Va. Code § 5-11-9(6)(A). The matter was set for public hearing in compliance with W. Va. Code § 5-11-10.

Administrative Law Judge Robert B. Wilson heard the case in December 2007. Following the three-day hearing, both parties submitted Proposed Findings of Fact and Conclusions of Law. On May 23, 2008, ALJ Wilson issued a Final Decision in each case, finding that Charleston Town Center discriminated against each Complainant in violation of the West Virginia Human Rights Act. The ALJ ordered the Mall to pay \$5,000 in damages to each of the Complainants for "humiliation, embarrassment, emotional distress and loss of personal

dignity.” Final Decision at 34. In addition to ordering the Mall to cease and desist from engaging in unlawful discriminatory practices, the ALJ ordered the Mall to “establish a plan to implement training of its contracted mall security personnel to refrain from engaging in racial profiling and to include sensitivity training regarding individuals belonging to classes protected under the West Virginia Human Rights Act.” Final Decision at 33-34.

On July 28, 2008, Charleston Town Center filed a Notice of Appeal and a Petition in Support of Appeal of the Final Decision of the Administrative Law Judge. The Human Rights Commission conducted an administrative review, and in the Final Order entered on November 26, 2008, the Commissioners of the West Virginia Human Rights Commission upheld and adopted the ALJ’s Final Decisions. Charleston Town Center now appeals from the West Virginia Human Rights Commission’s Final Order in both of these cases.

Amici curiae submit this brief in support of Appellees, Steven and Cynthia Bumpus, on behalf of Steven M. Bumpus; August Robinson, on behalf of Kevin Streets; and the West Virginia Human Rights Commission.

IV. STANDARD OF REVIEW

While questions of law are subject to *de novo* review, *Colgan Air, Inc. v. West Virginia Human Rights Commission*, 221 W. Va. 588, 595, 656 S.E.2d 33, 40 (2007), the scope of review for factual determinations is limited. Findings of fact made by the trier of fact should be sustained where the findings are supported by substantial evidence and are not clearly wrong. *Holbrook v. Poole Assocs., Inc.*, 184 W. Va. 428, 400 S.E.2d 863 (1990); *Bloss & Dillard, Inc. v. W. Va. Human Rights Comm'n*, 183 W. Va. 702, 398 S.E.2d 528 (1990); *W. Va. Human Rights Comm'n v. United Transp. Union, Local 655*, 167 W. Va. 282, S.E.2d 653 (1981). The limited scope of review regarding factual issues serves a dual purpose: protection of the integrity and autonomy of the administrative process and deference to an agency’s expertise and experience.

Consolo v. Fed. Maritime Comm'n, 383 U.S. 607 (1966). Applying this standard of review, the decisions of the Administrative Law Judge and the Human Rights Commission should be affirmed.

V. **ARGUMENT**

The Charleston Town Center Mall, a place of public accommodation, engaged in racial profiling in violation of the West Virginia Human Rights Act. Charleston Town Center refused, withheld, and denied the accommodations, advantages, facilities, privileges, and services of the Mall to Mr. Bumpus and Mr. Street on the basis of their race. The West Virginia Human Rights Act must be interpreted in a manner that provides meaningful protection against discrimination in a place of public accommodations. The analysis of *K-Mart Corp. v. West Virginia Human Rights Commission*, 181 W. Va. 473, 383 S.E.2d 277 (1989), should be rejected for its approval of blatant discrimination and failure to provide meaningful protection. *Amici curiae* respectfully request the Court to offer a standard that is consistent with the broad protections intended by the plain language of the West Virginia Human Rights Act.

A. **Appellant violated the plain language of the West Virginia Human Rights Act, which provides broad protection against discrimination in places of public accommodation.**

The West Virginia Human Rights Act prohibits discrimination by entities operating a place of public accommodation. The Human Rights Act makes it unlawful

[f]or any person being the owner, lessee, proprietor, manager, agent or employee of any place of public accommodation to . . . [r]efuse, withhold from or deny to any individual because of his or her race, . . . either directly or indirectly, any of the accommodations, advantages, facilities, privileges or services of the place of accommodations; . . .

West Virginia Code § 5-11-9(6). Under the plain language of the statute, Charleston Town Center's security guards' discriminatory conduct constituted prohibited activity. There is no dispute that the Charleston Town Center is a place of public accommodation or that the security

guards were employed by Charleston Town Center. Under the facts, it is clear that the security guards refused, withheld from, or denied to the Complainants because of their race, both directly and indirectly, the accommodations, advantages, facilities, privileges and services of the Mall.

Contrary to Appellant's contention, the Complainants were not merely subjected to "undue attention." Appellant's Br. at 12. The Complainants were followed and harassed by Mall security guards almost immediately upon entering the Mall. Final Decision at 2. The Complainants were denied the facilities and services of the food court when they were instructed to leave. *Id.* The security guards denied the Complainants the privileges of the common area of the Mall when the Complainants were told that they must keep moving and that they could not stop to window shop. *Id.* Clearly, the Complainants were denied the facilities, advantages, services, accommodations and privileges of the Mall when security guards summoned police officers and escorted them out of the Mall. *Id.* Later, while the Complainants—*who were minors at the time*¹—waited for a parent to pick them up, the security guards refused to even permit the Complainants to wait on a sidewalk outside of the Mall. *Id.*

Contrary to Appellant's assertions, the true public safety concern presented by this case arose when the security guards attempted to force juveniles off the premises without the knowledge or consent of their parents. Ultimately, the security guards summoned the police and caused the Complainants to be arrested for trespassing and obstructing, although these baseless charges were later dropped. *Id.* In short, it is clear that the Charleston Town Center denied public accommodations to the Complainants in violation of the plain language of the statute.

According to Town Center the security guards earlier had applied the "Code of Conduct" that prohibits congregation of four or more "juveniles," when they demanded that the Complainants leave the food court. Appellant's Br. at 4. If this is true, then the security guards were aware of the minor status of Mr. Bumpus and his colleagues.

B. The West Virginia Human Rights Act must be interpreted in a manner that provides meaningful protections against discrimination in places of public accommodation.

The analysis in *K-Mart* should be rejected because it fails to provide meaningful protection from discrimination in places of public accommodation. In *K-Mart*, a majority of the Supreme Court of Appeals approved profiling and harassment in a place of public accommodation. The *K-Mart* decision contravenes the plain language of the West Virginia Human Rights Act, which was clearly intended to provide broad protection against such blatant, discriminatory treatment. *Amici curiae* respectfully ask the Court to offer a standard that provides meaningful protections against discrimination in places of public accommodation, in keeping with the intent of the statute.

In *K-Mart*, store employees called police immediately upon seeing a family of Syrian nationals in the parking lot. 181 W. Va. at 474, 383 S.E.2d at 278. The store employees believed that the Baram family fit a profile of “gypsies” who were suspected of shoplifting. *Id.* While they shopped for gifts in the store, the Barams were followed closely by store employees and police. *Id.* After suffering this embarrassment, and humiliation, the family abandoned their shopping carts and left the store. *Id.*

Recognizing that the Barams were victims of “unreasonable surveillance, intimidation, and public embarrassment,” 181 W. Va. at 475, 383 S.E.2d at 279, the Human Rights Commission properly concluded that K-Mart had denied the Baramis “the advantages, privileges and services offered to other K-Mart customers.” *Id.* As the Human Rights Commission noted, “Discrimination in access to public accommodation may arise through subtleties of conduct just as surely as through openly expressed refusal to serve.” *Id.*

In overturning the findings of the Human Rights Commission in *K-Mart*, the appellate courts ignored the plain language of the statute, which offers broad protection against

discrimination in places of public accommodation. A majority of the Supreme Court of Appeals was not persuaded that there was a nexus between the Barams' national origin and the police summons. 181 W. Va. at 477, 383 S.E.2d at 281. The Court concluded, "while we do not condone merchants calling the police at the sight of a person or party it believes to be a possible thief, our holding today is based solely on the fact that we find no nexus between K-Mart's actions, while hasty and perhaps imprudent, and the Baram's national origin." 181 W. Va. at 479, 383 S.E.2d at 283. The court also held that the Barams did not suffer discrimination "when they were observed as possible shoplifters" due to their traditional Islamic dress. 181 W. Va. at 474, 383 S.E.2d at 278. In short, the majority refused to recognize that K-Mart's disparate treatment, intimidation, and humiliation of the Barams did, in fact, deny, both directly and indirectly, the accommodations, advantages, facilities, privileges or services of K-Mart on the basis of the Barams' race, color, or national origin.

In his strongly worded dissent, Justice Miller appropriately characterized K-Mart's actions as a "straightforward act of discrimination." 181 W. Va. at 479, 383 S.E.2d at 283. He noted the Barams were not simply "observed;" they were "embarrassed and humiliated." 181 W. Va. at 480, 383 S.E.2d at 284. This harassment caused the Barams to abandon any attempt to shop and to leave the store. *Id.* As Justice Miller remarked:

[A] powerful disincentive 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. The message is not even subtle, it is forceful and distinct: You are not welcome." As a consequence, the individual does not shop. When such an individual is within the protected class, . . . this is discrimination. . . . Here the tactic [is] intimidation.

181 W. Va. at 481, 383 S.E.2d at 285. It is not proper for a business to discriminate against a class of people because some members of that class acted improperly in the past. 181 W. Va. at 482, 383 S.E.2d at 286 (J. Miller, dissenting), *citing Marin Point, Ltd. v. Wolfson*, 640 P.2d 115,

125, *cert. denied*, 459 U.S. 858 (1982). An antidiscrimination statute does not foreclose a business enterprise from barring service to an individual on the basis of his own disruptive or unlawful conduct. *Id.* However, this “does not permit a business enterprise to exclude an entire class of individuals on the basis of a generalized prediction that the class ‘as a whole’ is more likely to commit misconduct than some other class of the public.” *Id.*

Amici curiae ask the Court to adopt a meaningful standard that is consistent with the plain language of the statute. The statutory language was clearly intended to prohibit other forms of invidious discrimination beyond the outright denial of access or service. The wording “either directly or indirectly” prohibits the use of intimidation, harassment, inferior service, or other discriminatory treatment to make members of a particular protected group feel unwelcome and thereby discourage their use of a place of public accommodation. The plain language guarantees equal access to not only the facilities and services, but also to the advantages and privileges of the public accommodation. Thus, the statute protects the ability to browse, window shop, stroll, and even the right to stop to socialize to the extent that such advantages and privileges are offered to others.

C. Even under the narrow rule established in *K-Mart*, the facts of this case establish that Appellants engaged in unlawful discrimination.

Setting aside the legal and public policy arguments against continued application of the *K-Mart* analysis, as a factual matter, Appellant’s reliance on *K-Mart* is misplaced. The facts of the instant case are clearly distinguishable from the facts in *K-Mart*.

Mr. Bumpus and Mr. Streets were subjected to more extreme discriminatory treatment than the complainants in *K-Mart*. In *K-Mart*, “[n]o one approached the Barams while shopping nor asked them to leave.” 181 W. Va. at 282, 383 S.E.2d at 478. By contrast, Mr. Bumpus and Mr. Streets were followed, confronted, told to keep moving, escorted to an exit, and ultimately

arrested. There can be little doubt that such treatment—i.e., escorting an individual off the premises—constitutes a denial of the accommodations, advantages, facilities, privileges or services of the Mall. Indeed, the plain language of the statute prohibits such action regardless of whether the denial of public accommodation occurs “directly or indirectly.” West Virginia Code § 5-11-9(6).

Additionally, while the Court found no nexus between the Complainants’ national origin and K-Mart’s actions in the *K-Mart* case, there is a clear nexus between the race of Mr. Bumpus and Mr. Streets and Charleston Town Center’s actions in this case. White juveniles were not subjected to similar treatment.

In short, this case must be distinguished from *K-Mart* due to critical differences in the type of public accommodation as well as the nature of the discriminatory treatment at issue.

D. The West Virginia Human Rights Act was intended to prohibit this form of racial profiling, harassment and intimidation in places of public accommodation.

The Human Rights Act “shall be liberally construed to accomplish its objectives and purposes.” W.V. Code § 5-11-15. The public policy objectives that inform the requisite “liberal[] constru[ction]” of the remainder of the Human Rights Act are stated in the statute:

It 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. Equal opportunity in the areas of employment and public accommodations is hereby declared to be a human right or civil right of all persons without regard to race, religion, color, national origin, ancestry, sex, age, blindness or disability. Equal opportunity in housing accommodations or real property is hereby declared to be a human right or civil right of all persons without regard to race, religion, color, national origin, ancestry, sex, blindness, disability or familial status.

The denial of these rights to properly qualified persons by reason of race, religion, color, national origin, ancestry, sex, age, blindness, disability or familial status is contrary to the principles of freedom and equality of opportunity and is destructive to a free and democratic society.

W.V. Code § 5-11-2. This “strong declaration of policy” did not exist in the statutory predecessor to the Human Rights Act. *Human Rights Comm'n v. Pauley*, 158 W. Va. 495, 499, 212 S.E.2d 77, 79 (1975), *overruled on other grounds*, *Human Rights Comm'n v. Pearlman Realty Agency*, 161 W. Va. 1, 239 S.E.2d 145 (1977).² Also absent from the earlier law were the Human Rights Act’s express declaration that “certain discriminatory practices [are] unlawful,” and any “meaningful measures for the enforcement” of the orders of the Human Rights Commission. *Id.* From this history, the Court concluded,

it is readily discernible that the Legislature . . . intended to and did provide the Commission the means with which to effectively enforce the law and meaningfully implement the legislative declaration of policy. 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.

Id.

Reading the “forceful language” of the legislatively-mandated policy objective and liberal construction provisions together, the Court has concluded in powerful terms that “every act of unlawful discrimination in employment, housing, or public accommodations is akin to an act of treason, undermining the very foundations of our democracy.” *Allen v. Human Rights Comm'n*, 174 W. Va. 139, 148, 324 S.E.2d 99, 108 (1984).

The “Court has consistently followed [the statutory] ‘liberal construction’ imperative in construing provisions of the Human Rights Act.” *Haynes v. Rhone-Poulenc, Inc.*, 206 W. Va. 18,

² *Pauley* was overruled on the narrow ground that it limited awards of compensatory damages in Human Rights Act cases to those instances in which “out of pocket expenses” could be proven. *Pearlman*, 161 W. Va. at 5, 239 S.E.2d at 147. Thus, if anything, the criticism of *Pauley* was that it was interpreting the Human Rights Act too narrowly. The discussion of legislative intent that we refer to here has been favorably cited by the Court even after *Pearlman*. See *Allen v. Human Rights Comm'n*, 174 W. Va. 139, 324 S.E.2d 99 (1984).

38, n. 18, 521 S.E.2d 331, 369, n.18 (1999), citing *Dobson v. Eastern Associated Coal Corp.*, 188 W. Va. 17, 422 S.E.2d 494 (1992); *Casteel v. Consolidation Coal Corp.*, 181 W. Va. 501, 383 S.E.2d 305 (1989); *Williamson v. Greene*, 200 W. Va. 421, 490 S.E.2d 23 (1997); *Skaggs v. Elk Run Coal Co.*, 198 W. Va. 51, 479 S.E.2d 561 (1996); *Barefoot v. Sundale Nursing Home*, 193 W. Va. 475, 457 S.E.2d 152 (1995); *Hanlon v. Chambers*, 195 W. Va. 99, 464 S.E.2d 741 (1995); *Holstein v. Norandex, Inc.*, 194 W. Va. 727, 461 S.E.2d 473 (1995); *Paxton v. Crabtree*, 184 W. Va. 237, 400 S.E.2d 245 (1990); *May Dep't Stores Co. v. W. Va. Human Rights Comm'n*, 191 W. Va. 470, 446 S.E.2d 692 (1994) (*per curiam*).

Thus, for example, the Court has employed the liberal construction requirement to determine that pregnant women are a protected class, notwithstanding that the Human Rights Act “does not specifically define pregnancy as being within the ambit of its provisions.” *Frank's Shoe Store v. Human Rights Comm'n*, 179 W. Va. 53, 365 S.E.2d 251 (1986) (reasoning that exclusion of pregnant women from the protected class would thwart the purpose of the statute and would be “outrageously unjust,” and that “such denial would not be acceptable by any enlightened standard.”). Similarly, the liberal construction requirement mandates that back-pay provisions of the Human Rights Act should not be “judicially restricted.” *Holbrook v. Poole Assoc., Inc.*, 184 W. Va. 428, 434, 400 S.E.2d 863, 869 (1990) (citing *West Virginia Inst. of Technology v. Human Rights Comm'n*, 181 W. Va. 525, 383 S.E.2d 490 (1989)). As another example, the Court has applied the liberal construction requirement in interpreting an ambiguous timing provision to provide the greatest possible amount of time for a claimant to file a claim. See *Mason v. City of Martinsburg*, 181 W. Va. 84, 85, 87, 380 S.E.2d 436, 437, 439 (1989). And the Court has “recognize[d] the necessity for the protection of the Human Rights Act to be extended to individuals who suffer collateral harm from discriminatory practices committed in

violation of the Act” in ruling that persons who do not themselves meet the age requirements for age discrimination nonetheless may be entitled to relief in an action brought by persons claiming age discrimination. *Bailey v. Norfolk & W. Ry. Co.*, 206 W. Va. 654, 670, 527 S.E.2d 516, 532 (1999).

We are not seeking for the Court to read the Human Rights Act as if it says something that it does not. Rather, the sweeping history of the Act and the Court’s own repeated interpretations point inextricably to the need to fulfill the broad purpose of the Act where doing so is consistent with the statutory language. Where a provision of the Act is deemed ambiguous, it must be construed liberally. *See Mason*, 181 W. Va. at 85, 380 S.E.2d 436 at 437 (principles of broad and liberal interpretation of Human Rights Act provide legislative intent for purposes of interpreting ambiguous provisions.). Thus, a favored interpretation is one that “best promotes the purpose of the statute.” *Conrad v. Szabo*, 198 W. Va. 362, 377, 480 S.E.2d 801 (1996); *see also Holstein*, 194 W. Va. at 731, 461 S.E.2d 473 at 477 (the Human Rights Act “should be so read and applied as to make it accord with the spirit, purposes and objects of the general system of law of which it is intended to form a part”) (citation omitted).

That said, *amici curiae* do not believe the statute, read as a whole, is ambiguous as it pertains to the case at hand. As noted above, Section 5-11-9(6) of the Human Rights Act provides:

It shall be an unlawful discriminatory practice . . .

(6) For any person being the owner, lessee, proprietor, manager, superintendent, agent or employee of any place of public accommodations to:

(A) Refuse, 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;

(B) Publish, circulate, issue, display, post or mail, either directly or indirectly, any written or printed communication, notice or advertisement to the effect that any of the accommodations, advantages, facilities, privileges or services of any such place shall be refused, withheld from or denied to any individual on account of race, religion, color, national origin, ancestry, sex, age, blindness or disability, or that the patronage or custom thereof of any individual, belonging to or purporting to be of any particular race, religion, color, national origin, ancestry, sex or age, or who is blind or disabled, is unwelcome, objectionable, not acceptable, undesired or not solicited;

Thus, the things that cannot be discriminatorily denied—directly or indirectly, by any person including an agent or employee of the place of public accommodation—are “accommodations, advantages, facilities, privileges or services” of the place of public accommodations. The statute does not define these terms, nor did the Court interpret the terms when it decided *K-Mart*. In fact, the Court did not evaluate whether *any* of these things, other than “services,” had been directly or indirectly denied, concluding merely that because the Syrian family had not made any purchases, it had not been denied “any services or amenities as required by W. Va. Code § 5-11-9.” *K-Mart*, 181 W. Va. at 282, 383 S.E.2d at 478.

Discriminatory denial of services is, arguably, the least subtle, and easiest to prove, type of discrimination prohibited by the Human Rights Act. The *K-Mart* Court expressed concern with the difficulty of proving “intimidation,” but the Court did not explain why intimidation by store employees could not result directly or indirectly in denial of “accommodations, advantages, facilities, privileges or services” of places of public accommodations. *Id.* This failure seems anomalous in light of the expansive views and careful statutory analysis of the Human Rights Act in the litany of prior cases described above. Webster’s defines “intimidate” to mean “to compel or deter by or as if by threats.” MERRIAM WEBSTER’S COLLEGIATE DICTIONARY 656 (11th ed. 2003). If someone is “compelled” not to use a place of public accommodations “by ...

threats,” that would be a “direct” denial of the public accommodations, while if they are “deterred” from such use “as if by threats,” that would be an indirect denial.

The *K-Mart* Court’s failure to explain why intimidation by store employees could not result directly or indirectly in denial of “accommodations, advantages, facilities, privileges or services” of places of public accommodations also seems contrary to the Court’s general openness in recognizing the probative value of various forms of evidence in discrimination cases, include circumstantial and inferential evidence. See, e.g., *Fourco Glass Co. v. Human Rights Comm’n*, 179 W. Va. 291, 293, 367 S.E.2d 760, 762 (1988) (“In general, a *prima facie* case of discrimination against a member of a protected class can be proven by direct or circumstantial evidence, or by inferential evidence, or by a combination of evidence.”). Most importantly, as long as intimidation is not independently actionable, the message to those of discriminatory intent will be that West Virginia tolerates discrimination, so long as it is conducted in sufficiently subtle fashion. This, too, seems contrary to the Court’s thinking, as expressed in the context of employer retaliation cases:

In a case premised on an alleged violation of a statute purposed to counter retaliation or other discrimination, we must keep in mind that those engaged in such conduct rarely broadcast their intentions to the world. Rather, employers who practice retaliation may be expected to seek to avoid detection, and it is hardly to be supposed that they will not try to accomplish their aims by subtle rather than obvious methods.

Fravel v. Sole’s Elec. Co., 218 W. Va. 177, 178-179, 624 S.E.2d 524, 525-526 (2005), quoting *Powell v. Wyoming Cablevision, Inc.*, 184 W. Va. 700, 403 S.E.2d 717 (1991). Thus, a standard based solely on whether something such as a purchase occurred is far too blunt an instrument to accurately measure discrimination. A more refined contextual analysis is both necessary and appropriate.

As the precedent discussed above indicates, the place to begin in crafting such an analysis is with the statute itself, including related statutory text that may show legislative intent.

In defining the term “public accommodations,” the statute provides:

The term “place of public accommodations” means any establishment or person, as defined herein, including the state, or any political or civil subdivision thereof, which offers its services, goods, facilities or accommodations to the general public, but shall not include any accommodations which are in their nature private.

W.V. Code 5-11-3(i). We respectfully submit that the key term in this definition is “offers.” The Legislature was not focused on “sales” or “purchases.” Nor is there any reason why it should have been. A civil rights law that focused solely on the consummation of a transaction would allow discriminatory practices that could prevent a consummation from ever occurring. *Cf. Williams v. Staples, Inc.*, 372 F. 3d 662 (4th Cir. 2004) (discriminatory action to thwart a victim from making a commercial purchase transaction, such as refusing to accept a check from an African American to pay for goods offered in a store, violates Section 1981); *Christian v. Wal-Mart Stores, Inc.*, 252 F. 3d 862, 873 (6th Cir. 2001), quoting *Watson v. Fraternal Order of Eagles*, 915 F. 2d 235, 243 (6th Cir. 1990) (“[U]nder § 1981 a plaintiff need not actually be refused service by a private club because such a standard would allow ‘commercial establishments [to] avoid liability merely by refusing minorities entrance to the establishment before they had a chance to order.’”). The plain language of the Human Rights Act makes it clear that the Legislature intended to provide broad protection.

As described above, this Court has long held that the provisions of the Human Rights Act must be read together, and that in doing so the Court may look to one part of the statute to help determine, consistent with the liberal construction requirement, how best to interpret another part. Indeed, as the Court said in *Currey v. Human Rights Comm’n*, 166 W. Va. 163, 165, 273 S.E.2d

77, 79 (1980), quoting *Fruehauf Corp. v. Huntington Moving & Storage Co.*, 159 W. Va. 14, 217 S.E.2d 907 (1975), Syllabus Point 5:

The Human Rights Act must be read in *pari materia*.

Statutes which relate to the same persons or things, or to the same class of persons or things, or statutes which have a common purpose will be regarded in *pari materia* to assure recognition and implementation of the legislative intent. Accordingly, a court should not limit its consideration to any single part, provision, section, sentence, phrase or word, but rather review the act or statute in its entirety to ascertain legislative intent properly.

Another important marker of legislative intent is found in the second part of the public accommodations provision of the Human Rights Act. While that provision applies to written communications, it is notable that what cannot be communicated is anything that would make a person in a protected class “unwelcome, objectionable, not acceptable, undesired or not solicited.” W.V. Code 5-11-9(6)(b).

This has two significant connotations. First, it shows in clear terms the legislative intent that discrimination at a place of public accommodation can occur by something other than an outright denial of access—namely, that more subtle indications that a person is “unwelcome” also can constitute discrimination.³ We respectfully submit that such indications that a person is unwelcome can include both verbal and non-verbal actions, and that both occurred in this case. This statutory interpretation is strongly supported by Section 5-11-9(6)(a)’s express recognition that discrimination can be “indirect” in nature.

³ As the court stated in *Solomon v. Waffle House, Inc.*, 365 F. Supp. 2d 1312, 1324 (N.D. Ga. 2004), “in light of the clear illegality of outright refusal to serve, a restaurant which wishes to discourage minority customers must resort to more subtle efforts to dissuade.” See also *McCaleb v. Pizza Hut of America, Inc.*, 28 F. Supp. 2d 1043, 1047 (N.D. Ill. 1998) (holding that a claim for violation of Section 1981 had been adequately stated even though plaintiffs had been served at a restaurant and had not been asked to leave: “The treatment plaintiffs received, however, was a clear message that they were not welcome in the restaurant.”).

Second, the language of Section 5-11-9(6)(b) shows that a place of public accommodations can discriminate by “not solicit[ing]” members of a protected class. As with the use of the word “offer” in the defined term “public accommodations,” this shows the legislative intent to bar discrimination that occurs before there is a sale or purchase. Indeed, the legislature clearly intended to bar discrimination that could occur before the person in the protected class even arrived at the place of public accommodation, i.e., in the course of public solicitation, such as an advertisement.⁴ Thus, the Human Rights Act, when read as a whole, and subjected to the required liberal construction, bars discrimination that occurs at any point in the interaction between the place of public accommodation and members of protected classes, not just at the culmination of the interaction.

Moreover, the statutory references to solicitations and offers help to pinpoint the nature of the “accommodations, advantages, facilities, privileges or services” offered by a mall such as Charleston Town Center. The mall itself is not in the business of retail sales; its tenants make such sales, but the mall does not. So the apparent *K-Mart* standard of requiring a “purchase” is unenforceable in the mall context, notwithstanding that no one disputes that Charleston Town Center is a place of public accommodations. A statute cannot be read in a manner that deprives the law of meaning. *See, e.g., Davis Mem’l Hosp. v. State Tax Comm’r*, 222 W. Va. 677, 671 S.E.2d 682, 691 (2008). Rather, the statutory context, and the use of terms like “offer” and “solicit,” make it clear that one must look to the *nature* of the place of public accommodation, and what it holds itself out as offering to the public, to determine whether it has denied such “accommodations, advantages, facilities, privileges or services.”

⁴ The record shows that Town Center’s solicitation of customers included advertising campaigns aimed specifically at teenagers. R. Vol. I at 322-24.

A mall's economic interest is primarily that of a landlord. It solicits tenants and collects rents from them. But the tenants generally are retail establishments, and so the rental price they are willing to pay will depend in large part on their perception of the customer traffic that a mall will bring. Thus, malls such as Town Center trade on their ability to attract potential customers to their tenants. To this end, they keep the premises clean, offer free convenience facilities such as restrooms and shelter from the weather, provide benches to rest, and take steps to make the premises attractive. They may also engage in advertising (and did so in this case), but advertising is not the only form of solicitation. The mere existence of a mall, with its attractive selection of stores in close proximity, is in itself a solicitation to the general public.

Thus, the "accommodations, advantages, facilities, privileges or services" offered by a mall such as Town Center are, in a nutshell, the use and enjoyment of the hallways and open spaces between the stores. By offering the use and enjoyment of its hallways and open spaces, Town Center solicits the general public to enter the mall, with the hope—but not the certainty—that shoppers will be enticed to buy the products offered by retailers.

Town Center was built, as the name implies, in the center of the downtown, just west of the former primary shopping area, and it opened in 1985. After it opened, the former shopping district centered around Capitol Street continued to survive, but hardly thrived. The older shopping district was forced to begin its transition to boutiques and professional offices. Town Center Mall became the center of shopping commerce, and a center of public life in downtown Charleston.

Thus, denial of use, or intimidation from the use of Charleston Town Center Mall is tantamount to denial of access to "Main Street" itself. Intimidation from the use of the town

square cannot be allowed on a discriminatory basis, and the West Virginia' Human Rights Act does not permit such.

It is well established that "humiliation, embarrassment, emotional and mental distress" resulting from discrimination are actionable under the Human Rights Act, and indeed may serve as the basis for an award of damages. *Pearlman Realty Agency*, 161 W. Va. at 1, 239 S.E.2d at 145. That was the finding, and the basis for the award of damages, in the instant case. R. Vol. I at 55, 123.

If *K-Mart* is given effect, and a purchase is required for a showing of discrimination in a place of public accommodations, other discriminatory actions or inactions that cause "humiliation, embarrassment, emotional and mental distress" will not be actionable under the public accommodation provision of the Human Rights Act. This will create a conflict among the various types of cases under the Human Rights Act, which would contravene the Court's decisions that the statute must be read as a whole, as described above. That conflict should be resolved, under the liberal construction requirement, in favor of permitting discrimination claims for any direct or indirect denial of public accommodations that result in "humiliation, embarrassment, emotional and mental distress"—not just those that involve a purchase.

We do not ask the Court to interpret the law in a way that would prohibit places of public accommodation from adopting reasonable guidelines to maintain order and safety, but such guidelines cannot shield discriminatory behavior. Charleston Town Center's references to its "Code of Conduct" are indefensible *post hoc* attempts to justify discriminatory conduct. Mr. Bumpus and his colleagues were never told that the security guards were applying the rule against congregation of four or more juveniles. R. Vol. III at 80-81, Final Decision at 6. If the young men had been aware of the issue, they would have had the option of dispersing their group

to fewer than four and continuing in the use and enjoyment of the mall, just like any other member of the public. But they were not informed of any such rule. Instead, they were asked to leave. They were unwelcome.

E. Persuasive authority from other jurisdictions confirms that individuals are entitled to be treated with dignity and respect in places of public accommodations, regardless of race.

The underlying thrust of the Human Rights Act is that human beings should be treated with dignity and respect in places of public accommodations, regardless of race. Anything less fails to “stamp out the evil of unlawful discrimination which is symptomatic of unbridled bigotry,” *Pauley*, 158 W. Va. at 495, 212 S.E.2d at 77, and thus “undermin[es] the very foundations of our democracy.” *Allen*, 174 W. Va. at 139, 324 S.E.2d at 99. The broad policy issues at stake here are not, of course, unique to West Virginia. Indeed, the Court’s case law on discrimination is replete with favorable citations to decisions from other jurisdictions. In fact, the Court has been willing to take pro-civil rights stances that move beyond the thinking of other states. *See, e.g., Pearlman Realty Agency*, 161 W. Va. at 5, 239 S.E.2d at 147-48 (1977) (“Many courts confronted with the same situation have come to the opposite conclusion and have disallowed administrative agency awards for humiliation, mental pain and suffering.”) (citations omitted). Accordingly, we offer a sampling of cases from beyond West Virginia for this Court’s consideration.

In New Jersey, courts have construed their own public accommodations statute much as we advocate here: “an establishment which caters to the public, and by advertising and other forms of invitation induces patronage generally, cannot refuse to deal with members of the public who have accepted the invitation, because of their race, creed, color, national origin or ancestry.” *Evans v. Ross*, 57 N.J. Super. 223, 231, 154 A.2d 441, 445, *cert. denied*, 31 N.J. 292,

157 A.2d 362 (1959).⁵ In *Evans*, the court noted that once “a proprietor extends his invitation to the public he must treat all members of the public alike.” 57 N.J. Super. at 231, 154 A.2d at 445. The *Evans* decision remains relevant today, and indeed has been applied, in striking parallel to the plain language of Section 5-11-9(b) of the West Virginia Human Rights Act, to reach the conclusion that a member of a protected class may not be told he or she is “not welcome” at a place of public accommodations. See *Franek v. Tomahawk Lake Resort*, 333 N.J. Super. 206, 216 (App. Div. 2000) (“It is unquestionably a violation of [New Jersey’s Law Against Discrimination] for the owner or operator of a public accommodation to tell a person, either directly or indirectly, that his or her patronage is not welcome because of a trait or condition which the [Law Against Discrimination] protects from discriminatory action, even though use of the facility on the particular occasion is not denied.” (citing *Evans*)).

In Oregon, “the statutory prohibition against ‘distinction, discrimination or restriction’ on the basis of race has been interpreted to encompass more than the outright denial of service. For example, it also proscribes serving customers of one race in a manner different from those of another race.” *King v. Greyhound Lines, Inc.*, 61 Or. App. 197, 202 (1982). Thus, “the chief harm resulting from the practice of discrimination by establishments serving the general public is not the monetary loss of a commercial transaction or the inconvenience of limited access but, rather, the greater evil of unequal treatment, which is the injury to an individual’s sense of self-worth and personal integrity.” *Id.* at 203. See also *Craig v. US Bancorp*, 2004 U.S. Dist. LEXIS 6987, at *12 (D. Or. Apr. 14, 2004) (applying the same Oregon law).

⁵ The Court has previously looked “with approval” to interpretations of the New Jersey courts on civil rights matters. See *Pearlman Realty Agency*, 161 W. Va. at 3, 239 S.E.2d at 147, citing *Zahorian v. Russell Fitt Real Estate Agency*, 62 N.J. 399, 301 A.2d 754 (1973); *Pauley*, citing *Jackson v. Concord Company*, 54 N.J. 113, 253 A.2d 793 (1969).

In *Creative Dining v. Dickerson*, 2000 Del. Super. LEXIS 352, at *1 (Del. Super. Ct. Aug. 23, 2000), the Delaware court interpreted a statutory provision that is very similar to the public accommodations provision of the Human Rights Act.⁶ In this case, the restaurant did not refuse to seat the African-American plaintiffs, but seated Caucasian patrons in line behind the plaintiffs first, and seated the plaintiffs at a table where they had to wait for dirty dishes to be cleared, while continuing to seat Caucasian patrons at cleared tables. *Id.* at *3-4. This difference in treatment was considered to be discrimination in provision of public accommodations. A similar result was reached in Pennsylvania. See *Williams v. Ramada Inn*, 2007 U.S. Dist. LEXIS 56739, at *1 (W.D. Pa. Aug. 3, 2007) (requiring African-American patrons to show identification before they are given menus or are seated, when Caucasian patrons were not required to show identification, is actionable under, *inter alia*, the Pennsylvania public accommodations law). And in *Perry v. Burger King Corp.*, 924 F. Supp. 548, 552 (S.D.N.Y., 1996), a federal district court rejected the argument that a black customer could be denied the use of a restroom made available to white customers just because he had completed his meal at the restaurant. The court held that the restaurant could not refuse to allow plaintiff to use the bathroom when the restaurant allowed whites to use the bathroom. *Id.* at 552.

In *Jackson v. Superior Court*, 30 Cal. App. 4th 936 (Cal. App. 1st Dist. 1994), a California court concluded that the Unruh Civil Rights Act (Cal. Civ. Code, § 51) applied to an African-American investment advisor even though he did not seek the services of the bank as a customer. The court noted that:

⁶ The Delaware Code provision provides: "No person being the owner, lessee, proprietor, manager, superintendent, agent or employee of any place of public accommodation, shall directly or indirectly refuse, withhold from or deny to any person, on account of race, age, marital status, creed, color, sex, handicap or national origin, any of the accommodations, facilities, advantages or privileges thereof...." 6 Del. C. § 4504.

[A] bank ordinarily allows persons to accompany its customers and help them pursue their banking business. When it refuses to allow an African American this courtesy because of his or her race, the bank denies that person the “full and equal accommodations, advantages, privileges or services” of the bank. . . . We conclude that petitioner was pursuing an accommodation, advantage or privilege of the bank within the meaning of the Unruh Civil Rights Act when he accompanied his clients to the bank to aid them in transacting their business and that he has stated a cause of action under the Unruh Civil Rights Act by alleging that he was discriminated against in the exercise of this accommodation because of his race.

Id. at 941-42. Similarly, in Hawaii, discrimination can occur even where access to the public accommodation is granted. *See State v. Hoshijo*, 102 Haw. 307 (Haw. 2003) (Hawaii Supreme Court ruled that racial slurs by a team manager directed at a fan during a basketball game, without any denial of access, violated Hawaii law against public accommodations discrimination).

Each of the cases described above interpret statutes intended to end discrimination in places of public accommodation. As these cases show, the interpretation we urge for the Human Rights Act is supported by persuasive authority from other jurisdictions. Since, as shown above, that interpretation also is supported by the plain language of the statute as and this Court’s own decisions, the decision below should be affirmed.

F. Summary

Charleston Town Center denied to Mr. Bumpus and Mr. Streets, both directly and indirectly, the accommodations, advantages, facilities, privileges, and services of the mall, on the basis of race, in violation of the West Virginia Human Rights Act. *Amici curiae* respectfully request that the Court interpret the Human Rights Act in *pari materia* to conclude that:

(1) discrimination can occur with the direct or indirect denial of the “accommodations, advantages, facilities, privileges or services” of a place of public accommodations;

(2) a determination of whether there has been a denial of the “accommodations, advantages, facilities, privileges or services” of a place of public accommodations must begin with a determination of the type of “accommodations, advantages, facilities, privileges or services” that the place of public accommodations offers to the public, and upon which it expressly or implicitly solicits the public to enter its premises;

(3) indirect denials of the “accommodations, advantages, facilities, privileges or services” of a place of public accommodations are not limited to denials of access and do not require consummation of a transaction, but rather can include actions or inactions that make members of a protected class “unwelcome, objectionable, not acceptable, undesired or not solicited,” including intimidation and other actions or inactions that cause a member of a protected class “humiliation, embarrassment, emotional and mental distress”;

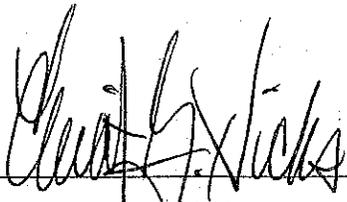
(4) discrimination can occur at any point in the interaction between a place of public accommodation and a member of a protected class; and

(5) under this standard, and the facts of this case, as described here and in more detail in Complainant’s brief, the decision of the Human Rights Commission should be allowed to stand.

VI. CONCLUSION

For the reasons set forth above, *amici curiae* respectfully requests that this Court affirm the Human Rights Commission’s Final Order.

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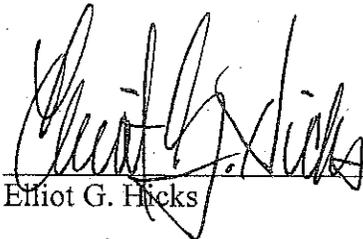
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CERTIFICATE OF SERVICE

Copies of the foregoing have been served on the following counsel of record by placing a copy in first class mail properly addressed to same:

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