No. 2-19-0362
IN THE APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

Hobby Lobby Stores, Inc., *Petitioner-Appellant,* v. Meggan Sommerville and the State of Illinois Human Rights Commission, *Respondents-Appellees.*	Appeal from the Illinois Human Rights Commission CHARGE Nos. 2011CN2993 and 2011CP2994 Hon. Robert J. Mangan, Presiding

BRIEF *AMICI CURIAE* OF LAMBDA LEGAL DEFENSE AND FUND, INC. AND EQUALITY ILLINOIS IN SUPPORT OF RESPONDENTS-APPELLEES

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POINTS AND AUTHORITIES

INTEREST OF AMICI CURIAE

Amici Curiae are organizations that represent the interests of lesbian, gay, bisexual and transgender ("LGBT") people. *Amici* respectfully tender this brief to provide the Court with information about the medical consensus concerning gender identity, and the legal landscape in Illinois and around the nation concerning protections against discrimination for transgender employees.

Lambda Legal Defense and Education Fund, Inc. ("Lambda Legal") is the nation's oldest and largest legal organization working for full recognition of the civil rights of LGBT people and everyone living with HIV through impact litigation, education, and policy advocacy. Lambda Legal has served as counsel of record or *amicus curiae* in landmark cases regarding the rights of LGBT people and people living with HIV. See, e.g., *Obergefell v. Hodges*, 576 U.S. 644 (2015); *United States v. Windsor*, 570 U.S. 744 (2013); *Lawrence v. Texas*, 539 U.S. 558 (2003); *Bragdon v. Abbott*, 524 U.S. 624 (1998); *Romer v. Evans*, 517 U.S. 620 (1996). More specifically, Lambda Legal has appeared as party counsel or *amicus curiae* in numerous cases addressing the application of employment protections to transgender workers. See, e.g., *Bostock v. Clayton Cty.*, 140 S. Ct. 1731 (2020); *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011); *Kastl v. Maricopa Cty. Cmty. Coll. Dist.*, 325 F. App'x 492 (9th Cir. 2009); *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061 (9th Cir. 2002) (en banc); *Roberts v. Clark Cty. Sch. Dist.*, 215 F. Supp. 3d 1001 (D. Nev. 2016); *Hall v. BNSF Ry. Co., No. C13-2160*, 2014 WL 4719007 (W.D. Wash. Sept. 22, 2014); *TerVeer v. Billington*, 34 F. Supp. 3d 100 (D.D.C. 2014); *Lopez v. River Oaks Imaging & Diagnostic Grp Inc.*, 542 F. Supp. 2d 653 (S.D. Tex.

2008). The issue before the Court is of acute concern to Lambda Legal and the community it represents, which stands to be directly affected by the Court's ruling.

Equality Illinois was founded in 1991 as the Illinois Federation for Human Rights to secure, protect and defend the basic civil rights of LGBTQ Illinoisans. Equality Illinois's work has contributed to measurable improvements across Illinois by advancing pro-LGBTQ policies, increasing the representation of LGBTQ persons on key boards and commissions, and unifying civically-powerful networks of LGBTQ and allied community groups. Equality Illinois has a particular interest in working for the full inclusion of LGBTQ individuals in the workplace because economic security and equity are the foundation most necessary for activating the Illinois LGBTQ community to work for equality for all in Illinois. Among the most prominent accomplishments of Equality Illinois was the organization's benchmark victory in 2005 in securing passage of an amendment to adding sexual orientation and gender identity to the Illinois Human Rights Act ("HRA"), which prohibits discrimination based on sexual orientation and gender identity in housing, employment, and public accommodations. The proper interpretation of that amendment, and the HRA generally, is at issue in this litigation.

SUMMARY OF ARGUMENT

The Illinois Human Rights Commission ("Commission") correctly determined that Hobby Lobby discriminated based on gender identity against Meggan Sommerville, a woman who has worked as an employee in Hobby Lobby's framing department for over 20 years, by denying her the use of the women's restroom. Hobby Lobby claims that it is justified in excluding Ms. Sommerville because she is transgender, relying upon a series of arguments that find no support under Illinois law. First, Hobby Lobby claims

that Ms. Sommerville is actually "an employee of the male sex," and that she therefore was not eligible to use the women's restroom—despite undisputed record evidence and factual findings that Ms. Sommerville is a woman. *Br. of Petitioner-Appellant* ("App. Br.") at 12, Sept. 13, 2019. To reach this conclusion, Hobby Lobby invents a definition of "sex" as referring exclusively to reproductive organs and structures, citing as authority solely the less applicable of two alternative Merriam-Webster dictionary definitions. App. Br. p. 13.

Hobby Lobby's denial that Ms. Sommerville is a woman ignores uncontroverted record evidence, contradicts the consensus view of the medical community about the nature of sex and gender identity, and fails as a matter of Illinois and federal law. The Commission found that Ms. Sommerville has a female gender identity. She corrected her Illinois driver's license to reflect that she is female, corrected her social security card, legally changed her name to Meggan Renee Sommerville, and documented that she is a woman with a letter from a medical provider. Illinois Human Rights Comm'n, Supplemental Recommended Order and Decision ("Order and Decision"), April 10, 2019, p. 3 ¶ 12. Hobby Lobby does not dispute these findings or the evidence that underlies them.

The consensus view of medical professionals is that a person's gender identity, which is a person's innate sense of oneself as belonging to a particular gender, is the primary determinant of a person's sex. Everyone has a gender identity. For most people, a person's gender identity aligns with the person's birth-assigned sex. For transgender people, however, the person's gender identity is incongruent with the person's sex assigned at birth. Many transgender people experience clinical distress as a result, and

undergo treatment, which can include gender-affirming health care procedures, counseling, social transition, and hormone therapy, among other life-saving interventions designed to bring a person's life into alignment with the person's gender identity. But each person's health care needs and treatment plan are distinct and individualized. Many transgender people fully transition without undergoing certain treatments available to or appropriate for others, including with respect to certain genital surgeries. The record here shows that Ms. Sommerville is a woman. She has a female gender identity. She also has undertaken numerous medical and legal steps to affirm her gender identity, including medical treatment and changing her name and sex designation on identity documents.

Illinois law categorically rejects Hobby Lobby's argument that a person's sex may be determined solely by reference to the person's anatomy. To the contrary, in Illinois, a person's legal sex is determined by the person's gender identity. Illinois permits transgender Illinoisans to correct the sex designation on their identity documents, such as a driver's license, regardless of anatomy. Transgender Illinoisans who were born in Illinois now may correct their original birth certificates without any requirement that the applicant undergo genital surgery. Thus, as a matter of Illinois law, too, Ms. Sommerville is a woman.

Moreover, under federal law, the Supreme Court recently ruled in *Bostock*, 140 S. Ct. 1731, that discrimination against a transgender employee based on her gender identity or transgender status constitutes a form of sex discrimination under Title VII of the Federal Civil Rights Act of 1964 (42 U.S.C. § 2000e, *et seq*.). Although the Court did not address questions related to bathroom access and other sex-segregated facilities, which were not before it, the Court's reasoning makes clear that Hobby Lobby's justifications

for excluding Ms. Sommerville from the women's restroom would fail as a matter of federal law because they turn upon her transgender status and assumptions about her anatomy, both of which Title VII forbids.

Moreover, even by reference to Merriam-Webster alone, the definition of "sex" is not nearly as cramped as Hobby Lobby suggests. Notably, Hobby Lobby cites only section 1(a), the first of Merriam-Webster's four alternative definitions of "sex," which is not even specific to human beings: "either of the two major forms of individuals that occur in many species and that are distinguished respectively as female or male especially on the basis of their reproductive organs and structures." App. Br. p. 13-14; *Sex*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/sex (last visited Aug. 4, 2020). Hobby Lobby omits the more relevant alternative definition, section 1(b), which rejects anatomy as the sole determinant of sex: "the sum of the structural, functional, and sometimes behavioral characteristics of organisms that distinguish males and females." *Id.* Hobby Lobby failed to mention this alternative definition even though Merriam-Webster illustrates this section with a quote from an article surveying transgender literature, making explicit its relevance here. *Id.*

The Commission was correct to hold that employers impermissibly discriminate against transgender employees under the HRA by excluding them from restrooms designated for members of their sex, and that such discrimination by Hobby Lobby also violates the HRA's prohibition against discrimination by public accommodations. Not only was the Commission's determination reasonable and consistent with the state's broader statutory scheme, it aligns with a vast body of precedent in other jurisdictions examining analogous prohibitions on discrimination based on sex and gender identity.

Hobby Lobby points for support to an outlier case from another jurisdiction, *Goins v. West Grp.*, 635 N.W.2d 717 (Minn. 2001), and characterizes contrary precedent elsewhere as "scarce." App. Br. p. 22. Nothing could be further from the truth. The Commission's determination that Hobby Lobby discriminated based on sex and gender identity by excluding a transgender woman from the women's restroom is consistent with decisions of an overwhelming number of state and federal courts, administrative agencies, and other adjudicative bodies.

Hobby Lobby also makes a belated claim that it has uncovered "new evidence" that the Administrative Law Judge ("ALJ") in this case was biased and should have recused himself. This "new evidence" consists solely of years-old references on websites to awards the ALJ received when he was in private practice for his advocacy in civil rights cases on behalf of gay plaintiffs. Hobby Lobby makes no suggestion that the ALJ possessed any knowledge, had any prior history, relationship, connection, or even expressed any prior opinions with respect to the parties or the facts at issue in this case. As a matter of law, a prior history of civil rights practice or advocacy does not warrant a judicial officer's recusal or disqualification from unrelated civil rights matters. This Court should reject Hobby Lobby's unwarranted attack on the ALJ's integrity.

ARGUMENT

I. HOBBY LOBBY'S PROPOSED DEFINITION OF "SEX" HAS NO MERIT; MS. SOMMERVILLE IS A WOMAN.

Modern scientific and medical understanding is that gender identity is a sex-related characteristic and that gender identity is the primary determinant of a person's sex. *See, e.g.*, *Adams v. Sch. Bd. of St. Johns Cty*., 318 F. Supp. 3d 1293, 1298 (M.D. Fla. 2018), *aff'd*, 968 F.3d 1286 (11th Cir. 2020); *Fabian v. Hosp. of Cent. Conn.*, 172 F.

Supp. 3d 509, 527 (D. Conn. 2016). The undisputed evidence is that Ms. Sommerville has a female gender identity. She has taken both legal and medical steps to affirm her gender identity, including correcting her Illinois driver's license, her social security card, legally changing her name, and documenting her course of medical treatment. Order and Decision, p. 3 ¶ 12. Hobby Lobby is both medically and legally wrong to characterize her as an employee of the "male sex," based simply on assumptions about her anatomy.

A. According to medical consensus, gender identity is the critical determinant of a person's sex.

Every person has a gender identity, which refers to one's inherent, internal sense of oneself as belonging to a particular gender. Am. Psychol. Ass'n, *Answers to Your Questions About Transgender People, Gender Identity, and Gender Expression* (2014), http://www.apa.org/topics/lgbt/transgender.pdf; Am. Psychol. Ass'n, *Key Terms and Concepts in Understanding Gender Diversity and Sexual Orientation Among Students* (2015), https://www.apa.org/pi/lgbt/programs/safe-supportive/lgbt/key-terms.pdf. The term gender identity is a well-established concept in medicine. Gender identity is innate, has biological underpinnings, and is firmly established in early life. Am. Psychol. Ass'n, *Guidelines for Psychological Practice with Transgender and Gender Nonconforming People*, 70 AM. PSYCHOLOGIST 832, 834 (2015) (hereinafter "Am. Psychol. Ass'n Guidelines").

A person's gender identity is not directly linked to, nor does it have a causal relationship with, the sex a person is assigned at birth. At birth, physicians generally make a determination about an infant's sex based solely on a cursory, visual assessment of external genitalia. For most people, all sex-related characteristics are congruent, and external organs are an accurate proxy for a person's gender. For transgender people,

however, the sense of one's self—one's gender identity—is different from the sex to which they were assigned at birth. *See* Am. Psychol. Ass'n Guidelines, *supra*, at 863; World Professional Ass'n for Transgender Health, *Standard of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People* 97 (2012), https://tinyurl.com/y39yvaa9 (hereinafter "Standards of Care"). Thus, a transgender woman is a woman who was described as male at birth on identity documents but has a female gender identity. A transgender man is a man who was described on identity documents as female at birth but has a male gender identity. For all people—including but not limited to transgender people—gender identity is the critical determinant of the person's sex. *See* Francine Russo, *Is There Something Unique About the Transgender Brain?*, SCI. AM. (Jan. 1, 2016), https://tinyurl.com/ob5our2; William Reiner, *To be Male or Female —That Is the Question*, 151 ARCHIVES PEDIATRIC & ADOLESCENT MED. 224, 225 (1997) ("[T]he organ that appears to be critical to psychosexual development and adaptation is not the external genitalia, but the brain.").

Being transgender "implies no impairment in judgment, stability, reliability, or general social or vocational capabilities." Am. Psychiatric Ass'n, *Position Statement on Discrimination Against Transgender and Gender Diverse Individuals* (2018), http://www.aglp.org/Documents/Position-2018-Discrimination-Against-Transgender-and-Gender-Diverse-Individuals.pdf. For many transgender people, however, the incongruence between a transgender person's gender identity and their sex assigned at birth can result in gender dysphoria. Am. Psychol. Ass'n Guidelines, *supra*, at 861. Gender dysphoria is the "clinically significant distress or impairment in social, occupational, or other important areas of functioning" associated with a marked

incongruence between a transgender person's gender identity and assigned sex. Am. Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* 451-53 (5th ed. 2013) (hereinafter "DSM-5").

The World Professional Association for Transgender Health ("WPATH") publishes Standards of Care, which are widely accepted as best practices for treating gender dysphoria. Under the Standards of Care, treatment for gender dysphoria may require a variety of interventions, often grouped under umbrella terms such as gender-affirming or transition-related health care. These medically necessary and often life-saving interventions include assessment, counseling, and, as appropriate, social transition, hormone therapy, and surgical interventions to bring the body into further alignment with one's gender identity. Transition-related health care, like all health care, is individualized, and tailored to an individual patient's needs. Some transgender patients may undergo gender-affirming surgeries, including genital surgeries, and others may fully transition without doing so. Standards of Care, at 54.

B. Under Illinois law, a person's gender identity is the critical determinant of a person's sex.

Consistent with the medical understanding of gender identity, Illinois law recognizes in numerous contexts that a person's gender identity is the critical determinant of the person's sex. This state permits a transgender applicant to correct the sex designation on a driver's license without any showing of particular medical treatment, or anatomical requirement. *See* Jake Wittich, *Transgender people no longer need medical paperwork to correct gender markers on Illinois identity documents* (Sept. 4, 2019, 5:03pm) https://tinyurl.com/y65rqchj. An applicant must sign a form attesting to the applicant's gender identity. *See* Office of the Sec'y of State Drivers Serv. Dep't, *Gender*

Designation Change Form 1 (Aug. 2019), https://tinyurl.com/y55knfmm. Illinois law similarly permits transgender people who were born in Illinois to correct the sex designation on a birth certificate. 410 ILCS 535/17 ("New certificate of birth; prerequisites"). State law does not require any particular treatment, let alone genital surgery. The Division of Vital Records will issue original birth certificates with corrected gender markers upon receipt of a declaration by a licensed health care professional stating that the person has undergone treatment that is "clinically appropriate for that individual for the purpose of gender transition based on contemporary medical standards." *Id.*[1] Thus, state law recognizes that a person's gender identity comprises the basis for determining and recording a person's legal sex without regard to reproductive organs or structure.

These provisions governing issuance of identity documents are consistent with other Illinois laws—apart from the HRA itself—that mandate that the legal "sex" of a transgender person be understood to be the person's gender identity. For example, the Disposition of Remains Act, 755 ILCS 65, permits Illinoisans to designate their gender identity, expression, and pronouns in written funeral and burial instructions and requires that those wishes be followed. Thus, although the HRA permits public accommodations to segregate by sex facilities such as restrooms, the Commission's conclusion that

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[1] The State of Illinois also recognizes that a person's gender identity determines the person's sex when issuing a birth certificate to a transgender parent's child. The State recently updated its birth certificate process to allow a transgender man who gestated and gave birth to a child to be listed as the child's father on the child's birth certificate, and to allow his spouse, a transgender woman, to be listed as the child's mother. *See* Jake Wittich, *Transgender parents welcome baby girl, prompting updates to the state's birth certificate system* (Jan. 6, 2020, 4:50 pm), https://tinyurl.com/yxq99knp.

employees must be allowed to use the restroom that aligns with their gender identity is consistent with the state's broader statutory scheme, and reflects the state's insistence throughout its laws that the sex of a transgender person be recorded and respected based on the person's gender identity.

II. THE COMMISSION'S RECOMMENDED LIABILITY DETERMINATION IS REASONABLE AND CONSISTENT WITH THE CLEAR WEIGHT OF AUTHORITY.

The Commission's determination that the Illinois Human Rights Act requires equal access to sex-segregated facilities for transgender people in employment and public accommodations is consistent with the overwhelming weight of authority on the issue. Indeed, the Commission itself previously has determined that the HRA mandates full and equal access to sex-segregated facilities for transgender people. For example, the Commission held that a local school district's policy violated the HRA by limiting a student's full enjoyment of equal facilities *Yates v. Lake Park Cmty. High Sch. Dist. 108*, ALS No. 17-0067, https://tinyurl.com/y6ohh547 (July 2019). More recently, in *Michael S. v. Komarek Sch. Dist. 94*, ALS No. 16-0003 (2019), http://bit.ly/SEvKomarek, the Commission again held that a transgender student must have access to the communal boys' restroom, rather than being forced to use the staff restroom at his school. The Commission's interpretation of a statutory provision of the Act is accorded substantial weight and deference; "[t]his is so because the Commission's interpretation of the Act flows directly from its expertise and experience with the statute that it administers and enforces." *Wanless v. Illinois Hum. Rts. Comm'n*, 296 Ill. App. 3d 401, 403 (3d Dist. 1998). The Commission's interpretation also is aligned with an overwhelming body of authority interpreting comparable nondiscrimination requirements in other jurisdictions.

A. Federal law holds that employment discrimination against a transgender employee constitutes a form of sex discrimination.

The Supreme Court held in *Bostock* that, under the plain text of Title VII, discrimination against an employee because she is transgender constitutes discrimination because of the employee's sex. 140 S. Ct. at 1738. The question presented was "whether an employer can fire someone simply for being homosexual or transgender." *Id.* at 1737. This required an analysis of whether discrimination based on either transgender status or sexual orientation is necessarily discrimination "because of sex." *Id*. at 1739. The Supreme Court answered this question plainly and forcefully: "[I]t is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex." *Bostock*, 140 S. Ct. at 1741. Justice Gorsuch, writing for the majority, held that "discrimination based on homosexuality or transgender status necessarily entails discrimination based on sex; the first cannot happen without the second." *Id*. at 1747. Notably, the Supreme Court respectfully treated the transgender woman at the heart of the case, Aimee Stephens, as a woman throughout its opinion, and contrasted her treatment to that of other women when it found sex discrimination. *Id.* at 1738.

Although the Court expressly declined to reach questions regarding bathroom access, which were not before it, the Court's reasoning makes apparent that employers engage in sex discrimination when excluding a transgender woman from the woman's restroom solely because of her anatomy. The Court held that an employee's transgender status is never justification for discrimination under Title VII: "The statute's message for our cases is equally simple and momentous: An individual's homosexuality or transgender status is not relevant to employment decisions. That's because it is impossible

to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex." *Bostock*, 140 S. Ct. at 1741. Thus, when analyzing whether an employer discriminates based on sex by excluding an employee from the bathroom, a court must ask whether the employee's sex played any part in the employer's decision. Here, where an employer admits that its decision to exclude a woman from the women's restroom is based on assumptions about the woman's sexual organs and anatomy, and whether she has undergone certain gender-affirming medical treatments, the answer is evident—the exclusion constitutes a form of sex discrimination. While an employer may designate separate restrooms for men and women, the employer may not exclude *transgender* women from the women's restroom, because a woman's "transgender status is not relevant to employment decisions." *Id*.

The Supreme Court's decision in *Bostock* was preceded by a vast body of federal authority that similarly concluded that anti-transgender discrimination is a form of sex discrimination, including four different circuit courts of appeals.[2] Federal courts have held that transgender people are protected against discrimination because of their sex

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[2] *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034 (7th Cir. 2017), *cert. dismissed sub nom. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ. v. Whitaker ex rel. Whitaker*, 138 S. Ct. 1260 (2018); *Equal Emp't Opportunity Comm'n v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560 (6th Cir. 2018); *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir.2011); *Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. March 25, 2005); *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. Aug. 5, 2004); *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. Feb. 29, 2000); *Rosa v. Park West Bank & Trust Co.*, 214 F.3d 213 (1st Cir. June 8, 2000).

under a variety of different federal statutes, including Title IX,[3] Title II,[4] the Affordable Care Act,[5] the Equal Credit Opportunity Act,[6] and the Gender Motivated Violence Act.[7] In addition there are multiple E.E.O.C decisions recognizing that transgender people are protected against discrimination because of their sex.[8]

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[3] *See, e.*g., *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034 (7th Cir. 2017), *cert. dismissed sub nom. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ. v. Whitaker*, 138 S. Ct. 1260 (2018); *J.A.W. v. Evansville Vanderburgh Sch. Corp.*, 323 F. Supp. 3d 1030 (S.D. Ind. 2018); *Grimm v. Gloucester Cty. Sch. Bd.*, 400 F. Supp. 3d 444, 457 (E.D. Va. 2019), *aff'd*, *Grimm v. Gloucester Cty. Sch. Bd.*, 972 F.3d 586 (4th Cir. 2020), *reh'g en banc denied*, 976 F.3d 399 (4th Cir. 2020); *Adams v. Sch. Bd. of St. Johns Cty.*, *Fla*., 318 F. Supp. 3d 1293, 1325 (M.D. Fla. 2018), *aff'd*, 968 F.3d 1286 (11th Cir. 2020); *M.A.B. v. Bd. of Educ. of Talbot Cty.*, 286 F. Supp. 3d 704 (D. Md. 2018); *Bd. of Educ. of the Highland Local Sch. Dist. v. United States Dep't of Educ.*, 208 F. Supp. 3d 850 (S.D. Ohio 2016).

[4] *See, e.g.*, *Equal Emp't Opportunity Comm'n R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560 (6th Cir. 2018); *Glenn v. Brumby*, 663 F.3d 1312, 1320 (11th Cir.2011); *Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. March 22, 2005); *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. Aug. 5, 2004); *Equal Emp't Opportunity Comm'n v. A & E Tire, Inc.*, 325 F. Supp. 3d 1131 (D. Colo. 2018); *Parker v. Strawser Construction*, 307 F. Supp. 3d 744 (S.D. Ohio Apr. 25, 2018); *Mickens v. Gen. Elec. Co.*, No. 3:16CV-00603-JHM, 2016 WL 7015665 (W.D. Ky. Nov. 29, 2016); *Roberts v. Clark Cty. Sch. Dist.*, 215 F. Supp. 3d 1005 (D. Nev. 2016); *Fabian v. Hosp. of Cent. Conn.*, 172 F. Supp. 3d 509 (D. Conn. Mar. 18, 2016); *Doe v. State of Arizona*, No. CV-15-02399-PHX-DGC, 2016 WL 1089743 (D. Ariz. Mar. 21, 2016); *United States v. Se. Oklahoma State Univ.*, No. CIV-15-324-C, 2015 WL 4606079 (W.D. Okla. July 10, 2015); *Finkle v. Howard Cty.*, 12 F. Supp. 3d 780 (D. Md. 2014); *Schroer v. Billington*, 577 F. Supp. 2d 293 (D.D.C. Sept. 19, 2008); *Lopez v. River Oaks Imaging & Diagnostic Group. Inc.*, 542 F. Supp. 2d 653 (S.D. Tex. 2008); *Mitchell v. Axcan Scandipharm, Inc.*, No. CIV.A. 05-243, 2006 WL 456173 (W.D. Pa. Feb. 17, 2006); *Tronetti v. TLC HealthNet Lakeshore Hosp.*, No. 03-CV-0375E (SC), 2003 WL 22757935 (W.D.N.Y. Sept. 26, 2003).

[5] *See, e.g., Flack v. Wis. Dep't of Health Servs.*, 328 F. Supp. 3d 931, 950 (W.D. Wis. 2018) ("This is text-book discrimination based on sex."); *Boyden v. Conlin*, 341 F. Supp. 3d 979 (W.D. Wis. 2018); *Prescott v. Rady Children's Hosp.-San Diego*, 265 F. Supp. 3d 1090, 1097 (S.D. Cal. 2017); *Rumble v. Fairview Health Servs.*, No. 14-CV-2037, 2015 WL 1197415 (D. Minn. Mar. 16, 2015).

[6] *Rosa v. Park West Bank & Trust Co.*, 214 F.3d 213 (1st Cir. June 8, 2000).

[7] *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. Feb. 29, 2000).

[8] *See, e.g., Lusardi v. Dep't of the Army*, EEOC Appeal No. 0120133395, 2015 WL 1607756 (April 1, 2015); *Complainant v. Dep't of Veterans Affs.*, EEOC Appeal No.

Thus, even absent explicit statutory language prohibiting discrimination based on gender identity or transgender status, federal courts have held that such discrimination constitutes a form of sex discrimination, simply as a matter of statutory interpretation. Although "sex" and "gender identity" are distinct concepts in the sense that being transgender is distinct from being male or female, discrimination based on a person's gender identity or transgender status is inherently a form of sex discrimination under federal law. *Bostock*, 140 S. Ct. at 1746-47.

B. Federal courts have clarified under analogous statutes that denying transgender people access to sex-segregated spaces is discrimination because of their sex.

Multiple Federal courts have concluded—even without enumerated protections for gender identity—that prohibiting transgender people from using sex-segregated facilities such as bathrooms is discrimination because of their sex. The Seventh Circuit addressed this issue squarely when it affirmed a lower court's preliminary injunction barring a school district from denying a transgender student the use of sex-segregated facilities. *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034 (7th Cir. 2017). The Court analyzed Title IX's prohibition against sex discrimination in educational settings, and concluded that although Title IX does not define "sex," it would be improper for a court to adopt a definition similar to the one Hobby Lobby advocates here. *Id.* at 1047 ("…absent from the statute is the term 'biological,' which the School District maintains is a necessary modifier."). The Court instead surveyed pre-*Bostock*

0120133123, 2014 WL 1653484 (Apr. 16, 2014); *Jameson v. U.S. Postal Service*, EEOC Appeal No. 0120130992, 2013 WL 2368729 (May 21, 2013); *Macy v. Holder*, EEOC Appeal No. 0120120821, 2012 WL 1435995 (April 20, 2012).

Supreme Court precedent for guidance, and concluded that the Supreme Court long has adopted an expansive understanding of "sex" in civil rights statutes as demonstrated in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (finding the Supreme Court "embraced a broad view of Title VII as Congress 'intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes") and *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998) (noting that the Court took an "expansive view of Title VII, where Justice Scalia, writing for a unanimous Court, declared that 'statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislatures by which we are governed.'"). *Whitaker*, 858 F.3d at 1048. The Court then summarized extensive Title VII case law holding that a transgender plaintiff can state a claim on the basis of sex stereotyping. *Id*. The court concluded that a policy that denies a transgender person the use of a restroom that conforms with the person's gender identity violates Title IX. *Id.* at 1049. Thus, the Commission's determination that the HRA prohibits discrimination against transgender people with regard to sex-segregated spaces such as restrooms is consistent with logic and precedent established in the jurisprudence of the Seventh Circuit.

Similarly, the Fourth and Eleventh Circuit Courts of Appeals recently held that school districts discriminate against students on the basis of sex when they deny boys who are transgender the use of the boys' bathroom. *Grimm v. Gloucester Cty. Sch. Bd.*, 972 F.3d 586 (4th Cir. 2020), *reh'g en banc denied*, 976 F.3d 399 (4th Cir. 2020); *Adams v. Sch. Bd. of St. Johns Cty.*, 968 F.3d 1286 (11th Cir. 2020). Specifically, the Fourth Circuit held that a school's policy requiring students to use the restroom associated with

their so-called "biological gender," rather than their gender identity, constituted impermissible sex discrimination under both Title IX and the equal protection guarantee. *Grimm*, 972 F.3d at 616-17. As an independent basis for its ruling, the court also held that such a policy targeted students because they are transgender, a quasi-suspect classification, and could not survive heightened scrutiny on this basis either. *Grimm*, 972 F.3d at 616. The Eleventh Circuit similarly struck down a school policy that proscribed restroom usage based on the sex designation on a student's original school enrollment documents rather than a student's gender identity. *Adams*, 968 F.3d at 1297. As here, the defendants in *Adams* urged the court to interpret Title IX's provisions authorizing sex-segregated facilities to mean "biological sex." After examining relevant precedent, however, the court concluded that the school's bathroom policy singled out the plaintiff boy for different treatment because of his transgender status, which was a form of sex discrimination, causing him "psychological and dignitary harm." *Id.* at 1310.

Several district courts also have held—absent enumerated protections based on gender identity—that denying transgender people access to sex-segregated spaces is discrimination because of their sex. For example, an Indiana District Court recently granted a motion for summary judgment on behalf of a transgender boy who was denied permission to use the boys' room. *J.A.W. v. Evansville Vanderburgh Sch. Corp.*, 396 F. Supp. 3d 833 (S.D. Ind. 2019). As in this case, the plaintiff in *J.A.W.* was told he could not use the boys' restroom and that he had to use the girls' restroom or use a gender-neutral single occupancy restroom. *Id.* at 837. The court examined the case law precedent and legal reasoning in *Whitaker* and held that a policy requiring a transgender person to

use a bathroom that does not conform with their gender identity violates the prohibition against sex discrimination in Title IX. *Id.* at 842.

In another example, a federal court in Maryland was presented with the argument that Title IX's regulations permit schools to exclude transgender people because "sex" should be understood to only apply to "birth sex." *M.A.B. v. Bd. of Educ. of Talbot Cty.*, 286 F. Supp. 3d 704 (D. Md. 2018); 34 C.F.R. § 106.33. Once again, the plaintiff in this case was forced to use a designated restroom that was inconsistent with his gender identity or a single-user restroom, resulting in the plaintiff experiencing "humiliation, and embarrassment, as well as alienation from his peers." *M.A.B.*, 286 F. Supp. 3d at 709. The court acknowledged the regulation authorized sex-segregated facilities, and was silent with regard to transgender people, but noted that neither the statute nor the regulations include the term "biological." *Id.* at 712. After examining relevant Supreme Court precedent, the court concluded that exclusion of transgender people from sex-segregated spaces is *per se* actionable sex discrimination under Title VII pursuant to the broad interpretation given in *Price Waterhouse* and *Oncale*. *M.A.B.*, 286 F. Supp. 3d at 714.

In yet another example, a federal court in Ohio issued a preliminary injunction ordering a school to allow a transgender girl to use the girls' restrooms. *Bd. of Educ. of the Highland Local Sch. Dist. v. United States Dep't of Educ.*, 208 F. Supp. 3d 850 (S.D. Ohio 2016). In this case too, the plaintiff was forced to use a separate bathroom that caused her to feel stigmatized and isolated. *Id.* at 870. The defendants in this case argued that "sex" "unambiguously means "biological sex" which they claimed is defined by what appears on one's birth certificate and does not include "gender identity." *Id.* at 865-

866. The court rejected this interpretation, holding that the plaintiff was "denied access to the communal girls' restroom 'on the basis of [her] sex.'" *Id.* at 870.

Federal courts also have rejected Hobby Lobby's argument that permitting a transgender woman to use the women's restroom would violate the privacy rights of fellow coworkers. For example, the Third Circuit held that a District Court's refusal to enjoin a school from permitting transgender people to use sex-segregated restrooms was proper because the mere presence alone of a transgender person in a bathroom is not sufficient to establish a sexual harassment claim. *Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 536 (3d Cir. 2018), *cert. denied sub nom*. *Doe v. Boyertown Area Sch. Dist.*, 139 S. Ct. 2636 (2019). In discussing the harm caused to transgender people by forcing them to use single-user facilities instead of the restroom designated for members of their sex, the court recognized that excluding transgender students "would very publicly brand all transgender students with a scarlet 'T,' and they should not have to endure that as the price of attending their public school." *Id.* at 530. *See also*, *Grimm*, 972 F.3d 586; *Adams*, 968 F.3d 1286; *Cruzan v. Special Sch. Dist., No. 1*, 294 F.3d 981, 984 (8th Cir. 2002) (school's policy of allowing a transgender woman to use the women's faculty restroom did not create a hostile working environment for teacher who objected.); *Parents for Privacy v. Dallas Sch. Dist. No. 2*, 326 F. Supp. 3d 1075, 1099 (D. Or. 2018); *Students v. United States Dep't of Educ.*, No. 16-CV-4945, 2016 WL 6134121, at *1 (N.D. Ill. Oct. 18, 2016), *report and recommendation adopted sub nom. Students & Parents for Privacy v. United States Dep't of Educ.*, No. 16-CV-4945, 2017 WL 6629520 (N.D. Ill. Dec. 29, 2017).

C. Federal Administrative agency authority clarifies that denying transgender people access to sex-segregated spaces is discrimination because of their sex.

In a case involving almost identical facts, the EEOC determined that "discrimination against a transgender individual because that person is transgender is, by definition, discrimination 'based on…sex,'…" *Lusardi v. Dept. of the Army*, EEOC DOC 0120133395, 2015 WL 1607756, at *7 (Apr. 1, 2015) (citing *Macy v. Holder*, EEOC DOC 0120120821, 2012 WL 1435995, at *7 (Apr. 20, 2012). In *Lusardi*, the defendant sought to justify denying a female transgender employee access to the women's restroom on the grounds that her co-workers would experience discomfort, and that transgender people should not be allowed to use restrooms consistent with their gender identity until they have undergone sterilizing surgical procedures. *Lusardi*, 2015 WL 1607756, at *2. The EEOC clarified that discomfort cannot justify "discriminatory terms and conditions of employment" and that the agency cannot condition access to facilities on a medical procedure. *Id.* at *9.

Similar to the facts in this case, the defendant also argued that it was unclear whether the plaintiff suffered actual harm by being restricted from using common restrooms. *Id.* at *9-10. However, the EEOC held that forcing a transgender employee to use a single-occupancy restroom "segregated her from other persons of her gender" and "perpetuated the sense that she was not worthy of equal treatment and respect" and that the denial constituted "a harm or loss with respect to the terms and conditions of the Complainant's employment." *Id.* at *9. The Commission concluded the "Complainant proved that she was subjected to disparate treatment on the basis of sex when she was denied equal access to the common female restroom facilities." *Id.* at *13.

D. Numerous state courts and administrative agencies elsewhere similarly have held under analogous provisions that denying transgender people access to sex-segregated spaces constitutes discrimination because of their sex.

State courts and administrative agencies in other jurisdictions have concluded—both under statutory frameworks enumerating gender identity as a protected characteristic as well as under statutory frameworks that do not—that prohibiting transgender people from using sex-segregated facilities is discrimination because of their sex. For example, the Supreme Court of Missouri recently held that a student adequately alleged he was denied full and equal use of public accommodations as an element of a sex discrimination claim when he was prevented from using boys' facilities. *R.M.A. v. Blue Springs R-IV Sch. Dist.*, 568 S.W.3d 420 (Mo. 2019), *reh'g denied* (Apr. 2, 2019). The dissent argued that "sex" should be restricted to what the dissent described as, "biological sex." *Id.* at 430-434. In response, the majority noted that the Missouri Human Rights Law does not mention "biological" or "legal" sex and that it "is telling—that in an opinion emphasizing the significance of adhering to the plain language of the statute—the dissent must add the word 'biological' to the statute to reach its result." *Id.* at 427 (FN 8).

The Supreme Judicial Court of Maine was presented with a similar question regarding whether enumerated protections in the Maine Human Rights Act ("MHRA") against discrimination in public accommodations based on gender identity conflict with statutory provisions providing for the separation of facilities according to sex. *Doe v. Reg'l Sch. Unit 26*, 86 A.3d 600 (Me. 2014); Me. Rev. Stat. Ann. tit. 5, § 4592; Me. Rev. Stat. Ann. tit. 20-A, § 6501. The Court held that a school policy violated the state nondiscrimination law by discriminating against a student when it prohibited her from using the girls' restroom and forced her to use a gender neutral bathroom. *Id*. The Court noted that the statutory provision allowing for sex-segregated facilities is consistent with

the state's nondiscrimination law, and that schools cannot "dictate the use of bathrooms in a way that discriminates against students in violation of the MHRA." *Id.* at 606.

In addition, the Colorado Department of Regulatory Agency's ("DORA") Division of Civil Rights considered a similar case and concluded that a school policy refusing to allow a transgender girl to use the girls' restrooms at her school violated Colorado law. *Coy Mathis v. Fountain-Fort Carson Sch. Dist. 8*, Charge No. P20130034X (Colo. Div. of Civil Rights June 17, 2013), https://tinyurl.com/glhg4fu. The defendant school district attempted to legitimize its exclusionary policy by arguing that "sex" refers to "biological categories" that exclude transgender people from using restrooms consistent with their gender identity. *Id.* at *5-6. Based on the evidence presented, DORA concluded that the claimant, who was a transgender girl, was "socially, legally, and medically" female. *Id.* at *9-10. In addition, DORA dismissed out of hand the school district's defense that the transgender girl experienced no harm because she was permitted to use a boys' restroom. *Id.* at *13-14. DORA concluded that the policy violated Colorado's prohibition against unlawful discrimination in a place of public accommodation. *Id*.

Also relevant, a jury in Iowa recently found that the Iowa Department of Administrative Services discriminated against a transgender man by forcing him to use the female restroom at a correction facility in the state where he worked. *Vroegh v Iowa Dep't. of Corr.*, No. LACL138797, 2019 WL 1396873 (Iowa Dist. Feb. 19, 2019).

E. Multiple state agencies expressly require employers to allow transgender employees to use sex-segregated facilities that are consistent with their gender identity.

Other state agencies have offered guidance clarifying that denying employees the use of sex-segregated facilities constitutes impermissible discrimination under state

statutes comparable to the Illinois HRA. For example, California promulgated regulations clarifying that employers must permit employees to use facilities that correspond to the employee's gender identity, regardless of their sex assigned at birth. Cal. Code Regs. tit. 2 § 11034(A) ("[e]mployers shall permit employees to use facilities that correspond to the employee's gender identity or gender expression, regardless of the employee's assigned sex at birth."). Colorado likewise requires that all covered entities allow individuals the use of gender-segregated facilities consistent with their gender identity. Colo. Code Regs. § 708-1:81.9.

A number of states have clarified this obligation through guidance. *See*, *e.g.*, Washington State Human Rights Commission, *Guide to Sexual Orientation and Gender Identity and The Washington State Law against Discrimination* (Feb. 2014), https://tinyurl.com/y5xgnqax. ("What restroom should a transitioning employee use? If an employer maintains gender-specific restrooms, transgender employees should be permitted to use the restroom that is consistent with the individual's gender identity."); Vermont Human Rights Commission, *Sex, Sexual Orientation and Gender Identity: A Guide to Vermont's Anti-Discrimination Law for Employers and Employees*, https://tinyurl.com/y5j6eztl (last visited Aug. 4, 2020) ("Does the Law Require Employers to Eliminate Sex-Segregated Bathrooms? No. Vermont employers may maintain sex-segregated bathrooms. However, the law does require that employers permit employees to access bathrooms in accordance with their gender identity, rather than their assigned sex at birth."); Delaware Department of Human Resources, *State of Delaware Guidelines on Equal Employment Opportunity and Affirmative Action Gender Identity Guidelines*, https://tinyurl.com/y2facmzy (last visited Aug. 4, 2020) ("…a transgender

employee will not be compelled to use only a specific restroom unless all other co-workers of the same gender identity are compelled to use only that restroom."); Iowa Civil Rights Commission, *Sexual Orientation & Gender Identity: A Public Accommodations Guide to Iowa Law* (July 2016), https://tinyurl.com/jp6pjxd, *Does the Law Prohibit Gender-Segregated Restrooms? ("No. It is still legal in Iowa for businesses to maintain gender-segregated restrooms. The new law does require, however, that individuals are permitted to access those restrooms in accordance with their gender identity, rather than their assigned sex at birth.").*

In addition, the Department of Labor's Occupational Safety and Health Administration (OSHA) supports practices and policies that reinforce that "employees should be permitted to use facilities that correspond with their gender identity." Occupational Safety and Health Administration, *Best Practices: A Guide to Restroom Access for Transgender Workers* (2015), https://tinyurl.com/zt3psnv. This guidance explains that a transgender employee's ability to use the restroom that aligns with the employee's gender identity can be a matter of physical safety for the transgender employee, and that the employee can experience significant physical and emotional harm if denied access. *Id.*

Thus, the Illinois Human Rights Commission's Recommended Liability Determination is consistent with the vast body of case law addressing the question of how nondiscrimination provisions and provisions authorizing sex-segregated facilities should be reconciled. Multiple courts, including the Seventh Circuit, have concluded that denying transgender people access to sex-segregated facilities constitutes discrimination because of their sex, and an overwhelming number of federal and state court rulings have

held that discrimination on the basis of gender identity or transgender status is discrimination because of sex under multiple analogous nondiscrimination statutes.

III. HOBBY LOBBY'S RELIANCE ON *GOINS V. WEST GROUP* IS MISPLACED.

This Court should reject Hobby Lobby's invitation to rely on *Goins*, 635 N.W.2d 717, for several reasons. First, *Goins* relied on a cramped, narrow statutory interpretation rendered by the Minnesota administrative agency in charge of enforcing that state's statute, which is the diametric opposite of the Commission's interpretation of Illinois law. Second, the legal landscape for transgender workers had changed so much from 1993 to 2005 that the Illinois legislature could not have had the naïve view of discrimination facing transgender workers that the *Goins* court attributed to the Minnesota legislature in 1993. Finally, the Illinois law contains the explicit facilities usage antidiscrimination requirement that the *Goins* court could not imagine the Minnesota legislature wanted.

First and foremost, the Illinois agency's expertise regarding the exact issue facing this Court presents the polar opposite of what the Minnesota commission had ruled regarding that state's statute. The Minnesota Supreme Court explicitly relied on that agency's constrictive ruling in reaching its holding. *See Goins*, 635 N.W.2d at 723 ("We believe, as does the Department of Human Rights, that the MHRA neither requires nor prohibits restroom designation according to self-image of gender . . .") (citing *Cruzan v. Special Sch. Dist. No. 1*, No. 31706 (Dep't of Human Rights Aug. 26, 1999).

Second, the legal landscape changed considerably between the Minnesota and the Illinois enactment; the naïve notion the *Goins* court attributed to the Minnesota legislature in 1993—that transgender workers would receive meaningful protection against discrimination under a statute that implicitly permits employers to exclude them

from restrooms—was understood to be false at the time the Illinois legislature passed protections for employees based on gender identity in 2005. The paradigmatic bathroom discrimination confronting transgender workers—an employer or a jurisdiction mandating bathroom usage in accordance with one's sex assigned at birth or anatomy—was not as well-defined or as rampant in 1993 as it was a dozen years later. The most prominent early cases involving discrimination against transgender workers either omitted mention of bathrooms or sent out mixed messages. *See, e.g., Ulane v. Eastern Airlines*, 742 F.2d 1081, 1086 (7th Cir. 1984) (collecting cases), *abrogated by Hively v. Ivy Tech Cmty. Coll. of Indiana*, 853 F.3d 339 (7th Cir. 2017). In short, *Goins* reflects a mentality that transgender workers receive meaningful protection under a statute that greenlights discrimination in bathroom usage. If that mindset had any legitimacy in 1993, it had none over a dozen years later when the Illinois legislature passed protections explicitly intended. *See generally Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1224 (10th Cir. 2007) (acknowledging the argument that "use of the women's restroom is [such] an inherent part of one's identity as a male-to-female transsexual, . . . that a prohibition on such use discriminates on the basis of one's status as a transsexual.").

Finally, the Illinois law contains the explicit facilities usage antidiscrimination requirement that the *Goins* court refused to believe that the Minnesota legislature "likely intended." *See Goins*, 635 N.W.2d at 723. The Illinois legislature explicitly commanded that, regardless of whether one's gender identity aligns with their sex assigned at birth, they were entitled to the "full and equal enjoyment" of public accommodations. *See* 775 ILCS 5/5-102(A). Ms. Sommerville alleged and proved discrimination in public accommodations; indeed, while Hobby Lobby contested its liability, it never contested

her premise that her bathroom usage implicated both the employment and public accommodations sections of the Act. Thus, *Goins* has no relevance whatsoever to Ms. Somerville's public accommodations claim. Moreover, because the Illinois legislature approved of a transgender person's use of bathrooms consistent with their gender identity in public accommodations, it is implausible to impute to the legislators an intent that a different rule applies when the context is a transgender worker and her workplace colleagues.

IV. THE COURT SHOULD REJECT HOBBY LOBBY'S BELATED EFFORT TO DISQUALIFY THE ALJ.

Hobby Lobby asserts that it was denied its right to a fair and impartial hearing at the Illinois Human Rights Commission because Administrative Law Judge William Borah ("ALJ Borah" or "Borah") practiced as a civil rights attorney for gay plaintiffs before he became an Administrative Law Judge. Specifically, Hobby Lobby complains that it recently discovered Borah received a Community Leadership Award in 2008 from the Illinois State Bar Association's Committee on Sexual Orientation and Gender Identity, which was reported contemporaneously in the Windy City Times. Windy City Times, *Borah Honored*, (July 16, 2008) http://www.windycitymediagroup.com/lgbt/Borah-honored/18912.html. Additionally, Hobby Lobby objects that in 2005, Borah co-presented an Illinois State Bar Association program entitled "Out at Work" regarding law firms fostering "gay-friendly work environments." Supp. C364. This is the full extent of the "newly discovered evidence of bias" (*Suppl. Br. of Petitioner-Appellant* ("App. Supp. Brief") at 3, Feb. 2, 2020). Everything else is mere frustration with the rulings ALJ Borah made in this case or

innuendo. Such assertions are insufficient as a matter of law to justify recusal or disqualification of an ALJ.

A. Hobby Lobby bears the burden of showing that the ALJ was actually biased or had an unconstitutional potential for bias.

As an initial matter, Hobby Lobby cites the wrong standard, improperly relying upon the Illinois Administrative Law Judge Code of Professional Conduct (hereinafter "ALJ Code"), https://tinyurl.com/y3zwy9vz (last visited Aug. 4, 2020) which does not provide a vehicle for a party to force an ALJ to recuse himself. The ALJ Code, which was created in 2016 (after ALJ Borah's initial decision in this matter at the Commission), is similar to the Code of Judicial Conduct in Illinois. The codes contain identical language concerning the standard judges should use in recusing themselves. Judges should recuse under both Codes when "the judge's impartiality might reasonably be questioned." Ill. S. Ct. R. 63, Canon 3 (C)(1); ALJ Code, Canon 2, Rule 2.11. In determining whether to recuse under the Illinois Judicial Code of Conduct, a judge must assess whether a reasonable person, with knowledge of all the facts and the law would believe the judge to be impartial. *People v. Buck*, 361 Ill. App. 3d 923, 932 (2nd App. 2005). However, "[t]he Judicial Code…says nothing that would give the impression that its provisions could be used by a party or his lawyer as a means to force a judge to recuse himself, once the judge does not do so on his own." *In re Marriage of O'Brien*, 2011 IL 109039, ¶ 45, 958 N.E. 2d 647 (2011).

Even if the ALJ Code did apply, nothing in ALJ Borah's background warrants recusal. Judges come from a variety of backgrounds, experiences, and previous legal practice. Once they take on the role of adjudicators, judges are required to set aside any personal beliefs that may interfere with their duty to apply the law fairly and impartially

and without bias or prejudice. ALJ Code, Canon 2, Rules 2.2 and 2.3; Ill. S. Ct. R. 63, Canon 3; *Grissom v. Bd. of Educ*., 75 Ill. 2d 314, 320 (1979). Therefore, all judges are presumed to be impartial. *In re Marriage of O'Brien*, 2011 IL 109039, ¶ 31. It is the burden of the party challenging a judge's impartiality to overcome this presumption with factual allegations of personal bias or prejudicial conduct during trial. *Id*.; *United States v. Baskes*, 687 F.2d 165, 170 (7th Cir. 1981). Hobby Lobby provides no evidence or authority sufficient to rebut this presumption, let alone to support the notion that a jurist's past civil rights advocacy renders the jurist incapable of impartiality in discrimination matters generally.

In any event, the appropriate standard for whether ALJ Borah was required to recuse himself in the proceedings at the Commission below is whether he possessed actual bias or an unconstitutional potential for actual bias—a standard Hobby Lobby also cannot meet. The Illinois Supreme Court has made clear that the standard for requiring disqualification of a judge, after a substantial ruling in a case, is actual bias (personal bias or prejudicial conduct during trial) or a high probability of the risk of actual bias. *In re Marriage of O'Brien*, 2011 IL 109039, ¶ 46-48. The proper inquiry is "whether 'under a realistic appraisal of psychological tendencies and human weakness,' the interest 'poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.'" *Id.* at ¶ 32 (quoting *Caperton v. A.T. Massey Coal Co*., 556 U.S. 868, 883-884 (2009)). In *Caperton*, the U.S. Supreme Court made clear that in the absence of actual bias, the Constitution requires recusal only in extraordinary situations. *Caperton*, 556 U.S. at 887. There, the Court found that the Constitution required a Justice of the West Virginia Supreme Court to

recuse himself from a case, where there was no evidence of actual bias, but where the head of a company appealing a $50 million adverse jury verdict had donated enough money to the Justice's election campaign to have "had a significant and disproportionate influence on the electoral outcome." *Caperton*, 556 U.S. at 885. Prior to *Caperton* the standard in Illinois for disqualification of administrative decisionmakers was actual bias. *Ladenheim v. Union Cty. Hosp. Dist.*, 76 Ill. App. 3d 90, 95-96 (5th Dist. 1979).

B. Hobby Lobby comes nowhere near to meeting its burden to show that ALJ Borah had an actual bias or potential for bias in the proceedings below.

Hobby Lobby has provided no information to show that ALJ Borah should have recused himself under any standard, let alone that he possessed an unconstitutional potential for bias. As an initial matter, a judge's rulings alone "almost never constitute a valid basis for a bias or partiality motion." *Liteky v. United States*, 510 U.S. 540, 555 (1994); 5 ILCS 100/10-30(b) (regarding disqualification of administrative law judges in Illinois "[a]n adverse ruling, in and of itself, shall not constitute bias or conflict of interest."). Unless a ruling comes with comments or opinions that express a rare degree of favoritism or antagonism, it cannot be considered a basis for arguing a judge is biased. *Liteky*, U.S. 540 at 555. Here, the Commission upheld ALJ Borah's recommended rulings and there is no allegation that ALJ Borah said or did anything during the proceedings or within his rulings that evidenced any bias or antagonism. Secondly, Hobby Lobby does not even allege that ALJ Borah was actually biased in the proceeding at the Commission. Hobby Lobby alleges only that ALJ Borah's past work gives rise to "an appearance of bias or prejudice." App. Supp. Brief at 7. If there is no actual bias, and there is absolutely

none alleged, then Hobby Lobby must assert that ALJ Borah has an unconstitutional potential for bias in order to be required to recuse himself.

Hobby Lobby attempts to analogize ALJ Borah's past civil rights work to "having bias or prejudice concerning a party." However, nothing suggests that ALJ Borah was familiar with one or both of the parties or even that he knew anything about the facts and circumstances of this case prior to being assigned as the ALJ. The assertion that his past civil rights work would bias ALJ Borah in favor of any LGBT plaintiff, without regard to the specific facts and circumstances of a case is a leap that cannot be countenanced and is clearly at odds with the case law.

There is a long history of unsuccessful attempts to disqualify judges based on their backgrounds or personal associations, including past civil rights work. In *United States v. Ala.*, the Eleventh Circuit held that a judge's background as a civil rights lawyer representing Black plaintiffs in race discrimination actions prior to joining the bench is not evidence of personal bias in a desegregation case. 828 F.2d 1532, 1543 (11th Cir. 1987). In one of the most well-known cases, *Commonwealth of Pa. v. Local Union 542, Int'l Union of Operating Engineers*, Judge Higginbotham found there was no basis to grant a request to recuse himself from a civil rights case regarding race on the grounds that he was African American, a scholar of race relations in America, and had recently publicly spoken to a group of historians about racial justice. 388 F. Supp. 155, 159 (E.D. Pa. 1974). As Judge Constance Baker Motley said, in an opinion denying a motion to disqualify her, "[t]he assertion, without more, that a judge who engaged in civil rights litigation and who happens to be of the same sex as a plaintiff in a suit alleging sex discrimination on the part of a law firm, is, therefore, so biased that he or she could not

hear the case, comes nowhere near the standards required for recusal." *Blank v. Sullivan & Cromwell*, 418 F. Supp. 1, 4 (S.D.N.Y. 1975). This is precisely the assertion that Hobby Lobby is now making in claiming ALJ Borah should have recused himself from hearing this matter simply because of his past work as a civil rights litigator on behalf of LGBT people. It, too, comes nowhere near the standards required for recusal. The logical conclusion of Hobby Lobby's contention would be a prohibition on judges from presiding over cases regarding any practice area, field of scholarship, or legal topic on which they worked before taking the bench. Hobby Lobby's argument is untenable and bears no relation to recusal law.

Hobby Lobby also argues that ALJ Borah's past work and his award for that work are equivalent to making statements that commit or appear to commit the ALJ to a particular result. Hobby Lobby repeatedly states that ALJ Borah is known to be a "'crusader' for transgender rights," which Hobby Lobby equates to being a "'crusader' for the position taken by one party [Sommerville] in litigation[.]" This appears to come from the Windy City Times piece, which says that Borah, "crusaded for eliminating sexual orientation-based discrimination[.]" Supp. C360. To believe that discrimination on the basis of sexual orientation should end cannot possibly be equated to having prejudged whether a specific transgender plaintiff experienced discrimination without hearing the evidence. The Illinois HRA has prohibited sexual orientation discrimination, which includes discrimination based on gender identity, since 2006. 775 ILCS 5/1-101. ALJ Borah became a member of the administrative law judiciary in 2009. Supp. C400; Human Rights Commission, *Administrative Law Judges: William J. Borah*, https://www2.illinois.gov/sites/ihrc/about/Pages/AdministrativeLawJudges.aspx (last

visited Aug. 6, 2020). If Hobby Lobby is suggesting that ALJ Borah believes in the law that prohibits sexual orientation discrimination, that could be true. But, a "judge cannot be disqualified merely because he believes in upholding the law." *Local Union 542*, 388 F. Supp. 155, 159 (E.D. Pa. 1974) (quoting *Baskin v. Brown*, 174 F.2d 391, 394 (4th Cir. 1949)). ALJ Borah is still required to take an unbiased look at the facts, apply them to the law, and make a determination based only on this information. There is absolutely nothing to suggest that he has done otherwise. This Court should uphold the decision of the Commission finding that Hobby Lobby has provided no information to indicate that ALJ Borah should have recused himself from this matter.

CONCLUSION

For the reasons stated above, this Court should affirm the determination of the Commission.

December 22, 2020

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CERTIFICATE OF COMPLIANCE
PURSUANT TO SUPREME COURT RULE 341

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing Rule 341(d) cover, the Rule 341(h)(1) statements of points and authorities, the Rule of 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 9,657 words.

Dated: December 22, 2020

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CERTIFICATE OF FILING AND SERVICE

I certify that on December 22, 2020, I caused a copy of the foregoing Brief of *Amici Curiae* of Lambda Legal and Equality Illinois to be electronically filed in the Appellate Court of Illinois, Second District by using the FileTime Illinois electronic filing system.

I further certify that the other participants in this appeal, named below, will be served via the FileTime Illinois electronic filing system transmitted December 22, 2020 at approximately 2 pm Central Time.

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Within five days of acceptance by the Court, the undersigned states that she will send to the above court thirteen copies of the Brief bearing the court's file-stamp.

Under penalties as provided by law pursuant to section 1-109 of the Illinois Code of Civil Procedure, I certify that the statements set forth in this instrument are true and correct to the best of my knowledge, information, and belief.

Dated: December 22, 2020

Respectfully submitted,

/s/ Camilla B. Taylor
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