No. 2-19-0362

IN THE
APPELLATE COURT OF
ILLINOIS SECOND DISTRICT

HOBBY LOBBY STORES, INC.,

Petitioner-Appellant,

v.

MEGGAN SOMMERVILLE and STATE OF ILLINOIS HUMAN RIGHTS COMMISSION,

Respondents-Appellees.

Petition for Review of Orders of Illinois Human Rights Commission Charge Nos. 2011CN2993 and 2011CN2994
ALS No. 35-0060C

BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION OF ILLINOIS, *ET AL.*, IN SUPPORT OF THE RESPONDENTS-APPELLEES

John Knight
Ghirlandi Guidetti
Carolyn Wald
Ameri Klafeta
Emily Werth
Roger Baldwin Foundation of ACLU, Inc.
150 North Michigan Avenue, Suite 600
Chicago, IL 60601
Telephone: 312.201.9740
Fax: 312.201.9760
Counsel for Amici Curiae

Terra Reynolds
Nicholas J. Siciliano
Renatta A. Gorski
Edwin D. Abundis
Latham & Watkins, LLP
330 North Wabash Avenue, Suite 2800
Chicago, IL 60611
Telephone: 312.876.7700
Fax: 312.993.9767
Counsel for Amici Curiae

Dated: December 22, 2020

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I. INTEREST OF AMICI CURIAE

The American Civil Liberties Union of Illinois (ACLU), an affiliate of the American Civil Liberties Union with 1.5 million members nationally and approximately 60,000 members in Illinois, is a non-partisan, non-profit organization dedicated to protecting the liberties guaranteed by the U.S. Constitution, the state Constitution, and state and federal human rights laws. The ACLU has participated as counsel and *amicus* in a number of legal cases seeking equality for transgender persons in Illinois and nationally. The ACLU also vigorously opposes the use of gender-based generalizations to justify limits on women's rights and opportunities. For example, the ACLU has represented a number of Illinois public safety officers who experienced discrimination because they were pregnant and/or breastfeeding. The ACLU has a vital interest in ensuring that all persons, regardless of gender or transgender status, are treated equally under the law so that they are able to live their authentic lives without discrimination in employment or public accommodations.

Chicago Alliance Against Sexual Exploitation (CAASE) is a not-for-profit that opposes sexual harm by directly addressing the culture, institutions and individuals that perpetrate, profit from, or support such harms. CAASE engages in direct legal services, prevention education, community engagement, and policy reform. CAASE's legal department provides advice and representation to survivors of sexual assault, including to survivors who were harmed in the workplace. CAASE's prevention education department provides programming on gender stereotypes and myths about sexual assault. On behalf of its individual clients, its prevention philosophy, and in support of its overall mission, CAASE is interested in seeing that laws and precedent related to workplace discrimination

are appropriately interpreted and applied so as to further—and not undermine—efforts to hold both systems and individuals appropriately accountable for their actions.

The Illinois Coalition Against Sexual Assault (ICASA) is a statewide non-profit organization comprised of 30 community-based sexual assault crisis centers working together to end sexual violence. The centers provide 24-hour crisis intervention services, and counseling and advocacy for victims of sexual assault and their significant others. Each center also presents prevention education programs in its local schools and communities. ICASA supports all survivors of sexual violence, including transgender and gender-nonconforming survivors. ICASA's mission includes advancing justice, ending oppression, and promoting equality. ICASA opposes discrimination based on sex, sexual orientation, and gender identity, and rejects the myth that discriminating against transgender people protects women.

Mutual Ground, Inc. is a non-profit organization in Aurora, Illinois that works to eradicate domestic and sexual violence through direct services for victims, advocacy, prevention education and leadership in the community. Gender inequalities increase the risk of violence toward transgender and gender non-conforming individuals and impede their ability to seek protection. Mutual Ground supports efforts promoting equal rights for people of all genders and in pursuit of a society in which all individuals live free of discrimination, harassment and abuse.

Mujeres Latinas en Acción, founded in 1973, is a bilingual/bicultural agency that empowers Latinas by providing services which reflect their values and culture and being an advocate on the issues that make a difference in their lives. Each year, the organization serves nearly 2,000 community members through gender-based violence and leadership

programming. Mujeres embraces an unwavering commitment to fair and equal treatment of all individuals regardless of gender and gender identity. Mujeres believes that systems of oppression can be challenged through community engagement and collective leadership, and that the voices of those most impacted by discrimination must remain at the forefront.

Northwest Center Against Sexual Assault (Northwest CASA) is the only full service not-for-profit agency that provides free services to sexual assault survivors and their loved ones within the North and Northwest suburbs of Cook County and McHenry County in Illinois. We are committed to anti-oppression work in our mission to end sexual violence. Northwest CASA supports legal protections against discrimination based on sexual orientation and gender identity and expression, and sees this as a fundamental commitment towards gender equality and eliminating sexual violence.

Resilience is a non-profit organization established in 1974 that provides crisis intervention, individual and group trauma therapy, and medical and legal advocacy in the greater Chicago metropolitan area to thousands of survivors of sexual assault and abuse each year. Resilience also provides public education and institutional advocacy in order to improve the treatment of sexual assault survivors and to effect positive change in policies and public attitudes toward sexual assault. As an expert on sexual victimization and trusted service provider, Resilience understands the disproportionate impact of sexual assault and abuse on survivors who are transgender or gender non-confirming and the oppressive systems that allow this violence to occur. Resilience has an interest in ensuring that employers cannot escape liability for discrimination based on sex or gender. Anything else sends a dangerous message of latitude for harms caused, including sexual assault, and

ignores long-standing research on what contributes to higher rates of gender-based violence against women and LGBTQ communities.

Rockford Sexual Assault Counseling (RSAC) is an Illinois based rape crisis center that has provided services for survivors in Winnebago, Boone and Ogle counties for over forty years. Services include support for survivors, prevention education and advocacy. RSAC works from the belief that the root of sexual violence is oppression in all its forms and RSAC works to effect change in all systems that oppress survivors. Ending sexual violence includes working to end gender-based discrimination which only serves to perpetuate the violence. RSAC is active in working with organizations and entities to create policy that focuses on equality, not traditional gender roles, and which provides equal access for all survivors.

The Shriver Center on Poverty Law (Shriver Center) has a vision of a nation free from poverty with justice, equity and opportunity for all. The Shriver Center provides national leadership to promote justice and improve the lives and opportunities of people with low income, by advancing laws and policies, through litigation, and legislative and administrative advocacy. The Shriver Center is committed to economic security and advancement, including the achievement of equal opportunities for women, people of color, and transgender individuals.

The Network is a collaborative membership organization dedicated to improving the lives of those impacted by domestic violence through education, public policy and advocacy, and the connection of community members to direct service providers. We believe that all individuals should be treated fairly, without regard to gender identity or

sex. The Network is inclusive of all genders and identities in our work and is anti-racist in our approach to community building.

VOICES of Stephenson County is a non-profit organization in Northwestern Illinois focused on providing individuals and their families victim-centered services and support in the treatment and prevention of domestic violence and sexual assault and abuse. Since founding, VOICES has worked diligently to provide support and validation to survivors within our community, while continuously advocating for the rights of all survivors across the state. As an agency that provides services to survivors of sexual abuse and violence regardless of race, gender, orientation, origin, or gender identity, we care deeply about ensuring the safety and privacy of all people. VOICES believes that prohibiting an individual from using the restroom that corresponds with their gender identity only perpetuates discrimination while doing nothing to increase safety.

Women Employed's mission is to improve the economic status of women and remove barriers to economic equity. Since 1973, the organization has assisted thousands of working women with problems of discrimination and harassment, monitored the performance of equal opportunity enforcement agencies, and developed specific, detailed proposals for improving enforcement efforts, particularly on the systemic level. Women Employed believes that ending sex discrimination requires barring discrimination against an employee because of their gender identity or expression because women's rights and LGBT rights are inextricable.

YWCA Evanston/North Shore has been an essential part of the community in Northeastern Cook County since 1931, providing a safe place for women and girls in which they can reach their fullest potential. The organization is dedicated to eliminating racism,

empowering women and promoting peace, justice, freedom, and dignity for all. Everything the organizations does is based on the belief that all women have the right to be safe and choose the direction of their lives. The programs address the violence and lack of economic security experienced by far too many women and families, and which disproportionally impact women of color and members of the LGBTQ community including transgender women.

II. SUMMARY OF THE ARGUMENT

In 2006, the Illinois legislature amended the Illinois Human Rights Act ("IHRA") to add express protections for transgender people. The IHRA now prohibits unlawful discrimination in employment and public accommodations on account of a person's "gender-related identity, whether or not traditionally associated with the person's designated sex at birth." 775 ILCS 5/1-103(O-1).

Hobby Lobby seems to pretend that this law does not exist when it comes to public and workplace restroom usage—it concedes that it has barred (and continues to bar) Meggan Sommerville, a long-time Hobby Lobby employee, from using the women's restroom because she is transgender. Its refusal because Ms. Sommerville's "gender-related identity" is not "traditionally associated" with her "designated sex at birth" presents a textbook example of discrimination that the 2006 amendments were designed to prevent. For this reason alone, the Court should affirm the Illinois Human Rights Commission's (the "Commission") decision and end Hobby Lobby's discrimination at long last.

Hobby Lobby offers several justifications for its unlawful practices, none of which has any merit. First, Hobby Lobby cherry-picks a portion of Merriam-Webster's definition for the word "sex," arguing that it may lawfully segregate restrooms based on a person's "reproductive organs and structures." Hobby Lobby's narrow construction not only

misconstrues the Merriam-Webster definition, it also conflicts with the IHRA's plain language and perpetuates injurious sex-based generalizations that define womanhood based solely on reproductive anatomy and capacity. Courts have rejected similar efforts to justify discrimination based upon antiquated sex-based generalizations. Hobby Lobby's proposed definition further defies common sense: surely, Illinois employers and places of public accommodation are not permitted to impose an "anatomy check" before a person enters a restroom.

Second, Hobby Lobby purports to rely on the IHRA's legislative history and an old out-of-state court decision to support its actions. But the legislative history actually supports the conclusion that Hobby Lobby is violating the IHRA's plain language. The same is true for *Goins v. West Group*, 635 N.W.2d 717 (Minn. 2001). The *Goins* court erroneously relied on "traditional and accepted" employment practices, rather than the plain meaning of the Minnesota Human Rights Act, to conclude that employers could lawfully segregate restrooms based a person's sex assigned at birth. But even if the IHRA were interpreted based on "traditional and accepted" employment practices rather than the statutory language, these practices support Ms. Sommerville's position, not Hobby Lobby's. Currently, nearly every Fortune 500 company has adopted transgender-affirming policies that would permit Ms. Sommerville to use the restroom associated with her gender-related identity.

Third, Hobby Lobby claims that barring Ms. Sommerville from the women's restroom protects others' privacy and safety. Courts repeatedly have rejected this exact argument and found that others' discomfort cannot justify discriminatory terms and conditions of employment. Indeed, the IHRA was designed to thwart, not perpetuate, the

prejudices of co-workers or customers. Furthermore, discriminatory policies like Hobby Lobby's actually endanger transgender people like Ms. Sommerville by forcing them to use restrooms that do not align with the gender they live every day.

Finally, Hobby Lobby argues that it did not discriminate against Ms. Sommerville because it offered her the use of a separate non-gendered restroom. Far from validating Hobby Lobby's conduct, requiring Ms. Sommerville to use a separate facility from other women further stigmatizes her and other transgender people.

The Court should affirm the Commission's decision.

III. ARGUMENT

A. Hobby Lobby Violated the IHRA, Which Prohibits Discrimination Based on Gender-Related Identity in Employment and Public Accommodations

Hobby Lobby violated (and continues to violate) Articles II and V of the Illinois Human Rights Act ("IHRA") by prohibiting Ms. Sommerville—a Hobby Lobby employee for over twenty years—from using the women's restroom because she is transgender. Hobby Lobby does not dispute the core facts. It concedes that Ms. Sommerville "has a female 'gender-related identity'" (App. Br. at 12), and that it will not let her use the women's restroom because her "birth sex"[1] is male (*id.* at 14).

Under Article II, it is a civil rights violation for any employer to "segregate . . . or to act with respect to . . . privileges or conditions of employment on the basis of unlawful discrimination[.]" 775 ILCS 5/2-102(A). Article V prohibits denial of "full and equal

[1] Hobby Lobby uses the term "birth sex" throughout its brief. The more accurate and accepted term is "sex assigned [or designated] at birth," which recognizes that some people realize their sex is different from what they were assigned at birth. *See* Wylie C. Hembree et al., *Endocrine Treatment of Gender-Dysphoric/Gender-Incongruent Persons: An Endocrine Society Clinical Practice Guideline*, 102 J. CLINICAL ENDOCRINOLOGY & METABOLISM 3869, 3875 (2017).

enjoyment of the facilities, goods, and services of any public place of accommodation" on the basis of unlawful discrimination. 775 ILCS 5/5-102(A). Unlawful discrimination means "discrimination against a person because of his or her . . . sexual orientation," 775 ILCS 5/1-103(Q), which is defined to include "gender-related identity, whether or not traditionally associated with the person's designated sex at birth." 775 ILCS 5/1-103(O-1).

Hobby Lobby has violated (and continues to violate) Article II in at least two ways. First, by forbidding Ms. Sommerville from using the restroom that matches her gender-related identity, Hobby Lobby has denied a privilege and condition of employment "on the basis of unlawful discrimination." *Id*. at 5/2-102(A). Second, by barring Ms. Sommerville from the women's restroom, Hobby Lobby has "segregated" Ms. Sommerville on account of her gender-related identity, which violates the IHRA's plain language. 775 ILCS 5/2-102(A) (an employer may not "segregate . . . on the basis of unlawful discrimination"); *compare Grimm v. Gloucester Cty. Sch. Bd.*, 400 F. Supp. 3d 444, 456-57 (E.D. Va. 2019) ("[A]ll students except for transgender students may use restrooms corresponding with their gender identity. Transgender students are singled out, subjected to discriminatory treatment, and excluded from spaces where similarly situated students are permitted to go."), *aff'd*, 972 F.3d 586 (4th Cir. 2020), *reh'g en banc denied*, 2020 U.S. App. LEXIS 30339 (4th Cir. 2020).

Hobby Lobby also violated (and continues to violate) Article V of the IHRA by barring Ms. Sommerville from using the women's restroom. *See* 775 ILCS 5/1-103(Q); 775 ILCS 5/5-102(A). Hobby Lobby—unquestionably a "public place of accommodation"—concedes that it denies Ms. Sommerville "full and equal enjoyment" of

its facilities because her gender-related identity does not match her sex assigned at birth. App. Br. at 8.

B. <u>None of Hobby Lobby's Arguments Justifies Its Unlawful Discrimination Under the IHRA</u>

Hobby Lobby misinterprets the IHRA and offers unpersuasive reasons for why its discriminatory treatment under Article II and Article V should be permitted. All of these arguments lack merit and should be rejected.

1. The IHRA's Definition of "Sex" Does Not Permit Hobby Lobby to Discriminate Based on "Reproductive Organs and Structures"

Hobby Lobby's primary defense rests on an exemption in Article V that permits discrimination based on "sex" for any facility "which is distinctly private in nature such as restrooms." 775 ILCS 5/5-103(B); *see also* App. Br. at 15. However, this exemption does not authorize Hobby Lobby's discriminatory conduct.

Although Article V's exemption allows places of public accommodation to provide separate restrooms based on "sex," it does not permit what Hobby Lobby attempts here—to prohibit a woman from using the women's restroom simply because she is transgender. *Compare Adams v. Sch. Bd. of St. Johns Cty.*, 318 F. Supp. 3d 1293, 1322 (M.D. Fla. 2018) ("Adams is not contending that the school cannot provide separate restrooms for the sexes—he just wants the school to recognize that, interpreting sex to include gender identity, he is a boy and should be permitted to use the boys' restrooms."); *aff'd*, 968 F.3d 1286 (11th Cir. 2020); *Grimm v. Gloucester Cty. Sch. Bd.*, 972 F.3d 586, 618 (4th Cir. 2020) ("Grimm does not challenge sex-separated restrooms; he challenges the Board's discriminatory exclusion of himself from the sex-separated restroom matching his gender

identity."); *Roberts v. Clark Cty. Sch. Dist.*, 215 F. Supp. 3d 1001, 1015 (D. Nev. 2016) ("Although [his employer] contends that it discriminated against Roberts based on his genitalia, not his status as a transgender person, this is a distinction without a difference here.").

Hobby Lobby suggests that Ms. Sommerville is not a woman because she was assigned male at birth, and therefore the IHRA allows Hobby Lobby to prohibit her from using the women's restroom. To make this argument, Hobby Lobby disregards the IHRA's definition of "sex" and proposes an alternative definition narrowly focused on "reproductive organs and structures" that it cherry-picks from Merriam-Webster. App. Br. at 13. Hobby Lobby simply ignores the remainder of Merriam-Webster's definition, which includes "the sum of the structural, functional, and sometimes behavioral characteristics of organisms that distinguish males and females," and "the state of being male or female." *Sex*, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/sex (last visited July 7, 2020).

But it is the IHRA's definition of "sex"—not Hobby Lobby's self-serving one—that controls. *See People v. Johnson*, 231 Ill. App. 3d 412, 419 (2d Dist. 1992) ("In its law-making function, the legislature has the power to define the terms used in a statute in any reasonable manner and may broaden or narrow the meaning the term otherwise would have.") (internal citations omitted); *Mack v. Seaman*, 113 Ill. App. 3d 151, 154 (1st Dist. 1983) ("It is . . . fundamental that the legislature has the power to articulate reasonable definitions of any terms within its enactment and that such definitions for the purpose of its acts will be sustained to the exclusion of hypothetical indulgences."); *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1736 (2020) (finding that Title VII's prohibition of sex

discrimination includes discrimination on the basis of transgender status). The IHRA does not define "sex" in terms of "reproductive organs and structures," but as "the status of being male or female." 775 ILCS 5/1-103(O).[2] Under the IHRA's definition of "sex," Ms. Sommerville is a woman.[3] Although Article V would permit Hobby Lobby to exclude Ms. Sommerville from the *men's* restroom, it requires Hobby Lobby to allow her to use the women's restroom.

Both Article II and Article V plainly prohibit discrimination based on gender-related identity, "whether or not traditionally associated with the person's designated sex at birth." 775 ILCS 5/1-103(O-1). The IHRA must be interpreted as a "harmonious whole," as Hobby Lobby urges. App. Br. at 13. Under this canon of statutory construction, Ms. Sommerville's "sex"—*i.e.*, her "status of being male or female"—is female, even though this differs from her "designated sex at birth." Article V (but not Article II) allows a public accommodation to differentiate based on "sex" in restroom use—*not* on someone's "designated sex at birth." 775 ILCS 5/5-103(B). But that is precisely what Hobby Lobby seeks here—to prohibit Ms. Sommerville from using the women's restroom because her "designated sex at birth" differs from her "gender-related identity." Hobby Lobby's

[2] The legislature does not define "status," but Black's Law Dictionary defines it as a "person's legal condition, whether personal or proprietary." *Status*, BLACK'S LAW DICTIONARY (11th ed. 2019). A person's "status" is not necessarily fixed permanently. The IHRA recognizes other ways in which a person's status might change, such as "marital status," which the IHRA defines as "the legal status of being married, single, separated, divorced, or widowed." 775 ILCS 5/1-103(J).

[3] Even Hobby Lobby acknowledges Ms. Sommerville's "status" as female. *See* Recommended Liability Determination, App. A048, C1800 (Hobby Lobby changed Ms. Sommerville's "personnel records and benefits information to identify her as female" and referred to her as Meggan). *See also id.*, App. A056, C1808 ("It has been established that Complainant is a transgender woman, acknowledged as such by Respondent in both words and acts.").

position directly contradicts *both* Article II and Article V. Accepting its argument would improperly require the Court both to redefine the word "sex" *and* to add a new exemption in Article II of the IHRA.

Hobby Lobby's proposed definition of "sex" also contradicts other courts' rulings. As the Commission noted, the "absence of male genitalia does not make a female, as that could occur by illness or injury." Recommended Liability Determination, App. A054, C1806. The Seventh Circuit similarly recognized that someone's status as male, for example, is not determined solely by any specific biological characteristic, since a person's birth certificate could reflect a "male sex," while a person's "chromosomal makeup" could reflect another. *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1053 (7th Cir. 2017), *overruled on other grounds by Illinois Republican Party v. Pritzker*, 973 F.3d 760, 763 (7th Cir. 2020); *see also, e.g.*, *Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 721 (4th Cir. 2016) (rejecting a definition of sex based on a "hard-and-fast binary division on the basis of reproductive organs" as "not universally descriptive"), *vacated*, 137 S. Ct. 1239 (2017); *see also, e.g.*, *Adams v. Sch. Bd. of St. Johns Cty.*, 968 F.3d 1286, 1308-09 (11th Cir. 2020) ("the School Board's preferred definition of 'biological sex' reduces Mr. Adams 'to nothing more than the sum of [his] external genitalia at birth,' to the exclusion of all other characteristics. . . . This understanding of 'sex'—or, for that matter, 'biological sex'—is as narrow as it is unworkable.").

Further, Hobby Lobby's attempt to redefine "sex" to mean "reproductive organs and structures" perpetuates harmful (and unlawful) sex-based generalizations. *Cf. Adams*, 968 F.3d at 1302 (striking down school policy requiring a transgender male student to use female restroom because policy enforces gender stereotype "that one's gender identity and

expression should align with one's birth sex.”). According to Hobby Lobby, Ms. Sommerville cannot use the women’s restroom because she does not possess particular “reproductive organs and structures.” But Hobby Lobby is not entitled to narrow the IHRA’s protections by imposing its own definition of womanhood upon the statute’s plain language.

The United States Supreme Court and federal courts of appeals have rejected similar efforts to narrow the scope of federal anti-discrimination statutes to justify discrimination against women arising from such sex-based generalizations. *See, e.g.*, *Int’l Union, United Auto. Aerospace & Agric. Implement Workers v. Johnson Controls, Inc.*, 499 U.S. 187, 211 (1991) (finding that assumptions about women’s reproductive role relative to their economic role were not permissible bases for excluding women from factory work); *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544 (1971) (rejecting policy of refusing to hire women with pre-school-age children while hiring men with pre-school-age children, based on assumptions about women’s role in raising children); *Kocak v. Cmty. Health Partners of Ohio, Inc.*, 400 F.3d 466, 470 (6th Cir. 2005) (finding that a woman “cannot be refused employment on the basis of her potential pregnancy”).

Indeed, the Supreme Court concluded over twenty years ago that “we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group[.]” *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989).[4] The Court reaffirmed and clarified this holding earlier this year in

[4] Hobby Lobby’s related argument that excluding Ms. Sommerville from the restroom “protects” female employees and patrons resembles historical justifications for laws and policies that actually disfavored and discriminated against women. In *Muller v. Oregon*, 208 U.S. 412, 422 (1908), for example, the United States Supreme Court upheld a statute forbidding women from working in a factory more than ten hours a day because a woman’s

Bostock, concluding that an individual's "transgender status is not relevant to employment decisions." 140 S. Ct. at 1754 ("An employer who fires an individual merely for being . . . transgender defies the law.").

Finally, it is impossible for Hobby Lobby to provide separate restrooms based on "reproductive organs and structures." To enforce such a policy, Hobby Lobby employees and patrons would be subjected to invasive and humiliating questions about their bodies before being allowed to use the restroom. *See Adams*, 318 F. Supp. 3d at 1314 ("[T]here could be transgender students whose enrollment documents are consistent with the students' gender identity, and no one would know they are using restrooms that are different from the ones that match their sex assigned at birth."), *aff'd*, 968 F.3d at 1298-99 (noting that the policy "does not even succeed in treating all transgender students alike[]" because students' enrollment documents controlled the determination of gender, and "[t]he designation of a student's sex on his school documents is not a 'legitimate, accurate proxy' for his sex assigned at birth." (citing *Craig v. Boren*, 429 U.S. 190, 204 (1976))). Indeed, the only reason Hobby Lobby knows Ms. Sommerville's gender identity does not align with her sex assigned at birth is because she shared this information with Hobby Lobby when she transitioned. As the Commission concluded, an anatomical pre-check before

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ability to bear children was essential to "the well-being of the [human] race." Similar "protectionist" laws were passed in the following decades. *See, e.g.*, *Goesaert v. Cleary*, 335 U.S. 464, 466 (1948) ("the oversight assured through ownership of a bar by a barmaid's husband or father minimizes hazards that may confront a barmaid without such protecting oversight"), *disapproved of by Craig v. Boren*, 429 U.S. 190 (1976). Courts have long since rejected such "protectionist" policies as impermissible discrimination—rather than protect women, these policies actually disadvantaged them. In *Johnson Controls*, for example, the Supreme Court observed that "[c]oncern for a woman's existing or potential offspring historically has been the excuse for denying women equal employment opportunities." 499 U.S. at 211 (citing *Muller*).

entering the restroom is "inherently problematic" and directly contradicts codified Illinois public policy to protect individuals from discrimination on account of their gender-related identity. 775 ILCS 5/1-102(A); Recommended Liability Determination, App. A054, C1806 ("[E]nforcement of Respondent's approach is inherently problematic. Broad customer screening could prove difficult, whether by merely asking the customer if they were [transgender] or using a version of 'stop and frisk' prior to the facility's use."); *see also DeLuna v. Burciaga*, 223 Ill. 2d 49, 60 (2006) ("In construing a statute, we presume that the legislature, in its enactment of legislation, did not intend absurdity, inconvenience or injustice."); *Burger v. Lutheran Gen. Hosp.*, 198 Ill. 2d 21, 46 (2001) ("It is well settled that statutes are to be construed in a manner that avoids absurd or unjust results.") (internal quotations omitted).

2. Legislative History and a Decades-Old Out-of-State Case Do Not Permit Hobby Lobby's Unlawful Discrimination

Hobby Lobby argues that the IHRA's legislative history, as well as a nineteen-year-old Minnesota Supreme Court decision interpreting Minnesota law, support its ability to prohibit Ms. Sommerville from using the women's restroom. Neither authority helps Hobby Lobby.

a. Legislative History Confirms that Hobby Lobby Is Violating the IHRA

The IHRA is clear and unambiguous—as an employer and place of public accommodation, Hobby Lobby cannot discriminate based on gender-related identity. The Court therefore should apply the statute's plain language and need not consult legislative history to determine whether Hobby Lobby discriminated against Ms. Sommerville.

DeLuna, 223 Ill. 2d at 59 ("[W]hen the language of the statute is clear, it must be applied as written without resort to aids or tools of interpretation.").

Even if it were relevant, however, the legislative history does not support Hobby Lobby's attempt to re-write the statute. In 2006, the Illinois legislature passed a bill adding "gender-related identity" as a protected class under the IHRA. Hobby Lobby argues that this bill was not intended to permit transgender women like Ms. Sommerville to use the women's restroom, citing testimony from Representative Terry Parke, who opposed the bill because it would allow transgender people to use restrooms that correspond with their gender-related identities. But Hobby Lobby mistakenly attributes Representative Parke's statements to the Illinois legislature as a whole. App. Br. at 22 (quoting 93d Gen. Assemb., House Proceedings, Jan. 11, 2005, at 10). On the contrary, the bill's supporters openly disagreed with Representative Parke and passed the bill into law despite his objections. *See* 93d Gen. Assemb., House Proceedings, Jan. 11, 2005, at 11.

b. Case Law Supports that Hobby Lobby Is Violating the IHRA

Hobby Lobby also argues that the Commission should have "looked to" other jurisdictions to interpret the IHRA. App. Br. at 22. Because the IHRA's meaning is clear and unambiguous, however, it would have been improper for the Commission to consult other jurisdictions for interpretive guidance. *DeLuna*, 223 Ill. 2d at 59. In any event, looking to other jurisdictions undermines Hobby Lobby's argument.

Hobby Lobby claims that the Commission should have relied on *Goins v. West Group*, 635 N.W.2d 717 (Minn. 2001), a nineteen-year-old case interpreting Minnesota law. In *Goins*, the Minnesota Supreme Court held that the Minnesota Human Rights Act

permitted an employer to designate restrooms based on "biological gender."[5] *Id*. at 723. The court reached this conclusion based not on the statute's language, but rather the court's assumption that the "traditional and accepted practice in the employment setting is to provide restroom facilities that reflect the cultural preference for restroom designation based on biological gender." *Id*. The Court should reject Hobby Lobby's invitation to follow the *Goins* court's reasoning here. *See People ex rel. Birkett v. Dockery*, 235 Ill. 2d 73, 81 (2009) ("It is a cardinal rule of statutory construction that we cannot rewrite a statute, and depart from its plain language, by reading into it exceptions, limitations, or conditions not expressed by the legislature.").

Goins was wrong when it was decided, and recent developments have further undermined the suppositions on which its reasoning was based. The rationale for the court's ruling—that the "traditional and accepted practice in the employment setting" is to segregate restrooms based on "biological gender"—was false at the time and is even more clearly untrue today. *Contra Goins*, 635 N.W.2d at 723. Ninety-one percent of Fortune 500 companies now have explicit gender-identity protections in their non-discrimination policies. *Corporate Equality Index 2020*, HUMAN RIGHTS CAMPAIGN FOUNDATION, at 5. The Corporate Equality Index expressly considers "gender transition guidelines with supportive restroom . . . guidance" as part of its evaluation criteria. *Id.* at 31. In 2016, sixty-eight companies, including some of the largest in the United States, submitted a brief challenging a North Carolina state law that banned transgender people from using the restroom consistent with their gender-related identity. *See Amicus Curiae* Br. by 68

[5] "Biological gender" is not "a medically accepted term." *Grimm*, 400 F. Supp. 3d at 457. Even Hobby Lobby argues that it wishes to discriminate based on "sex," not "gender."

Companies Opposed to H.B. 2 & In Support of Plaintiff's Motion for Preliminary Injunction, *United States v. North Carolina*, No. 16-cv-425 (M.D.N.C. July 8, 2016). The companies argued that transgender-affirming policies—*e.g.*, ones that allow transgender employees to use restrooms that match their gender identity—help recruit and retain better employees. *Id.* at 16.

In addition, numerous courts and agencies have issued more recent interpretations of statutes similar to the IHRA (none of which Hobby Lobby mentions) that further rebut *Goins*'s holding. For example, in *Doe v. Regional School Unit 26*, 86 A.3d 600, 606 (Me. 2014), the Maine Supreme Court interpreted the Maine Human Rights Act, which bars discrimination based on gender identity, to forbid discrimination against transgender people with respect to restroom use—despite a "sanitary-facilities provision" permitting restroom separation by sex. Likewise, in *Parents for Privacy v. Dallas School District No. 2*, 326 F. Supp. 3d 1075, 1108 (D. Or. 2018), *aff'd sub nom. Parents for Privacy v. Barr*, 949 F.3d 1210 (9th Cir. 2020), *cert. denied*, (U.S. Dec. 8, 2020) (No. 20-62), a federal district court in the District of Oregon found that "[a] policy that segregates school facilities based on biological sex and prevents transgender students from accessing facilities that align with their gender identity violates Oregon [anti-discrimination] law."[6] The Colorado Civil Rights Division reached a similar conclusion when it found that a school district violated the Colorado Civil Rights Act by forbidding a transgender student from using the

[6] Like the IHRA, Oregon state law prohibits discrimination in public accommodation on the basis of a person's sexual orientation, which is defined as "an individual's actual or perceived heterosexuality, homosexuality, bisexuality or gender identity, regardless of whether the individual's gender identity, appearance, expression or behavior differs from that traditionally associated with the individual's sex at birth." O.R.S. § 659A.403(1); O.R.S. § 174.100(7).

women's restroom. *See* Probable Cause Determination, *Coy Mathis v. Fountain-Fort Carson Sch. Dist. 8*, Colorado Civil Rights Division, Charge No. P20130034X (June 17, 2013).

The Iowa Civil Rights Commission instructs that under its Civil Rights Act, which is similar to the IHRA, "individuals are permitted to access . . . restrooms in accordance with their gender identity, rather than their assigned sex at birth." IOWA CIVIL RIGHTS COMMISSION, SEXUAL ORIENTATION & GENDER IDENTITY: A PUBLIC ACCOMMODATIONS PROVIDER'S GUIDE TO IOWA LAW (2018). The Washington State Human Rights Commission similarly enacted rules to implement the state's antidiscrimination law, which state that employers and places of public accommodation must "allow individuals the use of gender-segregated facilities, such as restrooms, locker rooms, dressing rooms, and homeless or emergency shelters, that are consistent with that individual's gender expression or gender identity." WASH. ADMIN. CODE § 162-32-060(1). Employers and entities that provide public accommodations in Washington cannot "request or require an individual to use a gender-segregated facility that is inconsistent with that individual's gender expression or gender identity, or request or require an individual to use a separate or gender-neutral facility." *Id.* § 162-32-060(2).

3. Discrimination Is Not an Appropriate Response to Alleged Privacy or Safety Concerns

Hobby Lobby tries to justify its discrimination by saying that it needs to "protect all its patrons and employees." App. Br. at 27. More specifically, Hobby Lobby asserts that female employees expressed "discomfort" with Ms. Sommerville's presence in the women's restroom. *Id.* at 25. But as the Commission found, "a co-worker's discomfort cannot justify discriminatory terms and conditions of employment. The prejudices of co-

workers or customers are part of what the Act was meant to prevent." Recommended Liability Determination, App. A057, C1809; *compare Adams*, 318 F. Supp. 3d at 1320 ("Thus, while the School Board must take into account the concerns of cisgender students and their parents, it may not do so at the expense of Adams' right to equal protection under the law."); *Doe v. Boyertown*, 897 F.3d, 518, 523 (3d Cir. 2018) ("we do not view the level of stress that cisgender students may experience because of appellees' bathroom and locker room policy as comparable to the plight of transgender students who are not allowed to use facilities consistent with their gender identity").

a. Numerous Courts, as well as the Commission in Other Decisions, Have Rejected "Privacy" Justifications for Discrimination

Hobby Lobby cites "privacy" concerns and claims of sexual "harassment" to support its discriminatory policy. Courts and other tribunals repeatedly have rejected similar justifications.

For example, the Eighth Circuit affirmed a district court's finding that a Minnesota school district did not discriminate against a non-transgender female employee by allowing a transgender female employee to use the women's faculty restroom, agreeing that "reasonable women could not find their working environment abusive or hostile when they must share bathroom facilities with a coworker who [is a transgender woman]." *Cruzan v. Special Sch. Dist., No. 1*, 294 F.3d 981, 984 (8th Cir. 2002).

The Third, Fourth, Seventh, Ninth and Eleventh Circuits have reached the same conclusion when considering similar facts in the school context. For example, in *Whitaker*, 858 F.3d at 1052, a Wisconsin school district claimed its anti-transgender restroom policy was necessary in order to "protect the privacy rights of all 22,160 students." The Seventh

Circuit disagreed, holding that a "transgender student's presence in the restroom provides no more of a risk to other students' privacy rights than the presence of an overly curious student of the same biological sex who decides to sneak glances at his or her classmates performing their bodily functions." *Id*. at 1052. The Ninth Circuit affirmed a district court's rejection of a claim that "high school students have a fundamental right not to share restrooms and locker rooms with transgender students who have a different assigned sex than theirs." *Parents for Privacy v. Barr*, 949 F.3d at 1223 (quoting *Parents for Privacy*, 326 F. Supp. 3d at 1096-99); *see also Boyertown*, 897 F.3d at 529 n.69 (finding that "discomfort being around students whom they define as different from themselves" did not justify prohibiting transgender students from using the restroom that matched their gender identity); *Grimm*, 972 F.3d at 613 (4th Cir. 2020) (recognizing privacy as an interest, but noting "that bodily privacy of cisgender boys using the restrooms did not increase when Grimm was banned from those restrooms"); *Adams*, 968 F.3d at 1303 (finding the school's bathroom policy "reveal[ed] no substantial relationship between privacy in . . . restrooms and excluding [appellee] from the boy's restroom").

The Illinois Human Rights Commission has also consistently reached this same conclusion. For example, in *P.S. v. Komarek School District #94*, Ill. Hum. Rts. Comm'n, ALS No. 16-0003 (Sep. 11, 2019),[7] a school district barred a student from using the restroom that matched his gender identity because of other boys' potential discomfort. The

[7] *Available at* https://www2.illinois.gov/sites/ihrc/Decision/IHRCDecisions/16-0003%20Case%20Name%20%20Michael%20S.%20and%20Andrea%20S.,%20on%20behalf%20of%20P.S.,%20a%20minor%20v.%20Komarek%20School%20District%2094.pdf.

Commission rejected the justification and concluded that this type of prejudice is "part of what the Act was meant to prevent." *Id.* at 15.

b. Excluding Ms. Sommerville from the Restroom Is Not an Appropriate Remedial Measure, and Hobby Lobby's Asserted "Safety" Concern is a Pretext for Discrimination

Hobby Lobby argues that Ms. Sommerville should not be able to use the women's restroom because she allegedly engaged in past "misconduct toward female employees." App. Br. at 25. This argument should be rejected.

First, there is no logical connection between the alleged past misconduct and Ms. Sommerville's ability to use the women's restroom today. The allegations from 2006 had nothing to do with the restroom. Likewise, employee complaints in 2011 about Ms. Sommerville's restroom use did not allege that she engaged in any misconduct (sexual harassment or otherwise) towards women.

Second, excluding any employee, whether transgender or not, from the restroom consistent with their gender identity is not a reasonable or proportionate remedial response to sexual harassment allegations. An employee who poses a legitimate safety risk to coworkers does so just as much in the break room as in the restroom. In such a situation, the appropriate consequence is likely suspension or termination, not merely exclusion from the restroom. It is thus evident that Hobby Lobby's "safety" argument is simply a pretext to discriminate against Ms. Sommerville because she is transgender.

c. Hobby Lobby's Discriminatory Restroom Policy Jeopardizes Ms. Sommerville's Safety and Is Unrelated to the Prevention of Sexual Violence

Although Hobby Lobby purports to be concerned with safety, its policy in fact endangers transgender people such as Ms. Sommerville. A group of nearly three hundred sexual assault and domestic violence organizations (including forty national organizations, and ten based in Illinois, four of which are *amici* here) recently declared that discriminatory restroom policies "jeopardize the safety of transgender people by forcing them into restrooms that do not align with the gender they live every day." *National Consensus Statement of Anti-Sexual Assault and Domestic Violence Organizations in Support of Full and Equal Access for the Transgender Community*, THE NATIONAL TASK FORCE TO END SEXUAL AND DOMESTIC VIOLENCE, (Apr. 13, 2018), https://vawnet.org/material/national-consensus-statement-anti-sexual-assault-and-domestic-violence-organizations ("National Consensus Statement").[8]

By contrast, "discriminating against transgender people does nothing to decrease the risk of sexual assault." *Id.* Refuting the oft-repeated speculation that non-discriminatory restroom policies will permit men pretending to be transgender women to "prey upon women," the organizations responded that "[n]ondiscrimination laws do not allow men to go into women's restrooms—period." *Id.* In fact, over "200 municipalities and 18 states

[8] *See also A.H. v. Minersville Area Sch. Dist.*, 408 F. Supp. 3d 536, 578 (M.D. Pa. 2019) ("[T]he risk that a member of the public may pose a safety concern to A.H. is arguably significantly higher when a child who by all appearances is female, is required to use a men's restroom."); *Grimm*, 400 F. Supp. 3d at 461 ("[T]ransgender individuals often undergo a variety of procedures and treatments that result in anatomical and physiological changes, such as puberty blockers and hormone therapy. Such treatments can result in transgender girls developing breasts . . . . [F]orcing such a transgender girl to use the male restrooms could likely expose boys to viewing physical characteristics of the opposite sex. From this perspective, the Board's privacy concerns fail to support the policy it implemented.").

have nondiscrimination laws protecting transgender people's access to facilities consistent with the gender they live every day," and none has "seen a rise in sexual violence or other public safety issues due to nondiscrimination laws." *Id.* The speculative fear that men will bombard the women's restroom (or women will use the men's room) "is based either on a flawed understanding of what it means to be transgender or a misrepresentation of the law." *Id.*

The Williams Institute at UCLA School of Law also recently found no evidence that permitting transgender people to use public facilities that align with their gender identity increased safety risks. *See* Amira Hasenbush et al., *Gender Identity Nondiscrimination Laws in Public Accommodations: a Review of Evidence Regarding Safety and Privacy in Public Restrooms, Locker Rooms, and Changing Rooms*, 16 SEXUALITY RES. & SOC. POL'Y 70 (Mar. 2019). The Williams Institute compared the safety of public restrooms, locker rooms, and changing rooms in localities that had adopted gender-identity-inclusive nondiscrimination laws with those that did not have such laws. The study found that the passage of transgender-inclusive restroom laws "is not related to the number or frequency of criminal incidents" in public spaces—and that fears "of increased safety and privacy violations as a result of nondiscrimination laws are not empirically grounded." *Id*. at 80.

Illinois school districts likewise have not come across "instances of harassment or inappropriate behavior related to transgender students accessing facilities of their choice" since the 2006 IHRA amendments were adopted. Rachel Percelay, *17 School Districts Debunk Right-Wing Lies About Protections for Transgender Students*, MEDIA MATTERS

FOR AMERICA (June 3, 2015, 10:27 AM), https://www.mediamatters.org/sexual-harassment-sexual-assault/17-school-districts-debunk-right-wing-lies-about-protections.

4. Permitting Ms. Sommerville to Use the Women's Restroom Will Not Eliminate Gender-Segregated Facilities

Hobby Lobby repeatedly (and incorrectly) laments that allowing Ms. Sommerville to use the women's restroom will cause "all public restrooms in Illinois, including those in public courthouses, [to] be single use or multiple use open to both sexes." App. Br. at 20. But permitting Ms. Sommerville to use the women's restroom "will not integrate the restrooms between the sexes." *Adams*, 318 F. Supp. 3d at 1317. On the contrary, Ms. Sommerville does not want to use the *men's* restroom; she wants to use the women's restroom, like any other woman. Put another way, Ms. Sommerville seeks equal treatment for *all* privileges and conditions of her employment, not just the ones outside the restroom. *See id*.

The Seventh Circuit already has rejected an argument similar to Hobby Lobby's in the school context. There, the school district argued that an "inclusive policy will result in the demise of gender-segregated facilities in schools." *Whitaker*, 858 F.3d at 1055. The court disagreed, quoting evidence that "allowing transgender students to use facilities that align with their gender identity has actually reinforced the concept of separate facilities for boys and girls." *Id.* And indeed, for all of Hobby Lobby's handwringing, gendered restrooms remain abundant in Illinois years after the ALJ issued his Recommended Liability Determination.

C. <u>Offering a Single-Use Alternative Further Stigmatizes Ms. Sommerville and Is its Own Form of Discrimination</u>

The Commission concluded that permitting Ms. Sommerville to use a unisex restroom did not absolve Hobby Lobby's discriminatory treatment. According to the Commission, Hobby Lobby "chose to resurrect the antiquated and long abandoned schemes of 'separate, but equal' and outright segregation." Recommended Order and Decision, App. A067, C3065 ("No amount of bathroom breaks, raises, promotions, or the availability of the newly constructed 'unisex' restroom, can substitute for barring [Ms. Sommerville] from a facility that is open to all the public, but her, or any other transgender [person.]").

Hobby Lobby argues that Ms. Sommerville is "treated the same as any other employee or patron regarding restroom usage" because she "may use the unisex restroom and the restroom corresponding to Ms. Sommerville's sex." App. Br. at 25. Hobby Lobby is wrong. Ms. Sommerville is the *only* employee or patron who is forbidden from using the restroom associated with the gender she lives every day.

The Commission is far from alone in deeming this treatment unlawful segregation. In the school context, the Seventh Circuit concluded that a "gender-neutral alternative" was not "sufficient" to relieve a defendant from liability—it "further stigmatized" the student, "indicating that he was 'different' because he was transgender." *Whitaker*, 858 F.3d at 1045, 1050; *see also id*. at 1045 ("[Appellee] was faced with the unenviable choice between using a bathroom that would further stigmatize him . . . or avoid use of the bathroom altogether at the expense of his health."). Numerous other courts have reached the same conclusion. *See, e.g.*, *Boyertown*, 897 F.3d at 530-31 (concluding that "requiring transgender students to use single user or birth-sex-aligned facilities is its own form of

discrimination" and such a policy would "invite[] more scrutiny and attention" from peers, and "very publicly brand all transgender students with a scarlet 'T'"); *Parents for Privacy*, 326 F. Supp. 3d at 1104, 1106 (finding that "requiring transgender students to use single-user facilities or facilities that match their [sex assigned at birth] is a form of sex discrimination" and that "[f]orcing transgender students to use facilities inconsistent with their gender identity would undoubtedly harm those students and prevent them from equally accessing educational opportunities and resources"); *Adams*, 318 F. Supp. 3d at 1316 (noting the "stigma that attaches" to the use of the gender-neutral restroom, and quoting testimony that such a policy sent a message that the school did not view the student "as a real boy"); *A.H.*, 408 F. Supp. 3d at 564 ("Courts have repeatedly rejected the argument that Title IX is satisfied when a school provides the transgender student use of a unisex bathroom, if the student is still prevented from using the bathroom corresponding to his/her gender identity."); *Grimm*, 972 F.3d at 624-27 (finding that a school unlawfully prohibited a male student from using the male restroom, even though it made available a separate unisex restroom).

Stigmatizing segregation is precisely what Hobby Lobby seeks here. Hobby Lobby's policy publicly brands Ms. Sommerville as different and not worthy of the privileges that every other employee and patron enjoy. This not only is harmful to Ms. Sommerville's health and well-being; it is unlawful discrimination in Illinois.

IV. CONCLUSION

For the foregoing reasons, *amici curiae* respectfully request that this Court affirm the Commission's decision.

SUPREME COURT RULE 341(c) CERTIFICATE

I, Nicholas J. Siciliano, certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 28 pages.

/s/ Nicholas J. Siciliano
Nicholas J. Siciliano
One of *Amici Curiae*'s Attorneys

No. 2-19-0362

IN THE
APPELLATE COURT OF
ILLINOIS SECOND DISTRICT

HOBBY LOBBY STORES, INC.,

Petitioner-Appellant,

V.

MEGGAN SOMMERVILLE and STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION,

Respondents-Appellees.

Petition for Review of Orders of Illinois Human Rights
Commission Charge Nos. 2011CN2993 and 2011CN2994
ALS No. 35-0060C

NOTICE OF FILING

TO: Evan Siegel
Assistant Attorney General
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601
civilappeals@atg.state.il.us

Jacob Meister
Jacob Meister & Associates
2129 N. Western Ave.
Chicago, IL 60647
jacob@meisterlaw.com

Counsel for Meggan Sommerville

Whitman H. Brisky
Mauck & Baker, LLC
1 N. LaSalle St., Suite 600
Chicago, IL 60602
wbrisky@mauckbaker.com
Counsel for Petitioner-Appellant

Please take note that on December 22, 2020, we file with the Illinois Appellate Court, Second District the attached BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION OF ILLINOIS, *ET AL*., IN SUPPORT OF THE RESPONDENTS-APPELLEES.

Dated: December 22, 2020

Respectfully submitted,
LATHAM & WATKINS LLP

/s/ Nicholas J. Siciliano
Nicholas J. Siciliano (ARDC No. 6287387)
Latham & Watkins, LLP
330 North Wabash Avenue, Suite 2800
Chicago, IL 60611
Telephone: 312.876.7700
Fax: 312.993.9767
Nicholas.Siciliano@lw.com

Counsel for *Amici Curiae*

CERTIFICATE OF SERVICE

The undersigned certifies that on December 22, 2020, BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION OF ILLINOIS, *ET AL*., IN SUPPORT OF THE RESPONDENTS-APPELLEES was filed with the Appellate Court of Illinois using the Court's electronic filing system. Copies of the above-listed documents were served by electronic mail upon the following counsel for the parties to all primary and secondary email addresses listed below:

Evan Siegel
Assistant Attorney General
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601
civilappeals@atg.state.il.us

Jacob Meister
Jacob Meister & Associates
2129 N. Western Ave.
Chicago, IL 60647
jacob@meisterlaw.com
Counsel for Meggan Sommerville

Whitman H. Brisky
Mauck & Baker, LLC
1 N. LaSalle St., Suite 600
Chicago, IL 60602
wbrisky@mauckbaker.com
Counsel for Petitioner-Appellant

Under penalties as provided by law pursuant to section 1-109 of the Illinois Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct, except as to matters stated to be information and belief and as to such matters the undersigned certifies as aforesaid that he verify believes the same to be true.

/s/Nicholas J. Siciliano

Nicholas J. Siciliano
Counsel for *Amici Curiae*

Nicholas J. Siciliano
(ARDC No. 6287387)
Latham & Watkins, LLP
330 North Wabash Avenue, Suite 2800
Chicago, IL 60611
Telephone: 312.876.7700
Fax: 312.993.9767
Nicholas.Siciliano@lw.com