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Clerk, U.S. Court of Appeals
For the Seventh Circuit
Room 2722
219 S. Dearborn Street
Chicago, IL 60604

Re: Kimberly Hively v. Ivy Tech Community College of Indiana
United States Court of Appeals for the Seventh Circuit
District Court No.: 3:14-cv-01791-RL-CAN
Appellate Court No.: 15-1720

Pursuant to FRAP 28(j), Appellee submits this response to Appellant's supplemental authority.

The supplemental authority is an EEOC commissioners' opinion interpreting 42 U.S.C §2000e-16b(a), the federal sector employment statute. In contrast, this appeal involves 42 U.S.C §2000e-2(a)(1), the non-federal sector employment statute. The opinion does not directly apply to this appeal because Appellant is not a federal employee.

While the new opinion is clearly not controlling, Appellant incorrectly insists it deserves "great deference." No deference is afforded when the issue involves plain statutory meaning. *EEOC v. Thrivent Fin.*, 700 F.3d 1044, 1049 (7th Cir. 2012) (rejecting EEOC's definition of "inquiries"). Deference is unnecessary on pure questions of statutory construction or where the agency's decision is clearly wrong. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 (1987); *Gen. Dynamics v. Cline*, 540 U.S. 581, 600 (2004) (EEOC's definition of "age" was "clearly wrong").

The new opinion is clearly wrong. The commissioners acknowledged sexual orientation is not "listed in Title VII as a prohibited basis for employment actions" and it is impermissible to "add words to [Title VII] to produce what is thought to be a desirable result." *Foxx* at 5, 13 n 13. The commissioners also recognized that their new opinion directly contradicts their own prior opinions. *Morrison v. Dep't of Navy*, No. 01930778, 1994 EEOPUB LEXIS 329 (1994) ("statutes and case law . . . mandate" Title VII does not prohibit sexual orientation discrimination); *Allen v. Dep't of Homeland Sec.*, No. 0120091819, 2010 EEOPUB LEXIS 3830 (2010) (same).

Nevertheless, the commissioners concluded – by a 3-2 vote – that "an allegation of discrimination based on sexual orientation is necessarily an allegation of sex discrimination."[1] *Foxx* at 6. This jettisons decades of judicial interpretation of the 50 year-old statute and inserts a new protected characteristic. Given the commissioners' attempt to discard decades of judicial authority on this exact issue, the unprecedented breadth of the commissioners' opinion, and the legal issue of pure statutory interpretation, the commissioners' opinion is entitled to no deference.

Sincerely,

/s/ Jason T. Clagg

Jason T. Clagg

PROOF OF SERVICE

I certify that on July 21, 2015 a copy of Defendant-Appellee Ivy Tech Community College of Indiana's letter in response to Plaintiff-Appellant Kimberly Hively's supplemental authority was served via the Court's CM/ECF system upon the following counsel of record in compliance with Circuit Rule 25(a):

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[1] *See* Dale Carpenter, *Anti-Gay Discrimination is sex discrimination, says the EEOC*, The Washington Post, July 16, 2015 (reporting 3-2 decision).