The Right to Sit in West Virginia

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THE RIGHT TO SIT IN WEST VIRGINIA

ABSTRACT

In 1901, West Virginia guaranteed that women working outside the home would have a place to sit down at their workplace. In 2023, despite that law, no worker in West Virginia is functionally required to be given a chair. This Note explores the use of seating laws to prevent the modern and historic workplace issue of prolonged standing, or when an employee is required to stand in one place for too long at one time. Prolonged standing in the workplace is an ergonomics problem, a medical concern, and a labor issue. The pain, discomfort, and long-term chronic disease caused by prolonged standing are all preventable, too—it just requires someone to have a chair to sit down while on the job, and to rest their feet for at least some short periods of time.

Around a century ago, nearly all states, including West Virginia, sought to prevent prolonged standing in the workplace, and did so by enacting seating laws that protected female employees, who were considered to experience the most deleterious effects of prolonged standing. These and other laws governing ergonomics formed the framework for guaranteeing what is referred to as “the right to sit.” Unfortunately, many of these protections are not currently in effect, and many workers continue to be subjected to prolonged standing in the workplace regardless of what the law requires. This Note discusses the history of seating laws, the specific law in West Virginia, its non-enforcement, and its path to revival. This Note argues that West Virginia’s female-only seating law could be resurrected and expanded to include all people, and advocates for policy changes to codify robust workplace seating protections in West Virginia and across the United States.

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I. INTRODUCTION

A. The Content of this Note

This Note explores the history of seating laws, from the Progressive Era to today. It chronicles how advocacy for greater legal equality between the sexes
also relegated sex-specific protective laws to a vestigial status and to a point where those laws do not currently protect any workers at all. This Note discusses federal and state ergonomic laws, clarifies the lack of preemption by federal agency regulations in this area, and focuses on current West Virginia law. Critically, this Note takes the view that West Virginia’s seating law for female employees still applies today and argues that labor advocates should seek to enforce the law in state court and discusses different litigation considerations for that purpose. This Note additionally discusses alternative methods to guarantee the right to sit and how the public can become involved. Finally, this Note will conclude with recommendations and encouragement for legislators, regulators, and litigators about expanding seating protections for all workers in West Virginia.

Part II will discuss the history of the state seating laws, and Part III will discuss the recent class action seating law cases from California. Parts IV, V, and VI cover different methods of enforcing the right to sit in West Virginia, strategic avenues for litigation, possible defenses, and other points of consideration. Part VII discusses alternative methods to guarantee the right to sit. Part VII provides recommendations for West Virginia lawmakers, regulators, and plaintiffs’ attorneys. Part IX concludes this Note.

B. Background

In the late 1800s and early 1900s, all the states adopted protective laws for the employment of women to different degrees. Nearly all included a mandatory seating law, which are a type of labor regulation that requires employers to provide their employees with a chair to sit while on the job. Generally, these laws only applied to women, and sometimes to children, and were often limited to particular occupations or workplaces. These laws were a result of women’s advocacy movements in the Progressive Era, which fought to keep women and children out of the most hazardous occupations and prevent exploitation by their employers. The statutory penalties for a violation were primarily fines and occasionally jail time.

These state law-based women’s protections were found to be constitutional during the *Lochner* era. The *Lochner* era refers to the period from the 1900s to the 1930s when the Supreme Court emphasized the individual freedom of contract over state labor regulations. The case itself, *Lochner v. New York*
York,\(^3\) struck down a state law regulating the weekly working hours of bakers in the state.\(^4\) This judicial philosophy was common, as the business-friendly court provided rulings that often struck down similar protective labor laws. However, the Court nevertheless upheld state statutory protections for women. In *Muller v. Oregon*,\(^5\) a case decided three years after *Lochner*, the Court decided that the Contract Clause of the Constitution did not prevent the state of Oregon from limiting the working hours of women in mechanical establishments, factories, and laundries to ten hours a day.\(^6\) The Court in *Muller* justified its decision on

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\(^3\) 198 U.S. 45 (1905).

\(^4\) *Id.*

\(^5\) 208 U.S. 412 (1908).

\(^6\) Justice Brewer wrote:

*That woman’s physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious. This is especially true when the burdens of motherhood are upon her. Even when they are not, by abundant testimony of the medical fraternity, continuance for a long time on her feet at work, repeating this from day to day, tends to injurious effects upon the body, and, as healthy mothers are essential to vigorous offspring, the physical wellbeing of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race.*

Still again, history discloses the fact that woman has always been dependent upon man. He established his control at the outset by superior physical strength, and this control in various forms, with diminishing intensity, has continued to the present. As minors, though not to the same extent, she has been looked upon in the courts as needing especial care that her rights may be preserved. Education was long denied her, and while now the doors of the schoolroom are opened and her opportunities for acquiring knowledge are great, yet, even with that and the consequent increase of capacity for business affairs, it is still true that, in the struggle for subsistence, she is not an equal competitor with her brother. Though limitations upon personal and contractual rights may be removed by legislation, there is that in her disposition and habits of life which will operate against a full assertion of those rights. She will still be where some legislation to protect her seems necessary to secure a real equality of right. Doubtless there are individual exceptions, and there are many respects in which she has an advantage over him; but, looking at it from the viewpoint of the effort to maintain an independent position in life, she is not upon an equality. Differentiated by these matters from the other sex, she is properly placed in a class by herself, and legislation designed for her protection may be sustained even when like legislation is not necessary for men, and could not be sustained. It is impossible to close one's eyes to the fact that she still looks to her brother, and depends upon him. Even though all restrictions on political, personal, and contractual rights were taken away, and she stood, so far as statutes are concerned, upon an absolutely equal plane with him, it would still be true that she is so constituted that she will rest upon and look to him for protection; that her physical structure and a proper discharge of her maternal functions -- having in view not merely her own health, but the wellbeing of
the basis that Oregon’s statute was a kind of a law that, while it benefited women, it was beneficial for all.\(^7\) The Court also specifically recognized sex-based differences in “long-continued labor, particularly when done standing,”\(^8\) showing appreciation for the prolonged standing issue, and had concern for women, especially expectant mothers, about the negative health effects caused by prolonged standing, saying that a “continuance for a long time on her feet at work, repeating this from day to day, tends to injurious effects upon the body.”\(^9\) Thus, these labor laws were legal, and kept intact for decades.

With their constitutionality upheld during the Supreme Court’s most scrutinizing era for codified labor protections, these laws remained on the books mostly untouched until the Civil Rights Movement. After passage of the Equal Pay Act of 1963,\(^10\) which amended the Fair Labor Standards Act,\(^11\) states reacted to the federal imposition of equal pay and labor standards within the workplace by expanding, repealing, amending, or leaving unchanged women’s protective

\(\text{Id. at } 421-23\) (emphasis added).

\(^7\) \text{Id.}
\(^8\) \text{Id. at } 423.
\(^9\) \text{Id. at } 421.
\(^10\) Equal Pay Act of 1963, Pub. L. No. 88-38, §§ 2(a)–(b), 77 Stat. 56 (1963) (“(a) The Congress hereby finds that the existence in industries engaged in commerce or in the production of goods for commerce of wage differentials based on sex: (1) depresses wages and living standards for employees necessary for their health and efficiency; (2) prevents the maximum utilization of the available labor resources; (3) tends to cause labor disputes, thereby burdening, affecting, and obstructing commerce; (4) burdens commerce and the free flow of goods in commerce; and (5) constitutes an unfair method of competition. (b) It is hereby declared to be the policy of this Act, through exercise by Congress of its power to regulate commerce among the several States and with foreign nations, to correct the conditions above referred to in such industries.”).
legislation. In some states like California, the law was expanded to include all workers.\textsuperscript{12} In Florida, which always maintained that both male and female employees should be provisioned a chair,\textsuperscript{13} the state now currently criminalizes employer noncompliance as a second-degree misdemeanor with a civil penalty of up to $500 per violation per day.\textsuperscript{14} In Arizona,\textsuperscript{15} Connecticut,\textsuperscript{16} and Oklahoma,\textsuperscript{17} it was repealed along with all other female-specific provisions in


\textsuperscript{13} Fla. Stat. Ann. § 448.05 (West 2023) (”If any merchant, storekeeper, employer of male or female clerks, salespeople, cash boys or cash girls, or other assistants, in mercantile or other business pursuits, requiring such employees to stand or walk during their active duties, neglect to furnish at his or her own cost or expense suitable chairs, stools or sliding seats attached to the counters or walls, for the use of such employees when not engaged in their active work, and not required to be on their feet in the proper performance of their several duties; or refuse to permit their said employees to make reasonable use of said seats during business hours, for purposes of necessary rest, and when such use will not interfere with humane or reasonable requirements of their employment, he or she shall be guilty of a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083.”).

\textsuperscript{14} Id. § 775.083.

\textsuperscript{15} Ariz. Rev. Stat. Ann. § 23-261 (2023) (repealed by Laws 1973, ch. 133, § 35, eff. Aug. 8, 1973; Laws 1973 ch. 172 § 58 eff. Aug. 8, 1973) (“Females shall not be employed, permitted, or suffered to work in any capacity where such employment compels them to remain standing constantly. Every person who shall employ any female in any place or establishment mentioned in Sec. 1 [Section 1 states, ‘No child under fourteen (14) years of age shall be employed in, about, or in connection with, any mill, factory, workshop, mercantile establishment, tenement-house manufactory or workshop, store, business office, telegraph or telephone office, restaurant, bakery, barbershop, apartment house, bootblack stand or parlor, or in the distribution or transportation of merchandise or messages’] shall provide suitable seats, chairs, or benches for the use of the females so employed, which shall be placed as to be accessible to said employees; and shall permit the use of such seats, chairs, or benches by them when they are not necessarily engaged in the active duties for which they are employed, and there shall be provided at least two chairs to every three (3) females.”).

\textsuperscript{16} Conn. Gen. Stat. Ann. § 557-31-27 (West 2023) (repealed by Laws 1974, P.A. 74-185, § 5). Seats to be provided for female employees. “In manufacturing, mechanical, mercantile and other establishment where females are employed, suitable seats shall be furnished for their use, to be used by them when their duties do not require them to be on their feet.” Id.

\textsuperscript{17} Okla. Stat. Ann. tit. 40, § 83 (West 2023) (repealed by Laws 1991, ch. 172, § 15, eff. Sept. 1, 1991) (“Every employer in any manufacturing, mechanical, or mercantile establishment, or workshop, laundry, printing office, dressmaking or millinery establishment, hotel, restaurant, or theatre or telegraph or telephone establishment and office, or any other establishment employing females, shall provide adequate and suitable toilet facilities for such employees and shall provide suitable seats for all female employees and permit them to use such seats when not engaged in the active performance of the duties of their employment.”).
the labor code. In states like New York\textsuperscript{18} and West Virginia,\textsuperscript{19} this law remains on the books, vestigial and unenforced, under each state’s respective labor code.

C. W. Va. Code § 21-3-11 and “Seats for female employees”

In 1901, West Virginia passed a seating law for women.\textsuperscript{20} West Virginia’s required seating statute has similar language to other states’ laws: it is particular to females, it specifies the kind of seats, and it specifies the workplaces where it applies.\textsuperscript{21} As once in force, this provision increased overall employee welfare in the state by providing seats for female employees and was broadly applicable to most workplaces.\textsuperscript{22}

§ 21-3-11. Seats for female employees.

\begin{quote}
Every person, firm or corporation employing females in any factory, mercantile establishment, mill or workshop in this state shall provide a reasonable number of suitable seats for the use of such female employees, and shall permit the use of such seats by them when they are not necessarily engaged in active duties for which they are employed, and shall permit the use of such seats at all times when such use would not actually and necessarily interfere with the proper discharge of the duties of such employees, and, where practicable, such seats shall be made permanent fixtures and may be so constructed or adjusted that, when not in use, they will not obstruct such female employee when engaged in the performance of her duties.\textsuperscript{23}
\end{quote}

This part of the Labor chapter, Article 3, Safety and Welfare of Employees, requires an affirmative duty by employers to make workplace reasonably safe, and allows the Commissioner of the Division of Labor to make general orders to prescribe safety devices.\textsuperscript{24}

\begin{flushleft}
\footnotesize
\textsuperscript{18} N.Y. LAB. LAW § 203-b (McKinney 2023) (“A sufficient number of suitable seats, with backs where practicable, shall be provided and maintained in every factory, mercantile establishment, freight or passenger elevator, hotel and restaurant for female employees who shall be allowed to use the seats to such an extent as may be reasonable for the preservation of their health. In factories, female employees shall be allowed to use such seats whenever they are engaged in work which can be properly performed in a sitting posture. In mercantile establishments, at least one seat shall be provided for every three female employees and if the duties of such employees are to be performed principally in front of a counter, table, desk or fixture, such seats shall be placed in front thereof, or if such duties are to be performed principally behind such counter, table, desk or fixture they shall be placed behind the same.”).

\textsuperscript{19} W. VA. CODE ANN. § 21-3-11 (West 2023).

\textsuperscript{20} Id. § 21-3-11.

\textsuperscript{21} Id.

\textsuperscript{22} Id.

\textsuperscript{23} Id. (emphasis added).

\textsuperscript{24} Id. § 21-3-1.
\end{flushleft}
§21-3-1. Employers to safeguard life, etc., of employees; reports and investigations of accidents; orders of commissioner.25

Every employer shall furnish employment which shall be reasonably safe for the employees therein engaged and shall furnish and use safety devices and safeguards, and shall adopt and use methods and processes reasonably adequate to render employment and the place of employment safe, and shall do every other thing reasonably necessary to protect the life, health, safety, and welfare of such employees: Provided, That as used in this section, the terms “safe” or “safety” as applied to any employment, place of employment, place of public assembly or public building, shall include, without being restricted hereby, conditions and methods of sanitation and hygiene reasonably necessary for the protection of the life, health, safety, or welfare of employees or the public.

Every employer and every owner of a place of employment, place of public assembly, or a public building, now or hereafter constructed, shall so construct, repair and maintain the same as to render it reasonably safe.

When an accident occurs in any place of employment or public institution which results in injury to any employee, the employer or owner of such place of employment or public institution, when the same shall come to his knowledge, shall provide the commissioner of labor the necessary information as to cause of the injury, on blanks furnished free of charge to the employer and prescribed by the commissioner of labor.

To carry out the provisions of this chapter the commissioner of labor shall have the power to investigate and prescribe that reasonable safety devices, safeguards, or other means of protection be adopted for the prevention of accidents in every employment or place of employment, and to make, modify, repeal, and enforce reasonable general orders, applicable to either employers or employees, or both, for the prevention of accidents.

All orders of the commissioner of labor shall be prima facie lawful and reasonable, and shall not be held invalid because of any technical omission, provided there is substantial compliance with the provisions of this chapter.

To enforce this Article, West Virginia Code § 21-3-14 provides the Commissioner the ability to request for a duty-bound prosecution of violations

25 Id. (emphasis added).
by the Attorney General, establishes criminal and civil penalties, and provides a mechanism for injured parties to seek redress through the recovery of civil penalties.\textsuperscript{26}

§ 21-3-14. Power of commissioner as to witnesses; prosecution of offenses; penalties; jurisdiction; exemption of coal mining operations; recovery of civil penalties.

The commissioner of labor or any authorized representative of the department of labor in the performance of any duty or the execution of any power prescribed by law shall have the power to administer oaths, certify to official acts, take and cause to be taken depositions of witnesses.

\textit{It shall be the duty of the Attorney General and the several prosecuting attorneys, upon request of the commissioner of labor or any of his authorized representatives, to prosecute any violation of the law which it is made the duty of the said commissioner of labor to enforce.}

\textit{If any employer, employee, owner or other person shall violate any provision of this chapter or shall fail or refuse to perform any duty lawfully required within the time prescribed by the commissioner of labor or his authorized representatives, for which no penalty has been specifically provided, or shall fail, neglect, or refuse to obey any lawful order given, made or promulgated by the commissioner of labor or his authorized representatives, or shall interfere with, impede, or obstruct in any manner the commissioner of labor or his authorized representatives in the performance of his or their official duties, he shall be guilty of a misdemeanor and, upon conviction thereof shall be fined not less than $10 nor more than $50, or shall be imprisoned for not exceeding six months, or both so fined and imprisoned, for each such offense; and each day such violation, omission, failure, or refusal continues shall be deemed a separate offense.}

A justice of the peace shall have concurrent jurisdiction with the circuit court and other courts having criminal jurisdiction in his county for the trial of offenses under this article. Those portions of all coal mining properties and operations which are under the supervision of the department of mines are excepted from the operation of provisions of this article.

\textsuperscript{26} Id. § 21-3-14.
In lieu of the penalties heretofore provided in this section, any such penalty may be recovered in a civil action in the name of the State of West Virginia.  

Together, these code sections should allow for the enforcement of seating protections for women in West Virginia workplaces. Although the terms are somewhat outdated, most workplaces will count under the meaning of the terms “factory, mercantile establishment, mill or workshop.” The majority of service industry jobs that have employees engaging in the buying or selling of goods with the general public would be considered “mercantile establishments” because those workplaces are where merchandise is displayed, held, or offered for sale, either at retail or wholesale. In today’s language, this would be construed to mean any big-box store, warehouse, convenience store, grocery store, pharmacy, and cafeteria, as well as other types of similar workplaces. However, the Division of Labor does not enforce the seating requirement, and so employers widely flout this law. Therefore, it is not uncommon to see employees, regardless of sex, working without a chair at any campus cafeteria, big-box or grocery store, or retail outlet in West Virginia.

D. The Medical Purpose for Seating Laws

Seating laws are a method of preventing injuries to people in their workplaces by providing a place for them to sit down while working. Prolonged standing is the name for chronic stress caused by physically demanding jobs that primarily affects the lower extremities. Prolonged standing is just standing in one place for too long. This is a common issue that affects all sections of American
working life and sectors of the economy. The worst effects of prolonged standing are typically seen in those who work in the service industry, where constantly being on one’s feet is often equated with attentiveness and diligence by the management. Many occupations suffer from prolonged standing, such as cashiers, salespeople, restaurant workers, security officers, and similar hourly wage workers. Furthermore, certain workplaces are more affected than others because it is not the kind of job that matters, rather, it is the type and duration of the prolonged standing activity that corresponds to the morbidity of chronic stress injuries and associated diseases. Examples of jobs that require prolonged standing can be found in nearly every industry and across the workforce. These include security guards on duty, trade workers with physically-demanding jobs like builders, electricians, and plumbers, doctors and nurses who stand over patients for hours, clerks attending to checkout counters, waitstaff and chefs in restaurants, and all other people in employment situations where an employer requires employees to do their jobs without a chair or where the workplace environment discourages use of a chair when a job could be done while seated.

is unhealthy. The performance of many fine motor skills also is less good when people stand rather than sit. Ergonomists have long recognized that standing to work is more tiring than sitting to work. Standing requires ~20% more energy than sitting. Standing puts greater strain on the circulatory system and on the legs and feet. Consequently, in industry we provide employees with ergonomic anti-fatigue to stand on, with anti-fatigue footwear, and with chairs to allow them to sit down during rest breaks.”


35 Different occupations have different durations of sitting and standing over a workday. Computer programmers, for instance, spend most of the day seated, while animal caretakers spend most of the day standing. See Sitting and Standing, Occupational Requirements Survey, U.S. BUREAU LAB. STAT., https://www.bls.gov/ors/factsheet/pdf/sit-and-stand.pdf. (last visited Jan. 14, 2024) (“On average civilian workers spent 43.6 percent of the workday sitting and 56.4 percent standing. Percentile estimates provide a range of requirements among workers. For example, at the 10th percentile, workers were required to stand for 5 percent of the workday while at the 90th percentile, workers stood for 100 percent of the workday. At the 50th percentile (median), 50 percent of civilian workers spent 60 percent or less of the workday standing and 50 percent of workers spent 60 percent or more of the workday standing. […] In 2022, civilian workers spent an average of 3.44 hours sitting and 4.17 hours standing. Time standing ranged from 24 minutes for the 10th percentile to 8 hours for the 90th percentile. […] The choice of sitting or standing is present when workers can alternate between sitting and standing. Choice of sitting or standing is present when the following conditions exist: [A] Workers typically have the flexibility to choose between sitting and standing throughout the workday. [B] There is no assigned time during the day to sit or stand. [And C] No external factors determine whether an employee must sit or stand. The choice
Prolonged standing has been discussed in medical literature as a cause for different chronic stress related diseases. The short-term effects of prolonged standing include pain, vascular constriction, and muscular tension, and in the long term, prolonged standing results in several negative health outcomes and is a contributory factor to many others. These deleterious health issues include, but are not limited to, musculoskeletal diseases, cardiovascular diseases, and reproductive issues. Prolonged standing effectively reduces the blood supply to the muscles resulting in the acceleration of the onset of fatigue and causes pain in the muscles of the legs, back and neck, as well as pooling of blood in the legs and feet which leads to varicose veins. One study of office workers found that low back, foot/ankle and lower limb symptoms are common in office workers using standing workstations, and that nearly half of workers develop pain within 30 minutes of standing. A review of laboratory studies recommends refraining from standing for periods of longer than 40 minutes to avoid musculoskeletal symptoms. Another review of different interventions for prolonged standing, such as allowing participants the use of sit-stand chairs at workstations, showed significant reductions in the self-reported measures of pain and discomfort after implementation of the interventions.

This information is instructive. Standing for a long time is painful and debilitating for any person who does it, especially in static workplace environments, and that makes the purpose for seating laws clear. Although these laws were originally designed to benefit women, each can be amended, resurrected, and given greater power to assist all people, who will benefit from simply having a chair to sit down on sometimes.

36 Jo et al., supra note 33.
42 Pieter Coenen et al., Associations of Prolonged Standing With Musculoskeletal Symptoms–A Systematic Review of Laboratory Studies, 58 GAIT & POSTURE 310, 310–318 (2017).
43 Waters & Dick, supra note 39.
II. THE HISTORY OF STATE SEATING LAWS

A. The Spread of Women’s Protective Laws During the Progressive Era

Seating laws became popular in the Progressive Era, when nearly all seating laws were initially passed. A record of these was included in a 1932 Department of Labor survey for the Women’s Bureau. This original report also summarized seating laws at the time. Over a period of about 60 years from around 1870 to 1930, these laws gradually spread across the United States as women increasingly entered employment outside of the home, taking on different, but broadly similar, codified forms.


45 Under Seating Laws:

Practically all the States, the District of Columbia, and the Territories of Puerto Rico and the Philippines islands have laws that require some kind of seating accommodations for women workers. In fact, only one State – Mississippi – is without any law of this kind. Florida’s law includes both male and female employees. In many of the States the laws apply to all or practically all occupations or industries, in a number to manufacturing and mercantile establishments, and in a few –Alabama, Maryland, North Dakota, and South Carolina–only to mercantile occupations. Most of the States specify that ‘suitable’ seats shall be provided, some designate ‘chairs, stools, or other contrivances,’ a few provide that the seats may be permanent fixtures so adjusted as not to obstruct the work. One State, however—Kentucky—says that seats that fold are not a compliance with the law. Regulations in four States—Kansas, Minnesota, New York, and Ohio—specify seats with backs; California, Kansas, and Washington require footrests, the first and last named stipulating individually adjustable footrests; and the same two States—California and Washington - require adjustable seats at worktables or machines to permit the position of the worker relative to her work to be substantially the same whether she is seated or standing. Many of the laws do not specify the number of seats to be provided, a few designate a ‘reasonable’ or ‘sufficient’ number, others require seats for all female employees or 1 seat for every 2 or 3 workers.

The laws vary little as to the extent to which the seats may be used. By far the majority of the laws provide that employees be permitted to sit when not actively engaged in their duties or when sitting does not interfere with the proper discharge of duties. Others specify that the seats may be used as may be necessary, or to such extent as may be reasonable, or necessary, for the preservation of health.


These protections varied between states. Some were part of a slate of women’s protections, while some were merely single enactments. As an illustration of the former, in Pennsylvania, a whole chapter of the labor code was dedicated to “Female Labor.” Females were restricted from working in connection with any establishment for more than six days or more than 48 hours in any one week, or more than ten hours in any one day. Further, Pennsylvania restricted the types of workplaces that women could work in, making it “unlawful for any female to be employed, or permitted to work, in any occupation dangerous to life or limb, or injurious to the health or morals.” This followed the concern at the time that women entering the workforce were being subjected to unscrupulous employers, and so to work outside of the home, women should be entitled to special state protections and assistance. Indeed, the law also provides for the inspection of workplaces by the state’s Industrial Board to determine and declare the dangers to an employed woman’s physical or moral wellbeing. Another statute meant to protect girls restricted females under 18 years of age from working at any establishment between 9 PM and 6 AM, unless they worked for a school-work program. Pennsylvania’s seating law, enacted separately, specified that employers shall provide one seat for every five female employees, a seating-ratio requirement that was featured among several state codes. Other laws guaranteed bathrooms, mandatory breaks, and “wholesome” drinking water. Penalties for violations ranged from $25 to $200 fines, or from 20 to 60 days in jail, depending on the offense. Many of these laws have since been abrogated or repealed, but the vestiges of female-only labor protections can be seen in this and other state codes throughout the United States, and some could still apply.

48 Id.
49 43 P.A. STAT. ANN. §§ 101–121 (West 2023) (repealed insofar as inconsistent with Act 1988, June 30, P.L. 475, No. 80, reestablishing the Industrial Board and creating a Policy, Planning and Evaluation Advisory Committee within the Department of Labor and Industry, pursuant to § 12(a) of said Act. See 71 P.S. § 574).
50 Id. § 103.
51 Id.
52 Muller v. Oregon, 208 U.S. 412, 421 (1908).
53 43 P.A. STAT. ANN. § 103 (West 2023).
54 Id. § 105.
55 Id. § 108 (“Every person employing or permitting females to work in any establishment shall provide suitable seats for their use conveniently accessible while they are working, and shall maintain and keep them there, and shall permit the reasonable use thereof by such females. At least one seat shall be provided for every five females employed or permitted to work.”).
56 Smith, supra note 44.
58 Id. § 107.
59 Id. § 112.
60 Id. § 118.
In contrast to Pennsylvania, West Virginia had relatively limited enactment of women’s protective legislation. In West Virginia, the two sections of the Safety and Welfare of Employees article of the Code that provide for a right to sit for female employees, § 21-3-11 and § 21-3-14, were both enacted alongside much of the rest of the article in 1901. However, West Virginia only adopted this seating rule, and other than creating provisions for separate bathrooms, washing facilities, and dressing rooms for both sexes, it enacted no other female-only statutory regulations or restrictions for the workplace. It can be hypothesized that this limited enactment of female-only labor protections also helped preserve the law in the long term, as the more onerous restrictions that other states enacted to burden women’s ability to freely work in various employment positions were repealed or amended out of effect. Unlike other states, West Virginia never dedicated a whole chapter of its legal code to female labor, so its seating law embedded in a generically titled chapter of its code survived with less legislative scrutiny.

B. The Civil Rights Movement and its Aftermath

In the 1960s, another women’s advocacy movement was on the rise, and its proponents sought greater rights and autonomy in the workplace, and Congress responded with the Equal Pay Act of 1963. After its passage, states reacted to the federal imposition of equal pay and labor standards with concern over the status of women’s protective legislation. These state protective laws came under scrutiny after 1965, when another law, the Civil Rights Act of 1964, created Title VII and outlawed employment discrimination on the basis of race, color, religion, sex, and national origin. It contained provisions that clarified its preemption toward state laws, and attempted to set a floor while states could maintain their own beneficial protections as the ceiling. That meant that some protections were fine, but all were up for review. In response to these concerns,

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61 W. VA. CODE ANN. § 21-3-13 (West 2023).
62 Id. § 21-3-14.
63 Id.
67 42 U.S.C.A. § 2000h-4 (West 2023) (“Nothing contained in any title of this Act shall be construed as indicating an intent on the part of Congress to occupy the field in which any such title operates to the exclusion of State laws on the same subject matter, nor shall any provision of this Act be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this Act, or any provision thereof.”).
68 Id. § 2000e-7 (“Nothing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter.”).
the federal government created the Task Force on Labor Standards ("Task Force") to study the issues of how states could reconcile their protective laws towards women workers with that of the new federal requirements. The Task Force recommended that states extend minimum wage and prescribed rest period laws to provide the same privileges to men as well as women; it also recommended to incorporate statutes pertaining to lunch periods, weight-lifting limits, and occupational hazards into comprehensive health and safety programs; it urged the removal of night work restrictions; and it recommended to removing hour limits with consensual overtime provisions. Later, in 1969, the Equal Employment Opportunity Commission released "Guidelines on Discrimination Because of Sex," and concluded that administrative regulation on the employment of females were discriminatory and in conflict with Title VII of the Civil Rights Act of 1964.

Many states opted to repeal these laws instead of extending the protections to include men. For instance, in 1969, Delaware repealed its whole chapter of women’s protective laws. Other states like Connecticut, Maryland, Massachusetts, New Mexico, and New York eliminated or reduced restrictions on women’s working hours. Court challenges to protective legislation also came swiftly. As an example, Ohio had repeated court battles over its seating law. In March 1971, the Court of Appeals of Ohio decided Jones Metal

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69 Munts & Rice, supra note 66, at 8.
70 Id. (citing Task Force on Labor Standards, Report (Washington: G.P.O., 1968)).
71 29 C.F.R. § 1604.1(d) (West 2023) ("(d) The Commission believes that such State laws and regulations, although originally promulgated for the purpose of protecting females, have ceased to be relevant to our technology or to the expanding role of the female worker in our economy. The Commission has found that such laws and regulations do not take into account the capacities, preferences, and abilities of individual females and tend to discriminate rather than protect. Accordingly, the Commission has concluded that such laws and regulations conflict with Title VII of the Civil Rights Act of 1964 and will not be considered a defense to an otherwise established unlawful employment practice or as a basis for the application of the bona fide occupational qualification exception.").
73 Munts & Rice, supra note 66, at 8.
74 OHIO REV. CODE ANN. § 4107.42 (West 2023) (repealed by 1982 H 74, eff. 7-21-82) ("Every person, partnership, or corporation employing females in any factory, workshop, business, office, telephone or telegraph office, restaurant, bakery, milliner or dressmaking establishment, or mercantile or other establishments shall provide a suitable seat for the use of each female so employed and shall permit the use of such seats when such female employees are not necessarily engaged in the active duties for which they are employed and when the use thereof will not actually and necessarily interfere with the proper discharge of the duties of such employees. Such seat shall be constructed, where practicable, with an automatic back support and so adjusted as to be a fixture but not obstruct employees in the performance of duty. Such person, partnership, or corporation shall provide a suitable lunchroom, separate and apart from the work-room, and in establishments where lunchrooms are provided, employees shall be entitled to not less than thirty minutes for meal time. In any such establishment in which it is found impracticable to provide suitable lunchroom, female employees shall be entitled to not less than one hour for meal time during which hour they shall be permitted to leave the establishment. No restriction as to hours or labor shall apply to..."
Products Co. v. Walker, and reversed a lower court determination that Ohio’s protective legislation for women was unconstitutional, holding that its laws, including the seating requirement, did not conflict with the Civil Rights Act of 1964. In another case decided later that same month, the District Court for the Southern District of Ohio declared that the state court had failed to give proper consideration to the narrow construction of the occupational qualification exception, and struck down the occupational prohibitions and working hour limits. However, the female-only seating laws were not found to be in conflict with or superseded by Title VII of the Civil Rights Act of 1964, since there was no showing that the statutes compelled a classification of employees on the basis of sex which deprived females of employment opportunities because of their sex, and were therefore valid. Despite favorable rulings for some of these laws, Ohio repealed all of its women’s labor protections in 1982, and later the entire chapter by 1995, including the seating law.

Additional concerns came with the development of equal protection jurisprudence. In 1976, Craig v. Boren was decided, where the Supreme Court held that statutory and administrative sex classifications were subject to intermediate scrutiny under the Fourteenth Amendment’s Equal Protection Clause. The adopted standard, that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives, was used to strike down Oklahoma law prohibiting the sale of 3.2% beer to males under the age of 21 and to females under the age of 18. The Court rejected the use of statistical evidence showing a higher incidence of drunk driving rates among males compared to females.

caneries or establishments engaged in the preparing for use perishable goods during the season they are engaged in canning their products. No person, partnership, or corporation, or agent thereof, shall violate this section.

76 Id. The Court of Appeals of Ohio explained, “in summary, R. C. 4107.42, requiring seats, lunchroom facilities and meal periods for women employees, is not discriminatory against women employees, but, if discriminatory at all, is discriminatory against men employees, and does not conflict with the Civil Rights Act of 1964, because, if that Act were to be interpreted to require employers engaged in an industry affecting commerce (having 25 or more employees) to provide similar benefits to male employees, R. C. 4107.42 would not in any way prevent such employer from doing so.” Id. at 823.
78 Id.
80 Ridinger, 325 F. Supp. 1089.
81 OHIO REV. CODE ANN. § 4107 (West 2023) (repealed 1995).
82 429 U.S. 190 (1976).
83 Id.
84 Id. at 197.
85 Id. at 190.
when both were between the ages of 18 and 21, as insufficient to support the gender-based discrimination arising from the statutes in question. 86 This was an extension of earlier reasoning, in Reed v. Reed, 87 where the Supreme Court held that an Idaho statute which provided that between persons equally qualified to administer estates, was based solely on a discrimination prohibited by, and was violative of, the Equal Protection Clause of the Fourteenth Amendment.

Women’s protective labor legislation came under serious question after these cases. Craig v. Boren was a direct challenge to a gendered statutory protection—the statute at issue was intended to protect men from drunk driving, and Oklahoma had sought to support its argument by showing a mathematical correlation between men aged 18 to 21 drinking alcohol and an increased incidence of drunk driving. States might have wanted to support protective legislation by showing evidence of the more long-term positive and negative effects the regulations had on women. Although, the Court’s dismissal of statistical evidence in that case let the remaining protective legislation fall into potentially unapplicable, unconstitutional obscurity, as a benevolently sexist vestige of the women’s labor movement from the Progressive Era.

C. The Creation of OSHA and the Defeat of a Federal Right to Sit

As a way to rectify some of the lost state protections, in 1970, Congress passed the Occupational Safety and Health Act of 1970 to govern occupational safety and health standards for places of employment. 88 It created the Occupational Health and Safety Administration (“OSHA”), which had the mandate to set safety standards for all employees applicable to businesses affecting interstate commerce, 89 create an enforcement program, 90 and allow for and improve state-based administration occupational safety and health laws. 91 Critically, it allowed for an agency of the federal government to finally create a rule protecting the right to sit. 92

It took a few years, but in 2001, OSHA attempted to promulgate ergonomics regulations for this area of labor law, which would have included

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86 Id. at 191, 199–204.
87 404 U.S. 71 (1971).
88 29 U.S.C.A. § 651(b) (West 2023).
89 Id. § 651(b)(3).
90 Id. § 651(b)(10).
91 Id. § 651(11).
92 Id. § 655(a) (“Without regard to chapter 5 of title 5 or to the other subsections of this section, the Secretary shall, as soon as practicable during the period beginning with the effective date of this chapter and ending two years after such date, by rule promulgate as an occupational safety or health standard any national consensus standard, and any established Federal standard, unless he determines that the promulgation of such a standard would not result in improved safety or health for specifically designated employees. In the event of conflict among any such standards, the Secretary shall promulgate the standard which assures the greatest protection of the safety or health of the affected employees.”).
protections for prolonged standing in the workplace. However, the 107th Congress passed, and the President signed, Senate Joint Resolution 6, which rescinded the Department of Labor’s original ergonomics rule. Under the Congressional Review Act, the agency is prohibited from issuing a rule that is substantially the same as the former one. Instead, OSHA has provided guidelines for the prevention of musculoskeletal disorders for employees and employers as advisory and informational tools. In an explanatory memorandum, the OSHA Directorate of Enforcement Programs maintained those guidelines are not enforceable.

These guidelines are not new standards or regulations and do not create any new OSHA duties for employers. An employer’s failure to implement a guideline is, therefore, not a violation, or evidence of a violation of the general duty clause of the OSH Act. Furthermore, the fact that OSHA has developed industry-specific guidelines is not evidence of an employer’s obligations under the general duty clause; and the fact that a measure is recommended in any OSHA guideline document but not adopted by an employer is not evidence of a violation of the general duty clause.

This might seem counterintuitive to an employee who has read the posters that outline the labor standards and employee rights that are required to be put up in every workplace. Indeed, one of the OSHA posters says that “[e]mployers must provide employees a workplace free from recognized hazards.” However, musculoskeletal disorders, the most common issue caused by prolonged standing, are not a recognized hazard, even though those issues could be entirely prevented by the employer’s provisioning of a seat in the workplace.

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94 S.J. Res. 6, 107th Cong. (2001) (enacted) (resolving that Congress disapproves the rule submitted by the Department of Labor relating to ergonomics and such rule shall have no force or effect).
97 Id.
This means that, in short, an average employee cannot depend on any agency of the federal government to require employers to provide them with a seat in the workplace.

Indeed, in the original ergonomics rule from 2001, OSHA would have accounted for prolonged standing as a type of static work position that contributes to musculoskeletal disorders.\(^{102}\) Congress blocked that regulation from taking effect, and OSHA can no longer issue that same or similar action without an affirmative act by Congress. Congress has not acted on this issue since. Therefore, without OSHA or another agency providing preempting federal regulations, employee seating requirements remain an uneven mix of state statutes and labor regulations. Finding ways to protect workers from the entirely preventable diseases caused by prolonged standing thus remains a nuanced, state-by-state challenge.

**D. Enforcement History in West Virginia**

West Virginia is one of a few states that maintains a female-specific seating law.\(^{103}\) However, there is no record of it ever being enforced.\(^{104}\) While this section of the labor code provides the Commissioner of the Division of Labor some delegated authority that could theoretically expand this law to include men,\(^{105}\) the Division of Labor has decided to leave § 21-3-11 unenforced and without a regulation on point.\(^{106}\) In the Division’s perspective, the law discriminates against sex, and thus may be unconstitutional as an abrogation of federalism and violate equal protection. While the Civil Rights Act contains an instructional section for interpretation that nothing in the Act shall be construed as invalidating any provision of state law unless that law is inconsistent with the Act,\(^{107}\) the Division has not sought to bring an enforcement action for the seating requirement on private employers due to the expense of litigation and potential burden for showing the constitutional merit for enforcing a sex-specific labor law. Instead, the Division has apparently opted for voluntary compliance by private employers, who openly defy the requirement, while the law itself remains on the books, potentially still valid and legally enforceable.

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\(^{103}\) W. VA. CODE ANN. § 21-3-11 (West 2023).

\(^{104}\) Division Email, supra note 30.

\(^{105}\) W. VA. CODE ANN. § 21-3-1 (West 2023) (“To carry out the provisions of this chapter the commissioner of labor shall have the power to investigate and prescribe that reasonable safety devices, safeguards, or other means of protection be adopted for the prevention of accidents in every employment or place of employment, and to make, modify, repeal, and enforce reasonable general orders, applicable to either employers or employees, or both, for the prevention of accidents.”).

\(^{106}\) Division Email, supra note 30.

Despite the sex-specific protections, the law probably survives constitutional scrutiny and should remain in effect, but to date there has been no recorded litigation on this statute, which complicates potential applications.\textsuperscript{108} Currently, employers widely flout the seating requirement, and no woman in West Virginia is functionally required to be provisioned a chair. As part of this article, West Virginia Code § 21-3-14 would declare violations of the statute to be a misdemeanor, for which conviction would result in a fine of between $10 to $50 per violation per day.\textsuperscript{109} This code section also contains a private right of civil action, allowing plaintiffs to recover potential fines as civil penalties, thereby allowing for private enforcement.\textsuperscript{110} However, these penalties are low, and would be capped at maximum of two years to comply with the state’s general statute of limitations.\textsuperscript{111} Therefore, the maximum penalty would be only $36,500, assuming two years of continuous, daily noncompliance, the proper litigant that could bring a claim, and a maximum award of $50 per violation.\textsuperscript{112}

But a case in theory is not necessarily one in reality. These possible civil damage awards are likely much lower, and the costs of going to court probably defeats the benefits. The theoretical maximum award is essentially impossible to achieve, and the real possible awards would almost certainly not be worth bringing an individual suit over with just a single plaintiff.\textsuperscript{113} This is because not every employee works every day, nor are businesses open every day, nor are all jobs suited for the use of chairs when and if they would be required. There is also no guarantee that a court would give the maximum amount per violation, either.

\textsuperscript{108} To clarify, there does not appear to be any electronically accessible documentation of this statute’s application, or any litigation about it, at any point in time. While it may have once been enforced, several different reasons can be speculated for why no enforcement action was taken in the period from 1901 to the 1970s: (a) that not all records of the Division of Labor are online and readily accessible for the public to view; however, this does not mean that the law has been unenforced, just that the records are not easily available; (b) that employers broadly complied with society’s expectations for a workplace culture that essentially protected female employees; or (c) that female employees were unlikely to seek enforcement for the general reasons that limit an injured person from asserting their rights in court, such as economics, logistics, or inconvenience.\textsuperscript{109} W. VA. CODE ANN. § 21-3-14 (West 2023).

\textsuperscript{109} Id.

\textsuperscript{111} Id. § 55-2-12 (“Every personal action for which no limitation is otherwise prescribed shall be brought: . . . (b) within two years next after the right to bring the same shall have accrued if it be for damages for personal injuries.”). W. VA. CODE ANN. §§ 21-3-1–21-3-22 does not contain its own specific statute of limitations that would alter this.

\textsuperscript{112} Presuming that a plaintiff worked 365 days a year without a chair, and were denied such use every day, then that plaintiff would be entitled to civil penalties in a range between $7,300 to $36,500, since: [365 days * 2 years * $10] = $7,300, and [365 days * 2 years * $50] = $36,500.

\textsuperscript{113} It is unlikely that a single employee works at a job for a single employer every single day, and thus more reasonable estimates are lower. Not counting weekends and public holidays, there are around 247 working days in West Virginia, for around 1,976 working hours. An average employee that works that schedule and was denied a seat for two years would thus be entitled to civil penalties in a range between $4,940 to $24,700. See Working Days in West Virginia, WORKINGDAYS.US, https://www.workingdays.us/West%20Virginia.htm#a3 (last visited Jan. 14, 2024).
These significant accounting issues and strategic considerations would preclude many injured parties from seeking redress, as the maximum penalty will likely not be worth the cost of litigation, not to mention the toil going to court often takes on the personal lives of litigants. Class action suits are probably necessary to recoup the litigation costs and would thus be the most cost-effective litigation strategy, but without updates to this code, these suits will become less lucrative by the year.

Finally, West Virginia does allow for attorney’s fees in these kinds of private enforcement actions, but not explicitly for these laws. West Virginia recognizes a general exception in suits of equity that allows for the collection of attorney’s fees for a prevailing party to collect attorney’s fees when the non-prevailing party has “acted in bad faith, vexatiously, wantonly or for oppressive reasons.” However, the standards for this exception are difficult to raise, and require more involvement on a non-complying employer than mere indifference. Other exceptions, such with class actions, and with certain civil procedure rules, allow for some cost sharing, but not to an extent that would stand to greatly benefit the damaged parties or make the cost of bringing a case lucrative. Therefore, the default American Rule that parties must pay for their own legal counsel functions as an additional burden on any injured party seeking redress. The cost of paying attorney’s fees, in conjunction with the low amount of possible civil awards, further explains why there has been no record of any litigation on this issue.

III. THE CALIFORNIA SEATING LAW CLASS ACTION LAWSUITS

In the mid-2010s, California had several cases where a group of plaintiffs sought to secure seating in their workplace, upheld a California seating law, and ultimately helped guarantee a seat for all workers in California. These cases have sparked greater interest in state seating laws across the United States. This section will provide a brief summary of those cases and discuss the potential implications for similar cases in West Virginia.

A. The California Cases

California has robust employee seating requirements, enabled by a suitable seating statute and a series of wage orders issued by the Industrial

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116 Chapman, supra note 114.
117 Id.
118 Id.
119 CAL. CODE REGS. tit. 8, § 11040(14)(A) (2023). ("All working employees shall be provided with suitable seats when the nature of the work reasonably permits the use of seats.")
Welfare Commission ("IWC"). After the passage of the consumer-protecting Private Attorneys General Act of 2004 ("PAGA") that allowed for the private enforcement of the California Labor Code, resultant litigation has taken the form of class actions. The primary contentions have been the applicability of the law, and on certifying the class, as the corporations argued for more holistic applications of the seating requirement with greater consideration given to employer preference, and for narrower class distinctions based on presumed use of seating by the employees, while the plaintiffs argued for broader interpretations of reasonable seating and for more expansive definitions of the class.

Garrett v. Bank of Am., N.A. was an early case on this issue, which found that California’s regulation was indeed allowable under federal law. It helped lay the groundwork for Hall v. Rite Aid Corp. Hall is the flagship case for enforcing California seating requirements within the state. Kristin Hall was a worker at a Rite Aid, who sought to use a chair at work. Her employer refused to provide it. She sued and was joined by other employees in her class action against Rite Aid, and together prevailed through multiple rounds of appeals. Her case ultimately guaranteed that employers in the state of California would have to provide their employees with a seat. Two further cases, Kilby v. CVS Pharmacy, Inc., and Thompson v. Target Corp., helped elaborate on some more specific definitions for bringing the claims within the state but were both ultimately victorious on the seating issue.

In particular, the California Supreme Court in Kilby outlined the main judicial consideration for the seating law as the "nature of work" rather than a "holistic" consideration for deciding these cases. The nature of the work would

123 Hall, 171 Cal. Rptr. 3d 504.
124 Id.
125 Id.
126 Id.
127 Id.
128 Id.
131 Kilby, 368 P.3d at 554.
be determined on a duty-based, location-based understanding, not the employee’s characteristics or on an overall assessment of whether the employee deserves a chair. If the duty allows the employee to sit, the employee should be provided a chair. The employer’s business judgment and considerations of the physical layout of the workplace are relevant but are not dispositive, and that a court’s objective inquiry should focus an employer’s reasonable expectations, not the employer’s preferences. Further, the burden was on the employer to show that a suitable seat for each duty was unavailable to use. Together, this meant that employees could use a chair as needed, when needed, and it was up to the employer to provide those seats. When the employer didn’t provide seats, the employer needed to have an excellent reason: the seats that would fit those duties don’t exist. This series of decisions is fantastic precedent for labor advocates and those that want to expand the right to sit to more workers and more workplaces across the United States.

B. Potential Applications of Similar Laws in West Virginia

These recent cases have helped inspire further cases to ensure employer compliance with seating requirements. Other states that allow for private enforcement actions or other PAGA-type laws can allow labor advocates and injured employees to uphold the right to sit by seeking penalties against the violating employers. As discussed, West Virginia has such a law already embedded in its labor code, in § 21-3-14. It allows for private enforcement by its provision that “in lieu of the penalties heretofore provided in this section, any such penalty may be recovered in a civil action in the name of the State of West Virginia.” A plain reading of this statute implies that private litigants can enforce violations in court by recovering the civil penalties that would otherwise be assessed against a violating employer. The statute also provides for clear jurisdiction over the application of this law to be brought in magistrate or circuit court. However, without previous litigation of record on the statute, the future of that application remains unclear and uncertain.

132 Id. at 565.
133 Id. at 563.
134 Id. at 565–567.
135 Id.
136 For a more robust discussion of current California seating requirements by the firm that represented the plaintiffs in Kilby, see California Seating Regulations Explained, RIGHETTI • GLUGOSKI, P.C., https://www.righettilaw.com/insights/california-seating-regulations-explained/ (last visited Jan. 14, 2024).
137 W. VA. CODE ANN. § 21-3-14 (West 2023).
138 Id.
139 Id. (“A justice of the peace shall have concurrent jurisdiction with the circuit court and other courts having criminal jurisdiction in his county for the trial of offenses under this article.”).
IV. ENFORCING THE RIGHT TO SIT IN WEST VIRGINIA

There are three primary ways to enforce the law and apply § 21-3-11 to West Virginia employers. First, by an honest attempt at a private lawsuit challenging an employer for violating the law. Second, by filing a petition for a declaratory judgment action to clarify the applicability of § 21-3-11. Third, by filing a petition for a writ of mandamus on the Commissioner of the Division of Labor, demanding that the Commissioner either: (1) enforce the law as written and prosecute violations by employers; or (2) issue an order interpreting the rules to include men; or (3) promulgate new rules protecting male employees under the Commissioner’s authority under § 21-3-1, given its regard to the state and federal constitutional rights of equal protection, and the office’s duty to enforce the law. Each of these methods will be discussed in order.

In all situations, using any of these methods will require an injured plaintiff to bring a case over a statutory seating violation—this means a plaintiff who works at a business, such as a pharmacy, and who is not allowed to sit on an employer-provided seat during working hours for even one day, would have proper standing to sue. Each of these claims can be brought in circuit court in the jurisdiction of the workplace. While it may not be fully recommended, nothing prevents a plaintiff from initiating all of these actions at the same time. Indeed, an ideal litigation strategy would be to bring a private lawsuit for civil damages, as a successful private suit will limit the necessity of other possible actions. Each of the other options will be explored.

These alternative options have some merit. If necessary, some litigants might wish to file a declaratory judgment action to clarify the law. If successful, depending on the plaintiff and situation, the next step could be to get a further judgment that the Division of Labor must enforce the law in accordance with that precedent, to compel a request to prosecute a known violation to the Attorney General’s office, or both.

A. File a Private Civil Lawsuit Against a Violating Employer

A private lawsuit against an employer would be the classic means to determine the viability of a test case. Litigation is enabled for private employees through § 21-3-14 in either magistrate court or circuit court.140 Jurisdiction for claims is written for “a justice of the peace” which shall be construed to mean that enforcement actions could be brought in magistrate court.141 However, the action is best brought in circuit court, as those courts are empowered to hear the other alternative claims, as different methods of claiming relief. The party would

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140 Id.
141 Id. § 50-1-17 (“On and after January 1, 1977, the phrase “justice of the peace” and the word “justice,” when used in a context meaning “justice of the peace,” shall be construed to mean magistrate as created by the provisions of this chapter.”).
be seeking prospective injunctive relief, i.e., a chair to use, and civil damages. Drafting the pleadings and filing might be the easiest part. The difficulty here arises not with the suit, but rather with the other circumstances—the sex of the plaintiff, the history of the law, and its discriminatory text. Success with this option will mean success in other venues in West Virginia, and a guaranteed right to sit in this state.

B. File a Declaratory Judgment Action

A declaratory judgment action is an action brought in court to resolve uncertainty in the law and declare the rights and legal obligations of a party.¹⁴³

¹⁴² FED. R. CIV. P. 65.
¹⁴³ W.VA. CODE ANN. § 29A-4-1 (West 2023) (“On petition of any interested person, an agency may issue a declaratory ruling with respect to the applicability to any person, property or state of facts of any rule or statute enforceable by it. A declaratory ruling, if issued after argument and stated to be binding, is binding between the agency and the petitioner on the state of facts alleged, unless it is altered or set aside by a court, but it shall not be binding on any other person. Such ruling is subject to review before the court and in the manner hereinafter provided for the review of orders or decisions in contested cases. Each agency may prescribe by rule the form for such petitions and the procedure for their submission, consideration and disposition.”). Moreover, § 29A-4-2 states:

(a) Any person, except the agency promulgating the rule, may have the validity of any rule determined by instituting an action for a declaratory judgment in the circuit court of Kanawha county, West Virginia, when it appears that the rule, or its threatened application, interferes with or impairs or threatens to interfere with or impair, the legal rights or privileges of the plaintiff or plaintiffs. The agency shall be made a party to the proceeding. The declaratory judgment may be rendered whether or not the plaintiff or plaintiffs has or have first requested the agency to pass upon the validity of the rule in question.

(b) The court shall declare the rule invalid if it finds that the rule violates Constitutional provisions or exceeds the statutory authority or jurisdiction of the agency or was adopted without compliance with statutory rule-making procedures or is arbitrary or capricious, or that, in the case of a rule adopted pursuant to section five, article three of this chapter, action under said section five was not justified.

(c) When the invalidity of a rule has been so declared, the agency shall, within thirty days after such declaratory judgment has been entered, acquiesce therein and modify or rescind such invalidated rule in accord with the requirement of such declaratory judgment unless the agency promptly, and in any event within such thirty-day period, notifies the plaintiff or plaintiffs of its intention to apply for an appeal to the Supreme Court of Appeals from such declaratory judgment pursuant to section one, article six of this chapter. In the event such agency shall thereafter make timely application for such appeal, the acquiescence of the agency in the invalidity of such rule shall not be required until thirty days after timely applications for such appeal have been refused or within thirty days after the appeal has been dismissed or otherwise disposed of in the Supreme Court of Appeals by an affirmance of the judgment invalidating said rule.
Considering that there is no available record of the law being applied and considering that the Division considers "certain provisions of [§ 21-3-1, et seq.] to be antiquated and/or obsolete,"\textsuperscript{144} an employer may have reasonable doubts about whether the statute still applies. West Virginia has adopted the Uniform Declaratory Judgments Act,\textsuperscript{145} which allows for any person whose rights, status, or legal relation are affected by a statute to have a court of record\textsuperscript{146} determine any question of construction or validity arising under the statute, and obtain a declaration of the rights, status, or other legal relations thereunder.\textsuperscript{147} An employer who is made the answering party to a complaint might wish to seek a declaratory judgment action in court to clarify whether the law can still fairly apply.

Notably, filing this action is a recommended step for any interested plaintiffs for a comprehensive, coordinated strategy to guarantee the right to sit to all workers in West Virginia. Taking this route, particularly with a female plaintiff who is more likely to succeed, will provide a persuasive precedent for its potential application towards employees across the state, and will assist with future actions for male employees. This action may have a substantial effect on many potential legal claims in that it would provide the initial judicial interpretation of the law, and whether the seating law applies today. Bringing this action in a favorable venue could have broad implications in other jurisdictions in West Virginia. This action will not provide equitable relief as a monetary award for a plaintiff, although the statute may allow for the award of attorney’s fees.\textsuperscript{148} Finally, this option will not preclude a plaintiff from seeking relief by other means,\textsuperscript{149} including by filing a petition for a writ of mandamus or a private lawsuit.

\textbf{C. Get the W. Va. Division of Labor to Enforce the Law}

The West Virginia Division of Labor has jurisdiction over public and private employers from this section of the Labor Code, but the Division does not enforce this statute.\textsuperscript{150} Although the office could enforce the law for violating

\footnotesize{\textit{Id.} \S 29A-4-2.}
\footnotesize{\textsuperscript{144} Division Email, supra note 30.}
\footnotesize{\textsuperscript{145} W. VA. CODE ANN. §§ 55-13-1–55-13-16 (West 2023).}
\footnotesize{\textsuperscript{146} "Court of record" here would refer to circuit court.}
\footnotesize{\textsuperscript{147} W. VA. CODE ANN. § 55-13-2 (West 2023).}
\footnotesize{\textsuperscript{148} Id. \S 55-13-10 (“In any proceeding under this article the court may make such award of costs as may seem equitable and just.”).}
\footnotesize{\textsuperscript{149} Id. \S 55-13-1 (“Courts of record within their respective jurisdictions shall have power to declare rights, status and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration shall be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree.”).}
\footnotesize{\textsuperscript{150} Division Email, supra note 30.}
employers, it does not, presumably due to the office’s expectations of how litigation would play out. In the Division’s perspective, the female-only language in the statute would make any enforcement action into an expensive, complex, and potentially futile effort for the Division of Labor. Although the Division is not responsible for the actual enforcement, it has a duty to request that the Attorney General file suit against employers violating the law.

The first step to engage with the Division of Labor would be to file a request for investigation. On that request form, the seating law and the employer’s violation of that law need to be specifically explained. After filing this request, it is up to the Division to decide whether it will investigate and enforce. If history is a guide, it will choose not to. Filing the writs of mandamus will require the Division to first deny enforcing the law.

Getting the Division of Labor to provide relief requires filing a writ of mandamus to either enforce the existing law or to use its current statutory powers to extend the female-only protections to male employees. This would require a certified petition to be filed in circuit court in the county “in which the record or proceeding is to which the writ relates.” As with other declaratory judgment actions and private lawsuits, the law requires that the writ be filed in the place of controversy, or more clearly, in the jurisdiction covering the actual place of a violation by an employer. These writs would serve several purposes, and depending on the plaintiff and litigation strategy, could be sought together to provide different kinds of alternate relief. Each of the writ of mandamus options will be discussed in turn.

1. Demand the Commissioner Enforce the Law

A fair reading of § 21-3-14 establishes that the Commissioner has a duty to enforce the law. The petitioner’s argument in the writ of mandamus would just be that: the Commissioner has a duty to enforce the law and must make a request of the Attorney General and the several prosecuting attorneys who in turn have a duty to prosecute any violation of the law. This writ would simply demand

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151 Id.
152 W. VA. CODE ANN. § 21-3-14 (West 2023).
154 Id.
155 W. VA. CODE ANN. § 53-1-3 (West 2023). “Application for a writ of mandamus or a writ of prohibition shall be on verified petition.” Id.
156 Id. § 53-1-2 (“Jurisdiction of writs of mandamus and prohibition (except cases whereof cognizance has been taken by the Supreme Court of Appeals or a judge thereof in vacation), shall be in the circuit court of the county in which the record or proceeding is to which the writ relates.”).
157 Id. § 21-3-14 (“It shall be the duty of the Attorney General and the several prosecuting attorneys, upon request of the commissioner of labor or any of his authorized representatives, to
that the request be made to the attorney general for prosecution of a violating employer. This writ would be the most likely to succeed for a female plaintiff, as might a male plaintiff with the right facts of discrimination by differential enforcement by the Division. However, the Division will likely be able to raise administrative discretion as a successful defense, but this would still require a court to determine the scope of the Division’s duties.

2. Demand the Commissioner Issue an Order Interpreting the Law to Include Men

A private litigant could file a petition applying for a writ of mandamus demanding the Commissioner interpret the law to include men. The Commissioner has the power to make orders to prevent accidents. Furthermore, the Commissioner’s orders will be prima facie lawful and reasonable, and as such, a court would interpret an order extending seating requirements to male employees as valid and enforceable. While chairs may not necessarily prevent accidents in all cases, they can prevent contributory factors from accumulating that may lead to further accidents. Further, it would extend the purpose of a current law that the Division has a duty to enforce and would comply with the federal constitutional mandate for equal protection. This option likely requires a proactive Commissioner, and could succeed in providing chairs to the workplace. However, success here could be limited by subsequent litigation over that interpretative order, and thus could curtail its broader applicability in the future. Stronger and longer lasting protections requires changing the law, not just interpreting an old law differently.

3. Demand the Commissioner Promulgate New Rules Providing for Equal Protection for Male Employees

Another requested form of relief would directly challenge the Commissioner of the Division to draft and submit new rules. Although the Commission has decided that the seating provision was “antiquated and/or obsolete,” it has seemingly not yet carried out its duty to remedy this

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158 Id. § 21-3-1 (“To carry out the provisions of this chapter the commissioner of labor shall have the power to investigate and prescribe that reasonable safety devices, safeguards, or other means of protection be adopted for the prevention of accidents in every employment or place of employment, and to make, modify, repeal, and enforce reasonable general orders, applicable to either employers or employees, or both, for the prevention of accidents.”).

159 Id. (“All orders of the commissioner of labor shall be prima facie lawful and reasonable, and shall not be held invalid because of any technical omission, provided there is substantial compliance with the provisions of this chapter.”).

160 U.S. CONST. amend. XIV.
interpretative defect by advancing a rule protecting male employees.\footnote{161}{See Division Email, supra note 30.} Filing a petition for a writ of mandamus making such a demand to the Commissioner could allow for a court to find that the Division has a non-discretionary duty to at least file new rules. The Division should resolve that issue by submitting new rules now. One benefit of this filing this writ, is that, if successful, it will allow for the expansion of the law by a means of providing a regulation on point, and serve to provide all employees in West Virginia, regardless of sex, a right to sit down in their workplace. However unlikely to succeed against a defense of the Division’s administrative discretion, it is nonetheless a potential option to explore.\footnote{162}{The Commissioner’s power to order an inclusive interpretation of the seating statute within the Division can occur separately from other litigation, and could allow for earlier enforcement and relief. However, if a court determines that the order is not reasonable, the Division will have to promulgate new rules. \textit{See} the State Administrative Procedures Act’s Chapter on Rule Making, \textit{W. Va. Code Ann.} §§ 29A-3-1–29A-3-9 (West 2023). Promulgating new rules would require the approval of the West Virginia Legislature, which engages in a unique form of legislative review where members read, review, and vote on proposed agency rules and corresponding enacting statutes, and consider related groupings of the proposed rules as separate bills. In effect, this gives new agency rules the same power as legislative statutes. Therefore, while seeking to get the Division of Labor to propose new rules has its merits, seeking to change the law with new proposed rules would be similar to lobbying for a regular legislative bill that changes the wording of the statute, and just as effective. Regardless, this could work as part of a multi-prong approach to changing the law. \textit{See} Kincaid v. Magnum, 189 W. Va. 404 (1993); \textit{see also} State \textit{ex rel.} Barker v. Manchin, 167 W. Va. 155 (1981).}

V. STRATEGIC CONSIDERATIONS FOR PLAINTIFFS

Enforcement through private litigation will require strategic considerations, based on the plaintiffs, arguments used, and the constitutional considerations. This section will discuss these different aspects for individual actions for both female and male plaintiffs, class actions, and arbitration agreements. A more complete picture of the various aspects of class actions and arbitration agreements is outside of the scope of this Note, but a sketch of the major concerns will be presented here.

A. Individual Actions

All individual actions are best started by the employee requesting a seat, in writing, with specific reference to § 21-3-11, to their employer for the performance of their specific job duties.\footnote{163}{Specifically, an employee should document each and any request for seating accommodations, as well as any refusals by their employer or employer’s agent to provide such a seat. In addition, any evidence of an employer’s policy that forbids seating accommodations for certain workers or certain jobs is also important to document.} This can be used as evidence of a demand and provide a basis for having the employer be on notice. Furthermore, individuals interested in filing suit should also file complaints with the Division.
of Labor and with the West Virginia Human Rights Commission, as applicable, and as needed if the employer does not respond to the written request for seating accommodations currently prescribed by law.

1. Female Plaintiffs

A female plaintiff would seek the direct application of the statute to her employer. Her argument would be plain—the law says that her employer shall provide her with a seat, and thus, she should be entitled to a seat, and it is her employer’s duty to provide that seat. That employer violated that duty, and thus, she is entitled to damages per § 21-3-14. Her damages sought would be for every day that her employer did not provide her with a chair, and she would seek the maximum civil penalty against her employer. Preferably, she would be an older plaintiff who had worked for the employer in the same position for some time, which could prove useful as an exhibit, especially if there is notable physical damage or medical records. A female plaintiff should also demand a jury trial, as a labor dispute over a questionable law would be a good way to determine the viability of this test case. At the very least, a jury demand would encourage the employer to settle or voluntarily comply with the law and provide seats for all employees.

2. Male Plaintiffs

A male plaintiff has at least two litigation strategies. The first is a direct challenge to the employer and asking the court to read “and men” into the statute, and the second is a challenge to the West Virginia Division of Labor for not interpreting the law to extend to men or for not having a rule extending equal protection to male employees. For either, the best practices would be to file a complaint with the Division of Labor and with the Human Rights Commission alleging discrimination, particularly if the Division decides to enforce the law for a female plaintiff but not a male plaintiff, or if an employer chooses to provide female employees with seats but not for the male employees.

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165 Similar strategies would likely be favored for gender non-conforming or transgender individuals, and the identity of those potential plaintiffs should not pose an issue towards an adequate legal resolution and a guarantee of a seat in the workplace. However, a more complete discussion of the issues that may arise is outside of the scope of this Note.

166 Id.

167 See also W. VA. CODE ANN. § 5-11-9(1) (West 2023) (“It shall be an unlawful discriminatory practice . . . for any employer to discriminate against an individual with respect to compensation, hire, tenure, terms, conditions or privileges of employment if the individual is able and competent to perform the services required even if such individual is blind or disabled.”).
The first strategy uses an argument that is essentially the same as the female plaintiff’s case against the employer, but with one crucial difference. He would argue that the statute is unconstitutional as written, and ask the court to take an expansive view of the statutory right to sit under the state constitution. A male plaintiff would ask the court to read the word “and male” into the title of section and the subject of the first sentence, under the grounds of equal protection under the law. This case would be more tenuous to make, as it is clearly outside of the letter of the law. A court in this instance may be less likely to find for a male plaintiff than it would for a female plaintiff, simply because the textual reading of the law does not include men, and the differences in scrutiny analysis that will be applied to sex-specific laws may allow the court to decide that it does not apply to any sex at all. For this reason, this case would be best decided after a female plaintiff successfully affirms the applicability of § 21-3-11 by a separate action.

For the second claim, a male plaintiff could file a writ of mandamus against the Commissioner of the West Virginia Division of Labor, asking for the Commissioner to issue an interpretative order to include men, if still available, or to promulgate rules extending § 21-3-11 to all employees. This would ask the Division to create and submit a regulation to expand the seating requirement so that it covers male employees. While less likely to succeed on its own, if there is substantial court precedent through a declaratory judgment for a female plaintiff, then a male plaintiff could ask for the extension of the law as the constitutional remedy. The legal request for the Division is unlikely to be granted, as a court may value administrative discretion over an explicit statutory duty, but this remains a possible option for an interested party.

B. Class Actions

A class action would clearly be the most lucrative suit and could allow for the collection of damages by the most parties possible. It is likely that any class actions will receive similar treatment by the opposing parties as the cases did in California—the arguments will focus on certifying the class, who is entitled to a chair, and at what times while performing their job responsibilities that employee was entitled to a chair. One thing to consider for plaintiffs’ attorneys pursuing a class action against a non-complying business would be the current hurdles for class actions in West Virginia, which are essentially the same as elsewhere in the United States. The general requirements for a class are numerosity, commonality, typicality, and adequacy. Cases generally meet this

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168 W. VA. CONST. art. 3, §§ 3, 10, 17.
169 U.S. CONST. amend. XIV.
171 FED. R. CIV. P. 23(a).
requirement when there are around or above forty members to the class. Next, because the plaintiffs are seeking monetary damages by way of enabled civil penalties through a dispute over a question of law, this will meet the certification standard, since the plaintiffs have the same predominate claim and this combined suit is a superior method for fairly and efficiently adjudicating the controversy.\textsuperscript{172} A class action suit against a grocery store, big-box retailer or wholesaler, or another employer with employees working under a common locus of facts and who can present common evidence, will likely be allowed to proceed under West Virginia law.

\textbf{C. Arbitration Agreements}

Another thing to consider are the use of contracts that require arbitration agreements over labor disputes. This may be uncommon in some employment arrangements in West Virginia, but it should be a consideration because an arbitration agreement may preclude employees from suing their employers for certain labor violations. Most arbitration agreements fall under the Federal Arbitration Act,\textsuperscript{173} except for those excluded in the Act, which does not apply to “the employment of seamen, railroad workers, or any other class of workers engaged in foreign or interstate commerce.”\textsuperscript{174} All other arbitration agreements, provided that they are not violative of the parties legal rights, can bind the parties, and can prevent an employee for suing their employer over not following state labor law. Arbitration agreements may contain valid class action waivers,\textsuperscript{175} and individual arbitration agreements in contracts are wholly enforceable.\textsuperscript{176} Together, this means that the terms of an arbitration agreement could frustrate private litigation to enforce the law by forcing arbitration as the required alternative to litigation. Strategic litigation to uphold the right to sit must therefore look for the right plaintiff in the right employment relationship.

VI. DEFENSES, COUNTER ARGUMENTS, AND OTHER CONSIDERATIONS

Enforcing an old law onto employers will bring a rash of counterarguments and defenses to maintain current business practices. A sketch of each of those arguments will be provided.

\textbf{A. Desuetude}

Desuetude is the “civil law doctrine holding that if a statute or treaty is left unenforced long enough, it ceases to have legal effect even though it has not
been repealed.” An employer might be inclined to argue that because this law has not been enforced, it would be immune from criminal penalties, and potentially, have a get-out-of-enforcement-free card.

The West Virginia Supreme Court of Appeals decided the seminal modern case on desuetude, Committee on Legal Ethics v. Printz178 where the Court held that penal statutes may become void under the doctrine of desuetude if: (1) the statute proscribes only acts that are malum prohibitum and not malum in se;179 (2) there must be been open, notorious and pervasive violation of the statute for a long period;180 and (3) there has been a conspicuous policy of nonenforcement of the statute.181 This holding was reaffirmed in 2003.182 Applying this doctrine to seating laws may allow for a reasonable defense. For the first factor, § 21-3-1 et seq. would fall squarely as a malum prohibitum act, since violations of its provisions is a crime and incurs civil penalties.183 For the

177 Desuetude, BLACK’S LAW DICTIONARY (11th ed. 2019).
179 The Court explained:

Crimes that are malum in se will not lose their criminal character through desuetude, but crimes that are malum prohibitum may. For instance, if no one had been prosecuted under an obscure statute prohibiting ax murders since Lizzie Borden was acquitted, we would still allow prosecution under that statute today. Even though no one has been prosecuted for an ax murder in 50 years, we all still understand that it is inappropriate to resort to garden tools to settle family quarrels. On the other hand, we might think it quite reasonable to approach the man who has embezzled the money that we have set aside for our children’s education and offer not to prosecute him if he will return the money to us.

Id. at 188.
180 Id. The Court explained, “[a]s Friedrich Carl von Savigny, the founder of the Historical School of Jurisprudence, described the basic foundations necessary for customary law to develop: 1. There must be a plurality of acts; 2. Uniform, uninterrupted acts; that is to say the custom is interrupted when among these acts others resting upon an opposite rule have come forth. This determination is beyond all doubt; [and] 3. The acts must recur throughout a long period.” Id. (citing F. SAVIGNY, SYSTEM OF THE MODERN ROMAN LAW 138 (William Holloway trans., 1867)).
181 Id. The Court explained, “or as the U.S. Supreme Court described it in Poe, “[an] undeviating policy of nullification . . . throughout all the long years that . . . bespeaks more than prosecutorial paralysis” Id. (citing Poe v. Ullman, 367 U.S. 497, 501 (1961)).
183 W. VA. CODE ANN. § 21-3-14 (West 2023) (“If any employer, employee, owner or other person shall violate any provision of this chapter or shall fail or refuse to perform any duty lawfully required within the time prescribed by the commissioner of labor or his authorized representatives, for which no penalty has been specifically provided, or shall fail, neglect, or refuse to obey any lawful order given, made or promulgated by the commissioner of labor or his authorized representatives, or shall interfere with, impede, or obstruct in any manner the commissioner of labor or his authorized representatives in the performance of his or their official duties, he shall be guilty of a misdemeanor and, upon conviction thereof shall be fined not less than $10 nor more than $50, or shall be imprisoned for not exceeding six months, or both so fined and imprisoned,
second factor, an employer using this defense could point to other violations of the law by different employers, as a means of proving it as a common labor practice. For the third factor, the continued nonenforcement and reference to the provisions as “obsolete and or antiquated” by the Division of Labor would likely be met.

A successful use of this defense will likely prevent any criminal penalties from being assessed if a violator was ever prosecuted by the Attorney General under the direction of the Commissioner of the Division of Labor. Considering that the Division has not enforced the law since the 1970s, and no available record of compliance actions exists, this doctrine may serve as a viable defense to limit criminal penalties and could potentially undermine the general application of the statute. Furthermore, this argument for applying the desuetude doctrine will grow in strength over time with continued inaction and nonenforcement, because the longer this noncompliance continues, the more persuasive the second and third factors become.

B. Unconstitutionality of Female-only Protections

An employer would likely argue that female-only protections are unconstitutional. Because these protections are unconstitutional, it is therefore not the duty of the employer to provide seats for their employees, as they would have no affirmative duty under any relevant authority to do so. This argument is sound, but it is no more complex than other claims of statutory discrimination on the basis of sex. Success on this ground is unlikely, as it depends on a court ruling against explicit textual allowances for these kinds of positive, women-only protective statutes. It is entirely fair to say that the law is discriminatory. The question is not truly an issue of constitutional analysis; the seating law clearly provides a benefit to one sex and not to another, and it plainly discriminates against men by denying them a chair in the way it would provide chairs to women. The real question here is the remedy. Should a court remedy the equal protection violation by striking down the law, or should a court remedy it by reading “and men” into the law? This remains to be decided.

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184 Division Email, supra note 30.
185 Id.
187 A more complete discussion of sex-based constitutional arguments, including those that refer to West Virginia’s state constitutional rights of equal protection, are outside of the scope of this Note. West Virginia does not have a direct analog to the federal guarantee of equal protection, but the Supreme Court of Appeals has held that equal protection arises out of multiple sections of the state constitution. See generally W. Va. Const. art. III § 10 (due process clause); id. art. III, § 17 (equal protection and open courts); id. art. VI, § 39 (special laws prohibited). See also Israel v. W. Va. Secondary Schs. Activities Comm’n, 182 W. Va. 454 (1989) (“a gender-based classification challenged as denying equal protection under Article III, Section 10 of our...
C. Defining the Class of Any Class Action

As in California, anyone seeking to bring an action for a group of plaintiffs as a class will likely need to navigate a circus of class action party categorizations. These categories could pertain to however an employer designates certain jobs and job responsibilities—some jobs, such as nurses, restaurant servers, or construction workers are likely performing their jobs on their feet regardless of any right to sit. Some kinds of employees may only be able to use a chair on some occasions in the performance of certain tasks, but not for other tasks. Some employees, like cashiers, could use seats at any time. This class categorization can become frustrating—some of these categorizations could be questions such as: how many hours did some employees need a chair, how reasonable was that need, and how often said employees were or were not permitted to use said seats? This was a common tactic used in the California class action cases, and it is worth consideration for prospective class action litigants in other states. Although the California Supreme Court rejected holistic determinations, its embrace of duty-specific seating requirements endorses these kinds of employee class subdivisions. This could make litigation in other states just as complex.

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constitution can only be upheld if the classification serves an important governmental objective and is substantially related to the achievement of the objective.”). Israel modified the standard set in Peters v. Narick, 165 W. Va. 622 (1980) (“Gender based classifications challenged as denying the right to equal protection by Article III, Section 17 of the West Virginia Constitution are to be regarded as suspect, accorded the strictest possible judicial scrutiny, and are to be sustained only if the State can demonstrate a compelling interest to justify the classification.”).

188 See Hall v. Rite Aid Corp., 171 Cal. Rptr. 3d 504, 507 (Ct. App. 4th 2014) (“Rite Aid asserted (1) its stores differed in size, sales volume, number of Cashier/Clerks, and sales counter configurations; (2) when Cashier/Clerks are not performing check-out counter work they are tasked with duties that varied among the stores; and (3) the percentage of time each Cashier/Clerk spent behind the check-out counter varied from 2 percent to 99 percent (with an average of about 42 percent) and the time spent on stockroom or floor duties was equally varied. Rite Aid’s evidence also showed that, even when performing duties at the check-out counter, the distance Cashier/Clers had to move away from the register (to retrieve controlled items such as tobacco and liquor) varied depending on the specific configuration of each store, and they often or very often performed tasks requiring them to lift, bend, twist, lean over, or move around while working at the check-out register. Because of the variety of tasks, 69 percent of surveyed Cashier/Clerks reported they spent at least half their time moving behind the counter, and 31 percent reported they spent at least 3/4 of their time moving behind the counter. [Kristin] Hall, whose proffered theory of recovery was that the work performed by Cashier/Clerks when stationed at the check-out registers reasonably permits the use of seats and therefore the failure to provide seats violated section 14, asserted many of these variations were irrelevant to her theory and therefore were not an obstacle to class certification. Hall argued the lack of uniformity in the sizes and configurations of the stores, or the variations in the amount of time Cashier/Clerks reported spending working at the check-out counter, had no relevance to whether the failure to provide seats violated section 14 because the nature of the check-out work itself reasonably permitted the use of a seat.”).


190 Kilby, 368 P.3d at 566.
D. Voluntary Compliance to Stop Litigation or Limit Penalties

Furthermore, in the process of litigating an action over a seating claim, an employer may choose to provide the suing party with a chair. This provisioning may cause a court to render the case or controversy requirement moot, as there would no longer be a dispute. However, this is not the case, as the facts of an employer being sued and providing seats to drop the suit would fall under the “voluntary cessation” exception for mootness and would not lead a court to dismiss the suit.\footnote{See generally Friends of the Earth, Inc. v. Laidlaw Env’t Sers., Inc., 528 U.S. 167 (2000). Given the nature of the seating issue across the whole range of the workforce, and the different kinds of employers and occupations that may provide and then remove chairs from employees, purposefully or inadvertently, the mootness doctrine is worth discussion for repeat violators.} If a court did, then a party could just provide chairs long enough for the case to be dismissed, and then remove the chairs and potentially also fire the employee in retaliation.

Although not a defense, voluntary compliance by an employer with providing seats for their employer would likely be a significant consideration for a judge assessing civil penalties for a violation under § 21-3-14. Additionally, it would likely serve as an employer’s show of good faith which would thus limit potential penalties. An employer may seek to show that subsequent remedial measures, while not limiting culpability, indicate the employer is now on notice of the statute and was unaware of the requirements under West Virginia law. A court may find some sympathy with that argument and may thus award a lower amount of damages, and thus make the suits less lucrative.

E. Plaintiff’s Loss of Employment

West Virginia is an at-will employment state, and so employers may fire any non-contractual employee at any time and for any reason, or for no reason at all.\footnote{See Cook v. Heck’s, Inc. 176 W. Va. 368, 372 (1986) (citing Wright v. Standard Ultramarine & Color Co., 141 W. Va. 368 (1955)).} However, employees of this state are entitled to be free from unlawful discrimination, wrongful discharge, and unlawful retaliation in the workplace.\footnote{W. VA. CODE ANN. § 55-7E-2 (West 2023).} In the case of an employer firing the plaintiff employee seeking a chair in the workplace, additional claims can be filed against the employer alleging unlawful discrimination, wrongful discharge, and unlawful retaliation. These may also allow for the repayment of employee back pay and attorneys’ fees.\footnote{See Chapman, supra note 114.}

VII. ALTERNATIVE METHODS TO GUARANTEE THE RIGHT TO SIT

While this Note has focused on the legal methods by which the right to sit is codified in statute, other methods for guaranteeing access to seating should
be included in the discussion. There are several alternative, non-legal methods to ensure that employees have a place to sit in the workplace, at least including: by voluntary compliance, institutional inertia, by incorporating it into labor contracts, by union advocacy, and by public discouragement of violating employers. Each of these alternatives will be discussed in turn.

A. Voluntary Compliance by Private Employers

Voluntary compliance is an ideal solution when current legal remedies are difficult or unable to be achieved. Voluntary compliance requires the employers to willingly provide seats for their employees as necessary. This option should be encouraged among employers and could be done to limit total liability from the seating requirement. While not impossible, relying only on this option and the goodwill of employers would likely not be sufficient to ensure that all workers are adequately protected.

B. Institutional Inertia

Institutional inertia is another means to gain access to a seat in the workplace. One clear example of this inertia would be in the realm of public employers, or more clearly, people who work for the government. Most government workers at this point have been provisioned a chair—in 2023, there are no clear examples of any clerk, office worker, attorney, staff member, official, or other employee of the state who does not have regular access to a chair. This has been a historical development, with the regular replacement of furniture within various governmental entities over time, alongside sharing practices to reuse old furniture between different offices. This has allowed for the sizable build-up of an array of different chairs and seating options for most government employees to use. In this way, it is institutional inertia, and not necessarily the law, that guarantees a right to sit.

C. Incorporation into Labor Contracts

Employees aware of § 21-3-11 should contract with their employers to requisition seats for their own use during work hours. Negotiations between the employee and employer should clarify the employer’s responsibility to provide a seat for use within the workplace. While not a systemic solution, it can nonetheless serve individual workers who can negotiate on their own behalf to get a seat in their workplace. Professional employees and independent contractors should work to incorporate these protections into their labor contracts so that employers specifically provide for seats as necessary for the job responsibilities.
D. Union Advocacy for the Right to Sit

Unions should advocate for a right to sit on local, state, and federal levels. The right to sit is a right all on its own—much like being entitled to a bathroom, lunch breaks, and other kinds of safety equipment, violations of the right to sit is an important workplace concern that affects the dignity and integrity of labor. Unions should negotiate labor contracts that stipulate employers are to provide seats for all employees. Union solidarity on this issue is also important: unions should support other unions who are advocating for seating for their workers. A united front by unionized employees may also allow for an easier persuasion of management and would serve as a valuable organizing platform for litigation strategies interested in class-wide relief.

E. Public Discouragement of Prolonged Standing in the Workplace

One final way to guarantee that workers in West Virginia have the right to sit is by getting the public involved. Armed with knowledge of the negative effects of prolonged standing and its complete preventability, members of the public should take special notice of when they see prolonged standing occurring in a workplace, or workers clearly in need of a chair, and then complain to the management.\textsuperscript{195} With enough public pressure, employers would be more inclined to change their policies to accommodate seating for their employees. Eventually, dealing with the negative public feedback, and potential fallout from managerial pushback, will cost more than merely providing chairs to all employees in a workplace. After all, the cost of providing a stool to one’s employees is cheaper\textsuperscript{196} when compared to the continued cost of wasted labor from managers being bothered by patrons.\textsuperscript{197} Complaining to the management of an establishment that some of the employees are working on their feet and deserve to sit on a chair could be viable tactic for a concerned advocate. Furthermore, open discussion and exposure of these practices in a negative way to the broader public will serve to discourage other employers in other jurisdictions from violating the law and from limiting access to seats in the workplace. Raising awareness of these harmful workplace environments and seat-denying management practices, such as on social media, will assist in making employers more likely to provide chairs. Bad press and public shaming are tried and true methods to encourage employers to change their business policies. A workplace culture should not perpetuate the idea that an employee being on their feet is equated with attentiveness and diligence, and thus have the management be

\textsuperscript{195} As the saying goes, “you must be the change you want to see in the world.”


\textsuperscript{197} An average manager’s salary in West Virginia is around $49,722, or around $15.48 an hour. Manager salary in West Virginia, Indeed, https://www.indeed.com/career/manager/salaries/WV (last visited Jan. 14, 2024).
justified to refuse to provide their employees with seats.\(^{198}\) Forcing employees to constantly stand and presuming they will be more diligent and attentive is built on a non-scientific logic that is harmful to everyone. Relying on the public may be better than the other methods, because it will change society’s expectations of working conditions in a more paradigmatic way, which would hopefully lead to greater impacts on larger issues concerning meeting human needs and advancing human dignity in the workplace.\(^{199}\)

**VIII. RECOMMENDATIONS FOR WEST VIRGINIA LEGISLATORS, REGULATORS, AND LITIGATORS**

**A. Recommendations for the State Legislature**

The Legislature should pass legislation that ensures compliance with seating requirements by expanding the law to protect all employees, increase the statutory penalties for a violation to be in line with Florida’s legal scheme and allow for higher private enforcement awards, and provide that private enforcement remains viable by the addition of a fee-shifting provision. For one, § 21-3-11 should be amended to include all employees in West Virginia and should apply to them as reasonably practicable, and the rest of the chapter should be updated with modern language and proper legal efficacy. Not all professions will use seats to perform their jobs, but that should not prevent the state from requiring an affirmative duty on every employer to provide seats for their employees. Another part would be to increase these penalties to the level of Florida, from its current maximum of $50 per violation to Florida’s $500 per violation,\(^{200}\) as it will put employers on notice to comply with the law and allow for more private suits for injured employees to collect damages. One last proposal would be to insert an additional provision into § 21-3-14 that allows for

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\(^{198}\) Examples of this kind of hostile attitude towards a business’s own employed workers, often disguised as pro-customer language, can be found throughout litigation about seating requirements. “[Nykeya Kilby’s] primary responsibility was to operate a cash register at the front of the store. This responsibility included scanning merchandise, bagging merchandise, and processing customer payments. Kilby spent about ninety percent of her time operating the cash register. The rest of the time she performed tasks that required her to move around the store, such as gathering shopping carts and restocking display cases. CVS informed Kilby during her training that she would be expected to stand for long periods of time. **CVS has a policy of not providing seats to Clerk/Cashiers because, in CVS’s judgment, standing while operating the cash register promotes excellent customer service.** Pursuant to this policy, CVS did not furnish Kilby with a seat while she operated the cash register.” Kilby v. CVS Pharmacy, Inc., 739 F.3d 1192, 1194 (9th Cir. 2013) (emphasis added).

\(^{199}\) See generally What Gen Z Wants in the Workplace, WASH. POST (June 16, 2023, 6:00 AM), https://www.washingtonpost.com/business/2023/06/16/gen-z-employment/.

\(^{200}\) FLA. STAT. ANN. § 775.083 (West 2023).
the collection of attorney’s fees\textsuperscript{201} would increase enforcement of this section of the labor code.

\textbf{B. Recommendations for the W. Va. Division of Labor}

The Commissioner of the Division of Labor should feel courageous to enforce the law and request the Attorney General prosecute a violating employer to protect female employees. The Commissioner should also draft new orders and submit new regulations that expand upon § 21-3-11 with its statutory powers under § 21-3-1. These powers are expansive but are not being used to provide ergonomics protections for employees in the state. The Commissioner must only draft an order to change its interpretation, or craft a rule, submit the rule to the Legislature for approval, and have it approved. In either case, the Division and any reviewing court will then be able to interpret the statute to include all male employees in addition to female ones. By enforcing the current law for female employees, interpreting the statute to include men, and by proposing and ratifying a new rule protecting male employees, the Division of Labor can guarantee a right to sit to all workers in West Virginia.

\textbf{C. Recommendations for Plaintiffs’ Attorneys}

Litigators and labor advocates should use § 21-3-11 and § 21-3-14 as a basis for guaranteeing the right to sit for all employees in West Virginia. A right of action exists, a statutory mandate is present, the defendants are in clear violation of the law, and the plaintiffs are sympathetic and suffering. The un lucrative nature of the suit is an important factor for consideration before filing a legal action, but a litigator looking to make a real difference for thousands of workers in West Virginia could have a real, lasting impact. A motivated attorney, or team of them, could guarantee every person a chair in their workplace in this state. Guaranteeing the right to sit to all employees in West Virginia would be an excellent pro bono opportunity for an established firm to showcase its commitment to improving the lives of the people of West Virginia now and for years to come.

\textbf{IX. CONCLUSION}

State seating laws are an underappreciated, yet salient labor issue. As the population of West Virginia gets older, more citizens are finding themselves working later in life than they expected. Their quality of life is dependent, in part, on the working conditions set forth by state labor standards. With more older people, working more on their feet longer into their lives, their health outcomes are likely to be greatly affected by prolonged standing in the workplace. The

\textsuperscript{201} Example language: “A court may also award a reasonable attorney’s fee to the prevailing party as part of the costs.”
external costs of not providing chairs involve untold sums being spent mitigating preventable chronic illnesses, as government sponsored healthcare programs cover the costs of employers denying employees a place to sit down while doing their job. Providing seats for all employees will prevent sex discrimination in the law, enable already-disabled people and vulnerable people to have a place to sit down, prevent future disabilities caused in the workplace, and save money on healthcare costs at the individual, state, and federal levels. Employers should be required to provide seats to all employees in West Virginia as reasonably appropriate for the fulfillment of their job. As members of the concerned public, we must work to ensure that employers are held to that modern and century-old mandate, and to ensure that our fellow human beings—our friends and our neighbors—are provided with simple dignities in the workplace.

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