IN THE SUPREME COURT
OF THE STATE OF MISSOURI

No. SC96683

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT: No. WD80005

RMA (A MINOR CHILD), BY HIS NEXT FRIEND:
RACHELLE APPLEBERRY,
Appellant,

v.

BLUE SPRINGS R-IV SCHOOL DISTRICT AND
BLUE SPRINGS SCHOOL DISTRICT BOARD OF EDUCATION,
Respondents.

Appeal from the Circuit Court of Jackson County at Independence
Circuit Court Case No. 1516-CV20874
Honorable Marco A. Roland

BRIEF OF *AMICUS CURIAE* THE NATIONAL WOMEN'S LAW CENTER *BY CONSENT OF ALL PARTIES*

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This Brief of the National Women's Law Center is filed with the consent of all parties.

I. INTEREST OF *AMICI CURIAE*

The National Women's Law Center is a nonprofit legal organization that is dedicated to the advancement and protection of women's legal rights and the expansion of women's opportunities. Since 1972, the Center has worked to secure equal opportunity in education for girls and women through full enforcement of Title IX of the Education Amendments of 1972, the Constitution's Equal Protection Clause, and other laws prohibiting sex discrimination. The Center has participated in numerous cases involving sex discrimination before various courts across the United States. Descriptions of the other *amici* are included in an appendix to this brief.

Amici submit this brief because the policy at issue—which bars a transgender male from using the same restroom and locker facilities as other males—rests on the same sort of sex discrimination, including sex stereotyping, that historically has been used to justify discrimination against women in schools and the workplace. Accordingly, *amici*'s perspectives and experiences in addressing such issues may assist the Court in its resolution of this case.

II. INTRODUCTION AND SUMMARY OF ARGUMENT

Respondents claim they are permitted to discriminate against RMA—a transgender boy—and deny him access to the male bathroom and locker room facilities at his school because "the [Missouri Human Right's] Act ["MHRA"] does not extend its protection to claims based on gender identity / transgender status."[1] Respondents' Br., at 2–3.

Respondents' argument relies on the same discriminatory sex stereotyping that amici have combatted for decades—*i.e.*, stereotyping that relies on perceptions of what it means to be "male" or "female" to subsequently discriminate against individuals that do

[1] Respondents also assert that the "District and the Board are not 'persons' within the scope of the public accommodation provision of the Act. (LF. 21-33).

not conform to that definition. Affirming the lower court's decision allows for sex stereotyping to have a place in our schools and workplaces and is a step back for women's rights movements as a whole.

Because Congress, state legislatures, and courts have recognized that sex stereotyping is sex discrimination, Respondents' arguments are not legally sound. The MHRA is a remedial statute, which Missouri courts have repeatedly broadly interpreted "in order to accomplish the greatest public good." *Mo. Comm'n on Human Rights v. Red Dragon Rest., Inc.*, 991 S.W.2d 161, 167 (Mo. App. WE.D. 1999). The MHRA and Title IX of the Education Amendments of 1972, the federal law prohibiting sex discrimination in federally funded education programs, rest in substantial part on the rejection of sex stereotypes—that is, a rejection of the idea that an individual's behavior must match the stereotype associated with his or her biological sex.[2] That is precisely the sort of stereotyping that underlies the policy challenged in this case: Respondents' bathroom and locker room policy discriminates against a transgender student because he does not conform to Respondents' notion of what it means to be male.

Moreover, discrimination against transgender individuals—the insistence that all other persons are permitted to act in accord with their gender identity, but transgender students are punished for doing so—is itself a form of sex discrimination. This understanding of sex discrimination is firmly rooted in case law, which recognizes that references to "sex" encompass the broader concept of gender identity and that rules governing workplaces and schools may not turn on reproductive anatomy. These decisions are in line with the MHRA, which was enacted with the broad goal of generally eradicating gender discrimination in public accommodations, including educational programs.

[2] As detailed *infra*, Missouri courts look to analogues federal anti-discrimination statutes when interpreting the MHRA.

Against this background, Respondents' contention that the at-issue restrictive policy was enacted to protect privacy and safety interests of all its students is unavailing. This type of pretextual argument—grounded in the very sorts of harmful stereotypes that civil rights laws are designed to overcome—has historically been used to justify discriminatory laws. Such pretexts, for example, have long been asserted in defense of rules that kept women out of the workforce and racial minorities out of public facilities like bathrooms. The courts, however, have approached such "protective" rules with the skepticism they deserve. The same outcome is appropriate here. RMA should not be excluded from using the school facilities appropriate to his gender identity.

III. ARGUMENT

A. Discrimination Against Transgender Individuals Is A Form Of Sex Stereotyping Prohibited Under The MHRA And Title IX.

1. The MHRA was intended to be a broad statute that shares a common history with Federal civil rights protections.

The MHRA, enacted in 1986, was preceded by the Fair Employment Practices Act, originally passed in 1960 and amended in 1965 to prohibit discrimination based on sex. *See Self v. Midwest Orthopedics Food & Ankle, P.C.*, 272 S.W.3d 364, 368 (Mo. App. W.D. 2008). Missouri courts recognize the MHRA and Title VII of the Civil Rights Act of 1964 as "coextensive, but not identical, acts." *Brady v. Curators of Univ. of Mo.*, 213 S.W.3d 101, 112 (Mo. App. E.D. 2006) and have consistently relied on federal law as guidance when it is "not inconsistent" with Missouri law. *See Daugherty v. City of Maryland Heights*, 231 S.W.3d 814, 818 (Mo. banc 2007).

a. Missouri courts have liberally construed the MHRA to effectuate its purpose as a remedial statute.

Because the MHRA is a remedial statute, Missouri courts have repeatedly given it a liberal construction "in order to accomplish the greatest public good." *Red Dragon*, 991 S.W.2d at 167 (quoting *Hagan v. Dir. of Revenue*, 968 S.W.2d 704, 706 (Mo. banc

1998)). In *Red Dragon*, the court stated that "this court must bear in mind that '[r]emedial statutes [like the MHRA] should be construed liberally to include those cases which are within the spirit of the law and all reasonable doubts should be construed in favor of applicability to the case.'" *Id*. at 166-67. The Court was presented with a question of whether an individual who was discriminated against because they associated with disabled individuals was protected by the MHRA even though the MHRA did not, at the time, specifically protect people from discrimination by association. The court concluded that the MHRA prohibits associational discrimination, even if such discrimination is not explicitly addressed in the statute. *Id.*

Similarly, in *Doe ex rel. Subia v. Kansas City, Missouri School District*, 372 S.W.3d 43, 47-48 (Mo. App. W.D. 2012), the court held the MHRA's definition of public accommodation must be interpreted broadly to include schools, even though the requirement that such a public accommodation be "open to the public" could be read narrowly "to mean accessible by all members of the populace," rather than accessible to a "subset of the general population." *Id.* at 50; *see also State ex rel. Wash. Univ. v. Richardson*, 396 S.W.3d 387, 396 (Mo. App. W.D. 2013) (finding that a narrow "interpretation of 'open to the public'" to exclude private, selective universities would "circumvent[ ] the legislature's purpose").

Missouri courts have also applied the MHRA's sex discrimination provision expansively to a range of instances involving gender-based discrimination, and, in certain instances, held that the statute provides greater protections than the MHRA's federal counterparts. *See, e.g., Doe ex rel. Subia*, 372 S.W.3d at 52 (holding that a failure to take prompt and effective remedial action to stop student-on-student sexual harassment may violate the MHRA); *Midstate Oil Co. v. Mo. Comm'n on Human Rights*, 679 S.W.2d 842, 846 (Mo. banc 1984) (holding that pregnancy discrimination is sex discrimination); *Gilliland v. Mo. Athletic Club*, 273 S.W.3d 516, 521 n. 8 (Mo. banc 2009) (finding that MHRA prohibits same-sex harassment).

A finding by this Court that sex discrimination includes discrimination as a result of sex stereotyping – including sex stereotyping against transgender individuals –is consistent with the Missouri courts' emphasis on reading the MHRA holistically to achieve the legislature's goal of preventing discrimination.

b. The plain meaning of the MHRA provides a basis for RMA's claim of discrimination.

Respondents deny RMA access to the restrooms and locker rooms that match his gender because he has female genitalia. The Dissent in the lower court's opinion pointedly concludes, "thus, but for RMA's sexual anatomy, the alleged discrimination would not have occurred" and "respondents conceded that the conduct was based on sex." Dissent at 2. Because RMA's sexual anatomy does not conform to Respondents' definition of male, they have denied him access to the boys' bathrooms and locker rooms.

The plain meaning of the MHRA, to protect individuals from discrimination based on sex, would be frustrated if the Court permits Respondents to discriminate against RMA based on his sexual anatomy.

c. Missouri courts look to federal law to interpret the MHRA.

Because the MHRA "is modeled after federal anti-discrimination laws," federal decisions supply "strong persuasive authority" for purposes of deciding certain issues. *Pollock v. Wetterau Food Distrib. Grp.*, 11 S.W.3d 754, 771 (Mo. App. E.D. 1999) (following federal precedent in interpreting the MHRA to provide for an award of pre-judgment interest); *see also Daugherty v. City of Maryland Heights*, 231 S.W.3d 814, 818 (Mo. banc 2007) ("In deciding a case under the MHRA, appellate courts are guided by both Missouri law and federal employment discrimination case[]law that is consistent with Missouri law.").

Where the language of the MHRA is similar to federal discrimination statutes, Missouri courts often have adopted the conclusions of federal courts interpreting the analogous federal law provisions. *See Daugherty*, 231 S.W.3d at 821–22 (relying on

federal disability case law to interpret the MHRA); *id.* at 818 (citing other Missouri cases applying federal precedents to interpret the MHRA); *Swyers v. Thermal Sci., Inc.*, 887 S.W.2d 655, 656 (Mo. App. E.D. 1994) (applying federal case law in construing the "after-acquired evidence" defense to an MHRA claim).

Relying on federal precedent is particularly important here, where the question of whether discrimination against transgender individuals constitutes sex discrimination has not yet been decided by this Court.[3] On-point federal authority that has examined these issues thus provides persuasive guidance in this context.

2. Congress intended Title IX to broadly prohibit sex discrimination in education, including on the basis of sex stereotyping.

Title IX, which shares the same fundamental purpose as the MHRA, was enacted to eradicate sex discrimination in educational programs. Title IX provides, in relevant part, that no person "shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving Federal financial assistance . . . ." 20 U.S.C. § 1681(a). When interpreting this statute, courts have looked for guidance from its prime sponsor, former Senator Birch Bayh of Indiana. *See N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 523-530 & n.13 (1982); *Cannon v. Univ. of Chicago*, 441 U.S. 677, 694-95 & n.16 (1979).

In addition to the statute's broad goal of eliminating all forms of sex discrimination in education, Congress was specifically concerned with eradicating pernicious sex stereotyping in educational institutions. When Senator Bayh introduced the amendment that became Title IX over forty years ago, he noted that sex discrimination, including discrimination based on stereotypes, serves as a barrier to

[3] Importantly, *Pittman v. Cook Paper Recycling Corp.*, 478 S.W.3d 479 (2015), a case heavily relied on by the Respondent, explicitly states that the Court "need not decide … whether or not the Missouri Human Rights Act prohibits sex discrimination based upon gender stereotyping because Pittman did not raise a gender stereotyping claim in his petition."

educational opportunities and achievement, declaring that "[i]t is time we change our operating assumptions." 118 Cong. Rec. 5804 (1972) (Statement of Sen. Bayh). Senator Bayh expressly recognized that sex discrimination in education is based on "stereotyped notions," like that of "women as pretty things who go to college to find a husband, go on to graduate school because they want a more interesting husband, and finally marry, have children, and never work again." *Id*. Title IX was therefore necessary to "change [these] operating assumptions" so as to combat the "vicious and reinforcing pattern of discrimination" based on these "myths." *Id*.[4]

3. Discrimination against transgender individuals is prohibited sex stereotyping.

Following U.S. Supreme Court precedent holding that sex stereotyping constitutes sex discrimination, courts across the country have found that discrimination against transgender individuals because of their gender identity is prohibited sex stereotyping. Respondents impose a policy that restricts students to facilities that match their assigned sex at birth or to gender-neutral facilities.

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[4] The recognition of stereotypes as a core problem motivating sex discrimination in education also permeated the 1970 Hearings that led to the adoption of Title IX. Numerous individuals testified to the harmfulness of stereotypes—in particular, those regarding gender roles—in perpetuating in-equality. *See, e.g.*, 1970 Hearings at 7 (statement of Myra Ruth Harmon, President, Nat'l Fed'n of Bus. & Prof'l Women's Clubs, Inc.) (discussing "certain sex role concepts which continue to mold our society," including "educational institutions"); *id.* at 436 (statement of Daisy K. Shaw, Dir. of Educ. & Vocational Guidance of N.Y.C.) (discussing how "perceptions of sex roles develop" very early in life, and what is needed to end sex discrimination is "thoroughgoing reappraisal of the education and guidance of our youth to determine what factors in our own methods of child rearing and schooling are contributing to this tragic and senseless underutilization of American women"); *id.* at 662 (statement of Frankie M. Freeman, Comm'r, U.S. Comm'n on Civil Rights) ("Because of outmoded customs and attitudes, women are denied a genuinely equal opportunity to realize their full individual potential ...."); *id.* at 364 (statement of Pauli Murray, Professor, Brandeis Univ.) (discussing importance of treating each person as an individual, and not according to their stereotype).

A school policy that treats transgender students differently from other students is sex discrimination rooted in sex stereotyping. *See Whitaker ex rel. Whitaker v. Kenosha Unified Sch. Dist. No. 1. Bd. of Educ.*, 858 F.3d, 1034, 1049 (7th Cir. 2017) (finding that a student "can demonstrate a likelihood of success on the merits of his claim because he has alleged that the School District has denied him access to the boys' bathroom because he is transgender"). In *Whitaker*, a school policy prevented a seventeen-year-old transgender boy, Ash, from using the boys' bathroom. *Id.* at 1040–42. Ash claimed the policy discriminated against him on the basis of sex by requiring him to use the bathroom designated to his sex assigned at birth or gender-neutral facilities. *Id.* Following *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), in its Title VII analysis, the Seventh Circuit held that Ash had a sex stereotyping claim under Title IX, reasoning:

> A Policy that requires an individual to use a bathroom that does not conform with his or her gender identity punishes that individual for his or her gender non-conformance, which in turn violates Title IX. The School District's policy also subjects Ash, as a transgender student, to different rules, sanctions, and treatment than non-transgender students, in violation of Title IX. Providing a gender-neutral alternative is not sufficient to relieve the School District from liability, as it is the policy itself which violates the Act.

Id. at 1049–50.

In finding Ash had a viable sex stereotyping claim, the Seventh Circuit declined to follow its previous narrow interpretation of "sex" discrimination articulated in a case involving a transgender employee. *See Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984). In *Ulane*, the court had interpreted Title VII to mean "it is unlawful to discriminate against women because they are women and against men because they are men." *Id.* at 1085.

In *Whitaker*, however, the court concluded that: "[*Ulane*'s] reasoning [] cannot and does not foreclose [] transgender students from bring[ing] sex-discrimination claims based upon a theory of sex-stereotyping as articulated four years later by the Supreme Court in *Price Waterhouse v. Hopkins*." *Whitaker*, 858 F.3d at 1047. The *Whitaker* court

rejected as "too narrow" the view that sex stereotyping claims are limited to instances in which a person is adversely treated because their mannerisms or dress do not conform with those typically attributed to their assigned sex. *Id.* at 1048.

Other courts have found policies like the one at issue here to violate transgender students' Title IX rights by penalizing them for their non-conformity with the stereotypes typically attributed to their assigned sex. *See, e.g., Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267, 297 (W.D. Pa. 2017) (finding transgender students "demonstrated a reasonable likelihood of showing that Title IX's prohibition of sex discrimination includes discrimination as to transgender individuals based on their transgender status and gender identity"); *Handling v. Minersville Area Sch. Dist.*, No. 17-0391, 2017 WL 5632662 (M.D. Pa. Nov. 22, 2017) (denying school district's motion to dismiss transgender girl's claim that school policy prohibiting her from using the girls' bathroom violated her rights under Title IX); *cf. Students & Parents For Privacy v. U.S. Dep't of Ed.*, No. 16-4945, 2017 WL 6629520, at *1 (N.D. Ill. Dec. 29, 2017) (holding *Whitaker* "controls and confirms" that magistrate judge correctly recommended denial of non-transgender students' motion for preliminary injunction that would require school district to segregate bathrooms and locker rooms on the basis of students' assigned sex at birth).

As in *Whitaker*, the court in *Evancho* similarly observed that "[c]ourts have long interpreted 'sex' for Title VII purposes to go beyond assigned sex as defined by the respective presence of male or female genitalia," and have included discrimination based on transgender status, gender nonconformity, and sexual orientation. 237 F. Supp. 3d 267, 296–97 (W.D. Pa. 2017) (citing *Prowel*, 579 F.3d 285, *EEOC*, 217 F. Supp. 3d 834, and *Mitchell v. Axcan Scandipharm, Inc.*, No. 05-0243, 2006 WL 456173 (W.D. Pa. Feb. 17, 2006)). In light of strong precedent expansively defining the term "sex," the court rejected the school district's argument—which Respondents repeat here—that the term "sex" does not go beyond a binary definition of male and female. *Evancho*, 237 F.Supp.3d at 296–97.

Respondents ask this court to look to *Johnston v. University of Pittsburgh of Commonwealth System of Higher Education*, 97 F. Supp. 3d 657 (W.D. Pa. 2015). However, in *Johnston*, the court applied a narrow reading of the term "sex" in finding a transgender student, denied use of school facilities designated for men, had no claim for sex stereotyping discrimination. The court narrowly limited sex stereotyping claims to include only adverse actions taken against an employee for non-conformity with the mannerism or dress associated with their assigned sex. In part, the court's reasoning in *Johnston* is based on dicta in *Ulane* that the Seventh Circuit has since repudiated. *Compare Whitaker*, 858 F.3d at 1048 (declining to apply *Ulane*); *with Johnston*, 97 F. Supp. 3d at 671 ("it is unlawful to discriminate against women because they are women and against men because they are men") (citing *Ulane*, 742 F.2d at 1085).

Furthermore, the court's decision in *Johnston* is an outlier among federal courts. Following the reasoning in *Price Waterhouse*, the Seventh Circuit arrived at the opposite conclusion reached in *Johnston*. *See Whitaker*, 858 F.3d at 1048 (transgender student could succeed on his Title IX claim under a theory of sex stereotyping for discrimination based on his transgender status). The Seventh Circuit correctly observed that: "By definition, a transgender individual does not conform to the sex-based stereotypes of the sex that he or she was assigned at birth." *Id.*

The Seventh Circuit's *Whitaker* decision is consistent with the decisions of other federal courts that have found no basis to carve out of *Price Waterhouse*'s recognition of sex stereotyping the particular manifestation of sex discrimination that transgender individuals face because of their gender non-conformity. *See, e.g., Glenn v. Brumby*, 663 F.3d 1312, 1318 n.5 (11th Cir. 2011) (noting *Price Waterhouse* eviscerated *Ulane*'s reasoning and finding "discrimination against a transgender individual because of her gender-nonconformity is sex discrimination"); *Smith v. City of Salem*, 378 F.3d 566, 573 (6th Cir. 2004) (under Title VII and the Equal Protection Clause, condemning suspension of transgender firefighter "based on [her] failure to conform to sex stereotypes by

expressing less masculine, and more feminine mannerisms and appearance"); *Dodds v. U.S. Dep't of Educ*., 845 F.3d 217 (6th Cir. 2016) (citing *Smith*, 378 F.3d 566, 576); *Barnes v. City of Cincinnati*, 401 F.3d 729, 737 (6th Cir. 2005) (discussing Title VII, condemning demotion of male transgender police officer for not "conform[ing] to sex stereotypes concerning how a man should look and behave); *Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000) (finding discrimination against "anatomical male [] whose outward behavior and inward identity did not meet social definitions of masculinity" is actionable sex discrimination under Gender Motivated Violence Act); *Etsitty v. Utah Transit Auth*., 502 F.3d 1215, 1222 (10th Cir. 2007) (concluding that transgender employee may claim sex discrimination under Title VII for discrimination-based sex stereotypes); *Bd. of Educ. of Highland Local Sch. Dist. v. U.S. Dep't of Educ*., 208 F. Supp. 3d 850 (S.D. Ohio 2016) (upholding a preliminary injunction requiring the school to allow a transgender female to use the girls' bathroom).

Other courts also have declined to follow *Johnston* and correctly have observed that legal precedent on the definition of "sex" has developed considerably since *Johnston. See e.g., Evancho*, 237 F. Supp. 3d at 288 n.33 ("This Court believes as *Johnston* predicted might occur that the decisional law has developed further, and has done so rather swiftly. Further, many of the cases relied on in *Johnston*, as to a degree *Johnston* did itself, came to that conclusion based on the absence of precedent from either the Supreme Court or the relevant regional court of appeals squarely ruling on the question."); *Handling*, 2017 WL 5632662, at *5 n.2 ("Because Defendant did not argue that this Court should apply *Johnston*, the Court need not engage in a detailed analysis of that case except to say that the Court finds the analysis in the more recent decisions of *Evancho* and *Whitaker* persuasive."). *Zarda v. Altitude Express, Inc.*, __ F.3d ___ (2nd Cir. 2018) (concluding that "when, for example, 'an employer … acts on the basis of a belief that [men] cannot be [attracted to men], or that [they] must not be, 'but takes no such action

against women who are attracted to men, the employer "has acted on the basis of gender.")

Respondents' approach runs counter to decades of Supreme Court precedent and its progeny regarding sex stereotyping. Courts have been clear that discrimination "because of sex" includes protections for all who are victims of negative treatment based on sex stereotyping, including transgender students.

B. Sex Discrimination Against Transgender Individuals Is Inherently Sex Discrimination.

Apart from the doctrine of sex stereotyping, Respondents' policy constitutes impermissible sex discrimination on multiple levels. As Judge Gabbert wisely observed in his dissenting opinion below, "Respondents denied RMA access to restrooms and locker rooms because he has female reproductive organs and structures. Thus, *but for* RMA's sexual anatomy, the alleged discrimination would not have occurred." Dissent at 2 (emphasis in original). Accordingly, even under Respondents' view of sex discrimination, Plaintiff has a valid claim.

Moreover, the Supreme Court has long recognized that, in light of anti-discrimination rules like Title VII and Title IX, rules governing the workplace and schools may not be based on reproductive anatomy. In *Johnson Controls*, the Court held that employees' pregnancies or capacity to become pregnant in the future were not permissible bases upon which to exclude them from factory work that might pose a risk to a fetus. *Int'l Union, United Auto., Aerospace & Agric. Implement Workers v. Johnson Controls, Inc.*, 499 U.S. 187, 206 (1991); *see also Kocak v. Cmty. Health Partners of Ohio, Inc.*, 400 F.3d 466, 470 (6th Cir. 2005) (applicant "cannot be refused employment on the basis of her potential pregnancy"). In doing so, the Supreme Court made clear that the social meaning ascribed to reproductive anatomy—in the case of *Johnson Controls*, that people with childbearing capacity are unfit for certain types of traditionally masculine work—is not a valid basis for discrimination. *See also* Reva Siegel, *Reasoning*

from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection, 44 Stan. L. Rev. 261, 281 (1992) ("As history amply demonstrates, claims about women's bodies can in fact express judgments about women's roles."). As the *Johnson* Court noted, the employer in question was wrong to assume that people who *could* become pregnant necessarily *would* become pregnant, treating every person with a womb as first and foremost a future mother rather than a worker: "It is no more appropriate for the courts than it is for individual employers to decide whether a woman's reproductive role is more important to herself and her family than her economic role." *Johnson Controls*, 499 U.S. at 211.

Reproductive organs are not determinative of who a person is. To the contrary, free decisions about how reproductive anatomy and capacity will shape one's life are, in large part, how we create ourselves; they are among "the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992). *See also Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (affirming fundamental importance of "the decision whether to bear or beget a child"). Just like the worker in the Johnson Controls factory, young transgender people must be free to shape their own destinies and decide the meaning of their own bodies unhindered by the pernicious assumption that their reproductive anatomy determines who they may be.

Finally, in *Schroer v. Billington*, a judge in the U.S. District Court for the District of Columbia put forth a persuasive and widely cited analogy in support of his decision that anti-transgender discrimination constituted sex discrimination. He wrote:

> Imagine that an employee is fired because she converts from Christianity to Judaism. Imagine too that her employer testifies that he harbors no bias toward either Christians or Jews but only "converts." That would be a clear case of discrimination "because of religion." No court would take seriously the notion that "converts" are not covered by the statute. Discrimination "because of religion" easily encompasses discrimination because of a *change* of religion.

577 F. Supp. 2d 293, 306 (D.D.C. 2008). By analogy, discrimination "because of . . . sex" encompasses discrimination because of a transition from one sex to another. *Id.*; *see also Fabian v. Hosp. of Cent. Conn.*, 172 F. Supp. 3d 509, 527 (D. Conn. 2016). Respondents' discriminatory policy cannot be saved on the theory that it does not distinguish "on the basis of sex" because it is not specifically directed at disfavoring women (or men) as a group. Surely, discrimination against someone because he is transgender is "related to sex or ha[ving] something to do with sex," *id*. (quoting *Ulane v. E. Airlines, Inc.*, 581 F. Supp. 821, 822 (N.D. Ill. 1983), *rev'd*, 742 F.2d 1081 (7th Cir. 1984)). Not extending the MHRA's protection to a student who has transitioned or is transitioning to another gender would be "blind ... to the statutory language itself." *Schroer*, 577 F. Supp. 2d at 307.[5]

C. Arguments Based on Protective Pretexts Have Historically Been Used To Justify Discrimination And Defend Exclusionary Policies, And Have Been Rejected By Courts.

Against this background, Respondents maintain that their bathroom and locker room policy—a policy that unquestionably interferes with Appellant's ability to obtain the benefits of a public education—was adopted because "The District and Board owe a responsibility to protect the privacy interests of all students and an obligation to address concerns for the safety of all students. Allowing a transitioning female to male student into the boys' restroom and locker room (or the other way around) creates a situation of concern not just for RMA but for all students." Respondents' Br. 26.

This argument should be rejected. Protective pretexts—which, historically, have often been grounded on the very sorts of harmful stereotypes that civil rights laws are designed to overcome—have long been used to justify discriminatory laws. In particular, bathrooms and other sex-segregated environments have been a special focus of policies

[5] In addition, just as discrimination against someone because of a change in how they express their spirituality is religious discrimination, discrimination against someone because of a change in how they express their gender should be considered sex discrimination.

grounded on protective pretexts. Respondents' bathroom policy falls squarely within this dangerous history, and the Supreme Court has repeatedly, and correctly, rejected these pretextual justifications for disfavoring women and other disadvantaged groups.

1. Discriminatory rules ostensibly designed to protect women have long reflected both stereotype and pretext.

Historically, the pretext of protecting women has been offered as an excuse to discriminate against both women and other disfavored groups. In the employment context, states routinely passed laws that barred women from certain professions with the ostensible aim of protecting their health and welfare. And after *Brown v. Board of Education*, 347 U.S. 483 (1954), states frequently justified policies that perpetuated segregation on the ground that such restrictions were necessary to protect women. Bathrooms and similar sex-segregated environments were a particular focus of these discriminatory rules. A review of this history shows some striking parallels to the rationales offered in support of Respondents' policy here.

a. Discriminatory rules with protective pretexts historically have been imposed in a variety of contexts.

The pretext of protecting women historically has been used not only to exclude women from the workplace and educational opportunities, but also to further a segregationist agenda.

In the nineteenth and earlier part of the twentieth centuries, laws that barred women from certain professions were frequently justified by their intent to protect women's health and welfare. In *Muller v. Oregon*, 208 U.S. 412 (1908), for example, the Supreme Court famously held that the State had a valid and over-riding interest in women-protective laws because "continuance for a long time on her feet at work . . . tends to injurious effects upon the body, and, as healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care. . . ." *Id.* at 421. In tune with the times, the Court accepted this rationale, concluding that "some legislation to

protect [women] seems necessary to secure a real equality of right." *Id.* at 422. Laws based on this sort of protective rationale continued to be enacted, and affirmed, over the next fifty years. *See, e.g.*, *Goesaert v. Cleary*, 335 U.S. 464, 466 (1948) (finding law's justification—"that the oversight assured through ownership of a bar by a barmaid's husband or father minimizes hazards that may confront a barmaid without such protecting oversight"—was "entertainable"), *disapproved of by Craig v. Boren*, 429 U.S. 190 (1976).

The impetus to protect women—particularly white women—similarly served as justification for segregationist policies, many of which were rooted in anti-miscegenation sentiment. *See generally* Reginald Oh, *Interracial Marriage in the Shadows of Jim Crow: Racial Segregation as a System of Racial and Gender Subordination*, 39 U.C. Davis L. Rev. 1321, 1348 (2006) ("With regards to white women, racial segregation operated as a paternalistic restriction on their liberties. It sought to 'protect' white women from 'succumbing' to their sexual desires for black men."). For example, schools forced to integrate racially after *Brown* started to consider sex-segregated schooling to avoid interracial interactions between the sexes. *See generally* Serena Mayeri, *The Strange Career of Jane Crow: Sex Segregation and the Transformation of Anti-Discrimination Discourse*, 18 Yale J.L. & Human. 187, 19293 (2006) ("But in the post-Brown era, sex-segregated schooling became salient in a different way: as a palliative for white Southern fears that racially mixed schools would lead down a slippery slope toward interracial marriage and social equality.").

b. Bathrooms, and similarly sex-segregated environments, have been a particular focus of these discriminatory rules.

In both the employment and racial segregation contexts, bathrooms and similar sex-segregated environments played a special role. The first laws separating restrooms according to sex were part of a nationwide practice of protecting women in the workplace, where they were seen as especially vulnerable. And after *Brown*, states tried

to justify the continued segregation of public bathrooms by pointing to supposedly heightened rates of venereal disease among black communities.

As increasing numbers of women entered the workforce, the perceived need for sex-specific restrooms—and the lack of restrooms open to women— posed a real and substantial impediment to women's employment:

> Throughout the late nineteenth and early twentieth centuries, the absence of adequate lavatory facilities appeared as an insurmountable obstacle to gender integration. Institutions including the Yale Medical School, the Princeton graduate program, the Brooklyn and Bronx bar associations, prominent Wall Street law firms, and various all-male clubs were unable to circumvent this obstacle for significant periods. As one law firm partner explained to a female applicant during the 1930's, much as his firm would like to hire her, the logistical difficulties were simply too great; she couldn't use the attorney's bathroom, she couldn't be relegated to the secretaries' bathroom, and the firm couldn't afford to build a new one. Variations of the same theme continue to appear as justifications for all-male associations. As Washington Metropolitan Club officials regretfully reported, "Much as we love the girls, we just don't have the lavatory facilities to take care of them."

Deborah L. Rhode, *The "No-Problem" Problem: Feminist Challenges and Cultural Change*, 100 Yale L.J. 1731, 1782-83 (1991) (footnote omitted).

At this time, states declared it within their traditional powers to regulate health and safety through laws that separated bathrooms by gender, usually adding such restrictions to new or existing protective legislation. *See, e.g.*, Act of May 25, 1887, ch. 462 § 13, 1887 N.Y. Laws 575; 1893 Pa. Laws, no. 244, 276; 1919 N.D. Laws, ch. 174, 317; 1913 S.D. Sess. Laws, ch. 240, 332; 887 Mass. Acts 668 ch. 103 § 2; *see also* Terry S. Kogan, *Sex-Separation in Public Restrooms: Law, Architecture, and Gender*, 14 Mich. J. Gender & L. 1, 15-16 (2007). Scholars have seen these bathroom laws largely as an expression of safety, sanitation, and modesty concerns, perhaps rooted in the idea that women were "especially vulnerable when they ventured into the public realm." *Id*. at 54; *see also* Louise M. Antony, *Back to Androgeny: What Bathrooms Can Teach Us About Equality*, 9 J. Contemp. Legal Issues 1, 4-7 (1998); Richard A. Wasserstrom, *Racism, Sexism, and*

Preferential Treatment: An Approach to the Topics, 24 UCLA L. Rev. 581, 593-94 (1977).

Sex-separation of restrooms also served to further entrench race segregation in these spaces. Even after *Brown*, states continued to point to protective purposes to legitimate the continued segregation of public bathrooms. *See, e.g.*, *Turner v. Randolph*, 195 F. Supp. 677, 679-80 (W.D. Tenn. 1961) ("In an apparent effort to support the ordinance as a reasonable and valid exercise of the police power, the defendants introduced proof at the hearing showing that the incidence of venereal disease is much higher among Negroes in Memphis and Shelby County than among members of the white race."). Desegregated bathrooms were framed as a public health threat, particularly for girls in school. *See, e.g.*, Phoebe Godfrey, *Bayonets, Brainwashing, and Bathrooms: The Discourse of Race, Gender, and Sexuality in the Desegregation of Little Rock's Central High*, 62 Ark. Hist. Q. 42, 64 (2003) ("If the black girls were allowed into white schools, it was believed they would infect white girls [with venereal diseases], making them both ill and sexually corrupt. White daughters in this case needed to be protected from the sexualized presence of the black girls."). The very real impact of such restroom restrictions is dramatized in the recent film *Hidden Figures*. *See* Christina Cauterucci, Hidden Figures *Is a Powerful Statement Against Bathroom Discrimination*, Slate (Jan. 18, 2017), *available at* http://www. slate.com/blogs/xx_factor/2017/ 01/18/hidden_figures_is_a_powerful_statement_against_bathroom_discrimination.html.

This attitude extended to other public facilities as well, and it became particularly difficult to desegregate public spaces where people's bodies were likely to come into direct contact. For example, the City of Jackson, Mississippi, preferred to close its public swimming pools rather than desegregate them. *See Palmer v. Thompson*, 403 U.S. 217, 227 (1971) (finding no discriminatory effect in this action). *But see Lawrence v. Hancock*, 76 F. Supp. 1004, 1005-06 (S.D.W. Va. 1948); *City of St. Petersburg v. Alsup*, 238 F.2d 830, 830 (5th Cir. 1956).

2. The Supreme Court has rejected these pretextual protective rationales for gender discrimination.

The Supreme Court has recognized that the rationale of protecting women does not justify the implementation of discriminatory laws that actually deny women opportunities. In *Frontiero v. Richardson*, the Court addressed these protective pretexts directly: "Traditionally, such discrimination was rationalized by an attitude of 'romantic paternalism' which, in practical effect, put women, not on a pedestal, but in a cage." 411 U.S. 677, 684 (1973) (plurality opinion). The Court in *Frontiero* held that such "gross, stereotyped distinctions between the sexes" are insupportable as a basis for public policy. *Id.* at 685.

The Court has since made clear that exclusionary policies ostensibly designed to protect women or other groups often do not serve that purpose in reality—and instead operate principally to disadvantage the disfavored groups. In *Johnson Controls*, for example, the Court addressed an employer's self-described "fetal-protection policy" that excluded "fertile female employee[s] from certain jobs" because of an expressed "concern for the health of the fetus." 499 U.S. at 190. Noting that the effect of the rule was the blanket exclusion of women from those jobs, the Court found the employer's policy to be both discriminatory against women (*see id.* at 197-200) and inconsistent with Title VII because it was unrelated to "job-related skills and aptitudes." *Id.* at 201; *see also id*. at 205 (Title VII is crafted "to protect female workers from being treated differently from other employees simply because of their capacity to bear children"). Given the manifest purpose of Title VII to achieve equal opportunities for women, the employer's "professed moral and ethical concerns about the welfare of the next generation" did not justify disparate treatment. *Id*. at 206.

Notably, in reaching this conclusion, the Court harked back to its decision in *Mueller*, observing that "[c]oncern for a woman's existing or potential offspring historically has been the excuse for denying women equal employment opportunities."

499 U.S. at 211. But pointing to Title VII and the Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k), the Court held that "[i]t is no more appropriate for the courts than it is for individual employers to decide whether a woman's reproductive role is more important to herself and her family than her economic role." 499 U.S. at 211. *See also Dothard v. Rawlinson*, 433 U.S. 321, 335 (1977) ("In the usual case, the argument that a particular job is too dangerous for women may appropriately be met by the rejoinder that it is the purpose of Title VII to allow the individual woman to make that choice for herself.").

Courts have also rejected laws that use a pretextual interest in women's health and well-being to limit their reproductive choices. *See, e.g.*, *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2316 (2016) (holding that abortion laws justified as protections for women's health and safety violated women's liberty when the burdens they imposed outweighed their benefits); *Planned Parenthood of Wis., Inc. v. Schimel*, 806 F.3d 908, 920 (7th Cir. 2015) (holding that the right to abortion could not be abridged "on the basis of spurious contentions regarding women's health," especially when the health-justified abridgement would actually harm women), *cert. denied*, 136 S. Ct. 2545 (2016).

The governing principle, accordingly, is clear. Under antidiscrimination laws like Title VII and Title IX and the MHRA, a rule that discriminates on the basis of sex may not rest on stereotype and assumption—the sort of rationale often offered in the past to support exclusionary rules that limit opportunity and the use of public facilities. Respondents' discriminatory policy must be measured against this principle.

3. Transgender students are the ones at great risk of sexual harassment and abuse.

Far from posing a threat to anyone else, transgender students—and particularly transgender girls and women—are sexually victimized at disturbingly high rates and need the protections of Title IX. A survey conducted by the National Center for Transgender

Equality found that "[t]he majority of respondents who were out or perceived as transgender while in school (K–12) experienced some form of mistreatment, including being verbally harassed (54%), physically attacked (24%), and sexually assaulted (13%) because they were transgender." National Center for Transgender Equality, The Report of the 2015 U.S. Transgender Survey 2 (Dec. 2016), *available at* https://perma.cc/ M7MQ-ZQ52 ("NCTE Survey"). Transgender girls were twice as likely as transgender boys to be sexually assaulted at school because of their gender identity. *Id.* at 133.

Startlingly, 17% of respondents "experienced such severe mistreatment that they left a school as a result." *Id.* at 2. The statistics are even more disturbing for transgender women: over a fifth left a K-12 school because of harassment. *Id.* at 135. Respondents who did not complete high school were more than twice as likely to have attempted suicide as the overall sample. *Id*. at 113.

The abuse continues after high school. According to a survey created by the American Association of Universities, nearly one in four transgender students experience sexual violence in college–a higher rate of victimization than non-transgender college women. David Cantor et al., Westat, Report on the AAU Campus Climate Survey on Sexual Assault and Sexual Misconduct 10 (Sept. 21, 2015), *available at* https:// perma.cc/ZY4T-F5LE.

Certainly, then, non-transgender girls and boys are not the only students who need the MHRA's and Title IX's protections against sexual harassment. Transgender students, and particularly transgender girls, must also be able to enjoy their civil rights to learn and thrive free from violence.

For the reasons explained by Appellant, Respondents' bathroom and locker room policy does not hold up to factual scrutiny. Respondents provide no evidence for their claim that transgender students in general pose a threat to their non-transgender classmates. Nor do they demonstrate that RMA is a danger to his peers. Instead, it is RMA who has experienced harm to his physical and mental health due to his exclusion

from the male-designated restroom and locker rooms. Plaintiff's Complaint, Ln. 51. Transgender students across the country are subject to harassment and violence while administrators claim they are the threats. NCTE Survey at 130-37. Respondents' claim that discriminating against transgender students is necessary to protect non-transgender students is mere pretext to justify prejudice. The Court should reject Respondents' arguments.

IV. CONCLUSION

The Court should reverse the granting of the Motion to Dismiss and remand.

Respectfully submitted this 27th day of February, 2018.

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies, pursuant to Missouri Supreme Court Rule 84.06(c), that this brief complies with Rule 55.03 and the length limitations contained in Rule 94.06(b) in that there are approximately 7,438 words in this brief (except for the cover, signature block, certificate of compliance, and certificate of service) according to the word count of Microsoft Word used to prepare this brief.

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The undersigned hereby certifies that on February 27, 2018, a true and correct copy of this brief and the attached appendix was served via the Missouri Courts E-Filing System upon the following counsel:

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