

IN THE
SUPREME COURT OF MISSOURI

SC96683

R.M.A., 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, Missouri
The Honorable Marco A. Roldan
Case No. 1516-CV20874

Brief of American Civil Liberties Union, ACLU of Missouri,
and Transgender Law Center as *Amici Curiae*
in Support of Appellant Filed with Consent

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Jurisdictional Statement

Amici adopt the jurisdictional statement as set forth in Appellant's brief.

Interest of *Amici Curiae* and Authority to File

The **American Civil Liberties Union** (“ACLU”) is a nationwide, nonprofit, nonpartisan organization with over 1.6 million members dedicated to defending the principles embodied in the Constitution and our nation’s civil rights laws. The **ACLU of Missouri** is one of the ACLU’s statewide affiliates with over 19,000 members. The ACLU and the ACLU of Missouri have long fought to ensure that lesbian, gay, bisexual, and transgender people are treated equally and fairly under law.

Transgender Law Center (“TLC”) is the largest national trans-led organization advocating self-determination for all people. Grounded in legal expertise and committed to racial justice, TLC employs a variety of community-driven strategies to keep transgender and gender nonconforming (“TGNC”) people alive, thriving, and fighting for liberation. TLC believes that TGNC people hold the resilience, brilliance, and power to transform society at its root, and that the people most impacted by the systems TLC fights must lead this work. TLC builds power within TGNC communities, particularly communities of color and those most marginalized, and lays the groundwork for a society in which all people can live safely, freely, and authentically regardless of gender identity or expression. TLC works to achieve this goal through leadership development and by connecting TGNC people to legal resources. It also pursues impact litigation and policy advocacy to defend and advance the rights of TGNC people, transform the legal system, minimize immediate threats and harms, and educate the public about issues impacting our communities.

Amici strive to strengthen and protect the rights of transgender and gender nonconforming students to be treated equally, to be free from discrimination and bullying, and to have equal opportunities to learn, participate, and contribute in school.

This *amici* brief is filed with consent of the parties.

Statement of Facts

Appellant R.M.A. is a student at Blue Springs R-VI School District (the “District”), where he has attended school since at least fourth grade. L.F. 11, 14. He is transgender, meaning that he was assigned the sex female at birth, but his gender identity is male. L.F. 11. R.M.A. began living as a boy in all aspects of his life in 2009. L.F. 11-12. He completed a legal name change to a name traditionally associated with boys in 2010, and he changed the sex designation on his birth certificate to male in 2014. L.F. 11. R.M.A. has participated in student athletics (football and track) on the boys’ teams. L.F. 13.

R.M.A. seeks to use the restrooms and locker rooms that other boys at his school use. L.F. 12-13. However, the District has consistently refused to treat him like other boys, instead requiring him to use a place separate from all other students to change for gym and use the restroom. L.F. 13-14. This exclusion has led R.M.A. to feel embarrassed, singled out, and inferior because he is transgender. L.F. 14. As a result, R.M.A. stopped participating in student athletics, and he participated in physical education via home schooling rather than at school with his peers. L.F. 13.

Argument

Excluding R.M.A. from common restrooms and locker rooms that match his gender identity is a damaging form of sex discrimination. It marks him as unfit to use the same facilities as other boys. The powerful stigma that comes from that exclusion, as well as the psychological and physical harms that stem from effectively being denied use of the restroom during the day, cause serious harms of the kind the MHRA was intended to prevent.

The MHRA's prohibition against discrimination because of sex encompasses the full range of sex discrimination, including discrimination based on a person's transgender status, gender nonconformity, or gender transition. Indeed, federal courts recognize that discrimination because a person is transgender is sex discrimination under federal statutes and the U.S. Constitution. This Court should reach the same result under the MHRA.

This Court should not artificially limit the scope of the MHRA's prohibition against discrimination because of sex based on unfounded fears and concerns about people who are transgender. The collective experience of school administrators in schools that do allow boys and girls who are transgender to use the same common restrooms and locker rooms as their peers teaches that, far from causing problems, inclusive policies foster a safe, welcoming, and optimal learning environment for all students.

I. Discrimination against students who are transgender causes serious harm of the type the MHRA was meant to prevent.

Transgender students who are not supported at school face staggering levels of harassment, violence, and discrimination.¹ Three-quarters of students who are transgender feel unsafe at school and report distressing rates of verbal harassment (51%), physical harassment (20%), and physical assault (9.6%).² As a result, students who are transgender are more likely to miss school and twice as likely to drop out of school as their peers, and also have lower levels of academic achievement.³ The hostile environment that many students who are transgender face at school also has a long-lasting effect on their lives: transgender students who experience victimization in school

¹ See Jenifer McGuire et al., *School Climate for Transgender Youth: A Mixed Method Investigation of Student Experiences and School Responses*, 39 J. YOUTH & ADOLESCENCE 1175 (2010); Russell B. Toomey et al., *Gender-Nonconforming Lesbian, Gay, Bisexual, and Transgender Youth: School Victimization and Young Adult Psychosocial Adjustment*, 46 DEV. PSYCHOL. 1580 (2013).

² See Gay, Lesbian & Straight Educ. Network, *2015 National School Climate Survey* 85, <https://www.glsen.org/article/2015-national-school-climate-survey> (“GLSEN School Climate Survey”).

³ *Id.* at 44.

are half as likely to plan to pursue post-secondary education and twice as likely to experience decreased life satisfaction and diminished mental health outcomes.⁴

Nearly 60% of students who are transgender attend schools that bar them from using the shared restrooms or locker rooms that match their gender identity.⁵ Excluding students who are transgender from facilities used by their peers singles them out for differential treatment and sends a message to the entire school community that they are different and must be segregated from other students. Transgender youth often internalize such messages—that their gender is a shameful aspect of their identity—and the mental health consequences of exclusion are grim: adolescents who are transgender experience depression, anxiety, self-harm, and suicidality at two to three times the rates of non-transgender adolescents.⁶ Research further demonstrates that more than 50% of

⁴ *Id.* at 41-49; *see also* Toomey, *supra* n.1.

⁵ *See* GLSEN School Climate Survey 38.

⁶ Ethan H. Mereish & V. Paul Poteat, *A Relational Model of Sexual Minority Mental and Physical Health: The Negative Effects of Shame on Relationships, Loneliness, and Health*, 62 J. COUNSELING PSYCHOL. 425 (2015); *see also* Sari L. Reisner et al., *Mental Health of Transgender Youth in Care at an Adolescent Urban Community Health Center: A Matched Retrospective Cohort Study*, 56 J. ADOLESCENT HEALTH 274 (2015).

youth who are transgender report attempting suicide at least once in their lifetimes.⁷

Missouri is no exception to these national trends. In recent years, Missouri has seen a brutal murder of a young transgender woman, a suicide of another young transgender woman, a police killing of a Black transgender woman, and numerous incidents of discrimination and harassment against transgender people.⁸ A 2009

⁷ Brian Mustanski & Richard T. Liu, *A Longitudinal Study of Predictors of Suicide Attempts Among Lesbian, Gay, Bisexual and Transgender Youth*, 42 ARCHIVES OF SEXUAL BEHAV. 437 (2013).

⁸ Dakin Andone & Deanna Hackney, *Prosecutor: No hate crime charges in murder of mutilated transgender teen*, CNN (Oct. 1, 2017), <https://www.cnn.com/2017/09/30/us/transgender-teen-murdered-not-hate-crime-trnd/index.html> (reporting prosecution of men for brutal killing of Ally Lee Steinfeld, a 17-year-old girl who was transgender); *Police Didn't Disclose Missouri Inmate's 2017 Suicide*, USNews (Feb. 15, 2018), <https://www.usnews.com/news/best-states/missouri/articles/2018-02-15/police-didnt-disclose-missouri-inmates-2017-suicide> (reporting that Amalia LeAnn Smith, a 24-year-old woman who was transgender, completed suicide while in a Missouri jail); David Lohr, *Transgender Woman Killed by Police Was 'Harassed and Executed,' Relative Says*, Huffington Post (Sept. 7, 2017), https://www.huffingtonpost.com/entry/transgender-woman-police-killing-stlouis_us_599df3f7e4b05710aa599d34 (reporting fatal police shooting of Kiwi Herring, a Black woman who was transgender); Transgender Law Center, *Victory for 9-Year-Old Transgender Student!* (May 20, 2013),

University of Missouri Campus Climate survey found that 57% of transgender respondents reported experiences of harassment on campus.⁹

Respondents from Missouri in a large survey of transgender people reported that 74% of those perceived as transgender in grades K-12 experienced some form of mistreatment, and 11% had experienced such severe mistreatment that they left a K-12 school.¹⁰ Fifty-eight percent of transgender respondents from Missouri had avoided

<https://transgenderlawcenter.org/archives/7834> (describing Trace, a transgender child who was suspended from school for three weeks and then placed in special education for telling his classmates that he was a boy); Christy Mallory et al., *Employment, Housing, and Public Accommodations Discrimination Based on Sexual Orientation and Gender Identity in Missouri*, WILLIAMS INST. 3-4, <https://williamsinstitute.law.ucla.edu/wp-content/uploads/MissouriNDRReport-Nov-2013.pdf> (summarizing employment discrimination in Missouri, including a woman fired from a Dollar Tree for being transgender, a woman fired from a job as a trucker for being transgender, a woman forced to shower in the men's locker rooms at work because she is transgender, and a man who is transgender relocating out of Missouri because of the prevalence of gender identity discrimination in jobs).

⁹ See Mallory, *supra* n.8, at 1.

¹⁰ National Center for Transgender Equality, *2015 U.S. Transgender Survey: Missouri State Report 1* (2017) [http://www .transequality.org/sites/default/files/docs/usts/USTSMOStateReport%281017%29.pdf](http://www.transequality.org/sites/default/files/docs/usts/USTSMOStateReport%281017%29.pdf).

using a public restroom in the past year because they were afraid, and 30% had limited the amount they ate or drank to avoid using a restroom.¹¹ Forty-five percent of transgender respondents from Missouri had experienced serious psychological distress in the month prior to the survey, compared to only 5% of the general population.¹²

Most significantly, research reveals that transgender people's poorer mental health outcomes are rooted in their experiences of extensive victimization and discrimination, rather than in their status as transgender.¹³ In one recent study, transgender people who experienced gender-based hostility in high school were approximately four times more likely to have attempted suicide than those who did not experience victimization.¹⁴ Similarly, the educational outcomes of LGBTQ youth mirror those of their non-LGBTQ classmates, when victimization is accounted for.¹⁵ Accordingly, if discrimination and victimization against transgender youth were eliminated, mental health and educational

¹¹ *Id.* at 2.

¹² *Id.* at 3.

¹³ Peter Goldblum et al., *The Relationship Between Gender-Based Victimization and Suicide Attempts in Transgender People*, 43 PROF. PSYCHOL. 468 (2012).

¹⁴ *Id.*

¹⁵ Shannon D. Snapp et al., *Messy, Butch, and Queer: LGBTQ Youth and the School-to-Prison Pipeline*, 30 J. ADOLESCENT RES. 57 (2015); *see also* Stephen T. Russell et al., *Are School Policies Focused on Sexual Orientation and Gender Identity Associated with Less Bullying? Teachers' Perspectives*, 54 J. SCH. PSYCHOL. 29 (2016).

outcomes for transgender youth would resemble those of other youth. The cost of discrimination, both to individual young people and their families and to the larger society, is extremely high.

When schools prevent students who are transgender from using the same facilities as their peers, those students often have no safe and meaningful access to the restrooms during the school day. When forced to use restrooms that conflict with their identity, students who are transgender experience anguish, which puts them at risk of serious harms including severe depression and suicide attempts.¹⁶ Being forced to use restrooms that conflict with their visible, lived identity also puts these students at increased risk for harassment and violence by their peers, similar to what any other student who tried to use facilities not matching their gender would experience.¹⁷ Forcing students who are transgender to use single-user or “gender-neutral” restrooms creates a similarly high risk of harassment and stigma. Such isolating practices segregate transgender youth from peers in a highly visible way, often subjecting them to invasive questioning from peers and staff about why they are using a different restroom and effectively “outing” them as transgender. In addition, schools generally have a small number of gender-neutral

¹⁶ Kristie L. Seelman, *Transgender Adults’ Access to College Bathrooms and Housing and the Relationship to Suicidality*, 63 J. HOMOSEXUALITY 1378 (2016).

¹⁷ Jody L. Herman, *Gendered Restrooms and Minority Stress: The Public Regulation of Gender and its Impact on Transgender People’s Lives*, 19 J. PUB. MGMT. & SOC. POL’Y 65, 72 (2013).

restrooms, if any, and they are often located far from classrooms (i.e., in the nurse’s office) or are otherwise difficult to access (i.e., locked to prevent student use), causing students using those facilities to be repeatedly late for class. Consequently, to avoid being stigmatized, outed, or tardy, transgender students often refrain from using the facilities at all. This can lead to significant health consequences. A recent study showed that 54% of transgender people reported a medical issue from refraining from restroom use, including dehydration, urinary tract infections, and kidney infections.¹⁸

Physical exclusion carries a powerful stigma that marks students who are transgender as unfit to use the same facilities as others. “[I]t is humiliating to be segregated from the general population.” *See G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 853 F.3d 729, 729 (4th Cir. 2017) (Davis, J., concurring). Our laws have long recognized the “daily affront and humiliation involved in discriminatory denials of access to facilities ostensibly open to the general public.” *Daniel v. Paul*, 395 U.S. 298, 307-08 (1969); *cf. Roberts v. U.S. Jaycees*, 468 U.S. 609, 625 (1984). “[D]iscrimination itself, . . . by stigmatizing members of the disfavored group[,] . . . can cause serious non-economic injuries to those persons who are denied equal treatment solely because of their membership in a disfavored group.” *Heckler v. Mathews*, 465 U.S. 728, 729 (1984); *cf. J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 142 (1994) (explaining that when a juror is excluded based on gender “[t]he message it sends to all those in the courtroom, and all

¹⁸ *Id.* at 75.

those who may later learn of the discriminatory act, is that certain individuals, for no reason other than gender, are presumed unqualified”).

Courts have also acknowledged the psychological and physical harms these forms of discrimination cause. *See Whitaker ex rel. Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1041 (7th Cir. 2017) (describing harm to boy who is transgender from not being permitted to use boys’ rooms, including fainting due to dehydration, stress-related migraines, and suicidal thinking); *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 728 (4th Cir. 2016) (describing evidence of daily psychological harm and repeated urinary tract infections resulting from school not permitting access to boys’ restrooms for boy who is transgender), *vacated and remanded on other grounds*, 137 S. Ct. 1239 (2017); *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267, 294 (W.D. Pa. 2017) (finding irreparable harm where girls who are transgender were marginalized through being prohibited from using girls’ rooms, “causing them genuine distress, anxiety, discomfort and humiliation”); *Bd. of Educ. of Highland Local Sch. Dist. v. U.S. Dep’t of Educ.*, 208 F. Supp. 3d 850, 878 (S.D. Ohio 2016) (finding irreparable harm where girl who is transgender was not permitted to use a girl’s room, singling her out and exacerbating her mental health conditions). In this case, R.M.A. stopped participating in track and football, did home school for physical education, and felt humiliated and singled out from his peers.

II. The allegations of the petition state a claim of sex discrimination.

The MHRA is a remedial statute that should be interpreted liberally to address the full range of sex discrimination, including discrimination on the basis of a person’s

gender identity or failure to comport with sex stereotypes. That interpretation also aligns the MHRA with the federal courts' interpretation of federal anti-discrimination laws, to which Missouri courts have regularly looked in interpreting the MHRA. Indeed, federal courts recognize that discrimination against people because they are transgender is discrimination because of sex under federal statutes as well as the U.S. Constitution.

A. The MHRA should be interpreted liberally to address all forms of sex discrimination.

When interpreting a remedial statute such as the MHRA, Missouri courts follow the precept that “remedial statutes 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.” *Mo. Comm’n on Human Rights v. Red Dragon Rest., Inc.*, 991 S.W.2d 161, 166-67 (Mo. App. W.D. 1999) (internal quotation marks omitted). Accordingly, Missouri courts have routinely construed the MHRA liberally “in order to accomplish the greatest public good.” *Id.* at 167 (quoting *Hagan v. Dir. of Revenue*, 968 S.W.2d 704, 706 (Mo. banc 1998)).

For example, in *Red Dragon*, the Court of Appeals read the MHRA to prohibit associational discrimination, even before the statute was amended to prohibit it explicitly. *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 of Appeals concluded that the MHRA’s definition of public accommodation must be interpreted broadly to include schools, even though the text of the statute was susceptible to a narrower interpretation. As a subsequent panel of that court noted, adopting a narrow interpretation of the definition of

a “public accommodation” would “circumvent[] the legislature’s purpose.” *State ex rel. Wash. Univ. v. Richardson*, 396 S.W.3d 387, 396 (Mo. App. W.D. 2013).

Consistent with this general approach, in the sex discrimination context, Missouri courts have applied the MHRA’s prohibition against discrimination “because of sex” to a broad range of gender-based discrimination. *See, e.g., Gilliland v. Mo. Athletic Club*, 273 S.W.3d 516, 521 n.8 (Mo. banc 2009) (same-sex harassment is sex discrimination); *Midstate Oil Co. v. Mo. Comm’n on Human Rights*, 679 S.W.2d 842, 846 (Mo. banc 1984) (pregnancy discrimination is sex discrimination).

That the Missouri legislature has declined to amend the MHRA to explicitly prohibit discrimination because of gender identity does not mean the legislature intended to allow discrimination against students because they are transgender. As an initial matter, the Supreme Court has repeatedly cautioned that acts of subsequent legislatures “deserve little weight in the interpretive process.” *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187 (1994).

Moreover, legislative failure to act could just as easily establish the opposite conclusion from the one the Circuit Court drew: that amendment of the statute was unnecessary because gender identity discrimination already is covered by the prohibition against discrimination because of sex. *Cf. Fabian v. Hosp. of Cent. Conn.*, 172 F. Supp. 3d 509, 527 n.12 (D. Conn. 2016). That is precisely the conclusion the Court of Appeals drew in *Red Dragon*, 991 S.W.2d at 161, which addressed whether the amendment of the MHRA to bar associational discrimination explicitly meant that the MHRA should be interpreted to exclude those claims prior to the amendment. In rejecting the employer’s

efforts to construe the statute narrowly, the Court of Appeals noted that “the purpose of a change in the statute can be clarification,” not only to change existing law. *Id.* at 167 (internal quotation marks omitted).

At a bare minimum, subsequent legislative action (or inaction) has no bearing on what the legislature intended (or did not intend) when it enacted the MHRA’s sex provision. Nor can legislative intent—whatever it may have been—alter the meaning of the words the legislature actually used. *Missourians for Honest Elections v. Mo. Elections Comm’n*, 536 S.W.2d 766, 775 (Mo. App. 1976) (en banc). Two decades ago, the Supreme Court squarely rejected the notion that legislative intent could limit the forms of sex discrimination prohibited by Title VII and made clear that the full scope of Title VII’s protections cannot be determined solely by reference to the kinds of discrimination that were evident to legislators in 1964. *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 79-80 (1998). As Justice Scalia observed, the mere fact that a particular strain of bias was “not the principal evil Congress was concerned with when it enacted Title VII” does not end the analysis: “[S]tatutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.” *Id.* at 79 (finding same-sex sexual harassment to be actionable sex discrimination under Title VII); *see also Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 679-81 (1983) (rejecting the argument that some of Title VII’s protections apply only to women and not to men, despite the fact that the prohibition against sex discrimination was enacted to combat discrimination against women). Just as

there is no exception to Title VII for same-sex sexual harassment, *see Oncale*, 523 U.S. at 79, there is no exception from Title VII (or the MHRA) for transgender people either.

The conclusion that schools are free to discriminate against students because they are transgender without violating the MHRA's prohibition against sex discrimination is inconsistent with the principle that Missouri courts should construe the MHRA broadly to carry out the legislature's goal of eradicating sex discrimination in all its forms.

B. This Court should look to federal case law construing prohibitions against discrimination “because of sex” when interpreting the parallel provision of the MHRA barring sex discrimination.

Missouri courts often rely on federal decisions interpreting anti-discrimination laws. That is because the MHRA “is modeled after federal anti-discrimination laws,” and federal decisions may 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); *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.”). Accordingly, where the language of the MHRA is similar to its federal counterpart, Missouri courts have often adopted federal courts’ reasoning and conclusions. *See, e.g., 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 regarding Title VII in construing the “after-acquired evidence” defense to an MHRA claim).

The MHRA sex discrimination provisions applicable to schools and employment are analogous to federal non-discrimination laws; both clearly and unambiguously prohibit discrimination in such contexts because of sex. *Compare* Mo. Rev. Stat. § 213.055.1(1)(a) (“unlawful employment practice . . . [f]or an employer . . . to discriminate against any individual . . . because of such individual’s . . . sex”), *and id.* § 213.065(2) (“withhold from or deny any other person, any of the accommodations, advantages, facilities, services, or privileges made available in any place of public accommodation, . . . or to segregate or discriminate against any such person in the use thereof on the grounds of . . . sex”), *with* 42 U.S.C. § 2000e-2(a)(1) (“unlawful employment practice for an employer . . . to discriminate against any individual . . . because of such individual’s . . . sex”), *and* 20 U.S.C. § 1681(a) (“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance”).

This Court should follow well-reasoned federal authority in finding that discrimination against students because they are transgender is sex discrimination under the MHRA to achieve the legislature’s goal of eradicating discrimination on the basis of sex.

C. Federal courts recognize that discrimination because a person is transgender is sex discrimination prohibited by Title IX and Title VII.

By targeting R.M.A. for different treatment because he is transgender, the District's policy impermissibly discriminates on the basis of sex. The First, Sixth, Seventh, Ninth, and Eleventh Circuits have recognized that discrimination against a transgender individual is discrimination because of sex under federal civil rights statutes. *See Whitaker*, 858 F.3d at 1051; *Dodds v. U.S. Dep't of Educ.*, 845 F.3d 217, 221 (6th Cir. 2016); *Glenn v. Brumby*, 663 F.3d 1312, 1316-19 (11th Cir. 2011); *Rosa v. Park W. Bank & Trust Co.*, 214 F.3d 213, 215-16 (1st Cir. 2000); *Schwenk v. Hartford*, 204 F.3d 1187, 1201-03 (9th Cir. 2000).

A person's transgender status is an inherently sex-based characteristic. R.M.A. was treated differently because he is a boy who was designated as female at birth. The incongruence between his gender identity and the sex assigned to him at birth is what makes him transgender. Treating a person differently because of the relationship between those two sex-based characteristics is literally discrimination on the basis of "sex." *See Fabian*, 172 F. Supp. 3d at 527.

Discrimination against people because they have undergone a gender transition is also inherently based on sex. By analogy, religious discrimination includes not just discrimination against Jews and Christians, but also discrimination against people who convert from Judaism to Christianity. *Cf. Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 144 (1987) (refusing to "single out the religious convert for different, less favorable treatment"). Similarly, sex discrimination includes not just discrimination

against boys, but also discrimination against boys who have undergone a gender transition from the sex assigned to them at birth. *See Schroer v. Billington*, 577 F. Supp. 2d 293, 306-07 (D.D.C. 2008) (making same analogy); *Glenn*, 663 F.3d at 1314 (firing employee because of her “intended gender transition” is sex discrimination); *Dawson v. H&H Elec., Inc.*, No. 4:14-CV-00583-SWW, 2015 WL 5437101, at *3 (E.D. Ark. Sept. 15, 2015) (same).

In addition, discrimination against people because they are transgender is sex discrimination because it inherently rests on sex stereotypes and gender-based assumptions. As the Supreme Court recognized in *Price Waterhouse v. Hopkins*, “assuming or insisting that [individual men and women] match[] the stereotype associated with their group” is discrimination because of sex. 490 U.S. 228, 251 (1989) (plurality).¹⁹ By definition, transgender people depart from stereotypes and overbroad generalizations about men and women. Indeed “a person is defined as transgender precisely because” that person “transgresses gender stereotypes.” *Glenn*, 663 F.3d at 1316; *accord Whitaker*, 858 F.3d at 1048; *Dodds*, 845 F.3d at 221. “[A]ny discrimination against transsexuals (as transsexuals)—individuals who, by definition, do not conform to gender stereotypes—is [thus] discrimination on the basis of sex as

¹⁹ All members of the Court agreed that discrimination on that basis would violate Title VII, although they divided over which party should bear the burden of proving causation. *See id.* at 259 (White, J., concurring); *id.* at 273 (O’Connor, J., concurring); *id.* at 295 (Kennedy, J., dissenting).

interpreted by *Price Waterhouse*.” *Finkle v. Howard Cty.*, 12 F. Supp. 3d 780, 788 (D. Md. 2014); *Doe 1 v. Trump*, 275 F. Supp. 3d 167, 210 (D.D.C. 2017) (“The defining characteristic of a transgender individual is that their inward identity, behavior, and possibly their physical characteristics, do not conform to stereotypes of how an individual of their assigned sex should feel, act and look.”), *stay denied*, No. 17-5267, 2017 WL 6553389 (D.C. Cir. Dec. 22, 2017). R.M.A. does “not conform to some people’s idea about who is a boy” because, unlike other boys, R.M.A. had a different sex assigned to him at birth. *G.G.*, 853 F.3d at 729 (Davis, J., concurring). Discriminating against him for upsetting those gender-based expectations is discrimination on the basis of sex.²⁰

²⁰ Before the Court of Appeals, the District centered its argument that this case does not involve sex discrimination on *Johnston v. University of Pittsburgh*, 97 F. Supp. 3d 657 (W.D. Pa. 2015). However, *Johnston* is an outlier and should not be considered persuasive; it relied on the discredited reasoning in *Sommers v. Budget Marketing, Inc.*, 667 F.2d 748 (8th Cir. 1982), and *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984), *see Johnston*, 97 F. Supp. 3d at 675-78, as well as *Etsitty v. Utah Transit Authority*, 502 F.3d 1215, 1222 (10th Cir. 2007), *see Johnston*, 97 F. Supp. at 668, all of which are inconsistent with both the logic and result in *Price Waterhouse*. *See, e.g., Schwenk*, 204 F.3d at 1201 (the “narrow[]” construction and “judicial approach” in *Ulane* “ha[ve] been overruled by the logic and language of *Price Waterhouse*.”); *Fabian*, 172 F. Supp. 3d at 526 (“*Price Waterhouse* abrogates” *Sommers* and *Ulane*); *Finkle*, 12 F. Supp.

Regardless of whether the discrimination is conceived of as discrimination based on sexual characteristics, discrimination based on change of sex, or discrimination based on gender nonconformity, it is impossible to discriminate against a person for being transgender without taking the impermissible “criterion” of “sex” into account. *Price Waterhouse*, 490 U.S. at 248 (plurality); *id.* at 262 (O’Connor, J., concurring); *id.* at 282 (Kennedy, J., dissenting).

Moreover, excluding R.M.A. from using the same restrooms and locker rooms as other boys because he is transgender subjected him to discrimination. *See Whitaker*, 858 F.3d at 1049-50; *Dodds*, 845 F.3d at 221; *Highland*, 208 F. Supp. 3d at 865; *cf. Mickens v. Gen. Elec. Co.*, No. 3:16-CV-00603-JHM, 2016 WL 7015665, at *3 (W.D. Ky. Nov. 29, 2016) (Title VII); *Roberts v. Clark Cty. Sch. Dist.*, 215 F. Supp. 3d 1001, 1004-05 (D. Nev. 2016) (same). As the Seventh Circuit explained: “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.” *Whitaker*, 858 F.3d at 1049. Indeed, “the most obvious example” of a Title IX violation is “the overt, physical deprivation of access to school resources.” *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 650 (1999); *cf. Snyder ex rel. R.P. v. Frankfort-Elberta Area Sch. Dist.*, No. 1:05-CV-824, 2006 WL 3613673, at *1-2 (W.D. Mich. Dec. 3d at 788; *Radtke v. Misc. Drivers & Helpers Union*, 867 F. Supp. 2d 1023, 1032 (D. Minn. 2012) (rejecting “reliance on decades-old Title VII cases” including *Sommers* and *Ulane*).

11, 2006) (requiring Black elementary school student to use separate restroom in response to harassment from others deprived her of “equal access to restroom facilities”). At school, at work, or in society at large, limiting a person’s ability to use the restroom limits their ability to participate as a full and equal member of the community. *G.G.*, 853 F.3d at 729 (Davis, J., concurring). Here, as elsewhere, “discriminatory treatment exerts a pervasive influence on the entire educational process.” *Norwood v. Harrison*, 413 U.S. 455, 469 (1973).

D. Federal courts recognize that discrimination against students because they are transgender is sex discrimination prohibited by the Equal Protection Clause.

For the same reasons that the District’s policy subjects R.M.A. to discrimination under Title IX and the MHRA, it also subjects him to discrimination under the Equal Protection Clause and triggers heightened scrutiny. *Whitaker*, 858 F.3d at 1051; *A.H. ex rel. Handling v. Minersville Area Sch. Dist.*, No. 3:17-CV-391, 2017 WL 5632662, at *7 (M.D. Pa. Nov. 22, 2017); *Evancho*, 237 F. Supp. 3d at 288; *Highland*, 208 F. Supp. 3d at 873-74.

In addition to constituting discrimination on the basis of sex, courts have recognized that discrimination based on transgender status is a quasi-suspect classification in its own right because “transgender people as a class have historically been subject to discrimination or differentiation”; “they have a defining characteristic that frequently bears no relation to an ability to perform or contribute to society”; “as a class they exhibit immutable or distinguishing characteristics that define them as a discrete

group”; and “as a class, they are a minority with relatively little political power.” *Evancho*, 237 F. Supp. 3d at 288; *accord Doe 1*, 275 F. Supp. 3d at 208-09; *Highland*, 208 F. Supp. 3d at 873-74; *Adkins v. City of New York*, 143 F. Supp. 3d 134, 139 (S.D.N.Y. 2015); *see also G.G.*, 853 F.3d at 730 (Davis, J., concurring) (recognizing that transgender individuals are “a vulnerable group that has traditionally been unrecognized, unrepresented, and unprotected”).

Under heightened scrutiny, the District must show “at least that the challenged classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.” *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1690 (2017) (brackets omitted). Moreover, the policy must “substantially serve an important governmental interest *today*, for ‘in interpreting the equal protection guarantee, [the Supreme Court has] recognized that new insights and societal understandings can reveal unjustified inequality that once passed unnoticed and unchallenged.’” *Id.* (quoting *Obergefell v. Hodges*, 135 S. Ct. 2584, 2603 (2015)). The Court must, therefore, determine whether the District’s policy substantially serves its asserted interests in light of current insights and understandings regarding transgender students.

Prohibiting R.M.A. from using facilities used by other boys simply because he is transgender is not substantially related to protecting student privacy. In its briefing before the Court of Appeals, the District suggested that it “owe[s] a responsibility to protect the privacy interests of all students and an obligation to address concerns for the safety of all students.” 2017 WL 529725, at * 26. That may be, but thousands of school

districts have found that privacy or safety concerns were unwarranted, or found ways to accommodate them. *See infra* § III. No court in this country has held that the mere presence of a student who is transgender in a common restroom or locker room violates anyone’s right to privacy, much less their safety.

In fact, many courts have recognized that the presence of students who are transgender in common restrooms or locker rooms does not infringe other students’ right to privacy. *See Whitaker*, 858 F.3d at 1052; *Doe v. Boyertown Area Sch. Dist.*, 276 F. Supp. 3d 324, 387 (E.D. Pa. 2017) (“[H]igh school students . . . have no constitutional right not to share restrooms and locker rooms with transgender students whose sex assigned at birth is different from theirs”), *appeal docketed*, No. 17-3113 (3d Cir. Sep. 28, 2017); *Students & Parents for Privacy v. U.S. Dep’t of Educ.*, No. 16-cv-4945, 2016 WL 6134121, at *2 (N.D. Ill. Oct. 18, 2016) (same), *report and recommendation adopted*, 2017 WL 6629520 (N.D. Ill. Dec. 29, 2017); *Evancho*, 237 F. Supp. 3d at 290 (finding that the presence of a girl who is transgender in common restroom used by other girls did not demonstrate “any threatened or actually occurring violations of personal privacy”); *Highland*, 208 F. Supp. 3d at 876 (finding that school district’s policy preventing a girl who is transgender from using restroom used by other girls was not substantially related to the district’s interest in student privacy); *see also Crosby v. Reynolds*, 763 F. Supp. 666, 670 (D. Me. 1991) (rejecting prisoner’s claim that housing another woman with her violated her right to privacy because that woman was transgender).

Instead of being tailored to address privacy interests, the District’s policy rests on generalized fears and discomfort that are not a legitimate basis for imposing unequal or stigmatizing treatment under any standard of scrutiny. *See Evancho*, 237 F. Supp. 3d at 293 n.42; *Highland*, 208 F. Supp. 3d at 877. Likewise, any suggestion that R.M.A. would be any more likely to harm his peers in the locker room or restroom than another boy has no basis apart from animus against transgender people. *Cf. Cruzan v. Special Sch. Dist. No. 1*, 294 F.3d 981, 983-84 (8th Cir. 2002) (per curiam) (rejecting female employee’s claim that a transgender female co-worker’s use of the women’s restrooms constituted sexual harassment).

E. While the Court of Appeals adopted an inappropriately narrow view of what constitutes sex discrimination, even under that reasoning, R.M.A. should succeed.

While the Court of Appeals was wrong to conclude that sex discrimination does not encompass sex-based stereotyping, it nonetheless recognized that discrimination includes “a deprivation based on a trait unique to one sex, or a deprivation based on traits *perceived* as unique to one sex.” No. WD80288, 2017 WL 4779447, at *5 (Mo. App. W.D. Oct. 26, 2017), *ordered transferred*, No. SC96828 (Jan. 23, 2018). Even under that narrow definition of discrimination because of sex, R.M.A.’s claim is valid because he has alleged that he has been excluded based on a trait perceived as unique to one sex: assigned sex at birth or particular genitalia. *See supra* § II.C; *see also R.M.A. by Appleberry v. Blue Springs R-IV Sch. Dist.*, No. WD80005, 2017 WL 3026757, at *9 (Mo. App. W.D. July 18, 2017) (Gabbert, J., dissenting).

However, the emphasis of the Court of Appeals on “capacity to become pregnant” as a defining characteristic of sex, *id.* at *6, and on depriving “one sex” of a right or privilege “afforded the other” as the hallmark of sex-based discrimination, implies drastic limits to the scope of MHRA. Those limits would be contrary to *Price Waterhouse* as well as other federal and state law.

While pregnancy is certainly a gender-related trait, it is hardly the only one, as the Court of Appeals itself seemed to acknowledge elsewhere. Such a narrow interpretation would lead to absurd results contrary to the plain meaning of the statute and intent of the legislature, as well as the language of *Price Waterhouse*. Title VII prohibits employers from taking any aspect of a person’s “gender into account.” *Price Waterhouse*, 490 U.S. at 258. “Discrimination ‘because of sex,’ . . . is not only discrimination because of maleness and discrimination because of femaleness, but also discrimination because of the . . . *properties or characteristics* by which individuals may be classified as male or female.” *Fabian*, 172 F. Supp. 3d at 526.

While assumptions about anatomy and capacity for pregnancy sometimes enter into discriminatory decisions based on sex, they do not always. Consider a coach who refused to accept any team members who had ever worn make-up because he believed conventional femininity was a sign of weakness; a Physics teacher who reduced the grades of any boy he perceived not to act “manly” enough; an English teacher who discouraged anyone with a conventional “girl’s name” from writing because of an assumption that readers would not take their work seriously; or an administrator who insisted that students be tested for a Y chromosome before permitting them to enroll in

Calculus. The intent behind these acts may have nothing to do with the anatomy or capacity for pregnancy of any of those discriminated against, but it would still most definitely be because of sex.

Further, public accommodations need not deprive a privilege to all members of one sex while granting it to all members of another to violate the law; it is enough to deny any one person a privilege “because of sex.” *Cf. Connecticut v. Teal*, 457 U.S. 440, 454-55 (1982) (“It is clear beyond cavil that the obligation imposed by Title VII is to provide an equal opportunity for *each* applicant regardless of race, without regard to whether members of the applicant's race are already proportionately represented in the work force.” (internal quotation marks omitted)); *Back v. Hastings On Hudson Union Free Sch. Dist.*, 365 F.3d 107, 118 (2d Cir. 2004) (noting that plaintiffs can survive summary judgment in Title VII cases “even when not all members of a disfavored class are discriminated against”).

In any event, discrimination against transgender people is in fact also precisely because of sexual anatomy. R.M.A. was not permitted to use the same facilities as other boys precisely because of assumptions about his anatomy: boys the administration assumed to have anatomy typical for boys were allowed to use boys’ facilities; boys the administration assumed to have anatomy typical for girls were not. And discriminating against someone by denying them the use of a sex-specific facility because they are transgender is no different than any other form of prohibited sex discrimination. *See supra* § II.C; *see also Lusardi v McHugh*, EEOC Doc. 0120133395, 2015 WL 1607756,

at *8 (EEOC Apr. 1, 2015) (denying transgender women the use of the restrooms used by other women constitutes sex discrimination).

III. Thousands of schools avoid discrimination against transgender students in restrooms and locker rooms without problems.

Recognizing the importance of treating all students equally, thousands of schools and school districts across the country ensure that students who are transgender are treated the same as other students in all aspects of the school environment, including use of restrooms and locker rooms that match the students' gender identity. As a result, millions of students across the country share restrooms and other sex-specific facilities with transgender students every day without incident.²¹

²¹ For examples of inclusive school policies, see U.S. DEP'T OF EDUC., Office of Elementary & Secondary Educ., Office of Safe & Healthy Students, *Examples of Policies and Emerging Practices for Supporting Transgender Students*, at 16-17 (2016), <http://www2.ed.gov/about/offices/list/oese/oshs/emergingpractices.pdf>. Education organizations, including the National Association of Secondary School Principals and National Education Association, also have issued guidance recommending that schools adopt policies that support and affirm transgender students, including in their use of facilities consistent with their gender identity. See Nat'l Ass'n of Secondary Sch. Principals, *Transgender Students*, <https://www.nassp.org/who-we-are/board-of-directors/position-statements/transgender-students?SSO=true>; Nat'l Educ. Ass'n, *Legal*

The collective experience of school administrators in schools and districts with such policies, as articulated in *amici curiae* briefs in support of transgender students seeking to use the same facilities as other students, demonstrate that the fears and concerns voiced by some have not materialized and that, in fact, inclusive policies minimize disruption and foster a safe, welcoming, and optimal learning environment for all students.²² Dr. Thomas Aberli, the principal of J.M. Atherton High School in Louisville, Kentucky, explains that Atherton High School has “multiple transgender individuals in our school... and... there has not been any issue at all with respect to implementation [of an inclusive restroom policy].”²³ Dr. Judy Chiasson, Program Coordinator for the Office of Human Relations, Diversity and Equity of the Los Angeles

Guidance on Transgender Students’ Rights (2016), https://www.nea.org/assets/docs/20184_Transgender%20Guide_v4.pdf.

²² Brief of *Amici Curiae* Sch. Administrators from Thirty-One States & Dist. of Columbia in Support of Respondent, *Gloucester Cty. Sch. Bd. v. G.G. ex rel. Grimm*, No. 16-273 (U.S. Mar. 2, 2017), <https://www.aclu.org/legal-document/gloucester-county-school-board-v-gg-school-administrators-31-states-and-district> (“School Administrators Br.”); Brief for Nat’l Educ. Ass’n et al. as *Amici Curiae* in Support of Respondent, *Gloucester Cty. Sch. Bd. v. G.G. ex rel. Grimm*, No. 16-273 (U.S. Mar. 2, 2017), <https://www.aclu.org/legal-document/gloucester-county-school-board-v-gg-national-education-association-et-al>.

²³ School Administrators Br. at 12.

Unified School District, the second-largest school district in the country, states that “[she has] yet to be called into a situation [involving the district’s inclusive policy] to respond to an actual incident; [she has] only had to respond to fears, and the fears are unfounded.”²⁴

One frequently voiced concern is that some students will pretend to be transgender to gain access to gender-specific spaces that they would not otherwise have access to, but because being transgender is an enduring aspect of one’s identity, that concern is misplaced. As Eldridge Greer, Associate Chief, Student Services, Denver Public Schools explains: “There are easier ways to get into the girls’ bathroom [than posing as transgender]—and we have policies and consequences to address that.”²⁵

Another common concern is that sharing gender-specific facilities with transgender students will infringe on the comfort and privacy of other students. Although non-transgender students do not have a reasonable expectation that they will not share a gender-specific facility with a transgender student,²⁶ school administrators have shown that schools can accommodate the privacy concerns of certain students without discriminating against transgender students. One solution has been to make single-user restrooms available for any student expressing discomfort around sharing facilities for any reason; other solutions include instituting greater privacy measures, such as curtains,

²⁴ *Id.* at 6.

²⁵ *Id.* at 16.

²⁶ *See supra* § II.D.

or a staggered schedule for facilities use.²⁷ Roger Bourgeois, Superintendent-Director of the Greater Lowell Technical Regional School District in Massachusetts explains:

“We’re not going to tell the transgender student they can’t go where they’re comfortable. I can still remember the remnants of white people being uncomfortable with black people being in the same locker rooms and restrooms, so it’s not about whether everyone is ‘comfortable.’ Just because some people are uncomfortable didn’t mean you treated people as second-class citizens.”²⁸ Dr. Aberli of Louisville, Kentucky, agrees that making a transgender student use a separate restroom is not the answer: “Tell me what you would say to that child—that there’s something so freakish about you, and so many people are uncomfortable with you, that you have to use a completely separate restroom than the one you feel like you should be using?”²⁹

It is the experience of many school administrators that their school’s inclusive policies are in the best interest not only of transgender students but of the entire school community. Denise Palazzo, Former Instructional Facilitator and Diversity and LGBTQ Coordinator, Broward County, Florida Public Schools explains that “an affirming policy has a positive effect on other students as well. If everyone is taken care of, students see that and they value that.”³⁰ Rachel Santa, Director of Special Education, Cumberland,

²⁷ School Administrators Br. at 17-19.

²⁸ *Id.* at 19.

²⁹ *Id.* at 21.

³⁰ *Id.* at 16.

Rhode Island Schools, confirms that “[w]hen kids see that you are respecting all students, then they know that they will be respected. We are showing them how to treat people respectfully and know they will be treated the same.”³¹

Social science research substantiates the experience of these school administrators that an inclusive school climate benefits all students and that, conversely, a negative school climate diminishes the experiences of all students. Schools with LGBTQ-inclusive policies report higher levels of safety not just for LGBTQ students, but for all students.³² Schools with Gender & Sexuality Alliance (“GSA”) clubs, formerly Gay-Straight Alliance clubs, report better health outcomes for all students, including those that do not participate in GSA clubs.³³ Anti-discrimination policies, such as allowing transgender students to use the same facilities as other students, model to the school community that the school respects and supports transgender students and expects other

³¹ *Id.*

³² Stacey S. Horn & Laura A. Szalacha, *School Difference in Heterosexual Students’ Attitudes About Homosexuality and Prejudice Based on Sexual Orientation*, 3 EUR. J. OF DEV. SCI. 64 (2009); *see also* Snapp, *supra* n.15.

³³ V. Paul Poteat et al., *Contextualizing Gay-Straight Alliances: Student, Advisor, and Structural Factors Related to Positive Youth Development Among Members*, 86 CHILD DEV. 176 (2015).

students to mirror that same respect. Such inclusiveness has been shown time and again to improve the overall climate of schools.³⁴

³⁴ Stephen T. Russell & Jenifer McGuire, *The School Climate for Lesbian, Gay, Bisexual, and Transgender (LGBT) Students*, in CHANGING SCHOOLS AND COMMUNITY ORGANIZATIONS TO FOSTER POSITIVE YOUTH DEVELOPMENT (Marybeth Shinn & Hirokazu Yoshikawa eds., 2008).

Conclusion

This Court should hold that barring students from common facilities because they are transgender is a form of sex discrimination prohibited by the MHRA.

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Respectfully submitted,

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Certificate of Service and Compliance

The undersigned hereby certifies that on February 27, 2018, the foregoing *amici* brief was filed electronically and served automatically on the counsel for all parties.

The undersigned further certifies that pursuant to Rule 84.06(c), this brief: (1) contains the information required by Rule 55.03; (2) complies with the limitations in Rule 84.06; (3) contains 7,766 words (excluding the cover, signature block, and this certificate of service and compliance), as determined using the word-count feature of Microsoft Office Word. Finally, the undersigned certifies that the electronically filed brief was scanned and found to be virus-free.

/s/ Anthony E. Rothert