

**IN THE SUPREME COURT OF MISSOURI**

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**No. SC96683**

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**R.M.A. by his next friend,**

*Plaintiff/Appellant,*

**v.**

**BLUE SPRINGS R-IV SCHOOL DIST., et al.,**

*Defendants/Respondents.*

Appeal from the Circuit Court of Jackson County, Missouri  
The Honorable Marco A. Roldan  
Case No. 1516-CV20874

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**BRIEF OF *AMICUS CURIAE* PROMO  
IN SUPPORT OF APPELLANT  
Filed with Consent**

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**PROMO**

Denise D. Lieberman, MBE # 47013  
6047 Waterman Blvd.  
St. Louis, MO 63112  
(314) 780-1833  
denise@deniselieberman.com

*Counsel for Amicus Curiae PROMO*

## TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	iii
INTEREST OF AMICUS .....	1
CONSENT OF PARTIES .....	5
JURISDICTIONAL STATEMENT .....	5
STATEMENT OF FACTS .....	5
POINTS RELIED ON .....	5
SUMMARY OF ARGUMENT.....	5
ARGUMENT .....	9
I.    EVOLVING UNDERSTANDINGS OF EQUALITY RENDER DIFFERENTIAL TREATMENT BASED ON GENDER IDENTITY ACTIONABLE UNDER THE MISSOURI HUMAN RIGHTS ACT .....	12
II.   INTERPRETING THE MISSOURI HUMAN RIGHTS ACT TO INCLUDE DISCRIMINATION BASED ON GENDER IDENTITY IS IN THE PUBLIC INTEREST .....	21
A.   TRANSGENDER PEOPLE HAVE EXPERIENCED A LONG HISTORY OF DISCRIMINATION IN MISSOURI.....	22
B.   TRANSGENDER STUDENTS IN MISSOURI FACE SIGNIFICANT GENDER-BASED DISCRIMINATION IN SCHOOL .....	27

C.	GENDER-BASED DISCRIMINATION DENIES TRANSGENDER STUDENTS IN MISSOURI EQUAL EDUCATION OPPORTUNITIES .....	30
D.	GENDER-BASED DISCRIMINATION STIGMATIZES TRANSGENDER STUDENTS .....	32
	CONCLUSION .....	33
	CERTIFICATE OF SERVICE .....	35
	CERTIFICATE OF COMPLIANCE .....	35

## TABLE OF AUTHORITIES

### CASES

<i>Adkins v. City of New York</i> , 143 F. Supp.3d 134 (S.D.N.Y. 2015) .....	22
<i>Barrier v. Vasterling</i> , No. 1416-CV03892, 2014 WL 5469888 (Mo. Cir. Oct. 27, 2014) ..	2
<i>Bowers v. Hardwick</i> , 478 U.S. 186 (1986).....	20,33
<i>Bradwell v. Illinois</i> , 83 U.S. 130 (1873) .....	13
<i>DC &amp; MS v. City of St. Louis</i> , 795 F.2d 652 (8 <sup>th</sup> Cir. 1986) .....	24
<i>Glenn v. Brumby</i> , 663 F.3d 1312 (11 <sup>th</sup> Cir. 2011) .....	18
<i>Glossip v. MO Dep’t of Transp.</i> , No. SC92583 (MO 2013) .....	2
<i>Hicklin v. Precynthe et al</i> , No. 4:16-cv-01357-NCC (E.D. Mo. Feb. 9, 2018) .....	7
<i>Hiveley v. Ivy Tech Community College</i> , 853 F.3d 339 (7 <sup>th</sup> Cir. <i>en banc</i> 2017) .....	15,16
<i>Johnson v. Mo. Dep’t of Social Servs.</i> , 0516-CV09517, 2006 WL 6903173 (Mo. Cir. Feb.17, 2006).....	13
<i>Lampley v. Missouri Commission on Human Rights</i> , No. WD80288 (Mo. App. W.D. Oct. 24, 2017) .....	7,15
<i>In Re Landrach</i> , 32 Ohio Misc. 2d 6 (Ohio Prob. Ct. 1987) .....	17
<i>Lawrence v. Texas</i> , 539 U.S. 558 (2003) .....	13
<i>Lawson v. Kelly</i> , Nos 14-3779; 14-3780 (8 <sup>th</sup> Cir. 2015) .....	2
<i>Littleton v. Prange</i> , 9 S.W.3d 223 (Tx Ct. App. 1999) .....	17
<i>Mathis v. Fountain-Fountain-Fort Carson School District 8</i> , No. P20130034X (Colo. Div. Civ. Rts. June 17, 2013) .....	19
<i>Minor v. Happersett</i> , 88 U.S. 162 (1875) .....	13

<i>MT v. JT</i> , 364 S.2d 1076 (NJ Sup. Ct. 1976) .....	17
<i>Obergefell v. Hodges</i> 576 U.S. ___, 135 S.Ct. 2584 (2015) .....	13,33
<i>Oiler v. Winn-Dixie Louisiana, Inc.</i> , No 00-3114, U.S. Dist LEXIS 17417 (E.D. La., Sept. 16, 2002) .....	16
<i>Oncale v Sundowner Offshore Service, Inc.</i> , 523 U.S. 75 (1998) .....	15
<i>Price Waterhouse v. Hopkins</i> , 490 U.S. 228 (1989) .....	14,15
<i>Reed v. Reed</i> , 404 U.S. 71 (1971) .....	14
<i>R.M.A. v. Blue Springs R-IV School District, et al.</i> , No. WD80005 (Mo. App. W.D. July 18, 2017).....	2,7,9,15
<i>Romer v. Evans</i> , 517 U.S. 620 (1996) .....	6,7,21,34
<i>Schroer v. Billington</i> , 577 F.Supp.2d 293 (D.D.C. 2008) .....	18
<i>Smith v. City of Salem</i> , 378 F.3d. 566 (6 <sup>th</sup> Cir. 2004) .....	15,18
<i>Sommers v. Budget Marketing Inc</i> , 667 F.2d 748 (8 <sup>th</sup> Cir. 1982) .....	17
<i>Ulane v. E. Airlines Inc.</i> , 742 F2d 1081 (7 <sup>th</sup> Cir. 1984) .....	16
<i>United States v. Carolene Prods. Co.</i> , 304 U.S. 144 (1938).....	23
<i>United States v. Virginia</i> , 518 U.S. 515 (1996) .....	14,30
<i>United States v. Windsor</i> , 570 U.S. ___, 133 S.Ct. 2675 (2013) .....	12,23,32
<i>Zarda v. Altitude Express</i> , No. 15-3775 (2 <sup>nd</sup> Cir. <i>en banc</i> Feb. 26, 2018).....	16

## **STATUTES AND LEGISLATION**

20 U.S.C. §§ 1681-1688 .....	30
Mo. Rev. Stat. §213.065.1 .....	6, <i>passim</i>

2017 Mo. Legis. Serv. SB43 .....	4
2017 Mo. Legis. Serv. SB98 .....	4
2017 Mo. Legis. Serv. HB62.....	4
2017 Mo. Legis. Serv. HB202.....	4
2017 Mo. Legis. Serv. HB205.....	4
2017 Mo. Legis. Serv. SB252 .....	4
2017 Mo. Legis. Serv. HB642.....	4
2017 Mo. Legis. Serv. HB745.....	4
2017 Mo. Legis. Serv. SB338 .....	23
2017 Mo. Legis. Serv. HB485.....	23
2017 Mo. Legis. Serv. HB846.....	23
2018 Mo. Legis. Serv. SB690 .....	4
2018 Mo. Legis. Serv. HB1434.....	4
2018 Mo. Legis. Serv. HB1755.....	4
2018 Mo. Legis. Serv. HB1763.....	4
2018 Mo. Legis. Serv. HB2074.....	4
2018 Mo. Legis. Serv. HB2253.....	4
2018 Mo. Legis. Serv. SB753 .....	20
2018 Mo. Legis. Serv. HB1360.....	20
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St. Louis Ord. 5421 (1864).....	24

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PROMO, MoTransRights, <a href="http://www.motransrights.org/">http://www.motransrights.org/</a> .....	2,5
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## INTEREST OF AMICUS

PROMO is Missouri's statewide organization advocating for lesbian, gay, bisexual, and transgender ("LGBT") equality through legislative advocacy, electoral politics, grassroots organizing, and community education.<sup>1</sup> PROMO envisions a Missouri where everyone has full equality in the hearts and minds of citizens, in all areas of the law, regardless of sexual orientation, gender identity, or gender expression. It is a member of the Equality Federation, a national network of statewide LGBT equality organizations.<sup>2</sup> A non-profit, non-partisan organization founded in 1986, PROMO is the leading voice for LGBT Missourians through the legislative and political process. PROMO represents the interests of an estimated 25,050 transgender Missourians whose legal rights under Missouri's Human Rights Act ("MHRA") to be free from sex-based discrimination in public accommodations due to their gender identity are impacted by the issues in this case.

PROMO works to advance "legislative changes that eliminate legal sanctions against the lesbian, gay, bisexual, and transgender community" and to "reduce ignorance of and animosity toward LGBT individuals."<sup>3</sup> It believes that "[a] shift in the Missouri laws, from a system flawed with fundamental injustices to one that truly embraces the concept of equality for all citizens, regardless of sexual orientation or gender identity,

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<sup>1</sup> PROMO Who We Are, <https://promoonline.org/who-we-are.html>

<sup>2</sup> *Id.*

<sup>3</sup> PROMO Organizational Vision, <http://promoonline.org/about-promo/about-promo.html>

will put us one step closer to a society where all voices are heard and people are free.”<sup>4</sup> PROMO has participated as *amicus curiae* in several cases addressing equality for LGBT Missourians in state and federal courts. *See, e.g., Lawson v. Kelly*, Nos 14-3779; 14-3780 (8<sup>th</sup> Cir. 2015); *Barrier v. Vasterling*, No. 1416-CV03892 (Circuit Court of Jackson County, Missouri 2014); *Glossip v. MO Dep’t of Transp.*, No. SC92583 (MO Supreme Court 2013). PROMO also participated as *amicus* in the instant case in the Western District Court of Appeals below, *R.M.A v. Blue Springs R-IV School District, et al.*, No. WD80005 (Mo. App. W.D. July 18, 2017).

As part of its mission, PROMO works to advance rights for transgender, gender nonconforming and non-binary persons in Missouri: “Transgender and gender nonconforming Missourians face barriers in many aspects of their everyday lives. These barriers may exist because of misunderstanding of who transgender people are or inadequate, and missing policy and law.”<sup>5</sup> PROMO sponsors events statewide to commemorate Transgender Remembrance Day “to honor all of the lives that have been lost to anti-transgender violence.”<sup>6</sup> PROMO’s leadership, including more than half of its staff and one of its board members, identify as transgender or non-binary. The

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<sup>4</sup> PROMO Who We Are, *supra*.

<sup>5</sup> PROMO MoTransRights, <http://www.motransrights.org/>

<sup>6</sup> Transgender Remembrance Day, <https://promoonline.org/574-transgender-day-of-remembrance-events-happening-near-you.html>

organization includes numerous prominent leaders who advocate for equality for transgender and gender nonconforming Missourians.

PROMO launched MoTransRights.org, a web portal for transgender and ally Missourians to learn more about policies and laws that affect transgender Missourians at the local, state, and federal level. In 2016, PROMO worked with the Missouri Housing Development Commission (MHDC) to update their nondiscrimination protections to include sexual orientation and gender identity for LGBT renters, contractors, and agencies that do business with the MHDC. Starting in 2012, PROMO has worked with Missouri hospital systems to update more than 125 hospital policies affecting LGBT employees, visitors, and patients, and trained more than 4,000 hospital staff and health providers in LGBT cultural competency. In 2017, PROMO trained nearly 2,500 health providers, business leaders, educators, and community leaders on transgender inclusion policies and best practices for working with transgender clients and coworkers.

As part of its overall mission, PROMO works to ensure that transgender Missourians have “safe and secure access to a restroom” and that transgender, non-binary, and gender independent students have “the right to attend school, take part in class, and be involved in extracurricular activities without fear of discrimination.”<sup>7</sup> Such discrimination is pervasive and ongoing. During the 2017 Missouri legislative session, PROMO lobbied against three specifically anti-transgender bathroom bills and five other

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<sup>7</sup> PROMO MoTransRights, *Bathrooms, Schools and Violence*,

<http://www.motransrights.org/bathrooms--violence--and-schools.html>

bills that would deny transgender people access to public restrooms in Missouri.<sup>8</sup> PROMO brought more than 100 people to the state Capitol to talk with legislators about those bills. In particular, PROMO organized nearly 50 parents, family members, students, doctors, attorneys, business leaders, health associations, and community organizations to testify against SB98, anti-transgender bill related to restrooms in public schools, in the Senate Education Committee. In just the first two months of the 2018 legislative session, PROMO is fighting six bills that would perpetuate discrimination against transgender Missourians.<sup>9</sup>

In 2016, PROMO worked to educate the public about a federal directive that public schools in the United States “must allow transgender students to use the bathroom according to their gender identity,” and in 2017, worked to educate the public about the

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<sup>8</sup> See, 2017 Mo. Legis. Serv. HB62, 2017 Mo. Legis. Serv. SB43, 2017 Mo. Legis. Serv. SB98 (all anti-transgender, bathroom bills); 2017 Mo. Legis. Serv. HB202, 2017 Mo. Legis. Serv. HB205, 2017 Mo. Legis. Serv. SB252, 2017 Mo. Legis. Serv. HB642, 2017 Mo. Legis. Serv. HB745 (bathroom, public restroom bills)

<sup>9</sup> 2018 Mo. Legis. Serv. SB690 (anti-transgender bathroom, public schools); 2018 Mo. Legis. Serv. HB1434, 2018 Mo. Legis. Serv. HB1755 (ban on gender neutral, multi-stall restrooms); 2018 Mo. Legis. Serv. HB1763, 2018 Mo. Legis. Serv. HB2074, 2018 Mo. Legis. Serv. HB2253 (bill that would exclude gender identity from nondiscrimination coverage).

rollback of this directive.<sup>10</sup> PROMO assists transgender individuals in filing reports of discrimination, including under the Missouri Human Rights Act, and in local municipalities where protections exist.<sup>11</sup> Accordingly, PROMO’s perspective, reflecting that of its transgender constituency and allies, including non-binary or gender independent students whose legal rights are impacted by the outcome of this case, will assist this Court in weighing the important issues here.

No party’s counsel authored this brief in whole or in part, and no party or party’s counsel contributed money intended to fund the preparation or submission of this brief.

### **CONSENT OF PARTIES**

This *amicus* brief is filed with the written consent of both parties.

### **JURISDICTIONAL STATEMENT**

*Amicus* hereby adopts the Jurisdictional Statement of Appellants in this matter.

### **STATEMENT OF FACTS**

*Amicus* hereby adopts the Statement of Facts of Appellants in this matter.

### **POINTS RELIED ON**

*Amicus* hereby adopts the Points Relied On of Appellants in this matter.

### **SUMMARY OF THE ARGUMENT**

The Missouri Human Rights Act (“MHRA”) ensures that “[a]ll persons within the jurisdiction of the state of Missouri are free and equal and shall be entitled to the full and

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<sup>10</sup> PROMO MoTransRights, *Bathrooms, Schools and Violence*, *supra*.

<sup>11</sup> *See*, MoTransRights, *supra*., and PROMO, *Have You Been Discriminated Against?*

<https://promoonline.org/resources/have-you-been-discriminated-against/>



equal use and enjoyment within this state of any place of public accommodation.” Mo. Rev. Stat. §213.065.1. The statute’s plain language explicitly renders its provisions fully applicable to “all persons” in Missouri, including transgender and gender non-binary Missourians. To read otherwise, as the majority did below, improperly renders these Missourians “strangers to its laws.” *Romer v. Evans*, 517 U.S. 620, 636 (1996). This court should reverse to ensure that the MHRA’s protections extend to all Missourians.

The MHRA’s promise of equal access to public accommodations includes the right to a public education free from discrimination based on sex for transgender and gender nonconforming students, who face more sex-based discrimination in school than their cis-gender counterparts.<sup>12</sup> Gender-based discrimination is a particular barrier for transgender, non-binary, and gender nonconforming students in Missouri, who face threats to their safety and ability to access education due to sex-based discrimination in school. *See id.* Courts around the country are now interpreting discrimination “because of sex” and “on the grounds of sex” to include disparate treatment based on gender stereotypes and a person’s gender identity. Increasingly, courts are finding that differential treatment based

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<sup>12</sup> *See* Greytak et al., *2013 National School Climate Survey*, GLSEN (2013),

[http://www.glsen.org/sites/default/files/2013%20National%20School%20Climate%20Survey%20Full%20Report\\_0.pdf](http://www.glsen.org/sites/default/files/2013%20National%20School%20Climate%20Survey%20Full%20Report_0.pdf); *See also*, Greytak, et al., *Harsh Realities: The Experiences of Transgender Youth in Our Nation’s Schools*. GLSEN (2009).

<http://www.glsen.org/sites/default/files/Harsh%20Realities.pdf>. (“Transgender students face much higher levels of harassment and violence than LGB students.”)

on gender identity is quintessentially discrimination “because of sex” within the meaning of laws designed to thwart gender-based discrimination, even if lawmakers could not have envisioned this application when they originally passed those laws.

This “evolving understanding of the meaning of equality” makes clear that transgender students must be included in the MHRA’s protection to ensure its legislative intent: To eradicate discrimination in the state of Missouri based on sex.

The majority opinion below, which held that “discrimination because of sex” is limited to “depriving one sex of a right or privilege afforded the other sex,” *R.M.A.* at \*13, is out of step with this evolution, even within its jurisdiction. For example, the Western District Court of Appeals recently ruled, contrary to the opinion issued in this case below, that the MHRA *does* extend beyond that narrow definition of sex discrimination to include failure to conform to sex stereotypes. *See, Lampley v. Missouri Commission on Human Rights*. No. WD80288 (Mo. App. W.D. Oct. 24, 2017). And earlier this month, a federal magistrate in the Eastern District of Missouri granted a preliminary injunction in support of a transgender inmate in Missouri, concluding that she had established a likelihood of success that the state failed to recognize and medically accommodate her gender identity while incarcerated. *See, Hicklin v. Precynthe et al*, No. 4:16-cv-01357-NCC (E.D. Mo. Feb. 9, 2018).

The applicability of Missouri’s Human Rights Act to claims of gender-based discrimination of transgender and gender nonconforming Missourians is in the public interest. Blocking such claims not only renders victims of such discrimination as “strangers to its laws,” *Romer*, 517 U.S. at 636, but effectively excludes transgender

Missourians from protection in all public accommodations. If the decision below is allowed to stand, then any state or municipal public building with only sex-segregated multi-stall public restrooms – such as the Missouri State Capitol and many municipal city halls -- could deny transgender persons access to any restrooms at all. This could effectively exclude a portion of the public, including many PROMO members who identify as transgender, from being able to advocate directly to their state and local elected officials and impede their ability to petition government for redress of grievances.

Even more, the decision below perpetuates the disproportionate discrimination faced by transgender, non-binary, and gender nonconforming students, facilitates bullying in schools, denies students equal access to education and full school activity participation, and undermines their ability to go to school in a safe learning environment<sup>13</sup> – all of which have been linked to numerous negative outcomes for transgender individuals throughout their lives. Today many experts and scholars agree that the right to be free from gender-based discrimination in schools includes allowing transgender students to use facilities consistent with their gender identities.<sup>14</sup> R.M.A.’s claim that he was denied access to facilities used by other boys at school thus falls squarely within the protections intended by the MHRA and R.M.A.’s claim should be

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<sup>13</sup> Griffin et al., *On the Team: Equal Opportunity for Transgender Student Athletes* (2010), [https://www.ncaa.org/sites/default/files/NCLR\\_TransStudentAthlete%2B\(2\).pdf](https://www.ncaa.org/sites/default/files/NCLR_TransStudentAthlete%2B(2).pdf)

<sup>14</sup> *See Id.*

allowed to proceed. The majority below erred by affirming the circuit court's dismissal of R.M.A.'s claim, and the decision should be reversed.

### ARGUMENT

R.M.A. is a transgender male student at Blue Springs South High School in the Blue Springs R-IV School District. Petition, 1516-CV20874 at ¶¶ 18-20. His name has been legally changed to a traditional male name. *Id.* at ¶¶ 21-22. His birth certificate has been amended to indicate his gender as male. *Id.* at ¶¶ 23-25. In all respects he is legally male. He previously participated on the boy's football and track teams, *Id.* at ¶ 40, but no longer does so because the school has denied him access to the facilities used by other boys in those sports. *Id.* at ¶¶ 41-42, 31-32. Through his next friend, he brought this claim for discrimination based on sex under the MHRA based on the district's failure to allow R.M.A. to use locker and restroom facilities used by other male students. The Circuit Court of Jackson County, Missouri, dismissed R.M.A.'s case for failure to state a cause of action in part concluding that discrimination against a person who is transgender does not constitute discrimination "because of sex" within the meaning of the MHRA. The Missouri Court of Appeals for the Western District affirmed in a 2-1 opinion with a dissenting opinion by Judge Gabbert. *R.M.A. v. Blue Springs R-IV School District, et al.*, No. WD80005, (Mo. App. W.D. July 18, 2017). The majority concluded that discrimination "based on sex" within the MHRA is limited to "depriving one sex of a public accommodation afforded the other sex," *R.M.A.* at \*14, and that R.M.A. is not entitled to relief because he "does not assert that as a member of one sex, he is being deprived of a public accommodation given to the other sex." *Id.* at \*15.

This narrow understanding of discrimination “because of sex” is out of step with today’s understandings of sex and gender. The court’s interpretation below imparts an inequality on Missouri’s transgender citizens who are left without recourse to combat sex-based discrimination related to their gender identity in public accommodations. The facts are undisputed that R.M.A. was denied access to public accommodations afforded to other male students, solely due to his gender identity. This is quintessentially discrimination “because of sex.” This court should interpret the MHRA to include such claims and allow R.M.A.’s case to proceed.

According to the Williams Institute, an academic research center at UCLA School of Law dedicated to the study of sexual orientation and gender identity, an estimated 1.4 million adults in the United States (or about .6 percent of the population) identify as transgender. Flores et al., *How Many Adults Identify as Transgender in the United States?*, WILLIAMS INSTITUTE (June 2016) at 3, <http://williamsinstitute.law.ucla.edu/wp-content/uploads/How-Many-Adults-Identify-as-Transgender-in-the-United-States.pdf>.

An estimated 25,050 adults in Missouri, or .54 percent of our state’s population, identify as transgender. *Id.* at 3. Younger adults aged 18-24 are more likely than older adults to identify as transgender. *Id.* at 2, 5-6. An estimated 3,600 young adults aged 18-24 in Missouri identify as transgender. *Id.* at 5. While research on the numbers of transgender adolescents is limited, available research suggests that between 1.4 and 3.2 percent of adolescents may be transgender. Wilson et al., *Sexual and Gender Minority Youth in Foster Care: Assessing Disproportionality and Disparities in Los Angeles*, WILLIAMS INSTITUTE (June 2016) at 34-37, <http://williamsinstitute.law.ucla.edu/wp-content/uploads/sexual-and-gender-minority-youth-in-foster-care.pdf>.

content/uploads/LAFYS\_report\_final-aug-2014.pdf. Some studies suggest that one in 500 children is transgender and that nearly ten percent of children may be gender non-conforming. Stephanie Brill & Rachel Pepper, *The Transgender Child* (2008) at 2; Joe Baum et al., *Support And Caring for Our Gender Expansive Youth: Lessons from the Human Rights Campaign's Youth Survey*, HRC (2014) at 4, [https://www.genderspectrum.org/staging/wp-content/uploads/2014/12/HRC\\_report.pdf](https://www.genderspectrum.org/staging/wp-content/uploads/2014/12/HRC_report.pdf).

Transgender and gender nonconforming youth experience distress associated with the stigmatization and bullying they face at school due to their gender identity and expression. Toomey, et al, *Gender-Nonconforming Lesbian, Gay, Bisexual and Transgender Youth: School Victimization and Young Adult Psychosocial Adjustment*, 46 Dev. Psychol. 1580, 2585 (2010). Some studies find that the numbers of young people identifying as transgender, non-binary, or gender nonconforming is increasing. A UCLA study found that more than one quarter (27 percent), or 796,000, of California's youth, ages 12 to 17, report they are viewed by others as gender nonconforming at school.<sup>15</sup>

Transgender and gender nonconforming students need support at school, including access to facilities and programs that correspond with their gender identity. Orr et al., *Schools in Transition: A Guide for Supporting Transgender Students in K-12 Schools* (2015), <http://nclrights.org/wp-content/uploads/2015/08/Schools-in-Transition.2015.pdf>.

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<sup>15</sup> Dowd, "27% of California adolescents say they are viewed as gender nonconforming, study finds," *UCLA Newsroom*, Dec 13, 2017, <http://newsroom.ucla.edu/releases/27-of-california-adolescents-are-gender-nonconforming-study-finds#.WjIsm3faLRE.facebook>

This includes the right to wear clothing that corresponds to their gender identity, the right to be addressed by gender appropriate pronouns and the right to access facilities that correspond to their gender identity. *Id.* Failure to do so constitutes discrimination based on their gender identity and impedes students’ ability to learn, stigmatizes them and puts them at higher risk for dropping out of school, depression and suicide. *Id.* at 8.

The majority’s failure to recognize R.M.A.’s claim under the MHRA imparts a deep inequality on Missourians who are subject to differential treatment based on their gender expression, gender identity or because they fall outside traditional gender stereotypes or binaries. The MHRA exists to protect the rights of all citizens against such sex-based differential treatment in public accommodations.

**I. EVOLVING UNDERSTANDINGS OF EQUALITY RENDER DIFFERENTIAL TREATMENT BASED ON GENDER IDENTITY ACTIONABLE UNDER THE MISSOURI HUMAN RIGHTS ACT.**

Our civil rights laws and the constitutional principals of equal protection under law that underlie them endure by recognizing an “evolving understanding of the meaning of equality,” *United States v. Windsor*, 570 U.S. \_\_\_\_, 133 S.Ct. 2675, 2693 (2013). Arguably, no area of law has seen understandings of equality evolve as rapidly as with respect to sexual orientation and gender identity. This court can – and must – consider our evolved understandings of gender in interpreting the scope of MHRA’s protections.

We have seen how an “evolving understanding of the meaning of equality” has influenced judicial interpretations related to gender and sexuality. Not long ago, Missouri criminalized consensual sexual activity by people of the same sex and barred gays and

lesbians from serving as foster parents no matter how qualified they were—both of those proscriptions now clearly offend our “understanding of the meaning of equality.” See *Lawrence v. Texas*, 539 U.S. 558 (2003); see also *Johnson v. Mo. Dep’t of Social Servs.*, 0516-CV09517, 2006 WL 6903173, at \*5 (Mo. Cir. Feb. 17, 2006). Until recently, equal protection under law was not thought to cover a right for same-sex couples to marry, but now our “understanding of the meaning of equality” extends to protect the right of gays and lesbians to marry. *Obergefell v. Hodges* 576 U.S. \_\_\_, 135 S.Ct. 2584 (2015). Similarly, not long ago, laws prohibiting sex discrimination in employment, education and public accommodations were interpreted to not include protection for transgender individuals, but increasingly, as set forth below, they do.

Such “evolving understanding of the meaning of equality” must also inform this Court’s interpretation of Missouri’s Human Rights Act and compel a conclusion that claims of discrimination based on gender identity fall within the Act’s prohibitions of sex discrimination.

Just as our understandings of equality when it comes to sexual orientation have evolved rapidly, so too have our understandings evolved of what constitutes gender-based discrimination. Early rulings found that women failed to state claims of gender inequality under the Equal Protection Clause after being denied the right to practice law, *Bradwell v. Illinois*, 83 U.S. 130 (1873), and the right to vote based on their gender. *Minor v Happersett*, 88 U.S. 162 (1875). It wasn’t until 1971 that the Supreme Court first struck a gender-based distinction as inconsistent with equal protection under law, finding that stereotypes about gender were insufficient to justify differential treatment based on sex.



*Reed v. Reed*, 404 U.S. 71 (1971) (finding a “new appreciation of women’s place has been generated in the United States” but pervasive discrimination will remain unless distinctions based on sex are more ardently scrutinized.) Then, sex-based distinctions could be justified by any “legitimate” government purpose; now, an “exceedingly persuasive” legislative purpose is necessary to justify distinctions based on sex under the Equal Protection Clause. *United States v. Virginia*, 518 U.S. 515 (1996). Courts’ understandings of what constitutes equality under law based on sex evolved as society’s understandings of gender evolved.

It was also once believed that legal prohibitions on discrimination “because of sex” in the workplace applied only to strict binary understandings of male and female based on physical traits, as the majority below did. However, it is now clear that the term “sex” as used in those laws covers more than strict binary notions of male and female but also includes sex stereotyping and gender expression. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250-51 (1989). Indeed, despite that gender expression is not explicitly referenced in Title VII, *Price Waterhouse* made clear that sex stereotyping, including basing decisions on perceptions about how a person expresses their gender, constitutes discrimination “because of sex” within the meaning of that law. *Id.* It is now undisputed that this kind of gender-based bias constitutes sex discrimination within Title VII. *Id.* The court below incorrectly failed to recognize *Price Waterhouse* as expanding the breadth and scope of actionable sex-based discrimination to gender stereotypes. (“*Price Waterhouse* was not a watershed case, but simply confirmed that ‘discrimination on the basis of sex’ means the deprivation of one sex of a right or privilege afforded the other

sex.” *R.M.A.* at \*17.) Indeed, the Missouri Court of Appeals for the Western District recently ruled that the MHRA’s proscription on sex-based discrimination *does* include failure to conform to sex stereotypes. *See Lampley*, No. WD80288 (Mo. App. W.D. Oct. 24, 2017). *See also, Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004) (the "narrow view" of the term "sex" in prior case law denying Title VII protection to transgender employees was "eviscerated" by *Price Waterhouse*; Title VII extends to transgender individuals based on gender stereotyping).

Courts are increasingly acknowledging this evolving understanding of sex-based discrimination, even if lawmakers could not have envisioned this application when they originally passed those laws. In *Oncale v. Sundowner Offshore Service, Inc.*, the Supreme Court found that “male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII. But statutory 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.” 523 U.S. 75, 79 (1998). And this past year, in *Hiveley v. Ivy Tech Community College*, the 7<sup>th</sup> Circuit *en banc*, citing *Oncale*, found the fact that Congress may not have anticipated application of Title VII’s proscriptions on discrimination “because of sex” to gender nonconformity can’t stand in the way of this application. In holding that discrimination based on sexual orientation was covered under Title VII’s prohibitions against discrimination “because of sex,” the court noted that since 1964, Title VII has been understood to cover far more than decision not to hire a woman because she is a woman or a man because he is a man. “The common sense reality that it

is actually impossible to discriminate on the basis of sexual orientation without discriminating on the basis of sex, persuade us that the time has come to overrule our previous cases that have endeavored to find and observe that line.” 853 F.3d 339, 351 (7<sup>th</sup> Cir. *en banc* 2017). The day before this brief was filed, the Second Circuit *en banc*, rejecting the Justice Department’s interpretation, similarly concluded that sexual orientation was covered under Title VII’s protections. *Zarda v. Altitude Express*, No. 15-3775, \*27, 68 (citations omitted) (2<sup>nd</sup> Cir. *en banc* Feb. 26, 2018) (even though Congress had not sought to address gay bias in Title VII, laws “often go beyond the principal evil to cover reasonably comparable evils.”)

Similarly, it was once thought that discrimination based on transgender status did not constitute discrimination “because of sex.” *See, Ulane v. E. Airlines Inc.*, 742 F.2d 1081, 1084-7 (7<sup>th</sup> Cir. 1984) (discrimination against transgender people is not discrimination “because of sex” within the meaning of Title VII; Title VII makes it unlawful for women to be discriminated against because they are women and men because they are men); *Oiler v Winn-Dixie Louisiana, Inc.*, No 00-3114, U.S. Dist LEXIS 17417, at \*28 (E.D. La., Sept. 16, 2002) (transgender woman lacked a claim for discrimination “because of sex” because she was “impersonating” a woman and “disguise[ing]” her sex.)

Like other courts of that era, nearly 35 years ago, the Eighth Circuit found that the meaning of “sex” in Title VII should be given its “traditional definition” within the strict

binary of biological male and female, based on genitalia at birth.<sup>16</sup> *Sommers v. Budget Marketing Inc*, 667 F.2d 748, 750 (8<sup>th</sup> Cir. 1982). We now know that sex and gender are more complex than the binary adopted by the court below.

The First, Sixth, Ninth, and Eleventh Circuits now recognize that discrimination against transgender individuals based on their transgender status is discrimination “because of sex.” Our “evolving understandings of the meaning of equality” dictate that this court interpret the MHRA similarly. *Sommers* reflects outdated and discredited understandings of gender. It is as outmoded as *Bowers* and *Ulane* and should not be considered persuasive in this court’s interpretation of the MHRA’s prohibition of sex discrimination.

Just as with the MHRA, the terms “transgender” and “gender identity” are absent from the language of Title VII and from Title IX, both of which, like the MHRA, prohibit

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<sup>16</sup> Even within now-outdated strict gender binaries, there was no agreement on the definition of one’s sex. *See MT v. JT*, 364 S.2d 1076 (NJ Sup. Ct. 1976) (post-surgical genitalia should determine one’s sex; gender and genitalia can be harmonized through surgery); *but see, In Re Landrach*, 32 Ohio Misc. 2d 6 (Ohio Prob. Ct. 1987) (sex as determined by physical traits at birth controls); *Littleton v. Prange*, 9 S.W.3d 223 (Tx Ct. App. 1999) (a person’s chromosomes, not their genitalia or sex as determined at birth, determine one’s gender).

discrimination “because of sex” in employment and education. Yet, today both provisions are increasingly interpreted to include discrimination based on a person’s gender identity and expression. Federal courts are increasingly finding that discrimination based on gender identity constitutes discrimination “because of sex.” The U.S. District Court for the District of Columbia, in concluding that discrimination against a transgender person constituted discrimination “because of sex” within the meaning of Title VII, explained that just as differential treatment based on a person’s conversion from one religion to another would clearly constitute discrimination “because of religion,” so too does discrimination “because of sex” include differential treatment based on a person’s gender dysphoria transition. *Schroer v. Billington*, 577 F.Supp.2d 293, 306 (D.D.C. 2008) (“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.”).

It is now clear that one’s sex is far more complex than the presence or absence of external genitalia at birth. Courts have made clear that one’s sex includes one’s notion of their gender identity and expression. *See, e.g., Schroer*, 577 F.Supp.2d 293; *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11<sup>th</sup> Cir. 2011) (citation omitted) (“the very acts that define transgender people as transgender are those that contradict stereotypes of gender appropriate appearance and behavior”); *Smith*, 378 F.3d 566. And increasingly, discrimination based on these traits is thus found to constitute discrimination “because of sex.” *Id.* This “evolving understanding of the meaning of equality” is being increasingly

interpreted to apply to transgender individuals seeking equal access to bathroom facilities as in the case at hand. *See infra*.

In the first major test of how state anti-discrimination laws would apply to transgender students, the Colorado Civil Rights Division, which enforces the Colorado Anti-Discrimination Act (Colorado’s version of the MHRA), concluded in 2013 that the Fountain-Fort Carson School District discriminated based on sex in a place of public accommodation against a transgender student, Coy Mathis, when it refused to allow her to use the girls’ bathroom at school. *Mathis v. Fountain-Fort Carson School District* 8, No. P20130034X (Colo. Div. Civ. Rts. June 17, 2013). Drawing on a growing body of research, the ruling stated that, “compartmentalizing a child as a boy or a girl solely based on their visible anatomy, is a simplistic approach to a difficult and complex issue.”<sup>17</sup>

Fourteen states and a large number of school districts around the country have explicitly protected gender-identity based discrimination in schools and created policies explicitly ensuring that transgender students are able to use facilities consistent with their

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<sup>17</sup> Indeed, even if the Blue Springs School District here is doing nothing more than “compartmentalizing a child.... solely based on their visible anatomy,” it is clearly still distinguishing R.M.A. based on sex-based traits, and accordingly, a claim of sex discrimination under the R.M.A. should lie on its face nonetheless.

gender identity.<sup>18</sup> Similar legislation has been introduced in Missouri this year.<sup>19</sup> The fact that Missouri has failed to pass such legislation yet does not mean that transgender students lack protection from gender-based discrimination. Rather, it is all the more compelling that MHRA is interpreted to ensure that students like R.M.A. have access to the state's anti-discrimination laws. Otherwise, they lack legal recourse for gender-based discrimination in public accommodations, despite the law's express application to them.

“It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.” *Bowers v. Hardwick*, 478 U.S. 186, 199 (1986) (Blackmun, J., dissenting). Our evolving understandings of equality make clear that sex and gender consist of more than simple binaries, and courts are increasingly interpreting laws prohibiting sex discrimination to include discrimination based on gender identity and expression. The

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<sup>18</sup> Some Missouri school districts allow transgender students to use facilities consistent with their gender identities. *See, e.g.*, Tate et al., “These schools let transgender students use the bathroom, and here’s what happened,” *Kansas City Star*, June 20, 2016, <http://www.kansascity.com/news/politics-government/article84811367.html#storylink=cpy>

<sup>19</sup> 2018 Mo. Legis. Serv. SB753; 2018 Mo. Legis. Serv. HB1360; 2018 Mo. Legis. Serv. HB1782; 2018 Mo. Legis. Serv. HB2100.

court should likewise interpret the MHRA under this enlightened view and allow R.M.A.’s claim to proceed.

## **II. INTERPRETING THE MISSOURI HUMAN RIGHTS ACT TO INCLUDE DISCRIMINATION BASED ON GENDER IDENTITY IS IN THE PUBLIC INTEREST**

Missouri law has long demonstrated animus, couched in tradition and misguided stereotypes, towards its LGBT citizens. Perpetuating a tradition of animus is never a legitimate state purpose. *See, Romer*, 517 U.S. at 632. R.M.A.’s exclusion from facilities available to other boys is based solely on outdated notions of what constitutes a “boy” and dangerous stereotypes about transgender individuals. The MHRA exists to dispel sex discrimination and sex stereotyping, and thus must give rise to a claim in order to advance its legislative intent of equal protection under law.

The majority’s refusal below to extend the MHRA’s protections to transgender Missourians experiencing gender-based discrimination impermissibly renders transgender Missourians as “strangers to its laws.” *Romer*, 517 U.S. at 636. It denies students like R.M.A. legal protection from discrimination that other students enjoy, based on nothing more than outdated understandings of gender and moral disapproval of their gender couched in unfounded stereotypes about transgender individuals – stereotypes that are increasingly found to constitute actionable discrimination. Under the ruling below, transgender students “are forbidden the safeguards that others enjoy or may seek without constraint,” *Romer*, 517 U.S. at 631. This defies MHRA’s express application to “all



persons” in Missouri and is inconsistent with the promise of equal protection under law upon which Missouri’s Human Rights Act is based.

**A. Transgender People Have Experienced a Long History of  
Discrimination in Missouri.**

Missouri’s lack of explicit reference to transgender individuals in its civil rights laws makes it all the more critical that our Human Rights Act protect against gender-based discrimination faced by its transgender citizens. Transgender individuals “have suffered a history of persecution and discrimination.” *Adkins v. City of New York*, 143 F. Supp.3d 134, 139 (S.D.N.Y. 2015). Historic discrimination against transgender people can be readily seen in housing, employment and public accommodations – particularly within educational systems – producing negative consequences for the health and well-being of our state’s transgender citizens throughout their lives. *See James, et al., The Report of the 2015 U.S. Transgender Survey*, National Center for Transgender Equality (2016), <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf>. This discrimination and exclusion additionally leads to significant health disparities for transgender individuals in Missouri. *See e.g., Winter, et al., The Health Equity Series: Responding to LGBT Health Disparities*, Missouri Foundation For Health (2012), <https://mffh.org/wordpress/wp-content/uploads/2016/04/LGBTHealthEquityReport.pdf>. The small number of transgender individuals in Missouri render them a discrete and insular minority who lack political power to change these laws. Laws like the MHRA exist precisely to protect

discrete and insular minorities like transgender Missourians from discrimination in public accommodations.

Despite a significant legal and cultural evolution in LGBT rights, many legal inequalities persist for Missouri’s transgender citizens, which continue to relegate them and their families to second-class citizenship and impose “a disadvantage,” a “separate status,” and a “stigma” on them. *See Windsor*, 133 S.Ct. at 2693. Missouri’s transgender citizens have suffered a history of invidious discrimination under law and continue to suffer severe disadvantages in the political arena, including outright animus that curtails their ability to politically protect their interests against discrimination.

Despite more than a decade-long effort by organizations like PROMO advocating for equal rights on behalf of the Missouri’s LGBT population, Missouri lawmakers have every year rejected proposed legislation to extend basic protections against discrimination in employment, housing and public accommodations to transgender Missourians.<sup>20</sup>

This would typically trigger heightened scrutiny in a constitutional framework, *see U.S. v. Carolene Prods. Co.*, 304 U.S. 144, 152-53, n.4 (1938) (heightened judicial scrutiny is warranted where prejudice against an insular minority “tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities”), and the public interest here dictates that this court should read the MHRA

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<sup>20</sup> 2017 Mo. Legis. Serv SB338; 2017 Mo. Legis. Serv HB485; 2017 Mo. Legis. Serv HB846.

inclusively. Any other result renders the law inaccessible to Missouri's transgender citizens.

Laws discriminating against transgender people run deep.<sup>21</sup> Transgender people face discrimination in education, in the criminal justice system and in the workplace. They are likely to make less money, more likely to be denied a promotion, and less likely to be hired due to their gender identity. Transgender individuals are more likely to be unemployed or under employed, and are more likely to live in poverty. *See James, et al., 2015 U.S. Transgender Survey, supra.* This study, the largest published survey of the transgender community, revealed that transgender individuals experienced higher rates of discrimination in housing, education and public accommodations, and found that transgender individuals face greater hurdles to accessing health care. *Id.*

Transgender individuals are also more likely to be mistreated by police and in the criminal justice system, and are more likely to be victims of violence and other crimes. *See James, et al., 2015 U.S. Transgender Survey, supra.*; Mallory et al., *Harassment by Law Enforcement Officers in the LGBT Community*, WILLIAMS INSTITUTE, (2015), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Discrimination-and-Harassment-in-Law-Enforcement-March-2015.pdf>.

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<sup>21</sup> For example, cities in Missouri historically had laws criminalizing cross-dressing, enforcing strict binary gender codes. *See, e.g., St. Louis Ord. 5421 (1864)*, which remained on the books until 1986, when it was ruled unconstitutional. *DC & MS v. City of St. Louis*, 795 F.2d 652 (8<sup>th</sup> Cir. 1986).

Violence against transgender people is profound. Human Rights Campaign, *Violence Against the Transgender Community in 2016*, <http://www.hrc.org/resources/violence-against-the-transgender-community-in-2016>. In 2015, at least 21 transgender people were killed in the United States, a record high at the time. *See*, Human Rights Campaign and Trans People of Color Coalition, *Addressing Anti-Transgender Violence*, (2015), <http://hrc-assets.s3-website-us-east-1.amazonaws.com//files/assets/resources/HRC-AntiTransgenderViolence-0519.pdf>. By 2017, at least 25 transgender people were killed in the United States, again, more than any other year on record.<sup>22</sup> The numbers are likely higher still as media, police and even family members sometimes misgender victims, making it even more difficult for advocates to collect reliable data. *See* Human Rights Campaign, *Addressing Anti-Transgender Violence*, *supra*.

Here in Missouri, three of the murders of LGBTQ people across the country in 2015 were in Kansas City, not far from the Blue Springs School District at issue in this case; two were transgender women.<sup>23</sup> In 2017, two of those murders were in Missouri,

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<sup>22</sup> Mogensen, “2017 Was the Deadliest Year For Trans People In At Least a Decade,” *Mother Jones*, Nov. 20, 2017, <https://www.motherjones.com/crime-justice/2017/11/its-2017-and-trans-people-are-dying-violent-deaths-in-record-numbers/>

<sup>23</sup> *See*, Jensen, “3 LGBTQ Homicides of People of Color in Kansas City,” *Huffington Post*, Aug. 28, 2016, [http://www.huffingtonpost.com/randall-jenson/three-lgbtq-homicides-of-\\_b\\_8050754.html](http://www.huffingtonpost.com/randall-jenson/three-lgbtq-homicides-of-_b_8050754.html); *see also*: Ennis, “Victim Number 17: Trans Woman of Color Murdered in Missouri,” *The Advocate*, Aug. 18, 2015,

one adult transwoman in St. Louis, MO, Kiwi Herring,<sup>24</sup> and one 17-year-old transgender teenager in Texas County, MO, Ally Steinfeld.<sup>25</sup>

These events have generated calls that that violence against transgender Missourians is “epidemic” and should be considered “a state of emergency” *See*, Gibson, “Anti-transgender violence must stop,” *Columbia Daily Tribune*, Sept. 15, 2015, [http://www.columbiatribune.com/opinion/letters\\_to\\_the\\_editor/anti-transgender-violence-must-stop/article\\_4b4fadb1-ad0f-5379-a6f3-8fb0bfc7e3d6.html](http://www.columbiatribune.com/opinion/letters_to_the_editor/anti-transgender-violence-must-stop/article_4b4fadb1-ad0f-5379-a6f3-8fb0bfc7e3d6.html). Fears for the safety of transgender Missourians are heightened locally in Kansas City and elsewhere in the wake of the presidential elections. *See*, Dempsey, “KC transgender community fears future following Republican wins on Election Day,” *KSHB Kansas City*, Nov. 18,

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<http://www.advocate.com/transgender/2015/08/18/victim-number-17-trans-woman-color-murdered-missouri>.

<sup>24</sup> Heffernan and Benchaabane, “Vigil honors transgender woman killed by St. Louis police after attack on officer,” *St. Louis Post Dispatch*, Aug. 23, 2017, [http://www.stltoday.com/news/local/crime-and-courts/vigil-honors-transgender-woman-killed-by-st-louis-police-after/article\\_26487868-577e-5123-af80-13f98dd3673e.html](http://www.stltoday.com/news/local/crime-and-courts/vigil-honors-transgender-woman-killed-by-st-louis-police-after/article_26487868-577e-5123-af80-13f98dd3673e.html)

<sup>25</sup> Rehwald, “Following slaying of trans teen: What is deadnaming and why pronouns matter,” *Springfield News-Leader*, Sept. 29, 2017, <https://www.news-leader.com/story/news/crime/2017/09/29/following-slaying-trans-teen-what-deadnaming-and-why-pronouns-matter/712539001/>

2016, <http://www.kshb.com/news/local-news/kc-transgender-community-fears-future-following-republican-wins-on-election-day>.

### **B. Transgender Students in Missouri Face Significant Discrimination in School.**

The 2015 U.S. Transgender Survey found high rates of mistreatment in schools (77%), including verbal harassment (54%), not allowed to dress in a way that fit their gender identity or expression (52%), physical assault (24%), and sexual violence (13%) among transgender students in grades K-12. 17% reported leaving school due to harassment. *See James, et al., 2015 U.S. Transgender Survey, supra.* The GLSEN study found that 90 percent of transgender students have heard derogatory remarks about their gender identity or sexual orientation at school and that 95 percent had heard sexist remarks. Over three-fourths of transgender students have been sexually harassed at school. More than half of transgender students have been physically harassed because of their gender identity and 44 percent reported being assaulted at school. The report found that students from the Midwest are more likely to experience higher levels of discrimination, as are students from small towns and rural areas. *See Greytak et al., Harsh Realities, supra.*

Missouri data is fairly consistent with nationwide findings for transgender students. Using Missouri-specific responses in the 2015 U.S. Transgender Survey, Missouri students also faced high rates of mistreatment in schools (74%), including verbal harassment (50%), physical assault (23%), and sexual violence (13%) among transgender students in grades K-12. Eleven percent reported leaving school due to

harassment. James, et al., *2015 U.S. Transgender Survey: Missouri State Report*, National Center for Transgender Equality (2017),

<http://www.transequality.org/sites/default/files/docs/usts/USTSMOStateReport%281017%29.pdf>. This gender-based discrimination has direct negative outcomes for students.

Almost half of transgender students have missed school because they felt unsafe. *Id.*

Transgender students who experience gender-based harassment have worse grades, lower educational achievements and are less likely to pursue post-secondary education and are at higher risk of suicide. Greytak, et al., *Harsh Realities*, *supra.*, at 27.

According to Gay Lesbian Straight Education Network's 2013 National School Climate Survey, transgender and gender nonconforming students faced more hostility than lesbian, gay or bisexual students. Four in ten said they felt unsafe at school because of their gender expression. About half reported being verbally harassed, and about one in five reported being physically assaulted. Greytak et al., *2013 National School Climate Survey*, *supra.* A majority of students (56.7%) who were harassed or assaulted at school did not report the incident to school officials, most commonly because they doubted that effective intervention would occur or the situation could become worse if reported. *Id.* Over 60 percent of students who did report an incident said that school staff did nothing in response. *Id.* Transgender students in Missouri face significant discrimination in school. GLSEN's School Climate Survey found that Missouri schools were not safe for LGBT students, based on high reports of verbal and physical harassment and lack of comprehensive anti-bullying policies. *Id.*

The issue of bathroom facilities for transgender students impedes equal access to education for transgender students in Missouri, further necessitating coverage under the MHRA. *See*, Grinberg, “Bathroom access for transgender teen divides Missouri town,” *CNN*, Sept. 5, 2015, <http://www.cnn.com/2015/09/03/living/missouri-transgender-teen-feat/>. After controversy erupted in Hillsboro, Missouri, about a transgender girl’s desire to use girls’ facilities, she reportedly dropped out of gym class, reportedly because she did not feel safe in the facilities. *Id.* Transgender students and their families have been outspoken about the harassment they face when attempting to access facilities and the need for protection.<sup>26</sup>

Access to restrooms, facilities, and activities is more than just access. For transgender and gender independent individuals, it relates to their permission to exist in the world. Research published in 2016 by Kristie Seelman found that 60 percent of

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<sup>26</sup> *See, e.g.*, Riley, “Banned from boys restroom, transgender teen lobbies Ozark school for access,” *Springfield News-Leader*, March 6, 2017, <https://www.news-leader.com/story/news/education/2017/03/05/banned-boys-restroom-transgender-teen-lobbies-ozark-school-access/98501776/>; and Delaney, “Only 6 St. Louis-area schools have a clear restroom policy for transgender students,” *St. Louis Post Dispatch*, June 29, 2017, <http://news.stlpublicradio.org/post/only-6-st-louis-area-schools-have-clear-restroom-policy-transgender-students#stream/0>



transgender youth who had been denied access to school bathrooms had attempted suicide, compared to 43 percent among those who had not been denied. Equality for transgender Americans is matter of life and death. *See* Seelman, “Transgender Adults' Access to College Bathrooms and Housing and the Relationship to Suicidality,” *Journal of Homosexuality* 63, 1378-1399 (2016), [https://www.researchgate.net/publication/280026618\\_Transgender\\_Adults%27\\_Access\\_to\\_College\\_Bathrooms\\_and\\_Housing\\_and\\_the\\_Relationship\\_to\\_Suicidality](https://www.researchgate.net/publication/280026618_Transgender_Adults%27_Access_to_College_Bathrooms_and_Housing_and_the_Relationship_to_Suicidality).

**C. Gender-Based Discrimination Denies Transgender Students in Missouri Equal Education Opportunities.**

Students have a right to equal access to educational opportunities regardless of gender. *See* Title IX of the Education Amendments of 1972, 20 USC 1681 et seq., *Virginia*, 518 U.S. at 531. The MHRA similarly protects against sex discrimination in public accommodations, including educational institutions. The majority’s affirmation that R.M.A. be excluded from facilities available to other boys solely due to his gender expression and genitalia is a gender-based action that is not justified by “an exceedingly persuasive justification.” *Id.*

By denying transgender students from accessing facilities consistent with their gender identity, transgender students in the Blue Springs R-IV School District are denied access to the same quality of education as their peers. When transgender students are denied access to locker rooms consistent with their gender identity, they are more likely to avoid participating in sports. When they cannot use the bathroom commensurate with their gender identity, they often avoid going to the bathroom at all. GLSEN’s School

Climate Survey found that over a third of respondents avoided gender-segregated spaces in school because they felt unsafe or uncomfortable (bathrooms: 35.4%, locker rooms: 35.3%). Greytak et al., *2013 School Climate Survey*, *supra*. A significant majority reported avoiding school functions and extracurricular activities (68.1% and 61.2%, respectively) because they felt unsafe or uncomfortable. *Id.* Here too, R.M.A. alleges that he dropped out of sports and gym at school as and suffered emotional distress due to his inability to access facilities consistent with his gender identity. Petition at ¶¶ 39, 41, 45.

According to a 2010 report about transgender participation, best practices, and policies for transgender student participation in sports: “School athletic programs are widely accepted as integral parts of the high school and college experience. The benefits of school athletic participation include many positive effects on physical, social, and emotional well-being. Playing sports can provide student athletes with important lessons about self-discipline, teamwork, success, and failure—as well as the joy and shared excitement that being a member of a sports team can bring. Additionally, participation in high school athletics shows that a student is well-rounded and can improve a student’s chances of acceptance into college. For some students, playing on high school teams leads to future careers in athletics as competitors, coaches, administrators, and athletic trainers. All students, including those who are transgender, deserve access to these benefits.” Griffin, et al, *On the Team*, *supra*, at 6.

Gender-based discrimination in schools has direct consequences for negative outcomes for transgender, non-binary, and gender nonconforming students, denying them equal educational opportunities. According to the School Climate Survey, LGBT students

who experienced victimization because of their gender expression in school were more than three times as likely to have missed school in the past month than their peers (58.6% vs. 18.2%); had lower GPAs; were twice as likely to report that they did not plan to pursue any post-secondary education (e.g., college or trade school; 8.2% vs. 4.2%); and had higher levels of depression and lower levels of self-esteem. Greytak et al., 2013 *School Climate Survey, supra*.

R.M.A.'s claim should be allowed to proceed in the interests of ensuring Missouri's transgender and gender nonconforming students equal access to education.

#### **D. Gender-Based Discrimination Stigmatizes Transgender Students.**

"The Constitution's guarantee of equality must at the very least mean that a bare desire to harm a politically unpopular group cannot justify disparate treatment of that group." *Windsor*, 133 S.Ct. at 2693. Transgender and gender nonconforming students are already highly stigmatized at school. The School Climate Survey found that more than half of students "frequently" or "often" heard negative remarks about their gender expression in school. A third (33.1%) heard negative remarks specifically about transgender people, like "tranny" or "he/she," frequently or often. More than half (55.5%) of students reported hearing negative remarks about gender expression from their teachers or other school staff. Greytak et al., 2013 *School Climate Survey, supra*. The ruling below that discrimination against transgender students is not actionable under Missouri law intended to ensure equal access to public accommodations further stigmatizes these students.

Here, R.M.A. alleges that he is being treated differently than other boys based on his gender identity. Yet he has been denied the opportunity to pursue a claim for discrimination because of sex under the MHRA because of his gender identity. The result is to exclude transgender students - and indeed all transgender Missourians - from the protection of Missouri's human rights law. The decision below excludes transgender boys like R.M.A. but not other boys from protections of the state's laws against gender-based discrimination. This singles out transgender and gender nonconforming youth and renders them strangers to the law. The effect is to validate gender-based discrimination against a population already more likely to face gender-based discrimination than their peers, and effectively exclude transgender and gender non-conforming Missourians from access to public accommodations, including numerous government offices and even the state Capitol. Compellingly, a "necessary consequence" of the exclusion of transgender youth from the protection of the MHRA is to stigmatize transgender students in the eyes of the state, that they are "somehow lesser." See *Obergefell*, 135 S.Ct. at 2600-02. This outcome offends the principle of equality under law on which the MHRA is based. Accordingly, it is in the public interest for R.M.A.'s claim to proceed.

### CONCLUSION

"It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past". *Bowers*, 478 U.S. at 199 (Blackmun, J., dissenting).

Gender-based discrimination is a particular barrier for transgender, non-binary, and gender nonconforming students in Missouri, who face threats to their safety and ability to access education due to sex discrimination in school. Our “evolving understanding of the meaning of equality” makes clear that sex and gender are not simple binaries, but rather part of a broader and complex understanding of gender and self.

This “evolving understanding of the meaning of equality” dictates that transgender students must be included in the MHRA’s protection to effectuate its legislative intent: To eradicate discrimination in the state of Missouri because of sex.

The applicability of the MHRA to claims of gender-based discrimination of transgender students is in the public interest. Shutting out such claims leaves those most vulnerable to sex-based discrimination in school without recourse under law. “A State cannot so deem a class of persons a stranger to its laws.” *Romer*, 517 U.S. at 636. R.M.A.’s claim that he was denied access to facilities used by other boys at school based on his gender expression thus falls within the protections of the MHRA. Accordingly, the majority below erred affirming dismissal of R.M.A.’s claim under the MHRA. This court should reverse and allow R.M.A.’s claim to proceed.

Respectfully Submitted,

**PROMO**

/s/ Denise D. Lieberman  
Denise D. Lieberman MBE #47013  
6047 Waterman Blvd.  
St. Louis, Missouri 63112  
(314) 780-1833

*Counsel for Amicus Curiae*  
**PROMO**

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on the 27<sup>th</sup> Day of February 2018, a true and correct copy of the foregoing was filed electronically with the court and served to counsel via the Missouri Courts' e-filing system.

/s/ Denise D. Lieberman

**CERTIFICATE OF COMPLIANCE**

The undersigned certifies that this brief includes the information required by Rule 55.03 and complies with the requirements contained in Rule 84.06(b). Relying on the word count of Microsoft Word, the undersigned certifies that this brief contains 7,981 words, excluding the cover, table of contents, table of authorities, certificate of service, certificate of compliance and signature block.

/s/ Denise D. Lieberman

