IN THE SUPREME COURT OF MISSOURI

No. SC96683

R.M.A. (A MINOR CHILD), BY HIS NEXT FRIEND: RACHELLE APPLEBERRY,

Appellant,

v.

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

Respondents.

On appeal from the Missouri Court of Appeals

Western Division

Case No. WD80005

BRIEF OF ALLIANCE DEFENDING FREEDOM AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS*

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American Psychological Association, *Answers to Your Questions About Transgender People, Gender Identity and Gender Expression* (3rd ed. 2014), http://www.apa.org/topics/lgbt/transgender.pdf..... 24

Asaf Orr, Esq., et al., National Center for Lesbian Rights, *Schools in Transition: A Guide for Supporting Transgender Students in K-12 Schools* (2015), http://bit.ly/2di0ltr 24

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INTEREST OF *AMICUS CURIAE*[1]

Alliance Defending Freedom (ADF) is an international not-for-profit legal organization providing strategic planning, training, funding, and direct litigation services to protect civil liberties.

ADF has a particular interest in the outcome of the instant case as the appellate decision properly interpreted the term "sex" in accord with its plain meaning when the Legislature enacted the Missouri Human Rights Act (MHRA). A similar question is at issue in cases ADF is currently litigating, including *Students and Parents for Privacy v. United States Department of Education*, No. 1:16-cv-04945, 2016 WL 6134121 (N.D. Ill. October 18, 2016), *Doe v. Boyertown Area School District,*, No. 17-3113 (3d Cir. *appeal docketed* Sept. 28, 2017), and *Maday v. Township High School District 211*, No. 17 CH 15791 (Cook County Circuit Court, Ill. Nov. 30, 2017).[2] In each of these cases, as in *R.M.A.*, professed transgender students of one sex are seeking to use group privacy facilities reserved to the use of the other sex, so as to affirm those students' perception of their gender. This can be done only by transmuting sex—the state of being male or female as grounded in human

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[1] The parties to this case have consented to the filing of this brief.

[2] Gender identity theory is being advanced in other contexts using the same tactic of redefining sex to include gender identity in the relevant law. Hence, ADF represents female inmates, who are incarcerated with male inmates that claim a feminine gender, in *Little v. United States*, No. 7:17-cv-0009 (N.D. Tex. Feb. 3, 2017), and represents a funeral-home owner who was sued by the EEOC for firing a male employee who claimed a feminine gender and refused to comply with the male dress code in *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, -- F.3d--, 2018 WL 1177669 (6th Cir. 2018).

reproduction—into a subjectively perceived continuum of malleable genders ranging from the masculine to the feminine or to something else. Such a result should not obtain in courts, which hold the fundamental judicial duty to interpret the law according to its plain meaning at the time of enactment. ADF argues that such straightforward interpretation is the proper and lawful route to preserve the reasonable expectation of privacy from the opposite sex that is provided by school privacy facilities.

SUMMARY OF ARGUMENT

As a threshold matter, we respectfully submit that much of the confusion on this issue is driven by conflating two very different concepts: sex and gender. To avoid that pitfall, we will use "sex" as referring to being either male or female as grounded in reproductive biology—sex is binary, fixed at conception, and objectively verifiable. "Gender" is used in the sense that gender identity advocates use it: a malleable, subjectively discerned continuum of genders that range from masculine to feminine to something else. Although gender identity advocates will refer to "male" or "female" genders, we use the terms masculine and feminine gender to avoid conflating sex with gender.

The court below properly dismissed R.M.A.'s complaint because the Missouri Human Rights Act categorically protects sex but does not categorically protect gender. That holding fully comports with Missouri law recognizing a fundamental right to use public restrooms designated for the use of one's own sex. By dismissing the legally unfounded claim, it protected the Respondent District's interest in protecting the bodily privacy of all of its students. In contrast, R.M.A. is advancing a different interest, which is to obligate the government to affirm R.M.A.'s claimed gender. Such is outside the role of laws like the MHRA which are aimed at eliminating sex-based invidious discrimination—not redefining what sex is.

Indeed, these contrasting legal interests are evident in every similar case of which ADF is aware: proponents of gender identity theory see sex-specific privacy facilities as a tool to affirm a student's perceived gender.[3] Against that, privacy defenders would preserve

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[3] This affirmation interest is evidenced in the Supplemental Declaration of Ashton Whitaker at 1 ¶ 4 and at 3 ¶ 11, *Whitaker v. Kenosha Unified School District No. 1 Board of Education*, 858 F.3d. 1034 (7th Cir. 2017) (No. 16-3522), ECF No. 16-2; Declaration of Ashton Whitaker at 3 ¶ 11 and at 4 ¶ 18, *Whitaker v. Kenosha Unified School District No. 1 Board of Education*, No. 2:16-cv-00943, 2016 WL 5239829 (E.D. Wis. Sept. 22, 2016), ECF No. 10-1; Declaration of Parent A in Support of Motion to Intervene at 4 ¶12 and at 6 ¶ 19, *Students and Parents for Privacy v. United States Department of Education*, No. 1:16-cv-04945, 2016 WL 6134121 (N.D. Ill. Oct. 18, 2016), ECF No. 32-1; Declaration of Parent B in Support of Motion to Intervene at 3 ¶ 8, at 4 ¶ 12, at 5 ¶ 17, and at 6 ¶ 21, *Students and Parents for Privacy v. United States Department of Education*, No. 1:16-cv-04945, 2016 WL 6134121 (N.D. Ill. Oct. 18, 2016), ECF No. 32-2; Declaration of Parent C in Support of Motion to Intervene at 2 ¶ 6, at 3 ¶ 10, and at 4 ¶ 12, *Students and Parents for Privacy v. United States Department of Education*, No. 1:16-cv-04945, 2016 WL 6134121 (N.D. Ill. Oct. 18, 2016), ECF No. 32-3; Complaint-in-Intervention at 10-11 ¶ 31, *Board of Education of the Highland Local School District v. United States Department of Education*, 208 F. Supp. 3d 850, No. 2:16-cv-00524 (S.D. Ohio 2016), ECF No. 15-1; Declaration of Proposed Intervenor Aidan DeStefano in Support of Motion for Leave to Intervene at ¶¶ 11, 13, 17, 18, 19, 20, *Doe v. Boyertown Area School District*, No. 5:17-cv-01249, 2017 WL 3675418 (E.D. Pa. Aug. 25, 2017), ECF No. 7-3; and in Affidavit of Nova Maday in Support of Plaintiff's Motion for Temporary Restraining Order or

the function of sex-specific privacy facilities, which is to provide a reasonable expectation of privacy from the opposite sex when one is disrobing or attending to personal hygiene.

In broad outline, there are three actors in this and similar cases that are being litigated in courts around the nation: (1) a local school or school district; (2) a few students who seek access to sex-specific privacy facilities as a way of affirming a claimed gender that is discordant from their sex; and (3) the vast majority of students who rely upon single-sex privacy facilities so as to have privacy from the opposite sex when they change clothes, use the restroom, or for female students, attend to feminine hygiene. While the precise role of each actor may vary from case to case, the core issues and arguments are largely the same.

First, the school districts. In the instant case, Blue Springs R-IV School District is standing by its policy of providing sex-separated group facilities to its students, so as to preserve their reasonable expectation of privacy from the opposite sex. Resp'ts Br. at 26, *R.M.A. v. Blue Springs R-IV School District*, No. WD80005 (Mo.App.W.D. July 18, 2017). Others, such as the defendant school districts in *Students and Parents for Privacy, Joel Doe*, and the *Maday* cases, for various reasons[4] implemented policies that authorize

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Preliminary Injunction, *Maday v. Township High School District 211*, No. 17 CH 15791 (Cook County Circuit Court, Ill. Nov. 30, 2017). While all affiants assert an interest in using opposite-sex privacy facilities to affirm their claimed genders, none assert that they are using privacy facilities for the purpose of obtaining privacy from the opposite sex.

[4] One key reason was the federal government's short-lived effort to impose gender identity ideology via Department of Education "guidance" to schools receiving federal education funds. That guidance claimed that "sex" under Title IX included "gender identity," and

students of one sex to access the other sex's privacy facilities, so as to affirm those students whose claimed genders differ from their sex. The lawsuits arise in various ways: Blue Springs was sued by a professed transgender student seeking gender affirmation, while in the ADF cases, students and their parents sued schools that enforce gender-affirmation policies, seeking to preserve students' reasonable expectation of privacy from the opposite sex within group privacy facilities.

Then there are a handful of students who claim a gender discordant with their sex and either initiated lawsuits or intervened (or sought to intervene) in ongoing lawsuits to assert their interests. In any event, all such students claim a gender that is discordant with

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threatened schools resisting that novel interpretation with loss of federal education funds. None of the DOE guidance was created via notice-and-comment rulemaking, and within months the DOE rescinded its misleading guidance and eschewed further reliance on the so-called guidance. Further, the DOE subsequently terminated some of its then-active enforcement actions seeking to compel schools to admit students to sex-specific privacy facilities based upon gender identity rather than sex. *See* U.S. Dep't of Justice, Civil Rights Division, and U.S. Dep't of Educ., Office for Civil Rights, *Dear Colleague Letter*, Feb. 22, 2017 (withdrawing Title IX guidance on transgender students). More recently, the DOE clarified that it had no jurisdiction over gender identity claims to accessing bathrooms, noting that Title IX protects only sex and not gender identity. *See* Moriah Balingit, *Education Department no longer investigating transgender bathroom complaints*, Wash. Post, Feb. 12, 2018, http://wapo.st/2pbjCVf.

their sex, and each insists that their respective schools must affirm their claimed gender by authorizing them to use opposite-sex privacy facilities.[5]

In all cases involving school privacy facilities of which ADF attorneys are aware, at the time professed transgender students sought legal relief they retained the genitalia of their natal sex, as appears to be the case with R.M.A. Op. ("R.M.A. Op.") at 3, 15, *R.M.A. v. Blue Springs R-IV School District*, No. WD80005 (Mo.App.W.D. July 18, 2017). In light of this, schools (including Respondents Blue Springs) which preserved sex-specific privacy facilities have affirmatively accommodated professed transgender students' privacy needs by providing single user facilities for such activities as changing clothes, showering, and personal hygiene.

Finally, there are all the other young male and female students attending the affected schools. These students hold—as all humans do—a right to bodily privacy that is implicated when they are required to be exposed amid the opposite sex within privacy facilities as a result of government action. But schools that enforce gender affirmation policies necessarily intermingle anatomical males with anatomical females within formerly single-sex privacy facilities, thus violating all students' reasonable expectation of privacy from the opposite sex.

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[5] We note that schools with gender-affirming policies often provide an array of services to affirm a student's discordant gender such as the use of desired name and pronouns, changing school records to reflect gender in lieu of sex, providing support teams, and allowing participation on sports teams based on gender. The ADF cases do not challenge such activities but focus solely on the adverse impact on all students' privacy and the resulting legal violations.

When schools preserve single-sex facilities, then every student benefits from having their reasonable expectation of privacy from the opposite sex in a restroom or locker room protected, and compassionate solutions may be extended on a case by case basis to those who are uncomfortable using a facility with other persons in their same sex-specific facility. Additionally, all students, whether they profess to be transgender or not, may access the facility designated for their sex. This provision of sex-specific group facilities comports precisely with Missouri law, and the dismissal of the case below should be affirmed by this honorable Court.

ARGUMENT

The MHRA states:

> 2. It is an unlawful discriminatory practice for any person, directly or indirectly, to refuse, withhold from or deny any other person, or to attempt to refuse, withhold from or deny any other person, any of the accommodations, advantages, facilities, services, or privileges made available in any place of public accommodation, as defined in section 213.010 and this section, or to segregate or discriminate against any such person in the use thereof because of race, color, religion, national origin, sex, ancestry, or disability.

§ 213.065, RSMo. (2016).[6]

The drafters of the MHRA did not state the obvious—that separating privacy facilities on the basis of sex would not violate the MHRA. After all, the point is well-settled in law, with even the United States Supreme Court recognizing that while it may be inappropriate to have a single-sex state military academy, it remains entirely appropriate to separate the sexes when it comes to living facilities: "Admitting women to [Virginia Military Institute] would

[6] In 2017 this section was slightly amended to read "because of race, color..." in lieu of its prior language, "on the grounds of race, color...," which is an immaterial change in respect to interpreting "sex." Unless noted, all references to RSMo. are to current versions.

undoubtedly require alterations necessary to afford members of each sex privacy from the other sex in living arrangements, and to adjust aspects of the physical training programs." *United States v. Virginia*, 518 U.S. 515, 550 n.19 (1996). As the Court explained, "[p]hysical differences between men and women, however, are enduring: '[T]he two sexes are not fungible . . . .'" *Id*. at 533 (quoting *Ballard v. United States*, 329 U.S. 187, 193 (1946)).

Missouri courts have treated access to privacy facilities in close alignment with the *VMI* standard. This Court recognized that using a public restroom is a fundamental right. *State v. Beine*, 162 S.W.3d 483, 487 (Mo. *banc* 2005), *as modified on denial of reh'g* (May 31, 2005). And that right is properly circumscribed when facilities are restricted to the use of one sex, being limited to "a license to use only the facility designated for one's [sex]." *State v. Girardier*, 484 S.W.3d 356, 361 (Mo.App.E.D. 2015).[7]

With these clear legal standards in mind, analyzing the dissenting opinion in this case illustrates why dismissal was proper. Consider this key passage in the dissent:

> Respondents denied RMA access to restrooms and locker rooms because he has female reproductive organs and structures. Thus, *but for* RMA's sexual anatomy, the alleged discrimination would not have occurred. When asked, "If RMA was denied access to public accommodations based on his sexual anatomy, how is that not discrimination based on sex?" *Respondents conceded that the conduct was based on sex* but countered that "it's not unlawful." However, unlawfulness addresses whether there was discrimination, i.e., an unfair practice, not whether the alleged discrimination was based on sex. In short, Respondents conflate conduct with motivation.

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[7] Although the *Girardier* court used "gender" here, in footnote 2 it pointed to federal workplace sanitation regulations that mandated sex-separated group restrooms and washrooms and noted that such sex-separated facilities were the overwhelming norm among the states. *Girardier*, 484 S.W.3d at 361. Thus, the *Girardier* panel no doubt meant "sex" when it said "gender."

Dissenting Op. ("Dis. Op.") at 2, *R.M.A. v. Blue Springs R-IV School District*, No. WD 80005 (Mo.App.W.D. July 18, 2017) (Gabbert, J., dissenting).

Although the dissent correctly notes that the pleaded facts are accepted as true and construed favorably in respect to the plaintiff when reviewing a motion to dismiss, it omits a key element: the plaintiff must "invoke principles of substantive law which may entitle the plaintiff to relief." *Asaro v. Cardinal Glennon Mem'l Hosp.*, 799 S.W.2d 595, 597 (Mo. *banc* 1990) (citing *Shapiro v. Columbia Union Nat'l Bank and Trust Co.*, 576 S.W.2d 310, 312 (Mo. *banc* 1978)). Thus, "[w]hen the defendant's actions are within a category not generally considered actionable," then such "specific facts on which liability is based must be pleaded." *Adolphsen v. Hallmark Cards, Inc.*, 907 S.W.2d 333 (Mo.App.W.D. 2015)

Thus, when Respondents answered the question, "If RMA was denied access to public accommodations based on his sexual anatomy, how is that not discrimination based on sex?" by saying that "the conduct was based on sex" but that "it's not unlawful," contra the dissent's view, they were not conceding anything. Because there is not generally liability for limiting entry to sex-specific facilities, the facts pled did not invoke any substantive law which may entitle the plaintiff to relief as required by *Asaro.*

Thus, the appellate court was doubly correct in dismissing the action with prejudice—first because sex means the objective, binary status of being male or female as explained in *Pittman v. Cook Paper Recycling Corp.*, 478 S.W.3d 479, 481 (Mo.App.W.D. 2015), and not the very different concept of the gender continuum. And second, because the substantive law only extends a license for entry to the sex-specific privacy facilities of one's own sex, and such access does not turn on a user perceiving himself or herself to be at a given point on a continuum of genders.

This analysis is entirely consistent with a motion to dismiss under Missouri's fact pleading procedure, in which such motions have more "bite" than motions to dismiss under the federal notice pleading system. *ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp*., 854 S.W.2d 371, 379 (Mo. *banc* 1993). More precisely, whereas the "federal courts rely on *summary judgment* procedures to dispose of baseless claims, . . . such continues to be the role of *motions to dismiss* in Missouri." *Id.* at 380 (internal citation omitted).

Note also that the dissent erred by incorrectly characterizing the access that was denied to R.M.A.: "Respondents denied RMA access to restrooms and locker rooms because he has female reproductive organs and structures." Dis. Op. at 2. Were this true, then R.M.A. would have had a winning constitutional claim for being denied access to public restrooms under *Beine*. But the access denial was not to restrooms and locker rooms generally, but solely for the male facilities. R.M.A. Op. at 3. Thus, R.M.A.'s claim squarely fails as a matter of law under *Girardier's* limited license doctrine.

The *Girardier* doctrine is important because it protects the bodily privacy rights of all persons, including all Blue Springs students, by preserving the reasonable expectation of privacy from exposure to the opposite sex in locker rooms and restrooms. And it ensures that Missouri law is consistent with federal law permitting federal funding recipients to "provide separate toilet, locker room, and shower facilities on the basis of sex" so long as "such facilities provided for students of one sex [are] comparable to such facilities provided for students of the other sex." 34 C.F.R. § 106.33.[8]

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[8] Although permissively phrased, 34 C.F.R. §106.33 issued to mitigate early concerns about bodily privacy if sex nondiscrimination was to be taken so literally as to obligate schools to have unisex restrooms. The statute and regulation complement one another,

In contrast, the interest claimed by professed transgender students directly contradicts *Girardier*: their gender-affirmation interest is effected only when the sexes are officially intermingled in the very spaces that are reserved to protect the privacy of girls from boys and boys from girls.

What is obvious from all this is that this case turns on straightforward statutory interpretation: what did sex mean when the MHRA was enacted, and it is to that question we turn.

I. In 1986, sex was objectively defined by human reproductive nature.

When a statutory term is undefined—as is the case for "sex" in the MHRA—then it is appropriate to seek that term's plain meaning from dictionaries. *State v. Moore*, 303 S.W.3d 515, 520 (Mo. *banc* 2010). The meaning is to be discerned as of the time the law was enacted, *Sermchief v. Gonzales*, 660 S.W.2d 683, 688-89 (Mo. *banc* 1983), and it is not a court's "province to question the wisdom, social desirability or economic policy underlying a statute as these are matters for the legislature's determination." *Winston v. Reorganized Sch. Dist. R-2, Lawrence Cty., Miller*, 636 S.W.2d 324, 327 (Mo. *banc* 1982).

So, what is sex? A person's sex is determined at conception[9] and may be ascertained at or before birth, being evidenced by objective indicators such as gonads, chromosomes, and

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barring invidious sex discrimination while permitting rational distinctions between the sexes to protect bodily privacy, as exemplified in the *VMI* decision.

[9] Scott F. Gilbert, *Developmental Biology* (6th Ed. 2000), https://www.ncbi.nlm.nih.gov/books/NBK9967/.

genitalia. *See* Am. Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* 451 (5th ed. 2013) (Sex "refer[s] to the biological indicators of male and female (understood in the context of reproductive capacity), such as in sex chromosomes, gonads, sex hormones, and nonambiguous internal and external genitalia."). While various species reproduce in different ways, humans reproduce sexually, which is "[a] form of reproduction that involves the fusion of two reproductive cells (gametes) in the process of fertilization. Normally, especially in animals, it requires two parents, one male and the other female." *Oxford Dictionary of Biology* (7th ed. 2015). "Male" is further defined as "an individual organism whose reproductive organs produce only male gametes," *id.*, and "female" is "an individual organism whose reproductive organs produce only female gametes." *Id.* Thus, to be of one sex or the other is defined by one's role in reproduction: male and female reproductive tracts together form a whole reproductive system.[10]

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[10] Gender identity advocates often cloud the question of interpreting "sex" by pointing to intersex conditions. But such conditions are rare, objectively diagnosable disorders of normal sexual development, and are quite unlike a theory of subjectively perceived continuum of genders suggested by gender identity theory advocates. Two examples of intersex conditions are 5 alpha reductase deficiency which is so rare that its incidence level is unknown, and androgen insensitivity syndrome which affects 2-5 persons per 100,000 people. *See* U.S. National Library of Medicine, http://bit.ly/2jgUBHa (explaining 5 alpha reductase deficiency) and http://bit.ly/2jBgCiH (explaining androgen insensitivity syndrome). Similarly, a condition known as Klinefelter's syndrome is caused by an abnormal XXY chromosome complement, and those who suffer it are male because the Y chromosome is present. U.S. National Library of Medicine, http://bit.ly/2kdNley; U.S.

These scientific facts—which we respectfully submit were true at all times relevant to this lawsuit (and long before)—are consistently reflected in dictionaries contemporaneous with the enactment of the MHRA in 1986, and of its predecessor statute, the Fair Employment Practices Act (enacted 1961) which was amended to prohibit sex discrimination in 1965. *Self v. Midwest Orthopedics Foot & Ankle, P.C.*, 272 S.W.3d 364, 368 (Mo.App.W.D. 2008).

Fortunately, federal courts interpreting "sex" in Title IX have collected contemporaneous dictionary definitions, and those dictionaries consistently define sex as being grounded in human reproductive nature:

> American Heritage Dictionary 1187 (1976) ("The property or quality by which organisms are classified according to their reproductive functions."); Webster's Third New International Dictionary 2081 (1971) ("The sum of the morphological, physiological, and behavioral peculiarities of living beings that subserves biparental reproduction with its concomitant genetic segregation and recombination which underlie most evolutionary change ..."); 9 Oxford English Dictionary 578 (1961) ("The sum of those differences in the structure and function of the reproductive organs on the ground of which beings are distinguished as male and female, and of the other physiological differences consequent on these.").

Franciscan All., Inc. v. Burwell, 227 F. Supp. 3d 660, 688 n.24 (N.D. Tex. 2016) (issuing currently effective nationwide injunction against interpreting 42 U.S.C. § 18116—the nondiscrimination provision of the Affordable Care Act, which incorporates Title IX's prohibition against sex discrimination—to include gender identity). These definitions

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National Library of Medicine, http://bit.ly/2jgWkwg. These objectively diagnosable disorders are not at issue in this case, and do not undermine the desirability of using objective criteria of sex, rather than subjective criteria, to provide privacy to students in privacy facilities.

firmly ground "sex" in our reproductive nature, and the *Pittman* court's analysis precisely tracks these definitions: "Indeed, the first definition of 'sex' provided by Webster's Third New International Dictionary is 'one of the two divisions of human beings respectively designated male or female[.]' Webster's Third New International Dictionary 2081 (Unabridged 1993)." *Pittman*, 478 S.W.3d at 482.

II. The differences between male and female merit privacy protections in restrooms and locker rooms.

These obvious, objective, and concrete differences between males and females lead to legal rights—specifically, the right to bodily privacy. Bodily privacy rights are evidenced through many areas of law. For example, females "using a women's restroom expect[] a certain degree of privacy from . . . members of the opposite sex." *State v. Lawson*, 340 P.3d 979, 982 (Wash. Ct. App. 2014). Similarly, teenagers are "embarrass[ed] . . . when a member of the opposite sex intrudes upon them in the lavatory." *St. John's Home for Children v. W. Va. Human Rights Comm'n*, 375 S.E.2d 769, 771 (W. Va. 1988). Allowing opposite-sex persons to view adolescents in intimate situations, such as showering, risks their "permanent emotional impairment" under the mere "guise of equality." *City of Phila. v. Pa. Human Relations Comm'n*, 300 A.2d 97, 103 (Pa. Commw. Ct. 1973).

These privacy interests are why a girls' locker room has always been "a place that by definition is to be used exclusively by girls and where males are not allowed." *People v. Grunau*, No. H015871, 2009 WL 5149857, at *3 (Cal. Ct. App. Dec. 29, 2009). As the Kentucky Supreme Court observed, "there is no mixing of the sexes" in school locker rooms and restrooms. *Hendricks v. Commw.*, 865 S.W.2d 332, 336 (Ky. 1993); *see also McLain v. Bd. of Educ. of Georgetown Cmty. Unit Sch. Dist. No. 3 of Vermilion Cty.*, 384 N.E.2d 540, 542 (Ill. App. Ct. 1978) (refusing to place male teacher as overseer of school girls' locker

room). Obviously, the right is reciprocal—what holds true for placing a male in girls' privacy facilities is no less true for placing a female in boys' privacy facilities. It is this privacy interest that the *Girardier* doctrine protects, and protecting these privacy interests must be perpetuated.

III. Sex and gender are not "reasonably comparable," making comparisons to *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) and *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998) deeply flawed, and contrary to Missouri law.

As the appellate court noted, R.M.A. relied heavily on arguments from *Price Waterhouse* to argue that the case created a sex stereotyping claim which would sweep gender identity into "sex" under Title VII and argued that holding should be imported to Missouri law. R.M.A. Op. at 16-17. The lower court correctly rejected the notion that *Price Waterhouse* was a "watershed case," but rather held that sex stereotyping may serve as evidence of sex discrimination. *Id.* at 17.

The appellate court was spot-on in that analysis, as *Price Waterhouse* was a case that dealt with evidentiary burdens. The United States Supreme Court made clear that the holding in *Price Waterhouse* dealt with evidence, and did not expand "sex" into uncharted territory:

> [W]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . . *Price Waterhouse* garnered five votes for a single rationale: Justice White agreed with the plurality as to the motivating-factor test, . . . he disagreed only as to the type of evidence an employer was required to submit to prove that the same result would have occurred absent the unlawful motivation. Taking the plurality to demand objective evidence, he wrote separately to express his view that an employer's credible testimony could suffice . . . . Because Justice White provided a fifth vote for the rationale explaining the result of the *Price Waterhouse* decision, . . . his concurrence is properly understood as controlling, and he, like the plurality, did not require the introduction of direct evidence.

Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 188–89 (2009) (internal quotations and citations omitted).

Note that the conclusion in *Gross*—that direct evidence of sex discrimination need not be entered—dovetails precisely with the R.M.A. appellate decision, as sex stereotyping is indirect evidence of sex discrimination and thus would be admissible under *Price Waterhouse*.

Justice Kennedy reinforced that *Price Waterhouse* was a case dealing with evidence and procedure when he carefully noted, "I think it important to stress that Title VII creates no independent cause of action for sex stereotyping. Evidence of use by decision makers of sex stereotypes is, of course, quite relevant to the question of discriminatory intent. The ultimate question, however, is whether discrimination caused the plaintiff's harm." *Price Waterhouse*, 490 U.S. at 294 (Kennedy, J, dissenting, joined by Rehnquist, CJ and Scalia, J).

Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75 (1998), comes into play only because gender identity advocates consistently try to buttress their misuse of *Price Waterhouse* to redefine sex by quoting a snippet from the case: "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils . . . ." *Oncale*, 523 U.S. at 79. But it cannot be seriously maintained that sex is "reasonably comparable" to gender in the context of sex nondiscrimination law. Unlike sex (which is binary, fixed, objectively discerned, and rooted in human reproduction), gender identity is a subjectively determined and malleable continuum ranging from masculine to feminine to something else:

> Other categories of transgender people include androgynous, multigendered, gender nonconforming, third gender, and two-spirit people. Exact definitions of these terms vary from person to person and may change over time but often include a sense of blending or alternating genders. Some people who use these terms to describe themselves see traditional, binary concepts of gender as restrictive.

Am. Psychological Ass'n, *Answers to Your Questions About Transgender People, Gender Identity and Gender Expression* 2 (3rd ed. 2014), http://www.apa.org/topics/lgbt/transgender.pdf; *see also* Asaf Orr, Esq., et al., National Center for Lesbian Rights,, *Schools in Transition: A Guide for Supporting Transgender Students in K-12 Schools* (2015) at 5 (describing gender identity as falling on a "gender spectrum") and 7 (defining "gender identity" as "a personal, deeply-felt sense of being male, female, both or neither"), http://bit.ly/2di0ltr (last visited March 22, 2018), and Randi Ettner, et al., *Principles of Transgender Medicine and Surgery* 43 (Routledge 2016) ("Gender identity can be conceptualized as a continuum, a mobius, or patchwork." (internal citations omitted)).

While the foregoing describes the conceptual framework of gender identity, it is playing out on campus in the cases ADF is litigating. The non-binary, malleable nature of gender is evidenced in *Students and Parents for Privacy*, where one student was born female, but then identified as "gender queer" before transitioning again to present "in a masculine manner." Decl. of Parent C in Supp. of Mot. to Intervene at 2 ¶ 4, *Students and Parents for Privacy v. U.S. Dep't of Educ.*, No. 1:16-cv-04945, 2016 WL 6134121 (N.D. Ill. Oct. 18, 2016), ECF No. 32-3.

Not only does gender differ from sex because it is malleable, non-binary, and subjective, but it is divorced from human reproductive nature. This came home in one colloquy in another ADF case, where the court was pressing the attorney representing a fifth-grade boy—who claimed a feminine gender—to admit what the record unequivocally demonstrated: that he was still anatomically male. The student's counsel evasively responded that it was "inappropriate to label any part of [the student's] body as male." *See* Amicus Curiae Br. of Alliance Defending Freedom in Supp. of Defs.-Appellants at Ex. 3, *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ*., 858 F.3d 1034 (7th Cir. 2017), ECF 31-4 (Transcript excerpt). That statement flatly rejects the male and female reproductive tracts as being definitional, instead relegating them to mere sex stereotypes. But if the primary sex characteristic does not define what male or female is, then how can secondary sex characteristics such as an Adam's apple, facial hair, or lactating breasts be considered to be masculine or feminine?

By showing that sex and gender are not reasonably comparable, it also demonstrates that those federal cases which have misread sex to include gender are in open conflict with the Missouri law as established in the plain text of the MHRA, in *Pittman's* straightforward and principled reading of "sex," and in the *Girardier* doctrine. And while the MHRA parallels similar federal nondiscrimination law in many ways, Missouri courts properly reject federal authorities when they conflict with the plain meaning of a Missouri law. *Tisch v. DST Sys., Inc*., 368 S.W.3d 245, 252 n.4 (Mo.App.W.D. 2012). Plainly, conflict is writ large when sex encounters gender in these cases.

CONCLUSION

Our private reproductive body parts engender privacy issues in these government-controlled privacy facilities where the right to bodily privacy should be protected by the school officials (who, standing *in loco parentis*, have a duty to protect that privacy). But injecting gender identity into sex ineluctably violates those privacy rights by intermingling adolescent male and female students in the very spaces that are meant to protect their privacy.

Certainly, those students who do struggle with discordant gender identities merit compassion and their safety and privacy must be protected. Schools do well to provide individualized privacy facilities to this end.

Yet when it comes to the meaning of "sex" in Missouri law, it means to be male or female as defined by human reproductive nature. This is not a question of interpreting the term "sex" broadly or narrowly, but accurately. If R.M.A. is to rewrite the term to mean something else, that is for the legislative branch to consider, not for the courts to command. Amicus thus urges this honorable Court to affirm the decision below, and thereby secure the privacy of all school children across Missouri.

[*signatures on next page*]

Respectfully submitted this 26th day of March, 2018,

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CERTIFICATE OF COMPLIANCE

Pursuant to Mo. R. Civ. P. 84.06(c), I hereby certify that the foregoing document includes the information required by Rule 55.03, complies with the limitations contained in Rule 84.06(b), and contains 6,298 words, as calculated by Microsoft Word 2013, excluding the parts of the brief exempted by Rule 84.06(b).

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CERTIFICATE OF SERVICE

I certify that on March 26, 2018, I served the foregoing, along with all exhibits and attachments, by filing it through the Court's e- filing system, which will automatically transmit notice to the following case participants:

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