SC96828

IN THE SUPREME COURT OF MISSOURI

HAROLD LAMPLEY AND RENE FROST,

Appellants,

v.

MISSOURI COMMISSION ON HUMAN RIGHTS
AND ALISA WARREN, EXECUTIVE DIRECTOR,

Respondents.

From the Circuit Court of Cole County, Missouri
The Honorable Patricia S. Joyce, Judge

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QUESTION PRESENTED

The Missouri Human Rights Act prohibits an employer from taking adverse employment acts "because of the race, color, religion, national origin, sex, ancestry, age or disability" of an employee. RSMo §§ 213.010, 213.055; A11, A16.

The questions presented in this appeal are

1. Whether the Act prohibits sexual-orientation discrimination.

2. Whether the Act prohibits an employer from discriminating against an employee because of sex stereotypes, such that the Act prohibits as sex discrimination any discrimination because of an employee's sexual-orientation.

3. Whether an associational or retaliation claim may proceed where the charge of discrimination alleges no conduct that the Act covers.

INTRODUCTION

The Missouri Human Rights Act prohibits employers from engaging in adverse acts "because of the race, color, religion, national origin, sex, ancestry, age or disability" of any employee. RSMo §§ 213.010, 213.055; A11, A16. The Legislature has not included the term "sexual orientation" in this list of protected characteristics. Even though many laws across the country prohibit discrimination because of a person's sexual orientation, the Missouri General Assembly has rejected more than forty attempts in recent years to add "sexual orientation" to the Missouri Human Rights Act. This policy decision lies within the Legislature's constitutional prerogative.

Moreover, since the Legislature passed the Act in 1965, the courts and the public have understood that the Act prohibits discrimination because of a person's sex, not sexual orientation. Courts interpret laws to have the plain and ordinary meaning of the words when the Legislature passed the law. The plain, ordinary meaning of a person's sex differs from the plain, ordinary meaning of a person's sexual-orientation. Sex refers to whether a person is physiologically male or female; sexual orientation refers to whether a person is primarily attracted to males or females. *Pittman v. Cook Paper Recycling Corp.*, 478 S.W.3d 479, 481 (Mo. App. W.D. 2015). The term sex means a person's physiological status as male or female—not a person's sexual orientation, gender-related attributes, gender identity, or failure to conform

to sex stereotypes. *R.M.A. by Appleberry v. Blue Springs R-IV Sch. District*, No. WD 80005, 2017 WL 3026757 at *4–5, *8 & nn. 6, 11–12 (Mo. App. W.D. July 18, 2017). This Court has never interpreted the Act's sex discrimination provision to create any liability for an employer who takes actions based on an employee's failure to conform to sex stereotypes. This Court should not now read into the Act what the legislature refused to enact.

This Court should also reject Mr. Lampley's attempt to bootstrap a sexual orientation claim through the prism of "sex stereotyping." Federal courts have rejected that attempt, as well. And sex stereotyping is not an independent claim in federal courts. Behaving in a way that deviates from a sex stereotype is merely *evidence* that an employer treated an employee worse *because* of sex. But where no members of one sex have been treated worse than members of the other sex, evidence that a person failed to behave in conformity with sex stereotypes lacks relevance.

Mr. Lampley never submitted evidence of sex stereotyping, but even if he had, it would bear no relevance. In conclusory fashion, Mr. Lampley alleges that his supervisors harassed him because of his sex. Although Mr. Lampley labels his claim as sex discrimination, he does not claim or allege any facts showing that his employer treated men worse than women. In fact, Mr. Lampley does not claim that he failed to behave in any stereotypically male or female way. He alleges only that he is gay and that his supervisor did

not harass non-gay coworkers. LF072, LF074. This case thus presents a claim of sexual-orientation discrimination, not sex discrimination, so even if this Court recognized sex-stereotyping theories for the first time, sex-stereotyping evidence lacks relevance.

Likewise, because the Act does not prohibit sexual-orientation discrimination, it does not prohibit retaliation against those who complain of sexual-orientation discrimination or prohibit discrimination against those who associate with a person harassed because of sexual orientation. The Act provides association or retaliation liability only if the charge alleges association with or retaliation for conduct that the Act covers.

The State of Missouri condemns mistreatment or harassment of any employee, and it provides for grievance procedures to remedy abuse of employees. It also provides victims of harassment with tort, civil, and criminal remedies. But Mr. Lampley is not challenging the adequacy of these remedies. He is instead asking this Court to inject language into the Act language the General Assembly never included.

STATEMENT OF FACTS

I. Factual Background.

A. Mr. Lampley's supervisors allegedly harassed him for being gay and for complaining about being harassed.

In his charge of discrimination filed before the Commission, Harold Lampley alleged that his employer the Missouri Department of Social Services Child Support Division harassed him because of his sexual orientation and then retaliated against him for complaining about its harassment.

But instead of viewing this harassment as discrimination because of Mr. Lampley's sexual orientation, Mr. Lampley claimed that this alleged harassment was sex discrimination. LF071, ¶2; LF073, ¶2. In his charge of discrimination and retaliation under RSMo §§ 213.055(1) and 213.070(2); A16, A18; LF072, and his amended charge that updated his factual narrative, LF073, Mr. Lampley checked the boxes on the form for "sex" and "retaliation." LF071, ¶2; LF073, ¶2. He then explained—as the sole basis for his claim of sex-discrimination—that his supervisors harassed him because his supervisors know "that I am gay and that I do not exhibit the stereotypical attributes of how a male should appear and behave." LF071, ¶¶2, 4; LF073, ¶¶2, 4.

Mr. Lampley alleged that his supervisors did not harass similarly-situated non-gay coworkers who exhibited "the stereotypical attributes of how a male or female should appear and behave." LF072, ¶¶15-16; LF074, ¶¶15–16. But Mr. Lampley did not allege that he was treated less favorably than a similarly-situated woman would have been. LF072, ¶¶15–16; LF074, ¶¶15–16.

That Mr. Lampley is gay allegedly surfaced to his direct supervisor Steven Kissinger and Mr. Kissinger's supervisor Cathy Woods, LF071, ¶¶3–7; LF073, ¶¶3–7. According to Mr. Lampley, both supervisors harassed Mr. Lampley in these ways:

- Mr. Kissinger allegedly spoke to Mr. Lampley "in an aggressive and condescending manner." LF071, ¶7; LF073, ¶7.
- Mr. Kissinger allegedly directed Mr. Lampley "to report to his office for closed-door meetings" about Mr. Lampley's performance. *Id.*
- Mr. Kissinger allegedly banged on Mr. Lampley's cubicle as he walked by. *Id.*
- Mr. Kissinger allegedly ignored Mr. Lampley's complaints. LF071–72, ¶¶10–12, 14; LF073–74, ¶¶10–12, 14.
- After Mr. Lampley filed a grievance, Mr. Kissinger allegedly increased Mr. Lampley's workload. LF072, ¶13; LF074, ¶13.

- Mr. Kissinger allegedly threw papers at Mr. Lampley's desk. LF072, ¶13; LF074, ¶13.
- Mr. Kissinger allegedly said he would dock vacation time from Mr. Lampley for meeting with a CWA Union representative instead of working during business hours but purportedly did not dock hours from other coworkers who were away from their desks during work hours. LF074, ¶15.
- When Mr. Lampley transferred to a new position, Mr. Kissinger allegedly stalked Mr. Lampley in Mr. Lampley's new location and negatively talked about Mr. Lampley to coworkers. LF074, ¶16.
- Mr. Lampley allegedly received two underscored performance reviews. LF072, ¶13; LF074, ¶¶13, 17.

Allegedly, Mr. Lampley filed grievances with his employer's Human Resources Department and a complaint with the Commission, but the harassment only worsened. LF071–72, ¶¶10–12, 14; LF073–74, ¶¶10–12, 14.

Mr. Lampley did not allege that his employer believes anything stereotypical about males. And Mr. Lampley did not allege that if his employer had such beliefs, that Mr. Lampley behaved in a way that deviated from those stereotypes.

B. Ms. Frost's supervisors allegedly harassed her for being Mr. Lampley's friend and for complaining about being harassed.

Mr. Lampley's coworker Rene Frost also filed a charge of discrimination with the Commission, alleging that their mutual supervisors harassed her for associating with Mr. Lampley and then retaliated against her for complaining about their harassment.

Although she does not allege that her supervisors discriminated against her because of her own sex or sexual orientation, she alleges that she is Mr. Lampley's friend and that her supervisors harassed her because he is "a male who is gay and who does not exhibit the stereotypical attributes of how a male should appear and behave." LF075, ¶2; LF077, ¶2.

Ms. Frost too saw this as sex discrimination. In her charge of discrimination and retaliation, LF075–076, and her amended charge that updated her factual narrative, LF077–079, Ms. Frost checked the boxes for "Other: association with person protected by Section 213.010 et seq." and "retaliation." LF076; LF078; A11.

Ms. Frost alleged that similarly-situated coworkers who were not close friends with Mr. Lampley were not treated differently. LF075–76, ¶¶2, 16–18; LF077, ¶¶2, 19–21. Ms. Frost did not allege that Mr. Lampley was

treated less favorably than a similarly-situated woman would have been. LF076, ¶¶16–18; LF078, ¶¶19–21.

Their mutual supervisor Mr. Kissinger was allegedly aware of their friendship. LF075, ¶¶6–7; LF077, ¶¶6–7. According to Ms. Frost's charge of discrimination, after Mr. Lampley filed his first grievance about his treatment, Mr. Kissinger harassed Ms. Frost in these ways:

- Mr. Kissinger allegedly threatened Ms. Frost with a poor performance review and said that her work was not good. LF075, ¶7; LF077, ¶7.
- Mr. Kissinger allegedly used a loud voice, and physically confronted Ms. Frost by leaning forward. *Id*.
- Mr. Kissinger allegedly used an aggressive and condescending manner during her performance evaluation, which lasted 2 hours instead of the usual 20 to 30 minutes. LF075–76 ¶7; LF077–78, ¶7.
- Mr. Kissinger allegedly announced her performance scores where others could hear. LF076, ¶8; LF078, ¶8.
- After Ms. Frost filed a grievance, Mr. Kissinger allegedly moved her desk away from Mr. Lampley, forbade her from lunching with Mr. Lampley, and forbade her from speaking to coworkers. LF076, ¶¶9–10; LF078, ¶¶9–10. (Upon review of her grievance, they let her resume lunching with Mr. Lampley. LF076, ¶14; LF078, ¶14.)

- Mr. Kissinger allegedly said he would dock vacation time from Ms. Frost for meeting with a CWA Union representative instead of working during business hours but allegedly did not dock hours from other coworkers who failed to work during business hours. LF078, ¶16.
- When Ms. Frost changed positions in the Division, Ms. Woods allegedly did not give Ms. Frost the training she needed. LF078, ¶17.
- Ms. Frost allegedly received an underscored performance review. LF078, ¶18.

C. The Missouri Commission on Human Rights declined to proceed on sexual-orientation discrimination claims.

The Missouri Commission on Human Rights declined to proceed on either charge of discrimination because the Missouri Human Rights Act does not prohibit sexual-orientation discrimination. LF084, LF086; RSMo §§ 213.010, 213.055; A11, A16.

The Commission cannot take any action outside its statutory jurisdiction and, by statute and precedent, the Commission must determine its own jurisdiction before issuing a right-to-sue letter, even if it makes no decision on the merits of a person's claims. § 213.075, RSMo; A19–21; *Farrow v. Saint Francis Med. Ctr.*, 407 S.W.3d 579, 589 (Mo. 2013); LF086. If the

Commission lacks jurisdiction over a charge, "the Commission's only option would be to close the complaint for lack of jurisdiction or the absence of any remedy." *Farrow*, 407 S.W.3d at 589.

The Commission lacked jurisdiction over Mr. Lampley's charge because the Act does not prohibit sexual-orientation discrimination and Mr. Lampley alleged discrimination because of his sexual orientation. LF084. The Commission thus terminated his proceedings rather than issue him a right-to-sue letter. LF084.

In its Investigation Summary, the Commission noted that Mr. Lampley based his charge on discrimination because of his sexual orientation. LF086. Mr. Lampley alleged that his employer "discriminated against him because of his sex and in retaliation." LF086. "By sex Complainant means sexual orientation." LF086. The charge thus "did not involve a category covered by the Missouri Human Rights Act." LF084, LF086. And because "sexual orientation is not protected from discrimination by the Missouri Human Rights Act, complaining about harassment because of sexual orientation is also not protected by the Missouri Human Rights Act." LF086.

For the same reason, the Commission determined that it also lacked jurisdiction over Ms. Frost's associational and retaliation charge. LF087. In its Investigation Summary, the Commission noted that Ms. Frost alleged that her employer harassed her "because of her association with someone who is

gay and in retaliation for complaining about it." LF089. But just as in Mr. Lampley's case, the Act did not prohibit discrimination because of a person's sexual orientation, and so the Commission terminated her proceedings as well rather than issue her a right-to-sue letter. LF087, LF089.

II. Procedural Background

A. The employees went to court to force the Commission to issue them right-to-sue letters.

The state employees then sued the Commission and its Executive Director for right-to-sue letters. LF002, LF008–17. Both employees filed in the Circuit Court of Cole County petitions for administrative review of the Commission's decisions or, in the alternative, for a writ of mandamus. LF008–017.

Once again, the employees asserted that their supervisors harassed them because of Mr. Lampley's sex—not because of his sexual orientation. LF031, LF043, LF058–060, LF153–55. Even if the Act does not prohibit sexual-orientation discrimination *directly*, they claimed, the Act still prohibits sexual-orientation discrimination *indirectly* because this harassment was purportedly based on sex stereotypes. In support, they cited the federal Equal Employment Opportunity Commission's recent re-interpretation of the federal employment discrimination statute Title VII. LF032, LF062–063.

B. The circuit court held that the Missouri Human Rights Act does not prohibit sexual-orientation discrimination.

The circuit court upheld the Commission's decisions because the plain text of Missouri Human Rights Act does not prohibit sexual-orientation discrimination. LF006–007, LF171–79; A1–A10. The court consolidated the two petitions, LF008–017, denied a writ of mandamus and entered summary judgment for the Commission, LF169–179; A1–A10; LF174, 178–79; A2, A10.

The circuit court held that under the recent decision in *Pittman v. Cook Paper Recycling Corp.*, 478 S.W.3d 479, 482 (Mo. App. W.D. 2015), "[s]exual orientation is not a protected category under the Missouri Human Rights Act." LF175–76; A6. The Act's text "does not provide any indication the legislature intends for sexual orientation or gender stereotyping[] to be protected under the category of sex discrimination." LF177; A8 (citing Sections 213.010, 213.055, 213.065, RSMo; A11, A16). And the "Missouri General Assembly has repeatedly declined to add" to the Act's coverage "'the gender-related identity, appearance, or mannerisms, or other gender-related characteristics of an individual.'" *Id.* (citing HB 1924 (2016), HB 2319 (2016), HB 2414 (2016), HB 2478 (2016), HB 407 (2015), HB 1858 (2014), HB 615 (2013), HB 1500 (2012)).

Because the Act is clear, the circuit court had no need to consult federal law, LF176; A7, but even if the Act were unclear, the circuit court held that deference would be appropriate on this point to the Commission. If an "agency's interpretation of a statute is reasonable and consistent with the language of the statute, it is entitled to considerable deference." *Morton v. Mo. Air Conservation Comm'n*, 944 S.W.2d 231, 236 (Mo. App. S.D. 1997). "To the extent that the [Commission] interprets gender stereotyping to be beyond the scope of the [Act], that is a reasonable interpretation." LF178; A9. "The statute says nothing about gender stereotyping claims." *Id.*

For these reasons, the circuit court also concluded that the retaliation and associational claims failed. LF178; A9. Citing the Eighth Circuit's decision in *Sweeney v. City of Ladue*, 25 F.3d 702, 703 (8th Cir. 1994), interpreting the Missouri Human Rights Act, the circuit court held that "[w]here the alleged protected class is not in fact protected, then there is also no valid basis for discrimination based on association." *Id.*

C. The Court of Appeals held that the Act prohibits sexual-orientation discrimination under a sex-stereotyping theory of sex discrimination.

The Western District Court of Appeals then reversed the circuit court on Mr. Lampley's sex-stereotyping theory, holding that the Commission should issue Mr. Lampley and Ms. Frost right-to-sue letters. *Lampley v.*

Missouri Comm'n on Human Rights, No. WD 80288, 2017 WL 4779447, at *5 (Mo. App. W.D. Oct. 24, 2017). The Court did not rule on the circuit court's denial of a writ of mandamus because the employees "failed to file a new writ with this court, and because issuance of right-to-sue letters provides an adequate remedy." *Id.*

1. The Court of Appeals held that an employee claiming sex discrimination may use evidence of an employer's reliance on sex stereotypes as prima facie evidence that the employee was treated differently from similarly-situated members of the opposite sex. *Id.* at *2–3. It acknowledged that nothing in the Act to date had prohibited an employer from harassing an employee for failure to conform to sex stereotypes. But it still held that "our existing case law provides a framework that readily accommodates a sex stereotyping theory." *Id.* at *2. The court relied on the plurality opinion in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989), which interpreted Title VII to hold that an employer's reliance on sex stereotypes can be *evidence* to prove that an employer treated women worse than men. *Id.* at *2. Some recent federal circuit court cases extend this "sex stereotyping analysis to cases involving both gender identity and sexual orientation." *Id.* at *4.

Adding to these cases, the Court of Appeals held that the Act prohibits any employment decision made because of a sex stereotype. *Id.* at *3. In *Midstate Oil Company*, this Court held that the Act prohibits pregnancy

discrimination, and the Court of Appeals read this decision to require all employment decisions to be rational and nondiscriminatory rather than obsolete and stereotyped. *Id.* (citing *Midstate Oil Co., Inc. v. Missouri Comm'n on Human Rights*, 679 S.W.2d 842, 847 (Mo. 1984)). Because the Court of Appeals saw all sex-based stereotyping as irrational, it concluded that "evidence an employee has suffered an adverse employment decision based on stereotyped ideas of how a member of the employee's sex should act can support an inference of unlawful sex discrimination." *Id.*

The Court of Appeals stressed that this new theory of sex stereotyping was a narrow evidentiary rule. *Id.* "This analysis simply allows the fact finder to determine whether sex stereotypes motivated disparate treatment." *Id.* A "sex stereotyping analysis does not create a new suspect class, but simply recognizes the manifold ways sex discrimination manifests itself." *Id.* at *5. "If an employer mistreats a male employee because the employer deems the employee insufficiently masculine, it is immaterial whether the male employee is gay or straight. The prohibition against sex discrimination extends to all employees, regardless of gender identity or sexual orientation." *Id.*

3. Taking Mr. Lampley's characterization of his charge of discrimination at face value—rather than examining his charge's factual narrative to see whether he alleged that his employer treated men worse

than similarly-situated women—the Court of Appeals held that Mr. Lampley pleaded sex discrimination. *Id.* at *1, *5. Mr. Lampley had checked the boxes for "sex" and "retaliation" in his charge of discrimination. *Id.* at *2. The Court of Appeals held that Mr. Lampley's charge alleged that his supervisors harassed him because of Mr. Lampley's behavior and personal appearance: Mr. Lampley "alleges his employer discriminated against him based on sex, because his behavior and appearance contradicted the stereotypes of maleness held by his employer and managers." *Id.* at *1.

The Court of Appeals cited no place in the record where Mr. Lampley alleged that his behavior or appearance failed to conform to a sex stereotype, nor that his employer believed any sex stereotypes about males. Still, the Court of Appeals held that Mr. Lampley's charge "offer[ed] evidence of sex stereotyping" and so "he should have been allowed to demonstrate how sex stereotyping motivated the alleged discriminatory conduct." *Id.* at *5.

4. Finally, in a footnote, the Court of Appeals held that the employees' retaliation claims could proceed even if the state employees had alleged no harassment that the Act prohibits. In its view, employees may sue for retaliation—even if the charge alleges no association with or retaliation for conduct that the Act covers—so long as the employees "had a reasonable, good faith belief that there were grounds for a claim of discrimination or

harassment." *Id.* at *5 n.2 (citing *Shore v. Children's Mercy Hospital*, 477 S.W.3d 727, 735 (Mo. App. W.D. 2015)).

STANDARD OF REVIEW

The standard of review for granting summary judgment is *de novo*. *ITT Commercial Fin. Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. 1993). "The criteria on appeal for testing the propriety of summary judgment are no different from those which should be employed by the trial court to determine the propriety of sustaining the motion initially." *Id*. Summary judgment is appropriate the parties dispute no material facts and the moving party is entitled to judgment as a matter of law. Mo. R. Civ. P. 74.04(c)(6).

The standard for issuing a writ of mandamus is high. A writ of mandamus is only appropriate "when there is a clear, unequivocal, specific right to be enforced." *Mo. Growth Ass'n v. State Tax Comm'n*, 988 S.W.2d 786, 788 (Mo. 1999). "Mandamus is only appropriate to require the performance of a ministerial act." *Id*. Under Section 536.150, mandamus is only appropriate to the Commission when the refusal to issue a right-to-sue letter violated established law or procedures. A 24; *State ex rel. Martin-Erb v. Mo. Comm'n on Human Rights*, 77 S.W.3d 600, 608 (Mo. 2002).

In reviewing an agency's factual determination, a court looks to whether there is substantial evidence to support the agency's decision. *Buchheit, Inc. v. Missouri Comm'n on Human Rights*, 215 S.W.3d 268, 276 (Mo. App. W.D. 2007). "Where the evidence before an agency would warrant

either of two opposing conclusions, we are bound by the agency's findings." *Morton v. Missouri Air Conservation Comm'n*, 944 S.W.2d 231, 236 (Mo. App. S.D. 1997). This Court also defer to the agency's interpretation of a statute if the agency's interpretation is reasonable and consistent with the statute. *Id.* The "interpretation and construction of a statute by an agency charged with its administration is entitled to great weight." *Mercy Hospitals East Communities v. Missouri Health Facilities Review Comm.*, 362 S.W.3d 415, 417 (Mo. 2012).

SUMMARY OF ARGUMENT

The Missouri Human Rights Act prohibits discrimination because of a person's sex, not because of a person's sexual orientation.

I. The plain and ordinary meaning of discrimination "because of … sex" does not include discrimination "because of … sexual orientation." *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 355 (7th Cir. 2017) (Posner, J., concurring). The term sex refers to a person's physiological status as male or female, not a person's sexual orientation, gender identity, gender-related attributes, or failure to conform one's behavior or appearance to sex stereotypes. And, as every earlier Missouri court concluded, discrimination because of a person's sex means treating men worse than women or vice versa—not treating gay people different from straight people.

But the General Assembly has not changed anti-discrimination laws. It has rejected more than forty recent attempts to add "sexual orientation" or gender identity to the protected classes in the Act even though many other laws prohibit discrimination in other contexts because of a person's sexual orientation or gender identity.

II. Because the General Assembly has not prohibited discrimination because of sexual orientation, the courts may not remove this policy question from the democratic process under a theory that conflates the term sex with the term sexual orientation. Mr. Lampley's attempt to bootstrap sexual

orientation or gender identity into the Act under a sex-stereotyping theory, would subvert the well-settled law that the plain, ordinary, and natural meaning of the statute governs.

Because the Missouri Human Rights Act is clear, there is no reason to look to federal law about the meaning of the term sex discrimination. But even if this Court looked to federal law, federal courts for five decades uniformly rejected Mr. Lampley's argument, and the U.S. Supreme Court recently rejected a petition for certiorari that argued precisely the claim Mr. Lampley argues here.

And under well-established federal law, evidence that an employer harassed an employee because the employee did not conform to sex stereotypes is relevant only to help prove that an employer treated a member of one sex worse than a member of the other sex. Non-conformity with sex stereotypes is not a freestanding basis of liability, and an employee cannot use it to bootstrap sexual orientation or gender identity into the Act.

Even if discrimination on the basis of sex stereotypes were itself a freestanding basis of liability, it would not apply here. Mr. Lampley has pleaded only an orientation. He has pleaded no *acts* that fail to conform to a stereotype. And assuming that Mr. Lampley would act in some ways just because of his orientation would itself impose stereotypes on Mr. Lampley.

III. Mr. Lampley alleges sexual-orientation discrimination. In his charge, he alleges that "I am gay and that I do not exhibit the stereotypical attributes of how a male should appear and behave." LF071, ¶4; LF073, ¶4. But although Mr. Lampley labels this claim as sex discrimination, he does not claim that his supervisors treated men worse than women. Nor has Mr. Lampley identified any manner of appearance or behavior by which he did not act in conformance with sex stereotypes. LF071–079. His charge and later court filings thus imply that having a gay sexual orientation is a per se failure to conform to a sex stereotype and thus sex discrimination. But Mr. Lampley never alleged that his employer believes any particular stereotype or that Mr. Lampley acted in a way that deviated from a stereotype held by his employer.

By allowing Mr. Lampley's charge to go forward on the limited facts he alleged, the Court of Appeals allowed an employee to repackage sexual-orientation discrimination as sex discrimination under a theory of sex stereotyping. Moreover, the Court of Appeals allowed Mr. Lampley to do so even though he did not allege that his employer held any stereotype or that he acts in any non-conforming way because of his sexual orientation. This decision expands the scope of the Act to include a new protected class.

But the Act does not include that class. It prohibits sex discrimination, not sexual-orientation discrimination. If this Court is to give the term sex its

ordinary meaning, it may not conflate the term sex with the term sexual orientation under any theory that would expand the Act to prohibit discrimination because of an employee's sexual orientation, gender identity, or other gender-related characteristics.

IV. Because the Act does not prohibit sexual-orientation discrimination, it does not protect from discrimination or retaliation those employees who complain of sexual-orientation discrimination or those employees who associate with an employee harassed because of his sexual orientation.

The circuit court's judgment should be affirmed.

ARGUMENT

I. The Missouri Human Rights Act does not prohibit sexual-orientation discrimination. (Responds to Mr. Lampley's Points I and II)

The trial court correctly held that the Missouri Human Rights Act does not prohibit discrimination because of a person's sexual orientation. Mr. Lampley does not purport to challenge this holding. He states that "Petitioners are not addressing whether the MHRA covers sexual orientation discrimination." Aplt. Br. 15 n.5. But he does seek to assert a claim for sexual-orientation discrimination thinly disguised as a sex-discrimination claim. This attempt contradicts the plain and ordinary meaning of the Act.

A. By its plain text, the Act prohibits sex discrimination, not sexual-orientation discrimination.

To identify the meaning of a statute, this Court looks first to the statute's plain language and examines its ordinary and public meaning at the time of enactment. *Parktown Imports, Inc. v. Audi of America, Inc.*, 278 S.W.3d 670, 672 (Mo. 2009). If the Act's text is clear, this Court will give it effect, and that is the end of the matter. *Id.*

The Court's role is "to determine what the legislature intended," not "to achieve a desired result." *Id.* "If the intent of the legislature is clear and unambiguous, by giving the language used in the statute its plain and

ordinary meaning, then we are bound by that intent and cannot resort to any statutory construction in interpreting the statute." *Goerlitz v. City of Maryville*, 333 S.W.3d 450, 455 (Mo. 2011) (quotation omitted). No court has power "to read into a statute legislative intent contrary to intent made evident by plain language." *Hinnah v. Dir. of Revenue*, 77 S.W.3d 616, 621 (Mo. 2002). This holds true "even when the court may prefer a policy different from that enunciated by the legislature," *Pittman v. Cook Paper Recycling Corp.*, 478 S.W.3d 479, 482 (Mo. App. W.D. 2015), *transfer denied* (Jan. 26, 2016).

A statute has a plain and ordinary meaning when the words are "plain and clear to a person of ordinary intelligence." *State v. Daniel*, 103 S.W.3d 822, 826 (Mo. App. W.D. 2003). "When a statute fails to define a word, a dictionary may be consulted to verify the word's plain and ordinary meaning." *McKinney v. State Farm Mut. Ins.*, 123 S.W.3d 242, 249 (Mo. App. W.D. 2003) (consulting Black's Law Dictionary); *see also State v. Jones*, 479 S.W.3d 100, 107 (Mo. 2016) (consulting Webster's Third New International Dictionary 2523 (3d ed. 1993)). In Missouri, "[w]ords and phrases shall be taken in their plain or ordinary and usual sense." RSMo § 1.090.

B. A person's sex differs from a person's sexual orientation.

The "plain language of the Missouri Human Rights Act is clear and unambiguous." *Pittman*, 478 S.W.3d at 482. The Act prohibits sex discrimination—not sexual-orientation, gender-identity, or sex-stereotyping discrimination. RSMo §§ 213.010, 213.055; A11, A16. In regular and common usage, discrimination "because of … sex" is *not* discrimination "because of … sexual orientation." *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 355 (7th Cir. 2017) (Posner, J., concurring).

1. The term sex in the Act dates to its original enactment in 1965 when the Fair Employment Practices Act, enacted in 1961, "was amended to prohibit discrimination on the basis of sex." *R.M.A.*, 2017 WL 3026757 at *6 (citing section 296.020, RSMo 1967). Renamed the Missouri Human Rights Act in 1985, this language remains unchanged to this day, despite many other amendments to the Act.

The public has long understood that "discrimination on the basis of sex" under the Act means "depriving one sex of a right or privilege afforded the other sex, including a deprivation based on a trait unique to one sex." *Id.* at *7. And when the General Assembly recodified the Fair Employment Practices Act as the Missouri Human Rights Act in 1986, it was presumptively aware of many court decisions holding that "discrimination

based on sex" means a practice that deprives one sex of a right or privilege afforded the other sex. *Scruggs v. Scruggs*, 161 S.W.3d 383, 391 (Mo. App. W.D. 2005).

2. Dictionaries of common usage also show that the term "sex" is distinct from the term "sexual orientation."

The term "sex" refers to whether a person is male or female. Black's Law Dictionary, for instance, defines "sex" as "[t]he sum of the peculiarities of structure and function that distinguish a male from a female organism." *Sex, Black's Law Dictionary* (10th ed. 2014). Likewise, the Oxford English Dictionary defines "sex" as "[e]ither of the two divisions of organic beings distinguished as male and female, respectively," determined by "those differences in the structure and function of the reproductive organs." *Sex*, *Oxford English Dictionary* (2d ed. 2000). The verb "sex" means "to determine the sex of, by anatomical examination; to label male or female." *Sex*, *Oxford English Dictionary* (2d ed. 2000). Similarly, the American Psychological Association states that "sex" means the "physical and biological traits" "that distinguish between males and females." *Sex*, *APA Dictionary of Psychology* (1997). Webster's Third New International Dictionary defines sex as "the two divisions of . . . human beings respectively designated male or female," which is "genetically controlled and associated with special sex chromosomes." *Sex*, *Webster's Third New International Dictionary* (2d ed. 1971).

The word "sex" in the Act thus does not mean "sexual orientation." The term sexual orientation was not in use in dictionaries in the 1960s. Under the current definition, sexual orientation refers to the direction of a person's sexual attraction, that is, whether a person is attracted to males, females, or both. Black's Law Dictionary, for example, defines "sexual orientation" as "inclination toward sexual activity or behavior with other males or females; heterosexuality, homosexuality, or bisexuality." *Sexual Orientation*, *Black's Law Dictionary* (10th ed. 2014). The American Psychological Association defines "sexual orientation" as "one's enduring sexual attraction to male partners, female partners, or both." *Sexual Orientation*, *APA Dictionary of Psychology* (1997). The Oxford English Dictionary defines sexual orientation as "orientation with respect to a sexual goal, potential mate, partner, etc." and, chiefly, "a person's sexual identity in relation to the gender to whom he or she is usually attracted." *Sexual Orientation*, *Oxford English Dictionary* (2009 ed.). And the Webster's New College Dictionary defines "sexual orientation" as "[t]he direction of one's sexual interest toward members of the same, opposite, or both sexes." *Sexual Orientation*, *Webster's New College Dictionary* (2d ed. 1995). Sexual orientation is thus not a subset of sex, but a different category altogether.

3. The public continues to share this basic understanding of the difference between sex discrimination and sexual-orientation discrimination.

Then and now, the common and ordinary meaning of the term "sex" is a "very different meaning and import than the term 'sexual orientation.'" *State v. Butler*, 799 S.E.2d 718, 724 (W. Va. 2017). "Sexual orientation is not currently an explicitly protected status under the MHRA." Ellen Henrion, *What's Missing? Addressing the Inadequate LGBT Protections in the Missouri Human Rights Act*, 81 Mo. L. Rev. 1173, 1176 (2016). Many advocacy groups—including *amicus curiae* ACLU—have acknowledged that the Act does not include sexual orientation, so they have called for the Act's amendment. The ACLU has long admitted that Missouri does not protect "individuals from discrimination based on sexual orientation."[1]

4. Like other deliberative bodies, the Missouri Legislature knows how to provide protections based on sexual orientation as well as sex if it wishes to do so. In fact, it has done so elsewhere. The Missouri hate crime statute lists both sex and sexual orientation. RSMo § 557.035.

Reflecting this public definition of the terms sex and sexual orientation, the Missouri courts also distinguish between a person's sex and a person's

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[1] *The Rights of Lesbian, Gay, Bisexual, and Transgendered People in Missouri and Kansas, American Civil Liberties Foundation of Kansas and Western Missouri*, aclu-mo.org/files/8614/0206/7726/ACLU-LGBT_Handbook-Update-3-22-13.pdf (last updated Mar. 22, 2013), at 4.

sexual orientation. The Missouri Code of Judicial Conduct Canon 2-2.3 provides that judges may not engage in harassment because of a person's sex *or* sexual orientation, Mo. Code Jud. Conduct Can. 2-2.3(B), and it provides that lawyers may not engage in harassment based on sex *or* sexual orientation, Mo. Code Jud. Conduct Can. 2-2.3(C). Nor is this the only example. *See, e.g.*, RSMo § 590.653.2 (distinguishing between "gender" and "sexual orientation"); Mo. R. Prof. Conduct 4-8.4(g) (distinguishing between "sex" and "sexual orientation"). If the word sex already included sexual orientation, each of these additions would have been superfluous. "This Court must presume every word, sentence or clause in a statute has effect, and the legislature did not insert superfluous language." *Bateman v. Rinehart*, 391 S.W.3d 441, 446 (Mo. 2013).

So, too, several Missouri municipalities have added sexual-orientation discrimination to local prohibitions on sex discrimination. *See* Freedom for All Americans, Missouri, freedomforallamericans.org/category/mo/ (last visited Jun. 26, 2017) (identifying local ordinances in Clayton, Columbia, Creve Coeur, Ferguson, Kirksville, Kirkwood, Maplewood, Olivette, Richmond Heights, St. Louis, Kansas City, University City, Jackson County, and St. Louis County).

Other states also share this common understanding of the difference between sex discrimination and sexual-orientation discrimination. They

prohibit each type of discrimination separately. *See, e.g.*, Illinois Human Rights Act, 775 Ill. Comp. Stat. 5/1-103(Q); Iowa Civil Rights Act, Iowa Code § 216.7(1)(a); Wis. Stat. § 106.52(3); Minnesota Human Rights Act, Minn. Stat. § 363A.11(1)(a)(1); Or. Rev. Stat. § 659A.403(1); Washington Civil Rights Act, Wash. Rev. Code § 49.60.030(1); D.C. Code § 2-1402.31(a). These states "have called such discrimination by its right name, and taken a firm and explicit stand against it." *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 166–67 (2d Cir. 2018) (Lynch, J., dissenting). But when the legislature has not added sexual orientation or gender identity to the list of protected characteristics, state courts hold that the law does not include this category of discrimination. *E.g.*, *State v. Butler*, 799 S.E.2d 718, 724 (W. Va. 2017); *Louisiana Dep't of Justice v. Edwards*, 2017-0173 (La. App. 1 Cir. 11/1/17), 233 So. 3d 76, 81.

C. The General Assembly chose not to add sexual orientation to the Act.

Since 1999, the Missouri General Assembly has considered and rejected more than 40 proposals to add sexual orientation or gender identity to the Missouri Human Rights Act.[2] "Attempts to amend the Missouri Human

[2] H.B. 485 (2017); H.B. 846 (2017); H.B. 911 (2017); S. 338 (2017); H.B. 1924 (2016); H.B. 2279 (2016); H.B. 2319 (2016); H.B. 2414 (2016); H.B. 2478

Rights Act to prohibit discrimination based upon sexual orientation have repeatedly been introduced in the legislature but have repeatedly failed." *Pittman*, 478 S.W.3d at 483 n.5.

To be sure, courts should be cautious when they consider events that have happened after a law's enactment. But where legislators have proposed the same or similar bills more than three dozen times in the legislature, and the General Assembly has rejected the proposal each time, the lesson is clear. § 48:18 2A Sutherland Statutory Construction § 48:18 (7th ed.). As the U.S. Supreme Court has held, when Congress rejects "repeated demands," it gives a "clear . . . expression of congressional intent." *Heckler v. Day*, 467 U.S. 104, 118 n.30 (1984). Although a single unenacted bill tells little about why the legislature rejected the bill, courts give strong weight to "the repeated

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(2016); S. 653 (2016); S. 237 (2015); H.B. 407 (2015); S. 962 (2014); H.B. 1858 (2014); S. 96 (2013); H.B. 615 (2013); S. 798 (2012); H.B. 1500 (2012); S. 239 (2011); H.B. 477 (2011); S. 626 (2010); H.B. 1850 (2010); S. 109 (2009); H.B. 701 (2009); S. 824 (2008); S. 1019, (2008); H.B. 1776 (2008); S. 266 (2007); H.B. 819 (2007); S. 716 (2006); H.B. 1458 (2006); H.B. 1593 (2006); S. 293 (2005); H.B. 476 (2005); S. 1238 (2004); H.B. 1521 (2004); S. 323 (2003); H.B. 510 (2003); H.B. 1561 (2002); S. 452 (2001); H.B. 712 (2001); S. 622 (2000); H.B. 1438 (2000); H.B. 639 (1999).

refusals of Congress to enact the suggested provision." *State of Illinois v. Gen. Paving Co.*, 590 F.2d 680, 683 (7th Cir. 1979). Discerning intent from legislative inaction is thus "most appropriate" when "a specific bill has been repeatedly brought to the General Assembly and rejected." *Yonga v. State*, 446 Md. 183, 130 A.3d 486, 498 (Md. 2016). "[T]he very fact that there have been twenty-six failed attempts [to amend the statute] cannot be ignored." *State v. Butler*, 799 S.E.2d 718, 725–26 (W. Va. 2017).

D. Courts agree that the Act does not prohibit sexual-orientation discrimination.

The Court of Appeals also understood that the Act does not prohibit sexual-orientation discrimination. As the Western District explained in *Pittman v. Cook Paper Recycling Corp.*, the Act does not prohibit sexual-orientation discrimination on its face or under a sex-stereotyping theory. 478 S.W.3d 479, 481 & n.7 (Mo. App. W.D. 2015). The Missouri Human Rights Act's prohibition against sex discrimination "has nothing to do with sexual orientation." *Id.* at 482.

That court also explained that even if Missouri allowed evidence of sex-stereotyping to help build a case of sex discrimination, alleging that a person "was discriminated against because of his sexual orientation" does not make out a claim of sex stereotyping. *Id.* at 484 & n.7. Instead, a person must

allege that he transgressed some other societal stereotypes of how he ought to appear or behave. *Id.*

A year later, the Eastern District followed *Pittman* and held that "sexual orientation is not a protected category under the Missouri Human Rights Act (RSMo Chapter 213)." *Moore v. Lift for Life Acad., Inc.*, 489 S.W.3d 843, 847 (Mo. App. E.D. 2016), transfer denied (May 11, 2016).

Then, just one year later, the Western District reaffirmed *Pittman*'s understanding of the Act, explaining in *R.M.A.* that sex discrimination does not include discrimination because of a person's "sexual orientation," "transitioning transgender status," or any other "gender-related trait." *R.M.A. by Appleberry v. Blue Springs R-IV Sch. Dist.*, No. WD 80005, 2017 WL 3026757 at *4–5 & nn. 6, 8, 11–12 (Mo. App. W.D. July 18, 2017).

As the plain and ordinary meaning of sex discrimination has always provided, to prohibit sex discrimination means "to prohibit the practice of depriving one sex of a right or privilege afforded the other sex." *R.M.A.*, 2017 WL 3026757 at *6–7. An employer cannot rely on a trait unique to one sex that an employer relies on to deny a person with that trait a working condition afforded to the other sex. This is why, for instance, pregnancy discrimination is sex discrimination. *Midstate Oil Co., Inc. v. Missouri Comm'n on Human Rights*, 679 S.W.2d 842, 846–47 (Mo. 1984). Pregnancy is a sex-related trait, unique to one sex and "thus susceptible to misuse to

deprive women from a right or privilege afforded to men." *R.M.A.*, 2017 WL 3026757 at *7–8. But sex discrimination does not occur, the Court of Appeals held, when an employer discriminates because of a trait that members of both sexes can share, such as sexual orientation. *Id.*

These cases were correct, and under stare decisis the Western District should have given them effect. *Rothwell v. Dir. of Revenue*, 419 S.W.3d 200, 206 (Mo. App. W.D. 2013). Indeed, this doctrine has "special force in the domain of statutory interpretation" because the Legislature "remains free to alter" what a court has held. *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 139 (2008).

II. The Missouri Human Rights Act does not prohibit sexual-orientation discrimination under a sex-stereotyping theory of sex discrimination. (Responds to Mr. Lampley and Ms. Frost's Points I and II).

The trial court correctly held that the Missouri Human Rights Act does not prohibit sexual-orientation discrimination under a sex-stereotyping theory of sex discrimination. Because the legislature has not chosen to make sexual orientation a protected class, the judiciary should not remove this policy question from the democratic process by conflating sex with sexual orientation.

A. By its plain text, the Act prohibits only treating one sex unfairly compared to the other sex.

1. Mr. Lampley and Ms. Frost's charges assert that any decision based on sex stereotypes is sex discrimination. Aplt. Br. 11–20. Like the Western District below, they suggest that any use of sex stereotypes is irrational, just like racial bias or animus. *Lampley*, 2017 WL 4779447, at *3. To them, any time an employer punishes an employee for not conforming to a sex stereotype, the employer is liable for sex discrimination, even if the employer treated no members of one sex differently from members of the other sex. *Lampley*, 2017 WL 4779447, at *3; Aplt. Br. 11-12.

But fairly read, the term "sex" discrimination in the Missouri Human Rights Act gives no notice to an ordinary employer that the employer could be liable for sexual-orientation discrimination under a sex-stereotyping theory. The Act also does not independently forbid any employment action based on sex stereotypes, and this Court has never adopted a sex-stereotyping theory.

Instead, the Act prohibits an employer from unfairly treating members of one sex worse than members of the other sex. At most, under the Act, testimony that an employer relied on sex stereotypes to the detriment of one sex but not the other sex might provide circumstantial *evidence* of sex discrimination. It is not a freestanding form of sex discrimination.

Mr. Lampley and Ms. Frost seek to convert a purported stereotype into a dispositive claim. To the extent an employer holds a stereotypical view about how men or women should behave, the holding of that stereotype might provide circumstantial evidence to prove sex discrimination. But in all circumstances, a court would have to determine whether the employer treated an employee worse *because* the employee was male or female. Disapproving of someone for being insufficiently masculine or feminine is not sex discrimination but sex stereotyping, and it lacks relevance to a sex discrimination claim unless it tends to show that the employer treated members of one sex worse than members of the other sex.

2. Mr. Lampley claims that the decision in *Ferguson v. Curators of Lincoln Univ.*, 498 S.W.3d 481, 491 (Mo. App. W.D. 2016) created a theory of liability that allowed for damages any time an employer acts because of age stereotypes. Aplt. Br. 11. But that case held only that "when (1) the decision to terminate an employee is based upon an age-dependent factor (such as retirement eligibility), (2) the employer offers implausible alternate explanations for the termination, and (3) there is evidence that someone with the ability to influence the decision acted based on age-based stereotypes, there is sufficient evidence from which a jury can infer that age was a contributing factor to the termination decision." *Ferguson v. Curators of Lincoln Univ.*, 498 S.W.3d 481, 492 (Mo. App. W.D. 2016), *transfer denied*

(Sept. 20, 2016). Thus, the court found that the evidence was sufficient only when a purported stereotype existed, the employer held the stereotype, *and* other explanations for termination other than age discrimination were "implausible." *Ferguson* is a far cry from holding that the mere assertion that some people in society might hold a stereotype raises a prima facie case.

In any event, Mr. Lampley has not asserted that his supervisors held sex-based stereotypes. Nor is being gay a sex stereotype. That orientation applies to men and women. Nor did Mr. Lampley allege any acts he took because of his orientation that might have deviated from sex stereotypes. Other courts have rejected the idea that courts can assume that gay individuals live their lives in certain ways. It is not true "that sexual orientation discrimination *always* constitutes discrimination for gender nonconformity." *Evans v. Georgia Reg'l Hosp.*, 850 F.3d 1248, 1258 (11th Cir. 2017) (W. Pryor, J., concurring), *cert. denied*, 138 S. Ct. 557 (2017). To assume that a person deviated in his behavior from sex stereotypes just because the person asserts a certain sexual orientation would itself be a form of stereotyping. *Id.* "[A]ssuming that all gay individuals behave the same way or have the same interests . . . disregard[s] the diversity of experiences of gay individuals." *Id.* It may, of course, be true "that some individuals who have experienced discrimination because of sexual orientation will also have experienced discrimination because of gender nonconformity," but that does

not "establish[] that *every* gay individual who experiences discrimination because of sexual orientation has a 'triable case of gender stereotyping discrimination.'" *Id.* (quoting *Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285, 287, 289, 292 (3d Cir. 2009) (Hardiman, J.)).

B. The Commission's regulations do not create employer liability for sexual-orientation or sex-stereotyping discrimination.

The regulations of the Missouri Commission on Human Rights also do not impose liability for sexual-orientation discrimination under a theory of sex stereotyping. The Commission's regulations require employers to judge applicants individually, not because of their sex.

In a regulation titled Employment Practices Related to Men and Women, the Commission explained that the bona fide occupational qualification exception as to sex is strictly construed. 8 C.S.R. 60-3.040(2); A25. An employer thus cannot label jobs as "men's jobs" or "women's jobs" because that tends "to deny employment opportunities unnecessarily to one sex or the other." *Id.* The regulation then explains that a bona fide occupational qualification exception does not apply to:

> 1. The refusal to hire a woman because of her sex based on assumptions of the comparative employment characteristics of

> women in general. For example, the assumption that the turnover rate among women is higher than among men;
>
> 2. The refusal to hire an individual based on stereotyped characterizations of the sexes. These stereotypes include, for example, that men are less capable of assembling intricate equipment; that women are less capable of aggressive salesmanship. The principle of nondiscrimination requires that individuals be considered on the basis of individual capacities and not on the basis of any characteristics generally attributed to the group.

8 C.S.R. 60-3.040(2)(A)2; A25.

This regulation prohibits using stereotyped characterizations as a pretext for hiring or not hiring an applicant because of the applicant's sex. This regulation does not recognize freestanding liability any time an employer bases a decision on an individual's sexual orientation.

Mr. Lampley and Ms. Frost argue that, by mentioning sex stereotypes, the Commission's regulations allow for sex stereotyping claims and prohibit employers from ever refusing "to hire an individual based on stereotyped characterizations of the sexes." 8 C.S.R. 60-3.040(2)(A)2; A25; Aplt. Br. 12–13, 19. This argument mischaracterizes the regulation. The regulation says

that employers may not rely on sex stereotypes to bar men or women from jobs because of their sex. This what the Act provides.

Moreover, even if the Commission wished to make any reliance on sex stereotypes actionable in the broad way Mr. Lampley suggests, it could not do so. A "regulation may not conflict with a statute and if it does the regulation must fail." *Pulitzer Pub. Co. v. Mo. State Emps. Ret. Sys.*, 927 S.W.2d 477, 480 (Mo. App. W.D. 1996) (citation omitted). And the "plain and unambiguous language of a statute cannot be made ambiguous by administrative interpretation and thereby given a meaning which is different from that expressed in a statute's clear and unambiguous language." *Wolff Shoe Co. v. Dir. of Revenue*, 762 S.W.2d 29, 31 (Mo. 1988).

C. Because Missouri's law is clear, this Court need not borrow from federal law.

Because the plain language of this statute is clear, this Court has no need to seek guidance from federal precedents interpreting Title VII. Title VII prohibits an employer from discriminating "against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2; A31.

Mr. Lampley and Ms. Frost argue that this Court should use recent Title VII precedent to interpret the Missouri Human Rights Act because Title

VII uses identical language to prohibit sex discrimination. Aplt. Br. 13–14; ACLU Br. 26–27. But the Missouri Human Rights Act is its own law with its own body of precedent and legislative history. It "is not merely a reiteration of Title VII. The Act is in some ways broader than Title VII, and in other ways is more restrictive." *Hammond v. Mun. Corr. Inst.*, 117 S.W.3d 130, 137 (Mo. App. W.D. 2003). And whether a court should look to federal law for guidance turns on whether the statute is ambiguous, not whether there is an analogous federal law. "Where the language of the statute is unambiguous, courts must give effect to the language used by the legislature." *Keeney v. Hereford Concrete Prods., Inc.*, 911 S.W.2d 622, 624 (Mo. 2015). But the Act's text and precedent is clear. *Pittman*, 478 S.W.3d at 482. This Court thus need not and should not adopt the view of federal courts interpreting a different statute under different precedents.

D. Federal authority weighs against reading sexual-orientation discrimination into the Act.

Even if this Court were to borrow from Title VII precedents, the weight of federal authority does not support interpreting the Missouri Human Rights Act to prohibit sexual-orientation discrimination under a sex-stereotyping theory. The U.S. Supreme Court has never held that discrimination because of a person's sexual orientation states a claim of discrimination because of a person's sex under Title VII. *Pittman v. Cook Paper Recycling Corp.*, 478

S.W.3d 479, 485 (Mo. App. W.D. 2015). Indeed, just a few months ago, the Supreme Court rejected certiorari on just this question. *Evans*, 850 F.3d 1248, *cert. denied*, 138 S. Ct. 557 (2017).

1. First, it is unclear whether Title VII even provides for sex stereotyping as an independent cause of action. Mr. Lampley asserts that federal courts have interpreted Title VII for decades to prohibit sex stereotyping. Aplt. Br. 13; ACLU Br. 21. But there is no Supreme Court precedent on this point because the Supreme Court decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250 (1989), lacked a majority, and a plurality opinion does not bind lower federal courts. "Two Justices concurred in the judgment only, and they said nothing about sex stereotyping as a 'theory' of sex discrimination." *Hively v. Ivy Tech Community College of Indiana*, 853 F.3d 339, 369 (7th Cir. 2017) (Sykes, J., dissenting).

What is more, the *Price Waterhouse* plurality stressed that the purpose of submitting evidence of an employer's reliance on sex stereotypes is to prove that men or women are treated worse because of their sex. In "saying that gender played a motivating part in an employment decision," the plurality meant that, "if we asked the employer at the moment of the decision what its reasons were and if we received a truthful response, one of those reasons would be that the applicant or employee was a woman." 490 U.S. at 250. For that reason, a sex-discrimination claim exists where an employer "acts on the

basis of a belief that a woman cannot be aggressive, or that she must not be." *Id.*

The federal courts that allow an employer's use of sex stereotypes as evidence to support an allegation of sex discrimination thus do not recognize sex stereotyping as its own kind of violation. Instead, sex stereotyping is only "*evidence* that gender played a part." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989). It is not a freestanding prohibition on employer decisions. "Because a claim of gender nonconformity is a behavior-based claim, not a status-based claim, a plaintiff still 'must show that the employer actually relied on her gender in making its decision.' That is, the employer must additionally establish that discrimination occurred on the basis of an enumerated class in Title VII." *Evans*, 850 F.3d at 1260 (quoting *Price Waterhouse*, 490 U.S. at 251).

The *Price Waterhouse* plurality opinion also understood evidence of sex stereotyping in the common, narrow sense of sex. A sex stereotype is not a sexual-orientation stereotype. In *Price Waterhouse*, for instance, the sex stereotype was evidence that women, but not men, should walk femininely or wear make-up. *Id.* at 235. But reliance on a sex stereotype differs from reliance on a sexual-orientation stereotype. Sexual orientation or sexual activity is not "just a sexual convention, bias, or stereotype—like pants and skirts, or hairdos." *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 134–35 (2d

Cir. 2018) (Jacobs, J., concurring). "Stereotypes are generalizations that are usually unfair or defective." *Id.* "Heterosexuality and homosexuality are both traits that are innate and true, not stereotypes of anything else." *Id.* For this reason, "being gay, lesbian, or bisexual, standing alone, does not constitute nonconformity with a gender stereotype that can give rise to a cognizable gender stereotyping claim." *Christiansen v. Omnicom Grp., Inc.*, 852 F.3d 195, 201 (2d Cir. 2017).

As the cases Mr. Lampley cites show, these jurists thus take care to state that the sex stereotype must be that a man is "insufficiently masculine" or that a woman is "insufficiently feminine" in his or her mannerisms, personal appearance, personality, or aesthetic tastes. *EEOC v. Boh Bros. Const. Co.*, 731 F.3d 444, 456 (5th Cir. 2013); *see also Christiansen v. Omnicom Grp., Inc.*, 852 F.3d 195, 200 (2d Cir. 2017); *Smith v. City of Salem, Ohio*, 378 F.3d 566, 572 (6th Cir. 2004).

Given this precedent, Mr. Lampley concedes that courts can and do distinguish between sexual-orientation and sex stereotyping claims. Aplt. Br. 15, 19–20; ACLU Br. 40. He agrees that these courts can and do separate any aspects of sexual orientation from the claims and look only to whether there are other facts alleged. Aplt. Br. 15–16; ACLU Br. 42–43

2. The longstanding and majority federal view is still that the term "sex" in Title VII bears its ordinary and natural meaning. Until last year,

every federal appeals court to have considered the issue rejected Mr. Lampley's argument. As a result, nearly every federal court holds that "a gender stereotyping claim should not be used to 'bootstrap protection for sexual orientation into Title VII.'" *Dawson v. Bumble & Bumble*, 398 F.3d 211, 218 (2d Cir. 2005).

As the Seventh Circuit had explained, "Congress intended the term 'sex' to mean 'biological male or biological female,' and not one's sexuality or sexual orientation." *Hamner v. St. Vincent Hosp. & Health Care Ctr., Inc.*, 224 F.3d 701, 704 (7th Cir. 2000). "The phrase in Title VII prohibiting discrimination based on sex means that it is unlawful to discriminate against women because they are women and against men because they are men." *Id.* (internal quotations omitted). Sex discrimination under the plurality opinion in *Price Waterhouse* "means the deprivation of one sex of a right or privilege afforded the other sex, including a deprivation based on a trait unique to one sex, or a deprivation based on traits perceived as unique to one sex," and sexual stereotyping means evidence of a decision made on sex "by assuming or insisting that [the person] matched the stereotype associated with their group." *R.M.A.*, 2017 WL 3026757 at *6, *8.

These federal circuit courts have respected Congress's rejection of dozens of bills that sought to add sexual orientation or gender identity to

Title VII.[3] "Although congressional inaction subsequent to the enactment of a statute is not always a helpful guide, Congress's refusal to expand the reach of Title VII is strong evidence of congressional intent in the face of consistent judicial decisions refusing to interpret 'sex' to include sexual orientation." *Simonton v. Runyon*, 232 F.3d 33, 35 (2d Cir. 2000). These courts thus "cite this pattern of legislation not because it does or can suggest legislative intent but because it illustrates that Congress is the appropriate branch in which

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[3] *E.g.*, S. 1006 115th Cong. (2017); H.R. 2282 115th Cong. (2017); S. 1858 114th Cong. (2015); H.R. 3185 114th Cong. (2015); H.R. 1755, 113th Cong. (2013); S. 815, 113th Cong. (2013); H.R. 1397, 112th Cong. (2011); S. 811, 112th Cong. (2011); H.R. 3017, 111th Cong. (2009); H.R. 2981, 111th Cong. (2009); S. 1584, 111th Cong. (2009); H.R. 2015, 110th Cong. (2007); H.R. 3685, 110th Cong. (2007); S. 16, 108th Cong. (2003); H.R. 3285, 108th Cong. (2003); S. 1705, 108th Cong. (2003); S. 1284, 107th Cong. (2002); H.R. 2692, 107th Cong. (2001); S. 19, 107th Cong. (2001); H.R. 2355, 106th Cong. (1999); S. 1276, 106th Cong. (1999); H.R. 1858, 105th Cong. (1997); S. 869, 105th Cong. (1997); H.R. 1863, 104th Cong. (1995); S. 932, 104th Cong. (1995); S. 2056, 104th Cong. (1995); H.R. 4636, 103rd Cong. (1994); S. 2238, 103rd Cong. (1994); *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081, 1085 n. 11 (7th Cir. 1984) (collecting bills between 1975 and 1982).

to" argue that Title VII should cover sexual-orientation discrimination. *Evans*, 850 F.3d at 1261 (Pryor, J., concurring).

Thus, "[n]umerous federal courts have held that a claim of discrimination based upon sexual orientation is not cognizable under Title VII." *Pittman*, 478 S.W.3d at 484 n.6 (collecting cases). This weight of federal authority included every federal circuit court until last year, and it still includes all but two today:

- The First Circuit holds that it is "settled law that, as drafted and authoritatively construed, Title VII does not proscribe harassment simply because of sexual orientation." *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 259 (1st Cir. 1999).
- The Second Circuit, until this year, held that the "law is well-settled in this circuit and in all others to have reached the question that . . . Title VII does not prohibit harassment or discrimination because of sexual orientation." *Simonton v. Runyon*, 232 F.3d 33, 35 (2d Cir. 2000).
- The Third Circuit held that "Title VII provides no protection from discrimination on the basis of sexual orientation." *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 260–61 (3d Cir. 2001).

- The Fourth Circuit holds that "Title VII does not prohibit conduct based on the employee's sexual orientation." *Hopkins v. Balt. Gas & Elec. Co.*, 77 F.3d 745, 751 (4th Cir. 1996).
- The Fifth Circuit holds that "[d]ischarge for homosexuality is not prohibited by Title VII." *Blum v. Gulf Oil Corp.*, 597 F.2d 936, 938 (5th Cir. 1979).
- The Sixth Circuit holds that "a gender stereotyping claim should not be used to bootstrap protection for sexual orientation into Title VII." *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 764 (6th Cir. 2006)
- The Seventh Circuit—until last year—held that "even though some may define 'sex' in such a way as to mean an individual's 'sexual identity,' our responsibility is to interpret this congressional legislation and determine what Congress intended when it decided to outlaw discrimination based on sex." *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1084–85 (7th Cir. 1984).
- The Eighth Circuit holds that "Title VII does not prohibit discrimination against homosexuals." *Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69, 70 (8th Cir. 1989).
- The Ninth Circuit holds that "Title VII's prohibition of 'sex' discrimination applies only to discrimination on the basis of

gender and should not be judicially extended to include sexual preference such as homosexuality." *DeSantis v. Pac. Tel. & Tel. Co.*, 608 F.2d 327, 329–30 (9th Cir. 1979).

- The Tenth Circuit holds that "Title VII's protections . . . do not extend to harassment due to a person's sexuality." *Medina v. Income Support Div., New Mexico*, 413 F.3d 1131, 1135 (10th Cir. 2005).
- The Eleventh Circuit holds that "[d]ischarge for homosexuality is not prohibited by Title VII." *Evans*, 850 F.3d at 1255.
- The D.C. Circuit also assumes that "Title VII does not cover sexual orientation." *US. Dep't of Hous. & Urban Dev. v. Fed. Labor Relations Auth.*, 964 F.2d 1, 2 (D.C. Cir. 1992).

As this list shows, most federal courts are not trying to redefine sex in Title VII. The ACLU brief asks this Court to adopt the holding in *Isaacs v. Felder Servs., LLC*, 143 F. Supp. 3d 1190, 1193 (M.D. Ala. 2015), that Title VIII covers sexual orientation-based discrimination, but they ignore that, a year later, the Eleventh Circuit rejected that holding. *Evans*, 850 F.3d at 1257 (11th Cir.), *cert. denied*, 138 S. Ct. 557 (2017*). Evans* confirmed that "[d]ischarge for homosexuality is not prohibited by Title VII." *Id*. The First Circuit just this last year held the same—twice. *Franchina v. City of*

Providence, 881 F.3d 32, 54 (1st Cir. 2018); *Maldonado-Catala v. Municipality of Naranjito*, 876 F.3d 1, 11 n.12 (1st Cir. 2017).

Though "the line between sexual orientation discrimination and discrimination 'because of sex' can be difficult to draw," *Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285, 291 (3d Cir. 2009), these federal appellate courts have recognized that such a line exists. After all, "the reality is that there is a distinction between one's sex and one's sexuality under Title VII." *Hamner*, 224 F.3d at 707.

To determine whether a plaintiff has stated a claim for discrimination, these courts thus "distinguish between discrimination based on stereotypical notions of femininity and masculinity and that based on sexual orientation." *Horton v. Midwest Geriatric Mgmt., LLC*, No. 4:17CV2324 JCH, 2017 WL 6536576, at *4 (E.D. Mo. Dec. 21, 2017). If it is unclear from the facts whether harassment occurred because of sexual orientation or sex stereotypes, a jury is to decide. *Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285, 292 (3d Cir. 2009).

Of course, in a case in which the employee's theory of sex-stereotyping is based *solely* on his or her sexual orientation, courts need not "struggle with exactly where to draw the line between actionable discrimination based on what is alleged to be gender non-conforming behavior and non-actionable discrimination based on sexual orientation." *Id.* (citation omitted). "Sexual

orientation alone cannot be the alleged gender non-conforming behavior that gives rise to an actionable Title VII claim under a sex-stereotyping theory." *Pambianchi v. Arkansas Tech Univ.*, No. 4:13-CV-00046-KGB, 2014 WL 11498236, at *5 (E.D. Ark. Mar. 14, 2014).

2. On the other hand, two federal appellate courts—in highly contested, split decisions—have recently used a sex-stereotyping theory to import sexual-orientation discrimination claims into Title VII. *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018) (en banc); *Hively v. Ivy Tech Community College*, No. 15-1720 (7th Cir. Apr. 4, 2017) (en banc). According to these courts, "it is actually impossible to discriminate on the basis of sexual orientation without discriminating on the basis of sex," because sexual orientation refers to the sex of one's preferred partners. *Hively*, 853 F.3d at 351.

But these courts did not give effect to the "ordinary, contemporary, common meaning" of the statute when Congress enacted it. *Zarda*, 883 F.3d at 136 (Lohier, J., concurring). These courts instead decided on "the basis of present need and present understanding rather than original meaning." *Hively*, 853 F.3d at 352–53. To them, it is "neither here nor there" what the term sex meant to "the Congress that enacted the Civil Rights Act in 1964." *Id.* at 345.

Unlike this Court, those judges see their role as "updating" the law, and they reject the view that are "merely the obedient servants of the 88th Congress (1963–1965), carrying out their wishes." *Id.* at 357 (Posner, J., concurring). To them, in the face of congressional inaction, "Title VII of the Civil Rights Act of 1964, now more than half a century old, invites an interpretation that will *update it to the present*, a present that differs markedly from the era in which the Act was enacted." *Id.* at 353 (emphasis added). To them, the "compelling social interest in protecting homosexuals (male and female) from discrimination justifies an admittedly loose 'interpretation' of the word 'sex' in Title VII to embrace homosexuality." *Id.* at 355. Even though this interpretation "cannot be imputed to the framers of the statute," these judges see it "as a sensible *deviation* from the literal or original meaning of the statutory language." *Id.* at 355 (emphasis added).

These judges thus admit that redefining of the term sex to include sexual orientation runs contrary to Title VII's plain and original meaning. In 1964, Congress used "the then-current understanding of the key word—sex." *Id.* at 357. "'Sex' in 1964 meant gender, not sexual orientation." *Id.* at 357.

And these courts admit that sex-stereotyping discrimination is "a different type of sex discrimination from the classic cases of old in which women were erroneously (sometimes maliciously) deemed unqualified for certain jobs." *Id.* at 356. Sex stereotyping is disadvantaging an employee

because he does not conform to notions of proper behavior, not disadvantaging members of one sex to the benefit of the other sex. *Id.*

These judges admit that they "are imposing on a half-century-old statute a meaning of 'sex discrimination' that the Congress that enacted it would not have accepted." *Hively*, 853 F.3d at 357. After all, unless a judge could abandon the original meaning, "what was believed in 1964 defines the scope of the statute for as long as the statutory text remains unchanged." *Id.* at 353.

3. This Court should not follow the reasoning of these new federal decisions, which contradict the weight of federal appellate authority.

First, the Supreme Court has never ruled on this issue and has in fact just declined to review a case in which the federal court rejected the same argument Mr. Lampley now asserts. *Evans*, 850 F.3d at 1257 (11th Cir.), *cert. denied*, 138 S. Ct. 557 (2017). Until last year, the Supreme Court had no need to step in because the courts of appeals agreed.

Second, these new decisions remain the minority view in the federal courts. Only the Second and Seventh Circuits—in split, highly contested decisions—have purported to redefine sex in Title VII to allow sexual-orientation claims. Every other circuit continues to maintain its longstanding interpretation.

Third, these cases stretch the term "sex" beyond its plain and ordinary meaning. "Sex," "'which is used in series with 'race' and 'religion,' is one of the words least likely to fluctuate in meaning." *Zarda*, 883 F.3d at 134 (Jacobs, J., concurring). "The problem sought to be remedied by adding 'sex' to the prohibited bases of employment discrimination was the pervasive discrimination against women in the employment market, and the chosen remedy was to prohibit discrimination that adversely affected members of one sex or the other." *Id.* at 140–43 (Lynch, J., dissenting). "The language of the Act itself would have been so understood not only by members of Congress, but by any politically engaged citizen deciding whether to urge his or her representatives to vote for it." *Id.* at 145. The Second and Seventh Circuit's approach is thus far from "faithful to the statutory text, read fairly, as a reasonable person would have understood it when it was adopted." *Hively*, 853 F.3d 360 (Sykes, J., dissenting). "The result is a statutory amendment courtesy of unelected judges." *Id.*

Fourth, this approach subverts the public's ability to understand and predict the law. "Anti-discrimination law should be explicable in terms of evident fairness and justice, whereas the analysis employed in the opinion of the Court is certain to be baffling to the populace." *Zarda*, 883 F.3d (Jacobs, J., concurring).

Fifth, as Judge Sykes pointed out in *Hively*, "[j]udicial statutory updating, whether overt or covert, cannot be reconciled with the constitutional design." *Hively*, 853 F.3d 360 (Sykes, J., dissenting). Without an express delegation of authority from the legislature to consider and make new rules of law in the common-law way, courts cannot ascribe to the law a meaning not born by the law at its inception. *Id*. The U.S. Supreme Court does not condone "judicial efforts to 'update' statutes," because "the proper role of the judiciary" is "to apply, not amend, the work of the People's representatives." *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1725–26 (2017).

III. Mr. Lampley charged only sexual-orientation discrimination. (Responds to Mr. Lampley and Ms. Frost's Points I and II).

The trial court correctly concluded that Mr. Lampley's charge alleged only sexual-orientation discrimination—and not even sex discrimination under a sex-stereotyping theory. Mr. Lampley had to allege some particular facts of sex discrimination. But Mr. Lampley did not allege that his supervisors treated him worse than a similarly-situated woman; he alleged that his supervisors treated him worse than similarly-situated non-gay coworkers of either sex. And neither in his charge nor in any later court

filings has he alleged that his supervisors harassed him because he failed to behave in any stereotypically male or female way. LF071–079; Aplt. Br. 7–9.

A. Whether a charge alleges sex discrimination is a legal question for a court, not a question of proof for a jury.

The Western District erred when it considered this question unsuitable for summary judgment. Aplt. Br. 16–17. It held that Mr. Lampley's charged "offer[ed] evidence of sex stereotyping" and so "he should have been allowed to demonstrate how sex stereotyping motivated the alleged discriminatory conduct." *Lampley,* 2017 WL 4779447 at *5. For the Court of Appeals, whether a claim of sex stereotyping is a mere pretext is a question for a jury to decide. *Id*. at *5. The "issue before this court is simply whether material issues of fact prevent the entry of judgment as a matter of law." *Id*.

But this case turns on a question of law, not a question of proof. Under the Act, Mr. Lampley had to allege his facts with some particularity. Whether he did so is a question of law for the court. Plus, his suit was to make the Commission issue him a right-to-sue letter; it was not for damages for sex discrimination, and so he did not need prove the facts of discrimination to a jury to prevail.

B. The Act requires an employee to allege sex discrimination with particularity.

On the merits, the Commission correctly determined that it could not issue Mr. Lampley a right-to-sue letter unless he made particular factual allegations of sex discrimination.

To state a claim under the Act, a party must file an administrative charge with the Commission and allege facts showing discrimination. Then the person must either adjudicate the claim through the Commission or obtain a right-to-sue letter (this is the same procedure that parties must follow before the EEOC if they wish to bring a claim under Title VII). RSMo § 213.075; A19–21; *see Stuart v. Gen. Motors Corp.*, 217 F.3d 621, 630 (8th Cir. 2000).

By statute, "any person claiming to be aggrieved by an unlawful discriminatory practice" must "file with the commission a verified complaint" that "shall state the name and address of the person alleged to have committed the unlawful discriminatory practice and which shall set forth the *particulars* thereof and such other information as may be required by the commission." RSMo § 213.075.1; A19–21 (emphasis added). Under this particularity requirement, the charge must put the employer on reasonable notice of each specific claim of discrimination—and the employee cannot rely on facts that are not in the charge. *Farrow v. Saint Francis Med. Ctr.*, 407

S.W.3d 579, 594 (Mo. 2013). An employee who fails to raise a charge of discrimination has not exhausted the available administrative remedies. *Id.*

Although charges are interpreted liberally, and a court will consider the charge to contain any incidents that are like or reasonably related to the allegations, the employee is limited only to claims that could reasonably be expected to grow out of the facts alleged. *Reed v. McDonald's Corp.*, 363 S.W.3d 134, 143 (Mo. App. E.D. 2012). If the facts do not allege sex discrimination, the charge does not reasonably allege sex discrimination. As Mr. Lampley concedes, the charge must give notice to the charged party about the basis of the claim. Aplt. Br. 17.

Cases involving the liberal constructions of claims are in some tension with the statutory particularity requirement. Taking liberal pleading standards too far could conflict with the Act's particularity requirement. For this reason, this Court has held that liberal construction of a charge need not go so far as to read into the complaint allegations of different types of discrimination. For instance, under a liberal construction, a court could expect a charge of racial discrimination that mentions previous complaints to be part of continuing racial harassment. *Alhalabi v. Missouri Dep't of Nat. Res.*, 300 S.W.3d 518, 525–26 (Mo. App. E.D. 2009). Likewise, where an employee alleged discrimination by his supervisors but did not name each supervisor as a defendant, this Court reserved judgment on whether an

identity of interests exists between the employer and supervisor if there is no prejudice from the technical omission. *Hill v. Ford Motor Co.*, 277 S.W.3d 659, 669–70 (Mo. 2009). But the Act does not allow employees to omit major elements of a claim in a charge. To do so would not state the "particulars" of the claim, as the statute requires.

C. Mr. Lampley alleged only sexual-orientation discrimination.

When it reviewed Mr. Lampley's charge, the Commission correctly concluded that Mr. Lampley alleged just facts showing sexual-orientation discrimination—not facts showing sex discrimination.

1. Mr. Lampley did not allege sex discrimination in his charge. Instead, in his charge's narrative, Mr. Lampley alleged sexual-orientation discrimination. He stated that similarly situated coworkers who were not gay had exhibited "the stereotypical attributes of how a male or female should appear and behave" and thus were not subject to this harassment. LF072, ¶15; LF074, ¶15. These coworkers were not treated differently and they endured no hostile work environment. LF072, ¶16; LF074, ¶16.

And that was all. Mr. Lampley did not allege that he was treated worse than a similarly-situated woman would have been—he alleged that he was treated worse than a similarly-situated non-gay coworker of either sex.

2. Nor did Mr. Lampley allege that his employer discriminated against him because of any purported sex stereotype. LF071–079. Even if sex stereotyping were a freestanding claim, Mr. Lampley would need to do more than state his sexual orientation. For a court to assume that all gay individuals act in the same way because of their sexual orientations would itself be impermissible stereotyping.

Mr. Lampley also does not allege that his employer held stereotypical views of males or that Mr. Lampley acted contrary to such a stereotypical view. This case thus involves no allegation of an employer discriminating against a gay man because he is feminine or speaks or dresses in an insufficiently masculine way. Mr. Lampley alleged no facts showing that he did not exhibit the stereotypical attributes of how a male should appear and behave.

The charges thus support only a simple legal argument: that any form of sexual-orientation discrimination is *per se* sex stereotyping and sex discrimination. In other words, his only theory of sex stereotyping is that *all* sexual-orientation discrimination is sex stereotyping and thus *per se* sex discrimination.

But this is not enough. This syllogism is a legal argument about the significance of allegations of sexual-orientation discrimination, not a set of a facts showing sex discrimination. And courts that recognize sex-stereotyping

theories have acknowledged that certain sex stereotypes "may *correlate* disproportionately with a particular sexual orientation," but they recognize that this correlation "by no means establishes that *every* gay individual" has a claim of sex discrimination. *Evans*, 850 F.3d at 1259 (emphasis added). A same-sex sexual orientation is not a trait unique to one sex.

Mr. Lampley's charge thus alleges not sex discrimination but sexual-orientation discrimination—it is "devoid of any allegation regarding gender stereotyping." *Pittman*, 478 S.W.3d at 484. As in *Pittman*, Mr. Lampley has not claimed "that he was harassed because he failed to comply with societal stereotypes of how he ought to appear or behave" but "that he was discriminated against because of his sexual orientation." *Pittman*, 478 S.W.3d at 484. He does not allege sex discrimination because he does "not allege that he was discriminated against or harassed because of his gender but alleges that he was discriminated against because of his sexual orientation." *Id.* at 482–83.

This case is no different from *Pittman*. In both instances, the plaintiffs allegedly experienced harassment from superiors in the workplace as a sole consequence of their sexual orientation (or in Ms. Frost's case, her association with someone of a certain sexual orientation). Likewise, in both instances other coworkers who were not of the same sexual orientation did not experience similar harassment. These allegations, without more, do not

constitute discrimination because of a person's sex. *Pittman*, 478 S.W.3d at 484.

3. Because Mr. Lampley and Ms. Frost failed to allege anything but sexual orientation-discrimination in their charges, the Commission was right to conclude that they did not allege sex discrimination. It was Mr. Lampley's burden under the statute and precedent to allege these claims with some particularity, and he chose to give as the sole instance of non-stereotypical appearance or behavior that he was gay—and his entire narrative of facts alleges that his supervisors harassed him because he was gay. Even now, he is careful not to suggest that his supervisors harassed him because of any other non-stereotypical reasons in his appearance or behavior besides that he is gay. Aplt. Br. 19.

The Commission's conclusion is thus entitled to deference from this Court. *City of Clayton v. Mo. Comm'n of Human Rights*, 821 S.W.2d 512, 528 Mo. App. E.D. 1991). The "interpretation and construction of a statute by an agency charged with its administration is entitled to great weight." *Mercy Hospitals East Communities v. Missouri Health Facilities Review Comm.*, 362 S.W.3d 415, 417 (Mo. 2012).

4. The Western District misread the record when it found in Mr. Lampley's charge allegations of non-stereotypical behavior or appearance beyond his sexual orientation.

The Court of Appeals read the charge to allow that "his employer discriminated against him based on sex, because his behavior and appearance contradicted the stereotypes of maleness held by his employer and managers." *Id.* at *1. Under this reading, Mr. Lampley's sexual orientation was merely "incidental to the underlying claim of sex discrimination, which . . . was evidenced by sex stereotyping." *Id. Lampley*, 2017 WL 4779447 at *2. And so he "should have been allowed to demonstrate how sex stereotyping motivated the alleged discriminatory conduct." *Id.* at *5.

But the Court of Appeals cited no place in the record where Mr. Lampley alleged that a non-stereotypical behavior or appearance in any way *other* than his sexual orientation. Nor could it have done so. Mr. Lampley did not allege in his charge that he had a non-stereotypical appearance or behavior other than his sexual orientation. In his factual narrative, where he had the burden of alleging some minimal facts of discrimination, Mr. Lampley alleged only that "that I am gay and that I do not exhibit the stereotypical attributes of how a male should appear and behave." LF071, ¶4; LF073, ¶4. He did not provide any "particulars" of *how* his conduct failed to exhibit such "stereotypical attributes of how a male should appear and behave," other than to allege that "I am gay." *Id.*

5. Mr. Lampley claims that he did show facts of sex discrimination because he checked the preprinted sex and retaliation boxes on the charge

and claimed that his supervisors discriminated against him because of a sex stereotype, Aplt. Br. 16–18, but the Commission cannot accept Mr. Lampley's legal conclusions at face value. But Mr. Lampley did not allege that women were treated better than men at his job; he alleged only that he was gay and that his supervisors harassed no non-gay coworkers. LF072, LF074.

Labeling sexual-orientation discrimination as sex stereotyping does not bring sexual-orientation discrimination under the Act. Checking the sex discrimination box on the charge form is a legal argument about the significance of the allegations, not the facts necessary to allege sex discrimination. Under the Act and this Court's precedent, the Commission cannot credit these conclusory allegations without a factual narrative describing with some basic particularity an instance of sex discrimination. LF071–079. As the Court of Appeals explained in *R.M.A.*, "alleging facts in a petition that implicate 'sex' without alleging facts that could establish discrimination on the grounds of sex (i.e. that one was deprived because of his sex of a right or privilege afforded the other sex)" states no claim. *R.M.A.*, 2017 WL 3026757, at *4.

This standard has long been the rule of the Commission as well as of the federal Equal Employment Opportunity Commission, which follows similar procedures. RSMo § 213.075; A19–21. If an "EEOC charge is bereft of any allusion to allegations of race or sex discrimination, merely checking off

the box of 'race' or 'sex' on the EEOC charge is insufficient to exhaust it as a claim." *Peyton v. AT & T Servs., Inc.*, No. 4:13CV00216 AGF, 2013 WL 2475700, at *2 (E.D. Mo. June 10, 2013) (collecting cases). Federal courts thus hold that when a party checks a box for "retaliation," but includes no allegations of retaliation in the "particulars" portion of the charge of discrimination, the party has not presented a retaliation claim. *McConnell v. Greenfield R-IV Sch. Dist.*, No. 15-003325-CV-S-JTM, 2015 WL 5692282, at *2 (W.D. Mo. Sept. 28, 2015). The key for a plaintiff is the "narrative of her charge" and whether it showed "how she was purportedly discriminated against on the basis" that she checked above. *Allen v. St. Cabrini Nursing Home*, No. 00 CIV 8558 CM, 2001 WL 286788, at *4 (S.D. N.Y. Mar. 9, 2001), *aff'd sub nom. Allen v. St. Cabrini Nursing Home Inc.*, 64 F.App'x 836 (2d Cir. 2003).

IV. An associational or retaliation claim must be based on discrimination that the Act covers.

The Missouri Human Rights Act does not allow for an associational or retaliation claim unless the claim charges association with or retaliation for conduct that the Act covers. Ms. Frost's case depends on whether she associated with a protected person. Because the Act does not cover sexual-orientation discrimination claims, Ms. Frost had not associated with a

protected person, and thus alleged no category that the Act covers within the Commission's jurisdiction.

Below, in a footnote, the Court of Appeals held that, even if the state employees alleged no discrimination that the Act prohibits, their retaliation claims could proceed independently, "as long as a plaintiff had a reasonable, good faith belief that there were grounds for a claim of discrimination or harassment." *Id.* at *5 n.2 (citing *Shore v. Children's Mercy Hospital*, 477 S.W.3d 727, 735 (Mo. App. W.D. 2015)).

But no employee may bootstrap *uncovered* conduct into the Act under a theory of association or retaliation. No party could have a "reasonable, good faith belief that there were grounds for a claim of discrimination" when the alleged discrimination relates to a category that the Act does not cover. Such a belief is "reasonable" only if it alleges association with or retaliation for conduct that the Act covers.

If any charge of harassment or unpleasant working conditions is enough to trigger liability under the Act if the employer retaliates against the complainant, even if the charge alleges no discrimination on a basis prohibited by the Act, this Court would expand the Act's scope would beyond what the Legislature provided. Employees would be able to invent protections under the Act by filing a charge about anything and labeling it as discrimination, even if they never alleged any discriminatory conduct. This

would turn the Act from a remedy for discrimination suffered by historically-disadvantaged classes into a general font of employment and tort law.

Because the employees' charges do not state claims under the Act, this Court should affirm the circuit court's entry of summary judgment for the Commission. Mandamus is also inappropriate on appeal because the employees "failed to file a new writ with this court, and because issuance of right-to-sue letters provides an adequate remedy." *Lampley*, 2017 WL 4779447, at *5.

CONCLUSION

The State of Missouri condemns mistreatment or harassment of any employee, and it provides for grievance procedures to remedy abuse of employees. The State also provides tort, civil, and criminal remedies for wronged employees and other victims of harassment. Federal and local laws provide additional protections. But whether to add a new protected class to the Human Rights Act is a policy question of public importance that should be left to the democratic process. In this context, it is the General Assembly's prerogative to decide whether and when to expand the Act's scope. Because the General Assembly has not yet done so, this Court should affirm the judgment of the trial court.

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CERTIFICATE OF SERVICE AND COMPLIANCE

I certify that a copy of the above Substitute Brief of Respondents was served electronically by Missouri CaseNet e-filing system on March 29, 2018, to all parties of record.

I also certify that the foregoing brief complies with the limitations in Rule No. 84.06(b) and that the brief contains 14,515 words.

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