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IN THE MISSOURI SUPEME COURT

R.M.A., (a minor child), **By his next friend:** **RACHELLE APPLEBERRY** **Appellant/Plaintiff,** **v.** **BLUE SPRINGS R-IV SCHOOL DISTRICT, ET AL.** **Respondents/Defendants.**	)	**Case No. SC96683**

ON APPEAL FROM THE
CIRCUIT COURT OF JACKSON COUNTY
HONORABLE MARCO A. ROLDAN

SUBSTITUTE REPLY BRIEF OF APPELLANT R.M.A.

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ARGUMENT

I. APPELLANT'S PETITION PLED A CLAIM OF SEX DISCRIMINATION IN PUBLIC ACCOMMODATION (REPLY TO RESPONDENTS' PART II AND AMICUS BRIEF OF ADF)

Respondents continue to assert that the discrimination in which they engaged does not constitute sex discrimination. Yet the language of their brief makes clear that it does. Additionally, the Alliance Defending Freedom ("ADF") filed an *amicus curiae* brief presenting an irrelevant argument wholly alien to Missouri law. Appellant addresses each of their arguments in turn.

a. Respondents engaged in sex discrimination.

Respondents' arguments regarding "sex" largely mirror those of their prior briefs and the decision of the Court of Appeals. As such, they have largely been addressed by Appellant, who will not repeat those arguments.

Respondents first discuss the dictionary definition of the word sex. They focus on the *first* definition of sex, which references "the two divisions, male or female." (Substitute Brief of Respondents/Defendants [hereinafter "Resp. Sub. Brief"], 23) (citing *Webster's NewWorld Dictionary*, 2nd College Ed., 1305 (1986)). They cite to *Pittman v. Cook Paper Recycling Corp.*, which also only used "the first definition of 'sex'" in deciding the meaning of the term under the Missouri Human Rights Act ("MHRA"). 478 S.W.3d 479 (Mo. App. 2015) (citing *Webster's Third New International Dictionary*, 2081

(Unabridged 1993)). As federal courts have noted, the dictionary relied on by the *Pittman* court has a second definition:

> the sum of the morphological, physiological, and behavioral peculiarities of living beings that subserves biparental reproduction with its concomitant genetic segregation and recombination which underlie most evolutionary change, that in its typical dichotomous occurrence is usu[ally] genetically controlled and associated with special sex chromosomes, and that is typically manifested as maleness and femaleness

G.G. ex rel. Grimm v. Gloucester County School Board, 822 F.3d 709, 721 (4th Cir. 2016) (quoting *Webster's Third New International Dictionary*, 2081 (1971)). The Fourth Circuit observed that while the definitions suggest that the word "sex" was understood "to connote male and female and that maleness and femaleness were determined primarily by" factors such as reproductive organs at birth, "by the use of qualifiers" the definitions also suggest that "although useful in most cases" the "hard-and-fast binary division on the basis of reproductive organs" is not "universally descriptive." *Id.* at 721-22.

Thus, while the first dictionary definition might myopically suggest that "sex" refers only the existence of two binary categories, the full definition, even at the time the MHRA was enacted, makes clear that the word encompasses they many complex qualities, traits, and presumptions connected to the categories.

Respondents also cite a law review article advocating for the passage of the Missouri Non-Discrimination Act ("MONA"), written by a 2L student who happens to

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now be counsel for Appellant. (*Id.* at 25-26) (citing Alex Edelman, *Show-Me No Discrimination: The Missouri Non-Discrimination Act and Expanding Civil Rights Protection to Sexual Orientation or Gender Identity*, 79 UMKC L.Rev. 741 (2011)). Respondents fail to make the important distinction between binding or persuasive precedent, and an argument in favor of a policy position. (*Id.* at 25, saying the "author held" as if it were a court decision). At the time the article was written, the author's understanding of civil rights law was more limited, and many of the precedents cited in this case had not been decided.

Passage of MONA in 2011 *would* have clarified the question now before this Court, and might have spared R.M.A. and many others, including Kquawanda Moore, Harold Lampley, and Rene Frost, from suffering discrimination. However, just as pregnancy discrimination did not need to be enumerated to be protected, neither does gender identity. *Self v. Midwest Orthopedics Foot & Ankle*, 272 S.W.3d 364, 371 (Mo.App.W.D. 2008). While the article in question advocated for such legislation, it in no way prevents this Court from recognizing the discrimination Appellant suffered for what it is—sex discrimination, already unlawful under the MHRA.

b. Binding and persuasive precedent clearly hold that Respondents engaged in sex discrimination.

Appellant has shown that the binding and persuasive authority holds that the discrimination he encountered was sex discrimination under multiple analyses, including those that recognize discrimination based upon a "gender-related trait" and "sex stereotyping."

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Respondents adopt the argument of the Court of Appeals regarding the meaning of the term "gender-related trait." (Resp. Sub. Brief, 29). As Appellant has argued, such a narrow definition of the term is antithetical to the MHRA's status as a remedial law meant to be broadly interpreted. (Substitute Brief of Appellant R.M.A. [hereinafter "App. Sub. Brief"], 21) (citing *Doe ex rel. Subia v. Kansas City, Missouri School District*, 372 S.W.3d 43, 48 (Mo.App.W.D. 2012); *MCHR v. Red Dragon Rest., Inc.*, 991 S.W.2d 161, 166-67 (Mo.App.W.D. 1999)).

Respondents point out that Appellant "does not allege that he is a member of one sex and being treated differently from the other sex" but rather, alleges that "he is being treated differently from others of the same sex." (Resp. Sub. Brief, 30). This, they argue "does not constitute discrimination on the grounds of sex." (*Id.*). Yet Respondents own description of what it means that Appellant is transgender shows otherwise. "He is transitioning from his birth *sex*, female, to male." (*Id.* at 29) (emphasis added). This is no error in drafting. Appellant's being transgender is inherently connected to his sex, and thus his exclusion from the boys' restroom is discrimination "on the grounds of . . . sex."

Respondents also aver that Appellant did not plead a claim of sex stereotyping. (Resp. Sub. Brief, 30). There is no requirement under the MHRA to expressly use that term, and at the time the petition was filed no Missouri Court had expressly recognized that theory. And while Appellant may not have used that term of art, he has met the motion to dismiss standard, pleading facts giving rise to the claim. Appellant pled that he is a "transgender teenager" and that he "transitioned to living as a male in September 2009." (L.F. 11, ¶ 18). He also pled that Respondents' reasons for denying him the same

accommodations as other boys is that he "is transgender and is alleged to have female genitalia." (L.F. 12, ¶ 33). "By definition, a transgender individual does not conform to the sex-based stereotypes of the sex that he or she was assigned at birth." *Whitaker v. Kenosha Unified School District,* 858 F.3d 1034, 1048 (7th Cir. 2017). Such an individual "is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes." *Id.* (quoting *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011)). Appellant has pled facts that give rise to his claim that he was subjected to sex stereotyping.

In support of their position, Respondents cite *Johnston v. Univ. of Pittsburg of Com. Systems of Higher Educ.*, 97 F.Supp.3d 657 (W.D. Penn. 2015). (31-32). But this single district court case is unpersuasive in light of the growing body of subsequent authority on the matter. *See, e.g., Whitaker,* 858 F.3d 1048; *Glenn,* 663 F.3d at 1318 n.5; *Smith v. City of Salem*, 378 F.3d 566, 573 (6th Cir. 2004). Indeed, it is not even clear that the decision in *Johnston* controls in Pennsylvania. Another court in the state found that, in light of *Whitaker* and other "recent cases," a school might be required not to engage in sex discrimination by denying students access to restrooms, despite the previous holding in *Johnston*. *Doe v. Boyertown Area Sch. Dist.*, 276 F. Supp. 3d 324, 390 (E.D. Pa. 2017).

In response to this growing body of federal precedent finding that the discrimination at issue in this case is sex discrimination, Respondents complain that "'evolution of thought' is not a hallmark of statutory interpretation or construction." (Resp. Sub. Brief, 32). This may be, but it is a hallmark of the interpretation of the MHRA that "Missouri appellate courts are guided by both Missouri and federal law in

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deciding cases under the MHRA," although "the protections of the MHRA are not identical to those found in federal statutory schemes . . . and, indeed, Missouri has adopted a different definition of 'discrimination' that in some respects offers greater protection" than federal law. *Hill v. Ford Motor Co.*, 277 S.W.3d 659, 664 (Mo. banc 2009); *see also Daugherty v. City of Maryland Heights*, 231 S.W.3d 814, 818 (Mo. banc 2007).

Respondents also attempt to dismiss the growing body of federal precedent by suggesting it "has proceeded in fits and starts, at best." (Resp. Sub. Brief, 32). In support of this, they cite a single case as a "cautionary tale" of why they claim these cases should not be persuasive. (*Id.*) (citing *Grimm*, 822 F.3d 709 (4th Cir. 2016)). Respondents focus on *Grimm*'s procedural history, noting the case was remanded after the Department of Education (under a new administration) revoked guidance they described as playing "a significant role." (*Id.*). In fact, the court had found that the guidance was "entitled to *Auer* deference and is to be accorded controlling weight in this case." *Grimm*, 822 F.3d at 723 (referencing *Auer v. Robbins*, 519 U.S. 452 (1997)). Thus, the decision arose from the guidance, and once the guidance was withdrawn, the decision had to be revisited. However, this does not diminish the persuasive value of the Court's reasoning to reach its decision, such as its analysis of the meaning of the word "sex." *Grimm*, 825 F.3d at 721-22. Moreover, nothing about the procedural history in *Grimm* suggests any other federal precedent should be less persuasive.

Respondents have not shown that the authorities cited by Appellant are not persuasive or do not show he was subjected to discrimination on the grounds of sex.

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c. *Amicus curiae* ADF's arguments are unrecognizable under the MHRA precedent.

In its *amicus curiae* brief, ADF argues extensively regarding the nature of gender identity and privacy. By its own admission, ADF sees this matter as but one in a line of cases in which it has involved itself, that is more about "privacy" than it is about discrimination. (Brief of *amicus curiae* ADF [hereinafter "ADF Brief"], 8). In its view, this case involves "three actors: (1) a local school or school district;" (2) transgender students who wish to use the facilities that correspond to their actual gender (although this is not ADF's phrasing); and the other students, who ADF contends "rely upon single-sex privacy facilities so as to have privacy from the opposite sex." (*Id.* at 11). Such a framing is wholly alien from the MHRA and any relevant authority—the other students at Respondents' school are not a party to this case. As a result, the brief does little to address the relevant questions at issue in the case, rendering the entire *amicus* brief unpersuasive.

ADF's brief repeatedly focuses on the privacy of the other students at Respondents' school. It offers no authority for the relevance of such privacy within the framework of the MHRA. Conversely, regulations adopted by the MCHR expressly prohibit, at least in the context of employment, "customer, client, coworker or employer preference" from being used to justify discrimination. 8 C.S.R. 60-3.020(4)(A).

In addition to disregarding the MHRA, ADF's brief is constructed around at least four presumptions about Missouri law that are incorrect, making its arguments fundamentally flawed. First, it presumes an important, absolute, and legally significant

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difference between "sex" and "gender." Second, it invents a "right to bodily privacy." Third, it invents a legal doctrine regarding the use of restrooms. And forth, it presumes that Appellant is not a male.

ADF begins its brief by stating that "much of the confusion on this issue is driven by conflating two very different concepts: sex and gender." (ADF Brief, 9). It defines the terms as starkly different, without citation to legal authority. (*Id.*). This assertion is in marked contrast to the binding authority under the MHRA, which, as Appellant has already pointed out, makes clear that discrimination based on "sex" also includes "gender," as courts use the two terms interchangeably. (App. Sub. Brief, 19). This difference undergirds all of ADF's arguments, highlighting those arguments inapplicability to the MHRA.

ADF's brief also invents, and is largely built around, a "right to bodily privacy" that it claims exists. (ADF Brief, 21). It asserts that these "[b]odily privacy rights" are "evidenced through many areas of law," and cites to a number of state law cases from other jurisdictions that discuss the *expectation* of privacy, but say nothing about a positive right to receive it. (*Id.*) (citing, *e.g., State v. Lawson*, 340 P.3d 979, 982 (Wash. Ct. App. 2014)).

The right to privacy is well established by a long line of United States Supreme Court cases, although ADF does not cite them. *See, e.g., Lawrence v. Texas*, 539 U.S. 558, 564-67 (2003); *Griswold v. Connecticut*, 381 U.S. 479, 484-85 (1965). However, these cases recognize a *negative* right to privacy, held against the government, preventing it from intruding upon private affairs. ADF's quite radical proposal is that there is a

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positive right to privacy, against private individuals such as Appellant, which the government is obligated to actively provide. Such positive rights are largely alien from American jurisprudence. *See, e.g. DeShaney v. Winnebago County Dept. of Social Servs.*, 489 U.S. 189, 195-96 (1989). ADF provides no authority why this should be an exception to that rule.

ADF also invents a legal doctrine, based on a ruling involving a criminal trespass. In that case, a male defendant was convicted of trespassing for sitting in the stall of a women's restroom and smoking for over an hour. *State v. Girardier*, 484 S.W.3d 356, 357-358 (Mo.App.E.D. 2015). The Appellate Court found that there was sufficient evidence for a jury to find that the defendant had "remained unlawfully" in the women's restroom because he knowingly went into an area where he was not permitted, and his concealment of his identity "provides evidence of his knowledge of his unlawful entry." *Id.* at 362. From this case, ADF invents what it refers to as the "*Girardier* doctrine." (ADF Brief, 22). It claims that the decision stands for the principle that the right of Missourians to use the restroom "is properly circumscribed when facilities are restricted to the use of one sex, being limited to 'a license to use only the facility designated for one's [sex].'" (*Id.* at 15). However, the phrase "*Girardier* doctrine" has never been used by any Missouri Court. It is clear from the case and those citing it that this portion of the decision stands only for the proposition that the opening of part of a building to the public does not protect one from charges of trespassing when exceeding the invitation by entering an area marked as off limits. *Girardier*, 484 S.W.3d at 363; *see also, e.g., State v. Naylor*, 510 S.W.3d 855, 859-60 (Mo. banc 2017) ("[b]ecause the defendant

knowingly entered an area of the building where he was not permitted to be, his status changed from an invitee to a trespasser").

Finally, ADF presumes that Appellant is not legally male. Its arguments are based on the notion of a privacy right separating males and females in certain facilities. Yet in his Petition for Damages, Appellant pled that his "legal sex is male." (L.F. 12, ¶ 25). Appellant's sex was changed on his birth certificate pursuant to a Missouri law. RSMo. § 193.215.9. Thus, to the extent that Missouri law understands Appellant's sex for legal purposes, it considers him a male. ADF points to no binding or persuasive legal authority to suggest otherwise.

Because its arguments are far outside Missouri law, the brief of ADF has little bearing on Appellant's claims and deserves to be largely disregarded by this Court.

d. The legal arguments made by ADF are unsupported by any authority.

The few substantive legal arguments made by ADF are similarly unsupported by relevant authority. ADF does reference a number of cases with relevant authority, but it does not cite to that authority. Rather, its brief outlines the organization's role in such cases. However, in many of those example, a court has already ruled against ADF and its position. See, e.g. *Whitaker*, 858 F.3d 1034 (ADF Brief, 25); *Boyertown*, 276 F. Supp. 3d 324 (ADF Brief, 8) (citing appeal).

ADF claims that *Price Waterhouse* does not stand for a broad expansion in the understanding of sex discrimination. In support of this assertion, it cites a case that discusses the precedential value of the case as a plurality decision. (ADF Brief, 22-23) (quoting *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 188–89 (2009)). However, the

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quotation used is grossly misleading, as it dealt with another issue in the case—the burden of proof in an employment discrimination matter—and not the question of sex stereotyping. On that issue, "a plurality of the Supreme Court and two justices concurring in the judgment, found that the plaintiff had adequately alleged that her employer, in violation of Title VII, had discriminated against her" based on her failure to conform to sex stereotypes. *Whitaker*, 858 F.3d at 1047; *see also, Price Waterhouse*, 490 U.S. 228, 261 (1989) (O'Connor, J. concurring).

ADF has failed to raise any substantive legal argument that this Court should consider. As a result, its brief is unworthy of consideration when ruling upon the substance of the case before the Court.

II. RESPONDENTS ARE PERSONS UNDER THE MHRA'S DEFINITION SECTION AT RSMO. § 213.010 (REPLY TO RESPONDENTS' PART I AND BRIEF OF AMICUS CURIAE THE STATE OF MISSOURI)

Respondents also argue that they are not persons under the MHRA, and therefore cannot be held liable for their acts of public accommodation discrimination. As Appellant discussed extensively in his substitute brief, this proposition is not supported by the relevant authority, and would render parts of the statute meaningless. Appellant has largely addressed Respondents' arguments in that brief. To the extent they changed from those made below, Appellant's reply is contained herein.

The Attorney General of the State of Missouri has also filed an amicus brief as a matter of right under Missouri Supreme Court Rule 84.05(f)(4). (Brief of *amicus curiae*

of the State of Missouri [hereinafter "Mo. Brief"], 7). Appellant will address those arguments as well.

a. The legislature intended Respondents to be "persons" within the meaning of the MHRA, and to be liable for public accommodation discrimination under the law.

Both Respondents and the State of Missouri assert that they are not covered by the definition of "person" in the MHRA, and therefore are not prohibited from engaging in public accommodation discrimination by the statute. (Resp. Sub. Brief, 14); (Mo. Brief, 10). Appellant has already extensively briefed why the only reasonable interpretation of the statute is to include Respondents in the definition of "person." (App. Sub. Brief, 36-45). That brief already addressed most of the arguments of Respondents and the Attorney General, and Appellant will focus on the novel arguments they make.

Both Respondents and the Attorney General argue that for a statute to include the state and its political subdivisions in its coverage, the intention to do so must be "clearly manifest" in the statute's language. (Resp. Sub. Brief, 15); (Mo. Brief, 11) (both quoting *Carpenter v. King*, 679 S.W.2d 866, 868 (Mo. banc 1984)). Appellant has already pointed out that the legislatures intention *is* clearly manifest, where the statute expressly makes it unlawful for the state and its subdivisions to engage in discrimination. (App. Sub. Brief, 38) (citing RSMo. § 213.070(3)). Respondents cite no authority to suggest that the state must be expressly included in every *definition* for the statute to apply to them. Even if they had, *Carpenter* makes clear that the clear intent to include the state and its subdivisions may be shown "where they are expressly named therein, or included by

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necessary implication." 679 S.W.2d at 868. As Appellant has explained, Respondents must be included in the definition of "person" to avoid an absurd result. (App. Sub. Brief, 40-42) (citing RSMo. § 213.075.1). Thus, they are included in the definition of "person" by necessary implication. Because the intent to include Respondents is "clearly manifest" in 213.070, they are liable under the MHRA.

In analyzing whether they are persons under the MHRA, Respondents focus a great deal on whether they are "corporations." (Resp. Sub. Brief, 16-18). The state's brief makes similar arguments, also addressing other terms. (Mo. Brief 24-26). Whether or not they are corporations, they are clearly included in the very expansive definition of the term "persons," as evidenced by the necessity of their inclusion for other portions of the statute. They also cite a federal case which held that public entities were not "persons" for the purpose of the Missouri Minimum Wage Law ("MMWL"). (Resp. Sub. Brief, 16-17) (citing *Davis v. Board of Trustees of North Kansas City Hospital*, No. 14-0625-W-CV-ODS, 2015 WL 8811516 *4 (W.D.Mo. March 2, 2015)). In addition to that precedent not being binding, there are important differences between the definitions in the MHRA and MMWL. The MMWL defines "person" as "any individual, partnership, association, corporation, business, business trust, legal representative, or any organized group of persons." RSMo. § 290.500(8). The MHRA defines "person" more broadly, so that it "includes one or more individuals, corporations," and various legal entities (including some absent from the MMWL), but is not limited to those. RSMo. § 213.010(14). Additionally, the MMWL contains no clear expression that the state is subject to its provisions. Because Respondents are "persons" under the MHRA even if they are not

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corporations, this argument does not shield them from liability for their public accommodation discrimination.

Both Respondents and the Attorney General cite *St. Joseph Light & Power Co. v. Nodaway Worth Elec. Co-op., Inc.* in their briefs to support their claims. (Resp. Sub. Brief 18-20); (Mo. Brief, 15) (citing 822 S.W.2d 574 (Mo. App. 1992)). Appellant has extensively briefed the important differences between the statute in that case and the MHRA. (App. Sub. Brief, 42-44). Another important distinction is that in *Nodaway Worth*, the different definitions were of the *same term* ("person"), with one definition (including the state) applying to the entire chapter, while the other definition (omitting the state) applied only to its section. 822 S.W.2d 575-76. The only reason for the legislature to provide a separate definition for that section would be to vary the meaning, imbuing any such changes with great import. In the MHRA, the two definitions are of different terms, and serve different functions. The exclusion from one of them of an express reference to the state is far less persuasive than it was in *Nodaway Worth*.

Missouri's brief additionally raised three reasons that it argued the omission of an express mention of the state from the definition of "person" meant that it is immune from liability for public accommodation discrimination.

First, it asserts that "when the same statute mentions the government and 'person' together, it employs those terms without overlap." (Mo. Brief, 13). In support of this argument, it cites a holding that Missouri courts "presume every word, sentence or clause in a statute has effect, and the legislature did not insert superfluous language." (*Id.* at 14) (quoting *Bateman v. Rinehart*, 391 S.W.3d 441, 446 (Mo. banc 2013)). It then points to

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the definition of "employer," which includes "the state, or any political or civil subdivision thereof, or any person employing six or more persons within the state." RSMo. § 213.010(7). The State then argues that if it is a person, its inclusion in the statute is "redundant." (Mo. Brief, 14). This is plainly untrue. This definition makes the state and its political subdivisions an "employer" regardless of whether it employs six or more persons. There are a few reasons the legislature might have wanted to make this distinction. For one, it can be uniquely unclear whether many of those who work on behalf of the state (e.g. elected officials) are *employed* by the entity or have a different relationship with it. For another, there is not the same risk that the political subdivisions of the state will be too small or unsophisticated to comply with the employment discrimination rules. And, generally speaking, the requirements not to discriminate in employment on most of the bases listed are already imposed on public entities by the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Thus, although the state is a "person," the language in 213.010(7) is not redundant.

The Attorney General's second argument is that "expressly naming the state in the definition of employer while excluding it from the definition of person shows a lack of intent" to include the state in the latter definition. (Mo. Brief, 14-15). As explained above, the inclusion in the state in the definition of "employer" serves an express purpose, to not require it to have six employees to be an employer. Since no such distinction is drawn in the definition of "employer," the legislature did not need to include it. Thus, the distinction provides no evidence of an intent to exclude the state from the definition of employer.

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The Attorney General's brief is not entirely clear in designating where its third point on this issue begins. In what appears to be its third point, the brief states that "at least 36 other statutes" have a definition of "person" that expressly includes the state and its political subdivisions, arguing that "when the legislature intends to include the government within the definition of 'person,' it does so expressly." (Mo. Brief, 15). As already discussed, to include the state and its political subdivisions in the coverage of a statute, the legislature must clearly express that intent. Certainly, the definition of "person" is one possible place for that clear expression, which the legislature has used repeatedly. In the MHRA, that clear expression is in RSMo. § 213.070(3). The Attorney General does not cite, and Appellant cannot find, any authority holding that the legislature must make the *clearest* expression of their intent, or even that the inclusion in the definition of "person" is a clearer expression of intent than a substantive provision expressly making the state liable.

Finally, the State's brief claims its position is supported by the fact that "[o]nly once has a Missouri court applied the public-accommodation provision against a school district." (Mo. Brief, 16). This may be the case regarding appellate courts, but the number is not so small considering that, by Appellant's count, there are only five reported Court of Appeals cases (aside from this one) that were direct appeals of a decision related to a claim for public accommodation discrimination, and no such Supreme Court cases. *See State ex rel. Washington Univ. v. Richardson*, 396 S.W.3d 387, 391-96 (Mo.App.W.D. 2013); *Wells v. Lester E. Cox Med. Centers*, 379 S.W.3d 919, 923-26 (Mo.App.S.D. 2012); *Subia*, 372 S.W.3d at 46-52; *Coleman v. Carnahan*, 312 S.W.3d 377

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(Mo.App.E.D. 2010); *Red Dragon*, 991 S.W.2d at 166-69. Thus, twenty percent of the previously reported cases involved a school district. This may even by an unusually high number, as there are other forms of relief for discrimination by public school districts. *See, e.g.*, 42 U.S.C. § 1983; Title IX of the Education Amendment of 1972.

b. Section 213.070(3) clearly makes Respondents liable for public accommodation discrimination because of sex.

Both the brief of the Respondents and that drafted by the Attorney General argue that the express provisions of Section 213.070(3) making discrimination because of sex by Respondents unlawful should not apply to them. (Resp. Sub. Brief, 20-22); (Mo. Brief, 16-22). A broad view of the MHRA render such arguments unpersuasive.

Much of the argument in both briefs is grammatical, drawing a distinction between the "last antecedent rule" and the "series-qualifier rule" and arguing for the latter. (Resp. Sub. Brief, 21) (quoting, e.g. *Norberg v. Montgomery*, 173 S.W.2d 387, 390 (Mo. 1947)); (Mo. Brief, 16-22) (citing *Spradling v. SSM Health Care St. Louis*, 313 S.W.3d 683, 688 (Mo. banc 2010)). However, these arguments are easily refuted, both grammatically and by the authority upon which they rely.

Respondents correctly state that the series-qualifier rule can apply where "several words are followed by a clause as much applicable to the first and other words as to the last." (emphasis added) (Resp. Sub. Brief, 21); (*see also*, Mo. Brief, 17-20). However, this argument inappropriately applies the singular forms used by the legislature in the phrase "as it relates to employment" to a plural series of nouns in a grammatically unsound way. The legislature used "it," a singular form third person pronoun, and

"relates," a singular present tense verb. Thus, the phrase "as it relates to employment" can only refer to the singular noun preceding this phrase, in this case "age," not to all preceding nouns. If the legislature had intended the series antecedent rule, it would have used "as they relate to employment." Thus, the grammatical analysis support's Appellant's reading, not that of Respondents.

More importantly, the precedent cited holds that the grammatical analysis is made considering, and secondary to, a statute's wider meaning. Thus, only after it "considered all sections of the [] law and harmonized them to give effect to the legislature's intent" did this Court determine the grammatical interpretation that supported the intent. *Spradling*, 313 S.W.3d at 688 (citing *Norberg*, 173 S.W.2d at 390). While Missouri's brief claims that "nothing else in the MHRA suggests" that "that the prohibition against sex discrimination applies against the government in more than its capacity as an employer," (Mo. Brief, at 17), this is not the case. Appellant has already briefed multiple ways the statute suggests it applies its prohibition on public accommodation discrimination to the state. (App. Sub. Brief, 39-42). Additionally, the plain language of the MHRA expressly states that section 213.070(3) covers public accommodation discrimination:

> If, after one hundred eighty days from the filing of a complaint alleging an unlawful discriminatory practice pursuant to . . . subdivision (3) of section 213.070 *as it relates to . . . public accommodations* . . . [provides a] right to bring a civil action.

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RSMo. § 213.111.1 (emphasis added). This provision alone renders the remainder of the State's arguments nearly superfluous.

By reviewing the entire MHRA, it is clear is that the legislature intended the list in 213.070(3) to enumerate all the forms of discrimination prohibited by the statute. The MHRA prohibits housing discrimination "because of race, color, religion, national origin, ancestry, sex, disability, or familial status." RSMo. § 213.040.1(1). It prohibits employment discrimination because of "race, color, religion, national origin, sex, ancestry, age or disability." RSMo. § 213.055.1(1). And it prohibits public accommodation discrimination because of "race, color, religion, national origin, sex, ancestry, or disability." RSMo. § 213.065.2. All forms of discrimination are prohibited because of race, color, religion, national origin, sex, ancestry, or disability. Age discrimination is prohibited exclusively in employment, and familial status discrimination is prohibited in housing. RSMo. § 213.040.1(1); 213.055.1(1). Thus, the phrase in 213.010(5) and 213.070(3) clearly describes all of discrimination prohibited by the MHRA by listing all the protected classes, and clarifying that two of those protected classes, age and familial status, are each limited in their protection to only one form of discrimination (employment and housing, respectively).[1]

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[1] In order to visualize this similarity, counsel for Appellant created a chart with the relevant statutory provisions, which is included in Appellant's appendix for the Court's reference.

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Missouri's brief next asserts that Appellant's argument fails "because the legislature has stated that this phrase describes 'an unlawful employment practice,'" and that Appellant "fails to mention that the same pertinent phrase appears not only in section 213.070, but also in section 213.055." (Mo. Brief, 17). To try and support this flimsy contention, it cherry picks a remote portion of the latter section, which states (in its broader context) that it is "an unlawful employment practice" for "an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, national origin, sex, ancestry, age as it relates to employment, or disability." RSMo. § 213.055(3). The Attorney General fails to mention that of the fourteen times that the protected categories are enumerated in *that section alone*, only this one uses the language "as it relates to employment," while all the others simply enumerate a person's "race, color, religion, national origin, sex, ancestry, age or disability." By the Attorney General's logic, the legislature defined the phrase even more narrowly, as an "unlawful employment act" carried out by an employment agency, so the state should only be liable in its capacity as an employment agency, not as an employer. Such a conclusion is foreclosed by the fact that the definition of "employer" expressly "includes the state, or any political or civil subdivision thereof." RSMo. § 213.010(7). This argument is unpersuasive.

Moreover, it is wrong that "same pertinent phrase appears" in both 213.055(3) and 213.070(3). The first says "to discriminate *against, any individual because of his* race, color, religion, national origin, sex, ancestry, age as it relates to employment, *or* disability." RSMo. § 213.055(3) (emphasis added). The second says "to discriminate *on*

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the basis of race, color, religion, national origin, sex, ancestry, age, as it relates to employment, disability, *or familial status as it relates to housing*." RSMo. § 213.070(3) (emphasis added). Thus, there is no meaningful basis for arguing that the legislature defined the latter phrase to mean only employment discrimination.

The State's brief next cites four Court of Appeals cases which it claims, "have rejected R.M.A.'s interpretation of this statute." (Mo. Brief, 21). None of those cases have done so. At best, the language cited is *dicta*, stating the law to an extent not at issue in the case; a closer look demonstrates that it mostly does not hold what *amicus* claims.

In the first, the Attorney General avers that "'[S]ection 213.070,' the Court of Appeals has determined, 'prohibits discrimination in employment, disability, and housing.'" (Mo. Brief, 21) (quoting *Coleman*, 312 S.W.3d at 380). This misrepresents the holding:

> Appellants assert that Respondents' alleged vilification constitutes a violation of section 213.070, which prohibits discrimination in employment, disability, and housing. Specifically, Appellants claim that Respondents' actions constitute employment discrimination. But Appellants do not allege any potential or actual employer/employee relationship between the parties. Rather, Mr. Coleman is self-employed. As such, section 213.070 is inapplicable here.

Coleman, 312 S.W.3d at 380. In context, it is not even clear whether the explanatory phrase "which prohibits discrimination in employment, disability, and housing" is the court describing the law or repeating the arguments of the appellants.

In either case, the only legal question about the meaning of 213.070 at issue in that portion of the decision was whether it prohibited the state from engaging in race discrimination in employment. *Id.* There is no question that it does, but that question is not at issue in this case.

While that portion of the decision did not address whether 213.070 prohibits public accommodation discrimination by the state, elsewhere it ruled on appellant's claim that he had been subjected to public accommodation discrimination because he was denied equal access to the security laws of the state of Missouri, observing "that, like a courthouse, a physical office of the Secretary of State falls within" the definition of public accommodation in 213.010(15)(e). *Coleman*, 312 S.W.3d at 379-80. In addressing this claim, the Court of Appeals presumes the state *can* be liable for public accommodation discrimination under 213.065. The appellant's claim failed not because the state is not a person, but because the state's laws are not places of public accommodation. *Id.* at 380. This presumption is also *dicta*, and therefore has not been relied upon by Appellant, but it cannot be said that this case stands for the proposition that the state and its subdivisions are not liable for public accommodation discrimination.

Similarly, the other cases cited by Missouri do not involve the question of whether public accommodation discrimination by the state and its political subdivisions are actionable under the MHRA. *See Korando v. Mallinckrodt, Inc.*, 239 S.W.3d 647, 648 (Mo.App.E.D. 2007) (claims of sex discrimination and retaliation in employment against a private corporation); *McCullough v. Commerce Bank*, 349 S.W.3d 389, 392 (Mo.App.W.D. 2011) (race and age discrimination in employment against a private

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employer); *McBryde v. Ritenour Sch. Dist.*, 207 S.W.3d 162, 167 (Mo.App.E.D. 2006) (race discrimination in employment by a public entity). More importantly, none of the cases were determined by whether the phrase "as it relates to employment" only limited age discrimination, and none of the decisions analyzed that question.

By contrast, the case cited by Appellant directly addressed the question of whether that phrase the limits only "age" or all the prior categories. *Subia*, 372 S.W.3d at 50-51. Thus, the decision is far more persuasive than those cited by the Attorney General, and the failure to address those cases is unremarkable. Plainly, the one time this question has been analyzed by an appellate court in this state, the decision was in unqualified agreement with Appellant's position.

As Appellant has repeatedly shown, the legislature's intent to make the state and its political subdivisions liable for public accommodation discrimination could not be clearer, from the express provisions in 213.070 to the clear presumptions in 213.111 and 213.040.5. This intent is clearly manifest, and the absence of that intent from the definition of the word "person" is insufficient to show otherwise.

The MHRA is a remedial statute, and the statue clearly contemplates the state and its subdivisions being liable for public accommodation discrimination. To read the MHRA otherwise would be to undo the clear intent of the legislature and grant blanket immunity to Respondents for their discriminatory actions.

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c. None of the State's other arguments immunize it for liability from claims of public accommodation discrimination.

In its final section, the brief filed by the Attorney General address some of the arguments previously made by Appellant in this case. However, these arguments are unpersuasive, and do not address the clearest statutory language that makes the state and its subdivisions liable for public accommodation discrimination.

Missouri's brief first argues that the inclusion of the state and its political subdivision in the definition of "place of public accommodation" is unpersuasive because most public schools allow private organizations to use their facilities. (Mo. Brief, 23) (citing RSMo. § 213.010 (15)). This may be the case, but to the extent they are so open to the public, such schools would be covered by the general language of the definition of public accommodation. RSMo. § 213.010 (15). Instead, the legislature made clear that "[a]ny public facility owned, operated, or managed by or on behalf of this state" or its political subdivisions are places of public accommodation. RSMo. § 213.010 (15)(e). This is yet another expression of the legislature's intent to make the state liable for public accommodation discrimination.

Finally, the Attorney General attempts to dismiss Appellant's well-reasoned briefing detailing how the statutory scheme of the MHRA falls apart if the government is not a "person" with arguments that do not address the substance of Appellant's legal claim. The brief seems to not understand Appellant's arguments, and has an unusual focus on the actual form used by the MCHR.

First, the State's brief avers that "R.M.A. overlooks that the MHRA covers not just employers, but supervisors whom a plaintiff can name in a complaint." (Mo. Brief, 26). This is true, but it does not address Appellant's argument. While a plaintiff could name a supervisor, including one working for the state, they still could not name any entity not defined as a "person." Thus, if (as Respondents and *amicus* argue) the state is not a person, no charge can be filed against the state, and no action can be brought, even for employment discrimination.

Next, the brief claims that the "complaint procedure also provides an opportunity to 'join' or 'substitute' a respondent when a person cannot name the proper respondent on the complaint form." (Mo. Brief, 26) (citing RSMo. § 213.075.4). That section provides a procedure for "[a] *person* who is not named as a respondent in a complaint," to be added later. RSMo. § 213.075.4 This does nothing resolve the issue, as such respondent still must be a "person," so if the definition of person excludes the state, it can still never be held liable.

The State's brief next argues that "[t]he form itself also clearly provides space to list the" state and its political subdivisions, and "[n]othing on the form prohibits a plaintiff from listing all necessary information." (Mo. Brief, 26-27). This misses Appellant's point entirely. The forms do not prevent Appellant from filing a charge because they consider the state to be "person," and therefore do not prevent it from being named. (Incidentally, the form cited by Respondents is furnished by the EEOC, not the MCHR).

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Finally, the Attorney general's brief claims, without any citation to authority, that Appellant's arguments related to 213.075 should "carry little weight" because it "outlines only the complaint procedure" and "does not purport to affect substantive rights." (Mo. Brief, 27). Yet this argument, like every argument previously made by Respondents, ignores the fact that if Respondents are either "persons" under the statute or not, and if they are not, they cannot be held liable for employment discrimination.

In the final paragraph, the Attorney General asserts that Appellant "can prevail only if the public accommodations provision clearly and unambiguously applies to the government." The MHRA states that "after one hundred eighty days from the filing of a complaint alleging an unlawful discriminatory practice pursuant to . . . subdivision (3) of section 213.070 as it relates to . . . public accommodations," a complainant may request, and the MCHR shall issue to such complainant, "a letter indicating his or her right to bring a civil action." If that does not clearly and unambiguously apply the public accommodation provisions of the MHRA to the government, Appellant is unsure of what would.

CONCLUSION

Neither Respondents' Brief, nor those of the two *amicus curiae*, provide a compelling argument as to why Appellant's claim for public accommodation discrimination should be dismissed. Therefore, the Court should reverse the dismissal of the case and remand it to the trial court for further proceedings.

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CERTIFICATE UNDER RULE 84.06(c)

I, Alexander Edelman, hereby certify that I am one of the attorneys for Appellant R.M.A., and that the foregoing Brief of Appellant:

(1) Includes the information required by Rule 55.03;

(2) Complies with the limitations contained in Rule 84.06(b); and

(3) Contains seven thousand seven hundred eighteen (7,718) words.

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CERTIFICATE OF SERVICE

I, Alexander Edelman, hereby certify that I am one of the attorneys for Appellant R.M.A., and that on the 5th day of April, 2018, I caused a copy of the aforesaid Substitute Reply Brief and a copy of the appendix thereto to be served upon counsel for the Respondents by electronic mail, sent to:

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