No. SC96683

IN THE

Supreme Court of Missouri

R.M.A. (A MINOR CHILD), BY HIS NEXT FRIEND [redacted],

Appellant,

v.

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

Respondents.

Appeal from the
Missouri Court of Appeals, Western District
Case No. WD80005

BRIEF OF AMICI CURIAE LAMBDA LEGAL AND GLBTQ LEGAL ADVOCATES AND DEFENDERS IN SUPPORT OF APPELLANT

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Vittoria L. Buzzelli, *Transforming Transgender Rights in Schools: Protection from Discrimination Under Title IX and the Equal Protection Clause*, 121 Penn St. L. Rev. 187 (2016) 8

Hana Church, *Prisoner Denied Sex Reassignment Surgery: The First Circuit Ignores Medical Consensus in* Kosilek v. Spencer, 57 B.C. L. Rev. E-Suppl. 17 (2016) 19

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JURISDICTIONAL STATEMENT

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

INTEREST OF AMICI CURIAE

The parties have consented to the filing of this brief.

Founded in 1973, Lambda Legal is the Nation's oldest and largest legal organization whose mission is to achieve full recognition of the civil rights of lesbian, gay, bisexual, and transgender ("LGBT") people and those living with HIV through impact litigation, education, and public policy. Lambda Legal has extensive experience litigating cases affecting the rights of LGBT people, including participation as either party counsel or amicus curiae in cases addressing the application of discriminatory bathroom policies to transgender individuals.

Through strategic litigation, public policy advocacy, and education, GLBTQ Legal Advocates & Defenders ("GLAD") works to create a just society free of discrimination based on gender identity and expression, HIV status, and sexual orientation. GLAD has litigated widely in both state and federal courts in all areas of the law in order to protect and advance the rights of LGBT people, as well as people living with HIV and AIDS.

The issues pending before this Court are of acute concern to Lambda Legal, GLAD, and the communities they represent. Transgender people face staggering levels of discrimination, and calls for legal help in this area are consistently among the most numerous that Lambda Legal and GLAD receive. Many of these inquiries come from transgender individuals experiencing discrimination with respect to sex-separated facilities. Lambda Legal and GLAD are dedicated to combatting such discrimination, and submit this brief to explain why Respondents' decision to prohibit R.M.A. from using the restroom consistent with his gender identity constitutes discrimination "because of . . . sex." Mo. Rev. Stat. § 213.065.1.

STATEMENT OF FACTS

Amici adopt the statement of facts set forth in Appellant's brief.

POINT RELIED ON

The Court of Appeals erred in dismissing R.M.A.'s claim of sex discrimination under the Missouri Human Rights Act ("MHRA") because his petition states a claim that Respondents have engaged in "discrimination . . . because of . . . sex" by (1) punishing R.M.A. for failing to conform to sex stereotypes; (2) discriminating against him on the basis of an inherently sex-based characteristic; and (3) treating him differently because he has transitioned from one gender to another. Mo. Rev. Stat. § 213.065.1; *see Price Waterhouse* v. *Hopkins*, 490 U.S. 228 (1989); *Midstate Oil Co.* v. *Mo. Comm'n on Human Rights*, 679 S.W.2d 842 (Mo. banc 1984).

ARGUMENT

Over the last decade, federal and state courts have recognized "with near-total uniformity" that discrimination against transgender individuals constitutes discrimination on the basis of sex. *Glenn* v. *Brumby*, 663 F.3d 1312, 1318 n.5 (11th Cir. 2011). The reason is simple: By discriminating against a man because he does not look like, act like, or possess all of the characteristics that a man traditionally does—or by discriminating against a woman because she does not fit traditional notions of femininity—a person necessarily punishes that individual for failing to conform to the stereotypes associated with his or her sex. Courts have long recognized that such "sex stereotyping" is discrimination "because of . . . sex." *Price Waterhouse* v. *Hopkins*, 490 U.S. 228, 250-251 (1989) (plurality op.). And that discrimination does not cease to be unlawful because the victim is transgender.

In this case, a school district denied a boy access to the restroom and locker room facilities customarily available to boys, and subjected him instead to the humiliating and degrading experience of using a "separate, single person, unisex bathroom," for the sole reason that he "is transgender." Pet. ¶¶ 33, 40, 43. Missouri does not tolerate "discrimination . . . because of . . . sex" in its places of public accommodation. Mo. Rev. Stat. § 213.065.1. Yet Respondents have deprived R.M.A. of the use and enjoyment of basic school facilities because he does not look and act like Respondents believe a boy should; because he has sex-based characteristics of which Respondents disapprove; and because he has legally changed his identity from one gender to another. In every respect this discrimination was "based on sex"—a fact that Respondents openly "conceded" in the court below. *R.M.A. by* [redacted] v. *Blue Springs R-IV Sch. Dist.*, No. WD80005, 2017 WL 3026757, at *9 (Mo.

Ct. App. July 18, 2017) (Gabbert, J., dissenting) (emphases omitted). The MHRA flatly bars such mistreatment. The judgment should be reversed.

R.M.A. HAS STATED A CLAIM FOR SEX DISCRIMINATION UNDER THE MHRA.

A. The MHRA Broadly Prohibits Disparate Treatment "Because Of" Sex.

The MHRA entitles "[a]ll persons" in Missouri to "the full and equal use and enjoyment within th[e] state of any place of public accommodation . . . without discrimination or segregation because of race, color, religion, national origin, sex, ancestry, or disability." Mo. Rev. Stat. § 213.065.1. As a "remedial prohibition," the MHRA is construed broadly. *Howard* v. *City of Kansas City*, 332 S.W.3d 772, 779 (Mo. banc 2011); *see Tolentino* v. *Starwood Hotels & Resorts Worldwide, Inc.*, 437 S.W.3d 754, 761 (Mo. banc 2014).

This Court has accordingly read the MHRA to bar a wide range of sex-based discrimination. It has held, of course, that the statute prohibits denying a person access to a public facility expressly because of his or her sex. *See, e.g.*, *Daugherty* v. *City of Maryland Heights*, 231 S.W.3d 814, 819 (Mo. banc 2007). It has also held that the MHRA prohibits denying access based on "a gender-related trait," such as pregnancy, that gives rise to an "inference of discrimination." *Midstate Oil Co.* v. *Mo. Comm'n on Human Rights*, 679 S.W.2d 842, 846 (Mo. banc 1984). And it has concluded that the Act's prohibition attaches "regardless of the sex of the claimant or the harasser"; a person may bring claims under the statute against a "member[] of either the same sex or the opposite sex." *Gilliland* v. *Mo. Athletic Club*, 273 S.W.3d 516, 521 n.8 (Mo. banc 2009) (citing *Oncale* v. *Sundowner Offshore Servs.*, 523 U.S. 75, 82 (1998)).

This Court has not yet addressed whether the MHRA permits "sex stereotyping" claims—that is, claims that an individual was discriminated

against because of his or her "gender non-conforming behavior [or] appearance." *Smith* v. *City of Salem*, 378 F.3d 566, 571 (6th Cir. 2004). But the plain text of the statute authorizes such claims. A public accommodation that denies service to women because "they do not wear dresses or makeup" or denies service to men "because they *do* . . . engag[es] in sex discrimination, because the discrimination would not occur but for the victim's sex." *Id.* at 574. In either case, sex is the "motivating factor" behind the challenged conduct. Mo. Rev. Stat. § 213.010(2).

Missouri's Commission on Human Rights, the agency charged with administering the MHRA, has long shared that view. Under regulations in effect for nearly two decades, the Commission has construed the Act to bar employers from "refus[ing] to hire an individual based on stereotyped characterizations of the sexes." 8 CSR § 60-3.040(2)(A)(2); *see* Mo. Rev. Stat. § 213.055.1(1)(a) (prohibiting discrimination in employment "because of . . . sex"). As the regulation explains, "[t]he 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 CSR § 60-3.040(2)(A)(2); *see also id.* § 60-3.020(4)(A) (prohibiting employment advertisements that make "assumptions of the comparative general employment characteristics of persons of a particular religion, national origin or sex," or rely on "stereotyped characteristics of the previously mentioned classes, such as their mechanical ability or aggressiveness"). The Missouri Department of Labor and Industrial Relations has likewise issued guidance explaining that "gender-based harassment" that "includes epithets, slurs, and negative stereotyping of men or women" can amount to unlawful sex discrimination. Mo. Dep't of Labor &

Indus. Relations, *Sex Discrimination & Harassment*, https://labor.mo.gov/mohumanrights/Discrimination/sex#gender (last visited Feb. 27, 2018).

This interpretation accords with the construction that the Supreme Court has given Title VII for nearly thirty years. This Court has often said that its interpretation of the MHRA is "guided by federal . . . cases" interpreting Title VII of the Civil Rights Act. *Cox* v. *Kansas City Chiefs Football Club, Inc.*, 473 S.W.3d 107, 115 (Mo. banc 2015); *see Daugherty*, 231 S.W.3d at 818-819 (listing examples). Although the MHRA is not "identical" to federal antidiscrimination statutes, this Court has indicated that the MHRA offers, if anything, " 'greater protection' against discrimination." *Cox*, 473 S.W.3d at 115 (quoting *Templemire* v. *W&M Welding, Inc.*, 433 S.W.3d 371, 383 (Mo. banc 2014); *Daugherty*, 231 S.W.3d at 819).

Since 1989, the U.S. Supreme Court—followed by every federal circuit—has concluded that sex stereotyping is discrimination "because of . . . sex" within the meaning of Title VII. In its pathmarking decision in *Price Waterhouse*, the Court held that an employer discriminated on the basis of sex when it denied a woman a promotion because it deemed her more "aggressive" than a woman should be, and instructed her to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." 490 U.S. at 235 (plurality op.) (internal quotation marks omitted). The Court explained that "an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender," and so by "forbidding employers to discriminate against individuals because of their sex," Title VII also forbids "disparate treatment of men and women resulting from sex stereotypes." *Id.* at 250-251 (internal quotation marks omitted); *see also City of L.A., Dep't of Water & Power* v. *Manhart*, 435 U.S. 702, 707 (1978) ("It is now well

recognized that employment decisions cannot be predicated on mere 'stereotyped' impressions about the characteristics of males or females."). Since that decision, hundreds of federal courts have followed suit, applying its holding to bar discrimination on the basis of sex stereotyping. *See, e.g.*, *Smith*, 378 F.3d at 573-574 (listing examples); *EEOC* v. *Boh Bros. Constr. Co.*, 731 F.3d 444, 454 & n.4 (5th Cir. 2013) (same).

Numerous state courts have reached the same conclusion in construing their own antidiscrimination statutes. In *Nelson* v. *James H. Knight DDS, P.C.*, 834 N.W.2d 64 (Iowa 2013), for instance, the Iowa Supreme Court held that "a decision based on a gender stereotype can amount to unlawful sex discrimination" under that State's employment discrimination law. *Id.* at 71. And in *Graff* v. *Eaton*, 598 A.2d 1383 (Vt. 1991), the Vermont Supreme Court followed *Price Waterhouse* in holding that "stereotypical remarks . . . can certainly be *evidence* that gender played a part" in an employment decision. *Id.* at 1386 (quoting *Price Waterhouse*, 490 U.S. at 251). Many other state appellate and supreme courts have done the same. *See, e.g.*, *Arcuri* v. *Kirkland*, 113 A.D.3d 912, 915 (N.Y. App. Div. 2014); *Harris* v. *City of Santa Monica,* 294 P.3d 49, 64 (Cal. 2013); *Gray* v. *Morgan Stanley DW Inc.*, No. 54347-4-I, 2005 WL 3462783, at *4 (Wash. Ct. App. 2005); *Enriquez* v. *W. Jersey Health Sys.*, 777 A.2d 365, 373-374 (N.J. Super. Ct. App. Div. 2001); *Pullar* v. *Indep. Sch. Dist. No. 701, Hibbing*, 582 N.W.2d 273, 277 (Minn. Ct. App. 1998); *Behrmann* v. *Phototron Corp.*, 795 P.2d 1015, 1018 (N.M. 1990); *People* v. *Salinas*, 551 P.2d 703, 706 (Colo. 1976). To our knowledge, no state court has concluded that sex stereotyping is *not* a form of prohibited sex discrimination.

In short, every indication of statutory meaning—the plain text of the MHRA, the longstanding construction given to it by the Commission, and the

"guid[ance]" offered by federal and state courts interpreting analogous antidiscrimination provisions, *Cox*, 473 S.W.3d at 115—supports the conclusion that sex stereotyping is "discrimination . . . because of . . . sex." Mo. Rev. Stat. § 213.065.1. Persons in Missouri cannot be denied full use and enjoyment of public accommodations simply because they do not look or act as members of their sex are expected to.

B. R.M.A. Has Alleged That Respondents Discriminated Against Him "Because Of" Sex.

Under these standards, R.M.A. asserts a straightforward claim of sex discrimination. R.M.A. alleges that he was assigned the sex of female at birth, but transitioned to male while attending the fourth grade. Pet. ¶ 18. R.M.A's name was legally changed to a traditional male name, and his birth certificate was amended to record his gender as male. *Id.* ¶¶ 21-25. Now an eighth grader, R.M.A. "liv[es] as male," is "recognized as a boy under the laws of the state of Missouri," and participates in physical education with other boys. *Id.* ¶¶ 18, 29, 38.

Nonetheless, R.M.A. alleges that Respondents have prevented him from using the same locker rooms and restrooms as other boys because R.M.A. "is transgender and is alleged to have female genitalia." *Id.* ¶ 33; *see id.* ¶¶ 27-32. R.M.A. must therefore get dressed for sports practice and games "in a separate, single person, unisex bathroom." *Id.* ¶ 40. Being excluded and subjected to inferior treatment has caused R.M.A. to feel "embarrassed, singled out and inferior to other boys," and has led him to "refrain from full participation in boys' P.E. and athletics." *Id.* ¶¶ 44-45.

R.M.A.'s allegations describe a policy that "den[ies]" him full enjoyment of "the accommodations, advantages, facilities, services, or privileges made available" to his fellow students "because of . . . sex." Mo. Rev. Stat. § 213.065.2; *see id.* § 213.065.1. That is so for three straightforward and

interrelated reasons: Respondents have engaged in sex-based discrimination by (1) punishing R.M.A. for failing to conform to sex stereotypes; (2) discriminating against R.M.A. on the basis of an inherently sex-based characteristic; and (3) treating R.M.A. differently because he has transitioned from one gender to another. Each of these reasons merits reversal of the Court of Appeals' decision.

1. R.M.A. alleges that Respondents discriminated against him because he does not conform to sex stereotypes.

It is undisputed that R.M.A. is a boy under Missouri law: He has legally changed his name to a traditionally male name, Pet. ¶ 21, and his birth certificate—the official record of his identity under Missouri law—records his gender as male, *id.* ¶¶ 23-24. But R.M.A. alleges that Respondents have told him that he cannot use the boys' restroom because he "is transgender"—that is, because he identifies as male despite being designated as female at birth. *Id.* ¶ 33.

That is sex stereotyping, plain and simple.[1] *Price Waterhouse* and its progeny make clear that a person discriminates on the basis of sex if he makes decisions "predicated on mere 'stereotyped' impressions about the characteristics of males or females." *Manhart*, 435 U.S. at 707; *see Price Waterhouse*, 490 U.S. at 251 (employers may not "assum[e] or insist[] that [men and women] match the stereotype associated with their group"). The assumption that all boys must have been assigned a male sex at birth is just

[1] Contrary to the assertion of the panel majority, R.M.A. has plainly raised and argued a sex stereotyping claim. *Compare R.M.A.*, 2017 WL 3026757, at *8, *with* Br. of Appellant R.M.A. 13-15 (arguing that "[d]iscrimination because of someone's status as transgender is a form of sex-stereotyping discrimination"), *and* Reply Br. of Appellant R.M.A. 6-7 ("Appellant's Petition repeatedly references how he was treated differently because of ways he was unlike other boys.").

such a stereotype—one that the State itself has rejected in its legal documents, *see* Pet. ¶¶ 23-24, and that neither science nor common experience supports.[2] So too are the other reasons that persons might consider a transgender boy different than other boys: because his voice, physical appearance, attire, or conduct is in some respect not seen as traditionally masculine.[3] By refusing to afford R.M.A. full enjoyment of their facilities on the basis of these characteristics, Respondents discriminated against R.M.A. "because of . . . sex."

Indeed, since *Price Waterhouse*, federal courts have recognized "with near-total uniformity" that discrimination against transgender individuals constitutes unlawful sex stereotyping. *Glenn* v. *Brumby*, 663 F.3d 1312, 1318 n.5 (11th Cir. 2011); *see Smith*, 378 F.3d at 573 (explaining that *Price Waterhouse* "eviscerated" prior precedents rejecting claims of sex-based discrimination by transgender individuals). As the Seventh Circuit explained in *Whitaker by Whitaker* v. *Kenosha Unified School District No. 1 Board of*

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[2] *See, e.g.*, Katie Aber, *When Anti-Discrimination Law Discriminates: A Right to Transgender Dignity in Disability Law*, 50 Colum. J.L. & Soc. Probs. 299, 304 (2017); Sonia K. Katyal, *The* Numerus Clausus *of Sex*, 84 U. Chi. L. Rev. 389, 420 (2017); Hana Church, *Prisoner Denied Sex Reassignment Surgery: The First Circuit Ignores Medical Consensus in* Kosilek v. Spencer, 57 B.C. L. Rev. E-Suppl. 17, 17 (2016); Sarah E. Gage, *The Transgender Eligibility Gap: How the ACA Fails to Cover Medically Necessary Treatment for Transgender Individuals and How HHS Can Fix It*, 49 New Eng. L. Rev. 499, 505 (2015).

[3] Vittoria L. Buzzelli, *Transforming Transgender Rights in Schools: Protection from Discrimination Under Title IX and the Equal Protection Clause*, 121 Penn St. L. Rev. 187, 204 (2016); Ilona M. Turner*, Sex Stereotyping* Per Se*: Transgender Employees and Title VII*, 95 Cal. L. Rev. 561, 563 (2007); Taylor Flynn, Trans*forming the Debate: Why We Need to Include Transgender Rights in the Struggles for Sex and Sexual Orientation Equality*, 101 Colum. L. Rev. 392, 392 (2001); Marvin Dunson III, *Sex, Gender, and Transgender: The Present and Future of Employment Discrimination Law*, 22 Berkeley J. Emp. & Lab. L. 465, 494 (2001).

Education, 858 F.3d 1034 (7th Cir. 2017), a transgender individual "[b]y definition . . . does not conform to the sex-based stereotypes of the sex that he or she was assigned at birth." *Id.* at 1048. Or, as the Eleventh Circuit wrote in *Glenn*, "[a] person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes." 663 F.3d at 1316. The First, Fourth, and Ninth Circuits have agreed. *See Rosa* v. *Park West Bank & Trust Co.*, 214 F.3d 213, 215-216 (1st Cir. 2000); *G.G.* v. *Gloucester County Sch. Bd.*, 822 F.3d 709 (4th Cir. 2016), *vacated in light of intervening guidance document*, 137 S. Ct. 1239 (2017); *Kastl* v. *Maricopa Cty. Cmty. Coll. Dist.*, 325 F. App'x 492, 493 (9th Cir. 2009). So have numerous federal district courts. *See, e.g.*, *Roberts* v. *Clark Cty. Sch. Dist.*, 215 F. Supp. 3d 1001, 1014 (D. Nev. 2016); *Fabian* v. *Hosp. of Cent. Connecticut*, 172 F. Supp. 3d 509, 527 (D. Conn. 2016); *Schroer* v. *Billington*, 577 F. Supp. 2d 293, 306 (D.D.C. 2008) (same); *Lopez* v. *River Oaks Imaging & Diagnostic Grp., Inc.*, 542 F. Supp. 2d 653, 660 (S.D. Tex. 2008); *see also Glenn*, 663 F.3d at 1317-18 & n.5 (listing other examples).

The panel below did not even attempt to grapple with these holdings, and their reasoning is irrefutable. *See R.M.A.*, 2017 WL 3026757, at *8. Respondents denied R.M.A. full enjoyment of its facilities because he does not have the characteristics that it believes a boy should. That is sex stereotyping, and the MHRA forbids it.

2. R.M.A. alleges that Respondents discriminated against him because of an inherently sex-based characteristic.

R.M.A. has also stated a claim of sex discrimination by alleging that the basis for Respondents' policy is a sex-based characteristic. In *Midstate Oil*, this Court made clear that a decision made on the basis of a "gender-related trait" such as pregnancy gives rise to an "inference of discrimination."

679 S.W.2d at 846. By penalizing a person for an attribute associated with one sex, the Court explained, the defendant at minimum creates a presumption that it has acted "because of . . . sex" rather than for a "legitimate, nondiscriminatory reason." *Id.*

Here, Respondents allegedly denied R.M.A. access to the restroom facilities customarily used by boys because he was born with female anatomy. Pet. ¶ 33. Like pregnancy, "female" anatomy is associated with only one sex, and so constitutes a "gender-related trait" as this Court used that term in *Midstate Oil*. By alleging that Respondents excluded him from the boys' restroom facilities on the basis of that trait, R.M.A. has at minimum raised a *prima facie* inference of discrimination. *See R.M.A.*, 2017 WL 3026757, at *9 (Gabbert., J., dissenting) ("*[B]ut for* RMA's sexual anatomy, the alleged discrimination would not have occurred.").[4]

3. R.M.A. alleges that Respondents discriminated against him because he has transitioned.

Finally, R.M.A. has stated a claim of sex discrimination because Respondents have penalized him for transitioning from one gender to another. It is well established that a person discriminates on the basis of religion by penalizing persons who convert from one religion to another—say, from Judaism to Catholicism. *See Schroer*, 577 F. Supp. 2d at 306; *cf. Hobbie* v. *Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 144 (1987) (refusing to adopt an interpretation of the Free Exercise Clause that would "single out

[4] Respondents have not offered a "legitimate, nondiscriminatory reason" for the discrimination, and it is premature at this stage of the litigation to determine whether any such reason exists. *See R.M.A.*, 2017 WL 3026757, at *9 (Gabbert, J., dissenting). Regardless, the evidence is overwhelming that excluding transgender individuals from customary restroom facilities serves no legitimate public purpose. *See, e.g.*, *Whitaker*, 858 F.3d at 1052; *Carcano* v. *McCrory*, 203 F. Supp. 3d 615, 624 (M.D.N.C. 2016).

the religious convert for different, less favorable treatment than that given an individual whose adherence to his or her faith precedes employment"). R.M.A.'s case is no different. He was assigned a female sex at birth but now identifies (and is legally designated) as male. Respondents have denied him access to the boy's restroom because of the transition—because he "is transgender." Pet. ¶ 33. This decision is "because of . . . sex," just as discrimination on the basis of religious conversion is discrimination "because of . . . religion."

C. The Arguments Offered By Respondents And Adopted By The Panel Majority Are Without Merit.

The Court of Appeals nonetheless concluded that R.M.A. cannot claim the protection of the MHRA because, in its view, the General Assembly "did not intend 'discrimination on the grounds of sex' to include the deprivation of a public accommodation . . . because a person is transitioning from female to male." *R.M.A.*, 2017 WL 3026757, at *9. This conclusion cannot withstand scrutiny: The court's method of construing the MHRA, its interpretation of the statute, and its application of that interpretation are all deeply flawed. And Respondents' alternative argument—that R.M.A. cannot claim relief simply because the statute does not include the word "transgender"—is meritless.

As an initial matter, the panel majority appeared to misapprehend the governing rules of statutory interpretation. The panel initially described its role correctly: It stated that "[t]he primary rule of statutory interpretation is to give effect to legislative intent *as reflected in the plain language of the statute at issue*." *Id.* at 9 (emphasis added) (quoting *Pittman* v. *Cook Paper Recycling Corp.*, 478 S.W.3d 479, 482 (Mo. App. 2015); *Crawford* v. *Div. of Emp't Sec.*, 376 S.W.3d 658, 664 (Mo. banc 2012)). But the panel repeatedly went on to suggest that it was appropriate to look behind the text of the

statute to give effect to the "social sensitivities" at the time of enactment and the "consequences" intended by the legislature. *Id.* at 10 n.6, 11, 14, 18-19. As a result, the panel's analysis of the MHRA abandoned the statute's "plain language" altogether; its interpretation relied exclusively on its understanding of regulations promulgated under a different statute, which the panel "presum[ed]" the legislature was "aware" of when it enacted the MHRA. *Id.* at 14.

The panel's approach was manifestly improper. This Court has time and again made clear that "courts must interpret 'the statutory language as written by the legislature.'" *Peters* v. *Wady Indus., Inc.*, 489 S.W.3d 789, 792 (Mo. banc 2016) (quoting *Frye* v. *Levy*, 440 S.W.3d 405, 424 (Mo. banc 2014)). Courts cannot "add statutory language where it does not exist" in order to effectuate what they understand to be the legislators' unstated beliefs and assumptions. *Id.* (quoting *Frye*, 440 S.W.3d at 424). As Justice Scalia wrote in *Oncale*—a decision whose expansive interpretation of Title VII this Court has adopted—"it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." 523 U.S. at 79; *see Gilliland*, 273 S.W.3d at 521 n.18 (adopting *Oncale*'s holding that the MHRA, like Title VII, forbids same-sex sexual harassment). For the reasons explained above, the provisions of the MHRA speak for themselves: Under any plausible construction of the statute's text, Respondents denied R.M.A. full and equal access to its restroom and locker room facilities "because of . . . [his] sex."

What is more, the panel's interpretation does not hold water even under the atextual approach it applied. The panel concluded that legislators intended the MHRA to prohibit only those acts that "depriv[e] one sex of a *right or privilege* afforded the other sex." *R.M.A.*, 2017 WL 3026757, at *7

(emphasis added). The only support the panel offered for this novel rule, however, was a regulation issued under a predecessor employment-discrimination statute that provided that "[e]mployees of both sexes shall have an equal *opportunity* to any available job that he or she is qualified to perform." *Id.* (emphasis added) (quoting 4 CSR 180-3.040(8) (1973)). By its plain terms, this regulation was not limited to measures depriving one sex of a "right or privilege" afforded the other; it barred any measures that deprived a person of "equal *opportunity*" because of sex. That language straightforwardly included policies refusing a person employment because he failed to conform to the stereotypes associated with his sex, or because he was a boy assigned a female sex at birth. And if the 1973 regulations leave any doubt, the current MCHR regulations expressly state that employers cannot "refuse to hire an individual based on stereotyped characterizations of the sexes." 8 CSR § 60-3.040(2)(A)(2); *see* Mo. Rev. Stat. § 213.055(1)(a) (similar).

In any event, even if the panel's cramped interpretation of the MHRA were correct, its conclusion still would not follow. Respondents *did* deny R.M.A. a "right or privilege afforded the other sex." If R.M.A. identified as a girl, he would be permitted to use the school's ordinary restroom and locker room facilities, since individuals who are assigned a female sex at birth and identify as girls are plainly afforded such access. It is only because R.M.A. was assigned a female sex at birth and identifies *as a boy* that he was deprived of the right to use and enjoy the school's customary facilities.

The panel refused to accept this straightforward conclusion because it recharacterized R.M.A.'s argument as a claim that "he was deprived of a public accommodation because he is transitioning from one sex to the other." That is not his argument; R.M.A. has consistently claimed that he "received different and inferior access to public facilities *because of his sex*"—that is,

because he is a boy who was assigned the female sex at birth. Pet. ¶¶ 33, 43 (emphasis added); *see also id.* ¶¶ 37, 49-50. By recasting R.M.A.'s argument as one based on transgender status, the panel majority improperly obscured the sex-based nature of the claim. When analyzing claims of sex discrimination, "[i]t is critical" that courts "isolate the significance of the plaintiff's sex" by holding everything else constant and changing "only the variable of the plaintiff's sex." *Hively* v. *Ivy Tech Comm. Coll. of Ind.*, 853 F.3d 339, 345 (7th Cir. 2017) (en banc). The question is thus not whether R.M.A. was treated differently from other "transsexuals"; that "comparison shifts too many pieces at once." *Id.*; *accord Zarda* v. *Altitude Express, Inc.*, No. 15-3775, 2018 WL 1040820, slip op. at 30-34 (2d Cir. Feb. 26, 2018) (en banc); *see also Manhart,* 435 U.S. at 711 (applying "the simple test of whether the evidence shows treatment of a person in a manner which but for that person's sex would be different"); *Smith*, 378 F.3d at 574 (similar). The question is whether R.M.A. was treated differently (and worse) from a person assigned a female sex at birth who does *not* identify as a boy. The answer is plainly yes: A person assigned the female sex at birth and who identifies as female would be free to use the school's customary locker rooms and bathrooms. But because R.M.A. was assigned the female sex at birth and identifies as male, Respondents forced him to use "a separate, single person, unisex bathroom" that left him feeling "embarrassed, singled out, and inferior" to his peers. Pet. ¶¶ 40,44.[5]

To the extent that the panel believed Respondents could escape liability under the MHRA simply by showing that they engaged in parallel sex-based

[5] R.M.A. would also suffer severe discrimination if Respondents compelled him to use the restroom and locker room facilities customarily used by girls (something that the petition does not allege occurred). In that circumstance, R.M.A.—unlike every other student who identifies as male—would be required to use a gender-nonconforming restroom.

discrimination towards girls as well as boys, that too was wrong. An employer is not immune from charges of race discrimination because it refuses to hire both white applicants and black applicants who are married to persons of the opposite race. *See McLaughlin* v. *State of Fla.*, 379 U.S. 184, 191 (1964) (rejecting "equal application" defense to statute barring interracial cohabitation); *cf. Loving* v. *Virginia*, 388 U.S. 1, 8 (1967) (rejecting "the notion that the mere 'equal application' of a statute containing racial classifications is enough to remove the classifications from the Fourteenth Amendment's proscription of all invidious racial discriminations"). Likewise, a school would plainly engage in forbidden sex-based stereotyping by requiring both genders to adhere to behaviors traditional to their sex—for example, by excluding women from vocational training programs that it considers "men's work," *Madison* v. *IBP, Inc.*, 330 F.3d 1051, 1053 (8th Cir. 2003), and simultaneously excluding men from nursing classes that it deems a "woman's job," *Mississippi University for Women* v. *Hogan*, 458 U.S. 718, 729 (1982).[6] So too here, Respondents cannot escape liability by showing that they would discriminate not only against a boy who lacks some traits

[6] This Court's case law and the Commission's regulations support this commonsense conclusion. This Court has held that the MHRA prohibits sexual harassment "regardless of the sex of the claimant or the harasser," and thus forbids a man from harassing both men and women. *Gilliland*, 273 S.W.3d at 521 & n.8 (citing *Oncale,* 523 U.S. at 82); *see Doe ex rel. Subia* v. *Kansas City, Mo. Sch. Dist.*, 372 S.W.3d 43, 46 (Mo. Ct. App. 2012) (reversing a trial court's dismissal of a male student's claim that his school violated the MHRA when it failed to protect him from harassment at the hands of another male student). Likewise, the Commission defines unlawful "sexual harassment" to include "[u]nwelcome sexual advances [or] requests for sexual favors" that impact the terms of employment. 8 CSR § 60-3.040(17)(A). Neither this Court's precedent nor the regulations suggest that sex-based harassment of a person of one sex becomes acceptable so long as the defendant engages in sex-based harassment of a person of the other sex, as well.

stereotypically associated with boys, but also against a transgender girl who lacks traits stereotypically associated with girls. In both cases the decision is "because of" the person's "sex."[7]

Finally, Respondents have argued that R.M.A.'s claim cannot stand simply because the MHRA does not include "gender identity" as a protected class. Resp. Ct. App. Br. 8-9. Even the panel below did not accept that argument, and it is meritless. The statute prohibits all discrimination "because of . . . sex," including countless acts that the legislature did not expressly list: same-sex sexual harassment, pregnancy discrimination, sex stereotyping, and much more. *See, e.g.*, *Gilliland*, S.W.3d at 521 n.8; *Midstate Oil Co.*, 679 S.W.2d at 846; *Price Waterhouse*, 490 U.S. at 250. The fact that these various ways of violating the statute are not specifically stated does not somehow exclude them from the statute's reach. The absence of the words "gender identity" is equally uninformative in determining whether discrimination against a boy because he was assigned a female sex at birth is discrimination "because of . . . sex."[8]

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[7] In any event, there is no basis to assert that Respondents would engage in parallel discrimination against a transgender girl. The petition contains no such allegation, and the court below could not simply assume as much at the motion to dismiss stage.

[8] Respondents attach some significance to the fact that the legislature has not amended the MHRA to refer expressly to transgender status or gender identity. Resp. Ct. App. Br. 10-11. But legislative inaction is "a weak reed upon which to lean and a poor beacon to follow in construing a statute." *Med. Shoppe Int'l, Inc.* v. *Dir. of Revenue*, 156 S.W.3d 333, 334 n.4 (Mo. banc 2005) (internal quotation marks omitted). "[T]he legislative process in our republican form of government is designed more to prevent the passage of legislation than to encourage it," *id.* at 334, and "the legislature may have many motivations for failing to amend a statute," *Missouri* v. *Grubb*, 120 S.W.3d 737, 740 (Mo. banc 2003); *see also Pension Benefit Guar. Corp.* v. *LTV Corp.*, 496 U.S. 633, 650 (1990) (observing that legislative inaction "lacks persuasive significance" because it supports "several equally tenable

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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inferences . . ., including the inference that the existing legislation already incorporated the offered change" (internal quotation marks omitted)).

CERTIFICATE OF COMPLIANCE

I, Natalie T. Lorenz, hereby certify that I am associated with counsel for *amici curiae* Lambda Legal and GLBTQ Advocates & Defenders, and that the foregoing brief:

(1) Includes the information required by Rule 55.03;

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

(3) Contains 6,522 words, exclusive of the cover, certificate of service, this certificate, and the signature block.

/s/ Natalie T. Lorenz
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CERTIFICATE OF SERVICE

I, Natalie T. Lorenz, hereby certify that I am associated with counsel for *amici curiae* Lambda Legal and GLBTQ Advocates & Defenders, and that on the 27th day of February, 2018, I caused a copy of the aforesaid Brief in Support of Appellant to be served upon counsel for Appellant and the Respondents through the Court's electronic filing system and by electronic mail, sent to:

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