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## Boot-Strapping Trans-Discrimination Claims to Sex: Band-Aiding the Discrimination of Transgender People

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## NOTE

### **Boot-Strapping Trans-Discrimination Claims to Sex: Band-Aiding the Discrimination of Transgender People**

*R.M.A. by Appleberry v. Blue Springs R-IV Sch. Dist.*, 568 S.W.3d 420 (Mo. 2019) (en banc).

*Zachary Walker\**

#### I. INTRODUCTION

R.M.A. was discriminated against merely because he identified as a male.<sup>1</sup> He was denied use of basic school facilities that are available to all other boys his age.<sup>2</sup> Under some federal and state laws, R.M.A. would be fully protected from such discrimination.<sup>3</sup> In Missouri, however, transgender individuals are not expressly recognized as a protected class.<sup>4</sup> Thus, until Missouri establishes safeguards for people who are discriminated against because of their transgender identity, R.M.A. and other transgender children must couch their claims as discrimination on the basis of “sex.”<sup>5</sup>

In Missouri, claims of discrimination may only be brought under one of the five protected classes listed in the Missouri Human Rights Act

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<sup>1</sup> *R.M.A. by Appleberry v. Blue Springs R-IV Sch. Dist.*, 568 S.W.3d 420, 424 (Mo. 2019) (en banc).

<sup>2</sup> See, e.g., MO. REV. STAT. § 213.010 (2017); see discussion *infra* Part III.B.

<sup>3</sup> See MO. REV. STAT. § 213.010(6) (2017).

<sup>4</sup> *R.M.A. by Appleberry*, 568 S.W.3d at 430 (Fischer, J., dissenting).

<sup>5</sup> *Id.* at 427.

(“MHRA”).<sup>6</sup> The five protected classes are “race. . . religion, national origin, sex, . . . [and] disability.”<sup>7</sup> This leaves transgender people vulnerable to discrimination. The Supreme Court of Missouri attempted to alleviate this problem in *R.M.A. by Appleberry v. Blue Springs R-VI School District*.<sup>8</sup> However, rather than holding that claims of transgender discrimination are protected under the MHRA, the court put a Band-Aid on the issue.<sup>9</sup>

This Note brings to light the injustice that is being swept under the rug by the court’s failure to recognize that the word “sex” lacks legal protections for transgender individuals in Missouri. Part II summarizes the underlying facts and holding of *R.M.A.* Part III discusses the background of the MHRA and its interplay with the meaning of “sex,” including a brief overview of the differences between transgenderism, gender identity, sexual orientation, and sex. Part IV dissects the rationale of the majority and dissenting opinions with a brief look at a subsequent United States Supreme Court case discussing transgender discrimination.<sup>10</sup> Lastly, Part V examines the implications of *R.M.A.* and four possible solutions that the Supreme Court of Missouri can adopt to more adequately provide legal protection against transgender discrimination.

## II. FACTS AND HOLDING

R.M.A. attended Delta Woods Middle School.<sup>11</sup> He classified his legal sex as male.<sup>12</sup> While attending Delta Woods, he attempted to use both the boys’ restroom and locker room.<sup>13</sup> However, the Blue Springs School District and their Board of Education (“Defendants”) denied R.M.A. access to such facilities due to Defendants’ belief that R.M.A. had female genitalia.<sup>14</sup> R.M.A. filed a complaint with the Missouri Commission on Human Rights (“Commission”) against Defendants for sex discrimination in a place of public accommodation under the MHRA.<sup>15</sup>

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<sup>6</sup> See *infra* Part III.B.

<sup>7</sup> MO. REV. STAT. § 213.065 (2017).

<sup>8</sup> 568 S.W.3d at 427.

<sup>9</sup> *Id.* at 428–29.

<sup>10</sup> *Bostock v. Clayton Cnty*, 140 S. Ct. 1731 (2020).

<sup>11</sup> *R.M.A. by Appleberry*, 568 S.W.3d at 426.

<sup>12</sup> *Id.* at 424.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 424, 431 (Fischer, J., dissenting).

<sup>15</sup> *Id.* at 424. The purpose of the MHRA is to prohibit “discrimination because of race, color, religion, national origin, ancestry, sex, age as it relates to employment,

The Commission issued a right to sue, but R.M.A. unsuccessfully petitioned the court for a writ of mandamus.<sup>16</sup> R.M.A. next brought suit against Defendants in a Missouri circuit court.<sup>17</sup> Defendants filed a motion to dismiss for failure to state a claim, which the court sustained without explanation.<sup>18</sup> R.M.A.'s appeal to the Supreme Court of Missouri followed.<sup>19</sup>

Defendants moved to dismiss on two grounds.<sup>20</sup> First, Defendants argued that “the MHRA does not cover claims based on gender identity.”<sup>21</sup> Second, Defendants argued that schools and school districts are not “persons” as defined by Section 213.010 of the Missouri Revised Statutes.<sup>22</sup> Thus, according to the Defendants, R.M.A. did not state a claim under the MHRA.<sup>23</sup> The Supreme Court of Missouri disagreed, holding instead that R.M.A. stated a valid claim because he properly pled the following elements of the MHRA:

- (1) Plaintiff is a member of a class protected by Section 213.065;
- (2) Plaintiff was discriminated against in the use of a public accommodation (as defined by Section 213.010); and
- (3) Plaintiff's status as a member of a protected class was a contributing factor in that discrimination.<sup>24</sup>

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disability, or familial status as it relates to housing . . . ,” including protecting discrimination as it related to public accommodation. MO. REV. STAT. § 213.010(6) (2017).

<sup>16</sup> *R.M.A. by Appleberry*, 568 S.W.3d at 424. A writ of mandamus is “a writ issued by a court to compel performance of a particular act by a lower court or governmental officer or body.” *Mandamus*, BLACK'S LAW DICTIONARY (11th ed. 2019).

<sup>17</sup> *R.M.A. by Appleberry*, 568 S.W.3d at 424.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* A motion to dismiss on the grounds of failure to state a claim requires an examination of R.M.A.'s petition, assuming all “properly pleaded facts” as true while simultaneously reading all allegations in favor of R.M.A. *Id.* As long as R.M.A.'s accepted facts are sufficient to state a claim the Defendants' motion will be vacated. *Id.*

<sup>24</sup> *Id.* at 425 (citing *Midstate Oil Co., Inc. v. Mo. Comm'n on Human Rights*, 679 S.W.2d 842 (Mo. 1984) (en banc)).

First, the Supreme Court of Missouri ruled that R.M.A. sufficiently pled that he was denied “‘full and equal use and enjoyment’ of a public accommodation” because Defendants denied him access to the boys’ restroom and locker room.<sup>25</sup> Second, R.M.A. sufficiently pled that he belonged to a protected class by stating that his legal sex is male.<sup>26</sup> Third, R.M.A. sufficiently pled that the discrimination that occurred due to his sex was a direct and proximate cause of his damages.<sup>27</sup> Accepting all pled facts as true, the court found that R.M.A. sufficiently established facts that could lead a reasonable jury to find and return a verdict for Plaintiff.<sup>28</sup>

### III. LEGAL BACKGROUND

With the rise in differences in gender identities and expressions, courts have split on how to handle transgender discrimination without explicit statutory protection. *R.M.A.* represents a trend in protecting the rights of transgender individuals via various human rights statutes and cases.<sup>29</sup> In deciding this case, the court faced a variety of background considerations, including: (1) the traditionally misunderstood differences between sex and gender concepts,<sup>30</sup> (2) previous sex discrimination claims under the MHRA and how the statute has been interpreted in those instances,<sup>31</sup> (3) other state and federal protections provided to transgender persons,<sup>32</sup> and (4) the interpretation of statutes similar to the MHRA.<sup>33</sup>

#### *A. Background of Transgenderism and Gender Identity*

Defining the concepts of sex, sexual orientation, gender, and gender identity is paramount to understanding the basis of R.M.A.’s claim, yet these concepts are often confusing and mistakenly interchanged.<sup>34</sup> In general, sex refers to the biological and physical traits that distinguish

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<sup>25</sup> *Id.* at 426.

<sup>26</sup> *Id.* at 427.

<sup>27</sup> *Id.* at 428–29.

<sup>28</sup> *Id.* at 425.

<sup>29</sup> *See, e.g.,* *Bostock v. Clayton Cnty, Ga.*, 140 S. Ct. 1731 (2020).

<sup>30</sup> *See R.M.A. by Appleberry*, 568 S.W.3d at 425 nn. 7–10.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 428.

<sup>33</sup> *Id.* at 429.

<sup>34</sup> *See, e.g.,* *Pittman v. Cook Paper Recycling Corp.*, 478 S.W.3d 479 (Mo. Ct. App. 2015).

males, females, and intersex persons.<sup>35</sup> Sexual orientation refers to the sex of persons to whom one is attracted, which is where terms such as gay, lesbian, and bisexual stem from.<sup>36</sup> Gender is the condition of maleness or femaleness determined by “attitudes, feelings and behaviors that a given culture associates with a person’s biological sex.”<sup>37</sup> Lastly, gender identity is the identification of one’s self as male or female.<sup>38</sup>

Where does transgenderism fit into this dichotomy? A transgender person is one whose “assigned biological sex [does not] match their felt identity.”<sup>39</sup> For example, a person may have been assigned female at birth, as R.M.A. was, but his felt *gender identity* is that of a male. A transgender person may even express his gender as a male by adopting traits that his culture associates more with “maleness.”<sup>40</sup> While the terms “trans” and “transgender” are relatively new,<sup>41</sup> nonbinary persons have existed for

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<sup>35</sup> Am. Psych. Ass’n, *Definitions Related to Sexual Orientation and Gender Diversity in APA Documents*, APA, <https://www.apa.org/pi/lgbt/resources/sexuality-definitions.pdf> [<https://perma.cc/YYZ5-PW3X>] (last visited Apr. 25, 2022). Intersex refers to “[a] person whose reproductive system has characteristics of both males and females . . . , with some cells that possess XX chromosomes and others that are XY.” *Intersex*, BLACK’S LAW DICTIONARY (11th ed. 2019).

<sup>36</sup> Am. Psych. Ass’n, *supra* note 35, at 6.

<sup>37</sup> *Id.* at 2.

<sup>38</sup> *Id.* at 4. For those of us who have never had to question whether our felt gender identity is in conflict with that of our biological sex, this may seem confusing. Gender identity is a feeling that one has, not an external expression to be perceived by others. *Id.* A person who has a gender identity of a man, but was born a female, may experience distress and identity issues. *Id.* at 2–3. However, this is nonetheless a recorded and understood phenomena that occurs to a small section of the population. ANDREW R. FLORES ET AL., HOW MANY ADULTS IDENTIFY AS TRANSGENDER IN THE UNITED STATES? 2 (2016), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-Adults-US-Aug-2016.pdf> [<https://perma.cc/SF89-FV7T>] (finding 0.6% of U.S. adults identify as transgender).

<sup>39</sup> Am. Psych. Ass’n, *supra* note 35, at 7. Why some individuals experience the feeling of another gender that is different than their biological self is still not fully understood. Am. Psych. Ass’n, *Transgender People, Gender Identity and Gender Expression*, APA (2014), <https://www.apa.org/topics/lgbtq/transgender> [<https://perma.cc/LM7B-669U>]. It could be a variety of factors, such as biological differences in the genetic makeup of an individual, different forms of the brain matching closer to the opposite sex, environmental pressures, or a combination of factors. *Id.*

<sup>40</sup> For example, a transgender man in the United States may cut his hair shorter, grow out other body hair, or wear clothes in a “manly” style to express a gender trait(s) that is commonly associated with men.

<sup>41</sup> See Genny Beemyn, *Transgender History in the United States*, TRANS BODIES, TRANS SELVES 28 (Laura Erickson-Schroth ed., 2014), [https://www.umass.edu/stonewall/sites/default/files/Infoforandabout/transpeople/genny\\_beemyn\\_transgende](https://www.umass.edu/stonewall/sites/default/files/Infoforandabout/transpeople/genny_beemyn_transgende)

much of written human history.<sup>42</sup> Even within the United States, transgenderism is not new.<sup>43</sup> However, transgender people have historically been disenfranchised and continue to face hardships that legislation such as the MHRA was designed to protect.<sup>44</sup>

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r\_history\_in\_the\_united\_states.pdf [https://perma.cc/7UBW-3HXP] (“A larger rights movement also grew significantly in the 1990s, facilitated by the increasing use of the term ‘transgender’ to encompass all individuals whose gender identity or expression differs from the social norms of the gender assigned to them at birth. This wider application of ‘transgender’ developed among writers and activists beginning the mid 1980s and started to catch on more widely in the early 1990s.”); *see also* Stephen Whittle, *A Brief History of Transgender Issues*, THE GUARDIAN (June 2, 2010), https://www.theguardian.com/lifeandstyle/2010/jun/02/brief-history-transgender-issues [https://perma.cc/U2A8-9GKA] (“‘Transvestite’ originated in 1910 from the German sexologist Magnus Hirschfeld who would later develop the Berlin Institute where the very first ‘sex change’ operations took place. ‘Transsexual’ was not coined until 1949, ‘transgender’ not until 1971, and ‘trans’ (a very British term) not until 1996.”).

<sup>42</sup> *See e.g.*, *Hinduism Case Study—Gender*, HARVARD DIVINITY SCHOOL RELIGIOUS LITERACY PROJECT, (2018), https://hwpi.harvard.edu/files/rpl/files/gender\_hinduism.pdf?m=1597338930 [https://perma.cc/X24W-2K7Z] (“[I]n Hindu society, people of non-binary gender expression have played important roles for over 2000 years. Called the third gender, evidence for their existence in Hindu society can be found in Hindu holy texts like the Ramayana and the Mahabharata, where Hindu hero Arjuna becomes the third gender. Third gender people have often been revered throughout South Asian history; for example, Muslim rulers of the Mughal Empire in the 15th to 19th centuries were generous patrons of third gender Indians.”); Walter L. Williams, *The ‘Two-Spirit’ People of Indigenous North Americans*, THE GUARDIAN (Oct. 11, 2010), https://www.theguardian.com/music/2010/oct/11/two-spirit-people-north-america [https://perma.cc/P8QK-SWDV] (“Native Americans have often held intersex, androgynous people, feminine males and masculine females in high respect. The most common term to define such persons today is to refer to them as ‘two-spirit’ people, but in the past feminine males were sometimes referred to as ‘berdache’ by early French explorers in North America, who adapted a Persian word ‘bardaj’, meaning an intimate male friend.”). It is important to note that these ideas and interpretations of gender and sex are *not* the same as what we think of transgenderism in western culture today.

<sup>43</sup> *See* Opinion, *Milestones in the American Transgender Movement*, N.Y. TIMES (Aug. 28, 2015), https://www.nytimes.com/interactive/2015/05/15/opinion/editorial-transgender-timeline.html [https://perma.cc/6A75-T7W2].

<sup>44</sup> Rose Gilroy et al., *Transgender Rights and Issues*, 22 GEO. J. GENDER & L. 417, 419 (2021) (citing Kiara Brantley Jones et al., *Black Trans Lives Matter: Activists Call for Inclusion in Racial Justice Movement*, ABC NEWS (Oct. 20, 2020), https://abcnews.go.com/US/black-trans-lives-matter-activists-call-inclusion-racial/story?id=73571954 [https://perma.cc/H6TT-GWF8]).

*B. The Missouri Human Rights Act and “Sex”*

Enacted in 1957, the MHRA initially only barred discrimination based upon “race or national ancestry.”<sup>45</sup> At the same time, the Missouri General Assembly established the Commission “to encourage fair treatment . . . foster mutual understanding and respect . . . and discourage discrimination . . . .”<sup>46</sup> After being amended over the years, the MHRA now prohibits discrimination based on “race, color, religion, national origin, ancestry, [and] sex.”<sup>47</sup> This statute codified a cause of action for those who experience discrimination in housing,<sup>48</sup> loans,<sup>49</sup> employment,<sup>50</sup> public accommodations,<sup>51</sup> and other areas.<sup>52</sup>

Before *R.M.A.*, transgender persons and other lesbian, gay, bisexual, and queer (“LGBTQ”) groups were not afforded express protection under the MHRA because Missouri courts had construed “sex” to exclude sexual orientation, gender identity, and transgenderism.<sup>53</sup> Instead, Missouri courts have interpreted the word “sex” to concern only a person’s biological distinctions.<sup>54</sup> For example, in *Pittman v. Cook Paper Recycling Corp.*, the plaintiff alleged discrimination based on sexual orientation.<sup>55</sup> The Missouri Court of Appeals held that the term “sex” within the MHRA is unambiguous and requires a “clear meaning” interpretation.<sup>56</sup> The court determined that the clear meaning of the word “sex” is “a person’s gender and has nothing to do with sexual orientation.”<sup>57</sup> Thus, the court held that the plaintiff’s pleadings did not state a sufficient cause of action because sexual orientation was not covered under the term “sex” in the MHRA.<sup>58</sup>

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<sup>45</sup> MO. REV. STAT. § 213.010 (1959).

<sup>46</sup> *Id.* § 213.020.2 (2016).

<sup>47</sup> *Id.* § 213.010(6) (2017).

<sup>48</sup> *See id.* § 213.040 (describing prohibited conduct). *See also id.* §§ 213.075, 213.076, 213.111 (establishing cause of action for engaging in prohibited conduct under MHRA).

<sup>49</sup> *Id.* § 213.045.

<sup>50</sup> *Id.* § 213.055.

<sup>51</sup> *Id.* § 213.060.

<sup>52</sup> *Id.* § 213.070.

<sup>53</sup> *See Pittman v. Cook Paper Recycling Corp.*, 478 S.W.3d 479, 482 (Mo. Ct. App. 2015) (“The clear meaning prohibiting discrimination based upon ‘sex’ . . . concerns discrimination based upon a person’s gender. . . .”).

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 481.

<sup>56</sup> *Id.* at 482.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 482–83.

Because Missouri has interpreted “sex” discrimination as requiring some discrimination based on a person’s *gender* – thereby conflating gender with sex – pleadings must relate to some gender trait or the biological sex itself to create a sufficient cause of action.<sup>59</sup> In *Lampley v. Missouri Commission on Human Rights*, the Supreme Court of Missouri recognized that claims of sex stereotyping – presumably related to sexual orientation – are valid allegations of “sex” discrimination under the MHRA.<sup>60</sup> The plaintiff in *Lampley*, a homosexual male, brought suit against his employer for sex discrimination.<sup>61</sup> The court distinguished the case from *Pittman* based on how the plaintiff pled his protected class.<sup>62</sup> While the plaintiff in *Pittman* pled a hostile work environment based on “sexual orientation,”<sup>63</sup> the plaintiff in *Lampley* alleged he was “discriminated against on the basis of sex because [he] did not conform to generally held sexual stereotypes.”<sup>64</sup> According to the court, the fact that the plaintiff was gay was only “incidental to the basis for the discrimination.”<sup>65</sup> The court reasoned that the alleged discrimination, as pleaded, actually stemmed from the fact that the plaintiff did “not exhibit the stereotypical attributes of how a male should appear and behave.”<sup>66</sup> The court’s holding suggests that individuals discriminated against based on their sexual orientation *may* still have sufficient causes of action if they disguise the claim as a valid allegation of sex discrimination under the MHRA.<sup>67</sup>

Other jurisdictions have largely agreed with this rationale,<sup>68</sup> which originated in *Price Waterhouse v. Hopkins*.<sup>69</sup> In *Hopkins*, the Supreme Court of the United States recognized that sex discrimination may occur when an employer relies upon sex stereotypes in its employment

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<sup>59</sup> See *Lampley v. Mo. Comm’n on Hum. Rts.*, 570 S.W.3d 16, 23–24 (Mo. 2019) (en banc).

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 19.

<sup>62</sup> See *id.* at 23.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 24.

<sup>67</sup> *Id.* at 25.

<sup>68</sup> See generally *Christiansen v. Omnicom Grp., Inc.*, 852 F.3d 195, 201 (2d Cir. 2017); *Smith v. City of Salem*, 378 F.3d 566, 575 (6th Cir. 2004); *Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864, 874 (9th Cir. 2001) (“*Price Waterhouse [v. Hopkins]* applies with equal force to a man who is discriminated against for acting too feminine.”).

<sup>69</sup> 490 U.S. 228, 250 (1989).

decisions.<sup>70</sup> The Court agreed with the trial court's finding that the discrimination stemmed from the employer's view that women must act a certain way and the woman in question diverted from that norm.<sup>71</sup> The Court held that discrimination based on a diversion from sex social norms violated Title VII.<sup>72</sup>

As *Pittman* and *Lamley* demonstrate, two similarly situated plaintiffs may obtain different pre-trial results depending solely on how they pled their discrimination.<sup>73</sup> In Missouri, as long as one ties the discrimination – whether based on gender identity or sexual orientation – to the court's interpretation of gender or biological sex, the court is likely to find that the requirement of sex discrimination is met.<sup>74</sup>

### *C. Other State and Federal Protections*

Although the MHRA's definition of "sex" is confined to rudimentary concepts of gender and sex, other states have explicit protections for transgender people.<sup>75</sup> For example, Illinois has codified "gender-related identity whether or not traditionally associated with the person's designated sex at birth" into its definition of "sexual orientation."<sup>76</sup> Because Illinois' statute explicitly includes gender identity, its human rights act "protects transgender individuals even though gender identity is not explicitly listed as a prohibited basis for discrimination."<sup>77</sup> Like

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<sup>70</sup> *Id.* ("[A]n 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.").

<sup>71</sup> *Id.* at 255.

<sup>72</sup> *Id.* at 250–51.

<sup>73</sup> Compare *Pittman v. Cook Paper Recycling Corp.* 478 S.W.3d 479, 482–83 (Mo. Ct. App. 2015) (dismissing sex discrimination claim because it pled discrimination based on sexual orientation) with *Lamley v. Mo. Comm'n on Hum. Rts.*, 570 S.W.3d 16, 24 (Mo. 2019) (en banc) (pleadings of sex stereotyping sufficiently allege sex discrimination); see generally *supra* notes 55–67 and accompanying text.

<sup>74</sup> See *Lamley v. Mo. Comm'n on Hum. Rts.*, 570 S.W.3d 16, 24 (Mo. 2019) (en banc).

<sup>75</sup> NAT'L CTR. FOR LESBIAN RIGHTS, STATE BY STATE GUIDE TO LAWS THAT PROHIBIT DISCRIMINATION AGAINST TRANSGENDER PEOPLE 3–4 (2010), <https://www.nclrights.org/wpcontent/uploads/2013/07/StateLawsThatProhibitDiscriminationAgainstTransPeople.pdf> [<https://perma.cc/YM6F-L7VY>] (finding that fifteen states and the District of Columbia had statutes prohibiting discrimination in employment, public accommodations, housing, credit, or schooling).

<sup>76</sup> 775 ILL. COMP. STAT. 5/1-103 (2021).

<sup>77</sup> Ellen Henrion, Note, *What's Missing? Addressing the Inadequate LGBT Protections in the Missouri Human Rights Act*, 81 MO. L. REV. 1173, 1179–80 (2016).

Illinois, California has broad protections for LGBTQ people too.<sup>78</sup> The California statute explicitly separates “sex, gender, gender identity, gender expression, . . . [and] sexual orientation . . . .”<sup>79</sup>

Prior to the United States Supreme Court’s recent decision in *Bostock v. Clayton County*,<sup>80</sup> federal anti-discrimination statutes have also afforded protections for both transgender identity *and* sexual orientation by allowing plaintiffs to bootstrap their claim under “gender stereotyping”<sup>81</sup> or tie the claim specifically to the narrowly defined class. As mentioned above, the *Hopkins* Court first outlined this argument when it held that discrimination against members of the LGBTQ community necessarily relies on a person’s sex because such discrimination stems from the common understanding of stereotypical characteristics of males and females.<sup>82</sup> This has been adopted in Missouri, as seen in *Lampley*.<sup>83</sup> The large disparity in the interpretation of discrimination statutes appears to stem from the conflation of sex, sexual orientation, gender, and the like.

#### D. Statutory Interpretation

The objective of statutory interpretation is to “give effect to legislative intent as reflected in the plain language of the statute at issue.”<sup>84</sup> When the language of a statute is unambiguous, “courts must give effect to the language used by the legislature.”<sup>85</sup> The text of a statute is ambiguous “only if its language is subject to more than one reasonable

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<sup>78</sup> CAL. GOV’T CODE § 12940(a) (2021).

<sup>79</sup> *Id.* This is different from the Illinois statute, which does not explicitly separate them within the statute but instead simply includes “gender identity” under its explicit protection of “sexual orientation.”

<sup>80</sup> 140 S. Ct. 1731 (2020).

<sup>81</sup> See Henrion, *supra* note 77, at 1181–82.

<sup>82</sup> See *infra* Part III.B.

<sup>83</sup> *Lampley v. Mo. Comm’n on Hum. Rts.*, 570 S.W.3d 16, 25 (Mo. 2019) (en banc) (“[A]n employee who suffers an adverse employment decision based on sex-based stereotypical attitudes of how a member of the employee’s sex should act can support an inference of unlawful sex discrimination. Sexual orientation is incidental and irrelevant to sex stereotyping. Sex discrimination is discrimination, it is prohibited by the Act, and an employee may demonstrate this discrimination through evidence of sexual stereotyping.”).

<sup>84</sup> *Pittman v. Cook Paper Recycling Corp.*, 478 S.W.3d 479, 482 (Mo. Ct. App. 2015) (quoting *Crawford v. Div. of Emp’t Sec.*, 376 S.W.3d 658, 664 (Mo. 2012) (en banc)).

<sup>85</sup> *Id.* at 482 (quoting *Keeney v. Hereford Concrete Prods., Inc.*, 911 S.W.2d 622, 624 (Mo. 1995) (en banc)).

interpretation.”<sup>86</sup> Necessarily, a statute is unambiguous when “a person of ordinary intelligence would find its meaning plain and clear.”<sup>87</sup> Where the term is not defined in the statute, Missouri courts use the “plain and ordinary meaning” that may be derived from a dictionary.<sup>88</sup> When the term is ambiguous and not defined, courts use different canons to determine the legislature’s intent.<sup>89</sup>

The MHRA is a remedial statute.<sup>90</sup> Remedial statutes are “construed liberally to include those cases which are within the spirit of the law and all reasonable doubts should be construed in favor of applicability to the case” when ambiguity exists.<sup>91</sup> “When it is uncertain whether a remedial statute applies [to a specific case], courts resolve the ambiguity in favor” of applying the statute to the injury.<sup>92</sup> When a claimant seeks protection under an MHRA class that is open to multiple interpretations, but is also within the spirit of the law, the court should apply the MHRA because it is a remedial statute.

The MHRA is considered “coextensive, but not identical” to its federal counterparts.<sup>93</sup> If the language in the MHRA is clear and unambiguous, a federal law to the contrary is not binding.<sup>94</sup> When Missouri courts review MHRA cases, they are “guided by both Missouri law and any federal . . . discrimination . . . case law that is consistent with Missouri law.”<sup>95</sup> Although Missouri follows the *Hopkins* sex-stereotype rationale to broaden the MHRA’s protections,<sup>96</sup> it still leaves vulnerable groups without adequate human rights protections unless they cleverly plead their discrimination claim.

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<sup>86</sup> Matthew Davis, *Statutory Interpretation in Missouri*, 81 MO. L. REV. 1127, 1129 (2016) (internal citations removed).

<sup>87</sup> *Id.*

<sup>88</sup> *Cox v. Dir. of Revenue*, 98 S.W.3d 548, 550 (Mo. 2003) (en banc).

<sup>89</sup> Davis, *supra* note 86, at 1129.

<sup>90</sup> *Lampley v. Mo. Comm’n on Hum. Rts.*, 570 S.W.3d 16, 23 (Mo. 2019) (en banc) (citing *Howard v. City of Kansas City*, 332 S.W.3d 772, 779 (Mo. 2011) (en banc)). A remedial statute is a statute that provides “a means to enforce rights or redress injuries.” *Remedial Statute*, BLACK’S LAW DICTIONARY (11th ed. 2019).

<sup>91</sup> *State ex rel. Ford v. Wennskay*, 824 S.W. 2d 99, 100 (Mo. Ct. App. 1992).

<sup>92</sup> Davis, *supra* note 86, at 11432.

<sup>93</sup> *Brady v. Curators of Univ. of Mo.*, 213 S.W.3d 101, 112 (Mo. Ct. App. 2006) (emphasis omitted).

<sup>94</sup> *Id.* at 113.

<sup>95</sup> *Lampley*, 570 S.W.3d at 22 (quoting *Diaz v. Autozoners, LLC*, 484 S.W.3d 64, 76 (Mo. Ct. App. 2015)).

<sup>96</sup> *See infra* Part III.B.

## IV. INSTANT DECISION

The crux of the case turned on whether “sex,” as covered by the MHRA, includes transgenderism.<sup>97</sup> The majority examined similar cases from Missouri and other federal circuits before ultimately ruling that R.M.A. sufficiently pled that he was a member of a protected class under the MHRA because he stated that his “legal sex is male” in his complaint.<sup>98</sup> This holding gives transgender persons some course for relief, but only if the discrimination claim is properly pled.

*A. Judge Wilson’s Majority Opinion*

The majority opinion, written by now Chief Justice Paul C. Wilson, described R.M.A.’s case as “simple and straightforward.”<sup>99</sup> First, Chief Justice Wilson acknowledged that the court may only reverse the motion to dismiss if it found that R.M.A. sufficiently pled all facts required to meet the elements of the cause of action.<sup>100</sup>

The elements of R.M.A.’s public accommodation sex discrimination claim are as follows:

- (1) Defendants denied Plaintiff the full and equal use and enjoyment of a public accommodation;
- (2) Plaintiff is a member of a protected class;
- (3) Plaintiff’s sex was a contributing factor in the denial of his use of a public accommodation; and
- (4) Plaintiff suffered damages due to Defendants’ conduct.<sup>101</sup>

Accepting R.M.A.’s allegations as true, the majority concluded that R.M.A. met the requirements of a sufficient petition.<sup>102</sup> Specifically, the court determined R.M.A. adequately pled the four requisite facts needed to prove his claim: (1) Defendants denied R.M.A. full and equal use and enjoyment of a locker room and bathroom; (2) R.M.A. was a member of a protected class because he pled his “legal sex is male;” (3) R.M.A.’s sex was a motivating

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<sup>97</sup> R.M.A. by Appleberry v. Blue Springs R-IV Sch. Dist., 568 S.W.3d 420, 430 (Mo. 2019) (en banc) (Fischer, J., dissenting).

<sup>98</sup> *Id.* at 427.

<sup>99</sup> *Id.* at 426.

<sup>100</sup> *Id.* at 424.

<sup>101</sup> *Id.* at 426–27.

<sup>102</sup> *Id.* at 426–28.

factor in his denial of locker room and bathroom use because he pled the discrimination was on “grounds of his sex;” and (4) R.M.A. pled that he suffered damages because he was denied use of the public accommodation.<sup>103</sup>

Although the majority spent little time discussing whether R.M.A. was a member of a protected class, it analogized the case to *Wrightson v. Pizza Hut* –<sup>104</sup> a Fourth Circuit decision – which held that a plaintiff sufficiently pled the elements of his claim where he alleged he was discriminated against because of his sex.<sup>105</sup> The Fourth Circuit made clear that even if there is discrimination on the basis of a plaintiff’s sexual orientation, a cause of action will lie “as long as the employee’s sex was a cause of the discrimination.”<sup>106</sup> Applying the Fourth Circuit’s approach, the *R.M.A.* court held that even if there was discrimination against R.M.A. because of his transgender status, he still sufficiently alleged that he was a member of a protected class because he pled discrimination due to his “legal sex” as a male.<sup>107</sup>

### *B. Judge Fischer’s Dissent*

Judge Fischer focused on the fact that the MHRA does not facially recognize allegations of gender identity discrimination.<sup>108</sup> Judge Fischer contended that the majority took only *some* of R.M.A.’s facts as true and ignored a principal allegation that R.M.A. was born a female who then transitioned to a male.<sup>109</sup> Judge Fischer pointed out that, “[t]aking *all* of [his] allegations as true,” R.M.A. alleged that the Defendants

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<sup>103</sup> *Id.* at 426–28.

<sup>104</sup> *Id.* at 428. The court said when comparing R.M.A.’s claim to the elements pled in *Wrightson*, “The same is true here. R.M.A.’s petition alleges he is a member of a protected class, he was discriminated against in the use of a public accommodation, his status as a member of a protected class was the basis for the discrimination he suffered, and he sustained damages, as required by section 213.065.” *Id.*

<sup>105</sup> *Id.* The Fourth Circuit held that “while it is true Title VII does not afford a cause of action for discrimination based upon sexual orientation, *Wrightson* does not allege that he was discriminated against because he is heterosexual.” *Wrightson v. Pizza Hut of Am., Inc.*, 99 F.3d 138, 143 (4th Cir. 1996). Instead, *Wrightson* alleged he was “discriminated against because of his sex, male.” *Id.* The Fourth Circuit said that for the purposes of a motion to dismiss, alleging *Wrightson* was discriminated against “because of his sex” must be accepted as true, and thus is sufficient to withstand dismissal. *Id.*

<sup>106</sup> *Id.* at 144.

<sup>107</sup> *R.M.A. by Appleberry*, 568 S.W.3d at 427–29.

<sup>108</sup> *Id.* at 430–34 (Fischer, J., dissenting).

<sup>109</sup> *Id.* at 431.

discriminated against him when they denied him access to the restroom and locker room because of his transgender identity.<sup>110</sup> Therefore, Judge Fischer argued the majority incorrectly extended the protections of the MHRA “beyond biological sex” to claims of transgender discrimination.<sup>111</sup>

Judge Fischer next discussed what the MHRA is intended to protect.<sup>112</sup> The MHRA prohibits discrimination on “grounds of . . . sex.”<sup>113</sup> Judge Fischer noted that the court should use the “plain and ordinary meaning” of the word “sex” because the legislature did not define the term.<sup>114</sup> Using a 1993 dictionary, Judge Fischer probed several possible definitions of the word “sex”:

The word “sex” means “one of the two divisions of [organisms] esp. human beings respectively designated male or female.” It also means the “sum of morphological, physiological, and behavioral peculiarities of living beings that subserves biparental reproduction with its concomitant genetic segregation and recombination . . . that is typically manifested as maleness or femaleness.” Additionally, the word “sex” refers to “the sphere of interpersonal behavior esp. between male and female,” the “phenomena of sexual instincts and their manifestations,” and “determin[ing] the sex of an organic being.”<sup>115</sup>

Using these possible definitions of “sex,” his dissent concluded that the definition necessarily refers to a biological classification of people as “male or female.”<sup>116</sup> Thus, according to Judge Fischer, the majority was precluded from interpreting “sex” to cover transgender status.<sup>117</sup> Under this analysis, R.M.A. failed to state a claim sufficient to survive Defendants’ motion to dismiss because R.M.A. failed to allege he was part of a protected class.<sup>118</sup>

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<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 431–32.

<sup>113</sup> *Id.* at 431 (quoting MO. REV. STAT. § 213.065(2) (2017)).

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 431–32 (citing *Sex*, WEBSTER’S INTERNATIONAL DICTIONARY (3ed. 1993)).

<sup>116</sup> *Id.* at 432.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 433–34.

## V. COMMENT

*R.M.A.* may be seen as both a good and bad outcome for individuals seeking justice for transgender discrimination. The good news is that this opinion gives transgender persons some ground to, at the very least, get their foot in the door of a courtroom. The bad news is that transgender persons must bootstrap the true reasoning of discrimination – their transgender status – to grounds related to sex. The court’s holding ultimately fell short in its attempt to address the lack of legal protection for transgender individuals. While the court had multiple avenues available to adequately address the issue, it adopted an approach that will force transgender individuals to couch their claims in “sex” rather than the true root of the discrimination. In addition to several arguments that the MHRA protects against gender identity discrimination, a subsequent United States Supreme Court decision offers a solution for Missouri courts to apply in future transgender discrimination cases.

*A. Bootstrapping Claims Under Sex and Sex Stereotyping*

*R.M.A.* gives transgender persons a way to claim discrimination under the MHRA so long as they plead correctly. As previously noted, the majority concluded that, because *R.M.A.* pled his “legal sex is male,”<sup>119</sup> he sufficiently met that element needed to prove his claim.<sup>120</sup> If *R.M.A.* never pled that the discrimination occurred due to his “legal sex,” the motion to dismiss most likely would have been upheld because the majority and dissent both acknowledged that transgender status is not explicitly protected under the MHRA.<sup>121</sup> Therefore, if a transgender person seeks protection because they were discriminated against on the grounds of their transgender status, they must bootstrap their claims to gender or biological sex.

There are a number of ways in which the Supreme Court of Missouri can find that transgender discrimination is *already* protected under the MHRA. First, the court could reason that the Missouri legislature intended the word “sex” to include transgender status. While it is unlikely that the Missouri legislature intended for transgender persons to be included in the protections of the MHRA,<sup>122</sup> the United States Supreme Court still found

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<sup>119</sup> *Id.* at 427.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 427. The court points to the fact that *R.M.A.* pled the discrimination occurred because of his sex. *Id.* at 431.

<sup>122</sup> *See, e.g., Pittman v. Cook Paper Recycling Corp.*, 478 S.W.3d 479, 482 (Mo. Ct. App. 2015) (“The clear meaning prohibiting discrimination based upon “sex”

transgender discrimination to be a violation of Title VII in *Bostock*,<sup>123</sup> despite the fact that Congress did not intend for transgender status to be included in the Act.<sup>124</sup> Because the Missouri legislature chose not to define “sex,” Missouri courts have some leeway to argue transgender persons may be protected on different grounds.

Second, the court could extend the *Lampley* reasoning to find that transgender discrimination is protected under the current text of the MHRA.<sup>125</sup> Under this theory, discrimination based on sexual orientation – or in R.M.A.’s case, gender identity – occurs by “sexual stereotyping.”<sup>126</sup> Jurisdictions that follow the sexual stereotyping rationale argue that the discrimination occurs not because of the plaintiff’s sexual orientation, but because the discriminator is influenced by prevalent stereotypes about how members of each sex should act.<sup>127</sup> Such discrimination would not have occurred “but for the victim’s sex,” and thus the discrimination is necessarily on the basis of “sex.”<sup>128</sup> The R.M.A. court could have extended this rationale to establish that discrimination on the basis of gender identity is inherently discrimination on the basis of “sex.”

### *B. Favoring a Broadened Definition of “Sex”*

Judge Fischer followed the traditional interpretation of the MHRA to conclude that it only protects against discrimination based on biological

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under the Missouri Human Rights Act intended by the Missouri legislature concerns discrimination based upon a person’s gender and has nothing to do with sexual orientation.”).

<sup>123</sup> *Id.* at 1739 (even assuming that sex meant “biological distinctions between male and female,” the Court still found Title VII to protect transgender discrimination).

<sup>124</sup> *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1752 (2020) (“[The] initial proponent of the sex discrimination rule in Title VII, [was] Representative Howard Smith. On some accounts, the congressman may have wanted or at least was indifferent to the possibility of) broad language with wide-ranging effect. Not necessarily because he was interested in rooting out sex discrimination in all its forms, but because he may have hoped to scuttle the whole Civil Rights Act and thought that adding language covering sex discrimination would serve as a poison pill.”).

<sup>125</sup> *See generally* *Lampley v. Mo. Comm’n on Hum. Rts.*, 570 S.W.3d 16 (Mo. 2019) (en banc).

<sup>126</sup> *See, e.g., id.*; *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); *Lewis v. Heartland Inns of Am., L.L.C.*, 591 F.3d 1033, 1040 (8th Cir. 2010).

<sup>127</sup> *See, e.g., Lampley*, 570 S.W.3d 16; *Price Waterhouse*, 490 U.S. 228 (1989); *Lewis*, 591 F.3d at 1040 (8th Cir. 2010).

<sup>128</sup> *Lampley*, 570 S.W.3d at 24 (citing *Lewis*, 591 F.3d at 1040) (internal emphasis omitted).

sex.<sup>129</sup> He argued that “sex” is unambiguous, and therefore the court should read the plain and ordinary meaning of the word.<sup>130</sup> In discussing the proper definition of the word “sex,” Judge Fischer listed two separate definitions<sup>131</sup> and concluded that both must be referring to biological sex.<sup>132</sup> However, those definitions themselves show that the word “sex” is actually *ambiguous*. While one definition provided the classic “male or female” dichotomy,<sup>133</sup> the other definition of “sex” was substantially different: the “sum of *morphological, physiological, and behavioral peculiarities . . . that is typically manifested as maleness or femaleness.*”<sup>134</sup> The second definition moves far past the traditional “male or female” understanding and expands “sex” to encompass the physiology and behavior of a person as well—“typically manifested as maleness or femaleness.”<sup>135</sup> Furthermore, physiological and behavioral aspects of a person align more with the definition of gender than sex, which Judge Fischer mistakenly used interchangeably throughout his analysis.<sup>136</sup> These definitions support arguments that either (1) “sex” is ambiguous because it has more than one reasonable interpretation, and therefore it should be read *in favor of* situations that are within the spirit of the MHRA,<sup>137</sup> or (2) the plain meaning of “sex” is something more than the biological separation of the male and female.

These exact definitions were also stated by Judge Gabbert in his dissent in *Pittman*.<sup>138</sup> However, Judge Fischer and Judge Gabbert came to opposite conclusions.<sup>139</sup> Judge Fischer argued that those definitions refer only to the biological separation of male and female, while Judge Gabbert argued those definitions are more expansive. Looking at the definitions above, Judge Gabbert came to the correct conclusion that “sex does not

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<sup>129</sup> *R.M.A. by Appleberry v. Blue Springs R-IV Sch. Dist.*, 568 S.W.3d 420, 430 (Mo. 2019) (en banc) (Fischer, J., dissenting).

<sup>130</sup> *Id.* at 432.

<sup>131</sup> *Id.* at 431–32.

<sup>132</sup> *Id.* at 432.

<sup>133</sup> *Id.* at 431.

<sup>134</sup> *Id.* at 431–32 (emphasis added).

<sup>135</sup> *Id.*

<sup>136</sup> *See supra* Part III.A.

<sup>137</sup> *See supra* Part III.D.

<sup>138</sup> *Pittman v. Cook Paper Recycling Corp.*, 478 S.W.3d 479, 486 (Mo. Ct. App. 2015) (Gabbert, J., dissenting).

<sup>139</sup> *R.M.A.*, 568 S.W.3d at 430 (Fischer, J., dissenting); *Pittman*, 478 S.W.3d at 489 (Gabbert, J., dissenting).

include only gender” because the definition includes the “morphological, physiological, and behavioral” aspects of sex.<sup>140</sup>

Under Judge Gabbert’s argument, if the plain and ordinary meaning of “sex” encompasses more than just gender or biological sex, there is an argument that transgender individuals fit within the definition of “sex” that takes into account “morphological, physiological, and behavioral” characteristics.<sup>141</sup> If that is the case, a plain interpretation of the MHRA would include transgenderism.

On the other hand, one may conclude that there are multiple reasonable interpretations of “sex.” If this is the case, courts may look to canons of interpretation or other sources, such as federal guidance, of the legislature’s intent.<sup>142</sup> The MHRA is a remedial statute and is interpreted to include situations that fit within the “spirit of the law.”<sup>143</sup> The spirit of the MHRA is to protect against discrimination.<sup>144</sup> The transgender community is a group that has been historically discriminated against. Therefore, any ambiguity of the word “sex,” the MHRA’s status as a remedial statute, and federal guidance such as *Bostock* support the finding that transgender individuals are already protected under the MHRA.

### C. Applying *Bostock*

One year after the *R.M.A.* opinion, the Supreme Court of the United States heard *Bostock v. Clayton County*.<sup>145</sup> There, three suits were consolidated into one because they all had the same question: whether sex discrimination under Title VII prohibits discrimination on the basis of sexual orientation or *transgender status*.<sup>146</sup> All parties to the suit agreed that Title VII is violated by intentional discrimination on grounds of sex.<sup>147</sup> The Court held that because sexual orientation or gender identity discrimination necessarily requires discrimination based on the

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<sup>140</sup> *Pittman*, 478 S.W.3d at 486 (Gabbert, J., dissenting).

<sup>141</sup> *See supra* Part III.A; *R.M.A. by Appleberry*, 568 S.W.3d at 431–32; *Pittman*, 478 S.W.3d at 486. A transgender person is one whose “assigned biological sex doesn’t match their felt identity.” Using the broad concepts of “morphological, physiological, and behavioral” concepts listed in one of the definitions provided of “sex,” transgender individuals would surely fit within the physiological and behavioral aspects.

<sup>142</sup> *See supra* Part III.D.

<sup>143</sup> *Lamley v. Mo. Comm’n on Hum. Rts.*, 570 S.W.3d 16, 22 (Mo. 2019) (en banc).

<sup>144</sup> MO. REV. STAT. § 213.020.2 (2016).

<sup>145</sup> 140 S. Ct. 1731 (2020).

<sup>146</sup> *Id.* at 1737.

<sup>147</sup> *Id.* at 1734.

individual's *sex*, intentional discrimination on such grounds violated Title VII.<sup>148</sup> The Court reasoned that a person's sex is a necessary "but-for cause" in discrimination based on that person's sexual orientation or transgender status.<sup>149</sup> Although *Bostock* is not binding upon Missouri because Title VII only applies to the federal government, Missouri courts often seek guidance from federal statutes when a Missouri statute is ambiguous or has a similar interpretation as a federal law.<sup>150</sup>

The *Bostock* Court's reasoning may be the most straightforward argument in favor of protecting transgender persons under the MHRA. The United States Supreme Court interpreted "sex" to mean exactly what the Defendants and dissent in *R.M.A.* wanted it to mean: "biological distinctions between male and female."<sup>151</sup> However, *Bostock* held that where a defendant "intentionally relies in part on an individual[s] . . . sex when deciding to discharge" that individual from their employment, a Title VII violation has occurred.<sup>152</sup> The Court correctly reasoned that to discriminate against a person because of their transgender status necessarily requires discrimination based on their sex because a person "intends to rely on sex."<sup>153</sup> The Court painted this reasoning with a hypothetical:

Imagine an employer who has a policy of firing any employee known to be homosexual. The employer hosts an office holiday party and invites employees to bring their spouses. A model employee arrives and introduces a manager to Susan, the employee's wife. Will that employee be fired? If the policy works as the employer intends, the answer depends entirely on whether the model employee is a man or a woman.<sup>154</sup>

The same logic applies to transgender persons. If one's goal is to discriminate against another solely due to their transgender status, their choice to discriminate necessarily depends on the individual's sex because their transgender status stems from their biological sex. Even under this strict definition, the Court concluded that discrimination against transgender individuals is included under Title VII's "sex" prong.<sup>155</sup>

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<sup>148</sup> *Id.*

<sup>149</sup> *Id.* at 1742.

<sup>150</sup> *See supra* Part III.D.

<sup>151</sup> *Bostock*, 140 S. Ct. at 1739.

<sup>152</sup> *Id.* at 1741.

<sup>153</sup> *Id.* at 1742.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

Applying the *Bostock* majority's argument to the MHRA, it is reasonable to conclude that transgender status should be, or perhaps already is, protected under the MHRA. Anytime someone discriminates against a person for their transgender status, they must necessarily rely on that individual's sex. As long as that discrimination is a motivating factor in the discriminator's adverse action, the discriminator has violated the MHRA.

## VI. CONCLUSION

The MHRA was enacted to protect groups of people who face discrimination for reasons society has deemed counter-intuitive to the function of a civilized nation.<sup>156</sup> As the attitudes and morals of society change over time, so should the law. While the Missouri legislature should explicitly resolve this issue by integrating more protected classes into the MHRA – like transgender persons – such action could take years, or it could never happen at all. However, there are four possible reasons to find that transgender persons should be or are *already* protected by the MHRA: (1) discrimination against a transgender individual is discrimination against their sex through sex stereotyping, which is a recognized claim;<sup>157</sup> (2) the plain and ordinary meaning of “sex” includes transgender status;<sup>158</sup> (3) there are multiple reasonable interpretations of “sex” that could include transgenderism because the protection of this class is within the spirit of the MHRA;<sup>159</sup> or (4) discrimination based on transgender status necessarily relies on that person's sex, as found in *Bostock*.<sup>160</sup>

The success of a transgender individual's claim of unjust discrimination should not depend on whether they properly bootstrapped their claim to “sex” in their pleadings. While allowing transgender people to plead around the true issue is better than nothing, continuing to force them to bootstrap their claims to falsely identified discrimination is only a Band-Aid that temporarily covers up the larger issue that the transgender community continues to face.

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<sup>156</sup> See *supra* Part III.B.

<sup>157</sup> See Lampley, *supra* note 128, at 24.

<sup>158</sup> See *supra* Part V.B.

<sup>159</sup> See *supra* Part V.B.

<sup>160</sup> See *supra* Part V.C.