

A BARE DESIRE TO HARM: TRANSGENDER PEOPLE AND THE EQUAL PROTECTION CLAUSE

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Abstract: The U.S. Supreme Court’s decision in *Obergefell v. Hodges* establishing marriage equality for same-sex couples marks a major shift in recognizing gay, lesbian, and bisexual people as a central part of the fabric of American society. *Obergefell* also marks the passing of the torch from “LGB” to “T”; the next civil rights frontier belongs to transgender people, for whom key barriers still remain. In January 2015, a transgender woman filed an equal protection challenge to a provision of the Americans with Disabilities Act (“ADA”), which explicitly excludes several medical conditions closely associated with transgender people. In support of this challenge, lawyers for the plaintiff (and co-authors of this Article) advance a novel argument: transgender people are a “suspect” or “quasi-suspect” class entitled to heightened scrutiny. The authors further argue that the ADA’s transgender exclusions are unconstitutional no matter what level of scrutiny applies because moral animus against transgender people is not a legitimate basis for lawmaking. This equal protection challenge paves the way for the extension of disability rights protection to transgender people under the Rehabilitation Act, Fair Housing Act, and state anti-disability discrimination laws that mirror the ADA. It also marks a new break for equality law—reaching far beyond disability rights to all laws that single out transgender people for disparate treatment. This challenge also informs the broader theoretical debate over the relationship between identity and impairment, and diagnosis and discrimination.

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INTRODUCTION

*All I was doing was being me. That's all I ever wanted.*¹

“A prime part of the history of our Constitution . . . is the story of the extension of constitutional rights and protections to people once ignored or excluded.”² Over the past several decades, this constitutional history has expanded to include the story of gay, lesbian, and bisexual people, culminating in the U.S. Supreme Court’s historic decision in *Obergefell v. Hodges* in 2015, which definitively recognized the right to marry someone of the same sex.³ But another story, lesser known and of more recent vintage, is being written. It is the story of transgender people.

Since its inception in the early 1990s, the transgender rights movement has been largely subsumed by the civil rights movement of gay, lesbian, and bisexual (“LGB”) people.⁴ This makes sense; many transgender people are also gay, lesbian, or bisexual, so legal victories in the sexual orientation context have necessarily accrued to transgender people.⁵ Marriage equality under *Obergefell* marks the summit of an incremental march toward equality under the Constitution—one that gained steam decades earlier with successful challenges to facially discriminatory laws that stripped LGB people of civil rights protections (*Romer v. Evans*, decided by the Court in 1996) and criminalized same-sex intimacy (*Lawrence v. Texas*, decided by the Court in 2003). By removing the last key barrier to equality under the Constitution for gay, lesbian, and bisexual people, *Obergefell* also marks the passing of the torch from “LGB” to “T.” The next civil rights frontier belongs to transgender people.

Like the LGB rights movement, the transgender rights movement has proceeded incrementally, successfully challenging cross-dressing laws, unfair workplace practices, public and private health insurance exclusions, and antiquated surgical requirements for obtaining changes to birth certificates and other official documents. In contrast to the legal challenges that have

¹ Blatt Dep. 189:17-21, Blatt v. Cabela’s Retail, Inc., No. 5:14-cv-4822-JFL (E.D. Pa. argued Dec. 9, 2015).

² United States v. Virginia, 518 U.S. 515, 557 (1996); see also RICHARD B. MORRIS, THE FORGING OF THE UNION, 1781–1789, at 193 (1987) (discussing the history of the Constitution).

³ See 135 S. Ct. 2584, 2608 (2015).

⁴ Shannon Price Minter, *Do Transsexuals Dream of Gay Rights?*, in TRANSGENDER RIGHTS 141, 142 (Paisley Currah et al. eds., 2006) (discussing the question of whether the gay rights movement should include transgender people).

⁵ See *id.* (stating that a “sizeable percentage of transgender people also identify as lesbian, gay, or bisexual”). For example, *Obergefell* benefitted transgender people, although not explicitly, in same-sex relationships (e.g., a male-to-female transgender person married to a non-transgender woman). See 135 S. Ct. at 2604–05 (recognizing the right to marry someone of the same sex).

characterized the LGB rights movement, however, no transgender litigant has ever challenged—let alone succeeded in striking down—a facially discriminatory federal law under the Equal Protection Clause. As a result, no court or agency has ever addressed the critical question of whether statutory transgender classifications should be subject to “heightened scrutiny”—the most rigorous standard of review applied by courts under the Equal Protection Clause. More specifically, in the context of a facially discriminatory federal law, no court or agency has analyzed whether transgender people are a “suspect” or “quasi-suspect” class, which would require that they have suffered a history of discrimination, have the ability to contribute to society, exhibit immutable distinguishing characteristics, and are a politically powerless minority. Nor has any court or agency determined whether statutory transgender classifications are sex-based and therefore subject to the same level of scrutiny as statutory gender classifications. And no court or agency has considered whether moral animus against transgender people is a legitimate basis for lawmaking. Simply put, the transgender rights movement is still without its *Obergefell*.⁶ As a result, the constitutional rights of transgender people remain uncertain.

But this is changing. The next chapter in the story of constitutional rights for transgender people is underway, and it comes from an unlikely place: a facial equal protection challenge to the Americans with Disabilities Act (“ADA”).⁷

Tucked away in the last title of the ADA, entitled “Miscellaneous Provisions,” is a set of exclusions from the ADA’s definition of disability.⁸ Specifically, the ADA excludes from its definition of disability “homosexuality and bisexuality” because they “are not impairments and as such are not disabilities.”⁹ Both medicine and law support this exclusion. Indeed, it is consistent with the American Psychiatric Association’s removal of the diagnosis of homosexuality from its *Diagnostic and Statistical Manual of Men-*

⁶ See *Obergefell*, 135 S. Ct. at 2604–05 (recognizing the right to marry someone of the same sex); see also *United States v. Windsor* (*Windsor II*), 133 S. Ct. 2675, 2695 (2013) (invalidating Section 3 of the Defense of Marriage Act (“DOMA”), which excluded same-sex marriages from the definition of “marriage” under federal law); *Lawrence v. Texas*, 539 U.S. 558, 562 (2003) (invalidating a state law that criminalized same-sex intimacy); *Romer v. Evans*, 517 U.S. 620, 629–30, 635–36 (1996) (invalidating a state constitutional amendment that prohibited all existing and future antidiscrimination laws protecting lesbian, gay, and bisexual people).

⁷ See Plaintiff’s Memorandum of Law in Opposition to Defendant’s Partial Motion to Dismiss Plaintiff’s First Amended Complaint at 16, *Blatt*, No. 5:14-cv-4822-JFL, 2015 WL 1360179 [hereinafter Plaintiff’s Memorandum of Law in Opposition] (arguing that the ADA’s exclusion of transgender people violates the Equal Protection Clause).

⁸ 42 U.S.C. § 12211 (2012).

⁹ *Id.*

tal Disorders (“DSM”) in 1973.¹⁰ It is also consistent with courts’ recognition that homosexuality and bisexuality were not “impairments” under the ADA’s precursor, the Rehabilitation Act of 1973.¹¹

The ADA also excludes from coverage “transvestism,” “gender identity disorders not resulting from physical impairments,” and “transsexualism,” but it does so for a very different reason.¹² Unlike homosexuality and bisexuality, the ADA does not exclude these conditions under the theory that they are not medical “impairments.”¹³ Instead, the ADA excludes transvestism, transsexualism, and gender identity disorder (“GID”) because of the moral opprobrium of two senior U.S. senators, conveyed in the eleventh hour of a marathon day-long floor debate, who believed that all were “sexual behavior disorders” undeserving of legal protection.¹⁴

In 2014, a transgender woman named Kate Lynn Blatt sued her employer, Cabela’s Retail, Inc., for discrimination under Title VII of the Civil Rights Act of 1964 and the ADA.¹⁵ The facts of Ms. Blatt’s case are, unfortunately, all too typical of the discrimination experienced by transgender people. Diagnosed with GID in October 2005,¹⁶ Ms. Blatt grew long hair,

¹⁰ AM. PSYCHIATRIC ASS’N, POSITION STATEMENT ON DISCRIMINATION AGAINST TRANSGENDER AND GENDER VARIANT INDIVIDUALS 2 (2012) [hereinafter APA POSITION STATEMENT ON DISCRIMINATION], http://www.dhcs.ca.gov/services/MH/Documents/2013_04_AC_06d_APA_ps2012_Transgen_Disc.pdf [perma.cc/94NS-H4GQ] (discussing APA’s support of gay and lesbian civil rights as background for support of transgender rights).

¹¹ See H.R. REP. NO. 101-596, at 88 (1990) (Conf. Rep.), available at 1990 WL 121679 (“The Senate bill restates current policy under section 504 of the Rehabilitation Act of 1973 that the term ‘disability’ does not include homosexuality and bisexuality.”).

¹² 42 U.S.C. § 12211. As discussed below, the DSM considered transsexualism to be a subtype of GID until 1994, when it removed the diagnosis of transsexualism altogether. See *infra* note 13 and accompanying text (discussing revision to DSM).

¹³ 42 U.S.C. § 12211. Indeed, the DSM considered each of these conditions to be medical impairments long before and well after passage of the ADA. See Christine Michelle Duffy, *The Americans with Disabilities Act of 1990 and the Rehabilitation Act of 1973*, in GENDER IDENTITY AND SEXUAL ORIENTATION DISCRIMINATION IN THE WORKPLACE: A PRACTICAL GUIDE 16-153 to 16-158 (Christine Michelle Duffy ed., 2014) (containing graphic depiction of organization of GID, transsexualism, and transvestism in various editions of DSM). Although the fifth edition of the DSM, published in 2013, eliminated “Gender Identity Disorder” (“GID”) and added “Gender Dysphoria,” the DSM did not remove the diagnoses associated with transgender people. AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 451 (5th ed. 2013) [hereinafter DSM-5].

¹⁴ See *infra* notes 118–187 and accompanying text (discussing Senate floor debate that ultimately resulted in the exclusion of the transgender-related conditions from the ADA).

¹⁵ Complaint and Jury Demand ¶ 1–2, *Blatt*, No. 5:14-cv-4822-JFL, 2014 WL 4379556 [hereinafter Complaint].

¹⁶ See Brief of Amici Curiae Gay & Lesbian Advocates & Defenders et al. in Opposition to Defendant’s Partial Motion to Dismiss at 11 n.4, *Blatt*, No. 5:14-cv-4822-JFL, 2015 WL 1322781 [hereinafter Brief of Amici Curiae] (stating that Plaintiff Blatt alleges that “her 2005 GID diagnosis also meets the 2013 Gender Dysphoria diagnostic criteria”); Complaint, *supra* note 15, ¶ 11.

dressed in feminine attire, underwent hormone therapy, and changed her name from “James” to “Kate Lynn” as part of her medical transition.¹⁷ In September 2006, Cabela’s, a sporting goods store, hired Ms. Blatt to work as a merchandise stocker. She attended a two-day orientation dressed in female attire and used the women’s employee restroom without issue.

Once she began working, however, the discrimination began. Cabela’s refused to give Ms. Blatt a female uniform and required her to wear a name-tag bearing the name “James” and to use the male bathroom until she provided documentation that her name and gender marker had been legally changed. When Ms. Blatt provided such documentation, she received three incorrect nametags before receiving one that read “Kate Lynn,” and Cabela’s again refused to allow her to use the female employee restroom. Her employer reasoned that because she did not take any time off work, she could not have undergone sex reassignment surgery and, therefore, might rape or assault someone using the female restroom. After suggesting that Ms. Blatt use the restroom at a Dunkin’ Donuts across the street, Cabela’s eventually allowed her to use the single-sex “family” restroom at the front of the store and far removed from her work station.

In addition, Cabela’s required Ms. Blatt to work alone in a secluded part of the store away from customers, while other merchandise stockers worked in teams throughout the store.¹⁸ Cabela’s failed to discipline employees who referred to Ms. Blatt as “ladyboy,” “he/she,” “fag,” “sinner,” “freak,” “cross-dressing gay fruit,” and “confused sicko.” Finally, Cabela’s refused to consider her for a promotion, and abruptly terminated her in March 2007.¹⁹

Invoking the ADA’s exclusion of GID and transsexualism, Cabela’s filed a motion to dismiss the ADA claim.²⁰ In January 2015, nearly twenty-five years after the ADA’s passage, Ms. Blatt filed the first-ever equal protection challenge to the ADA’s exclusion of GID and transsexualism.²¹ In her brief, Ms. Blatt argues that the exclusions target people with these med-

¹⁷ Plaintiff’s Memorandum of Law in Opposition, *supra* note 7, at 3–7. Except as otherwise noted, all facts in the case of *Blatt v. Cabela’s Retail, Inc.* are drawn from Part II of the Plaintiff’s Memorandum of Law in Opposition to the Defendant’s Partial Motion to Dismiss the Plaintiff’s First Amended Complaint.

¹⁸ Complaint, *supra* note 15, ¶ 23.

¹⁹ *Id.* ¶¶ 25–26.

²⁰ See Plaintiff’s Memorandum of Law in Opposition, *supra* note 7, at 7–8 (discussing procedural history of the case).

²¹ *Id.* at 8–44 (discussing the Plaintiff’s argument). Because Ms. Blatt was diagnosed with GID, not “transvestism,” she challenges only the constitutionality of the ADA’s exclusion of GID and transsexualism—not its exclusion of “transvestites” and “transvestism.” Nevertheless, her arguments against the exclusion of GID and transsexualism apply with equal force to the exclusion of transvestism.

ical conditions, namely, transgender people, and that this transgender classification should be subjected to strict scrutiny.²² At a minimum, she argues, the classification should be subjected to mid-level review because being transgender—that is, having an inconsistency between a person’s gender identity and assigned sex at birth—relates to a person’s sex.²³ Ms. Blatt further argues that the transgender classification fails even the most minimal level of scrutiny because the ADA’s legislative history, coupled with the structure and practical effect of its exclusions, reveal that the classification was founded upon nothing more than moral animus—an evidentiary trump card that discredits other “legitimate” explanations as mere pretext.²⁴

As the first facial equal protection challenge to a federal statute excluding transgender people,²⁵ Ms. Blatt’s case represents an important development for disability law, as well as a new break for transgender equality and equality law more generally. If Ms. Blatt’s argument prevails (either in her own case or in those that will undoubtedly follow), her challenge will establish firm precedent for the extension of disability rights protection to transgender people not only under the ADA, but also under the Rehabilitation Act and, possibly, the Fair Housing Act and a host of state antidiscrimination laws that exclude transgender people.²⁶ A successful equal protection challenge will also reach far beyond disability rights to *any* laws that single out transgender people for disparate treatment.²⁷ This includes current Department of Defense policies that prohibit military service on the basis of “transsexualism” and “transvestism,”²⁸ and inappropriate denials of medical

²² *Id.* at 18–26.

²³ *Id.* at 26–28.

²⁴ *Id.* at 34–39; see Susannah W. Pollvogt, *Unconstitutional Animus*, 81 *FORDHAM L. REV.* 887, 892 (2012) (arguing that evidence of animus is a “doctrinal silver bullet” that “poisons the well, discrediting other explanations as mere pretext for unconstitutional discrimination”).

²⁵ Transgender public employees have brought equal protection challenges to workplace practices under the Equal Protection Clause, and transgender inmates have brought equal protection challenges to the conditions of their confinement and inadequate healthcare. See *infra* notes 412–420 and accompanying text (discussing same). None of these cases, however, involved equal protection challenges to a *statute*; all challenged various practices or conditions. In addition, transgender litigants have brought challenges to *state* health care and birth certificate laws under the Equal Protection Clause. See *infra* notes 114, 471 and accompanying text (discussing same).

²⁶ See *infra* notes 465–466 and accompanying text (discussing the potential impact of Ms. Blatt’s equal protection challenge on the federal Rehabilitation and Fair Housing Acts and state antidiscrimination laws).

²⁷ See *infra* notes 469–471 and accompanying text (discussing laws that single out transgender people for disparate treatment).

²⁸ The repeal of “Don’t Ask Don’t Tell” did not apply to transgender people. See *infra* notes 382–383 and accompanying text.

coverage for transgender healthcare.²⁹ A successful ADA challenge would therefore be a crucial first step toward securing for transgender people what *Obergefell* and its predecessors secured for gay, lesbian, and bisexual people: constitutional recognition of their equality, an affirmation of equality law's expansive embrace, and a firm rejection of moral animus as a justification for exclusion.³⁰

Ms. Blatt's equal protection challenge also informs the broader theoretical debate over the relationship between transgender identity and medical impairment, as well as Gender Dysphoria's place under disability rights law. By claiming disability rights employment protection based on Gender Dysphoria, Ms. Blatt does not argue that all transgender people have a medical condition. On the contrary, she argues that many transgender people have no impairment; they are completely comfortable living just the way they are.³¹ For some transgender people, however, the incongruence between gender identity and assigned sex at birth results in Gender Dysphoria—a serious, but treatable, medical condition that should be protected by disability rights law.³² Ms. Blatt's argument also underscores the importance of the “social model” of disability, which holds that it is society's negative reactions to our medical conditions—not the conditions themselves—that cause disability.³³ Consistent with the social model, she argues that her employer's negative reactions to Gender Dysphoria—namely fear, discomfort, lack of understanding, and animus—resulted in her termination from a job that she performed well.³⁴ As a result, she deserves protection under disability rights law.

To paraphrase Justice Kennedy, Ms. Blatt's case, and many like it to come, thrust courts into “uncharted waters.”³⁵ But, there is no “cliff” on the

²⁹ See *infra* note 471 and accompanying text (discussing laws that single out transgender people for disparate treatment).

³⁰ See *supra* note 6 and accompanying text (discussing *Obergefell*, *Windsor II*, *Lawrence*, and *Romer* decisions).

³¹ See *infra* notes 474–478 and accompanying text (discussing Ms. Blatt's argument).

³² See *infra* notes 474–478 and accompanying text (discussing Ms. Blatt's argument).

³³ See *infra* notes 479–481 and accompanying text (discussing the “social model” of disability).

³⁴ See *infra* notes 479–481 and accompanying text (discussing the “social model” of disability). By claiming protection under the ADA, Ms. Blatt does not argue that Gender Dysphoria inherently prevents her from working. See *infra* note 481 and accompanying text (discussing the potential impact of Ms. Blatt's equal protection challenge on theoretical debates surrounding transgender rights). Indeed, were that the case, she would not have protections under the ADA. See *infra* note 481 and accompanying text (same).

³⁵ Transcript of Oral Argument at 48, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (No. 12-144), http://www.supremecourt.gov/oral_arguments/argument_transcripts/12-144_5if6.pdf [https://perma.cc/77JU-57K9] [hereinafter *Hollingsworth* Oral Argument] (discussing California's Propo-

horizon, just a destination as “wonderful” as it is inevitable: equal protection for transgender people under the ADA and beyond.³⁶ Part I of this Article discusses transgender identity and the medical diagnosis of Gender Dysphoria, with particular emphasis on the evolution of the diagnosis from “disorder” to “dysphoria” and its wide acceptance as a serious medical condition by the medical community and the courts.³⁷ Part II turns to the ADA’s exclusion of transvestism, transsexualism, and GID based on several senior senators’ moral animus toward transgender people.³⁸ Part III reviews the Supreme Court’s three-tiered equal protection analysis, focusing on the line of cases that have invalidated classifications based on “a bare desire to harm” politically unpopular groups.³⁹ This Part analyzes the novel arguments supporting recognition of transgender people as a new suspect class demanding strict scrutiny and, in the alternative, a quasi-suspect class demanding intermediate scrutiny. It further argues that the ADA’s transgender exclusions fail no matter what level of scrutiny is applied because there is simply no government justification other than moral animus for excluding transgender people from the law’s protections. Part IV discusses the broader implications of Ms. Blatt’s equal protection challenge for law and theory,⁴⁰ and the Conclusion offers some closing remarks.⁴¹

I. TRANSGENDER PEOPLE AND GENDER DYSPHORIA

A transgender person is someone whose gender identity—that is, an individual’s internal sense of being male or female—does not align with his or her assigned sex at birth.⁴² Usually, people born with the physical characteristics of males psychologically identify as men, and those with the physical characteristics of females psychologically identify as women. For a

sition 8, a ballot initiative that amended the state’s Constitution to validate only marriages between a man and a woman).

³⁶ See *Hollingsworth* Oral Argument, *supra* note 35, at 48 (discussing California’s Proposition 8); *cf. Obergefell*, 135 S. Ct. at 2604–05 (holding that same-sex couples may not be deprived the right to marry under the Equal Protection and Due Process Clauses).

³⁷ See *infra* notes 42–117 and accompanying text.

³⁸ See *infra* notes 118–202 and accompanying text.

³⁹ See *infra* notes 203–461 and accompanying text.

⁴⁰ See *infra* notes 462–481 and accompanying text.

⁴¹ See *infra* notes 482–484 and accompanying text.

⁴² See, e.g., DSM-5, *supra* note 13, at 457 (discussing Gender Dysphoria); *Guidance Regarding the Employment of Transgender Individuals in the Federal Workplace*, U.S. OFF. OF PERSONNEL MGMT., <http://www.opm.gov/policy-data-oversight/diversity-and-inclusion/reference-materials/gender-identity-guidance/> [perma.cc/8NJB-ZV8Z] [hereinafter *OPM Guidance*] (discussing core concepts relating to transgender people and answering common questions regarding employment of transgender people).

transgender person, however, this is not true; the person's body and the person's gender identity do not match.

Although transgender issues have exploded into the public consciousness in recent years,⁴³ transgender people have been a part of every society and culture throughout time:⁴⁴ from ancient males who altered their bodies and Native American Two-Spirit people, to the “mollies” of eighteenth-century London and the drag queens and transsexuals who helped spark a civil rights movement by resisting a police raid on the Stone Wall Inn in New York's Greenwich Village in 1969.⁴⁵ A growing body of medical research suggests that the incongruence between a person's gender identity and assigned sex at birth is caused by “genetics and/or in utero exposure to the ‘wrong’ hormones during the development of the brain, such that the anatomic physical body and the brain develop in different gender paths.”⁴⁶

⁴³ See generally CHAZ BONO, *TRANSITION: THE STORY OF HOW I BECAME A MAN* (2011) (autobiography of Chaz Bono, son of famous singers Sonny and Cher); Buzz Bissinger, *Caitlyn Jenner: The Full Story*, VANITY FAIR (June 30, 2015), <http://www.vanityfair.com/hollywood/2015/06/caitlyn-jenner-bruce-cover-annie-leibovitz> [<https://perma.cc/TK3Y-G5KC>] (featuring widely-publicized story of the transition of Caitlyn Jenner, a transgender woman formerly known as Olympian Bruce Jenner); Emily Nussbaum, *Inside Out*, NEW YORKER (Jan. 4, 2016), <http://www.newyorker.com/magazine/2016/01/04/inside-out-on-television-emily-nussbaum> [perma.cc/FX64-SLFG] (discussing the “masterpiece” television show “Transparent” that premiered its second season in 2015 about a grandfather who transitions); Opinion, *Transgender Lives: Your Stories*, N.Y. TIMES: TRANSGENDER TODAY, <http://www.nytimes.com/interactive/projects/storywall/transgender-today> [perma.cc/2F58-DKWQ] (opinion page featuring “personal stories that reflect the strength, diversity and challenges of the community”); Alia Wong, *The K-12 Binary*, THE ATLANTIC (July 9, 2015), <http://www.theatlantic.com/education/archive/2015/07/the-k-12-binary/398060/> [perma.cc/6MXL-34UY] (discussing the struggle over transgender rights in schools).

⁴⁴ See Richard Green, *Transsexualism: Mythological, Historical, and Cross-Cultural Aspects*, in HARRY BENJAMIN, *THE TRANSEXUAL PHENOMENON* app. C at 97 (1966), <http://www.mut23.de/texte/Harry%20Benjamin%20%20The%20Transsexual%20Phenomenon.pdf> [perma.cc/3N6A-RVWV] (“Evidence for the phenomenon today called transsexualism can be found in records backward through centuries and spanning widely separated cultures.”); see also Dallas Denny, *Transgender Communities of the United States in the Late Twentieth Century*, in TRANSGENDER RIGHTS 171, 171 (Paisley Currah et al. eds., 2006) (“From prehistoric times to the present, individuals whom today we might call transgender[] and transsexual have played prominent roles in many societies, including our own.”).

⁴⁵ See Denny, *supra* note 44, at 175 (discussing Christine Jorgensen and the history of sex reassignment surgery); Minter, *supra* note 4, at 142 (discussing transgender involvement in the gay liberation movement).

⁴⁶ Duffy, *supra* note 13, at 16-77 (discussing recent medical studies); see also *Doe v. Yunits*, 15 Mass. L. Rptr. 278, 282 n.6 (Super. Ct. 2001) (“In light of the remarkable growth in our understanding of the role of genetics in producing what were previously thought to be psychological disorders . . . all or some gender identity disorders [may] result ‘from physical impairments’ in an individual’s genome.”); DSM-5, *supra* note 13, at 457 (discussing genetic and, possibly, hormonal contribution to Gender Dysphoria); see also DSM-5, *supra* note 13, at 20 (defining “mental disorders” to include dysfunctions of “biological” and “developmental”—as well as “psychological”—processes underlying mental functioning).

Rather than two paths through the wood of embryonic development—one yielding normative “men” and another yielding normative “women”—there are multiple paths. “[N]ot all embryos will make the ‘right’ combination of turns that are needed to yield the normative man or woman A good number will take unexpected detours along the way.”⁴⁷

For many transgender people, the incongruence between gender identity and assigned sex does not interfere with their lives; they are completely comfortable living just the way they are.⁴⁸ For a subset of transgender people, however, the incongruence results in gender dysphoria—i.e., a feeling of stress and discomfort with one’s assigned sex.⁴⁹ The national and international medical community widely regards such gender dysphoria, if clinically significant and persistent, as a serious medical condition in need of treatment.⁵⁰ Many courts, legislatures, and agencies have accepted the consensus of the medical community and extended legal protections to people with gender dysphoria.⁵¹

Section A of this Part discusses the medical community’s recognition of gender dysphoria, including the evolution in terminology from “disorder” to “dysphoria,” and medical treatment of the condition.⁵² Section B then examines the recognition of gender dysphoria by the courts.⁵³

A. Gender Dysphoria and the Medical Community

Psychiatric and medical theorizing about gender dysphoria began in the Western world in the nineteenth century, and physicians in Europe began performing gender reassignment surgery as early as the 1920s.⁵⁴ But the

⁴⁷ Duffy, *supra* note 13, at 16-58.

⁴⁸ See *id.* at 16-10 (discussing transgender people who do not suffer from gender dysphoria); see also DSM-5, *supra* note 13, at 453 (stating that, in addition to a marked incongruence between gender identity and assigned sex, individuals with Gender Dysphoria exhibit “distress about this incongruence”).

⁴⁹ DSM-5, *supra* note 13, at 451. Consistent with the DSM-5, this Article uses “gender dysphoria” (lowercase) as a general descriptive term to refer “to an individual’s affective/cognitive discontent with the assigned gender,” and “Gender Dysphoria” (uppercase) to refer “more specifically . . . [to] a diagnostic category.” *Id.* at 451-52.

⁵⁰ See *id.* at 452-53 (providing diagnostic criteria of Gender Dysphoria); WORLD HEALTH ORG., INTERNATIONAL CLASSIFICATION OF DISEASES, at F64 (10th revision 2015), <http://apps.who.int/classifications/icd10/browse/2015/en#/F60-F69> [perma.cc/S2ZU-LFVC] [hereinafter ICD-10] (discussing gender identity disorders).

⁵¹ See *infra* notes 92-117 and accompanying text (discussing gender dysphoria and the law).

⁵² See *infra* notes 54-91 and accompanying text.

⁵³ See *infra* notes 92-117 and accompanying text.

⁵⁴ See Jack Drescher et al., *Minding the Body: Situating Gender Identity Diagnoses in the ICD-11*, 24 INT’L REV. PSYCHIATRY 568, 568-69 (2012) (providing history of gender identity diagnostic classification).

concept of gender dysphoria as a serious, treatable medical condition received little recognition until 1952, when the American media sensationally reported the story of ex-G.I. George Jorgensen, who underwent gender reassignment surgery in Denmark and returned to the United States as Christine Jorgensen.⁵⁵ At this time, Dr. Harry Benjamin, a New York endocrinologist, began treating people struggling with gender identity issues by providing them with hormonal therapy and referrals for surgery.⁵⁶ In 1966, in his influential treatise, “The Transsexual Phenomenon,” Dr. Benjamin defined “transsexualism” as a “syndrome” that results in one being “deeply unhappy as a member of the sex (or gender) to which he or she was assigned by the anatomical structure of the body, particularly the genitals.”⁵⁷ In 1969, a medical protocol for gender reassignment was developed and in the ensuing decade over forty university-affiliated gender programs sprang up across the United States, providing treatment to individuals with gender identity issues.⁵⁸

In 1980, the American Psychiatric Association (“APA”) introduced the GID diagnosis in the third edition of the DSM (“DSM-III”). The DSM-III defined GID as “an incongruence between anatomic sex and gender identity,” and created three GID subtypes: one for adolescents and adults (“Transsexualism”), another for children (“GID of Childhood”), and a third for conditions that did not fit the diagnostic criteria of the first two: “Atypical GID.”⁵⁹ In 1987, a revised version of the DSM (“DSM-III-R”)—the version in effect at the time the ADA was being debated—retained these three diagnoses⁶⁰ and added a fourth: “GID of adolescence or adulthood, nontranssexual type.”⁶¹ In the next two versions, the DSM-IV (1994) and DSM-IV-TR (2000), the transsexualism and childhood subtypes were combined into the single overarching diagnosis of “GID in children, adolescents, and adults.”⁶²

In 2013, the American Psychiatric Association published the fifth edition of the DSM (“DSM-5”), which removed the GID diagnosis entirely and

⁵⁵ See *id.* at 569 (discussing Christine Jorgensen); Denny, *supra* note 44, at 175 (same).

⁵⁶ Denny, *supra* note 44, at 175.

⁵⁷ BENJAMIN, *supra* note 44, at 11–12.

⁵⁸ Denny, *supra* note 44, at 175–76.

⁵⁹ AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 261–66 (3d ed. 1980).

⁶⁰ AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 71–78 (3d ed. revised 1987) [hereinafter DSM-III-R]. The DSM-III-R renamed “Atypical GID” “GID Not Otherwise Specified.” *Id.* at 77–78.

⁶¹ *Id.* at 76–77.

⁶² AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 532–38 (4th ed. 1994) [hereinafter DSM-IV]. With its removal in 1994, transsexualism is no longer considered to be a diagnosable condition under the DSM.

added a new diagnosis, “Gender Dysphoria.”⁶³ According to the DSM-5, Gender Dysphoria is characterized by: (1) “a marked incongruence” between one’s gender identity and one’s assigned sex, which is often accompanied by “a strong desire to be rid of” one’s primary and secondary sex characteristics and/or to acquire primary/secondary “sex characteristics of the other gender”; and (2) intense emotional pain and suffering resulting from this incongruence.⁶⁴ Among adolescents and adults, Gender Dysphoria often begins in early childhood, around the ages of two to three years (“Early-onset gender dysphoria”), but it may also occur around puberty or even later in life (“Late-onset gender dysphoria”).⁶⁵

The international medical community’s recognition of gender dysphoria as a serious medical condition has traced a similar path. The International Classification of Diseases (“ICD”), published by the World Health Organization pursuant to a consensus of 194 member states, has classified GID as a mental health condition since 1975.⁶⁶ The eleventh revision of the ICD, expected in 2017, will rename “transsexualism”—the ICD’s GID diagnosis for adolescents and adults—“Gender Incongruence,” characterized by “a marked and persistent incongruence between an individual’s experienced gender and the assigned sex.”⁶⁷

1. From “Disorder” to “Dysphoria”

The DSM-5’s deletion of GID and its addition of Gender Dysphoria reflects a major shift in the medical community’s understanding of gender identity and impairment. Given the newness and significance of these changes, as well as the dearth of discussion in the legal literature, a brief summary of these changes is instructive.

Gender Dysphoria differs from GID in four significant ways. First, and most obviously, unlike GID, Gender Dysphoria is not a “disorder.” For well

⁶³ DSM-5, *supra* note 13, at 452.

⁶⁴ *See id.* at 452–53 (“The condition is associated with clinically significant distress or impairment in social, occupational, or other important areas of functioning.”); *id.* at 453 (stating that, in addition to marked incongruence, “[t]here must also be evidence of distress about this incongruence”).

⁶⁵ *Id.* at 455–56.

⁶⁶ Drescher et al., *supra* note 54, at 570. The ICD-9, published in 1975, classified “transsexualism” as a medical condition. *Id.* The most current edition of the ICD, the ICD-10, published in 1990, includes the classification “Gender Identity Disorders,” and uses “transsexualism” to refer specifically to the GID diagnosis for adults and adolescents. ICD-10, *supra* note 50, at F64.

⁶⁷ WORLD PROF’L ASS’N FOR TRANSGENDER HEALTH, ICD-11 CONSENSUS MEETING 5 (2013), http://www.wpath.org/uploaded_files/140/files/ICD%20Meeting%20Packet-Report-Final-sm.pdf [perma.cc/H8HL-9MGW] (reviewing the recommendations of an expert working group of the World Health Organization regarding development of ICD-11).

over thirty years, incongruence between one's identity and assigned sex was considered a "disorder" of identity, that is, something non-normative with the individual.⁶⁸ This is no longer the case. Under the DSM-5, dysphoria, rather than incongruence, is the problem in need of treatment.⁶⁹ The change from GID to Gender Dysphoria destigmatizes the diagnosis by shifting the focus of the clinical problem from identity to dysphoria.⁷⁰ Simply put, having a gender identity different from one's assigned sex is no longer a "disorder"; it is perfectly healthy.⁷¹ What is not healthy, according to the DSM-5, and what therefore requires treatment, is the dysphoria that some transgender people experience.⁷²

Second, the diagnostic criteria for Gender Dysphoria are different than the GID criteria. Whereas the GID diagnosis required a "strong and persistent cross-gender identification" and a "persistent discomfort" with one's sex or "sense of inappropriateness" in the gender role of that sex, the criteria for Gender Dysphoria are more straightforward, requiring a "marked incongruence" between gender identity and assigned sex.⁷³ Significantly, the criteria also include a "post-transition specifier for people who are liv-

⁶⁸ See AM. PSYCHIATRIC ASS'N, GENDER DYSPHORIA 2 (2013), <http://www.dsm5.org/documents/gender%20dysphoria%20fact%20sheet.pdf> [perma.cc/43HV-RSWA] [hereinafter GENDER DYSPHORIA] (noting that the change in name eliminates GID's connotation "that the patient is 'disordered'").

⁶⁹ DSM-5, *supra* note 13, at 458 ("Gender dysphoria should be distinguished from simple nonconformity to stereotypical gender role behavior . . ."); GENDER DYSPHORIA, *supra* note 68, at 1 ("It is important to note that gender nonconformity is not in itself a mental disorder. The critical element of gender dysphoria is the presence of clinically significant distress associated with the condition."); WORLD PROF. ASS'N FOR TRANSGENDER HEALTH, STANDARDS OF CARE 169 (7th ed. 2012) [hereinafter SOC] ("Thus, transsexual, transgender, and gender nonconforming individuals are not inherently disordered. Rather, the distress of gender dysphoria, when present, is the concern that might be diagnosable and for which various treatment options are available.").

⁷⁰ DSM-5, *supra* note 13, at 451; GENDER DYSPHORIA, *supra* note 68, at 2 ("Part of removing stigma is about choosing the right words. Replacing 'disorder' with 'dysphoria' in the diagnostic label is not only more appropriate and consistent with familiar clinical sexology terminology, it also removes the connotation that the patient is 'disordered.'"); see also *Kosilek v. Spencer*, 740 F.3d 733, 737 n. 2 (1st Cir.) ("DSM-5 replaces the term gender identity disorder with gender dysphoria to avoid any negative stigma."), *withdrawn*, 774 F.3d 63 (1st Cir. 2014) (en banc), *cert. denied*, 135 S. Ct. 2059 (2015).

⁷¹ See *Denny*, *supra* note 44, at 180, 182 (noting that it is healthy to "vary from often unhealthy gender stereotypes and norms," to "transition gender roles without a goal of genital surgery," "to take hormones for a while and then stop," "to be a woman with breasts and a penis or a man with a vagina, to blend genders as if from a palette").

⁷² DSM-5, *supra* note 13, at 457–58 (discussing consequences of untreated Gender Dysphoria).

⁷³ Compare DSM-IV, *supra* note 62, at 532–38 (discussing GID diagnostic criteria), with DSM-5, *supra* note 13, at 452 (discussing Gender Dysphoria diagnostic criteria), and DSM-5, *supra* note 13, at 814 (stating that DSM-5 "emphasiz[es] the phenomenon of 'gender incongruence' rather than cross-gender identification per se, as was the case in DSM-IV gender identity disorder").

ing full-time as the desired gender.”⁷⁴ According to the DSM-5, this specifier was “modeled on the concept of full or partial remission,” which acknowledges that hormone therapy and gender reassignment surgery may largely relieve the distress associated with the diagnosis, much as chemotherapy and radiation restore normal cell growth in people with cancer, and as anti-depressants restore healthy brain functioning in people with depression.⁷⁵ Significantly, this specifier expands the diagnosis to those who may not formerly have been diagnosed with GID—i.e., those *without* distress “who continue to undergo hormone therapy, related surgery, or psychotherapy or counseling to support their gender transition.”⁷⁶

Third, the DSM-5 classifies Gender Dysphoria differently than previous versions classified GID. In every version of the DSM prior to 2013, GID was a subclass of some broader classification, such as “Disorders Usually First Evident in Infancy, Childhood, or Adolescence,” alongside other subclasses, such as Developmental Disorders, Eating Disorders, and Tic Disorders.⁷⁷ For the first time ever, the DSM categorizes the diagnosis separately from all other conditions.⁷⁸ Under the DSM-5, Gender Dysphoria is now literally in a class all its own.⁷⁹

Lastly, the Gender Dysphoria diagnosis is strongly supported by recent advancements in the medical knowledge and treatment of gender identity issues. Unlike the earlier DSM’s treatment of GID and transsexualism, the DSM-5 includes a section entitled “Genetics and Physiology,” which explicitly discusses the genetic and, possibly, hormonal contributions to Gender Dysphoria.⁸⁰ These findings, together with numerous recent medical studies,⁸¹ strongly suggest that physical impairments contribute to gender incongruence and, in turn, Gender Dysphoria. In sum, Gender Dysphoria

⁷⁴ GENDER DYSPHORIA, *supra* note 68, at 1; *see also* DSM-5, *supra* note 13, at 453 (discussing Gender Dysphoria diagnostic criteria).

⁷⁵ *See* DSM-5, *supra* note 13, at 451 (“[M]any are distressed *if* the desired physical interventions by means of hormone and/or surgery are not available.” (emphasis added)); *see also id.* at 453, 814–15 (discussing addition of post-transition specifier).

⁷⁶ GENDER DYSPHORIA, *supra* note 68, at 1.

⁷⁷ *See* DSM-III-R, *supra* note 60, at 3–4 (discussing categorization of GID).

⁷⁸ *See* DSM-5, *supra* note 13, at 451 (placing Gender Dysphoria in separate, stand-alone category).

⁷⁹ *Id.*; *see also* Duffy, *supra* note 13, at 16-153 to 16-158 (providing graphic depiction of the organization of GIDs and Gender Dysphoria in the various editions of the DSM).

⁸⁰ DSM-5, *supra* note 13, at 457; *see also* Second Statement of Interest of the United States at 3–5, *Blatt*, No. 5:14-cv-4822-JFL, 2015 WL 9872493 (“[T]he burgeoning medical research underlying [gender dysphoria] points to a physical etiology.”); SOC, *supra* note 69, at 169 (discussing recent advancements in knowledge and treatment of gender dysphoria).

⁸¹ *See* Duffy, *supra* note 13, at 16-72 to 16-74 & n.282 (citing numerous medical studies conducted in past six years that “point in the direction of hormonal and genetic causes for the in utero development of gender dysphoria”).

has physical roots that the GID and transsexualism diagnoses do not expressly share.

2. A Treatable Medical Condition

If left medically untreated, Gender Dysphoria can result in depression, anxiety and, for some people, suicidality and death.⁸² Fortunately, medical treatment is available.⁸³ There is no single course of medical treatment that is appropriate for every person with Gender Dysphoria. Instead, the World Professional Association For Transgender Health, Inc. (“WPATH”) has established internationally accepted Standards of Care (“SOC”) for the treatment of people with Gender Dysphoria.⁸⁴ The SOC were originally approved in 1979 and have undergone seven revisions through 2012, reflecting the rapidly expanding body of medical research relating to gender identity.⁸⁵

As part of the SOC, many transgender individuals with Gender Dysphoria undergo a medically recommended and supervised gender transition in order to live life consistent with their gender identity.⁸⁶ The current SOC recommend an individualized approach to gender transition, consisting of a medically-appropriate combination of hormone therapy, living part- or full-time in one’s desired gender role,⁸⁷ gender reassignment surgery, and/or psychotherapy.⁸⁸ Moreover, completion of the medical transition varies among transgender individuals. For example, some may only need to live part-time or full-time in their desired gender role to complete their transition, without undergoing hormone therapy or surgery.⁸⁹ Others may decide

⁸² DSM-5, *supra* note 13, at 454–55.

⁸³ See SOC, *supra* note 69, at 5 (“Gender dysphoria can in large part be alleviated through treatment.”); see also DSM-5, *supra* note 13, at 451 (discussing physical interventions for treating Gender Dysphoria).

⁸⁴ SOC, *supra* note 69, at 1. The World Professional Association for Transgender Health (“WPATH”) was formerly known as The Harry Benjamin International Gender Dysphoria Association. *Mission and Values*, WORLD PROF. ASS’N FOR TRANSGENDER HEALTH, http://www.wpath.org/site_page.cfm?pk_association_webpage_menu=1347&pk_association_webpage=3910 [perma.cc/2XR9-PXVS].

⁸⁵ SOC, *supra* note 69, at 169, 229.

⁸⁶ *Id.* at 9–10; see also *OPM Guidance*, *supra* note 42 (discussing gender transition).

⁸⁷ Living consistent with one’s desired gender role consists of “present[ing] consistently, on a day-to-day basis and across all settings of life, in [one’s] desired gender role,” which “provides ample opportunity for patients to experience and socially adjust in their desired gender role, before undergoing irreversible surgery.” SOC, *supra* note 69, at 61.

⁸⁸ *Id.* at 9.

⁸⁹ *Id.* at 5, 8 (“[W]hile many individuals need both hormone therapy and surgery to alleviate their gender dysphoria, others need only one of these treatment options and some need neither.”); see also DSM-5, *supra* note 13, at 454 (discussing those who resolve incongruence between gender identity and assigned sex “without seeking medical treatment to alter body characteristics”).

with their health care provider that it is medically necessary for them to undergo hormone therapy and/or gender reassignment surgery as well.⁹⁰

In addition to WPATH, the American Medical Association (“AMA”), the American Psychiatric Association, and the American Psychological Association, among others, have each acknowledged the necessity of medical interventions to assist transgender individuals with Gender Dysphoria.⁹¹

B. Gender Dysphoria and the Law

Following the consensus of the medical community, federal and state courts have consistently recognized GID and, more recently, Gender Dysphoria, as serious medical conditions deserving of protection under disability antidiscrimination law, as well as other laws. Prior to the ADA’s passage in 1990, federal disability antidiscrimination law recognized GID as an impairment that may constitute a disability under the ADA’s precursor, the Rehabilitation Act of 1973.⁹² For example, in 1985, in *Doe v. U.S. Postal Service*, the U.S. District Court for the District of Columbia ruled in favor

⁹⁰ SOC, *supra* note 69, at 10; *see also* DSM-5, *supra* note 13, at 453 (recognizing “cross-sex medical procedure[s] or treatment regimen[s]—namely, regular cross-sex hormone treatment or gender reassignment surgery confirming the desired gender”).

⁹¹ AM. MED. ASS’N, REMOVING FINANCIAL BARRIERS TO CARE FOR TRANSGENDER PATIENTS 1 (2008), http://www.tgender.net/taw/ama_resolutions.pdf [perma.cc/H2FE-3PYT]. According to the AMA,

[A]n established body of medical research demonstrates the effectiveness and medical necessity of mental health care, hormone therapy and sex reassignment surgery as forms of therapeutic treatment for many people diagnosed with GID . . . Health experts in GID, including WPATH, have rejected the myth that such treatments are “cosmetic” or “experimental” and have recognized that these treatments can provide safe and effective treatment for a serious health condition.

Id.; accord *Position Statements of the American Psychiatric Association: Access to Care for Transgender and Gender Variant Individuals*, ASS’N OF LGBTQ PSYCHIATRISTS (2013), <http://www.aglp.org/pages/LGBTPositionStatements.php> [perma.cc/H7ZF-WCHP]; *Transgender, Gender Identity, and Gender Expression Non-Discrimination*, AM. PSYCHOLOGICAL ASS’N (2008), <http://www.apa.org/about/policy/transgender.aspx> [https://perma.cc/F4EH-P4UU]; *see also* AM. MED. ASS’N HOUSE OF DELEGATES, RESOLUTION 011 (A-15): MILITARY MEDICAL POLICIES AFFECTING TRANSGENDER INDIVIDUALS 1–2 (2015), <http://www.palmcenter.org/files/A-15%20Resoulution%20011.pdf> [https://perma.cc/545N-DQRA] (stating that “treatments for gender dysphoria . . . are safe, effective, and medically necessary” and “there is no medically valid reason to exclude transgender individuals from service in the US military”); LAMBDA LEGAL, PROFESSIONAL ORGANIZATION STATEMENTS SUPPORTING TRANSGENDER PEOPLE IN HEALTH CARE 1–4 (2012), http://www.lambdalegal.org/sites/default/files/publications/downloads/fs_professional-org-statements-supporting-trans-health_1.pdf [https://perma.cc/NBL9-PG92] (providing list of various organizational position statements regarding transgender people).

⁹² Rehabilitation Act Amendments of 1974, Pub. L. No. 93-516, § 111(a), 88 Stat. 1617, 1619 (current version as amended at 29 U.S.C. § 706(8) (Supp. 1988)) (defining “handicap” without transgender exclusions).

of the plaintiff, a transgender woman, who had her conditional job offer revoked after she disclosed her intent to transition.⁹³ The plaintiff brought suit under section 504 of the Rehabilitation Act.⁹⁴ The court denied the Postal Service's motion to dismiss and held that the plaintiff "alleged the necessary 'physical or mental impairment'" to state a claim for disability discrimination under the Rehabilitation Act.⁹⁵ And the following year, in *Blackwell v. Department of Treasury*, the same court reiterated this protection when a Treasury Department supervisor canceled a job vacancy immediately after interviewing the plaintiff, a transgender woman, "to avoid the inevitable administrative hassle that would occur if [the Department] declined a qualified applicant."⁹⁶ The court concluded that "transvestism" was a covered "handicap" under the Rehabilitation Act, but ultimately held against the plaintiff on other grounds.⁹⁷ When Congress wrote GID out of federal disability antidiscrimination law in 1990,⁹⁸ it therefore deprived transgender individuals of protections they once enjoyed.

Like federal disability antidiscrimination laws, state disability antidiscrimination laws historically protected people with GID. Prior to the ADA's passage, state disability antidiscrimination laws presented a diverse set of definitions for the term "disability" (or "handicap").⁹⁹ None of these laws explicitly excluded GID.¹⁰⁰ Following the ADA's passage in 1990, many states amended their statutes to more closely track the ADA, which was widely "regarded as the 'state of the art' in disability discrimination."¹⁰¹ Today, approximately forty-three states have adopted antidiscrimination laws that track the ADA definition of disability virtually verbatim.¹⁰² Notably, only ten of these states have imported the ADA's exclusions.¹⁰³ In the remaining forty states with no GID exclusion in their antidiscrimination

⁹³ No. 84-3296, 1985 WL 9446, at *2-3 (D.D.C. June 12, 1985).

⁹⁴ *Id.*

⁹⁵ *Id.* at *2.

⁹⁶ 656 F. Supp. 713, 714-15 (D.D.C. 1986), *aff'd in part, vacated in part on other grounds*, 830 F.2d 1183 (D.C. Cir. 1987).

⁹⁷ *Id.* at 715 (holding that the plaintiff was refused hire "because [the supervisor] believed he was a homosexual (a condition not protected under the Rehabilitation Act)").

⁹⁸ See *supra* note 12 and accompanying text (discussing the exclusion of GID from the ADA).

⁹⁹ See Claudia Center & Andrew J. Imparato, *Redefining "Disability" Discrimination: A Proposal to Restore Civil Rights Protections for All Workers*, 14 STAN. L. & POL'Y REV. 321, 334 (2003) (discussing state disability laws).

¹⁰⁰ See *id.* (discussing state disability laws). One state, Iowa, interpreted its disability nondiscrimination statute to exclude "transsexualism" pre-ADA. *Sommers v. Iowa Civil Rights Comm'n*, 337 N.W.2d 470, 476-77 (Iowa 1983).

¹⁰¹ Center & Imparato, *supra* note 99, at 334.

¹⁰² *Id.*

¹⁰³ See Duffy, *supra* note 13, at 16-120 to 16-121 & n.516 (listing ten states where disability antidiscrimination laws adopt the ADA's GID exclusion).

statutes, a clear majority of courts and state agencies that have addressed the issue have held that GID and Gender Dysphoria are protected disabilities.¹⁰⁴ The ADA's GID exclusion is therefore not representative of state disability antidiscrimination law. It is instead a stark anomaly.

Courts have similarly recognized GID and Gender Dysphoria as serious medical conditions deserving of protection in a variety of other contexts. For example, in the prisoner context, all seven of the U.S. Courts of Appeals that have been presented with the question have found that GID poses a "serious medical need" for purposes of the Eighth Amendment.¹⁰⁵ At least one federal court has ruled likewise in the context of civil commitment.¹⁰⁶ In 2011, the U.S. Tax Court held that GID "is a serious, psychologically debilitating condition" within the meaning of the Tax Code and that the costs of gender reassignment surgery are deductible—a decision to which the IRS subsequently acquiesced.¹⁰⁷ And on May 30, 2014, the U.S. Department of Health and Human Services' Departmental Appeals Board invalidated its 1989 determination denying Medicare coverage of gender reassignment surgery.¹⁰⁸

Furthermore, courts have consistently held that state and local laws criminalizing cross-dressing¹⁰⁹ are unconstitutional as applied to people who dressed in accord with their gender identity pursuant to their "medically and psychologically necessary" course of treatment for GID.¹¹⁰ For ex-

¹⁰⁴ *Id.* at 16-111 to 16-125.

¹⁰⁵ *See, e.g.,* O'Donnabhain v. Comm'r, 134 T.C. 34, 62 (2010) (citing cases from various U.S. circuit courts that concluded GID constituted "serious medical need").

¹⁰⁶ *See* Battista v. Clarke, 645 F.3d 449, 454-55 (1st Cir. 2011) (affirming district court's determination that civil inmate's GID posed "substantial risk of serious harm," and that State was deliberately indifferent to inmate's medical needs).

¹⁰⁷ *O'Donnabhain*, 134 T.C. at 61. In November 2011, the IRS issued an Action on Decision in which it acquiesced to the Tax Court decision. IRS Announcement Relating to: *O'Donnabhain*, 2011-47 I.R.B. 789 (IRS ACQ 2011).

¹⁰⁸ NCD 140.3, Transsexual Surgery, U.S. Dep't of Health & Human Servs. App. Div., Decision No. 2576, at 1, 9-10, 2014 WL 2558402, at *1, *7-8 (May 30, 2014), <http://www.hhs.gov/dab/decisions/dabdecisions/dab2576.pdf> [<https://perma.cc/YP8Q-NT46>] (reviewing the National Coverage Determination regarding Medicare coverage for transsexual surgery, and acknowledging that GID is a "serious medical condition").

¹⁰⁹ Many local laws *explicitly* criminalized cross-dressing; state laws had much the same effect by prohibiting "disguise." *See* WILLIAM ESKRIDGE JR. & NAN HUNTER, *SEXUALITY, GENDER AND THE LAW* 54 (3d ed. 2011) (discussing St. Louis ordinance of 1864 prohibiting one's appearance "in any public place . . . in a dress not belonging to [one's] sex," citing dozens of similar local ordinances "making it illegal to appear in the attire not of one's sex" and discussing New York statute of 1845 prohibiting one's "having his face painted, discolored, covered or concealed, or being otherwise disguised, in a manner calculated to prevent his being identified").

¹¹⁰ *See* Doe v. McConn, 489 F. Supp. 76, 79 (S.D. Tex. 1980) (holding that Houston cross-dressing ban violated substantive due process rights of transgender individuals who cross-dress in preparation for sex-reassignment surgery). Courts also struck down cross-dressing laws as uncon-

ample, in 1978, in *City of Chicago v. Wilson*, the Illinois Supreme Court rejected the City's enforcement of its cross-dressing ban against two transgender women who wore female clothing in preparation for gender reassignment surgery.¹¹¹ According to the court, the City's desire to "protect[] the public morals" did not outweigh a transgender individual's "well-being."¹¹² The court also found no evidence that "cross-dressing" causes any harm to society.¹¹³

Courts have likewise upheld gender designation changes and name changes on birth certificates in recognition of the medical treatment for GID and the "deep personal, social, and economic interest in having the official designation of [one's] gender match what, in fact, it always was or possibly has become."¹¹⁴ Indeed, today, all states except Tennessee recognize the reality of one's post-transition sex, and a growing number of states permit gender designation changes on birth certificates without requiring that the person undergo gender reassignment surgery.¹¹⁵ State legislatures and ad-

stitutionally void for vagueness. See *City of Columbus v. Rogers*, 324 N.E.2d 563, 566 (Ohio 1975) (holding that Columbus city ordinance prohibiting appearance in "dress not belonging to [one's] sex" was unconstitutionally void for vagueness). Similar vagueness challenges resulted in the invalidation of ordinances in Chicago, Cincinnati, Detroit, Fort Worth, Miami Beach, St. Louis, and other jurisdictions. See I. Bennett Capers, *Cross Dressing and the Criminal*, 20 YALE J.L. & HUMAN. 1, 10 (2008) (discussing cases from these cities invalidating cross-dressing statutes).

¹¹¹ 389 N.E.2d 522, 525 (Ill. 1978).

¹¹² *Id.*

¹¹³ *Id.* ("There is no evidence, however, that cross-dressing, when done as part of a pre-operative therapy program or otherwise, is . . . harmful to society Individuals contemplating [sex-reassignment] surgery should . . . be entitled to pursue the therapy necessary to insure the correctness of their decision.").

¹¹⁴ *In re Heilig*, 816 A.2d 68, 79 (Md. 2003); see, e.g., *id.* at 87 (vacating trial court's denial of petitioner's request to amend gender designation on birth certificate and remanding for determination of whether petitioner had provided "sufficient medical evidence" of gender change); *accord* *Darnell v. Lloyd*, 395 F. Supp. 1210, 1214 (D. Conn. 1975) (holding that transgender plaintiff stated claim that State Commissioner of Health violated Equal Protection Clause by refusing to change plaintiff's gender designation on birth certificate); *In re* Petition for Change of Birth Certificate, 22 N.E.3d 707, 710 (Ind. Ct. App. 2014) (reversing trial court's denial of petition requesting change of gender designation on birth certificate based on "ample medical evidence" of gender transition); *In re* Eck, 584 A.2d 859, 860 (N.J. Super. Ct. App. Div. 1991) (ordering trial court to grant petitioner's name-change request based on "medically and psychiatrically indicated" need for surgical sex reassignment).

¹¹⁵ See *Changing Birth Certificate Sex Designations: State-by-State Guidelines*, LAMBDA LEGAL (Feb. 3, 2015), <http://www.lambdalegal.org/publications/changing-birth-certificate-sex-designations-state-by-state-guidelines> [<https://perma.cc/5YNR-SDZT>] (providing instructions on how to change the sex designation on a birth certificate in each state); Joseph De Avila, *Changing Gender Designation: Connecticut Passes Bill That Would Allow Transgender People who Have Transitioned to Amend Birth Records*, WALL STREET J. (June 1, 2015), <http://www.wsj.com/articles/changing-gender-designation-1433206274> [<https://perma.cc/D5KJ-Z37Y>] (discussing Connecticut law modernizing birth certificate amendment process); see also Press Release, AM. MED. ASS'N, *AMA Calls for Modernizing Birth Certificate Policies* (June 9, 2014), <http://>

ministrative agencies have similarly extended protections to transgender people with GID and Gender Dysphoria by requiring coverage of gender reassignment surgery under Medicaid¹¹⁶ as well as under private insurance plans.¹¹⁷

II. TRANSGENDER PEOPLE AND THE ADA

Although the ADA is not the only federal statute that facially discriminates against transgender people, the ADA's transgender classification is important because it perpetuates the very stigma the ADA seeks to dismantle. It is also the first federal transgender classification to be challenged under the Equal Protection Clause. For these reasons, this Article discusses the classification in some detail.

The ADA excludes from coverage eleven medical conditions, including three associated with transgender people: "transvestism, transsexualism . . . [and] gender identity disorders."¹¹⁸ These exclusions have no foundation in either medicine or law. Indeed, the exclusions contradict the opinion of the international medical community and the courts.¹¹⁹ Why, then, were they excluded from the ADA? The answer is straightforward: moral animus. The ADA's legislative history plainly demonstrates how two U.S. Senators excluded all medical conditions associated with transgender people in a feverish attempt to deny ADA coverage to mental conditions deemed morally unfit.¹²⁰

The moral animus underlying the ADA's exclusion of transgender people is rooted in two earlier attempts—one successful, and one unsuccessful—to exclude transgender people from other antidiscrimination laws. Sec-

www.ama-assn.org/ama/pub/news/news/2014/2014-06-09-modernizing-birth-certificate-policies.page [https://perma.cc/NY3Y-GALP] (supporting gender-designation changes without requirement of surgery).

¹¹⁶ *Victory! Connecticut Removes Barrier for Medicaid Coverage of Transgender Health Care*, GLAD (Mar. 27, 2015), <http://www.glad.org/current/item/victory-connecticut-removes-barrier-for-medicaid-coverage-of-transgender-he> [https://perma.cc/8VC2-T6B5] (discussing Medicaid coverage for treatment of Gender Dysphoria in Connecticut, Massachusetts, California, New York, Oregon, Vermont, and Washington, D.C.).

¹¹⁷ Parker Marie Malloy, *Connecticut Becomes Fifth State to Require Transgender Medical Coverage*, THE ADVOCATE (Dec. 31, 2013), <http://www.advocate.com/politics/transgender/2013/12/31/connecticut-becomes-fifth-state-require-transgender-medical-coverage> [https://perma.cc/L9VY-KBMD] (stating that Connecticut, California, Colorado, Oregon, and Vermont "require health insurance providers to cover treatments related to gender transition").

¹¹⁸ 42 U.S.C. § 12211(b)(1) (2012).

¹¹⁹ See *supra* notes 42–117 and accompanying text (discussing the medical community's and courts' recognition of conditions associated with transgender people).

¹²⁰ See *infra* notes 138–202 and accompanying text (discussing congressional debate of transgender exclusions).

tion A of this Part discusses the legislative history behind these earlier attempts.¹²¹ Section B then turns to the legislative history behind the ADA's transgender exclusion.¹²²

A. *The Civil Rights Restoration Act of 1987 and the Fair Housing Amendments Act of 1988*

The first attempt at excluding transgender people from antidiscrimination laws came in May of 1988, during floor debate in the Senate over whether to override President Ronald Reagan's veto of the Civil Rights Restoration Act.¹²³ Senator Jesse Helms of North Carolina argued unsuccessfully against an override on grounds that the Act would extend protection to "transvestites" under the Rehabilitation Act.¹²⁴ His justification for excluding "transvestites" was overtly moral. "[H]andicaps," he argued, "are diseases which have no conceivable moral content and yet have been associated in the past with irrational fears—such as epilepsy—or else physical impairments Transvestism and other compulsions or addi[c]tions," by contrast, were considered by some to be "moral problems, not mental handicaps."¹²⁵ Therefore, by extending protection to "transvestites," Congress wrongly "open[s] for the courts the opportunity to eliminate the entire concept of a moral qualification for any job, position, or privilege . . . by referring to the strong trend in psychiatry to classify almost all compulsive or

¹²¹ See *infra* notes 123–137 and accompanying text.

¹²² See *infra* notes 138–202 and accompanying text.

¹²³ The purpose of the Civil Rights Restoration Act of 1987 was to overturn the Supreme Court's 1984 decision in *Grove City College v. Bell*, which limited the application of Title IX and other federal antidiscrimination laws. 465 U.S. 555, 573–74 (1984).

¹²⁴ 134 CONG. REC. 4236 (1988) (statement of Sen. Helms), available at 1988 WL 1084657. According to the DSM, "Transvestism" (renamed "Transvestic Fetishism" under the DSM-III-R (1987) and, under the DSM-5, now called "Transvestic Disorder") is highly specific—it refers to sexual arousal from cross-dressing that results in significant distress or impairment. See DSM-5, *supra* note 13, at 458 (defining "Transvestic Disorder"). Although Senator Helms undoubtedly had the concept of "sexual arousal from cross-dressing" in mind when he referred to "transvestites" during debate on the Civil Rights Restoration Act, it is reasonable to assume that he also had in mind a broader swath of the transgender community—namely, males who cross-dress (without sexual arousal) and people who have undergone gender transition. See Ray Blanchard, *The DSM Diagnostic Criteria for Transvestic Fetishism*, 39 ARCHIVES SEXUAL BEHAV. 363, 365 (2009) (stating that "the term *transvestism* . . . was then, as now, sometimes used to denote cross-dressing homosexual men ('drag queens'), and . . . ha[s] historically also been used to denote transsexuals").

¹²⁵ 134 CONG. REC. 4236 (statement of Sen. Helms), available at 1988 WL 1084657.

destructive behavior patterns as discrete and medically treatable diseases.”¹²⁶ Senator Helms asked rhetorically,

Do we really want private institutions, particularly schools and day care centers to be prohibited from refusing to hire a transvestite because some Federal court may find that this violates the transvestite’s civil rights to wear a dress and to wear foam, that sort of thing? Do we really want to prohibit these private institutions from making employment decisions based on moral qualifications?¹²⁷

In support of his argument, Senator Helms cited the 1985 case of *Doe v. U.S. Postal Service* and the 1986 case of *Blackwell v. U.S. Department of Treasury*, in which federal district courts held—wrongly, in his opinion—that transsexualism and transvestism, respectively, were covered “handicaps” under the Rehabilitation Act.¹²⁸ Senator Ted Kennedy of Massachusetts dismissed Senator Helms’s argument as the fear-mongering of the “moral majority,” which aimed to defeat passage of the Restoration Act by claiming that it would extend civil rights protections to gays and lesbians.¹²⁹ Senator Helms’s moral arguments failed, and Congress voted 73–24 to override the President’s veto.¹³⁰

The second attempt at transgender exclusion came approximately five months later, on August 1, 1988, when the Senate considered amendments

¹²⁶ *Id.* (“[T]his bill opens the way for private institutions all over the country to find themselves forced to justify exclusion of various behaviorally handicapped persons from benefits by evidence from medical doctors and other experts, but not from morals or theology.”).

¹²⁷ *Id.*

¹²⁸ *Blackwell v. Dep’t of Treasury*, 656 F. Supp. 713, 714–15 (D.D.C. 1986), *aff’d in part, vacated in part on other grounds*, 830 F.2d 1183 (D.C. Cir. 1987); *Doe v. U.S. Postal Serv.*, No. 84-3296, 1985 WL 9446, at *2–3 (D.D.C. June 12, 1985); *see also supra* notes 93–97 and accompanying text (discussing *Doe* and *Blackwell*). Senator Helms was not alone in his moral opposition to “transvestites.” Senator Steve Symms of Idaho called civil rights protection of transvestites “rediculous [sic]” and an abdication of Congress’s “moral authority to legislate rules for the rest of society.” 134 CONG. REC. 4248 (1988), *available at* 1988 WL 1084659 (quoting Editorial, *Above the Law*, WALL STREET J., Feb. 8, 1988, at 24).

¹²⁹ *See* Ruth Colker, *Homophobia, AIDS Hysteria, and the Americans with Disabilities Act*, 8 J. GENDER RACE & JUST. 33, 38 (2004) (discussing legislative history). The Moral Majority, a conservative lobbying firm led by Jerry Falwell and Jerry Nims, warned that the Restoration Act would “protect active homosexuals, transvestites, alcoholics and drug addicts, among others, under the government’s antidiscrimination laws. These sins will be considered to be diseases or handicaps” under “this perverted law.” 134 CONG. REC. 4602 (1988), *available at* 1988 WL 1084953.

¹³⁰ *See* Colker, *supra* note 129, at 38 (discussing the Civil Rights Restoration Act’s legislative history).

to the Fair Housing Act.¹³¹ Senator Helms again argued against civil rights protection for transgender people. Citing *Blackwell*, Senator Helms proposed an amendment excluding transvestism from the definition of “handicap” under the Fair Housing Act.¹³² “My amendment is an attempt to put a little common sense back into the equation,” he explained.¹³³ “[I]t should be clear to the courts that Congress does not intend for transvestites to receive the benefits and protections that is [sic] provided for handicapped individuals.”¹³⁴ This time, Senator Helms succeeded, with the Senate voting 89–2 in favor of the amendment, making the Fair Housing Act the first antidiscrimination law to explicitly exclude transgender people.¹³⁵ The concern of Senator Alan Cranston, one of two senators to oppose Senator Helm’s amendment,¹³⁶ proved prescient: “If we remove protections from one form of disability, who will be next?”¹³⁷

Congress did not have to wait long to find out. The Pandora’s box of moral animus, once opened, would not be easily sealed, as the ADA’s legislative history demonstrates.

B. The Americans with Disabilities Act of 1990

On May 9, 1989, Senators Tom Harkin of Iowa and Ted Kennedy, along with thirty-two co-sponsors, introduced the Americans with Disabili-

¹³¹ See 134 CONG. REC. 19,711–51 (1988) (on file with authors) (discussing the Fair Housing Amendments Act in the Senate).

¹³² *Id.* at 19,727 (statement of Sen. Helms).

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.* at 19,728.

¹³⁶ *Id.* (statement of Sen. Cranston). Senator Lowell Weicker of Connecticut also voted against Senator Helms’s Fair Housing Act amendment. *Id.* Senator William Armstrong of Colorado was among those who voted for the amendment.

¹³⁷ *Id.* Senator Cranston voiced his staunch opposition to the amendment:

[T]he Senator from North Carolina has singled out for exclusion a disability that is considered by the American Psychiatric Association to be a mental disorder. Despite our efforts over the years to eliminate the stigma of mental illnesses, persons with mental illness are still frequently the subject of discrimination because some individuals have irrational fears about them and are made uncomfortable by them. This amendment would single out one category of individuals who are already being discriminated against and say to them, “Sorry you now have no protections. Congress has decided that it no longer cares whether or not you are cast out of our society.” . . . This amendment could open the door to any number of attempts to exclude other disabilities from this and other antidiscrimination laws . . . [T]he whole purpose of the Fair Housing Act and other antidiscrimination laws is to provide across-the-board evenhanded protection, not to pick and choose disabilities we approve of and exclude the ones we don’t.

ties Act.¹³⁸ Over the next several months, Congress held numerous hearings to consider the ADA.¹³⁹ Significantly, no attempt was made to exclude particular impairments, mental or physical, from the ADA's definition of disability. Instead, Congress deliberately went in the opposite direction, borrowing the definition of disability used in the Rehabilitation Act of 1973, which included *all* impairments—past, present, and perceived—so long as they “substantially limited” a “major life activity.”¹⁴⁰ But this comprehensive definition soon met opposition in both the House and Senate.

1. Transgender Exclusions and the Senate

Support for an inclusive definition of disability abruptly changed during the Senate floor debate on the ADA on September 7, 1989, driven in large part by the moral animus of two senators.¹⁴¹ Late in the day, Senator William Armstrong of Colorado came to the floor and expressed his concerns with the ADA's definition of disability—specifically, its coverage of certain mental impairments that “might have a moral content to them or which in the opinion of some people have a moral content.”¹⁴² According to Senator Armstrong, although “the ideals of our country certainly call upon the Senate to do whatever it can to be helpful to people in wheelchairs or who have some kind of a physical disability or handicap of some sort and who are trying to overcome it,” the ADA wrongly extended coverage to “some things which by any ordinary definition we would not expect to be

¹³⁸ See NAT'L COUNCIL ON DISABILITY, EQUALITY OF OPPORTUNITY: THE MAKING OF THE AMERICANS WITH DISABILITIES ACT 86 (2010), http://www.ncd.gov/publications/1997/equality_of_opportunity_The_Making_of_the_Americans_with_Disabilities_Act [<https://perma.cc/QC6V-SCLR>] [hereinafter NCD, EQUALITY OF OPPORTUNITY] (discussing legislative history).

¹³⁹ *Id.* (discussing hearings before the Senate Committee on Labor and Human Resources' Subcommittee on the Handicapped, on May 9, 10, and 16, and June 22, 1989).

¹⁴⁰ Rehabilitation Act Amendments of 1974, Pub. L. No. 93-516, § 111(a), 88 Stat. 1617, 1619 (current version as amended at 29 U.S.C. § 706(8) (Supp. 1988)) (defining “handicap” without transgender exclusions). According to the Senate Committee on Labor and Human Resources report,

It is not possible to include in the legislation a list of all the specific conditions, diseases, or infections that would constitute physical or mental impairments because of the difficulty of ensuring the comprehensiveness of such a list, particularly in light of the fact that new disorders may develop in the future.

S. REP. NO. 101-116, at 20 (1989) (on file with authors) (discussing the definition of the term “disability” in the ADA).

¹⁴¹ See 135 CONG. REC. 19,885 (statement of Sen. Hatch), available at 1989 WL 183216 (noting that ADA's “sweeping” inclusion of all mental impairments was “ignored” until Senator Armstrong raised this issue during floor debate).

¹⁴² *Id.* at 19,853 (statement of Sen. Armstrong), available at 1989 WL 183115.

included.”¹⁴³ Noting that the ADA’s coverage of mental impairments was “appealing to the heart” but ought to “give our heads some concern,” Senator Armstrong added that he planned to introduce an amendment “that will take voyeurism and some other [mental impairments listed in the DSM-III-R] out.”¹⁴⁴

Echoing Senator Armstrong’s moral concerns, Senator Helms protested that the ADA “den[ie]d the small businessman . . . the right to run his company as he sees fit.”¹⁴⁵ Specifically, the ADA deprived the employer of the right to make judgments about employees based on the employer’s “own moral standards,” with a particular emphasis on homosexuality and HIV status.¹⁴⁶ Senator Helms elaborated:

If this were a bill involving people in a wheelchair or those who have been injured in the war, that is one thing. But how in the world did you get to the place that you did not even [ex]clude transvestites? How did you get into this business of classifying people who are HIV positive, most of whom are drug addicts or homosexuals or bisexuals, as disabled? . . . What I get out of all of this is here comes the U.S. Government telling the employer that he cannot set up any moral standards for his business by asking someone if he is HIV positive, even though 85 percent of

¹⁴³ *Id.* at 19,852–53 (statement of Sen. Armstrong). Specifically, the ADA’s definition of disability covered a range of “[m]ental disorders,” including “homosexuality and bisexuality,” “exhibitionism, pedophilia, voyeurism,” “compulsive kleptomania, or other impulse control disorders,” “conduct disorder,” and “any other disruptive behavior disorder.” *Id.* at 19,853.

¹⁴⁴ *Id.* at 19,871, available at 1989 WL 183216. Senator Warren Rudman of New Hampshire likewise objected to the breadth of the ADA’s definition of disability, particularly its coverage of alcoholism, drug addiction, compulsive gambling, pedophilia, kleptomania, and other “socially unacceptable, often illegal, behavior.” *Id.* at 19,896 (statement of Sen. Rudman). Senator Rudman further stated,

A diagnosis of certain types of mental illness is frequently made on the basis of a pattern of socially unacceptable behavior and lacks any physiological basis. In short, we are talking about behavior that is immoral, improper, or illegal and which individuals are engaging in of their own volition, admittedly for reasons we do not fully understand [P]eople must bear some responsibility for the consequences of their own actions.

Id.

¹⁴⁵ *Id.* at 19,864 (statement of Sen. Helms).

¹⁴⁶ *Id.* Helms argued that:

[Employers should have the right to] sit down and say, son, I want to talk to you about several things that are important to me as the owner of this [business]. Are you HIV positive? Are you this or that? Because your condition and beliefs are important to me in the operation of my [business].

Id. at 19,867.

those people are engaged in activities that most Americans find abhorrent. That is one of the problems I find with this bill [H]e cannot say, look I feel very strongly about people who engage in sexually deviant behavior or unlawful sexual practices.¹⁴⁷

Senator Helms pressed the sponsors on the ADA's coverage of five groups of individuals: (1) "homosexuals"; (2) "people who are HIV positive or have active AIDS disease"; (3) those with "a history of psychosis, neurosis, or mental or psychological difficulties or disorder[s]," including pedophilia, schizophrenia, kleptomania, manic depression, intellectual disabilities, and psychotic disorders; (4) "transvestites"; and (5) illegal drug users.¹⁴⁸

On the other side, two Senators argued against Senators Armstrong and Helms in support of the ADA's broader coverage, but remained silent on the issue of transgender inclusion. Responding to Senator Helms's concerns about coverage of homosexuality under the ADA, Senator Harkin clarified that homosexuals were "absolutely not" covered by the ADA because "behavior characteristics . . . [such as] homosexuality and bisexuality are not disabilities under any medical standards."¹⁴⁹ Rejecting Senator Helms's objection that coverage of HIV/AIDS was a backdoor way of covering homosexuals,¹⁵⁰ Senators Harkin and Kennedy strongly defended the ADA's coverage of people with HIV/AIDS.¹⁵¹ Citing the letters of over 250 organizations and advocacy groups supporting the ADA's coverage of people with HIV/AIDS, Senator Kennedy stated that such coverage was "completely consistent with public health policy" and warned that, if Congress "fail[ed]" to provide this protection, we will continue to drive this epidemic underground.¹⁵² As a result, no amendment was offered to exclude HIV/AIDS during the Senate floor debate.¹⁵³

In response to Senator Helms's opposition to the inclusion of those with a "history of psychosis, neurosis, or mental or psychological difficulties or disorder[s]," Senator Harkin argued passionately for coverage, ex-

¹⁴⁷ *Id.* at 19,870.

¹⁴⁸ *Id.* at 19,866

¹⁴⁹ *Id.* at 19,885 (statement of Sen. Harkin).

¹⁵⁰ *Id.* at 19,865 (statement of Sen. Helms) (expressing concern that ADA was "going up one side of the street and down the other on its definitions" by protecting HIV-positive people in the United States, "85 percent of [whom] are drug users and/or homosexuals").

¹⁵¹ *Id.* (statement of Sen. Harkin) ("It is people who have AIDS and HIV infection who are covered on the basis of those disabilities.").

¹⁵² *Id.* at 19,867 (statement of Sen. Kennedy).

¹⁵³ See Colker, *supra* note 129, at 36 (noting that the legislative history of the ADA reflects "a sincere and widespread desire" to help HIV-positive individuals, "even when that protection threatened to derail passage of the ADA").

plaining that “being handicapped” includes not only physical disabilities but mental disabilities as well.¹⁵⁴ Senator Harkin argued that the purpose of the ADA is to dismantle the fear and prejudice surrounding both physical and mental disability.¹⁵⁵ Across the aisle, Republican Senator Pete Domenici of New Mexico likewise defended the ADA’s inclusion of various mental impairments, stating that “the time has arrived in the United States when people who have mental illnesses . . . [should] not be automatically discriminated against for employment in this country.”¹⁵⁶

In contrast to the vigorous support of ADA coverage for people with HIV/AIDS, bipolar disorder (“manic depression”), schizophrenia, and related mental disorders, there was literally no support for coverage of medical conditions associated with transgender people. Indeed, in response to Senator Helms’s objection to the ADA’s coverage of “transvestites,” Senator Harkin immediately accepted Senator Helms’s Amendment 717 excluding “transvestites,” citing Senator Helms’s identical amendment excluding transvestites from the Fair Housing Act the previous year.¹⁵⁷

Late in the day, Senator Armstrong distributed his proposed amendment—a “long list of various kinds of conduct . . . extracted from the DSM III[-R]”—to Senators Harkin, Kennedy, Bob Dole of Kansas, and Orrin Hatch of Utah.¹⁵⁸ Although disability rights advocates recommended putting the proposed amendment to an up-or-down vote, which they predicted

¹⁵⁴ 135 CONG. REC. 19,866 (statement of Sen. Harkin), available at 1989 WL 183216. “Some people only think of people who are physically disabled as being handicapped,” Harkin stated. “People can be mentally handicapped as well.” *Id.*

¹⁵⁵ *Id.* According to Senator Harkin:

There is a wellspring of fears and unfounded prejudices about people with disabilities, unfounded fears, whether people have mental disorders, whether they are manic depressives or schizophrenia or paranoia, or unfounded fears and prejudices based upon physical disabilities. The point of the [ADA] is to start breaking down those barriers of fear and prejudice and unfounded fears, to get past that point so that people begin to look at people based on their abilities, not first looking at their disability.

Id.

¹⁵⁶ *Id.* at 19,878.

¹⁵⁷ *Id.* at 19,864; see *supra* notes 131–137 and accompanying text (discussing Fair Housing Act amendment). Amendment 717 stated that: “For the purposes of this Act, the term ‘disabled’ or ‘disability’ shall not apply to an individual solely because that individual is a transvestite.” 135 CONG. REC. 19,883 (1989), available at 1989 WL 183216. Senator Harkin also reluctantly agreed to Senator Helms’s conforming amendment excluding those currently using illegal drugs from the Rehabilitation Act; an identical amendment excluded illegal drug use from the ADA. *Id.* (discussing Amendments 715 and 718).

¹⁵⁸ 135 CONG. REC. 19,871 (1989) (statement of Sen. Kennedy) (lamenting that they received Senator Helms’s amendment “late [in the] afternoon” and that they were “trying to determine the best approach for proceeding”).

would fail, the bill's sponsors' staff insisted on negotiating the amendment with Senator Armstrong.¹⁵⁹ Staff further insisted that "homosexuality and bisexuality" be in the negotiated list of exclusions.¹⁶⁰ Disability rights advocates reduced the list to approximately five conditions, which included homosexuality, bisexuality, and kleptomania but not any of the transgender exclusions.¹⁶¹ Dissatisfied with the meager list of exclusions, Senator Hatch entered the Senate antechamber and personally told disability rights advocates that he "needed some more."¹⁶² Advocates reluctantly obliged, selecting the three conditions associated with transgender people and six other conditions for exclusion from the ADA.¹⁶³ Senator Armstrong introduced the negotiated list of fourteen exclusions as Amendment 722, which read:

Under this act the term "disability" does not include "homosexuality," "bisexuality," "transvestism," "pedophilia," "transsexualism," "exhibitionism," "voyeurism," "compulsive gambling," "kleptomania," or "pyromania," "gender identity disorders," current "psychoactive substance use disorders," current "psychoactive substance-induced organic mental disorders," as defined by DSM-III-R which are not the result of medical treatment, or other "sexual behavior disorders."¹⁶⁴

The transgender exclusions contained in Senator Armstrong's amendment betray a stunning lack of congressional deliberation. Under the DSM in effect at the time of the Senate floor debate, "transsexualism" was a subtype of GID, making its exclusion superfluous in light of the GID exclusion.¹⁶⁵ Likewise, the diagnosis of "transvestism" no longer existed in the

¹⁵⁹ See Kevin M. Barry, *Disabilityqueer: Federal Disability Rights Protection for Transgender People*, 16 YALE HUM. RTS. & DEV. L.J. 1, 23–24 (2013) (detailing the off-the-record exchange regarding the proposed amendment).

¹⁶⁰ *Id.* at 24.

¹⁶¹ *Id.*

¹⁶² *Id.*; see also NCD, EQUALITY OF OPPORTUNITY, *supra* note 138, at 99 (stating that Senators Kennedy and Harkin "worked with Armstrong and Hatch for hours, in consultation with the disability community, to prepare a list" of excluded impairments, and "Senator Hatch typed the amendment himself").

¹⁶³ The final list hued closely to the floor debate; all impairments except GID and pyromania were explicitly mentioned by Senator Armstrong either on the Senate floor or in his statement published one week later. See 135 CONG. REC. 20,571–74 (1989) (statement of Sen. Armstrong), available at 1989 WL 183785.

¹⁶⁴ 135 CONG. REC. 19,831 (1989) (discussing Amendment 722), available at 1989 WL 183216. The House's version of the ADA removed the exclusion of "current psychoactive substance-induced organic mental disorders." See *infra* note 189 and accompanying text (discussing House's modified list of exclusions).

¹⁶⁵ See DSM-III-R, *supra* note 60, at 71–78 (classifying transsexualism as a subtype of GID).

DSM; it had been replaced nine years earlier by “transvestic fetishism.”¹⁶⁶ Furthermore, the amendment’s exclusion of “transvestism” was entirely redundant, as Senator Helms had already suggested an amendment to the ADA excluding “transvestites,” and Senator Harkin had agreed to it.¹⁶⁷ In spite of this, Amendment 722 was accepted, and the Senate passed the ADA, as amended, by a vote of 76–8.¹⁶⁸

On September 14, 1989, seven days after the ADA’s passage in the Senate but prior to its passage in the House of Representatives, Senator Armstrong cited excessive litigation as another reason for his opposition to the ADA’s coverage of a variety of mental impairments, including those impairments associated with transgender people.¹⁶⁹ In a statement submitted into the congressional record, entitled “ADA, Mental Impairments, and the Private Sector,” Senator Armstrong warned that the private sector would be “swamped” by a flood of “egregious” mental disability litigation if the ADA’s broad definition of disability were to become law.¹⁷⁰

For each condition, Senator Armstrong summarized one or more cases in which courts found such conditions to be disabilities under the Rehabilitation Act of 1973.¹⁷¹ Significantly, his summaries contain no analysis of why lawsuits brought by plaintiffs with these conditions were necessarily “egregious.”¹⁷² Indeed, in all but two of the fifteen cited cases, the employers ultimately won because the plaintiffs were found to be unqualified for the job or a direct threat to themselves and others.¹⁷³ This hardly seems like an “egregious” result for employers. Furthermore, the facts of many of the cases were plainly sympathetic. For example, Senator Armstrong cited *Doe*, in which the plaintiff’s conditional job offer was revoked after she disclosed her intent to transition to the other sex.¹⁷⁴ Describing the case as a “sad”

¹⁶⁶ See Duffy, *supra* note 13, at 16-155 to 16-156 (discussing the DSM’s treatment of “transvestism”).

¹⁶⁷ See *supra* note 157 and accompanying text (discussing Senator Helms’s Amendment 717 to remove “transvestites”).

¹⁶⁸ 135 CONG. REC. 19,903 (1989), available at 1989 WL 183216.

¹⁶⁹ 135 CONG. REC. 20,574 (1989) (statement of Sen. Armstrong), available at 1989 WL 183785.

¹⁷⁰ *Id.* “Private employers,” he stated, “prepare yourselves for lawsuits based on the following types of mental conditions! . . . [C]ompulsive gambling . . . acrophobia (fear of heights) . . . depressive neurosis . . . paranoid schizophrenia . . . manic depression . . . borderline personality disorder . . . schizoid personality disorder . . . sexuality disorders: transvestism and transsexualism . . . stress disorders . . . [and] miscellaneous mental disorders . . .” *Id.* at 20,572.

¹⁷¹ *Id.* at 20,572–74.

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Doe*, 1985 WL 9446, at *1; see also *supra* notes 93–95 and accompanying text (discussing *Doe*).

one, the court denied the employer's motion to dismiss and held that the plaintiff stated a claim for "disability" discrimination.¹⁷⁵

Likewise, Senator Armstrong cited *Blackwell*, in which an employer canceled a job vacancy just hours after interviewing the plaintiff, a transgender woman.¹⁷⁶ Notwithstanding the plaintiff's priority hiring credentials¹⁷⁷ and the interviewer's recommendation that the plaintiff be hired, the employer removed the posting to evade "the administrative hassle" with rejecting a qualified applicant.¹⁷⁸ Characterizing the employer's actions as "highly reprehensible," the court nevertheless held that, while "transvestism" was a covered disability under the Rehabilitation Act, the plaintiff was not entitled to relief because she was not able to prove that she was refused hire on that basis.¹⁷⁹

The facts from other cases cited by Armstrong are far from "egregious," and indeed seem tragic, involving precisely the qualified individuals that the ADA was intended to protect. They include the termination of a staff psychologist with depressive-neurosis because she had threatened to commit suicide, even though she had received "outstanding" job reviews;¹⁸⁰ the denial of admission to a medical school candidate with bipolar disorder because of self-destructive behavior, even though she had not experienced symptoms in several years as she obtained a master's degree at Harvard;¹⁸¹ and the termination of a twenty-two-year veteran of the FBI with a gambling addiction who had gambled away \$2000 in government funds, even though he immediately sought treatment for his addiction and no longer gambled, and the FBI director recommended against his termination.¹⁸²

Senator Armstrong also offered no support for his argument that coverage of various mental impairments would necessarily lead to a deluge of claims.¹⁸³ The cases cited by Armstrong indicate no flood of litigation under

¹⁷⁵ *Doe*, 1985 WL 9446, at *1, *3.

¹⁷⁶ *Blackwell*, 656 F. Supp. at 714; see also *supra* notes 96–97 and accompanying text (discussing *Blackwell*).

¹⁷⁷ See *Blackwell*, 656 F. Supp. at 714 (noting that the plaintiff had worked for nearly ten years in other branches of the Treasury Department, and had been laid off due to a reduction in force).

¹⁷⁸ *Id.* at 715 ("[The supervisor] knew [the] plaintiff could do the job and had no sound basis for even refusing to accept him for the job.").

¹⁷⁹ *Id.* The court stated that the plaintiff was instead refused hire because the supervisor believed he was a homosexual, which is not protected under the Rehabilitation Act. *Id.*

¹⁸⁰ *Doe v. Region 13 Mental Health-Mental Retardation Comm'n*, 705 F.2d 1402, 1404–05, 1409 (5th Cir. 1983).

¹⁸¹ *Doe v. N.Y. Univ.*, 666 F.2d 761, 772, 777 (2d Cir. 1981).

¹⁸² *Rezza v. U.S. Dep't of Justice*, No. 87-6732, 1988 WL 48541, at *1 (E.D. Pa. May 16, 1988).

¹⁸³ See *supra* note 170 and accompanying text (stating that mental impairment litigation under ADA would "swamp" private sector).

the Rehabilitation Act with respect to such impairments and, even if they did, Congress has never seen the potential for lawsuits “as reason to restrict classes of antidiscrimination coverage.”¹⁸⁴ Furthermore, if litigation were Senator Armstrong’s true concern, statistics suggest that he should have targeted orthopedic impairments, not (or not only) mental ones.¹⁸⁵

In sum, Senator Armstrong’s flood-of-“egregious”-mental-disability-litigation argument is without merit because the cases he cites were neither egregious nor indicative of a flood of litigation.¹⁸⁶ Instead, this argument against coverage for various mental impairments reduces to pure moral opposition; the fact that a transgender person—or a person with a gambling addiction or any number of other mental impairments—would dare to assert his or her rights under the Rehabilitation Act was “egregious” in and of itself.¹⁸⁷

2. Transgender Exclusions in the House of Representatives

When the ADA moved to the House of Representatives for debate, coverage of HIV/AIDS was once again in controversy and, once again, prevailed.¹⁸⁸ Nevertheless, the ADA’s transgender exclusions once again met

¹⁸⁴ *Sutton v. United Airlines*, 527 U.S. 471, 511 (1999) (Stevens, J., dissenting).

¹⁸⁵ See OFFICE OF RESEARCH, INFO., & PLANNING, U.S. EQUAL EMP. OPPORTUNITY COMM’N, ADA CHARGE DATA BY IMPAIRMENT/BASES—RECEIPTS FY 1997–FY 2015, <http://eeoc.gov/eeoc/statistics/enforcement/ada-receipts.cfm> [<https://perma.cc/GW52-ZK4V>] (providing data of charges based on various impairments between 1997 and 2015).

¹⁸⁶ 135 CONG. REC. 20,574 (1989) (statement of Sen. Armstrong), available at 1989 WL 183785.

¹⁸⁷ It did not matter to Senator Armstrong that such a person might not ultimately prevail in his or her discrimination claim because the impairment did not “substantially limit” a “major life activity,” the person was not qualified to perform the job, the person was a direct threat to safety, or the person was not discriminated against based on the disability. 42 U.S.C. §§ 12102, 12111(3), 12111(8), 12112(a) (2012); see also 135 CONG. REC. 19,885 (1989) (statement of Sen. Harkin), available at 1989 WL 183216 (“[I]ndividuals with many of the other behavior characteristics included on this list [of exclusions], which would have been considered disabilities under this act, in many situations, such individuals would not have been qualified for various employment positions, for example. Therefore, this amendment was particularly unnecessary.”). What mattered to Senator Armstrong was that such a person would have a discrimination claim at all. Better, then, to exclude from the outset those impairments “which by any ordinary definition we would not expect to be included”—those with “a moral content to them.” 135 CONG. REC. 19,852–53 (1989) (statement of Sen. Armstrong), available at 1989 WL 183115.

¹⁸⁸ Colker, *supra* note 129, at 46. Fears arose that the ADA “would bankrupt the restaurant industry by forcing employers to hire individuals who are HIV-positive, which would cause the public to perceive that their food was unsafe.” *Id.* In response, Representative Jim Chapman of Texas offered an amendment allowing a food service employer to deny employment to people with HIV/AIDS and other significant infectious diseases. *Id.* (citing 136 CONG. REC. H17296 (daily ed. July 12, 1990)). Many legislators opposed the amendment, arguing that it contradicted the ADA’s purpose by permitting irrational discrimination. NCD, EQUALITY OF OPPORTUNITY, *supra* note 138, at 131. Representative Ted Weiss argued that it “[f]ew in the face of the very

no opposition at all. The House modified the list of excluded mental impairments to read:

(a) Homosexuality and bisexuality

For purposes of the definition of “disability” in section 12102(2) of this title, homosexuality and bisexuality are not impairments and as such are not disabilities under this chapter.

(b) Certain conditions

Under this chapter, the term “disability” shall not include—

- (1) transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders;
- (2) compulsive gambling, kleptomania, or pyromania; or
- (3) psychoactive substance use disorders resulting from current illegal use of drugs.¹⁸⁹

While modest, the House’s modifications underscore the moral animus that fueled the ADA’s transgender exclusions. First, the House subdivided the list into two separate subsections, “Homosexuality and Bisexuality” and “Certain Conditions.”¹⁹⁰ Under the former, the House clarified that homosexuality and bisexuality were excluded from the ADA because they “are not impairments and as such are not disabilities.”¹⁹¹ Under the latter, the House listed eleven impairments drawn from the DSM-III-R, including the three impairments associated with transgender people.¹⁹² In so doing, the House made abundantly clear that transvestism, GID, and transsexualism were excluded, not because they were not medical conditions, but rather

purpose of the ADA by institutionalizing irrational discrimination,” and Representative Hamilton Fish argued that Congress “should not make exceptions to the principle in ADA that employment decisions should not be based on myth or stereotype . . . Congress must not enshrine ignorance and prejudice in the law.” *Id.* (citation omitted). The amendment narrowly passed the House but was replaced at conference with a far more moderate version, which allows an employer to deny employment to a person with an infectious or communicable disease only if the disease is one that is “transmitted to others through the handling of food” as determined by the Secretary of Health and Human Services. 42 U.S.C. § 12113 (2012); *see* Colker, *supra* note 129, at 48 (discussing the passage of the amendment in the Senate and at conference).

¹⁸⁹ 42 U.S.C. § 12211(a)–(b). The House’s version of the ADA removed the exclusion of “current psychoactive substance-induced organic mental disorders,” bringing the ADA’s total list of exclusions to thirteen. *Compare id.*, with *supra* note 164 and accompanying text (discussing Senator Armstrong’s amendment).

¹⁹⁰ 42 U.S.C. § 12211(a)–(b).

¹⁹¹ *Id.* § 12211(a).

¹⁹² *Id.* § 12211(b).

because the people who had these conditions (transgender people) were deemed so depraved as to be unworthy of civil rights protection.¹⁹³

Second, the House version further clarified Congress's belief that GID and transsexualism were "sexual behavior disorders."¹⁹⁴ But Congress was wrong. GID and transsexualism were never sexual behavior disorders; their exclusion was based on a mischaracterization of the medical literature, namely, the erroneous conflation of sexual behavior disorders with gender identity disorders. Since its inception in 1952 and continuing through to the present, the DSM has included a classification for sexual disorders, now referred to as "Paraphilic Disorders."¹⁹⁵ According to the DSM-5, Paraphilic Disorders refer to "any intense and persistent sexual interest"—other than sexual interest in "copulation or equivalent interaction" with "a physically mature, consenting human partner"—which either causes distress or "entail[s] personal harm or risk of harm, to others."¹⁹⁶ While the placement of GID and transsexualism in the DSM changed over time,¹⁹⁷ these conditions were never classified as disorders of sexual behavior. Rather, they were always grouped separately from the Paraphilic Disorders.¹⁹⁸ In fact, the DSM-III-R, the version in effect at the time of the ADA's passage, viewed GID as a disorder "usually first evident in infancy, childhood, or adolescence," alongside eating disorders and developmental disorders—"a classification hardly suggestive of a sexual behavior disorder."¹⁹⁹

¹⁹³ *Id.* § 12211(a)–(b); *see also supra* notes 141–187 and accompanying text (discussing evidence of moral animus in Senate floor debate).

¹⁹⁴ 42 U.S.C. § 12211(b)(1) (characterizing transgender exclusions as "sexual behavior disorders"); *see* H.R. REP. NO. 101-485(IV), at 80–81 (1990) (providing dissenting views of Representatives Dannemeyer, Barton, and Ritter, stating that "[s]ubparagraph (1) lists six sexual behavioral disorders and ends with a generic reference to 'other sexual behavior disorders'"); 135 CONG. REC. 20,573 (1989) (statement of Sen. Armstrong), *available at* 1989 WL 183785 (labeling "Transsexualism" a "Sexual Disorder"); 135 CONG. REC. 19,870 (1989) (statement of Sen. Helms), *available at* 1989 WL 183216 (discussing exclusion of "sexually deviant behavior or unlawful sexual practices"); 135 CONG. REC. 19,831 (1989) (statement of Sen. Armstrong), *available at* 1989 WL 183216 (offering amendment characterizing GID and transsexualism as "sexual behavior disorders").

¹⁹⁵ DSM-5, *supra* note 13, at 685; *see also* Duffy, *supra* note 13, at 16-153 to 16-158 (showing evolution of Paraphilic Disorders in DSM).

¹⁹⁶ DSM-5, *supra* note 13, at 685–86.

¹⁹⁷ *See* Duffy, *supra* note 13, at 16-153 to 16-158 (showing evolution of Paraphilic Disorders in DSM).

¹⁹⁸ *See id.* The ICD-10, published in 1990, likewise distinguishes "Gender Identity Disorder" from "Disorders of Sexual Preference," such as "Fetishism," "Fetishistic transvestism," "Exhibitionism," "Voyeurism," "Paedophilia," and "Sadomasochism." ICD-10, *supra* note 50, at F64–F65.

¹⁹⁹ *See* Duffy, *supra* note 13, at 16-88 (discussing classification of GID in various editions of the DSM). Two successive editions of the DSM, the DSM-IV (1994) and DSM-IV-TR (2000), carried this distinction forward, viewing GID as a condition that implicates gender, not sexual

Finally, the House inserted the words “not resulting from physical impairments” after “gender identity disorders,” presumably to cover those whose gender identity disorder was attributable to a morally neutral physical impairment, not an “immoral, improper” mental disorder for which a person “should bear some responsibility.”²⁰⁰

The House’s version of excluded impairments was accepted at conference and became law when the ADA was signed on July 26, 1990.²⁰¹ Two years later, on October 29, 1992, Congress passed an identical exclusion to the Rehabilitation Act.²⁰²

III. TRANSGENDER PEOPLE AND THE EQUAL PROTECTION CLAUSE

Few cases have addressed the ADA’s transgender exclusions, and no published case has analyzed their constitutionality.²⁰³ In fact, no case has

behavior. *See id.* In sweeping fashion, the DSM-5 sharply disassociates Gender Dysphoria from all other conditions, including Paraphilic Disorders. *Id.* In so doing, the DSM-5 makes abundantly clear that Gender Dysphoria, in a class all its own, is not a disorder of sexual behavior. Indeed, it is not a “disorder” at all—it is a dysphoria.

²⁰⁰ *See* 135 CONG. REC. 19,896 (1989) (statement of Sen. Rudman), *available at* 1989 WL 183216 (supporting Senator Armstrong’s amendment and stating that “people must bear some responsibility for the consequences of their own actions”). The ADA does not define the phrase “not resulting from physical impairments,” nor does the ADA’s legislative history shed any light. Second Statement of Interest of the United States, *supra* note 80, at 2. While it seems clear that the physical-impairment safe harbor was intended to include disorders of sex development (such as ambiguous genitalia or a mismatch in anatomic parts), it is not clear that this is *all* the carve-out was intended to include. By its terms, the safe harbor also applies to gender identity disorders that were once believed to be “purely” mental disorders but are now believed to have physical (i.e., genetic and/or biological) roots. *See id.* at 5 (“In light of the evolving scientific evidence suggesting that gender dysphoria may have a physical basis . . . the GID Exclusion should be construed narrowly such that gender dysphoria falls outside its scope.”); *see also* *Doe v. Yunits*, 15 Mass. L. Rptr. 278, 282 n.6 (Super. Ct. 2001) (“In light of the remarkable growth in our understanding of the role of genetics in producing what were previously thought to be psychological disorders, this Court cannot eliminate the possibility that all or some gender identity disorders result ‘from physical impairments’ in an individual’s genome.”); Duffy, *supra* note 13, at 16-71 to 16-78 (discussing physical-impairment safe harbor).

²⁰¹ 42 U.S.C. § 12211; *see* H.R. REP. NO. 101-596, at 88 (1990) (Conf. Rep.), *available at* 1990 WL 121679 (discussing impairments excluded from ADA).

²⁰² H.R. REP. NO. 102-973, at 158 (1992) (Conf. Rep.), *available at* 1992 WL 322488.

²⁰³ *See* Duffy, *supra* note 13, at 16-44 to 16-48 & n.191 (discussing and citing cases). In the handful of cases discussing these exclusions, courts have invoked the exclusions without analysis and held against the transgender plaintiff. *See, e.g.,* *James v. Ranch Mart Hardware, Inc.*, No. 94-2235-KHV, 1994 WL 731517, at *2 (D. Kan. Dec. 23, 1994) (dismissing ADA claim of transgender employee); *see also* *Johnson v. Fresh Mark, Inc.*, 337 F. Supp. 2d 996, 1001 (N.D. Ohio 2003), *aff’d*, 98 F. App’x 461 (6th Cir. 2004) (same); *Doe v. United Consumer Fin. Servs.*, No. 1:01 CV 1112, 2001 WL 34350174, at *6 (N.D. Ohio Nov. 9, 2001) (same); *accord* *Michaels v. Akal Sec.*, No. 09-cv-1300, 2010 WL 2573988, at *6-7 (D. Colo. June 24, 2010) (holding that the transgender plaintiff could not bring a claim under the Rehabilitation Act because of the exclusions). In its most recent published decision addressing a disability discrimination claim brought

addressed the constitutionality of *any* federal statute that facially discriminates against transgender people.²⁰⁴ *Blatt v. Cabela's Retail, Inc.* is the first to do so, and it surely will not be the last.²⁰⁵ This Part details the equal protection analysis deployed in *Blatt* that should inevitably invalidate the ADA's transgender exclusions as well as other laws that single out transgender people for disparate treatment.²⁰⁶ Section A provides an overview of equal protection in general and the various tiers of scrutiny—strict, intermediate and rational basis—involved.²⁰⁷ Section B explains why the ADA's exclusion of transvestism, transsexualism, and GID is, in fact, a *transgender* classification.²⁰⁸ Section C then analyzes what level of scrutiny transgender classifications require.²⁰⁹ Finally, section D explains why these transgender classifications violate equal protection.²¹⁰

A. Equal Protection Generally

The Fourteenth Amendment's Equal Protection Clause prohibits states from “deny[ing] to any person within [their] jurisdiction the equal protection of the laws.”²¹¹ Stated another way, “[A]ll persons similarly circumstanced shall be treated alike.”²¹² The Fifth Amendment impresses the same obligation on the federal government.²¹³ The determination of whether a governmental classification is found to violate equal protection typically depends on what level of scrutiny—“strict,” “intermediate,” or “rational basis”—the court applies to the classification at issue.²¹⁴ The level of scru-

by a transgender employee, the Equal Employment Opportunity Commission (“EEOC”) likewise relied on the Rehabilitation Act's transgender exclusions, and EEOC regulations mirroring these exclusions, to dismiss the employee's claim. *Bell v. Shalala*, E.E.O.C. Doc. No. 01941146, 1994 WL 1755505, at *3 (Sept. 9, 1994), *abrogated by* *Macy v. Holder*, E.E.O.C. Doc. No. 0120120821, 2012 WL 1435995 (Apr. 20, 2012).

²⁰⁴ See *supra* note 25 and accompanying text (discussing other challenges, but identifying Ms. Blatt's case as the first to challenge a federal statute that facially discriminates against transgender people).

²⁰⁵ *Blatt v. Cabela's Retail, Inc.*, No. 5:14-cv-4822-JFL (E.D. Pa. argued Dec. 9, 2015); see also *supra* notes 15–34 and accompanying text (discussing the *Blatt* case).

²⁰⁶ See *infra* notes 203–461 and accompanying text.

²⁰⁷ See *infra* notes 211–266 and accompanying text.

²⁰⁸ See *infra* notes 267–276 and accompanying text.

²⁰⁹ See *infra* notes 277–437 and accompanying text.

²¹⁰ See *infra* notes 438–461 and accompanying text.

²¹¹ U.S. CONST. amend. XIV.

²¹² *Reed v. Reed*, 404 U.S. 71, 76 (1971).

²¹³ See *Adarand Contractors v. Peña*, 515 U.S. 200, 224 (1995) (noting that a Fifth Amendment equal protection analysis is the same as that under the Fourteenth Amendment).

²¹⁴ ERWIN CHEREMINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 551 (4th ed. 2011) (discussing tiers of scrutiny).

tiny, in turn, depends on the type of classification.²¹⁵ While an extensive review of the Supreme Court's tiers-of-scrutiny analysis is beyond the scope of this Article, some introductory points are instructive.

1. Heightened Scrutiny: Strict and Intermediate

Classifications based on race, alienage, and national origin are considered "suspect" classifications and therefore receive "strict" scrutiny.²¹⁶ This means that the classification violates equal protection unless the government can show that the classification is "narrowly tailored to further a compelling governmental interest."²¹⁷ Classifications based on sex and illegitimacy of birth are considered "quasi-suspect" classifications and receive intermediate scrutiny.²¹⁸ This means that the classification violates equal protection unless the government can show that the classification is "substantially related to the achievement" of "important governmental objectives."²¹⁹ Given the burden of the government's proof, classifications subject to strict or intermediate scrutiny—collectively, "heightened scrutiny"—are generally held unconstitutional.²²⁰ All other classifications are subject to what is known as "rational basis review," unless the challenger can persuade a court that the classification warrants heightened scrutiny.²²¹

The Supreme Court has identified a series of four factors for determining whether a classification warrants heightened scrutiny: (1) the lack of relevance of the characteristic upon which the classification is based; (2) a history of discrimination against those with the characteristic; (3) the immutability of the characteristic; and (4) the minority status or political powerlessness of those with the characteristic.²²² These factors, and their place in the Court's three-tiered equal protection hierarchy, have been much ma-

²¹⁵ *Id.* at 553–54.

²¹⁶ *Id.* at 554.

²¹⁷ *Shaw v. Reno*, 509 U.S. 630, 643 (1993).

²¹⁸ CHEMERINSKY, *supra* note 214, at 553.

²¹⁹ *Id.*

²²⁰ *Id.* at 553–54.

²²¹ *Id.* at 688–89.

²²² *See, e.g.,* *Frontiero v. Richardson*, 411 U.S. 677, 684–88 (1973) (plurality opinion) (analyzing factors and concluding that classifications based on sex are subject to heightened scrutiny); *Windsor v. United States (Windsor I)*, 699 F.3d 169, 181–82 (2d Cir. 2012) (identifying factors and concluding that classifications based on homosexuality warrant heightened scrutiny), *aff'd*, 133 S. Ct. 2675 (2013) (declining to decide whether classifications based on homosexuality should be given heightened scrutiny but finding that DOMA violated equal protection principles); *see also* ROBERT C. FARRELL & ALISON E. CONROY, *EQUAL PROTECTION: CASES AND MATERIALS* 169–74 (2013) (discussing factors).

lined by Supreme Court Justices and commentators alike.²²³ Notwithstanding legitimate criticisms, the four-factor test determines the level of scrutiny a court will apply and is therefore generally dispositive of whether a classification will stand or fall.

2. Rational Basis Review: Deferential and Demanding

For those classifications that do not merit heightened scrutiny, the burden is on the challenger of the law to show that the classification is not “rationally related to a legitimate government purpose.”²²⁴ To complicate matters, the Supreme Court has employed two distinct varieties of rational basis review—one deferential, the other considerably more demanding.²²⁵

Deferential review is, as its name suggests, “usually tantamount to no review at all.”²²⁶ Simply put, the government classification is upheld—every time. This is because courts applying the deferential rational basis review to a statute need not ascertain its *actual* purpose. Instead, a court will “hypothesize the purpose of a law” or rely on post hoc rationalization by government attorneys defending the law—“even in the face of strong evidence to the contrary.”²²⁷ Furthermore, courts applying deferential rational basis review do not require an *actual* correlation between the classification and the (real or hypothesized) purpose.²²⁸ So long as the governmental decisionmaker could have reasonably believed that the classification

²²³ See CHEMERINSKY, *supra* note 214, at 555 (discussing criticisms of levels of scrutiny); *see, e.g.*, Craig v. Boren, 429 U.S. 190, 212 (1976) (Stevens, J., concurring) (criticizing standards of review as applied to equal protection claims); Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481, 546 (2004) (discussing problems with three-tiered framework); Marcy Strauss, *Reevaluating Suspect Classifications*, 35 SEATTLE U. L. REV. 135, 138 (2011) (same). As EEOC Commissioner Chai Feldblum has colorfully remarked:

[T]he Supreme Court’s jurisprudence under the “classification” prong of equal protection bears the mark of case-by-case adjudication, not the mark of a coherently developed theory applied uniformly and systematically to all comers . . . Essentially, advocates [arguing for heightened scrutiny under the Equal Protection Clause] are required to dance in a room where a nine-person, three-tiered analysis orchestra is playing. The fact that this may be a less than optimal room in which to dance, because the orchestra’s musical instruments contain distorted acoustic qualities that skew the notes from the start, is really just too bad for the dancers.

Chai R. Feldblum, *Sexual Orientation, Morality, and the Law: Devlin Revisited*, 57 U. PITT. L. REV. 237, 247 n.30 (1996).

²²⁴ CHEMERINSKY, *supra* note 214, at 688.

²²⁵ See FARRELL & CONROY, *supra* note 222, at 29.

²²⁶ *Id.*

²²⁷ *Id.* at 12; *see also* U.S. R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 179 (1980) (ending inquiry where there are “plausible reasons for Congress’ action”).

²²⁸ See FARRELL & CONROY, *supra* note 222, at 22 (discussing *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981)).

would serve the (real or hypothesized) purpose, courts will find the law rationally related to that purpose—even if the decisionmaker was mistaken in its belief and the law does not, in fact, serve such purpose.²²⁹

By contrast, under the demanding version of rational basis review, the Court insists on evidence of an actual—not hypothetical—legitimate governmental interest, and a correlation in fact between the challenged classification and such purpose.²³⁰ As noted by many commentators, the Court's application of demanding over deferential rational basis review lacks coherence.²³¹ The nature of the disadvantaged class, the significance of the deprivation at issue, the internal logic of the Court's analysis of means ("rational relationship") and ends ("legitimate government purpose"), and even the shifting majorities on the Court do not provide a unifying principle.²³²

The most that can be said of the extraordinarily few cases employing demanding rational basis is this: animus matters.²³³ Virtually every law disadvantages some people incidentally.²³⁴ But when it appears that the very goal of the legislature is to adversely impact a class—that is, disadvantage for disadvantage's sake—its impartiality is "suspect,"²³⁵ and requires "careful consideration."²³⁶ As the Court famously stated in 1973, in *U.S. Department of Agriculture v. Moreno*, and as it has reiterated on multiple occasions since that time, "a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest."²³⁷ In short, evi-

²²⁹ *See id.*

²³⁰ *Id.* at 29.

²³¹ *See id.* at 43–45 (discussing the problems with demanding versus deferential rational basis review); *see also* *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 458 (1985) (Marshall, J., concurring) ("To be sure, the Court does not label its handiwork heightened scrutiny, and perhaps the method employed must hereafter be called 'second order' rational-basis review rather than 'heightened scrutiny.'").

²³² Robert C. Farrell, *Successful Rational Basis Claims in the Supreme Court from the 1971 Term Through Romer v. Evans*, 32 IND. L. REV. 357, 411 (1999) (attempting to identify a "predictable pattern" in Supreme Court's application of demanding rational basis analysis).

²³³ *See* Pollvogt, *supra* note 24, at 892 (stating that a showing of animus "is virtually the only way a plaintiff is successful" under rational basis review).

²³⁴ *Cleburne*, 473 U.S. at 446; *see also* *Romer v. Evans*, 517 U.S. 620, 635 (1996) (discussing "incidental disadvantages" that laws "impose on certain persons").

²³⁵ *Fritz*, 449 U.S. at 181 (Stevens, J., concurring).

²³⁶ *Romer*, 517 U.S. at 633; *see also* *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979) ("[Discriminatory purpose] implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group.").

²³⁷ 413 U.S. 528, 534 (1973) (emphasis added); *see also* *Lawrence v. Texas*, 539 U.S. 558, 583 (2003) (O'Connor, J., concurring) ("Moral disapproval of a group cannot be a legitimate governmental interest under the Equal Protection Clause because legal classifications must not be 'drawn for the purpose of disadvantaging the group burdened by the law.'" (quoting *Romer*, 517

dence of animus can trigger demanding rational basis review. Once triggered, animus is an evidentiary trump card that discredits other “legitimate” governmental interests as pretextual.²³⁸

Evidence of animus can be either direct or indirect. A small but growing handful of Supreme Court cases—particularly those in the sexual orientation context—makes the point. In *Moreno*, the Court invalidated an amendment to a federal statute that deprived food stamps to poor households containing one or more unrelated persons.²³⁹ Of significance to the Court’s holding was direct evidence of animus—legislative history suggesting that the actual purpose of the law was not fraud prevention but was instead “to prevent so-called ‘hippies’ and ‘hippie communes’ from participating in the food stamp program,” which the Court deemed an illegitimate governmental interest.²⁴⁰ In 1985, in *City of Cleburne v. Cleburne Living Center*, the Court invalidated a local zoning ordinance that required a special use permit for group homes housing people with intellectual disabilities but required no permit for other multi-person dwellings.²⁴¹ Like *Moreno*, the Court’s decision in *Cleburne* rested, in part, on direct evidence of animus.²⁴² According to the Court, the zoning ordinance was invalid because it appeared from the record of the City Council proceedings “to rest on an irrational prejudice” against people with intellectual disabilities.²⁴³

Direct evidence of animus (for example, in the statute’s text or legislative history) is not required to trigger demanding rational basis review. The Court has inferred animus from the structure and practical effect of the challenged law.²⁴⁴ In 1996, in *Romer v. Evans*, the Court invalidated a state con-

U.S. at 633)); *see also infra* notes 239–266 and accompanying text (discussing *Moreno*, *Cleburne*, *Romer*, *Windsor II*, and *Obergefell*).

²³⁸ *See* Pollvogt, *supra* note 24, at 889, 904 (discussing the importance of animus in equal protection jurisprudence); *see also* Russell K. Robinson, *Unequal Protection*, 68 STAN. L. REV. 151, 173 (2016) (“Under animus review, the Court tends to proceed directly from detecting a whiff of animus to declaring such hate-based laws invalid, with little discernible analysis of the state’s interests.”); Goldberg, *supra* note 223, at 545 (“Whether characterized as ‘animosity,’ ‘mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable [in the relevant context],’ or ‘irrational prejudice,’ the Court has firmly singled out a set of government interests that are illegitimate and, thus, impermissible, even under the most lenient review.”).

²³⁹ *Moreno*, 413 U.S. at 538.

²⁴⁰ *Id.* at 534.

²⁴¹ *Cleburne*, 473 U.S. at 447–48, 450.

²⁴² *Id.* at 446–47; *Moreno*, 413 U.S. at 538.

²⁴³ *Cleburne*, 473 U.S. at 450. Specifically, the Court noted “the negative attitude of the majority of property owners” and “[unsubstantiated] fears of elderly residents of the neighborhood” regarding people with intellectual disabilities. *Id.* at 448.

²⁴⁴ *See* Pollvogt, *supra* note 24, at 911 (stating that “plaintiffs can prove that a challenged law is based in unconstitutional animus . . . by pointing to direct evidence of private bias in the legislative record, or by supporting an inference of animus based on the structure of a law”).

stitutional amendment that prohibited all existing and future antidiscrimination laws protecting lesbian, gay, and bisexual people, while leaving all other antidiscrimination laws intact.²⁴⁵ According to the Court, the amendment's imposition of such broad burdens (i.e., nullifying a vast array of legal protections) on such a narrow group of people (lesbian, gay, and bisexual people), without sufficient factual context for the relationship between the classification and the legitimate purpose it purportedly served, was so "exceptional," "unprecedented," "unusual," "rare," and "far-reaching" that it appeared to have been "drawn for the purpose of disadvantaging the group burdened by the law"—an illegitimate purpose.²⁴⁶ Reiterating *Moreno's* repudiation of laws motivated by "a bare . . . desire to harm," the Court determined that the "sheer breadth" of Colorado's amendment was "inexplicable by anything but animus toward the class it affects."²⁴⁷ This inference of animus was also supported by the law's practical effect: "immediate, continuing, and real injuries" to a class of people deemed "unequal to everyone else."²⁴⁸ The Colorado amendment, the Court concluded, was "a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit."²⁴⁹

In 2003, in *Lawrence v. Texas*, the Court invalidated a state law that criminalized same-sex intimacy.²⁵⁰ Although decided under the Due Process Clause's substantive guarantee of liberty, *Lawrence* sounded in equal protection.²⁵¹ The purpose of the statute was clearly to express moral disapproval of same-sex intimacy, and the practical effect of the statute was equally clear: to "demean the lives of homosexual persons," thus stigmatiz-

²⁴⁵ 517 U.S. at 629–30, 635–36; see Kimberly Jenkins Robinson, *The Constitutional Future of Race-Neutral Efforts to Achieve Diversity and Avoid Racial Isolation in Elementary and Secondary Schools*, 50 B.C. L. REV. 277, 300–01 (2009) (discussing the Court's application of rational basis review in *Romer* and *Moreno*).

²⁴⁶ *Romer*, 517 U.S. at 632–33, 635 ("A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense.").

²⁴⁷ *Id.* at 634–35 (discussing "the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected"); *Moreno*, 413 U.S. at 534.

²⁴⁸ *Romer*, 517 U.S. at 635. Although "there was ample *direct* evidence of animus" against gay and lesbian people, "the Court could not invoke this evidence" because *Bowers v. Hardwick*, which upheld the constitutionality of laws criminalizing sodomy, was still good law at the time that *Romer* was decided. Pollvogt, *supra* note 24, at 928 (emphasis added); see also *Bowers v. Hardwick*, 478 U.S. 186 (1986), *overruled by Lawrence*, 539 U.S. 558.

²⁴⁹ *Romer*, 517 U.S. at 635.

²⁵⁰ 539 U.S. at 562.

²⁵¹ *Id.* at 578; see also *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604 (2015) ("Although *Lawrence* elaborated its holding under the Due Process Clause, it acknowledged, and sought to remedy, the continuing inequality that resulted from laws making intimacy in the lives of gays and lesbians a crime against the State.").

ing them.²⁵² Such a statute, the Court held, “furthers no legitimate state interest.”²⁵³

In 2013, in *United States v. Windsor*, the Supreme Court invalidated section 3 of the Defense of Marriage Act (“DOMA”), which excluded same-sex marriages from the definition of “marriage” under federal law.²⁵⁴ Invoking *Moreno* and *Romer*, the Court easily found a “bare desire to harm” in DOMA’s structure and practical effect, as well as in its text and legislative history.²⁵⁵ With respect to structure, the Court stated that “DOMA’s *unusual* deviation from the usual tradition of recognizing and accepting state definitions of marriage” was “strong evidence” of a law motivated by “improper animus or purpose.”²⁵⁶ Like the amendment at issue in *Romer*, DOMA was at once too narrow and too broad; it singled out a “subset of state-sanctioned marriages” and deprived them of the protection of more than a thousand laws.²⁵⁷

Further supporting an inference of animus was the law’s practical effect: “to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States.”²⁵⁸ Echoing *Romer*’s repudiation of an amendment that inflicted injury on gay and lesbian people by making them “unequal to everyone else,” the Court stated that DOMA codifies inequality, and “demeans” not only same-sex couples but also their children.²⁵⁹

²⁵² *Lawrence*, 539 U.S. at 575, 577 (discussing law’s imposition of stigma and suggesting that law was motivated by governing majority’s view that same-sex intimacy was “immoral”).

²⁵³ *Id.* at 578.

²⁵⁴ *Windsor II*, 133 S. Ct. at 2695. The Court invalidated DOMA under both the Equal Protection Clause and the Due Process Clause, utilizing the same reasoning. *Compare id.* (“DOMA is unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution.”), *with id.* (stating that DOMA violates “the equal protection guarantee of the Fourteenth Amendment” as incorporated in the Fifth Amendment).

²⁵⁵ *Id.* at 2693. The Supreme Court resisted the Second Circuit’s invitation to apply heightened scrutiny to classifications based on sexual orientation, but the Court reached the same result as the Second Circuit by applying demanding rational basis. *See id.*

²⁵⁶ *Id.* (emphasis added).

²⁵⁷ *Id.* at 2694.

²⁵⁸ *Id.* at 2693.

²⁵⁹ *Id.* at 2694, 2696.

DOMA writes inequality into the entire United States Code. . . . [It] tells those [same-sex] couples, and all the world, that their otherwise valid marriages are unworthy of federal recognition. This places same-sex couples in an unstable position of being in a second-tier marriage. The differentiation demeans the couple . . . [and] humiliates tens of thousands of children now being raised by same-sex couples. . . . [It] instructs all federal officials, and indeed all persons with whom same-sex couples interact, including their own children, that their marriage is less worthy than the marriages of others.

In addition to the inference of animus created by DOMA's structure and practical effect was the direct evidence of animus in DOMA's legislative history and text. According to the House Report on DOMA, the purpose of the law was to express "both moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality."²⁶⁰ DOMA's text was equally plain. The "stated purpose of the law was to promote an 'interest in protecting the traditional moral teachings reflected in heterosexual-only marriage laws'"—a purpose confirmed by the very title of the law: the Defense of Marriage Act.²⁶¹ According to the Court, "The history of DOMA's enactment and its own text demonstrate that interference with the equal dignity of same-sex marriages . . . was more than an incidental effect of the federal statute. It was its essence."²⁶²

In 2015, in *Obergefell v. Hodges*, the Court invalidated state laws prohibiting the licensing of same-sex marriages and recognition of same-sex marriages performed out-of-state on grounds that such laws violated gay and lesbian couples' fundamental right to marry under the Due Process and Equal Protection Clauses.²⁶³ Although *Obergefell* involved the deprivation of a fundamental right, a finding that would normally call for heightened scrutiny, the Court did not explicitly invoke heightened scrutiny.²⁶⁴ Instead, the Court held that the state laws barring recognition of same-sex marriages violated equal protection based on indirect evidence of moral animus.²⁶⁵ This evidence included a "history of disapproval" of same-sex relationships, and the practical effect of such laws: "a grave and continuing harm on gays and lesbians, which serves to 'disrespect and subordinate them.'"²⁶⁶

Id. at 2694–96 (citations omitted).

²⁶⁰ *Id.* at 2693; see also ESKRIDGE & HUNTER, *supra* note 109, at 316–18 (discussing statements in DOMA's legislative history opposing same-sex marriage on moral grounds).

Representative Robert Barr . . . [stated] that the "flames of hedonism, the flames of narcissism, the flames of self-centered morality are licking at the very foundation of our society: the family unit." Representative Tom Coburn supported DOMA because his constituents felt "homosexuals" are "immoral" and "promiscuous." The issue, he said, "is not diversity"—the issue is "perversity."

ESKRIDGE & HUNTER, *supra* note 109, at 318 (citation omitted).

²⁶¹ *Windsor II*, 133 S. Ct. at 2693.

²⁶² *Id.*

²⁶³ *Obergefell*, 135 S. Ct. at 2604.

²⁶⁴ See *id.* (declining to explicitly discuss heightened scrutiny); see also CHERMERINSKY, *supra* note 214, at 812 (discussing fundamental rights and the application of strict scrutiny to such rights).

²⁶⁵ *Obergefell*, 135 S. Ct. at 2604.

²⁶⁶ *Id.* The Court's due process analysis reiterated this theme of harm. *Id.* at 2602, 2606–07 (referring repeatedly to the "hurt," "stigma and injury," "dignitary wounds," "pain and humilia-

B. The ADA's Exclusion of Transvestism, Transsexualism, and GID Is a Transgender Classification

Before analyzing what level of scrutiny to apply to the ADA's transgender exclusions, it is first necessary to explain why these exclusions are, in fact, a transgender classification.²⁶⁷ The ADA does not explicitly exclude "transgender" people. The ADA excludes people with GID, transsexualism, and transvestism.²⁶⁸ One might argue that the ADA exclusions are therefore not a "transgender" classification at all, but merely a classification of various medical impairments. This contention overlooks realities.

"Transgender" is an umbrella term that describes those whose gender identity does not conform to their assigned sex at birth.²⁶⁹ Because the defining feature of GID, transsexualism, and transvestism is nonconformity between gender identity and assigned sex at birth, everyone with these conditions is necessarily "transgender."²⁷⁰ Furthermore, because the ADA excludes not only those with these conditions, but also those who once had these conditions and all those perceived by others as having these conditions, the ADA in fact excludes a broad swath of the transgender community that does *not* have any of these conditions.²⁷¹ The fallacy of a contrary conclusion is easily apparent. To say that the ADA's exclusion of transvestism, transsexualism, and GID does not exclude transgender people as a class would be like saying that the exclusion of sickle cell anemia does not exclude African-American people or that an exclusion for Gaucher's Disease does not exclude Jews.

The Supreme Court's decision in *Lawrence*, which invalidated laws that criminalized same-sex intimacy, is also instructive.²⁷² In that case, a majority of the Court implicitly rejected the state's attempt to draw a distinction between laws that burden classes of people (lesbian and gay people) and those that burden some other characteristic that is closely correlated with that group (sexual activity between people of the same sex).²⁷³ Jus-

tion," and demeaning and disparaging treatment suffered by same-sex couples and their children, as well as the lack of any "risk of harm to [same-sex couples] or third parties").

²⁶⁷ See CHEMERINSKY, *supra* note 214, at 686 (noting that an "equal protection analysis always must begin by identifying how the government is distinguishing among people").

²⁶⁸ 42 U.S.C. § 12211(b) (2012).

²⁶⁹ See DSM-5, *supra* note 13, at 458 (defining "transgender"); see also *supra* note 42 and accompanying text (discussing the term "transgender person").

²⁷⁰ See *supra* note 42 and accompanying text (discussing the term "transgender person").

²⁷¹ See 42 U.S.C. § 12102 (2012) (covering those with a "record of" and "regarded as having" a disability).

²⁷² *Lawrence*, 539 U.S. at 579.

²⁷³ See *id.* at 574 (stating that laws criminalizing sodomy denied homosexual couples the right to make intimate and personal choices about their lives "just as heterosexual persons do").

tice O'Connor went one step further in her concurring opinion, explicitly stating that "homosexual conduct 'is closely correlated with being homosexual'" and therefore, "one could not escape the fact that the law was 'directed toward gay persons as a class.'"²⁷⁴ The same is true here; the classification of medical conditions "closely correlated" with transgender people plainly *is* the classification of transgender people.²⁷⁵

Moreover, if there were any doubt as to the nature of the classification, it bears noting that the ADA does not simply exclude three medical conditions in the DSM associated with transgender people; it excludes the *only* three medical conditions in the DSM closely associated with transgender people.²⁷⁶ Congress's exclusion of all three DSM conditions associated with transgender people proves definitively that the ADA exclusions are a transgender classification.

C. What Level of Scrutiny for Transgender Classifications?

Having determined that the ADA's exclusion of GID, transvestism, and transsexualism is a transgender classification, the next issue is what level of scrutiny to apply to the classification: "strict," "intermediate," or "rational basis."²⁷⁷ This section provides three alternatives. Subsection 1 proposes applying heightened scrutiny to transgender classifications because transgender people are a suspect/quasi-suspect class under the Supreme Court's four-factor test.²⁷⁸ Subsection 2 proposes applying heightened scrutiny to transgender classifications because such classifications are necessarily based on sex.²⁷⁹ Subsection 3 argues that such classifications fail even under rational basis review, because they are based on a bare desire to harm.²⁸⁰

²⁷⁴ *Id.* at 583 (O'Connor, J., concurring); see also Pollvogt, *supra* note 24, at 924 (stating that "[b]oth the majority opinion (implicitly) and the concurrence (explicitly) in *Lawrence* recognized the principle that laws criminalizing homosexual conduct in fact criminalized homosexual identity").

²⁷⁵ See *Lawrence*, 539 U.S. at 583 (O'Connor, J., concurring) (noting that laws targeting homosexual conduct target homosexuals as a class).

²⁷⁶ See Duffy, *supra* note 13, at 16-153 to 16-158 (listing transgender-associated diagnoses).

²⁷⁷ See *supra* notes 211-266 and accompanying text (providing background on levels of scrutiny).

²⁷⁸ See *infra* notes 281-398 and accompanying text.

²⁷⁹ See *infra* notes 399-435 and accompanying text.

²⁸⁰ See *infra* notes 436-437 and accompanying text.

1. A New Suspect/Quasi-Suspect Class: Heightened Scrutiny Based on Transgender Status

The Supreme Court has determined that classifications based on race, national origin, alienage, sex, and illegitimacy receive heightened scrutiny.²⁸¹ For nearly thirty years, the Court has been unwilling to subject other classifications to such scrutiny.²⁸² Lower federal courts and state courts, however, have not shared the Court's reluctance, holding that classifications based on sexual orientation should receive heightened scrutiny.²⁸³ The Department of Justice has likewise concluded that, "given a number of factors, including a documented history of discrimination, classifications based on sexual orientation should be subject to a heightened standard of scrutiny."²⁸⁴ This subsection argues that transgender classifications warrant heightened scrutiny because transgender people are a suspect/quasi-suspect class, based on the Supreme Court's four-factor test: transgender people have suffered a history of discrimination, they have the ability to participate in and contribute to society, they exhibit immutable distinguishing characteristics, and they are a minority and lack political power.²⁸⁵ At least one federal district court—in the 2015 case of *Adkins v. City of New York*—has determined that transgender people are a quasi-suspect class based on these four factors.²⁸⁶ It is highly likely that other courts will follow suit.

a. Transgender Individuals Have Suffered a History of Discrimination

As the District of Columbia Court of Appeals recently observed, "the hostility and discrimination that transgender individuals face in our society today is well-documented."²⁸⁷ Transgender people are disproportionately at

²⁸¹ See *supra* notes 216–223 and accompanying text (discussing classifications that receive heightened scrutiny).

²⁸² CHEMERINSKY, *supra* note 214, at 688; see *Clark v. Jeter*, 486 U.S. 456, 461–62 (1988) (adopting intermediate scrutiny standard for non-marital children).

²⁸³ FARRELL & CONROY, *supra* note 222, at 3.

²⁸⁴ Letter from Eric H. Holder, Jr., U.S. Attorney Gen., to John A. Boehner, Speaker, U.S. House of Representatives, regarding the Defense of Marriage Act 5 (Feb. 23, 2011), <http://www.justice.gov/opa/pr/letter-attorney-general-congress-litigation-involving-defense-marriage-act> [<https://perma.cc/V34B-ZZ3T>] [hereinafter 2011 DOJ DOMA Letter].

²⁸⁵ See *id.* (concluding that classifications based on sexual orientation should be subject to heightened scrutiny based on a four-factor test).

²⁸⁶ *Adkins v. City of New York*, No. 14-cv-7519, 2015 WL 7076956, at *4 (S.D.N.Y. Nov. 16, 2015) (holding that "transgender people are a quasi-suspect class" entitled to heightened scrutiny under the Supreme Court's four-factor test, and denying defendant's motion to dismiss plaintiff's claim that police targeted her because she was transgender).

²⁸⁷ *Brocksmith v. United States*, 99 A.3d 690, 698 (D.C. 2014); see also *Adkins*, 2015 WL 7076956, at *3 (stating that "this history of persecution and discrimination [against transgender people] is not yet history").

risk for discrimination in almost all aspects of life, including employment, housing, education, public accommodations, and access to government services.²⁸⁸ Experiences of employment discrimination, in particular, are nearly universal for transgender individuals. According to The National Transgender Discrimination Survey Report (“National Survey”), the most extensive survey of transgender discrimination ever taken, 97% of nearly 6500 respondents experienced harassment or mistreatment on the job or took actions like hiding their gender transition to avoid such treatment, and 47% of respondents lost their jobs, were denied a promotion, or were denied a job as result of being transgender.²⁸⁹ In fact, survey respondents experienced unemployment at twice the rate of the general population, with rates up to four times higher for transgender people of color.²⁹⁰

These barriers to employment contribute to tremendous economic insecurity; respondents were four times more likely than the general population to have a household income of less than \$10,000 per year, and 16% of respondents were compelled to work in the underground economy, such as sex work or selling drugs.²⁹¹ A report by the Williams Institute at UCLA School of Law, which summarized six studies of transgender employment discrimination conducted between 1996 and 2006, similarly revealed that as high as 60% of transgender respondents reported being unemployed and as high as 64% earned incomes less than \$25,000 per year.²⁹²

Given these employment barriers, it is not surprising that transgender individuals also face significant housing instability. According to the National Survey, 19% of respondents had been homeless at some point in their lives (2.5 times the rate of the national population) and almost 2% of respondents were currently homeless (nearly twice the percentage of the national population).²⁹³ For those who had attempted to access homeless shelters, 29% were turned away altogether because they were transgender, 42%

²⁸⁸ See generally JAIME M. GRANT ET AL., NAT’L CTR. FOR TRANSGENDER EQUALITY & NAT’L GAY & LESBIAN TASKFORCE, INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY 3–8 (2011), http://www.thetaskforce.org/static_html/downloads/reports/reports/ntds_full.pdf [<https://perma.cc/5EHB-RTEM>] [hereinafter NATIONAL SURVEY] (providing summary of discrimination against transgender people in various aspects of life).

²⁸⁹ See *id.* at 53 (providing statistics regarding employment discrimination).

²⁹⁰ *Id.* at 3.

²⁹¹ *Id.* at 22.

²⁹² BRAD SEARS & CHRISTY MALLORY, THE WILLIAMS INST., DOCUMENTED EVIDENCE OF EMPLOYMENT DISCRIMINATION & ITS EFFECTS ON LGBT PEOPLE 14 (2011), <https://multco.us/file/15673/download> [<https://perma.cc/5D2Y-VRRT>].

²⁹³ NATIONAL SURVEY, *supra* note 288, at 4.

were forced to stay in facilities designated for the wrong gender, and 55% experienced harassment, including physical and sexual assault.²⁹⁴

Education is another area in which transgender people experience significant discrimination. Transgender individuals in grades K–12 frequently experience harassment (78%), physical assault (35%), and sexual assault (12%) by students as well as by teachers and staff.²⁹⁵ In fact, 15% of respondents in K–12 and higher education left school altogether because of such harassment.²⁹⁶ Nineteen percent of respondents in higher education were denied access to gender-appropriate housing.²⁹⁷

In places of public accommodation, transgender individuals frequently experience discrimination—from outright denial of services (44%) to verbal harassment (53%) and physical assault (8%).²⁹⁸ For example, in doctor’s offices, hospitals, emergency rooms, and mental health clinics, 28% of respondents experienced harassment and 19% were denied services altogether. In retail stores, discrimination was even worse, with 37% of respondents reporting harassment and 32% reporting denial of services.²⁹⁹ Twenty-two percent of respondents reported verbal harassment and 4% were physically attacked on buses, trains, and taxis.³⁰⁰

Because transgender individuals are more likely to be the victims of violent crime, to be on the street due to homelessness, or to work in the underground economy, they are also more likely to interact with police.³⁰¹ These interactions often involve discrimination. For example, 22% of respondents reported harassment by police, including being profiled as sex workers and arrested (a practice known colloquially as “Walking While Transgender”), and 20% reported being denied services by the police.³⁰² Six percent of respondents reported being physically assaulted by police, and 2% reported being sexually assaulted by police; for transgender people of color, these numbers more than double to 15% and 7%, respectively.³⁰³ Not surprisingly, this discrimination has a chilling effect, with 46% of respondents reporting being uncomfortable seeking police assistance.³⁰⁴ Incarcer-

²⁹⁴ *Id.*

²⁹⁵ *Id.* at 33.

²⁹⁶ *Id.* at 40.

²⁹⁷ *Id.* at 39.

²⁹⁸ *Id.* at 124.

²⁹⁹ *Id.* at 72.

³⁰⁰ *Id.* at 130.

³⁰¹ *Id.* at 158.

³⁰² *Id.*

³⁰³ *Id.* at 160.

³⁰⁴ *Id.* at 162; see also H.R. REP. NO. 111-86, at 11 (2009) (finding that “transgender people frequently distrust law enforcement authorities, and the police often lack training and familiarity with transgender people”).

ated transgender individuals also experience discrimination in the form of harassment by correctional officers (37%) and other inmates (35%),³⁰⁵ physical and sexual assault (16% and 15%, respectively),³⁰⁶ and even the denial of routine health care (12%).³⁰⁷

Discrimination jeopardizes not only transgender rights, but also transgender health and, quite literally, transgender lives. As the APA has concluded, “discrimination and lack of equal civil rights is damaging to the mental health of transgender and gender variant individuals.”³⁰⁸ The DSM agrees that for transgender people, “high levels of stigmatization, discrimination, and victimization” can “lead[] to negative self-concept, increased rates of mental disorder comorbidity, school dropout, and economic marginalization, including unemployment, with attendant social and mental health risks, especially in individuals from resource-poor family backgrounds.”³⁰⁹ Indeed, such discrimination can also lead to death. According to the National Survey, 41% of respondents reported attempting suicide compared to just 1.6% of the general population.³¹⁰ These numbers are consistent with those of another study reported by the APA, which found that “gender-based discrimination and victimization were found to be independently associated with attempted suicide in a population of transgender individuals, 32% of whom had histories of trying to kill themselves.”³¹¹ These statistics reveal perhaps the most troubling truth about discrimination’s toll on the lives of transgender people: many contemplate death over living in a society that persistently discriminates against them.

The animus leveled at transgender individuals often extends beyond discrimination, culminating in horrific hate crimes. In 2014, the National Council of Anti-Violence Programs reported the hate-motivated murder of eighteen members of the LGBT community in the prior year.³¹² Thirteen of those murdered were transgender individuals, all but one of whom was a transgender woman of color.³¹³ These numbers continue a three-year trend in which transgender women—and transgender people of color, in particular—experienced a greater risk of homicide than others in the LGBT com-

³⁰⁵ NATIONAL SURVEY, *supra* note 288, at 166.

³⁰⁶ *Id.* at 167.

³⁰⁷ *Id.* at 169.

³⁰⁸ APA POSITION STATEMENT ON DISCRIMINATION, *supra* note 10.

³⁰⁹ DSM-5, *supra* note 13, at 458.

³¹⁰ NATIONAL SURVEY, *supra* note 288, at 82.

³¹¹ APA POSITION STATEMENT ON DISCRIMINATION, *supra* note 10.

³¹² NAT’L COALITION OF ANTI-VIOLENCE PROGRAMS, LESBIAN, GAY, BISEXUAL, TRANSGENDER, QUEER AND HIV-AFFECTED HATE VIOLENCE IN 2013, at 8, 22–23 (2014), http://avp.org/storage/documents/2013_ncavp_hvreport_final.pdf [<https://perma.cc/5MLF-XGX5>].

³¹³ *Id.*

munity.³¹⁴ Due to the compelling need for protections for transgender people against hate violence, Congress passed and President Obama signed into law the Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act of 2009, which extended federal protections against crimes based on gender, disability, gender identity or sexual orientation.³¹⁵ In passing this law, the House of Representatives Judiciary Committee emphasized the “particularly violent” nature of hate crimes against transgender people and the “extreme bias against gender nonconformity.”³¹⁶

Importantly, transgender people have endured pervasive discrimination for well over a century. In *Windsor*, the Second Circuit concluded that lesbians and gay people had experienced a history of discrimination for at least ninety years.³¹⁷ According to the court, the fact that for many years homosexual conduct was a criminal act in many states provided “the most telling proof of animus and discrimination against homosexuals in this country.”³¹⁸ The same is true with transgender expression: beginning in the mid-nineteenth century and continuing through much of the twentieth century, such expression was explicitly prohibited by state and local laws that criminalized cross-dressing.³¹⁹ Add to this the fact that, for much of this country’s history, transgender people have been regarded as a subset of the gay

³¹⁴ See H.R. REP. NO. 111-86, at 11 (stating that advocacy groups reported the murder of over 400 people due to anti-transgender bias since 1999, and that “[i]n 2008 alone, there were 21 murders of transgender and gender non-conforming people”).

³¹⁵ See 18 U.S.C. § 249 (2012).

³¹⁶ H.R. REP. NO. 111-86, at 11. As the authors of the National Survey have observed:

It is part of social and legal convention in the United States to discriminate against, ridicule, and abuse transgender and gender non-conforming people within foundational institutions such as the family, schools, the workplace and health care settings, every day. Instead of recognizing that the moral failure lies in society’s unwillingness to embrace different gender identities and expression, society blames transgender and gender nonconforming people for bringing the discrimination and violence on themselves.

NATIONAL SURVEY, *supra* note 288, at 8.

³¹⁷ *Windsor I*, 699 F.3d at 182. As Attorney General Eric Holder stated in his letter notifying Congress of the Department of Justice’s refusal to defend DOMA, “there is, regrettably, a significant history of purposeful discrimination against gay and lesbian people, by governmental as well as private entities, based on prejudice and stereotypes that continue to have ramifications today.” 2011 DOJ DOMA Letter, *supra* note 284, at 2.

³¹⁸ *Windsor I*, 699 F.3d at 182; see also 2011 DOJ DOMA Letter, *supra* note 284, at 2 (citing *Lawrence* and noting that states historically demeaned gays and lesbians by criminalizing their private sexual conduct).

³¹⁹ See Jennifer Levi & Daniel Redman, *The Cross-Dressing Case for Bathroom Equality*, 34 SEATTLE U. L. REV. 133, 171 (2010) (discussing laws criminalizing cross-dressing); see also *supra* notes 109–113 and accompanying text (same).

and lesbian community, and it becomes clear that transgender people have endured the same discrimination as gays and lesbians.³²⁰

Indeed, one could reasonably argue that transgender people have suffered more than gays and lesbians.³²¹ While “homophobia and transphobia are tightly intertwined,”³²² the greatest scorn has been reserved for those widely regarded as the “the most subversive” segment of the LGBT community: transgender people.³²³ As the Connecticut Supreme Court said of gay and lesbian people in *Kerrigan v. Commissioner of Public Health*, transgender people “are hated, quite irrationally, for what they are.”³²⁴ The “bigotry and hatred” that transgender people have faced “are akin to, and, in certain respects, perhaps even more severe than, those confronted by some groups that have been accorded heightened judicial protection.”³²⁵

This historical discrimination against transgender people is perhaps best epitomized by Congress’s explicit exclusion of transgender people from four federal civil rights laws over the past thirty years. In 1988, Congress excluded “transvestites” from the Fair Housing Act.³²⁶ In 1990, Con-

³²⁰ Duffy, *supra* note 13, at 16-133 (noting that transgender people have been considered “a subset of the gay and lesbian community,” and “have suffered the same fate as gays and lesbians”).

³²¹ Minter, *supra* note 4, at 142.

Gender nonconforming people consistently have been among the most visible and vulnerable members of gay communities—among the most likely to be beaten, raped, and killed; among the most likely to be criminalized and labeled deviant; among the most likely to end up in psychiatric hospitals and prisons; among the most likely to be denied housing, employment, and medical care; among the most likely to be rejected and harassed as young people; and among the most likely to be separated from their own children.

Id.

³²² *Id.*

³²³ See Duffy, *supra* note 13, at 16-133 (discussing historical discrimination against transgender people). While some may argue that such scorn has ancient roots, the treatment of transgender people over the whole of human history points in the opposite direction. *Compare* *People v. Simmons*, 357 N.Y.S.2d 362, 365 (Crim. Ct. 1974) (“Western civilization has long abhorred transvestism.”), with Minter, *supra* note 4, at 171 (“From prehistoric times to the present, individuals whom today we might call transgender[] and transsexual have played prominent roles in many societies, including our own.”). In short, while animus toward transgender people has existed for quite some time, respect for transgender people is a tradition far more deeply rooted. *Cf. Lawrence*, 539 U.S. at 571 (stating that “historical grounds relied upon [by the Supreme Court] in *Bowers*” for upholding sodomy laws “are not without doubt and, at the very least, are overstated”).

³²⁴ See 957 A.2d 407, 446 (Conn. 2008) (discussing the irrational nature of the prejudice directed at lesbian and gay people, “who are ridiculed, ostracized, despised, demonized and condemned merely for being who they are”).

³²⁵ See *id.*

³²⁶ See *supra* notes 131-137 and accompanying text (discussing transgender exclusion from the Fair Housing Act).

gress excluded GID, transsexualism, and transvestism from the ADA.³²⁷ The following year, Congress added an identical exclusion to the Rehabilitation Act of 1973, thereby stripping transgender people of civil rights protections they had enjoyed for nearly twenty years.³²⁸ And in 2008, Congress passed the ADA Amendments Act (“ADAAA”), which maintained the transgender exclusions while expanding the definition of disability under the ADA and Rehabilitation Act for all other impairments.³²⁹ By explicitly excluding transgender people from these civil rights protections, Congress expressly sanctioned blatant discrimination against transgender people, codifying their unequal status in law.

The discrimination inherent in these transgender exclusions is compounded by the callous way in which the ADA and Rehabilitation Act excludes transgender people. First, the ADA and Rehabilitation Act group GID, transsexualism, and transvestism together with a variety of other mental conditions widely regarded as being immoral.³³⁰ By singling out *only* these conditions for exclusion, the ADA and Rehabilitation Act brand transgender people as morally unfit for civil rights.³³¹ In so doing, these laws both reflect and perpetuate the very problems they seek to dismantle: “the prejudiced attitudes or ignorance of others” and the “inferior status” that people with disabilities occupy in our society.³³²

Second, the ADA and Rehabilitation Act classify GID and transsexualism as “sexual behavior disorders” despite the fact that the medical community has never classified them as such.³³³ This crass coupling likewise reflects the disdain of lawmakers who believed that all transgender people must necessarily have a sexual disorder.³³⁴ Lastly, and more subtly, the

³²⁷ See *supra* notes 138–201 and accompanying text (discussing transgender exclusion from the ADA).

³²⁸ See *supra* note 202 and accompanying text (discussing transgender exclusion from the Rehabilitation Act).

³²⁹ See ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (codified as amended in 42 U.S.C. §§ 12101–12213 (2012)).

³³⁰ See 42 U.S.C. § 12211(b).

³³¹ See Barry, *supra* note 159, at 25 (stating that all “of the mental impairments actually excluded from the ADA have, in Senator Armstrong’s words, “a moral content to them”).

³³² 42 U.S.C. § 12101(a)(6); *Sch. Bd. of Nassau Cnty. v. Arline*, 480 U.S. 273, 284 (1987) (“Allowing discrimination based on the contagious effects of a physical impairment would be inconsistent with the basic purpose of [the statute], which is to ensure that handicapped individuals are not denied jobs or other benefits because of the prejudiced attitudes or the ignorance of others.”); see also 42 U.S.C. § 12101(a)(3) (finding that “society has tended to isolate and segregate individuals with disabilities”).

³³³ See *supra* notes 194–199 and accompanying text (discussing the ADA’s misclassification of GID and transsexualism).

³³⁴ See Duffy, *supra* note 13, at 16-88 (discussing Congress’s misunderstanding that GID and transsexualism were sexual behavior disorders).

ADA excludes “transvestites” in two separate sections of the law, underscoring the legislators’ extreme desire to deny transgender people legal protection.³³⁵ In its rush to exclude anything and everything “transgender,” Congress excluded transvestism twice—the only medical condition to receive such a dubious distinction.³³⁶

b. Transgender Individuals Have the Ability to Participate in and Contribute to Society

In *Windsor*, the U.S. Court of Appeals for the Second Circuit concluded that “the aversion homosexuals experience has nothing to do with aptitude or performance.”³³⁷ The same can be said of the discrimination leveled at transgender people.³³⁸ The incongruence between a transgender person’s gender identity and assigned sex, like sexual orientation, race, national origin, and alienage, “bears no relation to ability to perform or contribute to society.”³³⁹ Although there are some characteristics, such as age and disability, that “may arguably inhibit an individual’s ability to contribute to society, at least in some respect,”³⁴⁰ transgender status is not one of them. As the Connecticut Supreme Court said of gay and lesbian people in *Kerrigan*, “in this critical respect,” transgender people “stand in stark contrast to other groups that have been denied suspect or quasi-suspect class recognition, despite a history of discrimination.”³⁴¹

Importantly, “transgender” and “impairment” are not synonymous. Although some transgender people experience Gender Dysphoria—distress and discomfort with their assigned sex which, if left untreated, may limit their ability to work or engage in other life functions—many do not.³⁴² Indeed, many transgender people are completely comfortable living just the

³³⁵ See *supra* note 167 and accompanying text (discussing Amendments 717 and 722, which excluded “transvestites” and “transvestism,” respectively).

³³⁶ See Colker, *supra* note 129, at 33, 50 (stating that this “redundancy is itself derogatory because it highlights the legislators’ extreme desire to prevent this group from having legal protection”).

³³⁷ *Windsor I*, 699 F.3d at 182–83.

³³⁸ *Adkins*, 2015 WL 7076956, at *3 (“[T]ransgender status bears no relation to ability to contribute to society. . . . [A] transgender person, simply by virtue of transgender status, is [not] any less productive than any other member of society.”).

³³⁹ *Windsor I*, 699 F.3d at 182.

³⁴⁰ *Id.*

³⁴¹ *Kerrigan*, 957 A.2d at 435; see also 2011 DOJ DOMA Letter, *supra* note 284, at 3 (“Recent evolutions in legislation (including the pending repeal of Don’t Ask, Don’t Tell), in community practices and attitudes, in case law (including the Supreme Court’s holdings in *Lawrence* and *Romer*), and in social science . . . make clear that sexual orientation is not a characteristic that generally bears on legitimate policy objectives.”).

³⁴² See *supra* notes 48–49 and accompanying text (discussing gender dysphoria).

way they are.³⁴³ Stated another way, while everyone who experiences Gender Dysphoria is necessarily transgender, not everyone who is transgender necessarily experiences Gender Dysphoria.³⁴⁴ The mere fact that some members of a suspect class may sometimes experience impairment does not diminish their status as a suspect class and the requisite scrutiny accorded such classifications. Accordingly, transgender individuals are perfectly able to participate in and contribute to society.

Numerous cases, drawn principally from the employment context, confirm transgender people's ability to participate and contribute. For example, in 2011, in the equal protection case of *Glenn v. Brumby*, the Eleventh Circuit Court of Appeals ruled in favor of a transgender employee with no job performance problems who was fired by her employer—over the recommendation of her immediate supervisor—solely because she intended to undergo gender transition.³⁴⁵ And in 2002, in *Barnes v. City of Cincinnati*, the U.S. District Court for the Southern District of Ohio similarly rejected the City's argument that a police officer's status as a transgender person hindered the officer's job performance as a sergeant, noting that a city-mandated psychological evaluation during probation found the officer fit for duty.³⁴⁶

c. Transgender Individuals Exhibit Immutable Distinguishing Characteristics

"Immutability" literally means "cannot be changed," but refers more broadly to "characteristic[s] determined solely by the accident of birth," not by "individual responsibility."³⁴⁷ Immutability is an important consideration because it means the characteristic is outside of the person's control, thus rendering the discrimination "more clearly unfair."³⁴⁸ Simply put, heaping

³⁴³ Brief of Amici Curiae, *supra* note 16, at 4.

³⁴⁴ See *id.* (discussing Gender Dysphoria).

³⁴⁵ 724 F. Supp. 2d 1284, 1292 (N.D. Ga.), *aff'd*, 663 F.3d 1312 (11th Cir. 2011). Similarly, in 1986, in *Blackwell v. U.S. Dep't of Treasury*, the U.S. District Court for the District of Columbia characterized the defendant's refusal to hire a transgender employee as "highly reprehensible," stating that the Department "knew plaintiff could do the job and had no sound basis for even refusing to accept him for the job," and fired the plaintiff simply "to avoid the inevitable administrative hassle that would occur if [the Department] declined a qualified applicant." 656 F. Supp. 713, 714–15 (D.D.C. 1986), *aff'd in part, vacated in part*, 830 F.2d 1183 (D.C. Cir. 1987).

³⁴⁶ No. C-1-00-780, 2002 U.S. Dist. LEXIS 26207, at *30 (S.D. Ohio 2002), *aff'd*, 401 F.3d 729 (6th Cir. 2005).

³⁴⁷ *Frontiero*, 411 U.S. at 686 (plurality opinion); see also FARRELL & CONROY, *supra* note 222, at 171 (discussing concept of immutability).

³⁴⁸ See *Kerrigan*, 957 A.2d at 436 (quoting *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 909 F.2d 375, 377 (9th Cir. 1990) (Canby, J., dissenting)) (discussing the importance of immutability in equal protection cases).

burdens on certain people because of a characteristic outside of their control “would seem to violate the basic concept of our system that legal burdens should bear some relationship to individual responsibility.”³⁴⁹ In addition to the degree of one’s control over the acquisition of a defining trait, the “relative ease or difficulty with which a trait can be changed” is also relevant to the immutability inquiry because it helps determine “whether someone, rather than being victimized, has voluntarily joined a persecuted group and thereby invited the discrimination.”³⁵⁰

Transgender status is neither chosen nor changeable; it is immutable. According to the APA, children typically begin “expressing gendered behaviors and interests” between ages two and four years.³⁵¹ The formation of one’s gender identity begins even earlier, likely within the first two years and perhaps even before birth.³⁵² This, of course, well precedes a child’s ability to choose.³⁵³ Indeed, it strains logic to say that a person chooses to become part of the transgender class—membership in which quadruples one’s risk of suicide and exposes the person to almost certain discrimination in nearly every aspect of life.³⁵⁴

In addition to lack of choice, over fifty years of medical research has confirmed that transgender status, like sexual orientation, is not “correctable.”³⁵⁵ In the past, some practitioners tried to “cure” transgender people

³⁴⁹ *Frontiero*, 411 U.S. at 686 (plurality opinion).

³⁵⁰ *Dean v. District of Columbia*, 653 A.2d 307, 346 (D.C. 1995) (Ferren, J., concurring in part and dissenting in part), *abrogated by Obergefell*, 135 S. Ct. 2584; *see also Watkins v. U.S. Army*, 875 F.2d 699, 725 (9th Cir. 1989) (Norris, J., concurring) (stating that immutable characteristics are “are so central to a person’s identity that it would be abhorrent for the government to penalize a person for refusing to change them”).

³⁵¹ DSM-5, *supra* note 13, at 455.

³⁵² *See Doe v. McConn*, 489 F. Supp. 76, 78 (S.D. Tex. 1980); *see also Schroer v. Billington*, 424 F. Supp. 2d 203, 213 n.5 (D.D.C. 2006) (stating that, according to some, one’s “internal sexual identity . . . is produced in significant part by hormonal influences on the developing brain *in utero*”). *See generally*, Gerald P. Mallon, *Practice with Transgendered Children*, in *SOCIAL SERVICES WITH TRANSGENDERED YOUTH* 49, 52–54, 57–58 (Gerald P. Mallon ed., 1999) (stating that a person’s self-image as male or female is established at an early age and is highly resistant to change).

³⁵³ *McConn*, 489 F. Supp. at 78; *see also Meriwether v. Faulkner*, 821 F.2d 408, 412 (7th Cir. 1987) (stating that “transsexualism is not voluntarily assumed”).

³⁵⁴ *See Hernandez-Montiel v. Immigration & Naturalization Serv.*, 225 F.3d 1084, 1095 (9th Cir. 2000) (stating that a gay, transgender asylum applicant’s female sexual identity “must be fundamental, or [s]he would not have suffered this persecution and would have changed years ago”), *abrogated by Thomas v. Gonzales*, 409 F.3d 1177 (9th Cir. 2005), *vacated*, 547 U.S. 183 (2006).

³⁵⁵ *Compare* Brief of Amici Curiae Gay & Lesbian Advocates & Defenders et al. in Support of Appellant A.M.B. at 6, *In re A.M.B.*, No. CUM-09-634, (Me. Apr. 4, 2010), 2010 WL 3972079, at *7 n.7 (stating that attempts “to ‘cure’ transgender people through aversion therapies and other techniques intended to alter cross-gender identification . . . were not only unsuccessful, but caused severe psychological damage”), *and* M.G. Gelder & I.M. Marks, *Aversion Treatment*

through aversion therapies and other techniques intended to alter cross-gender identification.³⁵⁶ Those efforts were not only unsuccessful, but caused severe psychological damage.³⁵⁷ In “The Transsexual Phenomenon,” Dr. Benjamin declared attempts to cure a “useless undertaking.”³⁵⁸ Today, efforts to alter a person’s core gender identity are viewed as futile and unethical.³⁵⁹ Accordingly, the treatment paradigm has shifted from attempting to “cure” the transgender person “to facilitating acceptance and management of a gender role transition.”³⁶⁰ As courts have repeatedly found with respect to sexual orientation, gender identity is such a “central, defining [trait] of personhood” that it “may be altered [if at all] only at the expense of significant damage to the individual’s sense of self.”³⁶¹ Indeed, in 2015, in *Norsworthy v. Beard*, the U.S. District Court for the Northern District of California stated that “the Ninth Circuit’s conclusion that heightened scrutiny should be applied to Equal Protection claims involving discrimination based on sexual orientation . . . applies with at least equal force to discrimination against transgender people, *whose identity is equally immutable*.”³⁶²

Importantly, transgender people who undergo transition from one gender to another do not “abandon” their transgender status. Although transition aligns one’s gender identity with one’s outward expression of gender, it does not eliminate the incongruence between one’s gender identity and assigned sex at birth. For example, a post-operative male-to-female transgender person has a gender identity (female) that does not align with

in Transvestism and Transsexualism, in *TRANSSEXUALISM AND SEX REASSIGNMENT* 383, 403 (Richard Green & John Money eds., 1969) (finding that aversion therapy is unhelpful), with 2011 DOJ DOMA Letter, *supra* note 284, at 3 (“[A] growing scientific consensus accepts that sexual orientation is a characteristic that is immutable; it is undoubtedly unfair to require sexual orientation to be hidden from view to avoid discrimination.”), and 2011 DOJ DOMA Letter, *supra* note 284, at 2 n.3 (“[S]ome of the discrimination [against lesbian and gay people] has been based on the incorrect belief that sexual orientation is a behavioral characteristic that can be changed . . .”).

³⁵⁶ Gelder & Marks, *supra* note 355, at 403.

³⁵⁷ Mallon, *supra* note 352, at 55–58.

³⁵⁸ BENJAMIN, *supra* note 44, at 53.

³⁵⁹ Mallon, *supra* note 352, at 55–56.

³⁶⁰ Walter O. Bockting & Eli Coleman, *A Comprehensive Approach to the Treatment of Gender Dysphoria*, in *GENDER DYSPHORIA: INTERDISCIPLINARY APPROACHES IN CLINICAL MANAGEMENT* 131, 131–32 (W.O. Bockting & E. Coleman eds., 1992).

³⁶¹ *Kerrigan*, 957 A.2d at 439 (quoting *Jantz v. Muci*, 759 F. Supp. 1543, 1548 (D. Kan. 1991)); see also *Watkins*, 875 F.2d at 725 (Norris, J., concurring) (stating that immutability describes “traits that are so central to a person’s identity that it would be abhorrent for the government to penalize a person for refusing to change them”).

³⁶² 87 F. Supp. 3d 1104, 1119 n.8 (N.D. Cal. 2015) (emphasis added); see also *Hernandez-Montiel*, 225 F.3d at 1093 (“Sexual orientation and sexual identity are immutable; they are so fundamental to one’s identity that a person should not be required to abandon them.”).

her assigned sex at birth (male). A person who transitions is still a transgender person.³⁶³

One might argue that transgender status is not immutable because it is not always obvious; some transgender people “pass” as the other gender, whereas others do not outwardly express their gender identity out of fear of prejudice or worse. This argument seems wrong in both law and fact. Under Supreme Court case law, visibility is not a prerequisite for finding that a distinguishing characteristic is immutable.³⁶⁴ As the Second Circuit stated in *Windsor*, these characteristics—such as alienage, for example—require “no ‘obvious badge.’”³⁶⁵

The Second Circuit’s approach is not only consistent with case law but also makes good sense. As with sexual orientation, the fact that some transgender people may be able to keep their transgender status private is irrelevant.³⁶⁶ What matters is that when and if their transgender status “is manifest”—for example, when a potential employer requests prior employment records from an employee who has since undergone transition—it “invites discrimination.”³⁶⁷ Indeed, to rule otherwise by making strict scrutiny turn on the obviousness of a trait would subtly encourage those who can hide their transgender status to do so and further stigmatize those who cannot.³⁶⁸

³⁶³ Although some transgender people do not *personally* identify as transgender, they are part of a group whose “gender identity . . . is different from the sex assigned to them at birth.” *OPM Guidance*, *supra* note 42 (“Some individuals who would fit this definition of transgender do not identify themselves as such, and identify simply as men and women, consistent with their gender identity.”). The same would be true for those with white skin who do not personally identify as “Caucasian.”

³⁶⁴ *Windsor I*, 699 F.3d at 183; *see also* 2011 DOJ DOMA Letter, *supra* note 284, at 3 (concluding that “sexual orientation is a characteristic that is immutable” even though it “carries no visible badge”).

³⁶⁵ *Windsor I*, 699 F.3d at 183. The court went on to state,

Classifications based on alienage, illegitimacy, and national origin are all subject to heightened scrutiny . . . even though these characteristics do not declare themselves, and often may be disclosed or suppressed as a matter of preference. What seems to matter is whether the characteristic of the class calls down discrimination when it is manifest.

Id. (footnote omitted) (citation omitted).

³⁶⁶ *See id.* at 183–84 (requiring “no obvious badge” for immutable characteristics).

³⁶⁷ *Id.* at 184.

³⁶⁸ *See* Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of “Don’t Ask, Don’t Tell,”* 108 YALE L.J. 485, 500 (1998) (“By withholding protection from these classifications, the judiciary is subtly encouraging groups comprised by such classifications to assimilate by changing or hiding their defining characteristic.”).

To the extent that the visibility of a distinguishing characteristic “still carries some weight”³⁶⁹ as a matter of law, transgender people surely meet this test as a matter of fact. Like racial minorities, most transgender people share “obvious . . . characteristics that define [them] as a discrete group.”³⁷⁰ As the Eleventh Circuit observed in *Glenn*, “A person is defined as transgender precisely because . . . [his or her] appearance, behavior, or other personal characteristics differ from traditional gender norms.”³⁷¹ Simply put, transgender status is often quite obvious. Indeed, it is this visibility that makes transgender status “a quintessentially stigmatic condition that . . . engender[s] fear and discomfort in others.”³⁷²

d. Transgender Individuals Are a Minority and Lack Political Power

According to the Supreme Court, a classification may warrant heightened scrutiny if the group so classified is “a minority or politically powerless.”³⁷³ Because the Court has characterized this factor in disjunctive terms, at least one court has concluded that a showing that *either* the group is a minority *or* lacks political power will satisfy this factor.³⁷⁴ According to the Connecticut Supreme Court in *Kerrigan*, this disjunctive interpretation acknowledges that a group that is not “a true minority” may still warrant heightened protection if it “nonetheless is lacking in political power.”³⁷⁵

Regardless of the interpretation used, transgender people satisfy both parts of the analysis.³⁷⁶ They are clearly a minority; researchers estimate that transgender individuals make up approximately 0.3% of the adult population.³⁷⁷ Transgender people are also politically powerless, for two reasons.

³⁶⁹ FARRELL & CONROY, *supra* note 222, at 173.

³⁷⁰ *Bowen v. Gilliard*, 483 U.S. 587, 602 (U.S. 1987).

³⁷¹ *Glenn*, 663 F.3d at 1316.

³⁷² Jennifer L. Levi & Bennett H. Klein, *Pursuing Protection for Transgender People Through Disability Laws*, in TRANSGENDER RIGHTS 79, 89 (Paisley Currah at al. eds., 2006); see also *Adkins*, 2015 WL 7076956, at *3 (stating that “transgender status is a sufficiently discernible characteristic to define a discrete minority class”).

³⁷³ *Bowen*, 483 U.S. at 602. This reference to minority status and political powerlessness is drawn from the famous footnote 4 of *United States v. Carolene Products Co.*, in which the Court stated that “prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.” 304 U.S. 144, 153 n.4 (1938).

³⁷⁴ See *Kerrigan*, 957 A.2d at 439 (citing *Bowen*, 483 U.S. at 602; *Lyng v. Castillo*, 477 U.S. 635, 638 (1986)).

³⁷⁵ *Id.*

³⁷⁶ See *Adkins*, 2015 WL 7076956, at *4 (stating that “transgender people are a politically powerless minority”).

³⁷⁷ GARY J. GATES, WILLIAMS INST., HOW MANY PEOPLE ARE LESBIAN, GAY, BISEXUAL, AND TRANSGENDER? 1 (2011), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-How->

First, they are woefully underrepresented in government and in other positions of power. No acknowledged transgender person has ever been elected to the U.S. Congress, served as President, or served on the federal judiciary or the Supreme Court. This underrepresentation pervades all levels of local, state, and federal government.³⁷⁸ As the Second Circuit noted with respect to lesbian and gay people in *Windsor*, this lack of acknowledged transgender people in government is “attributable either to hostility that excludes them” or to a hostility that forces them to keep their gender identity “private.”³⁷⁹

Second, in addition to their exclusion from positions of power, transgender people are severely limited in their ability to attract the attention of lawmakers. The hostility transgender people experience undermines transgender advocacy, “suppress[ing] some degree of political activity by inhibiting the kind of open association that advances political agendas.”³⁸⁰ This lack of political power is epitomized by the exclusion of transgender people from four federal civil rights laws—the Fair Housing Act, Rehabilitation Act, ADA, and the ADAAA—for no reason other than moral animus.³⁸¹

Transgender people’s limited ability to attract the attention of lawmakers is also underscored by their lack of political power relative to lesbian, gay, and bisexual people. In 2011, for example, the U.S. Department of Defense repealed its “Don’t Ask Don’t Tell” policy for LGB people, but not for transgender people.³⁸² The armed forces can still refuse transgender applicants for admission, and the estimated 15,500 transgender service mem-

Many-People-LGBT-Apr-2011.pdf [https://perma.cc/9PPL-AWYF]. The number of transgender adults diagnosed with Gender Dysphoria is much smaller. According to the APA, between 0.005% to 0.014% of adult males are diagnosed with Gender Dysphoria, and between 0.002% to 0.003% of adult females are diagnosed with Gender Dysphoria. DSM-5, *supra* note 13, at 454.

³⁷⁸ See *Adkins*, 2015 WL 7076956, at *4 (“[T]here is no indication that there have ever been any transgender members of the United States Congress or the federal judiciary.”); see, e.g., Kristen Holmes, *Obama Appoints First Transgender White House Staff Member*, CNN POL. (Aug. 19, 2015), <http://www.cnn.com/2015/08/18/politics/transgender-white-house-obama-first-staff/> [https://perma.cc/S8J3-M6JS] (discussing first openly transgender White House staffer); Deborah Sontag, *Once a Pariah, Now a Judge: The Early Transgender Journey of Phyllis Frye*, N.Y. TIMES (Aug. 29, 2015), http://www.nytimes.com/2015/08/30/us/transgender-judge-phyllis-fryes-early-transformative-journey.html?_r=0 [https://perma.cc/D4DB-Z93T] (discussing first openly transgender state judge, Phyllis Frye); cf. *Frontiero*, 411 U.S. at 686 (plurality opinion) (discussing underrepresentation of women in positions of power).

³⁷⁹ *Windsor I*, 699 F.3d at 184–85.

³⁸⁰ See *id.* at 185 (discussing the inability of gays and lesbians to protect themselves “from the discriminatory wishes of the majoritarian public”).

³⁸¹ See *supra* notes 326–329 and accompanying text (discussing transgender exclusions).

³⁸² See Duffy, *supra* note 13, at 16–140 (discussing “Don’t Ask Don’t Tell” and its application to transgender service members).

bers in the U.S. military can still be discharged for being transgender.³⁸³ Additionally, in 2007, the “last-minute jitters [of] some Democrats” over the Employment-Non Discrimination Act’s (“ENDA”) trans-inclusive language prompted members of Congress to introduce a “compromise” bill that stripped out “gender identity,” fracturing the coalition of transgender and gay rights organizations in the process.³⁸⁴ Although the LGBT community now stands united behind a trans-inclusive ENDA, the compromise bill’s support in Congress, and among some LGB advocacy groups, demonstrates transgender people’s weak political position relative to the lesbian, gay, and bisexual community.³⁸⁵

Indeed, transgender people, unlike gays and lesbians, had no one to speak for them when Congress debated the ADA in 1989. As a result, the ADA excluded three medical conditions associated with transgender people—GID, transsexualism, and transvestism.³⁸⁶ Significantly, the ADA excludes these conditions not because they “are not impairments,” but rather because of the moral condemnation of two senior Senators, who believed GIDs and transsexualism were “sexual behavior disorders” undeserving of legal protection.³⁸⁷ In stark contrast to legislators’ understanding of homosexuality and bisexuality, Senator Armstrong, the chief proponent of the transgender exclusions, admitted that he was “simply not learned enough or well enough informed” to comprehend the very medical conditions he proposed excluding from the ADA.³⁸⁸ Senator Harkin’s statement that he was “not familiar” with many of Senator Armstrong’s proposed exclusions suggests a similar lack of familiarity with the transgender exclusions.³⁸⁹ The reason that senators were not familiar with these medical conditions was because there was literally no one advocating on behalf of the transgender community during the ADA debate. Transgender people lacked the power to

³⁸³ Emma Margolin, “Don’t Ask, Don’t Tell” Lives on for Transgender Troops, MSNBC (Oct. 22, 2014), <http://www.msnbc.com/msnbc/dont-ask-dont-tell-lives-transgender-troops> [https://perma.cc/2N2C-TLAP].

³⁸⁴ Matt Foreman, *A Non-Transgender-Inclusive ENDA? No Way!*, BILERICO PROJECT (Sept. 27, 2007), http://www.bilerico.com/2007/09/a_nontransgenderinclusive_enda_no_way.php [https://perma.cc/4ED3-T6C4].

³⁸⁵ See *id.* (discussing congressional support for stripping ENDA of protections for transgender people); see also Duffy, *supra* note 13, at 16-138 (discussing Human Rights Campaign’s support for trans-exclusive ENDA).

³⁸⁶ 42 U.S.C. § 12211(b).

³⁸⁷ See *supra* notes 138–202 and accompanying text (discussing ADA’s transgender exclusions).

³⁸⁸ 135 CONG. REC. 19,871 (1989) (statement of Sen. Armstrong), available at 1989 WL 183216.

³⁸⁹ 135 CONG. REC. 19,853 (1989) (statement of Sen. Harkin), available at 1989 WL 183115.

attract the attention of lawmakers, which resulted in the exclusion of various conditions that uniquely impact transgender people.

Although transgender people have achieved some impressive legal successes over the years,³⁹⁰ these advances in no way disqualify them from recognition as a suspect class. As the Connecticut Supreme Court stated in *Kerrigan*, “[t]he term political powerlessness . . . is clearly a misnomer.”³⁹¹ The Supreme Court does not require that people be “wholly lacking in political influence but, rather, that the discrimination to which they have been subjected has been so severe and so persistent that, as with race and sex discrimination, it is not likely to be remedied soon enough merely by resort to the majoritarian political process.”³⁹² Indeed, the Supreme Court recognized African-Americans as a suspect class, and women as a quasi-suspect class, despite important political successes for both of these groups in the years preceding these decisions.³⁹³ Significantly, the Court continues to apply heightened scrutiny to race and sex classifications “notwithstanding the great strides that [African-Americans and women] have made and continue to make in recent years in terms of political strength.”³⁹⁴

³⁹⁰ These include an end to laws criminalizing cross-dressing; passage of the Hate Crimes Act; protection of transgender people under the Violence Against Women’s Reauthorization Act of 2013; coverage of gender reassignment surgery under Medicare and, in some states, Medicaid; the amendment of birth certificate laws to permit a change of gender designation; and, according to various federal agencies and several circuit courts, Title VII protection from employment discrimination. See Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 54 (codified as amended in scattered sections of U.S.C. tits. 18, 22, 25, 42); *supra* notes 105–117 and accompanying text (discussing Medicare’s and Medicaid’s protection of transgender people); *infra* notes 399–435 and accompanying text (discussing Title VII’s protection of transgender people).

³⁹¹ *Kerrigan*, 957 A.2d at 444.

³⁹² *Id.* at 440; see also 2011 DOJ DOMA Letter, *supra* note 284, at 3 (“[W]hile the enactment of the Matthew Shepard Act and pending repeal of Don’t Ask, Don’t Tell indicate that the political process is not closed *entirely* to gay and lesbian people, that is not the standard by which the Court has judged ‘political powerlessness.’” (emphasis added)).

³⁹³ Compare *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964) (recognizing African-Americans as a suspect class and subjecting classification to “most rigid scrutiny”), with U.S. CONST. amends. XIII–XV (providing for the end of slavery, the right to due process and equal protection under the law, and the right to vote), and Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241–68 (codified at 42 U.S.C. § 2000d (2012)) (targeting racial discrimination), and Civil Rights Act of 1960, Pub. L. No. 86-449, 74 Stat. 86–92 (codified at 42 U.S.C. § 1974 (2012)) (same), and Civil Rights Act of 1957, Pub. L. No. 85-315, 71 Stat. 634–38 (codified at 42 U.S.C. § 1971 (2012)) (same); compare also *Craig*, 429 U.S. at 197 (applying heightened scrutiny to classifications based on gender), with 2011 DOJ DOMA Letter, *supra* note 284, at 3 (discussing constitutional and statutory protections for women, including passage of the Nineteenth Amendment and protection from sex discrimination under Title VII, in existence at time the Supreme Court recognized women as quasi-suspect class).

³⁹⁴ *Kerrigan*, 957 A.2d at 440–41.

Furthermore, despite some of the gains in recent years, it is unlikely that the democratic process will rectify the problem of discrimination against transgender people anytime soon.³⁹⁵ As courts have noted with respect to gays and lesbians, there are many people in this country with sincere religious beliefs against homosexuality, and this sentiment has a strong influence over policymakers.³⁹⁶ The enduring moral disapprobation aimed at gay and lesbian people applies equally to transgender people. This is because most opponents conflate sexual orientation with gender identity.³⁹⁷ Among those opponents who understand the difference between sexual orientation and gender identity, one would be hard-pressed to find a person who morally disapproves of lesbians and gay people but approves of transgender people. Simply put, those who disapprove of lesbians and gay people also disapprove of transgender people; they view both with equal disdain.³⁹⁸

2. A Sex-Based Classification: Heightened Scrutiny Based on Gender

Although the Supreme Court's four-factor test decidedly points toward heightened scrutiny of classifications based on transgender status, heightened scrutiny is warranted for another reason. Classifications based on transgender status are necessarily based on sex—a type of classification the Supreme Court has long subjected to intermediate scrutiny.³⁹⁹ This subsec-

³⁹⁵ *Id.* at 461.

³⁹⁶ *See id.* at 444–45.

[M]any people . . . sincerely believe that homosexuality is morally reprehensible. Indeed, homosexuality is contrary to the teachings of more than a few religions. . . . Feelings and beliefs predicated on such profound religious and moral principles are likely to be enduring, and persons and groups adhering to those views undoubtedly will continue to exert influence over public policy makers.

Id. (footnote omitted) (citations omitted); *see also Lawrence*, 539 U.S. at 571 (“[F]or centuries there have been powerful voices to condemn homosexual conduct as immoral. The condemnation [of homosexuality] has been shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family.”).

³⁹⁷ A case in point is the statement of the Moral Majority, the late Jerry Falwell's conservative lobbying firm, which characterized “homosexuals” and “transvestites” as sinners, and laws that would protect them as “perverted.” *See supra* note 129 and accompanying text (discussing the Moral Majority). The Traditional Values Coalition, another conservative lobbying group, likewise characterizes transgender civil rights as part of “the homosexual agenda,” and “transgender[]” as a “sexual orientation.” *See, e.g., TRADITIONAL VALUES COALITION, ENDA HURTS KIDS: THE IMPACT ON CLASSROOMS* 6 (n.d.), http://www.dawnstefanowicz.org/documents/ENDA_HURTS_KIDS.pdf [<https://perma.cc/GA89-CFYW>] (characterizing transgender civil rights as part of “the homosexual agenda”).

³⁹⁸ *See supra* note 129 and accompanying text (discussing the Moral Majority).

³⁹⁹ *See Boren*, 429 U.S. at 197 (subjecting classification based on gender to intermediate scrutiny).

tion argues that transgender classifications are sex-based classifications for two reasons: transgender people's nonconformance with sex stereotypes, and, more straightforwardly, transgender people's identification with a sex other than their birth sex.

a. Nonconformance with Sex Stereotypes

First, transgender people do not conform to stereotypes associated with their assigned sex at birth and the sex with which they identify.⁴⁰⁰ For example, a male-to-female transgender person who wears a dress, and a female-to-male transgender person who undergoes surgery to have his breasts removed, defy stereotypical assumptions about their birth sex—i.e., that men do not typically wear dresses, and that women do not typically remove their breasts. They may also defy stereotypical assumptions about the sex with which they identify—i.e., that women do not typically require ongoing electrolysis to remove facial hair, and that men do not typically undergo mastectomies. Therefore, transgender classifications necessarily implicate stereotypical assumptions about sex.⁴⁰¹

For over fifteen years, courts have recognized with “near-total uniformity” that transgender discrimination is sex discrimination based on sex stereotyping.⁴⁰² Recognition of this “sex stereotyping” theory of transgender discrimination is the result of two Supreme Court decisions. In 1989, in the seminal case of *Price Waterhouse v. Hopkins*, the Supreme Court held that Title VII prohibits discrimination based not only on sex—that is, a person being a man or a woman—but also on “sex stereotypes,” that is, stereotypes about how men and women should express themselves.⁴⁰³ Then, in 1998, in *Oncale v. Sundowner Offshore Services*, the Court held that Title VII's prohibition extended beyond discrimination by men against women—the “principal evil” that originally concerned Congress—to discrimination by men against men.⁴⁰⁴ The precedent set by the

⁴⁰⁰ See *Price Waterhouse v. Coopers*, 490 U.S. 228, 256 (1998) (holding that Title VII's prohibition on “sex” discrimination includes discrimination based on “sex stereotypes”), *superseded by statute on other grounds*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended at 42 U.S.C. § 1981 (2012)), *as recognized* in *Burrage v. United States*, 134 S. Ct. 881 (2014).

⁴⁰¹ See *id.*

⁴⁰² *Glenn*, 663 F.3d at 1317–18 & n.5.

⁴⁰³ See *Price Waterhouse*, 490 U.S. at 251 (“In forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.”).

⁴⁰⁴ 523 U.S. 75, 79 (1998) (“[S]tatutory prohibitions often go beyond the principle evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principle concerns of our legislators by which we are governed.”).

combination of *Price Waterhouse* and *Oncale* has led four circuit courts and many district courts to find that transgender discrimination is sex discrimination based on transgender people's nonconformance with sex stereotypes.⁴⁰⁵

b. Identification with Other Sex

A second reason that transgender classifications are necessarily sex-based classifications derives not from stereotypical assumptions about how men and women should express themselves, but rather from the sex with which men and women identify. Transgender people, by definition, have gender identities that do not align with their assigned sex at birth—for example, a person born with a male anatomy who identifies as a woman.⁴⁰⁶ Therefore, transgender classifications necessarily implicate sex: the assigned sex with which the transgender person does not identify, and another sex with which the person does identify.⁴⁰⁷

Federal agencies have espoused this view. As the Equal Employment Opportunity Commission (“EEOC”) stated in its groundbreaking 2012 decision in *Macy v. Department of Justice* and recently reiterated in its 2015 ruling in *Lusardi v. Department of Army*, “discrimination against a transgender individual because that person is transgender is, by definition, discrimination ‘based on . . . sex.’”⁴⁰⁸ The Department of Justice has also adopted this “straightforward” view, stating that sex discrimination “encompasses discrimination based on gender identity, including transgender status” and “includes discrimination because an employee’s gender identification is as a member of a particular sex, or because the employee is transi-

⁴⁰⁵ See Duffy, *supra* note 13, at 14-29 to 14-41 (citing cases).

⁴⁰⁶ See *supra* note 42 and accompanying text (discussing meaning of transgender).

⁴⁰⁷ See *infra* notes 408–411 and accompanying text (citing cases).

⁴⁰⁸ *Lusardi v. McHugh*, E.E.O.C. Doc. No. 0120133395, 2015 WL 1607756, at *7 (Apr. 1, 2015); see also *Macy*, 2012 WL 1435995, at *7.

When an employer discriminates against someone because the person is transgender, the employer has engaged in disparate treatment “related to the sex of the victim.” This is true regardless of whether an employer discriminates against an employee because the individual has expressed his or her gender in a non-stereotypical fashion, because the employer is uncomfortable with the fact that the person has transitioned or is in the process of transitioning from one gender to another, or because the employer simply does not like that the person is identifying as a transgender person.

Macy, 2012 WL 1435995, at *7 (citation omitted).

tioning, or has transitioned, to another sex.”⁴⁰⁹ Accordingly, the Department “no longer assert[s] that Title VII’s prohibition against discrimination based on sex does not encompass gender identity *per se* (including transgender discrimination).”⁴¹⁰ Several recent cases likewise support this straightforward theory of transgender discrimination as discrimination based on sex.⁴¹¹

c. Transgender Classifications Are Sex-Based Classifications

No matter which theory one adopts, transgender classifications are plainly sex-based classifications. At least two circuit courts have determined that government discrimination against transgender people is sex discrimination in violation of the Equal Protection Clause. For example, in 2004, in *Smith v. City of Salem*, the U.S. Court of Appeals for the Sixth Circuit held that a transgender firefighter, who was suspended after advising her employer that she was in the process of transitioning, stated a claim of sex discrimination under Title VII and the Equal Protection Clause.⁴¹² And in 2011, in *Glenn*, the Eleventh Circuit followed suit, affirming the trial court’s grant of summary judgment in favor of a transgender employee who was terminated from her job after informing her employer that she intended to transition.⁴¹³ According to the Eleventh Circuit, “A person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes. The very acts that define transgender people as transgender are those that contradict stereotypes of gender-appropriate appearance and behavior.”⁴¹⁴ Accordingly, “discrimination against a transgender individual because of her gender-nonconformity is sex

⁴⁰⁹ Memorandum from U.S. Attorney Gen. to U.S. Attorneys 2 (Dec. 15, 2014), <http://www.justice.gov/file/188671/download> [<https://perma.cc/38SM-DWLW>] [hereinafter 2014 DOJ Transgender Claims Letter].

⁴¹⁰ *Id.*

⁴¹¹ See, e.g., *Smith v. City of Salem*, 369 F.3d 912, 921–22 (6th Cir.), amended and superseded by 378 F.3d 566 (6th Cir. 2004) (concluding that “[e]ven if [transgender plaintiff] had alleged discrimination based only on his self-identification as a transsexual—as opposed to his specific appearance and behavior—this claim too is actionable pursuant to Title VII”); *Schroer*, 577 F. Supp. 2d at 295 (holding that refusal to hire transgender employee after she advised her employer “that she planned to change her anatomical sex by undergoing sex reassignment surgery was literally sex discrimination ‘because of . . . sex’”); *Ulane v. E. Airlines, Inc.*, 581 F. Supp. 821 (N.D. Ill. 1983) (“[T]he term, ‘sex,’ as used in any scientific sense and as used in [Title VII] can be and should be reasonably interpreted to include among its denotations the question of sexual identity and that, therefore, transsexuals are protected by Title VII.”), *rev’d*, 742 F.2d 1081 (7th Cir. 1984).

⁴¹² 378 F.3d at 577.

⁴¹³ *Glenn*, 663 F.3d at 1316.

⁴¹⁴ *Id.*

discrimination . . . that is subject to heightened scrutiny under the Equal Protection Clause.”⁴¹⁵

District courts have similarly found transgender discrimination to be sex discrimination under the Equal Protection Clause. In 2002, in *Barnes v. City of Cincinnati*, the U.S. District Court for the Southern District of Ohio entered judgment after a jury trial in favor of a transgender police officer who was demoted after undergoing transition.⁴¹⁶ According to the court, “excluding transsexuals as a class . . . [in the] interest of promoting only competent and capable police officers” is sex discrimination in violation of Title VII and the Equal Protection Clause.⁴¹⁷ In 2011, in *Wilson v. Phoenix House*, the U.S. District Court for the Southern District of New York held that a transgender female inmate stated a claim for violation of the Equal Protection Clause on the basis of sex when the in-patient substance abuse treatment center in which she was confined required her to sleep in male facilities and use male bathrooms, denied her participation in a female support group, and discharged her to state prison when an alternative placement could not be found.⁴¹⁸ And in 2015, in *Norsworthy*, the U.S. District Court for the Northern District of California held that a transgender inmate who was denied sex reassignment surgery stated a claim of sex discrimination under the Equal Protection Clause.⁴¹⁹ Noting that “transgender persons meet the indicia of a ‘suspect’ or ‘quasi-suspect classification’ identified by the Supreme Court,” the court concluded that “discrimination against transgender individuals is a form of gender-based discrimination subject to intermediate scrutiny.”⁴²⁰

Notwithstanding the above cases, most transgender discrimination cases are resolved under Title VII or related antidiscrimination statutes,⁴²¹ not the Equal Protection Clause.⁴²² This is because the Equal Protection Clause

⁴¹⁵ *Id.* at 1319.

⁴¹⁶ 2002 U.S. Dist. LEXIS 26207, at *30.

⁴¹⁷ *Id.* Because the Sixth Circuit affirmed the district court’s ruling under Title VII, it did not reach the equal protection issue. *Barnes*, 401 F.3d at 741.

⁴¹⁸ No. 10-civ-7364-DLC, 2011 WL 3273179, at *1–3 (S.D.N.Y. Aug. 1, 2011).

⁴¹⁹ *Norsworthy*, 2015 WL 1478264, at *10.

⁴²⁰ *Id.*; see also *Cummings v. Greater Cleveland Reg’l Transit Auth.*, No. 1:14-CV-01729, 2015 WL 410867, at *4 (N.D. Ohio Jan. 29, 2015) (holding that transgender employee stated claim that she was denied equal pay and a series of promotions because of gender identity in violation of the Equal Protection Clause).

⁴²¹ See, e.g., *Rosa v. Park W. Bank & Trust Co.*, 214 F.3d 213, 216 (1st Cir. 2000) (discussing Equal Credit Opportunity Act); *Schwenk v. Hartford*, 204 F.3d 1187, 1205 (9th Cir. 2000) (discussing Gender Motivated Violence Act); *Schroer*, 577 F. Supp. 2d at 295 (discussing Title VII); *Miles v. N. Y. Univ.*, 979 F. Supp. 248, 250 (S.D.N.Y. 1997) (discussing Title IX).

⁴²² See *Duffy*, *supra* note 13, at 15-3 (discussing the difference between Title VII and constitutional claims).

does not apply in all discrimination cases—such as where the claim is brought by a federal employee⁴²³ or private employee,⁴²⁴ or where the court avoids reaching the constitutional question by resolving the case through statutory interpretation.⁴²⁵ Nevertheless, statutory sex discrimination cases, like cases decided under the Equal Protection Clause, overwhelmingly hold that discrimination against transgender people is sex discrimination.⁴²⁶ This is significant, because the showing a plaintiff must make to recover under antidiscrimination statutes mirrors the showing under the Equal Protection Clause and, therefore, these statutory sex discrimination cases inform the equal protection analysis.⁴²⁷ A flood of federal agencies has likewise interpreted transgender discrimination to be sex discrimination under Title VII and related antidiscrimination statutes, thus providing further support for like treatment of transgender discrimination under the Equal Protection Clause.⁴²⁸

Despite widespread recognition by courts that sex discrimination includes transgender discrimination under the Equal Protection Clause and related antidiscrimination statutes, there are some outlier cases holding to the contrary. Nearly all of these are easily explained because they are old

⁴²³ According to the U.S. Supreme Court, Title VII “provides the exclusive judicial remedy for claims of discrimination in federal employment.” *Brown v. Gen. Servs. Admin.*, 425 U.S. 820, 835 (1976).

⁴²⁴ Private employers are not state actors and are therefore not subject to the Equal Protection Clause. *See* U.S. CONST. amend. XIV.

⁴²⁵ *See Int’l Ass’n of Machinists v. Street*, 367 U.S. 740, 749 (1961) (“Federal statutes are to be so construed as to avoid serious doubt of their constitutionality.”).

⁴²⁶ *See supra* notes 402–405, 408–422 and accompanying text (citing cases holding that transgender discrimination is sex discrimination in violation of Title VII and other statutes).

⁴²⁷ *See, e.g., Glenn*, 663 F.3d at 1316–18 (relying on Title VII case law in holding that discrimination against transgender employee was sex discrimination in violation of Equal Protection Clause); *accord Smith*, 378 F.3d at 577; *see also* Duffy, *supra* note 13, at 15–5 (“Constitutional discrimination claims by LGBT employees often rely significantly on case law interpreting federal statutes that prohibit sex discrimination, including Title VII.”).

⁴²⁸ *E.g., Macy*, 2012 WL 1435995, at *5–6 (EEOC case concluding that transgender discrimination is sex discrimination in violation of Title VII); OFFICE OF FED. CONTRACT COMPLIANCE PROGRAMS, U.S. DEP’T OF LABOR, DIRECTIVE 2014-02 (2014), http://www.dol.gov/ofccp/regs/compliance/directives/dir2014_02.html [<https://perma.cc/PJ2C-KNF6>] (discussing Department of Labor support of same); 2014 DOJ Transgender Claims Letter, *supra* note 409, at 1–2 (representing Department of Justice support of same); *see also* OFFICE FOR CIVIL RIGHTS, U.S. DEP’T OF EDUC., QUESTIONS AND ANSWERS ON TITLE IX AND SEXUAL VIOLENCE 5 (2014), <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf> [<https://perma.cc/X7HM-QMVX>] (“Title IX’s sex discrimination prohibition extends to claims of discrimination based on gender identity or failure to conform to stereotypical notions of masculinity or femininity . . .”); U.S. OFFICE OF SPECIAL COUNSEL, OSC FILE NO. MA-11-3846, REPORT OF PROHIBITED PERSONNEL PRACTICE 2 (2014), https://osc.gov/Resources/2014-08-28_Lusardi_PPP_Report.pdf [<https://perma.cc/4SMU-L8L2>] (concluding that discrimination against transgender employee “likely constitute[s] a [prohibited personnel practice] of sex discrimination”).

cases premised on reasoning that has been “eviscerated” by *Price Waterhouse* and *Oncale*.⁴²⁹ Prior to 2000, courts routinely held that transgender discrimination was not sex discrimination because Congress had “only the traditional notions of ‘sex’ in mind”—that is, discrimination against non-transgender males and non-transgender females.⁴³⁰ Since that time, four circuit courts and a number of district courts throughout the circuits have definitively held that transgender discrimination *is* sex discrimination,⁴³¹ with many noting that old cases to the contrary have been “overruled by the logic and language” of the Supreme Court’s decisions in *Price Waterhouse* and *Oncale*.⁴³² Several other circuit courts have implied as much,⁴³³ and absolutely no circuit court since *Oncale* has held that transgender discrimination is *not* sex discrimination.⁴³⁴ Accordingly, the ever-dwindling number of post-2000 district court cases that have declined to extend Title VII to transgender discrimination⁴³⁵ are part of an old road that is rapidly fading.

3. No Heightened Scrutiny: Rational Basis Review

If a challenger cannot persuade a court that the ADA’s transgender exclusions warrant heightened scrutiny (because transgender people are

⁴²⁹ See *Glenn*, 663 F.3d at 1318 n.5.

⁴³⁰ See, e.g., *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 6612 (9th Cir. 1977) (affirming district court’s determination that “Title VII does not embrace transsexual discrimination”), *overruled by Schwenk*, 204 F.3d 1187; *Ulane*, 742 F.2d at 1085 (holding that transsexuals “do not enjoy Title VII coverage”); *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 750 (8th Cir. 1982) (per curiam) (holding that “the legislative history does not show any intention to include transsexualism in Title VII”).

⁴³¹ See *Glenn*, 663 F.3d at 1317–18 n.5 (citing cases).

⁴³² *Id.* (“[S]ince the decision in *Price Waterhouse*, federal courts have recognized with near-total uniformity that ‘the approach in *Holloway*, *Sommers*, and *Ulane* . . . has been eviscerated’ by *Price Waterhouse*’s holding . . .” (quoting *Smith*, 378 F.3d at 573)); accord *Schwenk*, 204 F.3d at 1201; *Tronetti v. TLC Healthnet Lakeshore Hosp.*, No. 03-CV-0375E(SC), 2003 WL 22757935, at *4 (W.D.N.Y. Sept. 26, 2003).

⁴³³ See *Hunter v. United Parcel Serv., Inc.*, 697 F.3d 697, 704 (8th Cir. 2012) (implying that “transgendered or gender non-conforming individuals” are a “protected class” under Title VII, but affirming grant of summary judgment for employer because transgender employee failed to establish that he was “transgender or gender non-conforming”); *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1224 (10th Cir. 2007) (citing *Smith*, *Barnes*, *Rosa*, and *Schwenk* for proposition that Title VII applies to transgender discrimination and “assum[ing], without deciding, that such a claim is available” to transgender plaintiffs, but affirming grant of summary judgment for employer based on employer’s legitimate, non-discriminatory reason for terminating transgender employee).

⁴³⁴ See *Duffy*, *supra* note 13, at 14–69 to 14–77 (discussing *Oncale*).

⁴³⁵ See *Sweet v. Mulberry Lutheran Home*, No. IP02-0320-C-H/K, 2003 WL 21525058, at *2, *6 (S.D. Ind. June 17, 2003) (relying on *Ulane* in holding that transgender discrimination is not sex discrimination under Title VII); *Oiler v. Winn-Dixie La., Inc.*, No. 00-3114, 2002 WL 31098541, at *5–6 (E.D. La. Sept. 16, 2002) (declining to extend protection under Title VII to discrimination on basis of GID).

deemed not to be a new suspect/quasi-suspect class, and, alternatively, because transgender classifications are deemed not to be sex-based classifications), the exclusions will receive the default level of scrutiny: rational basis review.⁴³⁶ Although the rational basis test is, generally speaking, “enormously deferential to the government,”⁴³⁷ it is unlikely that the ADA’s transgender exclusions can satisfy even this minimal level of scrutiny because of the moral animus underlying the exclusions—a topic to which this Article now turns.

D. Constitutionally Impermissible Discrimination: A Bare Desire to Harm

No matter what level of scrutiny is applied—“strict,” “intermediate,” or “rational basis”—the ADA’s transgender exclusions are unconstitutional. Rooted in moral animus, motivated by nothing more than a bare congressional desire to harm transgender people, they are devoid of any compelling, important, or legitimate governmental interest. Direct evidence of animus in the ADA’s legislative history, together with evidence supporting an inference of animus, drawn from the exclusions’ structure and practical effect, confirm this poisoned purpose.

As in *Moreno*, *Cleburne*, and *Windsor*, moral animus is explicit in the ADA’s legislative history.⁴³⁸ Senators Armstrong, Helms, and Rudman repeatedly invoked immorality as the justification for the transgender exclusions, decrying the ADA’s coverage of “sexually deviant behavior.”⁴³⁹ Senator Helms’s moral diatribe against the Civil Rights Restoration Act sixteen months prior to the ADA’s passage, in which he advocated for private employers’ right to “mak[e] employment decisions based on moral qualifications,”⁴⁴⁰ and his exclusion of “transvestites” from the Fair Housing Act just one year prior to the ADA’s passage, likewise demonstrate the moral animus motivating the transgender exclusions.

In addition to the direct evidence of moral animus in the ADA’s legislative history, indirect evidence of moral animus abounds in the structure of the transgender exclusions. Three structural attributes, in particular, evince such animus. First, as in *Romer* and *Windsor*, the ADA disadvantages a conspicuously narrow group of people.⁴⁴¹ Of the literally hundreds of medical conditions contained in the DSM-III-R, the ADA singles out just eleven—

⁴³⁶ See *supra* notes 224–266 and accompanying text (discussing rational basis review).

⁴³⁷ CHEMERINSKY, *supra* note 214, at 553.

⁴³⁸ See *supra* notes 239–262 and accompanying text (discussing cases).

⁴³⁹ See *supra* notes 141–187 and accompanying text (discussing Senate floor debate of ADA).

⁴⁴⁰ 134 CONG. REC. 4235 (1988) (statement of Sen. Helms), available at 1988 WL 1084657.

⁴⁴¹ See *supra* notes 245–249, 254–262 and accompanying text (discussing *Romer* and *Windsor II*).

including transvestism, GID, and transsexualism—for exclusion from the ADA.⁴⁴² Significantly, all eleven are widely perceived to involve a moral failing of some kind. Indeed, most of the exclusions (but not the transgender exclusions) pertain to conduct deemed so depraved that it is criminalized.

Second, the haphazard way in which transvestism, GID, and transsexualism are excluded—namely, the ADA’s erroneous classification of GID and transsexualism as “sexual behavior disorders,” the ADA’s superfluous exclusion of the GID subtype, “transsexualism,” and the ADA’s redundant exclusion of “transvestites” and “transvestism” in two different sections of the statute—further supports the moral animus underlying the transgender exclusions.⁴⁴³ In their frenzy to exclude any and all medical conditions associated with transgender people, Senators Armstrong and Helms completely disregarded medical accuracy and internal consistency in the ADA.

Third, as in *Romer* and *Windsor*, the sheer breadth of the ADA’s deprivation of rights, and the unusual character of the deprivation, raises an inference of animus.⁴⁴⁴ The ADA does not simply make it more difficult for people with GID, transsexualism, and transvestism to show that the law covers them.⁴⁴⁵ Rather, the ADA makes it *impossible* by completely excluding from coverage people with these conditions, as well as those who formerly had or are falsely perceived as having these conditions.⁴⁴⁶ Furthermore, the transgender exclusions do not merely exclude transgender people from bringing claims in the employment context; rather, they exclude transgender people from bringing *any* claims under the ADA, including claims involving discrimination in public accommodations and government benefits and services. In addition to the breadth of the exclusions, their unusual character also points strongly toward animus.⁴⁴⁷ Civil rights laws generally do not exclude narrow groups of people. Instead they generally protect everyone.⁴⁴⁸ The ADA’s exclusion of specific mental impairments is therefore completely at odds with civil rights laws. Except for the Fair Housing Act’s exclusion of “transvestites” in 1988, the ADA’s transgender exclusions are

⁴⁴² See 42 U.S.C. § 12211(b) (excluding transvestism, GID, and transsexualism).

⁴⁴³ See *supra* notes 165–167, 194–199 and accompanying text (discussing treatment of ADA exclusions in Congress).

⁴⁴⁴ See *supra* notes 244–249, 254–262 and accompanying text (discussing inferences of animus in *Romer* and *Windsor*).

⁴⁴⁵ For example, the ADA does not increase transgender people’s burden of proving that they are substantially limited in a major life activity, qualified, or not a direct threat.

⁴⁴⁶ See 42 U.S.C. § 12211(b).

⁴⁴⁷ See *supra* notes 244–249, 254–262 and accompanying text (discussing inferences of animus in *Romer* and *Windsor II*).

⁴⁴⁸ See Barry, *supra* note 159, at 17 (discussing Senator Armstrong’s mischaracterization of civil rights laws and stating that they generally “protect all races, including white people; all religions, including atheists; and all sexes, including men”).

so “exceptional,” “unprecedented,” “unusual,” and “rare,” that they appear to have been “drawn for the purpose of disadvantaging the group burdened by the law.”⁴⁴⁹

An inference of animus is also suggested by the practical effect of the transgender exclusions, which amounts to a one-two punch for transgender people.⁴⁵⁰ First, the exclusions bar transgender people from securing the antidiscrimination protections provided by the ADA, including protection from discrimination in the workplace, in the receipt of government benefits and services, and in access to public accommodations.⁴⁵¹ Second, the ADA’s exclusion of conditions associated with transgender people, together with a small handful of other conditions deemed immoral, also sends a strong symbolic message: transgender people have no civil rights worthy of respect.⁴⁵² By maintaining the transgender exclusions, the ADA therefore “imposes a stigma”⁴⁵³ on transgender people by marking them as undeserving of civil rights protection, which is starkly at odds with the goals of the ADA.⁴⁵⁴

Under heightened scrutiny, the equal protection analysis would end here. The transgender exclusions fail because moral animus is plainly insufficient to constitute a compelling or necessary governmental interest.⁴⁵⁵ Nevertheless, the ADA’s transgender exclusions still fail even under rational basis review. Given the overwhelming evidence of moral animus underlying the transgender exclusions, the demanding variety of rational basis review would apply.⁴⁵⁶ Under demanding rational basis, animus is an evidentiary

⁴⁴⁹ *Romer*, 517 U.S. at 632–33, 635.

⁴⁵⁰ See *supra* notes 244–266 and accompanying text (discussing Supreme Court’s inference of animus based on practical effect of challenged law in *Romer*, *Lawrence*, *Windsor II*, and *Obergefell*).

⁴⁵¹ 42 U.S.C. § 12211(b).

⁴⁵² The same negative associations attached to people living with HIV/AIDS in the 1980s and 1990s. See *Cain v. Hyatt*, 734 F. Supp. 671, 680 (E.D. Pa. 1990) (“The particular associations AIDS shares with sexual fault, drug use, social disorder, and with racial minorities, the poor, and other historically disenfranchised groups accentuates the tendency to visit condemnation upon its victims.”).

⁴⁵³ *United States v. Windsor (Windsor II)*, 133 S. Ct. 2675, 2693; see also *Obergefell*, 135 S. Ct. at 2590, 2602 (citing *Windsor II* and discussing the “stigma” imposed on same-sex couples and their children by laws prohibiting same-sex marriage); *Lawrence*, 539 U.S. at 575 (discussing the “stigma” imposed by same-sex sodomy statutes).

⁴⁵⁴ 42 U.S.C. § 12101(a)(6) (2012); *Sch. Bd. of Nassau Cnty.*, 480 U.S. at 284; see also 42 U.S.C. § 12101(a)(2) (stating that “society has tended to isolate and segregate individuals with disabilities”).

⁴⁵⁵ See *Pollvogt*, *supra* note 24, at 900 (“Because laws based on animus cannot survive rational basis review, by definition neither can they survive intermediate or strict scrutiny.”).

⁴⁵⁶ See *supra* notes 224–266 and accompanying text (discussing the more demanding form of rational basis review).

trump card that discredits other “legitimate” explanations as mere pretext.⁴⁵⁷ As the Court stated in *Romer*, a classification grounded in moral animus inflicts “immediate, continuing, and real injuries that outrun and belie *any* legitimate justifications that may be claimed for it.”⁴⁵⁸ And as the Court stated in *Windsor*, “no legitimate purpose overcomes the purpose and effect to disparage and to injure.”⁴⁵⁹

Accordingly, Senator Armstrong’s suggestion that the transgender exclusions were motivated, in part, by a desire to shield private employers from a flood of “egregious” lawsuits plainly fails to overcome the powerful evidence of moral animus underlying the exclusion.⁴⁶⁰ His suggestion is also completely unfounded; there is nothing inherently “egregious” or otherwise frivolous about transgender people claiming protection under disability antidiscrimination law, nor is there anything to suggest that permitting such claims would lead to a flood of lawsuits—especially given the small number of people with GID, transsexualism, and transvestism.⁴⁶¹

IV. BLATT’S IMPLICATIONS

Ms. Blatt’s equal protection challenge has broad legal and theoretical implications. From a legal standpoint, if Ms. Blatt’s challenge prevails, it will provide antidiscrimination protection to many transgender people under the ADA. Because the ADA is a “comprehensive” civil rights law,⁴⁶² it will extend protection beyond the workplace to many other areas, such as public accommodations and government benefits and services, in which transgender people experience discrimination. And, unlike other civil rights laws, the ADA also requires reasonable accommodations,⁴⁶³ which, for transgender workers, might include modifying policies governing restroom usage and dressing and grooming standards, as well as modifying a person’s work schedule or granting a person leave to seek counseling, hormone therapy, electrolysis, reassignment surgery, or other treatment.⁴⁶⁴

⁴⁵⁷ See *supra* notes 224–266 and accompanying text (same).

⁴⁵⁸ *Romer*, 517 U.S. at 635 (emphasis added).

⁴⁵⁹ *Windsor II*, 133 S. Ct. at 2696 (emphasis added).

⁴⁶⁰ See *supra* notes 169–187 and accompanying text (discussing Senator Armstrong’s “flood-of-egregious-litigation” argument).

⁴⁶¹ See DSM-5, *supra* note 13, at 454 (noting that only between 0.005% to 0.014% of adult males and 0.002% to 0.003% of adult females are diagnosed with Gender Dysphoria).

⁴⁶² 42 U.S.C. § 12101(b) (2012).

⁴⁶³ 42 U.S.C. § 12112(b)(5)(A) (2012).

⁴⁶⁴ 42 U.S.C. § 12111(9)(A)–(B) (2012). See generally U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM’N, ENFORCEMENT GUIDANCE: REASONABLE ACCOMMODATION AND UNDUE HARDSHIP UNDER THE AMERICANS WITH DISABILITIES ACT (2002), <http://www.eeoc.gov/policy/>

Furthermore, Ms. Blatt's challenge, if successful, will almost certainly extend disability rights protection to transgender people under the Rehabilitation Act, which contains an identical exclusion, and, possibly, to the Fair Housing Act, which contains a similar exclusion.⁴⁶⁵ It will also be strong persuasive precedent for numerous state disability antidiscrimination laws with transgender exclusions that mirror the ADA.⁴⁶⁶

More broadly, by securing legal recognition under the ADA and other disability antidiscrimination laws, Ms. Blatt's argument will achieve something else: it will eliminate a source of blatant, legally-sanctioned prejudice that has served for twenty-five years to stigmatize transgender people as unworthy of disability rights. In so doing, it will make good on the ADA's promise to break down "the prejudiced attitudes or ignorance of others" and the "inferior status" that people with disabilities occupy in our society.⁴⁶⁷ Indeed, in a memorandum to then-Attorney General Eric Holder supporting Ms. Blatt's equal protection challenge, the representatives of five national transgender rights organizations confirmed that the transgender community "stands united" against the ADA's "animus-based" transgender exclusions, which serve to exacerbate the stigma against transgender people.⁴⁶⁸

Additionally, a successful equal protection challenge will reach far beyond disability rights, setting the stage for challenges to *all* laws that single out transgender people for disparate treatment. This includes current Department of Defense policies that prohibit military service on the basis of "transsexualism" and "transvestism,"⁴⁶⁹ sundry federal regulations import-

docs/accommodation.html#leave [https://perma.cc/Y4AM-6CWC] (discussing types of reasonable accommodations under the ADA).

⁴⁶⁵ See *supra* notes 131–137, 202 and accompanying text (discussing the Fair Housing and Rehabilitation Acts).

⁴⁶⁶ See *supra* notes 99–104 and accompanying text (discussing state antidiscrimination laws).

⁴⁶⁷ See *supra* note 332 and accompanying text (quoting *Sch. Bd. of Nassau Cnty. v. Arline*, 480 U.S. 273, 284 (1987), and the ADA).

⁴⁶⁸ Memorandum from Jennifer Levi, Dir., Transgender Rights Project, Gay & Lesbian Advocates & Defs. et al., to Eric Holder, Jr., U.S. Attorney Gen., Dep't of Justice et al. 8 (Jan. 21, 2015) (on file with authors).

⁴⁶⁹ See, e.g., 32 C.F.R. pt. 154 app. D (1987) (stating that significant adverse information in background investigation includes "[a]ll indications of moral turpitude, heterosexual promiscuity, aberrant, deviant, or bizarre sexual conduct or behavior, transvestitism, transsexualism, indecent exposure, rape, contributing to the delinquency of a minor, child molestation, wife-swapping, window-peeping, and similar situations from whatever source"); DEP'T OF DEFENSE, INSTRUCTION, NO. 6130.03, MEDICAL STANDARDS FOR APPOINTMENT, ENLISTMENT, OR INDUCTION IN THE MILITARY SERVICES 48 (2010), available at <http://www.dtic.mil/whs/directives/cores/pdf/613003p.pdf> [https://perma.cc/BL3V-U6EP] (prohibiting military service based on "current or history of psychosexual conditions . . . including but not limited to transsexualism, exhibitionism, transvestism, voyeurism, and other paraphilias"); Duffy, *supra* note 13, at 16–140 (discussing "Don't Ask Don't Tell"). The Pentagon recently announced its intention to revise its policies prohibiting transgender people from serving in the military. Matthew Rosenberg, *Pentagon Moves to*

ing the ADA's transgender exclusions,⁴⁷⁰ and state laws that inappropriately deny medical coverage for transgender healthcare.⁴⁷¹

A successful challenge to the ADA's transgender exclusions would therefore provide an important new break for transgender equality and for equality law more generally. It would be a crucial first step toward accomplishing for transgender people what *Romer*, *Lawrence*, *Windsor*, and *Obergefell* did for gay, lesbian, and bisexual people: constitutional recognition of their equality. Moreover, a successful *Blatt* challenge—invoking either heightened scrutiny or demanding rational basis—would reaffirm equality law's expansive embrace of subordinated groups and its prohibition of moral animus as a justification for exclusion, and would temper the “pluralism anxiety” of courts resistant to the extension of equal protection doctrine.⁴⁷² On the heels of marriage equality, a successful ADA challenge would also underscore the continued salience of group-based identity politics for securing constitutional rights.⁴⁷³

At a theoretical level, Ms. Blatt's case informs the broader debate over what it means to be “transgender” and what it means to be “disabled.” As for the former, her argument brings coherence to the impairment-identity debate that exists in transgender rights discourse.⁴⁷⁴ Some well-intentioned laypeople that support or are even part of the transgender community question the authenticity of Gender Dysphoria (and GID before it). For them, the

Allow Transgender People to Serve Openly in the Military, N.Y. TIMES (July 13, 2015), <http://www.nytimes.com/2015/07/14/us/pentagon-plan-would-let-transgender-people-serve-openly.html?smid=nytcore-iphone-share&smprod=nytcore-iphone> [https://perma.cc/US9W-Q3JC].

⁴⁷⁰ For example, the Department of Labor has incorporated the ADA's transgender exclusions into regulations implementing the Job Training Partnership Act of 1982, 29 C.F.R. § 34.2 (1993), and regulations implementing the Workforce Investment Act of 1998, 29 C.F.R. § 37.4 (1999). Department of Veterans Affairs regulations similarly exclude “[s]ervices and supplies related to transsexualism or other similar conditions such as gender dysphoria” from medical coverage for survivors and dependents of veterans. 38 C.F.R. § 17.272 (2008).

⁴⁷¹ See *Casillas v. Daines*, 580 F. Supp. 2d 235, 246–47 (S.D.N.Y. 2008) (holding that denial of Medicaid reimbursement for gender reassignment surgery was rationally related to conservation of limited medical resources and health of citizens, even though state legislature's reasoning supporting exclusion was nearly twenty years old); see also *Ravenwood v. Daines*, No. 06-CV-6355-CJS, 2009 WL 2163105, at *13 (W.D.N.Y. July 17, 2009) (“[T]he mere passage of time is not a sufficient reason to find the law fails *rational basis review*.” (emphasis added)).

⁴⁷² See Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 748 (2011) (discussing U.S. Supreme Court's reliance on pluralism anxiety as justification for limiting expansion of equality doctrine).

⁴⁷³ See *id.* at 755 (“Under the Supreme Court's own account, pluralism anxiety has pressed the Court away from traditional group-based identity politics in its equal protection and free exercise jurisprudence.”).

⁴⁷⁴ See, e.g., Judith Butler, *Undiagnosing Gender*, in *TRANSGENDER RIGHTS* 274, 274–75 (Paisley Currah et al. eds., 2006) (discussing the debate over whether or not to keep GID as a diagnosis); see also Barry, *supra* note 159, at 44–45 (discussing objections to GID diagnosis).

diagnosis pathologizes gender nonconformity and stigmatizes transgender people as “abnormal.”⁴⁷⁵ According to Ms. Blatt and her amici, however, the new diagnosis of Gender Dysphoria, by its terms, does quite the opposite. By deleting all reference to “disorder,” by noting that the condition is physiologically rooted and treatable through medical interventions such as hormones and surgery, and by focusing on distress—not identity—as the problem in need of treatment, Gender Dysphoria in fact depathologizes gender nonconformity.⁴⁷⁶ It sharply disassociates gender nonconformity, which is perfectly healthy, from a serious medical condition that, if left untreated, can lead to death.⁴⁷⁷

By claiming disability rights protection based on Gender Dysphoria, Ms. Blatt does not argue that gender nonconformity is a medical condition and that all transgender people necessarily have Gender Dysphoria. Many transgender people, she argues, do not have Gender Dysphoria; they experience no distress as a result of their gender nonconformity.⁴⁷⁸ For them, sex discrimination laws like Title VII and state and proposed federal gender-identity discrimination laws are the most logical route to legal protection. However, for those transgender people who experience clinically significant distress as a result of their gender nonconformity, who have successfully undergone medical treatment to alleviate such distress, or who are perceived by others as having such distress, disability rights law should protect them.

As for what it means to be “disabled,” Ms. Blatt’s argument underscores the importance of the “social model” of disability underlying disability rights law. “Disability,” under the social model’s rendering, results not from the way in which our medical conditions disadvantage us, but rather from the ways in which our society disadvantages us through its negative reactions to our medical conditions.⁴⁷⁹ Disability rights laws like the ADA adopt this understanding, protecting all who are treated adversely based on a past, present, or perceived medical impairment. Indeed, in 2008, Congress

⁴⁷⁵ See Butler, *supra* note 474, at 275.

⁴⁷⁶ See *supra* notes 68–72 and accompanying text (discussing the change from “disorder” to “dysphoria”).

⁴⁷⁷ See DSM-5, *supra* note 13, at 458 (distinguishing Gender Dysphoria from gender nonconformity); see also Ashley Fantz, *An Ohio Transgender Teen’s Suicide, a Mother’s Anguish*, CNN (Jan. 4, 2015), <http://www.cnn.com/2014/12/31/us/ohio-transgender-teen-suicide/> [<https://perma.cc/9WGW-L9YR>] (discussing suicide of transgender teen Leelah Alcorn).

⁴⁷⁸ Cf. Brief of Amici Curiae, *supra* note 16, at 4 (“For many transgender people, this incongruence between gender identity and assigned sex does not interfere with their lives; they are completely comfortable living just the way they are.”).

⁴⁷⁹ See Levi & Klein, *supra* note 372, at 89 (explaining how transgender people are limited by stigma, rather than an inherent condition); see also Kevin Barry, *Toward Universalism: What the ADA Amendments Act of 2008 Can and Can’t Do for Disability Rights*, 31 BERKELEY J. EMP. & LAB. L. 203, 211–12 (2010) (discussing the social model of disability).

amended the ADA to clarify its intent that the definition of disability should not be limited to those whose impairments prevent or severely restrict them from performing life activities; rather, the law should “be construed in favor of broad coverage of individuals.”⁴⁸⁰ By claiming protection under the ADA, Ms. Blatt therefore does not argue that Gender Dysphoria, in and of itself, prevents her from working.⁴⁸¹ Instead she argues, consistent with the social model, that her employer’s negative reactions to Gender Dysphoria—namely, fear, discomfort, lack of understanding, and animus—have disabled her, thereby triggering the protection of disability rights law.

CONCLUSION

Transgender issues have exploded into the public consciousness in recent years, with the stories of well-known figures like Caitlyn Jenner and Chaz Bono bringing light to the struggles of transgender people in our midst.⁴⁸² With this awareness has come long overdue recognition of transgender people’s legal rights in healthcare, in the workplace, and beyond. But key barriers remain. Unlike their gay, lesbian, and bisexual counterparts, whose constitutional rights were finally vindicated in *Obergefell*, the constitutional rights of transgender people remain uncertain. With marriage equality achieved, the next civil rights frontier belongs to transgender people. It begins with *Blatt v. Cabela’s Retail, Inc.*, a case challenging the ADA’s exclusion of medical conditions associated with transgender people under the Equal Protection Clause. Transgender classifications like these should receive heightened scrutiny because transgender people are a “suspect” or “quasi-suspect” class, or because such classifications are necessarily based on sex. But even under rational basis review, these classifications should fail because they are rooted solely in moral animus.

A successful equal protection challenge to the ADA will extend disability rights protection to transgender people under a host of federal and state laws, and will inform the broader theoretical debate over the relationship between identity and impairment, and diagnosis and discrimination. A successful challenge will also reach far beyond disability rights to all laws that single out transgender people for disparate treatment, paving the way

⁴⁸⁰ See 42 U.S.C. § 12102(4)(A) (2012).

⁴⁸¹ Indeed, were that the case, she would not have protections under the ADA; she would instead need to seek protection under the Social Security Act, which provides “disability” insurance benefits to those who cannot work. 42 U.S.C. § 423(d)(1)(A) (2012).

⁴⁸² See *supra* note 43 and accompanying text (discussing Caitlyn Jenner, Chaz Bono, and other recent, public transgender stories).

toward “equal dignity in the eyes of the law” for transgender people.⁴⁸³ In the words of Justice Kennedy, “The Constitution grants them that right.”⁴⁸⁴

⁴⁸³ See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2608 (2015) (recognizing the right to marry someone of the same sex under the Equal Protection and Due Process Clauses).

⁴⁸⁴ *Id.*

