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NOTE

A Narrow Escape: Transcending the GID Exclusion in the Americans with Disabilities Act

Blatt v. Cabela's Retail, Inc., No. 5:14-cv-04822, 2017 WL 2178123 (E.D. Pa. May 18, 2017)

*Taylor Payne**

I. INTRODUCTION

The Americans with Disabilities Act (“ADA”) was implemented in 1990 and is hailed as a pivotal piece of legislation that protects the civil rights of individuals with disabilities.¹ Driven by the prejudice of certain influential legislators, transgender individuals were purposefully excluded from the ADA’s protection.² This exclusion – commonly referred to as the “GID Exclusion” – ensured that “transsexualism” and “gender identity disorders not resulting from physical impairments” were not considered a “disability” under the ADA.³ The GID Exclusion effectively produced a categorical bar for transgender plaintiffs seeking legal recourse under the ADA despite the fact that many transgender individuals experience clinically significant stress known as Gender Dysphoria, a recognized and serious medical condition that can substantially limit major life activities.⁴

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1. Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12101–12213 (1990).

2. See 135 CONG. REC. S10765-01 (daily ed. Sept. 7, 1989) (statements of Sen. Harkin), Cong. Rec S 10765-01, at 1989 WL 183216.

3. 42 U.S.C. § 12211(b)(1) (2012) (“Disability shall not include . . . transsexualism [or] gender identity disorders not resulting from physical impairments.”).

4. See, e.g., *Johnson v. Fresh Mark, Inc.*, 337 F. Supp. 2d 996 (N.D. Ohio 2003) (finding an employer’s requirement that transgender employee use men’s restroom did not violate the ADA because “transsexualism is excluded from the definition of disability no matter how it is characterized, whether as a physical impairment, a mental disorder, or some combination thereof”), *aff’d*, 98 F. App’x 461 (6th Cir. 2004); AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS *Gender Dysphoria* § 302.6, at 455 (5th ed. 2013) [hereinafter DSM-V] (listing clinically significant distress or impairment in social, occupational, or other important areas of functioning as consequence of Gender Dysphoria).

For almost two decades following the passage of the ADA, the GID Exclusion was left virtually unchallenged. Moreover, transgender plaintiffs who tried to invoke the ADA's protections were unsuccessful – that is until 2014, when Kate Lynn Blatt (“Blatt”) brought suit in federal court.⁵ Blatt, a transgender woman with Gender Dysphoria,⁶ alleged she was either covered under the ADA or the ADA's exclusions were unconstitutional.⁷ Blatt's suit marks one of the few times the GID Exclusion has been challenged and the only time in which a court has held the ADA does not categorically bar transgender plaintiffs from protection.⁸

This Note discusses the groundbreaking ruling of *Blatt v. Cabela's Retail, Inc.* and its potential impact on transgender individuals in the public and legal spheres. Part II of this Note provides the pertinent facts and holding from *Blatt*. Part III discusses the history of the ADA and the impetus for the GID Exclusion. Part III then turns to the current legal landscape for transgender individuals at the national and state level. Part IV details the instant decision and explores the U.S. District Court for the Eastern District of Pennsylvania's legal reasoning and holding. Part V addresses arguments for and against the holding of the instant decision, detailing positions argued by the United States of America and amici curiae in the case.

Ultimately, Part V argues that *Blatt* should be recognized as a momentous decision. Not all transgender individuals have Gender Dysphoria⁹ and therefore they may not always be able to invoke the protections found in the ADA on that basis.¹⁰ However, for transgender individuals who do experience Gender Dysphoria, *Blatt* provides hope that decades-old prejudice enshrined in federal legislation can be overcome through reasonable statutory

5. See *Blatt v. Cabela's Retail, Inc.*, No. 5:14-cv-04822, 2017 WL 2178123 (E.D. Pa. May 18, 2017).

6. Individuals are diagnosed with Gender Dysphoria when they experience clinically significant stress that results from “[a] marked incongruence between experienced/expressed gender and [gender assigned at birth].” See DSM-V, *supra* note 4, § 302.6, at 455.

7. *Blatt*, 2017 WL 2178123, at *2.

8. *Id.* at *4; see also *Johnson*, 337 F. Supp. 2d at 1001–02; *Rentos v. Office Sys.*, No. 95 CIV. 7908 LAP, 1996 WL 737215, at *7–8 (S.D.N.Y. Dec. 24, 1996).

9. See Brief of Amici Curiae Gay & Lesbian Advocates & Defenders, Mazzoni Center, National Center for Lesbian Rights, National Center for Transgender Equality, National LGBTQ Task Force, and Transgender Law Center in Opposition to Defendant's Partial Motion to Dismiss at 3, *Blatt*, 2017 WL 2178123 (No. 5:14-cv-04822) [hereinafter Brief of Amici Curiae] (noting that many transgender individuals do not experience stress related to their transgender status; “they are completely comfortable living just the way they are [without medical or other intervention].”).

10. The specifics of a particular case would determine whether a transgender individual without Gender Dysphoria would be covered under the ADA. Theoretically, even a transgender individual without Gender Dysphoria might enjoy ADA protection, provided they were discriminated against because they were “regarded as” having Gender Dysphoria. See text accompanying *infra* note 51.

interpretation, resulting in much needed legal protections for a community that still faces “severe and pervasive discrimination in nearly every aspect [of life].”¹¹

II. FACTS AND HOLDING

In 2014, Blatt filed suit against her former employer, Cabela’s Retail, Inc. (“Cabela’s”), for impermissible sex discrimination in violation of Title VII of the Civil Rights Act of 1964 (“Title VII”) and impermissible discrimination on the basis of disability under the ADA.¹² Blatt sought an award of damages, injunctive and declaratory relief, attorney’s fees, and other relief.¹³ In response, Cabela’s filed a motion to dismiss Blatt’s ADA claim.¹⁴ Ultimately, Cabela’s motion to dismiss was denied.¹⁵

Cabela’s is a retail business that specializes in outdoor equipment and clothing.¹⁶ In September 2006, Cabela’s hired Blatt as a seasonal stocker.¹⁷ One year before she was hired, Blatt was diagnosed with Gender Dysphoria,¹⁸ sometimes referred to as Gender Identity Disorder (“GID”).¹⁹ Blatt was assigned male at birth, but she identifies as female.²⁰ Blatt engaged in hormone therapy, grew her hair long, dressed in female attire, and changed her name in order to conform to her female gender.²¹

As part of her employment at Cabela’s, Blatt was required to attend an employee orientation at which she dressed in women’s clothing and used the women’s restroom without any problem.²² Following orientation, Blatt requested a female uniform²³ and began wearing one when she did not receive a

11. Brief of Amici Curiae, *supra* note 9, at 1.

12. *Blatt*, 2017 WL 2178123, at *1.

13. First Amended Complaint and Jury Demand ¶ 1, *Blatt*, 2017 WL 2178123 (No. 5:14-cv-04822).

14. *See Blatt*, 2017 WL 2178123, at *1.

15. *Id.*

16. Our History, CABELA’S: WORLD’S FOREMOST OUTFITTER, <https://www.cabelas.com/content.jsp?pageName=history> (last visited June 25, 2018); *see* First Amended Complaint and Jury Demand, *supra* note 13, ¶ 14 (“Blatt was excited to begin her employment with the Defendant, as she is an active participant in outdoor sports, and highly knowledgeable about the same.”).

17. First Amended Complaint and Jury Demand, *supra* note 13, ¶¶ 12–13.

18. *Id.* ¶ 10; *see supra* text accompanying note 6.

19. “Gender Identity Disorder” was removed from DSM-V and replaced with “Gender Dysphoria”; the two have different diagnostic criteria. *See* discussion *infra* Section III.A.

20. First Amended Complaint and Jury Demand, *supra* note 13, ¶ 9.

21. *Id.* ¶ 11.

22. *Id.* ¶ 15.

23. These requests were made as requests for reasonable accommodations. *Id.* ¶ 16.

response to her request.²⁴ Blatt also requested a nametag that read “Kate Lynn” as a reasonable accommodation for her Gender Dysphoria, but Cabela’s Human Resources Director denied her request.²⁵ Blatt’s complaint alleged that, in retaliation for requesting the female nametag, the Human Resources Director forced her to wear a nametag that read “James.”²⁶ Additionally, the Human Resources Director commanded all other employees to refer to Blatt as “James” or they would be fired.²⁷ Blatt also alleged that the Human Resources Director told her she could receive a nametag reading “Kate Lynn” only after she legally changed her name and gender marker.²⁸ The Human Resources Director also prohibited Blatt from continuing to use the women’s restroom until her gender marker was legally changed.²⁹ Moreover, Blatt was often secluded and forced to work alone, unlike other non-transgender employees who often worked in teams.³⁰

Approximately one month after she was hired, Blatt was called in for an abrupt meeting with one of Cabela’s shift supervisors who accused Blatt of “failing to pull her weight” and suggested she consider quitting.³¹ Following this meeting, Blatt was subjected to numerous derogatory and offensive comments by fellow employees, including being called “‘he/she,’ ‘ladyboy,’ ‘fag,’ ‘sinner,’ and ‘freak.’”³² Employees also asked offensive questions about Blatt’s body.³³ Blatt reported the discrimination against her to a different Cabela’s supervisor (“Supervisor Bowers”), who reported the discrimination to Cabela’s upper management, including the Human Resources Director.³⁴ However, neither upper management nor the Human Resources Director attempted to investigate the matter or take steps to prevent further discrimination.³⁵

24. *Id.*

25. *Id.* ¶¶ 16–17.

26. *Id.* ¶ 18. “James” was the name given to Blatt when she was born. *Id.* ¶ 9.

27. *Id.* ¶ 18.

28. *Id.* A gender marker is the designation on an official identity document or other identity form that lists one’s gender. Am. Psychological Ass’n, *Guidelines for Psychological Practice with Transgender and Gender Nonconforming People*, 70 AM. PSYCHOLOGIST 832, 862 (2015),

<https://www.apa.org/practice/guidelines/transgender.pdf> [hereinafter APA Guidelines]. Transgender individuals often encounter administrative and legal barriers that hinder them from accurately reflecting their gender identity on driver’s licenses, passports, etc. Robyn B. Gigl, *Transgender: Understanding Who the “T” in “LGBT” Are and Their Unique Legal Issues*, N.J. LAW., June 2013, at 10, 17.

29. First Amended Complaint and Jury Demand, *supra* note 13, ¶ 19.

30. *Id.* ¶ 23.

31. *Id.* ¶ 20.

32. *Id.* ¶ 21.

33. *Id.*

34. *Id.* ¶ 22.

35. *Id.*

Blatt applied for a promotion approximately two months after she was hired and at various points thereafter in the course of her employment.³⁶ A Cabela's supervisor told Blatt that the corporate office had specifically ordered him not to promote Blatt even though he thought Blatt was "well-qualified" for the promotion.³⁷ After applying for one promotion, Blatt overheard a maintenance manager tell Supervisor Bowers that Blatt was a "confused sicko" and that he would not interview Blatt "under any circumstances."³⁸

Even after Blatt legally changed her name and gender marker, Cabela's Human Resources Director refused to allow her access to the women's restroom,³⁹ citing the unfounded belief that Blatt would pose a danger to other women.⁴⁰ Supervisor Bowers told Blatt that the staff wished her to use a gender-neutral restroom at a Dunkin' Donuts across the street.⁴¹ When Blatt refused, Cabela's reluctantly allowed her to use a family unisex restroom at the front of the store, which was still significantly farther away than the employee restrooms.⁴² After Blatt legally changed her name, Cabela's issued her three incorrect nametags⁴³ before finally providing her with a nametag that correctly stated her name.⁴⁴

According to Blatt's complaint, in February 2007, Blatt "amicably approached" a maintenance technician and asked about her cleaning schedule.⁴⁵ In response, the technician yelled at Blatt and blamed her for disrupting the schedule.⁴⁶ Blatt was subsequently fired for allegedly threatening the technician's son during the altercation.⁴⁷ Blatt did not know the technician had a son and denied making any such threats.⁴⁸ Blatt claimed Cabela's articulated reason for terminating her "was [] pretextual and her employment was actual-

36. Compare *id.* ¶ 25 (applying for a promotion around "November of 2006 and continuing throughout the course of her employment"), with *id.* ¶ 12 (starting work in September 2006). Blatt's complaint alleges she had excellent job performance. *Id.* ¶ 25.

37. *Id.*

38. *Id.* ¶ 26.

39. Blatt was under the impression she would be able to use the women's restroom after she legally changed her name and gender marker. See *id.* ¶ 28.

40. *Id.* ¶ 29.

41. *Id.* ¶ 30. As Blatt was denied use of the female restroom as a reasonable accommodation, she requested a gender-neutral restroom as a reasonable accommodation. See *id.* ¶¶ 29–30.

42. *Id.* ¶ 31.

43. Blatt's complaint stated that she thought an incorrect nametag was provided to her on three separate occasions intentionally in an effort to degrade her. *Id.* ¶ 32.

44. *Id.*

45. *Id.* ¶ 33.

46. *Id.*

47. *Id.* ¶ 34. The technician "was neither terminated nor disciplined for her involvement in said altercation." *Id.* ¶ 35.

48. *Id.* ¶ 34.

ly terminated based on her sex, her actual and/or perceived disability and/or record of impairment, and in retaliation for opposing unlawful discrimination in the workplace and requesting a reasonable accommodation for her disability.”⁴⁹ After she was fired, Blatt filed suit against Cabela’s alleging unlawful discrimination in violation of Title VII and the ADA.⁵⁰

“The ADA makes it unlawful for a covered employer to discriminate against any ‘qualified individual on the basis of disability.’”⁵¹ To bring suit under the ADA, a plaintiff must show that “(1) [they⁵² are] disabled within the meaning of the ADA,⁵³ (2) [they are] a qualified individual under the ADA,⁵⁴ and (3) [they] suffered an adverse employment action because of [their] disability.”⁵⁵ “Disability” under the ADA includes “physical or mental impairments that substantially limit one or more major life activities.”⁵⁶ Blatt asserted her Gender Dysphoria substantially limited one or more of her major

49. *Id.* ¶ 36.

50. *Blatt v. Cabela’s Retail, Inc.*, No. 5:14-cv-04822, 2017 WL 2178123, at *2 (E.D. Pa. May 18, 2017).

51. *EEOC v. Prod. Fabricators, Inc.*, 763 F.3d 963, 969 (8th Cir. 2014) (quoting 42 U.S.C. § 12112(a) (2012)).

52. Throughout this Note, singular “they” is used in order to respect and acknowledge nonbinary individuals; the author believes that “they” should be the default singular pronoun for an individual of unknown gender, rather than utilizing “he or she.” *See Singular ‘They’*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/words-at-play/singular-nonbinary-they> (last visited Aug. 24, 2018).

53. “Disability” under the ADA is a broad concept; a person is covered under the ADA if they are discriminated against based on (1) a real disability, (2) a perceived disability or (2) a record of such impairment. 42 U.S.C. § 12102(1) (2012). An individual is also covered by the ADA if the person has – currently or in the past – a medical condition that, without treatment, would be substantially limiting. *See id.* § 12102(4)(E)(i) (“The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures.”).

54. “The term ‘qualified individual’ means an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.” 42 U.S.C. § 12111(8) (2012).

55. *Prod. Fabricators, Inc.*, 763 F.3d at 969 (quoting *Hill v. Walker*, 737 F.3d 1209, 1216 (8th Cir. 2013)); *Young v. Warner–Jenkinson Co.*, 152 F.3d 1018, 1021 (8th Cir. 1998)).

56. 42 U.S.C. § 12102(1)(A) (2012).

[M]ajor life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working [A] major life activity also includes the operation of major bodily functions, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.

Id. § 12102(2)(A)–(B).

life activities including, but not limited to, reproducing, social and occupational functioning, and interacting with others.⁵⁷ Thus, Blatt alleged her Gender Dysphoria met the criteria of a disability and entitled her to protection under the ADA.⁵⁸

Cabela's filed a motion to dismiss Blatt's ADA claim, asserting that Blatt failed to state a claim upon which relief could be granted.⁵⁹ Cabela's argued the explicit text of the ADA – in particular § 12211, which excludes from the definition of disability “gender identity disorders not resulting from physical impairments”⁶⁰ – applied to Blatt's Gender Dysphoria and precluded her from bringing a viable ADA claim.⁶¹ Blatt argued her condition was covered under the ADA or, in the alternative, that if her condition was excluded from the scope of the ADA's coverage, then the GID Exclusion violated her right to equal protection as guaranteed under the Fifth Amendment of the United States Constitution.⁶²

The U.S. District Court for the Eastern District of Pennsylvania, Judge Joseph F. Leeson Jr. presiding, narrowly construed the text of the ADA's GID Exclusion and held that Blatt's Gender Dysphoria is a covered disability under the ADA.⁶³ Judge Leeson construed the ADA's language narrowly to avoid ruling on the constitutionality of the GID Exclusion.⁶⁴

The ADA's GID Exclusion provides that “gender identity disorders not resulting from physical impairment” are not disabilities under the ADA.⁶⁵ Judge Leeson held that the term “gender identity disorders” referred “only [to] the [state] of identifying with a . . . gender [other than the one to which an individual is assigned at birth].”⁶⁶ Judge Leeson further held that clinically disabling conditions, like Blatt's Gender Dysphoria, “go[] beyond” simply identifying with a gender other than the one assigned.⁶⁷ Thus, disabling conditions like Blatt's Gender Dysphoria are not included in the narrowly con-

57. First Amended Complaint and Jury Demand, *supra* note 13, ¶ 10.

58. *Blatt v. Cabela's Retail, Inc.*, No. 5:14-cv-04822, 2017 WL 2178123, at *2 (E.D. Pa. May 18, 2017).

59. *Id.* at *1.

60. 42 U.S.C. § 12211 (2012).

61. *Blatt*, 2017 WL 2178123, at *2.

62. *Id.*

63. *Id.* at *3–4.

64. *Id.* at *2–3 (alteration in original) (citations omitted) (quoting *United States v. Witkovich*, 353 U.S. 194, 201 (1957)) (“The constitutional-avoidance canon prescribes that ‘[w]hen the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that [the court] will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.’ . . . Thus, if there is a ‘fairly possible’ interpretation of § 12211 that permits the Court to avoid the constitutional question Blatt has raised, the Court must adopt that interpretation.”).

65. 42 U.S.C. § 12211.

66. *Blatt*, 2017 WL 2178123, at *2.

67. *Id.*

strued term “gender identity disorders” and therefore are not barred from coverage as a disability under the ADA.⁶⁸

As Part IV of this Note will further explore, Judge Leeson arrived at this conclusion by invoking the constitutional-avoidance canon and further by looking to the text of the ADA’s GID Exclusion and attempting to render it internally consistent.⁶⁹ Because Judge Leeson found that Blatt did experience clinically significant stress (as reflected in her official Gender Dysphoria diagnosis), he held that the ADA did not exclude her from its protection.⁷⁰ Cabela’s motion to dismiss Blatt’s ADA claim was denied.⁷¹

Of particular note in the instant case are the statements of interest submitted by the U.S. Department of Justice (“DOJ”).⁷² In its first Statement of Interest, the DOJ asked the Eastern District of Pennsylvania to avoid ruling on the constitutionality of the ADA’s GID Exclusion and instead asked the court to resolve Blatt’s claim under Title VII alone.⁷³ The DOJ dodged opining about the constitutionality of the GID Exclusion and did not provide any analysis of Blatt’s ADA claim.⁷⁴ Subsequently, the DOJ was specifically ordered by the Eastern District of Pennsylvania to address the ADA claim in a second statement of interest.⁷⁵ The DOJ’s Second Statement of Interest and the arguments of amici curiae – various lesbian, gay, bisexual, and transgender (“LGBT”) advocacy organizations – are further discussed in Part V of this Note.⁷⁶

III. LEGAL BACKGROUND

Section A first addresses terms and definitions related to gender. Section B then briefly details the ADA, including when and to whom it applies, its mandates, and what plaintiffs must show in order to support a viable cause of action under its provisions. Section C explains that transgender plaintiffs have not often sought protection under the ADA and further explains that protection for transgender plaintiffs has been denied in the limited instances

68. *Id.* at *4. In other words, Judge Leeson differentiated between a plaintiff whose internal sense of gender differs from their gender assigned at birth (i.e., someone who is transgender) and a person who experiences clinically significant stress related to their gender identity (i.e., someone with Gender Dysphoria). *See id.* at *3–4.

69. *See id.* at *2–3.

70. *Id.* at *4.

71. *Id.* at *5.

72. Statement of Interest of the United States of America, *Blatt*, 2017 WL 2178123 (No. 5:14-cv-04822) [hereinafter First Statement of Interest]; Second Statement of Interest of the United States of America, *Blatt*, 2017 WL 2178123 (No. 5:14-cv-04822) [hereinafter Second Statement of Interest].

73. First Statement of Interest, *supra* note 72.

74. *See id.*

75. *See* Second Statement of Interest, *supra* note 72.

76. *See infra* Section V.C.

in which ADA suits have been filed. Section D then explores current legal protections utilized by transgender plaintiffs who experience discrimination and discusses how those protections have developed over time. Sections E and F conclude this Part by exploring recent legal developments with respect to the rights of transgender individuals.

A. Understanding Terms and Definitions Related to Gender

As our understanding of gender evolves, so, too, does the language we use to conceptualize it. There are various terms in modern vernacular that were not widely known or used in previous decades, and this Section describes a few such terms pertinent to the instant case.

“Gender identity” refers to someone’s deeply felt, inherent sense of being a man, woman, or other gender (e.g., non-binary, genderqueer, etc.).⁷⁷ “Transgender” is an umbrella term used to describe someone whose internal sense of gender differs from the gender they were assigned at birth.⁷⁸ In this Note, “gender assigned at birth” is used rather than “sex assigned at birth.” This Note uses “gender” rather than “sex” in this context because when the term “sex assigned at birth” is used, *gender* assigned at birth is typically what is being conveyed and intended – a person’s sex is more difficult to determine than commonly understood.⁷⁹ Moreover, the definition and understanding of

77. *GLAAD Media Reference Guide – Transgender*, GLAAD, <https://www.glaad.org/reference/transgender> [hereinafter *GLAAD Guide*].

Non-binary and/or genderqueer [are] terms used by some people who experience their gender identity and/or gender expression as falling outside the categories of man and woman. They may define their gender as falling somewhere in between man and woman, or they may define it as wholly different from these terms. The term is not a synonym for *transgender* or *transsexual* and should only be used if someone self-identifies as non-binary and/or genderqueer Gender nonconforming [is] a term used to describe some people whose gender expression is different from conventional expectations of masculinity and femininity. Please note that not all gender non-conforming people identify as transgender; nor are all transgender people gender non-conforming. Many people have gender expressions that are not entirely conventional – that fact alone does not make them transgender. Many transgender men and women have gender expressions that are conventionally masculine or feminine. Simply being transgender does not make someone gender non-conforming. The term is not a synonym for transgender or transsexual and should only be used if someone self-identifies as gender non-conforming.

Id. (emphasis omitted).

78. APA Guidelines, *supra* note 28, at 832; *see also* *GLAAD Guide*, *supra* note 77.

79. *See Gender and Genetics*, WORLD HEALTH ORG., <http://www.who.int/genomics/gender/en/index1.html> (last visited Aug. 26, 2018) (“[T]here is a range of chromosome complements, hormone balances, and phenotypic

“sex” is influenced by social and cultural norms as much as the understanding of “gender.”⁸⁰

GID is an outdated diagnostic term the medical community formerly used to diagnose and treat transgender individuals.⁸¹ The term is found in the ADA’s exclusions – hence the shorthand “GID Exclusion” – because the drafters of the GID Exclusion extrapolated their exclusionary language from the preeminent Diagnostic and Statistical Manual of Mental Disorders, Third Edition Revised (“DSM-III-R”), which was authoritative circa 1990.⁸² GID appeared in two editions (including their respective revised editions) of the

variations that determine sex.”). WHO details how certain conditions, such as Klinefelter syndrome, Congenital Adrenal Hyperplasia (CAH), and Androgen Insensitivity Syndrome (AIS) can affect the appearance of secondary sex characteristics – which are commonly used to determine the “sex” of an infant. *See id.* For instance, “Androgen Insensitivity Syndrome (AIS) is an X-linked recessive disorder in which affected individuals have external female genitalia and breast development despite being [designated as] genetically male (46XY).” *Id.*

80. *See* PENELOPE ECKHERT & SALLY MCCONNELL-GINET, LANGUAGE AND GENDER 1–2 (2013).

[W]hile we think of sex as biological and gender as social, this distinction is not clear-cut. People tend to think of gender as the result of nurture – as social and hence fluid – while sex is the result of nature, simply given by biology. However, nature and nurture intertwine, and there is no obvious point at which sex leaves off and gender begins.

Id. at 2.

A sharp demarcation between sex and gender ultimately fails because there

is no single objective biological criterion for [sex. The determination of an individual’s s]ex is based [on] a combination of anatomical, endocrinal, and chromosomal features, and the selection among these criteria for sex assignment is based very much on cultural beliefs about what actually makes someone male or female. Thus the very definition of the biological categories *male* and *female*, and people’s understanding of themselves and others as male or female, is ultimately social “[L]abeling someone a man or a woman is a social decision. We may use scientific knowledge to help us make the decision, but only our beliefs about gender – not science – can define our sex. Furthermore, our beliefs about gender affect what kinds of knowledge scientists produce about sex in the first place.”

Id. (quoting ANNE FAUSTO-STERLING, SEXING THE BODY (2000)).

81. *See e.g.*, *Gender Identity Disorders: Transsexualism, Gender Identity Disorder of Childhood, and Atypical Gender Identity Disorder*, AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (3rd ed., rev. 1987); *Gender Identity Disorder*, AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (4th ed., 1994).

82. Brief of Amici Curiae, *supra* note 9, at 12. *See also* 42 U.S.C. § 12211 (2012).

Diagnostic and Statistical Manual of Mental Disorders as a recognized medical condition.⁸³ Many advocates of the transgender community took issue with GID as the name of the medical condition; advocates felt this name endorsed the notion that being transgender was a deviant mental disorder.⁸⁴

In the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (“DSM-V”), published in 2013, the American Psychiatric Association (“APA”) removed GID, replaced it with “Gender Dysphoria,” and revised the underlying diagnostic criteria.⁸⁵ Gender Dysphoria refers to the clinically significant stress that accompanies the “marked incongruence” between one’s internal sense of gender and their gender assigned at birth.⁸⁶ Not every transgender person has Gender Dysphoria – some transgender individuals do not experience clinically significant stress related to their gender identity.⁸⁷ Often, those who do not experience clinically significant stress do not seek medical intervention, such as hormone therapy or surgery.⁸⁸

In addition to “gender identity disorders not resulting from physical impairment,” the ADA’s GID Exclusion prohibits coverage for “transsexualism.”⁸⁹ “Transsexual” is an older term, though some individuals still prefer

83. See e.g., AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS *Gender Identity Disorders* §§ 302.5, 302.60, 302.82, at 261–66 (3d ed. 1980) [hereinafter DSM-III]. GID was listed in different forms in DSM-IV and DSM-III. See, e.g., DSM-III, *supra* § 302.60 (Gender Identity Disorder of Childhood); *id.* § 302.85 (Atypical Gender Identity Order).

84. See Camille Beredjick, *DSM-V to Rename Gender Identity Disorder ‘Gender Dysphoria,’* THE ADVOC. (July 23, 2012, 8:00 PM), <https://www.advocate.com/politics/transgender/2012/07/23/dsm-replaces-gender-identity-disorder-gender-dysphoria>.

85. Compare DSM-V, *supra* note 4, § 302.6, with DSM-III, *supra* note 83. Brief of Amici Curiae, *supra* note 9, at 17.

86. See DSM-V, *supra* note 4, § 302.6, at 455.

87. See Brief of Amici Curiae, *supra* note 9, at 4.

88. See *id.* (“[T]hey are completely comfortable living just the way they are.”).

89. 42 U.S.C. § 12211(1) (2012). The exclusions in § 12211 also prohibit coverage for “transvestites,” although this exclusion is not especially relevant for transgender individuals. *Id.* “Transvestite” is a particularly antiquated term and was typically used to “refer to men who occasionally wear clothes, makeup, and accessories culturally associated with women.” GLAAD Guide, *supra* note 77. Now more commonly referred to as “cross-dressing,” “transvestitism” describes a form of gender expression.

Gender expression [refers to e]xternal manifestations of gender, expressed through a person’s name, pronouns, clothing, haircut, behavior, voice, and/or body characteristics. Society identifies these cues as masculine and feminine, although what is considered masculine or feminine changes over time and varies by culture. Typically, transgender people seek to align their gender expression with their gender identity, rather than the [gender] they were assigned at birth.

to self-identify as transsexual.⁹⁰ The term refers to an individual who has changed or seeks to change their body through medical intervention.⁹¹ Unlike “transgender,” “transsexual” is not an umbrella term, and many transgender individuals do not identify as transsexual.⁹²

B. Overview of the ADA

Recognizing that individuals with disabilities continually encounter various forms of discrimination, Congress enacted the ADA to provide clear and enforceable standards to address and eradicate such discrimination.⁹³ The ADA “prohibits discrimination against individuals with disabilities in all areas of public life, including jobs, schools, transportation, and all public and private places that are open to the general public.”⁹⁴ An individual is considered “disabled” within the meaning of the ADA if they have a physical or mental impairment that substantially limits a major life activity, if they have a record of such impairment, or if they are regarded as having such impairment.⁹⁵ In addition to making discrimination on the basis of disability unlawful, the ADA mandates “reasonable accommodations” for individuals with disabilities in various circumstances and prohibits retaliation for requesting reasonable accommodations.⁹⁶ Government agencies, such as the DOJ, regulate and enforce the provisions of the ADA.⁹⁷

Id. “Transvestites” are typically cisgender – that is, their gender identity matches their gender assigned at birth. *See id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. 42 U.S.C. § 12101.

94. *An Overview of the Americans with Disabilities Act*, ADA NAT’L NETWORK, <https://adata.org/factsheet/ADA-overview> (last visited June 25, 2018). For example, “the ADA prohibits discrimination in all employment practices, including job application procedures, hiring, firing, advancement, compensation, training, and other terms, conditions, and privileges of employment. It applies to recruitment, advertising, tenure, layoff, leave, fringe benefits, and all other employment-related activities.” *The ADA: Questions and Answers*, EEOC, <https://www1.eeoc.gov/eeoc/publications/adaqa1.cfm?renderforprint=1> (last visited June 25, 2018).

95. 42 U.S.C. § 12102(1)(a) (2012); *see also supra* notes 51–62 and accompanying text.

96. 42 U.S.C. § 12112(b)(5); *see also An Overview of the Americans with Disabilities Act, supra* note 94.

Reasonable accommodation is a modification or adjustment to a job or the work environment that will enable a qualified applicant or employee with a disability to participate in the application process or to perform essential job functions. Reasonable accommodation also includes adjustments to assure that a qualified individual with a disability has rights and privileges in employment equal to those of [employees without disabilities.]

To establish a prima facie claim of employment discrimination under the ADA, a plaintiff must show that “(1) [they are] disabled within the meaning of the ADA,⁹⁸ (2) [they are] a qualified individual under the ADA,⁹⁹ and (3) [they] suffered an adverse employment action because of [their] disability.”¹⁰⁰ This burden is different for retaliation claims¹⁰¹ and claims related to the failure to reasonably accommodate.¹⁰²

C. Transgender Plaintiffs Have Not Historically Found Redress Under the ADA

While the ADA has protected the civil rights of many individuals with disabilities since its enactment, it has not proven useful for transgender individuals seeking recourse under its mandates. Although some federal courts, including federal courts of appeal, have held that sex discrimination encompasses discrimination based on transgender status,¹⁰³ transgender plaintiffs have not generally succeeded in bringing federal discrimination claims under the ADA.¹⁰⁴ This is because § 12211’s GID Exclusion specifically excludes

The ADA: Questions and Answers, *supra* note 94.

97. *An Overview of the Americans with Disabilities Act*, *supra* note 94. Title I (Employment) is regulated and enforced by the U.S. Equal Employment Opportunity Commission; Title II (Public Services: State and Local Government) and Title III (Public Accommodations and Services Operated by Private Entities) are regulated and enforced by the DOJ; Title IV (Telecommunications) is regulated by the Federal Communication Commission. *Id.*

98. *See supra* notes 51–62 and accompanying text.

99. *See supra* note 53 and accompanying text.

100. *EEOC v. Prod. Fabricators, Inc.*, 763 F.3d 963, 969 (8th Cir. 2014) (quoting *Hill v. Walker*, 737 F.3d 1209, 1216 (8th Cir. 2013)).

101. *Id.* at 972. “[T]o establish . . . a retaliation claim under the ADA, a ‘plaintiff must show that (1) [she] engaged in a statutorily protected activity, (2) the employer took an adverse action against [her], and (3) there was a causal connection between the adverse action and the protected activity.’” *Id.* (quoting *Hill*, 737 F.3d at 1218).

102. *Id.* at 971.

To show that an employer failed to participate in the interactive process, the employee must show: “(1) the employer knew about the employee’s disability; (2) the employee requested accommodations or assistance for his or her disability; (3) the employer did not make a good faith effort to assist the employee in seeking accommodations; and (4) the employee could have been reasonably accommodated but for the employer’s lack of good faith.”

Id. (quoting *Peyton v. Fred’s Store of Ark., Inc.*, 561 F.3d 900, 902 (8th Cir. 2009)).

103. *See infra* notes 127–28 and accompanying text.

104. *See, e.g., Johnson v. Fresh Mark, Inc.*, 337 F. Supp. 2d 996 (N.D. Ohio 2003) (finding an employer’s requirement that transgender employee use men’s restroom did not violate the ADA because “transsexualism is excluded from the definition of disability no matter how it is characterized, whether as a physical impairment, a mental disorder, or some combination thereof”), *aff’d*, 98 F. App’x 461 (6th Cir. 2004).

“transsexualism” and “gender identity disorders not resulting from physical impairments.”¹⁰⁵ Until *Blatt*, the few federal courts that considered the issue generally dismissed ADA claims brought by transgender plaintiffs out-of-hand due to the text of the GID Exclusion.¹⁰⁶

D. Intent to Exclude Transgender Individuals from Coverage Under the ADA

The ADA was the first comprehensive civil rights law concerning individuals with disabilities that prohibited discrimination in public accommodations, employment, public services, and telecommunications.¹⁰⁷ The ADA was a noteworthy victory for disability advocates who for decades lobbied for such protections, but passage of the ADA required last-minute compromise.¹⁰⁸ The legislative record demonstrates that Senator Armstrong, Senator Hatch, and Senator Helms (who harbored a particularly sharp animus toward the LGBT community¹⁰⁹) feared that certain individuals – those engaged in illegal activities like drug usage and those deemed to lead “immoral” lifestyles, namely, “homosexuals,” “bisexuals,” and “transvestites” – would be

105. 42 U.S.C. § 12211(b)(1) (2012).

106. *Id.*

107. Section 504 of the Rehabilitation Act of 1973 protected only against discrimination on the basis of disability in federal programs and by those programs and activities receiving federal financial assistance. Rehabilitation Act of 1973, 29 U.S.C.A. § 794(a) (Westlaw through Pub. L. No. 115–185), *preempted by Joren v. Napolitano*, 633 F.3d 1144 (7th Cir. 2011). *See generally* Rehabilitation Act of 1973, Pub. L. No. 93–112, 87 Stat. 355 (codified as amended at 29 U.S.C. §§ 701–796 (1982)).

108. Kevin M. Barry, *Disabilityqueer: Federal Disability Rights Protection for Transgender People*, 16 YALE HUM. RTS. & DEV. L.J. 1, 11–23 (2013).

Given the unlikely company in which GID (and Transsexualism) finds itself, one might guess that this list was not the result of careful congressional deliberation. And one would be right. This list was a slapdash collection . . . grafted onto the ADA by amendment to ensure passage in the Senate.

Id. at 11.

109. *See, e.g.*, 135 CONG. REC. S10765-01 (statement of Sen. Helms), Cong. Rec. S10768, at 1989 WL 183216.

If the Senator will forgive me, I know everybody has a different idea about how to draft a piece of legislation. 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?

Id.

covered under the statute.¹¹⁰ The exclusions found in § 12211 were meant to quell the Senators' reservations.¹¹¹ Some senators knew the exclusions were questionable,¹¹² but neither they nor the interested disability advocates were prepared to risk the ADA's passage in the Senate.¹¹³ Alas, the exclusions were codified.¹¹⁴ For this reason, when transgender plaintiffs face discrimination in public accommodations, employment practices, and elsewhere, they typically seek legal redress under other statutes (and, when appropriate, constitutional provisions).¹¹⁵

110. *See, e.g., id.* ("Well, all that is well and good. 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 those people are engaged in activities that most Americans find abhorrent. That is one of the problems I find with this bill."); *see also* Barry, *supra* note 108, at 14 (alteration in original) ("Echoing Senator Armstrong's and Rudman's moral concerns, Senator Jesse Helms (R-NC) pressed the sponsors on the ADA's presumptive coverage of five groups of individuals: 'homosexuals'; 'transvestites'; illegal drug users and alcoholics; 'people who are HIV positive or have active AIDS disease'; and those with 'psychosis, neurosis, or other mental, psychological disease[s] or disorder[s],' namely, pedophilia, schizophrenia, kleptomania, manic depression, intellectual disabilities, and psychotic disorders.").

111. Kevin Berry writes:

GID was excluded from the ADA because, in 1989, a small handful of senators believed that gender nonconformity – like pedophilia, pyromania, and kleptomania – was morally harmful to the community. In the eleventh hour of a marathon floor debate, and in the absence of an organized transgender lobby, the ADA's sponsors and disability rights advocates reluctantly agreed to sacrifice GID and nine other mental impairments in exchange for passage in the Senate. The fact that Congress went out of its way to exclude GID, along with nine mental impairments that involve some harm to oneself or others, sends a strong symbolic message: people with GID have no civil rights worthy of respect. The ADA is a moral code, and people with GID its moral castaways.

Barry, *supra* note 108, at 1.

112. *See id.* at 14–15 (alteration in original) (quoting 135 CONG. REC. S10765-01 (daily ed. Sept. 7, 1989), Cong. Rec S 10785, at 1989 WL 183216) ("Senator Harkin assured Senator Helms that, even absent an explicit exclusion, homosexuality and bisexuality were not covered by the ADA—not for moral reasons, but for medical ones. '[B]ehavior characteristics' such as 'homosexuality and bisexuality are not disabilities under any medical standards.'").

113. *See* Barry, *supra* note 108, at 24–25.

114. *See* 42 U.S.C. § 12211(b)(1) (2012).

115. For example, transgender plaintiffs often seek redress under Title VII of the Civil Rights Act and its prohibition of sex discrimination. *See infra* note 128. Transgender plaintiffs also seek redress under equal protection guarantees of the United States Constitution. *See* Glenn v. Brumby, 724 F. Supp. 2d 1284, 1299 (N.D. Ga. 2010) (holding transgender employee could bring equal protection claim based on sex stereotyping), *aff'd*, 663 F.3d 1312 (11th Cir. 2011).

E. Current Legal Protections for Transgender Individuals

Transgender individuals in the United States do not currently enjoy the protection of explicit federal civil rights legislation that bars discrimination on the basis of gender identity.¹¹⁶ While Congress has been slow to pass explicit legislation protecting the rights of transgender individuals, federal courts and various federal agencies have provided alternate avenues for such individuals to assert claims of discrimination based on gender identity, including transgender status.

Title VII provides one such avenue.¹¹⁷ For transgender plaintiffs, the critical question in litigation has commonly been whether discrimination based on transgender status constitutes impermissible sex discrimination under Title VII.¹¹⁸ Early appellate decisions held that Title VII's prohibition on sex discrimination did not proscribe discrimination on the basis of transgender status.¹¹⁹ However, the legal landscape for transgender individuals shifted significantly following the United States Supreme Court's decision in *Price Waterhouse v. Hopkins*.¹²⁰

Price Waterhouse concerned a female accountant who was nominated for partnership in her accounting firm.¹²¹ When she was denied the partnership, she sued under Title VII, claiming that her firm discriminated against her on the basis of her sex.¹²² The plaintiff was told to “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair

116. See, e.g., Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (2012).

117. Title VII of the Civil Rights Act, as amended, makes it unlawful for an employer “to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.” 42 U.S.C. § 2000e-2(a). Title VII specifically prohibits employment discrimination on the basis of sex, including the hiring and termination of employees and discrimination “with respect to [an individual’s] compensation, terms, conditions, or privileges of employment . . .” 42 U.S.C. § 2000e-2(a)(1).

118. See *infra* notes 128–29 and accompanying text.

119. See, e.g., *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748 (8th Cir. 1982) (“[D]iscrimination based on one’s transsexualism does not fall within the protective purview of the Act.”); *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659 (9th Cir. 1977). “By the mid-1980s, it was thus settled [law] in the Seventh, Eighth and Ninth Circuits that Title VII did not prohibit employment discrimination on the basis of transgender identity.” *Fabian v. Hosp. of Cent. Conn.*, 172 F. Supp. 3d 509, 521 (D. Conn. 2016) (“[T]hat result was premised in all three Circuits on congressional intent and a ‘plain reading’ or ‘traditional definition’ of the word ‘sex.’”).

120. 490 U.S. 228 (1989), *superseded by statute*, Title VII of the Civil Rights Act of 1964, Pub. L. No. 102-166, 105 Stat. 1071, *as recognized in* *Burrage v. United States*, 571 U.S. 204 (2014).

121. *Id.* at 231.

122. *Id.* at 231–32.

styled, and wear jewelry.”¹²³ The Court deemed these comments “clear signs” that partners at the plaintiff’s firm were responding adversely to her because she was a woman and held that the accounting firm had engaged in impermissible sex discrimination.¹²⁴

In so holding, the Court recognized that discrimination based on failure to conform to gender stereotypes is an actionable form of sex discrimination.¹²⁵ Transgender plaintiffs who have succeeded in federal courts have often relied on the sex discrimination framework espoused in *Price Waterhouse*.¹²⁶

Post-*Price Waterhouse*, the First, Sixth, Seventh, Ninth, and Eleventh Circuits have held that discrimination based on transgender status constitutes impermissible sex discrimination under Title VII or the Equal Protection

123. *Id.* at 235 (quoting *Price Waterhouse v. Hopkins*, 618 F. Supp. 1109, 1117 (D.D.C. 1985), *aff’d in part, rev’d in part* by 825 F.2d 458 (D.C. Cir. 1987), *rev’d* by 490 U.S. 228 (1989), *superseded by statute*, Title VII of the Civil Rights Act of 1964, Pub. L. No 102–166, 105 Stat 1071, *as recognized in* *Burrage v. United States*, 571 U.S. 204 (2014)).

124. *Id.*

125. *Id.* at 251.

126. *See e.g.*, *Barnes v. City of Cincinnati*, 401 F.3d 729, 737 (6th Cir. 2005) (holding that trans plaintiff stated a claim for sex discrimination “by alleging discrimination . . . for [their] failure to conform to sex stereotypes”).

Clause.¹²⁷ Numerous U.S. District Courts have reached the same conclusion.¹²⁸

The U.S. Court of Appeals for the Tenth Circuit is the only federal appellate court post-*Price Waterhouse* to maintain the pre-*Price Waterhouse* doctrine on transgender status and Title VII.¹²⁹ The Tenth Circuit relied on the “traditional” sex binary to conclude that transgender plaintiffs were not entitled to Title VII protection “based solely on their status as [transgender].”¹³⁰

In 2012, the U.S. Equal Employment Opportunity Commission (“EEOC”) ruled that discriminating against someone based on transgender status constitutes discrimination based on sex, which violates Title VII.¹³¹ Discrimination against a person based on transgender status may also contra-

127. See *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 574 (6th Cir. 2018) (holding a funeral home’s decision to fire a transitioning, transgender employee violated Title VII); *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Ed.*, 858 F.3d 1034 (7th Cir. May 30, 2017) (holding that discrimination against transgender students constitutes sex discrimination under Title IX of the Education Amendments Act of 1972 and the Equal Protection Clause of the U.S. Constitution upon a theory of sexual-stereotyping); *Chavez v. Credit Nation Auto Sales, LLC*, 641 F. App’x 883, 891 (11th Cir. 2016) (finding a genuine issue of material fact existed as to whether gender bias motivated the firing of transgender plaintiff, which would violate Title VII); *Glenn v. Brumby*, 663 F.3d 1312, 1317 (11th Cir. 2011) (affirming a transgender employee could bring an equal protection claim because “discrimination against a transgender individual because of [their] gender nonconformity is sex discrimination, whether it’s described as being on the basis of sex or gender”), *aff’g*, 724 F. Supp. 2d 1284 (N.D. Ga. 2010); *Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. 2005) (holding that transgender plaintiff stated a claim for sex discrimination “by alleging discrimination ... for [their] failure to conform to sex stereotypes”); *Smith v. City of Salem*, 378 F.3d 566, 575 (6th Cir. 2004) (“[D]iscrimination against a plaintiff who is . . . transgender . . . is no different from the discrimination directed against Ann Hopkins in *Price Waterhouse*, who, in sex-stereotypical terms, did not act like a woman.”); *Rosa v. Park W. Bank & Tr. Co.*, 214 F.3d 213 (1st Cir. 2000); *Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000) (determining Gender Motivated Violence Act, which parallels the sex discrimination standard of Title VII, reaches conduct motivated by transgender identity and other gender nonconformity).

128. See, e.g., *Fabian v. Hosp. of Cent. Conn.*, 172 F. Supp. 3d 509, 528 (D. Conn. 2016) (denying defendant’s motion for summary judgment because discrimination on the basis of transgender identity is cognizable under Title VII as sex discrimination); *Roberts v. Clark Cty. Sch. Dist.*, 215 F. Supp. 3d 1001, 1015–16 (D. Nev. 2016) (granting partial summary judgment for employee by finding employer discriminated against transgender employee on the basis of his gender); *Schroer v. Billington*, 577 F. Supp. 2d 293 (D.D.C. 2008) (finding a revocation of a job offer “because of sex” constituted discrimination in violation of Title VII).

129. See *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215 (10th Cir. 2007).

130. *Id.* at 1222.

131. *Macy v. Dep’t of Justice*, Appeal No. 0120120821 (EEOC April 20, 2012), <http://www.eeoc.gov/decisions/0120120821%20Macy%20v%20DOJ%20ATF.txt>.

vene the Fair Housing Act (“FHA”).¹³² Though the FHA does not explicitly prohibit discrimination based on gender identity, discrimination against a transgender person based on non-conformity with gender stereotypes may be covered by the FHA’s prohibition of discrimination based on sex in accordance with *Price Waterhouse*.¹³³

In 2014, then-Attorney General Eric Holder of the DOJ issued a policy memo that directed all Department of Justice Correspondents and United States Attorneys to “take the position in litigation that the protection of Title VII . . . extends to claims of discrimination based on an individual’s gender identity, including transgender status.”¹³⁴ Holder explained, “This will help to foster fair and consistent treatment for all claimants throughout the government, in furtherance of this Department’s commitment to fair and impartial justice for all Americans.”¹³⁵ On October 4, 2017, Attorney General Jeff Sessions issued a memo reversing this policy, stating, “Title VII does not prohibit discrimination based on gender identity *per se*.”¹³⁶

The civil rights of transgender individuals have become an increasingly salient issue. The public’s and the media’s increased attention on the issue reflect this saliency, as do the aforementioned stances taken by federal agencies like the U.S. Department of Housing and Urban Development (“HUD”), the EEOC, and the DOJ.¹³⁷ The recent increase in litigation concerning

132. See Fair Housing Act, 42 U.S.C. § 3604 (2012).

133. *Ending Housing Discrimination Against Lesbian, Gay, Bisexual and Transgender Individuals and Their Families*, U.S. DEP’T OF HOUS. & URBAN DEV., https://www.hud.gov/program_offices/fair_housing_equal_opp/LGBT_Housing_Discrimination (last visited June 26, 2018). HUD also has an Equal Access Rule. “In addition, housing providers that receive HUD funding or have loans insured by the Federal Housing Administration (FHA), as well as lenders insured by FHA, are subject to HUD’s Equal Access Rule, which requires equal access to HUD programs without regard to a person’s actual or perceived sexual orientation, gender identity, or marital status.” *Id.*

134. Press Release, Dep’t of Just., Attorney General Holder Directs Dep’t to Include Gender Identity Under Sex Discrimination Emp’t Claims (Dec. 18, 2014), <https://www.justice.gov/opa/pr/attorney-general-holder-directs-department-include-gender-identity-under-sex-discrimination>. See also Memorandum from the Attorney General to United States Attorneys Heads of Department Components 2 (Dec. 15, 2014), <http://www.justice.gov/file/188671/download>.

135. Press Release, Dep’t of Just., Attorney General Holder Directs Dep’t to Include Gender Identity Under Sex Discrimination Emp’t Claims (Dec. 18, 2014), <https://www.justice.gov/opa/pr/attorney-general-holder-directs-department-include-gender-identity-under-sex-discrimination>.

136. Memorandum from the Attorney General to United States Attorneys Heads of Department Components (Oct. 4, 2017), <https://www.justice.gov/ag/page/file/1006981/download> (alteration in original).

137. See *supra* notes 130–35 and accompanying text.

transgender rights in federal courts also reflects the growing saliency of the issue.¹³⁸

Since *Price Waterhouse*, Title VII has been instrumental in securing employment protections for transgender employees, but not all federal courts of appeal have held that Title VII's prohibition of sex discrimination includes discrimination based on transgender status or gender identity.¹³⁹ Likewise, the Fifth and Fourteenth Amendment guarantees of equal protection have been held to protect transgender individuals in employment, education, military service, and other matters, but their reach is limited to the constraint of the federal and state governments.¹⁴⁰ While unquestionably necessary, neither Title VII nor the Fifth or Fourteenth Amendment provides comprehensive, nationwide protections for transgender individuals in certain crucial areas of the law, such as public accommodations. Nor is there an explicit federal law protecting transgender individuals in public accommodations.¹⁴¹ Instead, a patchwork of state and local laws provide some public accommodations protection for transgender individuals.¹⁴²

138. See, e.g., *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034 (7th Cir. 2017); *Doe 1 v. Trump*, 275 F. Supp. 3d 167 (D.D.C.), *stay denied by* No. 17-1597 (CKK), 2017 WL 6553389 (D.D.C. Dec. 22, 2017); *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267 (W.D. Pa. 2017); *Carcaño v. McCrory*, 203 F. Supp. 3d 615 (M.D.N.C. 2016); *Bd. of Educ. of the Highland Local Sch. Dist. v. U.S. Dep't of Educ.*, 208 F. Supp. 3d 850 (S.D. Ohio 2016); *Love v. Johnson*, 146 F. Supp. 3d 848 (E.D. Mich. 2015).

139. See *supra* notes 128–29 and accompanying text.

140. See U.S. Const. amends. V, XIV; see also *supra* note 128.

141. Federal law does not prohibit discrimination on the basis of sex in public accommodations, however the majority of states – forty-four and the District of Columbia – do. NAT'L CTR. FOR TRANSGENDER EQUAL., TRANSGENDER PEOPLE AND ACCESS TO PUBLIC ACCOMMODATIONS 1 (2014), https://transequality.org/sites/default/files/docs/kyr/PublicAccommodations_September2014.pdf.

Many state courts and enforcement agencies have interpreted these laws to protect transgender people. Many states and localities also explicitly prohibit discrimination based on gender identity and sexual orientation in public accommodations. The following 17 states have explicit protections: California, Connecticut, Colorado, Delaware, Hawaii, Illinois, Iowa, Maryland, Maine, Minnesota, Nevada, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, and Washington State, as well as the District of Columbia. More than 200 cities and counties also explicitly prohibit gender identity discrimination even if their state does not.

Id.

142. See *id.*

F. States' Attacks on Transgender Individuals

The issue of transgender rights likely conjures thoughts of so-called state “bathroom bills” that seek to limit or deny transgender individuals’ ability to use restrooms that correspond with their gender identity.¹⁴³ These bills represent only one facet of the fight for transgender rights, but their proliferation in state legislatures in recent years highlights the controversy that still surrounds those rights. During the 2017 legislative session, sixteen states considered bathroom bills targeting transgender individuals.¹⁴⁴ Moreover, six states in 2017 “considered legislation that would preempt municipal and county-level anti-discrimination laws.”¹⁴⁵

Proposed and enacted “bathroom bills” have ranged in scope; some merely prohibit transgender individuals from using restrooms that correspond to their gender identity, while others make the act a crime punishable by incarceration or a fine.¹⁴⁶ For instance, Mark Jennings, a Representative in the Wyoming House, filed House Bill 244, which proposed that using a public restroom not corresponding to an individual’s gender assigned at birth constituted an act of public indecency punishable by up to six months’ imprisonment or a \$750 fine.¹⁴⁷

State legislatures are not the only state authorities that have proposed or enacted bathroom bills. American universities have also implemented bathroom bills. For example, in a 2015 case, campus police at the University of Pennsylvania arrested a transgender student because he used the men’s re-

143. See Joellen Kralik, “Bathroom Bill” Legislative Tracking: 2017 State Legislation, NAT’L CONF. OF ST. LEGIS. (July 28, 2017), <http://www.ncsl.org/research/education/-bathroom-bill-legislative-tracking635951130.aspx>.

144. See Kralik, *supra* note 143. The states are Alabama, Arkansas, Illinois, Kansas, Kentucky, Minnesota, Missouri, Montana, New York, South Carolina, South Dakota, Tennessee, Texas, Virginia, Washington, and Wyoming. *Id.* Human Rights Campaign tracked legislation in 2016, and of the more than 175 anti-LGBT bills tracked, forty-four were anti-trans, and twenty-nine of those forty-four specifically related to bathrooms or locker rooms. HUMAN RIGHTS CAMPAIGN FOUND., ANTI-TRANSGENDER LEGISLATION SPREADS NATIONWIDE, BILLS TARGETING TRANSGENDER CHILDREN SURGE 2 (Feb. 19, 2016), <http://assets2.hrc.org/files/assets/resources/HRC-Anti-Trans-Issue-Brief-FINAL-REV2.pdf>.

145. Kralik, *supra* note 143. The six states are Missouri, Montana, North Carolina, South Carolina, and Texas. *Id.*

146. *See id.*

147. See Arno Rosenfeld, *Bill Would Amend Wyoming Civil Rights Law to Regulate Bathroom Use*, CASPER STAR TRIB. (Jan 27, 2017), https://trib.com/news/state-and-regional/govt-and-politics/bill-would-amend-wyoming-civil-rights-law-to-regulate-bathroom/article_2a60c7b3-37cf-5963-9894-d669b6501b7b.html; *see also* H.B. 0244, 2017 Leg., Reg. Sess. (Wy. 2017), <http://www.wyoleg.gov/2017/Introduced/HB0244.pdf>.

stroom.¹⁴⁸ Following his arrest, the transgender student was expelled from the university.¹⁴⁹ The university even filed criminal charges against him with the District Attorney's office alleging indecent exposure, criminal trespass, and disorderly conduct.¹⁵⁰

Bathroom bills affect younger students in public primary and secondary schools as well. Missouri is among the states that have recently undertaken the passage of bathroom bills that would affect K-12 students. In 2017, Senate Bill 98, sponsored by Representative Ed Emery, proposed that students at K-12 public schools must use bathrooms, locker rooms, and shower facilities that match their assigned gender at birth.¹⁵¹ The bill provided "accommodations" to transgender students in the form of "single-stall restrooms, access to unisex restrooms, or controlled use of faculty restrooms, locker rooms, or shower rooms."¹⁵²

G. The Supreme Court Almost Weighs In

In 2017, the United States Supreme Court almost took up the issue of transgender rights in *G.G. ex rel Grimm v. Gloucester School Board*.¹⁵³ Specifically, *G.G.* concerned a young transgender man (Gavin Grimm) and whether he had the right to use the restroom at his high school that corresponded with his gender identity.¹⁵⁴ The case was brought because Grimm was prohibited from using the men's restroom¹⁵⁵ after his school board implemented a policy requiring students to use restrooms consistent with their assigned gender at birth.¹⁵⁶ Grimm challenged the policy, alleging discrimination in violation of Title IX and the Equal Protection Clause.¹⁵⁷

The U.S. District Court for the Eastern District of Virginia dismissed Grimm's Title IX claims.¹⁵⁸ However, the U.S. Court of Appeals for the Fourth Circuit reversed the dismissal, giving deference to the Department of Education's ("DOE's") interpretation of Title IX; in a letter from the DOE's Office for Civil Rights ("OCR"), the DOE communicated that, under Title IX, "school[s] generally must treat transgender students consistent with their

148. *Johnston v. Univ. of Pittsburgh of Commonwealth Sys. of Higher Educ.*, 97 F. Supp. 3d 657, 663–64 (W.D. Pa. 2015).

149. *Id.* at 664.

150. *Id.*

151. S. 98, 99th Gen. Assemb., 1st Reg. Sess. (Mo. 2017), http://www.senate.mo.gov/17info/BTS_Web/Bill.aspx?SessionType=R&BillID=57095306.

152. *Id.*

153. 822 F.3d 709 (4th Cir.), *cert. granted in part*, 137 S. Ct. 369 (2016), *vacated and remanded*, 137 S. Ct. 1239 (2017).

154. *Id.* at 714–15.

155. *Id.* at 714.

156. *Id.* at 716.

157. *Id.*

158. *Id.* at 717.

gender identity.”¹⁵⁹ The position of the DOE was formalized in guidance issued jointly by the DOJ and the DOE in 2016.¹⁶⁰ The joint guidance prohibited schools receiving federal money from discriminating based on a student’s sex, “including discrimination based on a student’s transgender status.”¹⁶¹ The guidance explicitly directed federal agencies to treat a student’s gender identity as the student’s sex for purposes of enforcing Title IX.¹⁶²

The Fourth Circuit’s decision garnered a significant amount of attention in the media, and far more media attention followed when the United States Supreme Court agreed to hear the case.¹⁶³ However, on February 22, 2017, the DOJ and the DOE withdrew their joint guidance regarding treatment of transgender students.¹⁶⁴ In light of the withdrawn guidance, the Court vacated the Fourth Circuit’s decision – a decision that relied on the aforementioned OCR letter that mirrored the position of the later-adopted joint guidance –

159. *Id.* at 718; *see also* CATHERINE E. LHAMON, DEP’T OF EDUC., QUESTIONS AND ANSWERS ON TITLE IX AND SINGLE-SEX ELEMENTARY AND SECONDARY CLASSES AND EXTRACURRICULAR ACTIVITIES ¶ 31 (Dec. 1, 2014), <https://www2.ed.gov/about/offices/list/ocr/docs/faqs-title-ix-single-sex-201412.pdf> (recognizing transgender students should be treated consistent with their gender identity for purposes of same-sex classes); Letter from James A. Ferg-Cadima, Acting Deputy Assistant Sec’y for Policy, Off. for Civ. Rts., to Emily T. Prince, Esq. (Jan. 7, 2015), http://www.bricker.com/documents/misc/transgender_student_restroom_access_1-2015.pdf.

160. Letter from Catherine E. Lhamon, Assistant Sec’y for Civil Rights, U.S. Dep’t of Educ., and Vanita Gupta, Principal Deputy Assistant Attorney Gen. for Civil Rights, U.S. Dep’t of Justice to Colleague (May 13, 2016), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf> (asserting schools must “treat the student consistent with the student’s gender identity”). According to the Department of Education’s website, that joint guidance was disseminated to “ensure that all students, including transgender students, can attend school in an environment free from discrimination based on sex.” Press Release, U.S. Dept. of Educ., U.S. Departments of Education and Justice Release Joint Guidance to Help Schools Ensure the Civil Rights of Transgender Students (May 13, 2016), <https://www.ed.gov/news/press-releases/us-departments-education-and-justice-release-joint-guidance-help-schools-ensure-civil-rights-transgender-students>.

161. Letter from Catherine E. Lhamon, *supra* note 160, at 1.

162. *Id.* at 2.

163. *See, e.g.*, Sheryl Gay Stolberg, *Bathroom Case Puts Transgender Student on National Stage*, N.Y. TIMES (Feb. 23, 2017), <https://www.nytimes.com/2017/02/23/us/gavin-grimm-transgender-rights-bathroom.html>.

164. Letter from Sandra Battle, Acting Assistant Sec’y for Civil Rights, U.S. Dep’t of Educ., and T.E. Wheeler, II, Acting Assistant Attorney Gen. for Civil Rights, U.S. Dep’t of Justice, to Colleague (Feb. 22, 2017), <https://www.justice.gov/crt/page/file/942021/download>.

and remanded the case.¹⁶⁵ While this was a disappointing moment for many transgender individuals and their advocates, it is almost surely not the last time the Court will take up the issue of transgender rights, whether in the context of access to restrooms or otherwise.

IV. THE INSTANT DECISION

In the instant case, the Eastern District of Pennsylvania denied Cabela's motion to dismiss, holding that Blatt's condition of Gender Dysphoria was not excluded from coverage under § 12211 of the ADA.¹⁶⁶ Recall that Blatt alleged she was either covered under the ADA or the ADA's exclusions violated her right to equal protection.¹⁶⁷ Had the court held the ADA excluded Blatt from coverage, it would have been forced to rule on the constitutionality of the ADA's GID Exclusion.¹⁶⁸ Citing its obligation under the constitutional-avoidance canon,¹⁶⁹ the court rationalized a "fairly possible" construction of the ADA's GID Exclusion under which it did not need to address the constitutional issue.¹⁷⁰

The court concluded that reading the phrase "gender identity disorders" narrowly to refer to merely "the state of identifying with a [gender other than the one assigned at birth]" was a fair interpretation of the GID Exclusion.¹⁷¹ Gender Dysphoria, the court said, "goes beyond" merely identifying with a gender other than the one assigned at birth and is "characterized by clinically significant stress and other impairments that may be disabling."¹⁷²

In adopting this narrow interpretation of "gender identity disorders," the court first looked at the text of § 12211.¹⁷³ The court noted two distinct categories of exclusion: "non-disabling conditions that concern sexual orientation or identity," such as homosexuality and bisexuality, and "disabling conditions that are associated with harmful or illegal conduct," such as pyromania and

165. Gloucester Cty. Sch. Bd. v. G.G. *ex rel.* Grimm, 137 S. Ct. 1239 (2017) (mem.) ("Judgment vacated, and case remanded to the United States Court of Appeals for the Fourth Circuit for further consideration in light of the guidance document issued by the Department of Education and Department of Justice on February 22, 2017.")

166. Blatt v. Cabela's Retail, Inc., No. 5:14-cv-04822, 2017 WL 2178123, at *4 (E.D. Pa. May 18, 2017).

167. *Id.* at *2.

168. *See id.*

169. "[E]ven if a serious doubt of constitutionality is raised, it is a cardinal principle that [the court] will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Id.* (citing *United States v. Witkovich*, 353 U.S. 194, 201 (1957)).

170. *Id.* at *2–4.

171. *Id.* at *4.

172. *Id.* at *2.

173. *Id.* at *3 n.2.

kleptomania.¹⁷⁴ The court reasoned that if it adopted Cabela's proffered theory of exclusion, then it would create internal incongruence in the statute, as it would exclude a disabling condition (Gender Dysphoria) that is *not* associated with harmful or illegal conduct.¹⁷⁵

Under the narrower definition of "gender identity disorders" adopted by the court, no such internal incongruence would arise because "gender identity disorders" would belong to the first category of exclusions encompassing non-disabling conditions that concern "sexual orientation or identity."¹⁷⁶

In support of its conclusion, the court emphasized the legislative history of § 12211. The court stated that § 12211 revealed Congress' careful intention to distinguish between excluding certain identities from the scope of the ADA (homosexuality, for instance) on one hand, and not excluding disabling conditions that individuals with those identities might have on the other.¹⁷⁷

The court further explained that its narrow interpretation comported with the Third Circuit's mandate that the ADA be "broadly construed to effectuate its purposes" as "a remedial statute designed to eliminate discrimination against the disabled in all facets of society."¹⁷⁸ The court reasoned that, under the Third Circuit's instruction, exceptions "such as those listed in [§] 12211 should be read narrowly to give the statute a broad reach."¹⁷⁹

174. *Id.* at *3.

175. *Id.*

176. *Id.* It should be noted that sexual orientation/identity is different from gender identity. See GLAAD Guide, *supra* note 77. Judge Leeson refers to "non-disabling conditions that concern sexual orientation or identity," and one presumes "identity" as used by Judge Leeson in this context refers to sexual identity. See Blatt, 2017 WL 2178123, at *3. Nonetheless, Judge Leeson states that "gender identity disorders" belongs in the first category of non-disabling conditions just described. *Id.* Thus, one can also presume that Judge Leeson intended to refer to a category of exclusion encompassing non-disabling conditions that concern both sexual orientation *and* gender identity. See *id.*

177. *Id.* For instance, the legislative record demonstrates that legislators agreed that homosexuality was not to be considered a disability, but a gay person with HIV would not be excluded from ADA protection because HIV is a disabling condition, and thus the individual would be entitled to protection on that ground. See 135 CONG. REC. S10765-01 (daily ed. Sept. 7, 1989), Cong. Rec S 10767, at 1989 WL 183216.

178. Blatt, 2017 WL 2178123, at *3 (citing Disabled in Action of Pa. v. Se. Pa. Transp. Auth., 539 F.3d 199, 208–09 (3d Cir. 2008)); see also 42 U.S.C. § 12101 (2012).

179. *Id.* at *3 (citing Bonkowski v. Oberg Indus., 787 F.3d 190, 195 (3d Cir. 2015) ("Following traditional canons of statutory interpretation, remedial statutes should be construed broadly to extend coverage and their exclusions or exceptions should be construed narrowly.")). The Code of Federal Regulations, as well as other courts to address similar issues, likewise dictate that the ADA should be construed broadly in favor of expansive coverage. See, e.g., 29 C.F.R. § 1630.2(j)(1)(i) (2012) ("The term 'substantially limits' shall be construed broadly in favor of expansive coverage, to the maximum extent permitted by the terms of the ADA.").

V. COMMENT

This Part first explores how the instant decision's legal reasoning aligns with contemporary medical standards. This Part then addresses the potential arguments against the decision reached by the Eastern District of Pennsylvania in *Blatt v. Cabela's Retail, Inc.* Next, this Part explores the importance and limitations of the DOJ's Second Statement of Interest in *Blatt* and further argues that it articulates another viable method through which transgender individuals with Gender Dysphoria could be encompassed by the protections of the ADA. This Part then discusses the position of amici curiae in *Blatt* and argues that it, too, presents a viable method by which Gender Dysphoria could be encompassed by the protections of the ADA. Finally, this Part addresses the manifold ways the public and legal spheres will change if individuals with Gender Dysphoria are entitled to ADA protection.

A. A Landmark Ruling

For twenty-five years, the ADA's exclusion of transgender individuals stood relatively unchallenged.¹⁸⁰ The instant case marks the first time that a federal court has held the ADA does not categorically bar a transgender individual from coverage.¹⁸¹ The Eastern District of Pennsylvania's decision is significant not only for holding that a transgender plaintiff with Gender Dysphoria can sue under the ADA, but also for the reasoning underlying its decision.

In *Blatt*, Judge Leeson delivered two important conclusions: (1) that being transgender is not, in itself, a medical condition or disability¹⁸² and (2) that Gender Dysphoria – the stress that can accompany being transgender – is a medical condition and a covered disability.¹⁸³ In so concluding, Judge Leeson drew an important line between identifying with a gender other than

180. Kevin Barry & Jennifer Levi, *A Landmark Victory for Trans Rights – Under the Americans with Disabilities Act*, SLATE (May 24, 2017, 12:27 PM), http://www.slate.com/blogs/outward/2017/05/24/a_landmark_victory_for_trans_rights_under_the_ada.html; but see *Johnson v. Fresh Mark, Inc.*, 337 F.Supp.2d 996 (N.D. Ohio 2003), *aff'd*, 98 F. App'x 461 (6th Cir. 2004) (dismissing a transgender employee's sex discrimination claim despite the employee's argument that her GID resulted from a physical impairment and therefore should not be barred from coverage under the GID Exclusion).

181. Barry & Levi, *supra* note 180.

182. *Id.* Judge Leeson does not explicitly state that being transgender is not a disability. See generally *Blatt*, 2017 WL 2178123. Nonetheless, Judge Leeson reaches this conclusion. See *id.* at 4. The opinion articulates the mere state of identifying with a gender other than the gender assigned at birth (i.e., being transgender) belongs to the non-disabling category of exclusion. *Id.* at *4. Thus, one assumes that in placing transgender status in the non-disabling category, it is not considered a disability. See *id.*

183. Barry & Levi, *supra* note 180.

the one assigned at birth and the clinically significant stress that can accompany one's gender identity.¹⁸⁴

Judge Leeson's decision was praised by advocates for this distinction, which aligns with contemporary medical standards.¹⁸⁵ The DSM-V has shifted away from labeling or implying that transgender people are mentally ill.¹⁸⁶ "Gender Dysphoria" replaced the term "Gender Identity Disorder" in the DSM-V to facilitate an understanding that being transgender is not, in itself, a mental condition.¹⁸⁷ In contrast, the clinically significant stress that can result from being transgender is a medical condition.¹⁸⁸ When the change was implemented in 2013, the APA wrote, "DSM-[V] aims to avoid stigma and ensure clinical care for individuals who see and feel themselves to be a different gender than their assigned gender. . . . *It is important to note that gender nonconformity is not in itself a mental disorder.*"¹⁸⁹ Thus, Judge Leeson's opinion reflects the prevailing views of one of the nation's foremost authorities on mental health and mental conditions – the APA¹⁹⁰ – and his decision has been acknowledged for its conformity with these prevailing medical views.¹⁹¹

However, because not all transgender people have Gender Dysphoria, *Blatt* may not benefit the entire transgender community. Absent a showing that a transgender individual was discriminated against because they were *regarded as* having Gender Dysphoria, a plaintiff that does not experience Gender Dysphoria would not be protected by the ADA.¹⁹² In this way, *Blatt* may appear to be a peculiar decision. It may strike one as perplexing to imagine that an employer could discriminate against two transgender employees in precisely the same way, but only the employee that does or is thought to experience Gender Dysphoria would be protected under the statute. Application of *Blatt* may therefore be complicated given that many transgender people do not, in fact, experience Gender Dysphoria.¹⁹³ Thus, *Blatt* does not

184. *Blatt*, 2017 WL 2178123, at *4.

185. *Id.*

186. *See supra* Section III.A.

187. *See* AM. PSYCHIATRIC ASS'N, GENDER DYSPHORIA 1 (2013), https://www.psychiatry.org/File%20Library/Psychiatrists/Practice/DSM/APA_DSM-V-Gender-Dysphoria.pdf.

188. *Id.*

189. *Id.* (emphasis added).

190. "APA is a national medical specialty society whose more than 37,000 physician members specialize in the diagnosis, treatment, prevention and research of mental illnesses, including substance use disorders." *Id.* at 2.

191. *See* Barry & Levi, *supra* note 180.

192. *See supra* note 51.

193. As explored in Section III.A of this Note, transgender is an umbrella term and there are various gender identities that fall under this umbrella. One might think of transgender men or women, but the gender identity spectrum extends far beyond this limited, binary conception. *See* GLAAD Guide *supra* note 77. Many individuals in the umbrella do not experience Gender Dysphoria. *See* Brief of Amici Curiae,

render the GID Exclusion obsolete; an adoption of *Blatt* nationwide would mean the exclusion simply denies ADA protection to a distinct section of the transgender community – those who do not and are not assumed to suffer from Gender Dysphoria.

However, this result comports with the purpose of the ADA – to provide legal protections for individuals with disabling conditions.¹⁹⁴ Without the presence of a disabling condition like Gender Dysphoria (or a discriminatory action under the presumption of Gender Dysphoria¹⁹⁵), invocation of the ADA would be improper, as the relief sought would be beyond the ADA's scope and purpose.

Blatt begs practical questions as well. Presumably, transgender plaintiffs with Gender Dysphoria need to prove their disability in some way – but how? Must they have an official diagnosis? Not everyone can afford medical care, including the ability to be officially diagnosed by a medical or mental health professional. Moreover, the necessity of an official diagnosis may present problems for transgender individuals who live in areas in which medical or mental health providers refuse to provide them service precisely because they are transgender and have Gender Dysphoria.¹⁹⁶ Thus, if one is unable to travel to a non-discriminatory doctor or psychiatrist,¹⁹⁷ the very reason an individual is entitled to protection under the ADA may be the reason they are unable to prove that entitlement. No such evidentiary issue was presented in *Blatt* because Blatt had an official diagnosis, but that may not always be the case. Future courts may have to grapple with these kinds of questions.

supra note 9, at 3–4. Individuals who are non-binary, gender-fluid, genderqueer, or agender may not experience Gender Dysphoria. Though empirical studies have not attempted to understand a correlation between particular gender identities and the experience of Gender Dysphoria, it is possible that one subset of the transgender population experiences Gender Dysphoria less regularly than another.

194. See 42 U.S.C. § 12101(b)(1) (2012).

195. A person treated adversely based on Gender Dysphoria, whether real or perceived, would be covered under the ADA's regarded-as prong, as amended. See 42 U.S.C. § 12102(2)(C) (2012).

196. Shabab Ahmed Mirza & Caitlin Rooney, *Discrimination Prevents LGBTQ People from Accessing Health Care*, CTR. FOR AMERICAN PROGRESS (Jan. 18, 2018, 9:00 AM), <https://www.americanprogress.org/issues/lgbt/news/2018/01/18/445130/discrimination-prevents-lgbtq-people-accessing-health-care/>. The Center for American Progress stated that twenty-nine percent of transgender respondents reported that a doctor or health care provider had refused them an appointment because they were transgender. *Id.*

197. Twenty-nine percent of transgender respondents had to travel more than twenty-five miles or more to access transition-related care. *Id.*

B. Arguments Against Judge Leeson's Interpretation of the GID Exclusion

One argument against Judge Leeson's interpretation of the GID Exclusion is that the legislature intended to exclude transgender people from ADA protection. However, this argument ultimately provides little cause to reject the reasoning in *Blatt*. The legislative record makes clear that lawmakers intended to ensure that LGBT people were not considered disabled because they are LGBT.¹⁹⁸ However, those same lawmakers discussed that LGBT status should not preclude coverage for LGBT people who also happen to have disabling conditions.¹⁹⁹ *Blatt* does not stray from this intent – Blatt is covered not because she is transgender, but because she has a disabling condition.²⁰⁰

One could also quibble that Gender Dysphoria is not disabling; however, the text of the ADA and medical literature, including the definition of Gender Dysphoria in the DSM-V, support Judge Leeson's finding that Gender Dysphoria is, in fact, disabling.²⁰¹ To be diagnosed with Gender Dysphoria, an individual must have “clinically significant []stress or impairment in occupational, social, or other important areas of functioning” that is present for at least six months.²⁰² By definition under the ADA, significant social and occupational impairment constitutes a disability.²⁰³

Another argument against Judge Leeson's interpretation of the GID Exclusion is that “gender identity disorders not resulting from impairment” should be interpreted to *include* Gender Dysphoria. This argument is not especially strong. Recall that Judge Leeson defined “gender identity disorders” as merely the state of identifying with a gender other than the one assigned at birth, and thus held the phrase did not include a condition like Gender Dysphoria.²⁰⁴

In reaching this conclusion, Judge Leeson took a classic interpretive approach and construed the statute so as to render it internally consistent.²⁰⁵ As

198. See 135 CONG. REC. S10765-01 (daily ed. Sept. 7, 1989), Cong. Rec S 10767, at 1989 WL 183216; see also Barry, *supra* note 108, at 24–25.

199. See 135 CONG. REC. S10765-01, Cong. Rec S 10767, at 1989 WL 183216. “Congress was careful to distinguish between excluding certain sexual identities from the ADA's definition of disability, on one hand, and not excluding disabling conditions that persons of those identities might have, on the other hand.” *Blatt v. Cabela's Retail, Inc.*, No. 5:14-cv-04822, 2017 WL 2178123, at *3 (E.D. Pa. May 18, 2017).

200. *Id.* at *4.

201. See DSM-V, *supra* note 4, § 302.6, at 455.

202. *Id.* at 451–53.

203. See 42 U.S.C. § 12102(2) (2012). “Concentrating, thinking, communicating and working” are all listed as major life activities, the substantial impairment of which renders the condition from which they are caused to be a disability under the ADA. *Id.*

204. *Blatt*, 2017 WL 2178123, at *4.

205. *Id.* at *3.

Judge Leeson recognized, the statute creates two categories of exceptions.²⁰⁶ The first deals with “non-disabling conditions that concern sexual orientation or gender identity,” and the second concerns disabling conditions that are “associated with harmful or illegal conduct.”²⁰⁷ Judge Leeson rightly determined that to exclude Gender Dysphoria “would exclude from the ADA conditions that are actually disabling but that are not associated with harmful or illegal conduct.”²⁰⁸ Therefore, including Gender Dysphoria in the definition of “gender identity disorders” would create an anomalous result. Consequently, an argument that the GID Exclusion should encompass Gender Dysphoria lacks convincing support.²⁰⁹

C. The DOJ Says Gender Dysphoria is Covered Under the ADA

The DOJ took an official position in its Second Statement of Interest that ultimately aligned with Judge Leeson’s holding that Gender Dysphoria is a disabling condition covered under the ADA.²¹⁰ However, unlike Judge Leeson’s decision, the DOJ’s position was not based on a narrow interpretation of the ADA’s exclusion, and it provides another rationale that supports the conclusion that Gender Dysphoria is a protected disability under the ADA.

The ADA excludes “gender identity disorders *not resulting from physical impairment*.”²¹¹ In its Second Statement of Interest, the DOJ recognized the contemporary medical view that suggests Gender Dysphoria has roots in biology and physiology.²¹² In relevant part, the Second Statement of Interest reads: “[U]nder a reasonable interpretation of the statute, Plaintiff’s [G]ender [D]ysphoria falls outside of the scope of the GID Exclusion because a growing body of scientific evidence suggests that it may ‘result[] from [a] physical impairment[.]’”²¹³ Quoting the amici curiae in the case, the DOJ endorsed the view that “burgeoning medical research underlying [Gender Dysphoria] points to a physical etiology.”²¹⁴

Physiological and biological roots arguably fall under the “physical impairment” caveat of the GID Exclusion. The ADA itself does not define the phrase “not resulting from physical impairment.”²¹⁵ However, the ADA is construed to provide at least as much protection as the regulations implement-

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.* at *3.

210. Second Statement of Interest, *supra* note 72, at 5–6.

211. 42 U.S.C. § 12211(b)(1) (2012) (emphasis added).

212. Second Statement of Interest, *supra* note 72, at 3.

213. *Id.*

214. *Id.* (alteration in original) (quoting Brief of Amici Curiae, *supra* note 9, at 15).

215. *Id.* at 2.

ing the Rehabilitation Act,²¹⁶ which define “physical impairment” to mean “[a]ny physiological disorder or condition’ affecting various body systems including ‘neurological,’ ‘reproductive,’ or ‘genitourinary.’”²¹⁷ Further, the regulations implementing the Rehabilitation Act explain that “physical impairment” was designed to include “any condition which is . . . physical but whose precise nature is not at present known.”²¹⁸ Thus, the DOJ argued, the term “physical impairment,” if properly construed, leaves room for scientific developments.²¹⁹ Given the burgeoning science, “the remedial nature of the ADA” and the broad reading of “physical impairment,” the DOJ asserted “that [G]ender [D]ysphoria falls outside [the GID Exclusion’s] scope” and therefore “[s]hould not be excluded from the ADA’s definition of ‘disability.’”²²⁰

This official stance taken by the DOJ is profound. It perhaps marks the first time that the federal government has recognized and urged in an official capacity that Gender Dysphoria has roots in physiology. The DOJ’s Second Statement of Interest is important in another respect – given the DOJ’s prestige and authority, it may increase the likelihood that future courts hearing ADA complaints from transgender individuals adopt Judge Leeson’s view that Gender Dysphoria is not excluded from ADA protection.

Even if courts reject Judge Leeson’s narrow interpretation of the term “gender identity disorders,” adoption of the DOJ’s position would take Gender Dysphoria out of the purview of the ADA’s exclusion of “gender identity disorders *not resulting from physical impairment*.”²²¹ If Gender Dysphoria is said to be a “gender identity disorder” but is recognized by courts as having roots in physiology (i.e., resulting from physical impairment), then the exclusion would not apply.²²²

In reply to the DOJ’s Second Statement of Interest, a statement was filed by a prominent group of LGBT advocacy organizations serving as amici curiae in the case.²²³ In this statement, the amici agreed that Gender Dysphoria is not excluded by the GID Exclusion.²²⁴ However, the amici asserted, as they did in a previously filed brief,²²⁵ that this is because Gender Dysphoria is not

216. *Id.* at 3 (quoting *Bragdon v. Abbott*, 524 U.S. 624, 631–32 (1998)).

217. *Id.* (alteration in original) (quoting 28 C.F.R. § 35.104 (2012)).

218. *Id.* (alteration in original) (quoting 42 C.F.R. §§ 84.62–84.99 (1977)).

219. *Id.*

220. *Id.* at 5–6.

221. *See* 42 U.S.C. § 12211(b)(1) (2012) (emphasis added).

222. *See id.*

223. Statement of Amici Curiae Gay & Lesbian Advocates & Defenders, Mazzoni Center, National Center for Lesbian Rights, National Center for Transgender Equality, National LGBTQ Task Force, and Transgender Law Center in Response to Second Statement of Interest of the United States of America, *Blatt v. Cabela’s Retail, Inc.*, No. 5:14-CV-04822 (E.D. Pa. Dec. 1, 2015), 2015 WL 9907588 [hereinafter Statement of Amici Curiae in Response].

224. *Id.* at 1.

225. *See* Brief of Amici Curiae, *supra* note 9, at 13.

a “gender identity disorder” at all; instead, it is a separate, “new and different diagnosis that does not fall within the letter or spirit of the GID Exclusion.”²²⁶ Amici noted that the GID Exclusion prohibits coverage for certain “gender identity disorders” but says nothing of Gender Dysphoria.²²⁷ As of the DSM’s revision in 2013, the amici argued, Gender Identity Disorder and “gender identity disorders” no longer exist; “there is only Gender Dysphoria.”²²⁸

Amici supported this argument by detailing that when Gender Dysphoria replaced GID in the DSM-V, the APA did more than rename the diagnosis – “it revised the diagnostic criteria underlying the diagnosis, it re-categorized the diagnosis within the DSM, and it referenced new science supporting the physiological etiology of the diagnosis.”²²⁹ Therefore, as a matter of statutory interpretation, the amici made a strong argument that Gender Dysphoria does not fall under any definition of “gender identity disorder” and is completely outside the purview of the GID Exclusion.²³⁰ The amici opined that the DOJ ignored “significant differences” between GID and Gender Dysphoria but nonetheless agreed with the “thrust of the United States’ position” that Gender Dysphoria “falls outside the scope of the GID Exclusion.”²³¹

Whatever reasoning one might find most persuasive, the ultimate conclusion drawn by Judge Leeson, the DOJ, and amici curiae is the same: Gender Dysphoria is a protected disability under the ADA.

D. A New Legal Landscape Under Blatt

Blatt is a profound decision with vast implications. For those with Gender Dysphoria, a new world will emerge if Judge Leeson’s interpretation of the ADA²³² prevails in other courts around the country – a world marked by an exponential increase in legal protections. Transgender individuals with Gender Dysphoria who face discrimination in myriad facets of life would finally have a means to access the protection Congress and many states refuse to enact through targeted legislation.

If courts interpret the ADA to include protection for transgender individuals with Gender Dysphoria, public accommodations nationwide would no longer have carte blanche to deny transgender individuals service or the right to use restrooms consistent with their gender identity.²³³ This would be par-

226. Statement of Amici Curiae in Response, *supra* note 223, at 2.

227. See 42 U.S.C. § 12211(b)(1) (2012).

228. Statement of Amici Curiae in Response, *supra* note 223, at 2 n.1.

229. See Brief of Amici Curiae, *supra* note 9, at 15.

230. See *id.* at 20–24.

231. Statement of Amici Curiae in Response, *supra* note 223, at 2–3.

232. Implications are equally vast under the DOJ and amici’s reasoning, each concluding that Gender Dysphoria falls outside the purview of the GID Exclusion. See *supra* Section IV.C.

233. See 42 U.S.C. § 12182(a) (2012) (“No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, ser-

ticularly groundbreaking because private entities such as hotels, movie theaters, restaurants, stadiums, grocery stores, shopping centers, banks, pharmacies, lawyers' and doctors' offices, hospitals, and more are considered public accommodations so long as their "operations . . . affect commerce."²³⁴ Given the far-reaching protections of the ADA, adopting *Blatt* nationwide would have a powerful effect on the daily lives of transgender individuals.

Moreover, a nationwide adoption of *Blatt* would likely have a profound effect on young transgender individuals attending primary, secondary, and post-secondary school who are threatened with discrimination.²³⁵ In recent years, an increasing number of lawsuits have been filed that challenge school board prohibitions regarding the use of restrooms that match a student's gen-

vices, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.”).

234. See 42 U.S.C. § 12181(7) (2012). Under the ADA, all of

[t]he following private entities are considered public accommodations . . . if the operations of such entities affect commerce[:] (A) an inn, hotel, motel, or other place of lodging, except for an establishment located within a building that contains not more than five rooms for rent or hire and that is actually occupied by the proprietor of such establishment as the residence of such proprietor; (B) a restaurant, bar, or other establishment serving food or drink; (C) a motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment; (D) an auditorium, convention center, lecture hall, or other place of public gathering; (E) a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment; (F) a laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment; (G) a terminal, depot, or other station used for specified public transportation; (H) a museum, library, gallery, or other place of public display or collection; (I) a park, zoo, amusement park, or other place of recreation; (J) a nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education; (K) a day care center, senior citizen center, homeless shelter, food bank, adoption agency, or other social service center establishment; (L) and a gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation.

Id. “The term ‘commerce’ means travel, trade, traffic, commerce, transportation, or communication – (A) among the several States; (B) between any foreign country or any territory or possession and any State; or (C) between points in the same State but through another State or foreign country.” *Id.* § 12181(1).

235. See, e.g., Moriah Balingit, *Gavin Grimm Just Wanted to Use the Bathroom. He Didn't Think the Nation Would Debate It.*, WASH. POST (Aug. 30, 2016), https://www.washingtonpost.com/local/education/gavin-grimm-just-wanted-to-use-the-bathroom-he-didnt-think-the-nation-would-debate-it/2016/08/30/23fc9892-6a26-11e6-ba32-5a4bf5aad4fa_story.html?utm_term=.f593a4f8f371.

der identity.²³⁶ Under *Blatt*, a university, high school, elementary, or other school policy categorically prohibiting transgender students from using restrooms that match their gender identity would not be permissible. Indeed, under *Blatt*, even private universities not receiving federal funds would be prohibited from implementing “bathroom bills” or policies that target transgender individuals so long as such entities properly fit within the description of a “public accommodation.”²³⁷ Moreover, if a nationwide consensus aligned with *Blatt* takes hold, “bathroom bills” could not be enacted by state legislatures.

E. Eliminating Discrimination in Employment

The ADA applies to certain private employers with more than fifteen employees, state and local governments, employment agencies, labor unions, agents of an employer and joint management labor committees.²³⁸ The ADA prohibits discrimination in a wide variety of employment practices, including hiring, firing, advancement, compensation, training, and more.²³⁹ Currently, there are states in which laws do not prohibit discrimination on the basis of gender identity.²⁴⁰ In those states, individuals can be fired simply for being transgender. If no binding, favorable federal court precedent exists in the jurisdiction upon which a transgender person could rely, no legal recourse for a termination or other adverse action would be available. The logic and holding of the instant case would change such a result.

As *Blatt* suggests, transgender individuals are often fired *because* they are transgender.²⁴¹ It is not difficult to imagine that prejudice against transgender individuals likely also biases employers against giving promotions to transgender employees, even when their job performance is stellar.²⁴² It likely happens to transgender individuals across the country. ADA protection for transgender individuals with Gender Dysphoria would be a crucial

236. See, e.g., *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267 (W.D. Pa. 2017); *Bd. of Educ. of the Highland Local Sch. Dist. v. U.S. Dep’t of Educ.*, 208 F. Supp. 3d 850 (S.D. Ohio 2016).

237. See *supra* note 234 and accompanying text.

238. 42 U.S.C. § 12111(2)–(5) (2012).

239. *Id.* § 12112(a) (2012).

240. See MOVEMENT ADVANCEMENT PROJECT, STATE EMPLOYMENT NON-DISCRIMINATION LAWS (June 21, 2018), <http://www.lgbtmap.org/img/maps/citations-nondisc-employment.pdf>. States without legislation prohibiting discrimination against transgender employees include Alabama, Alaska, Arizona, Arkansas, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, Nebraska, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Virginia, West Virginia, Wisconsin, and Wyoming. *Id.*

241. See, e.g., *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560 (6th Cir. 2018).

242. See First Amended Complaint and Jury Demand, *supra* note 13, ¶ 25.

step toward ensuring equal employment opportunity for all transgender workers.

F. Healthcare and Incarceration

For transgender individuals with Gender Dysphoria, access to healthcare can be critical to mental and physical health. A nationwide adoption of *Blatt* would be profound for transgender individuals with Gender Dysphoria in the healthcare context because it would prohibit any “pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment” from discriminating against a transgender individual with Gender Dysphoria.²⁴³

This means that a pharmacy could not refuse to provide hormones, a doctor/hospital could not refuse to provide medical care, and an insurance office could not refuse to provide service to a transgender individual with Gender Dysphoria based on their condition.²⁴⁴ Protections of this sort are imperative for transgender individuals with Gender Dysphoria and may be particularly vital in areas with few providers or in areas where religious-based refusal of care is common.

Blatt would also be transformative for transgender people who are incarcerated. Often, prisons and jails refuse to house transgender individuals according to their gender identity.²⁴⁵ This practice can subject transgender people to physical and sexual violence as well as harassment.²⁴⁶ In June 2018, a federal court in *Doe v. Massachusetts* declined to dismiss the lawsuit of a transgender woman being housed in a men’s prison based on the GID Exclusion, ruling instead that the woman could proceed with her ADA claim.²⁴⁷ The judge found that Doe “adequately stated a claim under the ADA” and “adequately pled that she ha[d] been denied the reasonable ac-

243. These entities, even if private, are considered places of public accommodation under the ADA, provided they affect commerce. 42 U.S.C. § 12181(7)(F) (2012).

244. A proliferation of *Blatt* nationwide would be especially important if so-called “religious freedom” bills are enacted at the state level, giving healthcare providers the legal authorization to refuse to provide care to someone in any instance in which their gender identity/expression offends a provider’s personal feelings about morality and/or religion.

245. See Megan McLemore, *US Bureau of Prisons Policy Change Endangers Transgender Prisoners*, HUM. RTS. WATCH (May 14, 2018), <https://www.hrw.org/news/2018/05/14/us-bureau-prisons-policy-change-endangers-transgender-prisoners>.

246. More than one in three transgender women have been sexually victimized according to Prison Rape Elimination Act data. *Id.* In a national survey, transgender prisoners reported “physical and sexual assault rates six to [ten] times higher than non-transgender prisoners.” *Id.* See also ALLEN J. BECK, *SEXUAL VICTIMIZATION IN PRISONS AND JAILS REPORTED BY INMATES 2011-12*, (2013).

247. No. CV 17-12255-RGS, 2018 WL 2994403, at *8 (D. Mass. June 14, 2018).

commodation of a transfer to a woman's prison."²⁴⁸ *Doe* demonstrates the significance of rulings in line with *Blatt* and illustrates the meaningful and potentially life-saving effects of recognizing Gender Dysphoria as a disability entitled to ADA protection.

VI. CONCLUSION

The ADA is a fundamental piece of civil rights legislation. Its scope is vast, guaranteeing equal opportunity for individuals with disabilities in public accommodations, employment, transportation, state and local government services, and telecommunications.²⁴⁹ While the prohibition on sex discrimination found in the Civil Rights Act of 1964 and elsewhere encompasses transgender individuals in many jurisdictions, the current patchwork of protections is inadequate for protecting the rights of all transgender individuals in the United States. Without explicit federal legislation that provides protections on the basis of gender identity and transgender status, one can expect that transgender individuals will continue to face discrimination by states, businesses, and individuals alike. For this reason, existing federal legislation like the ADA that can be properly construed to protect transgender individuals may play an important role in the developing legal landscape.

Though the ADA codified harmful and unnecessary prejudice against transgender individuals in the GID Exclusion, the instant decision by the Eastern District of Pennsylvania marks what could be the first rumbling of a seismic legal shift. If other courts follow the decision of Judge Leeson, transgender individuals may soon find that they are indeed afforded the sweeping protections of the ADA.

248. *Id.*

249. See Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12101–12213 (1990) (amended 2008).