

WHEN TRANS RIGHTS ARE DISABILITY RIGHTS: THE PROMISES AND PERILS OF SEEKING GENDER DYSPHORIA COVERAGE UNDER THE AMERICANS WITH DISABILITIES ACT

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Trans rights are under attack, and the once-promising pathway of workplace protections under Title VII now resemble shifting sands. With the recent trio of certiorari grants in Zarda, Bostick, and Harris Funeral Homes, the Supreme Court appears poised to eviscerate hard-fought protections under Title VII for trans people unless the Court fulfills its countermajoritarian role. This Note posits another more robust route for trans people, in the workplace and beyond it: the Americans with Disabilities Act (ADA). It begins with an introduction to the trans population in the United States, with a special emphasis on their systematic oppression through legal systems and insidious discrimination across society. This Note then discusses the practical limits of pursuing trans rights under Title VII, which has been the primary vehicle of litigants thus far. This Note then pivots to suggest that the ADA is the best vehicle for trans rights. It explores the distinctions between Gender Identity Disorder (GID) and trans identity, and the rightful coverage of GID as a disability under the ADA. The Note discusses the greater breadth of the ADA, before discussing the history of its specific carveout for those individuals who experience GID, and the constitutional infirmity of this carveout. The Note then focuses on the landmark case of Blatt v. Cabela's Retail, Inc., which was the first decision recognizing a cause of action for individuals with GID under the ADA, before turning other cases outside of the employment context to demonstrate the great breadth of the ADA as a vehicle for trans rights as compared with Title VII. The Note then examines another recent case, Parker v. Strawser Construction, Inc., which reached the opposite result and criticized the ruling of the Blatt court in doing so. The Note concludes by turning to the potential limits of this approach, including theoretical critiques, doctrinal limits based on ADA case law, and the risk of litigating the constitutionality of the GID exclusion, each of which it dismisses as outweighed by the potential for the meaningful realization of rights offered by this pathway.

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“We live with particular social and physical struggles that are partly consequences of the conditions of our bodies and partly consequences of the structures and expectations of our societies, but they are struggles which only people with bodies like ours experience.”¹

I. INTRODUCTION

The fight for trans civil rights has significantly progressed in the past decade, but it has been a hard-fought battle.² Until recently, the only viable legal option for nationwide protection appeared to be under Title VII of the Civil Rights Act of 1964, which bans workplace discrimination “because of sex.” While not all courts have recognized Title VII protections for transgender individuals, several federal appellate courts have ruled on these protections, resulting in a circuit split, and the Supreme Court has recently granted a writ of certiorari on the issue for the 2019 term.³ Given the current

¹ Susan Wendell, *Toward a Feminist Theory of Disability*, 4 FEMINIST ETHICS & MED. 104, 117 (1989).

² The term trans has been utilized throughout this paper instead of transgender as it is considered “to be [more] inclusive of a wide variety of identities under the transgender umbrella.” See *GLAAD Media Reference Guide*, GLAAD, <https://www.glaad.org/reference/transgender> [<https://perma.cc/6C9B-9N29>]. In a litigation setting, language should always track that used by the client.

³ *R.G. & G.R. Harris Funeral Homes Inc. v. Equal Employment Opportunity Commission*, SCOTUSBLOG, <https://www.scotusblog.com/case-files/cases/r-g-g-r-harris-funeral-homes-inc-v-equal-opportunity-employment-commission/> [<https://perma.cc/RGE3-749V>] (indicating that certiorari was granted on the issues of whether transgender people can avail themselves of Title VII based on their status as transgender *or* under a sex

composition and jurisprudence of the Supreme Court, many are bracing for a decision that will deny coverage under Title VII for trans individuals.⁴ However, there is another route to robust protection for trans individuals, both in the workplace and beyond: the Americans with Disabilities Act (ADA). In 2017, the Eastern District of Pennsylvania held in *Blatt v. Cabela's Retail, Inc.* that individuals with gender dysphoria, a condition experienced by many trans individuals, may receive ADA protections.⁵ ADA coverage for trans individuals would provide a wealth of substantive legal protections as it offers even more expansive protections than Title VII beyond the workplace, in virtually all public spaces.

Extending protections to trans individuals under the ADA is a significant frontier in the continued struggle for civil rights. If other courts follow *Blatt*, it will open a meaningful pathway to protection. However, other courts may remain unconvinced of these legal arguments and the potential for a circuit split looms: less than a year after *Blatt*, the Southern District of Ohio reached the opposite conclusion in *Parker v. Strawser Construction, Inc.*, despite hearing similar arguments. In its opinion, the *Strawser* court specifically critiqued the decision in *Blatt*, claiming it could “find no support, textual or otherwise, for the *Blatt* court’s interpretation.”⁶ Even if other courts do follow *Blatt*, the ADA will not be a silver bullet for trans individu-

stereotyping theory). In the Petition for Certiorari, conservative group Alliance for Defending Freedom characterized the circuits as “irreconcilably” split on the theory of sex stereotyping as it pertains to transgender individuals. Petition for Writ of Certiorari at 25, R.G. & G.R. Funeral Homes, Inc. v. EEOC (2018) (No. 18-107), 2018 WL 3572625. The Third, Sixth, and Seventh Circuits have allowed for transgender individuals to proceed under a sex stereotyping theory, *see id.*, while the Tenth Circuit held otherwise, at least with regard to bathroom access. *See id.* at 25–26.

⁴ *See, e.g.*, Robert Barnes, *Supreme Court to Decide Whether Gay, Transgender Workers are Protected by Anti-Discrimination Laws*, WASH. POST (Apr. 22, 2019), https://www.washingtonpost.com/politics/courts_law/supreme-court-to-decide-if-anti-discrimination-employment-laws-protect-on-basis-of-sexual-orientation-and-gender-identity/2019/04/22/175fca02-6503-11e9-a1b6-b29b90efa879_story.html?utm_term=.00de6996a54f [<https://perma.cc/TL7M-KPEK>] (“Overturning such rulings ‘would be disastrous, relegating LGBTQ people around the country to a second-class citizen status,’ said James Esseks, director of the ACLU’s LGBT and HIV Project. ‘The LGBTQ community has fought too long and too hard to go back now, and we are counting on the justices not to reverse that hard-won progress.’”); Vin Gurrieri, *Politics Looms As High Court Agrees To Weigh LGBT Rights*, LAW360 (Apr. 22, 2019), <https://www.law360.com/articles/1152170/politics-looms-as-high-court-agrees-to-weigh-lgbt-rights> [<https://perma.cc/NR7S-K98Y>] (“Jason Habinsky, a partner at Haynes and Boone LLP, said Monday that the timing of the Supreme Court’s decision to hear the cases amounts to a ‘perfect storm of politics and jurisprudence. . . . Politics is going to bleed all over this case[.]’”); Jared Odessky, *Commentary Roundup for Bostock, Zarda and Harris Cert Grants*, ONLABOR (Apr. 24, 2019), <https://onlabor.org/commentary-roundup-for-bostock-zarda-and-harris-cert-grants/> [<https://perma.cc/YV6R-5EUI>] (“‘[I]t’s hard to see this going well,’ writes Jay Michaelson at The Daily Beast. ‘I am not optimistic,’ says Georgetown Law professor Sheila Foster. ‘Not great news,’ contends Columbia Law professor Katherine Franke. ‘Yikes,’ tweets Mark Joseph Stern at Slate.”).

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

⁶ *Parker v. Strawser Constr., Inc.*, 307 F. Supp. 3d 744, 754 (S.D. Ohio 2018).

als, as they will face the same host of challenges any ADA plaintiff faces and lurking equal protection issues could come to the fore. Some trans individuals and activists balk at what could be viewed as the further pathologization of trans identity, which may result in a cascade of harms for trans people;⁷ however, it is necessary to recognize the ableism present in many of these critiques and to consider whether the disability and trans rights movements could both benefit more from a unified front. Ultimately, using the recent district court decision in *Blatt* as a focal point illustrating a turning point from the status quo to a new frontier of opportunity, this Note argues that the recognition of gender dysphoria as a disability protected by the ADA can lead to the expansion of civil rights and the upsetting of the discriminatory status quo.

II. TRANS PEOPLE IN THE UNITED STATES AND THE NEED FOR GREATER PROTECTIONS UNDER LAW

Trans individuals represent a significantly marginalized population in the United States. Despite the increasing visibility of the community in recent years, the trans community continues to face rampant discrimination and serious systemic barriers to equality. Current studies estimate the number of trans individuals living in the United States to be between 1 and 1.4 million, an estimate which has nearly doubled between 2011 and 2016.⁸ Adults age 18–24 report being trans at much higher percentages than any other age group, regardless of geography.⁹ Some have attributed the higher

⁷ See, e.g., Mauro Cabral, *I Am Transgender and Being Myself Is Not a Disorder*, THE GUARDIAN (Feb. 24, 2017), <https://www.theguardian.com/global-development-professionals-network/2017/feb/24/im-transgender-why-does-the-who-say-i-have-a-mental-disorder> [<https://perma.cc/KF2C-A5WL>] (“[Treating] trans people as psychologically abnormal suggests that just being ourselves is a disorder . . . [I]t also means that someone else . . . needs to provide a specific diagnosis for us to have access to those key but basic rights: identity, freedom of expression, bodily integrity, autonomy and healthcare.”); Kayley Whalen, *(In)Validating Transgender Identities: Progress and Trouble in the DSM-5*, NAT’L LGBTQ TASK FORCE, <https://www.thetaskforce.org/invalidating-transgender-identities-progress-and-trouble-in-the-dsm-5/> [<https://perma.cc/PMY8-ZCHN>] (“As long as gender variance is characterized by the medical field as a mental condition, transgender people will find their identities invalidated by claims that they are “mentally ill,” . . . This has even been used to justify discrimination against transgender people . . . in child custody cases, discrimination in hiring/workplace practices, or justifying them to be mentally unfit to serve in the military.”).

⁸ Esther L. Meerwijk & Jae M. Sevelius, *Transgender Population Size in the United States: A Meta-Regression of Population-Based Probability Samples*, 107 AM. J. PUB. HEALTH e1, e5 (2017) (estimating that there are nearly one million trans adults living in the United States and that future studies will likely observe even higher numbers as trans individuals feel freer to report their identities); Jan Hoffman, *Estimate of U.S. Trans Population Doubles to 1.4 Million Adults*, N.Y. TIMES (June 30, 2016) (estimating the trans population to be nearly 1.4 million trans adults in the United States, using federal and state data).

⁹ ANDREWS R. FLORES, JODY L. HERMAN, GARY J. GATES & TAYLOR N.T. BROWN, *HOW MANY ADULTS IDENTIFY AS TRANSGENDER IN THE UNITED STATES?* 1, 2 (2016),

rates of self-identification amongst young people as related to the increased access to resources, increased visibility of trans people, and greater advocacy for trans inclusion.¹⁰ Trans people are “more likely to be from racial and ethnic minorities, particularly from Latino backgrounds,” thus increasing the likelihood that these individuals will face overlapping and interdependent oppressions due to their intersectional identities.¹¹

Discrimination against trans individuals is neither speculative nor rare; rather, it is pervasive and severe. The National Center for Trans Equality (NCTE) surveyed 27,715 trans individuals in 2015 about their experiences with discrimination in the United States.¹² Thirty percent of respondents who were employed reported being fired, denied a promotion, or experiencing other workplace mistreatment *because of* their gender identity within the past year. Trans individuals were also more likely to live in poverty than the general population, and experienced an unemployment rate of fifteen percent.¹³ Almost half of the trans individuals surveyed had been verbally harassed because of their gender identity and nearly one in ten were physically attacked within the past year because they were trans.¹⁴ Nearly one-third of those surveyed experienced mistreatment in public accommodations, including denial of equal treatment or service, verbal harassment, and physical attacks; one in five respondents avoided certain public accommodations in the past year out of fear they would be mistreated because they were trans.¹⁵ Trans people of color and those who were undocumented unsurprisingly experienced “deeper and broader patterns of discrimination” than their white counterparts.¹⁶ These statistics represent only a select number of the myriad forms of discrimination impacting trans people and give rise to serious concerns as to the rampant discrimination against this community.

III. THE LIMITED POTENTIAL OF TITLE VII FOR ROBUST TRANS RIGHTS

Some trans individuals pursue relief for discrimination against them based on their gender identity under Title VII of the Civil Rights Act of

<https://williamsinstitute.law.ucla.edu/wp-content/uploads/How-Many-Adults-Identify-as-Transgender-in-the-United-States.pdf> [<https://perma.cc/4DZJ-ET6U>].

¹⁰ Ana Valens, *How Big is the Transgender Population, Really?*, DAILY DOT (Mar. 29, 2017), <https://www.dailydot.com/irl/transgender-population-in-us/> [<https://perma.cc/A5AV-WM8H>].

¹¹ Hoffman, *supra* note 8. For an in-depth exploration on how race and gender intersect to oppress women of color in interlocking ways, see generally Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 Stan. L. Rev. 1241 (1991).

¹² JAMES ET AL., NAT'L CTR. FOR TRANSGENDER EQUALITY, THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY 18 (2016), <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf> [<https://perma.cc/HL6W-YPK5>].

¹³ *Id.* at 5.

¹⁴ *Id.*

¹⁵ *Id.* at 16.

¹⁶ *Id.* at 6.

1964, though this avenue is by its very nature circumscribed in its ability to provide expansive rights to the trans community. Within the realm of employment discrimination, Title VII may provide significant relief in some cases, but in others, it may not be sufficient to allow for more meaningful inclusion.

In the past fifty years, the scope of sex discrimination under Title VII has rapidly been expanded by courts in such a way that trans individuals now have a solid foundation upon which to bring a successful Title VII claim. Title VII of the Civil Rights Act of 1964 prohibits employment discrimination “because of . . . sex.”¹⁷ In the years immediately following its passage, courts narrowly interpreted this provision to prohibit discrimination on the basis of a plaintiff’s sex as assigned at birth.¹⁸ However, the Supreme Court’s decision in *Price Waterhouse v. Hopkins* significantly changed the legal landscape under Title VII for trans plaintiffs.¹⁹ The *Price Waterhouse* Court found that an employer acting upon gendered stereotypes in the workplace, such as withholding promotion opportunities from a woman who does not wear make-up, has acted in a manner that constitutes sex discrimination.²⁰ This has become known as the “sex stereotyping” theory of gender discrimination.²¹ Following *Price Waterhouse*, a number of lower courts recognized a cause of action under Title VII for trans plaintiffs under the sex stereotyping framework where they have suffered discrimination because of gender non-conformity.²² Recently, the Sixth Circuit became the first federal appellate court to weigh in on whether discrimination against trans people is categorically discrimination on the basis of sex.²³ In *Harris Funeral Homes*, the Sixth Circuit held that “discrimination on the basis of trans and transitioning status is necessarily discrimination on the basis of sex,” providing powerful support to trans plaintiffs under Title VII.²⁴ While *Harris Funeral*

¹⁷ 42 U.S.C. § 2000e-2(a) (2012).

¹⁸ Jason Lee, Note, *Lost in Transition: The Challenges of Remediating Transgender Employment Discrimination Under Title VII*, 35 HARV. J. L. & GENDER 423, 426 (2012) (collecting early Title VII cases brought by trans plaintiffs).

¹⁹ 490 U.S. 228 (1989).

²⁰ *Id.* at 250–51.

²¹ *See id.* at 250; *see also* Ilona M. Turner, Comment, *Sex Stereotyping Per Se: Transgender Employees and Title VII*, 95 CAL. L. REV. 561, 562 (2007) (discussing *Price Waterhouse* decision).

²² *See* Turner, *supra* note 21, at 577 (“Following [the Court’s] encouragement to view Title VII’s sex discrimination provision expansively, the lower federal courts began to acknowledge the merit of discrimination claims by transgender plaintiffs. The majority of these cases have been decided in favor of the transgender plaintiffs, relying on *Price Waterhouse*’s explicit endorsement of a gender-stereotyping theory . . .”); *see also* Smith v. City of Salem, 378 F.3d 566, 575 (6th Cir. 2004).

²³ *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560 (6th Cir. 2018).

²⁴ *Id.* at 571; *see also* Mark Joseph Stern, *Businesses Can’t Fire Transgender Employees for Religious Reasons, Federal Appeals Court Rules in Landmark Decision*, SLATE (Mar. 7, 2018), <https://slate.com/news-and-politics/2018/03/sixth-circuit-rules-businesses-cant-fire-transgender-employees-for-religious-reasons.html> [<https://perma.cc/K5EW-K3AA>].

Homes represents an important moment in Title VII jurisprudence, Title VII may still be insufficient for some.

Protections for trans individuals under Title VII is precarious at best, especially as the Supreme Court may potentially overturn *Harris Funeral Homes* this term and shut trans plaintiffs out of Title VII altogether.²⁵ Even if the Supreme Court does find that Title VII extends coverage to trans individuals, Title VII's protections, by their very nature, will remain circumscribed to the workplace. Trans individuals suffering from gender dysphoria need legal avenues to protection from discrimination that reach places far beyond the workplace "to all of the other places that intimately touch transgender lives."²⁶ These places include educational settings, housing, public accommodations, and even prisons.²⁷ Within the workplace, there are also limits as

²⁵ At the time of this Note's drafting, it remains unclear—even after oral arguments—how the Supreme Court will rule on the issue of transgender discrimination under Title VII. Justice Gorsuch described the textual argument as "close . . . very close." Transcript of Oral Argument at 25:11–15, R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC (Oct. 8, 2019) (No. 18-107), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2019/18-107_c18e.pdf [<https://perma.cc/7VEK-NX7Z>]. Justice Gorsuch, a devoted textualist, then proceeded to question whether the justices should "take into consideration the massive social upheaval" that could follow the textual reading put forth by LGBTQ advocates. *Id.* at 25:16–20. As Professor Leah Litman succinctly noted, "There is no social upheaval exception to textualism." Leah Litman, *A Tale of Two Neil Gorsuch's, TAKE CARE* (Oct. 8, 2019), <https://takecareblog.com/blog/a-tale-of-two-neil-gorsuch> [<https://perma.cc/3VGG-PRVN>]. Professor Richard Primus, in analyzing the oral arguments in *Harris Funeral Homes* and its companion cases, likewise focused on Justice Gorsuch and characterized the cases as "[t]esting the [l]imits of [his] [t]extualism." Richard Primus, *The Supreme Court Case Testing the Limits of Gorsuch's Textualism, POLITICO* (Oct. 15, 2019), <https://www.politico.com/magazine/story/2019/10/15/lgbt-discrimination-supreme-court-gorsuch-textualism-229850> [<https://perma.cc/R4QY-TXUJ>]. Professor Primus noted that, for textualists, "[w]hat matters is the text of the statute[, a]nd the text that Congress adopted, read literally, covers LGBTQ scenarios," and opined that, if Justice Gorsuch strays from his textualist principles, critics "will say that he pretends to have a consistent interpretive theory, but he's willing to jettison that theory when he doesn't like the result it would lead to." *Id.* All eyes will remain on Justice Gorsuch as the October 2019 term comes to a close next year.

²⁶ Kevin Barry, *Disabilityqueer: Federal Disability Rights Protection*, 16 YALE HUMAN RTS & DEV. L.J. 1, 39 (2013).

²⁷ See Elizabeth F. Schwartz, *The Many Faces of Transgender Discrimination*, TRIAL (Oct. 2016), <https://www.justice.org/what-we-do/enhance-practice-law/publications/trial-magazine/many-faces-transgender-discrimination> [<https://perma.cc/ZV9A-STN9>]. Trans people can and do seek protection under the "sex" provision of laws like the Fair Housing Act or Title IX, but these avenues are being dismantled by the Trump administration and may also be fully foreclosed if the Supreme Court finds in *Harris Funeral Homes* that "sex" cannot encompass "gender identity" and transgender people. See, e.g., Know Your Rights: Fair Housing and Transgender People, NAT'L CTR. FOR TRANSGENDER EQUALITY (Mar. 2012), https://transequality.org/sites/default/files/docs/kyr/FairHousing_March2012.pdf [<https://perma.cc/CEL4-FNWX>] (noting that "courts have increasingly held that discrimination because a person is transgender, or because he or she fails to conform to gender stereotypes, is sex discrimination under federal civil rights laws"); see also Anya Kamenetz & Cory Turner, *Trump and Transgender Rights: What Just Happened?*, NPR (Feb. 23, 2017), <https://www.npr.org/sections/ed/2017/02/23/516837258/5-questions-about-the-trump-administrations-new-transgender-student-guidance> [<https://perma.cc/K8XP-EN94>] (breaking down the Department of Education's about-face on protection of transgender students under Title IX).

to what Title VII can offer trans employees. A victory under Title VII may entitle an individual to damages, reinstatement, and/or back pay,²⁸ but does nothing to move the needle toward greater inclusion of trans individuals in the workplace and accommodation to their needs in the first instance.²⁹ As a reactionary regime, Title VII punishes employers who discriminate but places no affirmative obligation on employers to adequately accommodate the unique needs of their trans employees. Title VII alone does not provide sufficient protection for trans individuals “who need to modify their work schedule or take leave to seek counseling, hormone therapy, electrolysis, surgery, or other treatment.”³⁰ Accordingly, trans individuals and advocates seek a statute with a broader reach, both in terms of reliefs available and contexts in which one can seek relief from discrimination.

IV. PROTECTION FOR GENDER DYSPHORIA UNDER THE AMERICANS WITH DISABILITIES ACT

Title VII alone may be insufficient to protect trans individuals, but the Americans with Disabilities Act (ADA) may provide a pathway to significant relief, legal protection, and ultimately greater inclusion of trans individuals. *Blatt v. Cabela's Retail Inc.*, a recent landmark decision, opened up an approach to legal protection long thought to be foreclosed to trans people. An examination of the *Blatt* litigation highlights the complex issues that arise in advancing these claims, many of which remain live and show the difficult landscape for future plaintiffs.

a. Possibilities for Greater Protections of Trans Individuals

The ADA was passed into law in 1990 and was amended to provide more expansive coverage in 2008. It now offers broad legal protections for individuals with disabilities against discriminatory treatment in a wide variety of settings.³¹ Congress sought to provide a “clear and comprehensive national mandate for the elimination of discrimination” against individuals with disabilities.³² Following the ADA Amendments Act (ADAAA) in 2008, the statute employs a broad definition of disability to maximize the extent of the ADA’s coverage, motivated in part by federal courts’ attempts to narrow

²⁸ *Remedies for Employment Discrimination*, EEOC, <https://www.eeoc.gov/employees/remedies.cfm> [<https://perma.cc/G76W-D4Q5>].

²⁹ See Barry, *supra* note 26, at 38 (arguing that making a successful Title VII case under a gender stereotyping theory is difficult and may not necessarily achieve all of the results a trans person will need to be protected from discrimination).

³⁰ Kevin M. Barry & Jennifer L. Levi, *The Future of Disability Rights Protections for Transgender People*, 35 *TOURO L. REV.* 25, 53 (2019).

³¹ See *What is the Americans with Disabilities Act?*, ADA NAT’L NETWORK, <https://adata.org/learn-about-ada> [<https://perma.cc/FR8C-PU2W>] (providing overview of ADA and its legal coverage and protections).

³² 42 U.S.C. § 12101(b)(1).

the reach of the ADA following its passage.³³ The ADA utilizes a three-prong definition of disability, covering individuals who have a physical or mental impairment that substantially limits at least one major life activity, have a record of such an impairment, or who are regarded as having such an impairment.³⁴ The ADA defines “major life activities” to encompass a wide-ranging swath of activities, including the impairment of major bodily functions.³⁵ Congress specifically provided that the definition of disability “shall be construed in favor of broad coverage of individuals under this chapter, to the maximum extent permitted.”³⁶

The ADA’s broad coverage of individuals, as well as its expansive sweep in terms of remedies and settings that it covers “would fill important gaps and provide another, and surer, layer of needed protections.”³⁷ Unlike Title VII, the ADA compels a more proactive regime, conferring an affirmative obligation on employers and public entities to provide reasonable accommodations to disabled³⁸ individuals.³⁹ An employer could be required to provide accommodations such as modifying restroom-use policies or dress-code standards, as well as modifying a work schedule or granting leave to accommodate an individual’s need to seek counseling, hormone therapy, or reassignment surgery, for example—none of which can be compelled under Title VII.⁴⁰ Furthermore, the ADA applies not only to employers but also to public entities and public accommodations.⁴¹ Protections for trans individuals could extend to restaurants, homeless shelters, public schools, social ser-

³³ See ADA Amendments Act of 2008 § 2(a)(4), 42 U.S.C. § 12101 Historical and Statutory Notes (explaining that the Supreme Court’s decisions narrowing the scope of the ADA “eliminat[ed] protection for many individuals whom Congress intended to protect”); see also Alex B. Long, *Introducing the New and Improved Americans with Disabilities Act: Assessing the ADA Amendments Act of 2008*, 103 Nw. L. REV. 217, 219–23 (2008) (detailing the number of ways in which Congress expanded the scope of the ADA in the ADA Amendments Act through its alterations to the definition of disability).

³⁴ 42 U.S.C. § 12102(1)(A–C) (2012).

³⁵ 42 U.S.C. § 12102(2)(A–B) (2012).

³⁶ 42 U.S.C. § 12102(4)(A) (2012).

³⁷ Barry, *supra* note 26, at 40.

³⁸ There remains a persistent debate in the disability community about whether to utilize “person-first” (e.g. individual with a disability) versus “identity-” or “community-first” (e.g. disabled individual or Deaf individual) language. I have chosen to use identity-first language here as many self-advocates and their allies prefer identity-first language because it shows their disability “as an inherent part of [their] identity – the same way one refers to ‘Muslims,’ ‘African-Americans,’ [or ‘LGBTQ’].” E.g., Lydia Brown, *Identity-First Language*, AUTISTIC SELF ADVOCACY NETWORK, <http://autisticadvocacy.org/about-asan/identity-first-language/> [<https://perma.cc/QYD3-E97J>]. Advocates should always use their client’s preferred terminology and be cognizant of the variety of different preferences that may exist.

³⁹ Barry, *supra* note 26, at 38; see also 42 U.S.C. § 12112(b)(5)(A) (2012) (explaining that employers must make “reasonable accommodations to [a qualified employee’s] known physical or mental limitations”).

⁴⁰ Barry, *supra* note 26, at 38.

⁴¹ See 42 U.S.C. §§ 12111–12117 (2012) (detailing ADA’s employment coverage); 42 U.S.C. §§ 12131–12165 (detailing ADA’s coverage of public services) (2012); 42 U.S.C. §§ 12181–12189 (2012) (detailing ADA’s coverage of public accommodations).

vices, prisons, and so on.⁴² The expansiveness of the ADA, in terms of who can seek coverage, where coverage extends, and what redress can be provided, may make it an attractive choice.

Some trans individuals experience gender dysphoria, which meets the definition of a disability under the ADA because the mental distress associated with the condition interferes with one's ability to think and concentrate, amongst other disabling effects. The American Psychiatric Association (APA) defines gender dysphoria as "a conflict between a person's physical or assigned gender and the gender with which he/she/they identify."⁴³ Individuals with gender dysphoria "often experience significant distress and/or problems functioning associated with this conflict."⁴⁴ For some trans people, this conflict, "if clinically significant and persistent, is a serious medical condition."⁴⁵ The fifth edition of the *Diagnostic and Statistical Manual of Mental Disorders* (DSM-V) lays out criteria for finding a diagnosis of gender dysphoria, which is characterized by "a difference between one's experienced/expressed gender and assigned gender," causing "significant distress or problems functioning," and as meeting at least two other behavioral indicators from a longer list, for at least a period of six months.⁴⁶ Left untreated, gender dysphoria can lead to debilitating depression, anxiety, and, for some, suicidality and death.⁴⁷ However, the effects of gender dysphoria can be ameliorated by an individualized approach to gender transition, which may consist of "a medically-appropriate combination of hormone therapy, 'living part time or full time in another gender role, consistent with one's gender identity,' gender reassignment surgery, and/or psychotherapy."⁴⁸

This decision to use "gender dysphoria," in the DSM-V, and to shed the term "gender identity disorder," reflects a noteworthy change.⁴⁹ The

⁴² See generally 42 U.S.C. §§ 12181–12189 (2012).

⁴³ Ranna Parekh, *What is Gender Dysphoria?*, AM. PSYCHIATRIC ASS'N (Feb. 2016), <https://www.psychiatry.org/patients-families/gender-dysphoria/what-is-gender-dysphoria> [<https://perma.cc/SS9A-KDM7>].

⁴⁴ *Id.*

⁴⁵ Brief of Amici Curiae Gay & Lesbian Advocates & Defenders, Mazzoni Ctr., Nat'l Ctr. for Lesbian Rights, Nat'l Ctr. for Transgender Equal., Nat'l LGBTQ Task Force, and Transgender Law Ctr. in Opposition to the Defendant's Partial Motion to Dismiss at 4, *Blatt v. Cabela's Retail, Inc.*, No. 14–4822 (E.D. Pa. Jan. 23, 2015) [hereinafter *Blatt Amici Curiae Brief*].

⁴⁶ AM. PSYCHIATRIC ASS'N, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* 451–53 (5th ed. 2013) [hereinafter *DSM-V*]; see *id.* at 453 (emphasizing that distress is key to diagnosis of gender dysphoria).

⁴⁷ *Id.* at 454–55.

⁴⁸ *Blatt Amici Curiae Brief*, *supra* note 45, at 8 (quoting WORLD PROF'L ASS'N FOR TRANSGENDER HEALTH, *STANDARDS OF CARE* 9 (7th ed., 2012), https://www.wpath.org/media/cms/Documents/SOC%20v7/Standards%20of%20Care_V7%20Full%20Book_English.pdf [<https://perma.cc/JA4C-MKK8>] [hereinafter *SOC*]).

⁴⁹ Francine Russo, *Where Trans is No Longer a Diagnosis*, SCI. AM. (Jan. 6, 2017), <https://www.scientificamerican.com/article/where-transgender-is-no-longer-a-diagnosis> [<https://perma.cc/CF2U-ANYT>] ("The new diagnosis recognized that a mismatch between one's birth gender and identity was not necessarily pathological . . . [and] shifted the emphasis in treatment from fixing a disorder to resolving distress over the mis-

APA explained that its decision to focus on “gender dysphoria” in the DSM-V was to move away from treating gender nonconformity itself as a mental disorder.⁵⁰ Instead, diagnosis is appropriate only when gender nonconformity is accompanied by “the presence of clinically significant distress.”⁵¹ The APA noted that its decision was motivated by a desire to fight stigma and that “[r]eplacing ‘disorder’ with ‘dysphoria’ in the diagnostic label is not only more appropriate and consistent with familiar clinical sexology terminology, [but] it also removes the connotation that the patient is ‘disordered.’”⁵² There was criticism over the decision to leave any form of gender identity disorder in the DSM-V, grounded in the argument that “continued labeling of expressions of gender as pathological is discriminatory,”⁵³ but the APA ultimately decided to include gender dysphoria as a diagnosis in hopes that it would provide a diagnostic name “more appropriate to the symptoms and behaviors [individuals] experience without jeopardizing their access to effective treatment options.”⁵⁴ The shift toward gender dysphoria focuses on the mental distress experienced by individuals that may be associated with cross-gender identification, rather than cross-gender identification alone as sufficient to sustain any sort of diagnosis. Simply put, being trans alone cannot sustain a diagnosis of gender dysphoria under the DSM-V, as it could for a diagnosis of gender identity disorder under the DSM-IV. A trans person must also be experiencing significant mental distress, resulting from the difference between assigned gender and experienced/expressed gender, before any sort of diagnosis could be appropriate.

Thus, gender dysphoria is not the result of being trans per se, but the result of mental stress from the intolerance and discrimination many trans people face *because* of their gender identity.⁵⁵ Gender dysphoria is characterized by debilitating mental impairments; any sufferer of anxiety or depression could detail how the symptoms of anxiety and depression

match.”); *see also* Barry, *supra* note 26, at 11 (2013) (characterizing DSM-5’s changes as “less ‘stigmatizing’ and ‘better reflect[ing] the core of the problem’” that is the incongruence between gender identity and assigned gender).

⁵⁰ *Gender Dysphoria*, AM. PSYCHIATRIC ASS’N (2013), https://www.psychiatry.org/File%20Library/Psychiatrists/Practice/DSM/APA_DSM-5-Gender-Dysphoria.pdf [<https://perma.cc/R6VH-JYQV>] [hereinafter APA, *DSM-V Rationale*]; *see also* Robin Marvin, *Proposed DSM-5 Revisions to Sexual and Gender Identity Disorder Criteria*, 12 AM. MED. ASS’N J. ETHICS 673, 674 (2010) (noting the shift away from a diagnosis purely on grounds of “cross-gender” identification, which had been the hallmark of the DSM-IV definition of gender identity disorder).

⁵¹ APA, *DSM-V Rationale*, *supra* note 50.

⁵² *Id.*

⁵³ Marvin, *supra* note 50, at 675.

⁵⁴ APA, *DSM-V Rationale*, *supra* note 50, at 2; *see also* Marvin, *supra* note 50, at 675 (noting concern that removal of some form of gender identity disorder “would lead to denial of medical care for transgender individuals, hamper their ability to pursue discrimination claims, and deprive people, including children, with GID of the counseling and medical treatments demonstrated to be beneficial”).

⁵⁵ *See Frequently Asked Questions About Trans People*, NAT’L CTR. FOR TRANSGENDER EQUALITY (July 9, 2016), <https://transequality.org/issues/resources/frequently-asked-questions-about-transgender-people>. [<https://perma.cc/JQ59-G7X4>].

“substantially limit[]” one’s major life activities, especially when one considers that the ADA includes “concentrating, thinking, communicating, and working” as major life activities.⁵⁶ On its face, gender dysphoria appears to be a disability under the ADA.

b. Historical Exclusion of Gender Identity Disorders

Despite the obvious case for gender dysphoria’s coverage under the ADA, trans individuals have historically faced a major roadblock to protection. For nearly thirty years, individuals with “gender identity disorders” (GIDs) have been excluded under the ADA.⁵⁷ As discussed *supra*, GIDs were previously defined solely by a cross-gender identification, while the new category of gender dysphoria focuses on clinically significant distress that may accompany cross-gender identification. Separated from the ADA’s primary definitional provision, in a subchapter entitled “Miscellaneous Provisions,” is a secondary definitions section, which quietly excludes a number of disparate groups from coverage under the ADA.⁵⁸ Section 12211(b) exempts the following conditions from coverage under the ADA: “transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, [GIDs] not resulting from physical impairments, or other sexual behavior disorders; compulsive gambling, kleptomania, or pyromania; or psychoactive substance use disorders resulting from current illegal use of drugs.”⁵⁹ Nestled between voyeurism and compulsive gambling is a carveout excluding those suffering from “[GIDs] not resulting from physical impairments.” The list of exclusions was drawn “directly from the DSM-III-R, the version of the DSM in effect at the time the ADA was being debated.”⁶⁰ Professor Kevin Barry has detailed the legislative history of this exclusion at length and explained how the clause was motivated by moral, legal, and pragmatic concerns.⁶¹ Leading disability rights and LGBTQ advocate Chai Feldblum recalled feeling “sick to her stomach” as backroom deal-making resulted in the exclusion of GIDs under the ADA.⁶² The exclusion of certain mental

⁵⁶ See 42 U.S.C. §§ 12102 (1–2) (2012); see also JAMES ET AL., *supra* note 12, at 105 (“Thirty-nine percent (39%) of [trans] respondents reported currently experiencing *serious* psychological distress, a rate nearly eight times higher than in the U.S. population (5%).”) (emphasis added).

⁵⁷ See generally Barry, *Disabilityqueer*, *supra* note 26, at 5–6 (discussing the origins of the exclusion of GIDs and the changed understanding of this exclusion).

⁵⁸ See 42 U.S.C. § 12211 (2012).

⁵⁹ 42 U.S.C. § 12211(b)(1–3) (2012). The statute also makes clear that homosexuality and bisexuality are not impairments and thus not disabilities under the ADA. 42 U.S.C. § 12211(a) (2012).

⁶⁰ *Blatt Amici Curiae Brief*, *supra* note 45, at 12.

⁶¹ See generally Barry, *Disabilityqueer*, *supra* note 26 (providing detailed legislative history of the passage of the amendment containing the exclusions and the motivations of the senators behind it).

⁶² *Id.* at 24.

impairments transformed the ADA into a sort of “moral code: ‘disability’ coverage applies to those we pity, not those we despise.”⁶³

The exclusion of GIDs from the ADA had powerful effects, both symbolically and practically. In a symbolic sense, some scholars posited that the exclusion of GIDs “[sent] a strong message: [that] people with [GIDs] [had] no civil rights worthy of respect.”⁶⁴ Practically speaking, individuals with GIDs could not invoke the protections of the ADA, even if this impairment substantially limited their major life activities. When Congress amended the ADA in 2008, it ignored activists’ calls to jettison the exclusion, despite other legal changes evincing an acknowledgment of the discrimination faced by the trans community, changes in medical opinion about GIDs, and increased activism for trans inclusion.⁶⁵ The ADAAA functioned as both a symbolic and practical strengthening of the barriers to trans equality and civil rights, confirming once more that trans individuals could not seek legal redress for disability discrimination.⁶⁶ Trans people seeking relief still did not attempt to invoke the ADA for greater legal protection, as it seemed to offer only a dead end.⁶⁷ However, the willingness of some litigants to pursue ADA claims finally bore fruit in the summer of 2017, shortly after the removal of GIDs from the DSM-V in 2013.

c. *Blatt v. Cabela’s Retail, Inc.: Recognition of ADA Claims for Individuals with Gender Dysphoria*

When Ms. Kate Lynn Blatt filed a lawsuit against her employer, Cabela’s, GIDs had been excluded from coverage under the ADA for nearly twenty-five years.⁶⁸ Yet her complaint alleged claims of discrimination under both Title VII *and* the ADA.⁶⁹ Ms. Blatt was designated male at birth and was diagnosed in October 2005 with gender dysphoria, which she alleged was a disability under the ADA as it substantially impaired her abilities to interact with others, reproduce, and socially and occupationally function.⁷⁰ Ms. Blatt began to present more femininely and to engage in hormone therapy because of her gender dysphoria; she also ceased using the name she

⁶³ *Id.* at 25; *see also id.* at 26 (characterizing gender identity disorders as “despised or, at best, misunderstood”).

⁶⁴ *Id.* at 27 (drawing parallels to Michael Waterstone’s theory in the article *Returning Veterans and Disability Law*, 85 NOTRE DAME L. REV. 1081 (2010) that federal law serves an important expressive function).

⁶⁵ *Id.* at 31.

⁶⁶ *Id.* at 33.

⁶⁷ *See, e.g.,* Kevin Barry & Jennifer Levi, *Blatt v. Cabela’s Retail, Inc. and a New Path for Transgender Rights*, 127 YALE L.J.F. 373, 381 (2017) (explaining that transgender people “eschewed disability rights law in favor of sex discrimination protections” because of the Armstrong-Helms amendment to the ADA).

⁶⁸ *Id.*

⁶⁹ First Amended Complaint and Jury Demand ¶¶ 1–2, *Blatt v. Cabela’s Retail, Inc.*, 2017 WL 2178123 (E.D. Pa. Aug. 15, 2014) (No. 5:14-CV-04822).

⁷⁰ *Id.* ¶¶ 9–10.

was given at birth, “James.”⁷¹ When she began to work for Cabela’s in fall 2006, she was already presenting herself to the world as Kate, in conformance with her gender identity; at her new employee orientation, she had no issues when she wore female attire and used the female restroom.⁷² Ms. Blatt then requested a female uniform and a nametag reading “Kate Lynn”; her request for the nametag was denied and her employer required her to wear a nametag reading “James.”⁷³ Cabela’s then denied Ms. Blatt access to the women’s restroom until she presented documentation of a legal change in her gender marker. Even after she provided that documentation, her employer delayed allowing her access to that restroom because she had not undergone gender reassignment surgery.⁷⁴ At one point, her employer attempted to make her use the restroom at a Dunkin Donuts located across the street but eventually allowed her to use the unisex family restroom, which was located far from other employee restrooms and was less clean.⁷⁵ Throughout all of this, Ms. Blatt also faced a barrage of insulting comments and questions from her coworkers.⁷⁶ Following her termination, Ms. Blatt filed her complaint alleging unlawful discrimination under Title VII and the ADA.

Cabela’s, unsurprisingly, moved to dismiss her ADA claim for failure to state a claim because of the exclusion of GIDs from ADA coverage.⁷⁷ Cabela’s also claimed that she had pled no facts supporting her claim that she was “regarded as” having an impairment under the ADA.⁷⁸ Cabela’s further argued for the dismissal of her failure to accommodate claim because, as she was not impaired, she had no legal entitlement to accommodations.⁷⁹ In her response, Ms. Blatt, however, “did something that no litigant had ever done before”⁸⁰ and advanced an argument that the ADA’s exclusion of individuals with GIDs violated the Constitution’s guarantee of equal protection.⁸¹ Specifically, she argued that the exclusion of GIDs “fail[ed] strict, intermediate, and rational basis scrutiny” and that the exclusion impermissi-

⁷¹ *Id.* ¶ 11.

⁷² *Id.* ¶¶ 12–15.

⁷³ *Id.* ¶¶ 16–18.

⁷⁴ *Id.* ¶¶ 19, 28–29.

⁷⁵ *Id.* ¶¶ 29–31.

⁷⁶ *Id.* ¶¶ 21–22, 26 (detailing employees calling Ms. Blatt “he/she,” “ladyboy,” “fag,” “sinner,” “freak,” “cross-dressing gay fruit,” and “confused sicko” as well as asking her frequent questions about her genitalia, all of which she reported to management to no avail).

⁷⁷ Defendant’s Memorandum of Law in Support of the Partial Motion to Dismiss at 8–9, *Blatt*, 2017 WL 2178123 (E.D. Pa. Oct. 22, 2014) (No. 5:14-CV-04822), 2014 WL 8276665.

⁷⁸ *Id.* at 9–10.

⁷⁹ *Id.* at 11–12.

⁸⁰ Barry & Levi, *supra* note 67, at 382.

⁸¹ Plaintiff’s Memorandum of Law in Opposition to Defendant’s Partial Motion to Dismiss at 1–3, *Blatt*, 2017 WL 2178123 (E.D. Pa. Jan. 20, 2015) (No. 5:14-CV-04822), 2015 WL 13215247.

bly resulted from moral animus.⁸² In over twenty pages, Ms. Blatt rigorously argued for a heightened standard of review for trans people and also argued that the exclusion would fail under less rigorous standards of review after *Romer v. Evans* and *United States v. Windsor*.⁸³ In essence, she had thrown down the constitutional gauntlet against the exclusion of trans people suffering gender dysphoria.

Shortly thereafter, several leading trans rights organizations entered the fray by filing a joint amicus brief that advanced a separate, more narrow statutory argument in favor of coverage for individuals with gender dysphoria under the ADA. Amici curiae opened their brief by arguing that the exclusion of individuals with GIDs resulted from “moral opprobrium . . . without foundation in either medicine or law.”⁸⁴ They argued that GIDs, and now gender dysphoria, had always been serious medical conditions, not disorders of sexual behavior, and were entitled to legal protection.⁸⁵ Amici concurred in Ms. Blatt’s constitutional challenges but also presented the court with an alternative route—that gender dysphoria was squarely outside the scope of the ADA’s exclusion.⁸⁶ Amici emphasized the numerous ways in which gender dysphoria is distinct from GIDs and advocated for a narrow reading of the ADA’s exclusion of GIDs.⁸⁷ The DSM-III-R,⁸⁸ which had shaped the view of Congress in its adoption of the ADA and its exclusions, required “[p]ersistent discomfort and sense of inappropriateness about one’s assigned sex” and a “[p]ersistent preoccupation” with acquiring the secondary sex characteristics of the other sex.⁸⁹ Subsequent versions of the DSM focused on “strong and persistent cross-gender identification” and “persistent discomfort.”⁹⁰ In contrast, amici explained that the DSM-V’s adoption of “gender dysphoria” was significant in several ways. First, the name of the diagnosis is different, focusing on dysphoria resulting from incongruence, not incongruence itself, as the condition to be treated.⁹¹ Additionally, the criteria for a diagnosis are distinct, broadening the category of diagnosis “to those who may not formerly have been diagnosed with GID.”⁹² Finally, and perhaps most notably, the underlying medical research supporting the gender dysphoria diagnosis is different because the research strongly suggests that

⁸² *Id.* at 2; *see also id.* at 9–15 (detailing legislative history discussed *supra*).

⁸³ *See generally id.* at 15–39 (arguing that transgender classifications require heightened review, as a suspect or quasi-suspect class, or, in the alternative, intermediate scrutiny, as a sex-based classification).

⁸⁴ *Blatt Amici Curiae Brief*, *supra* note 45, at 2.

⁸⁵ *Id.*

⁸⁶ *Id.* at 2–3.

⁸⁷ *Id.*

⁸⁸ AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 76 (3rd ed., rev. 1987).

⁸⁹ DSM-III-R, at 76.

⁹⁰ *See* AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 537 (4th ed., rev. 2000).

⁹¹ *Blatt Amici Curiae Brief*, *supra* note 45, at 13.

⁹² *Id.* at 13–14.

“physical impairments contribute to gender incongruence and, in turn, [gender dysphoria].”⁹³ Amici charged that the ADA is at the very least *silent* as to its coverage of gender dysphoria; at best, gender dysphoria is squarely within the ambit of the ADA because “the burgeoning medical research underlying [gender dysphoria] points to a physical etiology . . . [and] GIDs resulting from physical impairments . . . have always been covered by the ADA.”⁹⁴ By clearly laying out the ways in which gender dysphoria was distinctive from the GIDs excluded by the ADA, Amici offered the court a way to avoid the lurking constitutional question raised by Ms. Blatt, catering to courts’ desire to avoid such determinations, in line with the canon of constitutional avoidance.

The constitutional claims advanced by Ms. Blatt also drew the Department of Justice (DOJ) into the litigation where the DOJ filed two statements of interest. In its first statement of interest, the DOJ argued that the court should instead resolve Ms. Blatt’s Title VII claims first, as the favorable resolution of those claims could make her ADA claims superfluous.⁹⁵ However, as discussed *supra*, following the suggestion of the DOJ would have been insufficient for the plaintiff here: resolution of a claim on Title VII grounds would not be a substitute for resolving a claim on ADA grounds because Title VII would not mandate reasonable accommodations, such as providing the appropriate nametag. Cabela’s quickly fired back that the DOJ’s resolution was unsupported, “[did] not fit within the strictures of the doctrine of constitutional avoidance because it simply cannot insure a dispositive resolution without a decision on Ms. Blatt’s constitutional challenge,” and that the doctrine of constitutional avoidance should not apply.⁹⁶ The DOJ then filed a second statement of interest that advanced an argument almost identical to that advanced by the trans advocacy groups—that gender dysphoria was not actually excluded under the ADA because of growing evidence that the condition likely results from a physical impairment, thus allowing a court to avoid the lurking constitutional issue.⁹⁷ The DOJ argued that gender dysphoria could fall outside the gender identity disorder exclusion “even if [its] precise etiology is not yet definitely understood,” before citing to the brief of amici curiae and the scientific evidence therein.⁹⁸ Cabela’s again responded to the DOJ, attacking its new statement of interest

⁹³ *Id.* at 14–15.

⁹⁴ *Id.* at 15.

⁹⁵ Statement of Interest of the United States of America at 2, *Blatt*, 2017 WL 2178123 (E.D. Pa. July 21, 2015) (No. 5:14-CV-04822), 2015 WL 5173778.

⁹⁶ Cabela’s Memorandum of Law in Response to the Statement of Interest at 2, *Blatt*, 2017 WL 2178123 (E.D. Pa. Aug. 21, 2015) (No. 5:14-CV-04822), 2015 WL 7188535; see generally *id.* at 4–11 (advocating that constitutional avoidance is a limited doctrine and that the case at bar does not satisfy the factors set forth by the Supreme Court in *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288 (1936), for invoking this justiciability doctrine).

⁹⁷ See Second Statement of Interest of the United States of America at 2, *Blatt*, 2017 WL 2178123 (E.D. Pa. Nov. 16, 2015) (No. 5:14-CV-04822), 2015 WL 9872493.

⁹⁸ *Id.* at 3–6 (citing *Blatt* Amici Curiae Brief, *supra* note 45, at 15 & n.57).

as “rooted in guesswork and surmise,” before arguing that none of the parties could adequately argue that gender dysphoria has a physical etiology, or even if some cases did, that no party could conclusively diagnose that Ms. Blatt suffered from a form of gender dysphoria that *did* have a physical etiology.⁹⁹ While DOJ and amici curiae offered a narrow road of constitutional avoidance, the primary parties to the matter remained rooted to receiving a resolution of the constitutional claims underpinning the matter.

In May of 2017, Judge Joseph F. Leeson, Jr. issued a landmark ruling,¹⁰⁰ finding that Ms. Blatt had stated a claim under the ADA, as gender dysphoria was not subject to the ADA’s exclusion of GIDs.¹⁰¹ The court took note of Congress’s mandate that the ADA’s provisions be interpreted broadly, turning to a statutory interpretation of the provision at issue.¹⁰² The court noted that when a “fairly possible” interpretation of a statute allows a court to avoid disposing of a larger constitutional question, it must engage in constitutional avoidance by reading the statute narrowly.¹⁰³ The court then did so, and advanced an interpretation raised by none of the parties to the litigation. The court noted that the ADA’s exclusion listed a number of conditions that fell into “two distinct categories: first, non-disabling conditions that concern sexual orientation or identity, and second, disabling conditions that are associated with harmful or illegal conduct.”¹⁰⁴ To read the ADA’s exclusion of GIDs to encompass gender dysphoria would mean that the “[GIDs] would occupy an anomalous place in the statute, as it would exclude from the ADA conditions that are actually disabling but that are not associated with harmful or illegal conduct,” fitting in neither of the two major categories it outlined.¹⁰⁵ The court narrowly interpreted the statute so that GIDs only encompassed the condition of identifying with a different gender, whereas “disabling conditions that persons who identify with a different gender may have—such as Blatt’s gender dysphoria”—fell outside of the exclusion and warranted ADA coverage.¹⁰⁶ Thus, one’s trans identity, marked by an identification with a gender identity that they were not assigned at birth, is not a disability; but the mental impairment and suffering that may result from the incongruence between one’s gender identity and gender assigned at birth, diagnosable as gender dysphoria, would be a disa-

⁹⁹ Cabela’s Memorandum of Law in Response to the Second Statement of Interest at 2–3, *Blatt*, 2017 WL 2178123 (E.D. Pa. Nov. 30, 2015) (No. 5:14-CV-04822), 2015 WL 9907608.

¹⁰⁰ *See, e.g.*, Barry & Levi, *supra* note 67, at 385 (characterizing the ruling as “a major step forward for transgender people”); Daniel Trotta, *U.S. Judge Allows First Transgender Person to Sue Under Disability Law*, REUTERS (May 19, 2017), <https://www.reuters.com/article/usa-lgbt-idUSL2N1IL1NJ> [<https://perma.cc/QFK5-VAYV>] (discussing precedential value of decision).

¹⁰¹ *Blatt*, 2017 WL 2178123, at *1, *4 (E.D. Pa. May 18, 2017).

¹⁰² *Id.* at *2–3.

¹⁰³ *Id.* at *3.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at *4.

¹⁰⁶ *Id.*

bility. Soon after the court's opinion, the parties reached a settlement, leaving an open question of how plaintiffs with gender dysphoria would fare in terms of summary judgment, trials, and court-ordered remedies.¹⁰⁷ Nonetheless, the decision is impactful as the court's narrow reading laid out a path for future trans parties¹⁰⁸ with gender dysphoria to argue for coverage and protection under the ADA.

V. THE POST-*BLATT* BATTLE FOR THE EXPANSION OF RIGHTS

Trans advocates have filed other path-breaking lawsuits, some of which commenced prior to the court's opinion in *Blatt*, which seek to leverage the expansive coverage of the ADA and to show its transformative potential for trans people suffering from gender dysphoria. The recent litigation targets correctional policies, employer bathroom policies, and state policies that negatively impact trans plaintiffs with gender dysphoria. This section does not seek to provide a comprehensive catalog of the cases filed but rather to highlight a select few cases that distinctly demonstrate the potential of the ADA as an avenue for trans individuals with gender dysphoria beyond the workplace. This section concludes with a discussion of another recent employment decision in *Parker v. Strawser Construction, Inc.*, which suggests the likelihood that this avenue for litigation will face further appellate scrutiny and underscores the continued importance of a unified, thoughtful strategy amongst advocates in this field.

In *Doe v. Arrisi*,¹⁰⁹ advocates challenged an exclusion of individuals with gender dysphoria under an analogous provision of the Rehabilitation Act (RA). The RA, which Congress passed in 1973, prohibits discrimination on the basis of disability by recipients of federal funds; when the ADA was

¹⁰⁷ Tim Cwiek, *Landmark Transgender Disability Case Settled*, PHILADELPHIA GAY NEWS (Sept. 25, 2017), <http://www.epgn.com/news/breaking-news/12542-landmark-trans-disability-case-settled> [https://perma.cc/LHS7-KKF6] (indicating Ms. Blatt's satisfaction with her settlement and her case's impact on trans civil rights).

¹⁰⁸ At the time of this writing, another case, *EEOC v. Deluxe Financial Services, Inc.*, is pending in Minnesota. Some of the facts are strikingly similar to *Blatt*, but Ms. Austin faces compounded injustice in that her employer health plan does not cover certain procedures for trans individuals, including gender reassignment surgery, yet her employer would not allow her to have her personnel records altered or to use the appropriate restroom *until* she underwent gender reassignment surgery. See Complaint in Intervention at 7–14, 16, *EEOC v. Deluxe Fin. Servs., Inc.*, No. 0:15-cv-02646 (D. Minn. Oct. 22, 2015). In the Eastern District of Pennsylvania, where Ms. Blatt's suit was filed, another case has recently been filed against the Hospital of the University of Pennsylvania, alleging in part that plaintiff had been fired as a result of her gender dysphoria. See Complaint at 11–12, 16–18, *Doe v. Hosp. of the Univ. of Pa.*, No. 2:19-cv-02881 (E.D. Pa. July 2, 2019).

¹⁰⁹ See generally Brief of Amici Curiae, *Doe v. Arrisi*, No. 3:16-cv-08640 (D.N.J. Nov. 21, 2017), http://lgbtbar.org/wp-content/uploads/sites/6/2017/11/Doe-v.-Arrisi_Amicus-Br.-Filed-11.21.17.pdf [hereinafter *Arrisi Amici Curiae Brief*] (arguing that law requiring a transgender woman with gender dysphoria to have a birth certificate designating her sex as “male” violates both the ADA and Rehabilitation Act).

subsequently passed, it incorporated the RA's definition of disability.¹¹⁰ The plaintiff in *Arrisi* challenged a New Jersey policy that required confirmation of gender reassignment surgery before the State would change the sex classification on an individual's birth certificate.¹¹¹ The plaintiff, who suffered from gender dysphoria, argued that the policy was intentionally discriminatory, discriminatory in effect, and constituted a failure to accommodate in violation of the ADA and RA.¹¹² Amici in *Arrisi* highlighted that "[p]eople with disabilities and transgender people share in common a lengthy history of societal prejudice and neglect" and that trans individuals "with gender dysphoria are frequently subjected to discrimination in multiple areas of their lives (e.g., housing, employment, school, healthcare, interactions with police and other government officials) that exacerbates [gender dysphoria's] negative health outcomes."¹¹³ Amici further argued that denying an individual the change of a sex classification on their birth certificate based on failure to undergo a gender reassignment surgery constituted discrimination based on how someone chooses to treat their disability, which ADA Enforcement Guidance clearly considers discrimination.¹¹⁴ The matter is still pending before the district court and its outcome will be important, as at least twenty-six states¹¹⁵ also require trans individuals with gender dysphoria to go through gender reassignment surgery prior to changing sex designations on their birth certificates, despite the fact that this likely constitutes discrimination on the basis of how an individual chooses to treat their disability.

A trans individual with gender dysphoria also challenged her incarceration in a men's prison as violating the ADA and RA in *Doe v. Massachusetts Department of Corrections* ("*Mass. DOC*").¹¹⁶ She alleged that the prison "forced her to shower in view of—and having to view—men, to be strip-searched by men, to be vulnerable to taunts and ridicule by men, and to live

¹¹⁰ Jennifer L. Levi & Bennett H. Klein, *Pursuing Protection for Transgender People through Disability Laws*, in *TRANSGENDER RIGHTS* 74, 79 (Paisley Currah, Richard M. Juang, & Shannon Price Minter, eds. 2006). Thus, the RA represents another path to protection for transgender people if the source of the discrimination against the plaintiff is a recipient of federal funding.

¹¹¹ *Arrisi* Amici Curiae Brief, *supra* note 109, at 3.

¹¹² *Id.* at ix–x.

¹¹³ *Id.* at 1, 6.

¹¹⁴ *Id.* at 10 (citing EEOC, *Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act* ¶ 38 n.106, <https://www.eeoc.gov/policy/docs/accommodation.html> [<https://perma.cc/V3FU-N84h>]).

¹¹⁵ *Changing Birth Certificate Sex Designations: State-By-State Guidelines*, LAMBDA LEGAL, <https://www.lambdalegal.org/know-your-rights/article/trans-changing-birth-certificate-sex-designations> [<https://perma.cc/5UE8-JDAZ>] (last updated Sept. 17, 2018) (collecting the various statutory provisions about changing sex classifications on birth certificates; noting that at least two states strictly forbid the reclassification of sex designations on their birth certificates).

¹¹⁶ *Doe v. Mass. Dep't of Corr.*, No. 1:17-CV-12255, 2018 WL 2994403 at *1 (D. Mass. June 14, 2018).

her life in fear of being sexually victimized by men.”¹¹⁷ Defendants in *Mass. DOC* maintain a “blanket prison policy that segregates prisoners based on anatomy, external genitalia, or assigned birth sex” and does not accommodate individuals with gender dysphoria.¹¹⁸ Defendants attempted to defeat the plaintiff’s disability discrimination claims by invoking one of the ADA’s exceptions—arguing that accommodating the plaintiff’s gender dysphoria would be a risk to public safety.¹¹⁹ Amici were adept to point out that the public safety exception to the ADA is only available for “*actual* risks, not on mere speculation, stereotypes, or generalizations.”¹²⁰ Amici argued that the defendants must adopt a policy based on inmates’ gender identity, or in the alternative, provide inmates with gender dysphoria reasonable accommodations.¹²¹ Most notably, two prominent disability rights organizations, the Bazelon Center for Mental Health Law and the Disability Rights Education & Defense Fund, joined transgender advocates and demonstrate a more unified effort between the trans and disability communities in fighting for coverage of individuals with gender dysphoria.

In March 2018, the court granted in part the plaintiff’s motion for a preliminary injunction, reserving its ruling on the motion to dismiss while it awaited the DOJ’s possible intervention on the constitutional question.¹²² While it did not yet grant the plaintiff’s request to be transferred to a women’s facility, the court required defendants to use female correctional officers for strip searches to the extent possible and to provide for separate accommodations and shower time.¹²³ In June 2018, the court denied the defendants’ motion to dismiss, finding that the “ADA’s exclusion applies only to ‘gender identity disorders *not resulting* from physical impairments,’ and Doe has raised a dispute of fact that her [gender dysphoria] may result from physical causes.”¹²⁴ The court further noted that reading Doe’s gender dysphoria as not covered by the ADA would cause serious constitutional issues, as it is “virtually impossible to square the exclusion of otherwise bona fide disabilities with the remedial purpose of the ADA, which is to redress discrimination against individuals with disabilities based on anti-

¹¹⁷ Brief of Amici Curiae at 3, *Doe v. Mass. Dep’t of Corr.*, 2018 WL 2994403 (D. Mass. Feb. 27, 2018) (No. 1:17-CV-12255), [hereinafter *Mass. DOC Amici Curiae Brief*].

¹¹⁸ *Id.* at 18.

¹¹⁹ *Id.* at 16.

¹²⁰ *Id.* (quoting 28 C.F.R. § 35.130(h) (2012)).

¹²¹ *Id.* at 18–19.

¹²² Memorandum and Order at 2–4, *Doe v. Mass. Dep’t of Corr.*, 2018 WL 2994403 (D. Mass. Mar. 5, 2018) (No. 1:17-CV-12255) [hereinafter *Memorandum and Order*]; Professor Kevin Barry, who helped to author the brief of amici curiae, speculated from his attendance at the oral argument that the judge in *Mass. DOC* appears to believe he cannot avoid the case’s constitutional issue. See Personal Conversation with Kevin Barry, Professor, Quinnipiac University School of Law (Apr. 6, 2018) [hereinafter *Personal Conversation*].

¹²³ *Memorandum and Order* at 5.

¹²⁴ *Doe v. Mass. Dep’t of Corr.*, No. 1:17-CV-12255, 2018 WL 2994403, at *6 (D. Mass. June 14, 2018).

quoted or prejudicial conceptions of how they came to their station in life.”¹²⁵ Thus, the court concluded that “to the extent that the statute may be read as excluding an entire category of people from its protections because of their gender status, such a reading is best avoided.”¹²⁶ The case was eventually dismissed as moot because Doe received all of the relief sought, including her request to be transferred to a women’s prison.¹²⁷ This case and Doe’s eventual transfer to the correct facility show a route of vital reform for trans individuals who are incarcerated. Nearly one in six trans individuals have been to prison, and the rate is significantly higher for black trans people—one in two have been to prison.¹²⁸ There, they face higher risks of assault, a lack of access to medical treatment, and a higher likelihood of being placed in solitary confinement.¹²⁹ With the trans prison population facing daily discrimination, the potential impact of this case could be significant.

Perhaps the most notable post-*Blatt* case to date, however, is *Parker v. Strawser Construction, Inc.*, because it specifically addresses the *Blatt* court’s analysis and found it wanting.¹³⁰ Tracy Parker was working as a truck driver in Ohio for several years before she began her transition. When she informed her employer of her gender dysphoria diagnosis and intent to transition, she began facing regular harassment from her co-workers, as well as discipline by her immediate supervisor for non-existent or minor errors in her logbook.¹³¹ Ms. Parker’s therapist eventually requested accommodations for Ms. Parker’s gender dysphoria in the workplace, including allowing her to use female restrooms and ensuring that she would be referred to using “female gender terminology.”¹³² Ms. Parker was sexually assaulted by a co-worker, which resulted in the co-worker’s termination but also increased harassment of Ms. Parker by her co-workers and supervisor.¹³³ When Ms. Parker approached the company superintendent about the pervasive harassment, the superintendent said there was nothing he could do and instructed her to resign.¹³⁴ Ms. Parker did not end up resigning, but she was demoted following her reporting of the sexual harassment, and one of her harassers filled her position.¹³⁵ When Ms. Parker complained that she was being discriminated against because of her gender, disability, and protected com-

¹²⁵ *Id.* at *8.

¹²⁶ *Id.*

¹²⁷ Electronic Order, ECF No. 115, *Doe v. Mass. Dep’t of Corr.*, No. 1:17-CV-12255, 2018 WL 2994403 (D. Mass. Apr. 8, 2019) (text-only order).

¹²⁸ *Transgender Incarcerated People in Crisis*, LAMBDA LEGAL, <https://www.lambdalegal.org/know-your-rights/article/trans-incarcerated-people> [<https://perma.cc/3FY4-6LL2>].

¹²⁹ *See id.*; *see also Police, Jails & Prisons*, NAT’L CTR. FOR TRANSGENDER EQUALITY, <https://transequality.org/issues/police-jails-prisons> [<https://perma.cc/HJH2-ST2Z>].

¹³⁰ *Parker v. Strawser Constr., Inc.*, 307 F. Supp. 3d 744, 754 (S.D. Ohio 2018).

¹³¹ *Id.* at 748.

¹³² *Id.* at 748–49.

¹³³ *Id.* at 749.

¹³⁴ *Id.*

¹³⁵ *Id.* A pay-cut also accompanied the demotion. *Id.*

plaints, she was suspended without pay and ordered to see a company-approved therapist or risk termination.¹³⁶ Ms. Parker complied, but returned to a work environment still replete with pervasive, gender-based harassment.¹³⁷ Not long after her return, Ms. Parker was terminated for insubordination; her letter of termination addressed her as “Mr. Parker.”¹³⁸ After her termination, Ms. Parker filed charges with the EEOC before eventually bringing a lawsuit in federal court, alleging violations of Title VII, the ADA, and Ohio’s anti-discrimination laws.¹³⁹

In April 2018, the district court issued its opinion, finding that Ms. Parker had successfully pled claims for sex discrimination, sexual harassment, and retaliation under Title VII, but dismissing her ADA claims on grounds that gender dysphoria was not a disability under the ADA.¹⁴⁰ In deciding the sex discrimination claims under Title VII, the court was directly following the Sixth Circuit’s precedent in *Harris Funeral Homes*.¹⁴¹ Her employer resorted to a familiar argument in claiming her ADA claim had to be dismissed: that her gender dysphoria fell into the ADA’s exclusion of “gender identity disorders not resulting from physical impairments.”¹⁴² Ms. Parker, in turn, employed similar arguments to those raised in *Blatt*, and specifically cited to the Eastern District of Pennsylvania’s decision in *Blatt*.¹⁴³ The Southern District of Ohio, however, did not find this framing of gender dysphoria availing. In its decision, the court claimed it could find “no support, textual or otherwise, for the *Blatt* court’s interpretation.”¹⁴⁴ The court dismissed the *Blatt* court’s reasoning that the ADA only intended to exclude “non-disabling” gender identity disorders, noting that any disorders that “do not substantially limit a major life activity are already excluded from coverage, and an additional exclusion for any non-disabling condition would be superfluous.”¹⁴⁵ Instead, it found Congress’s intent to exclude *all* gender identity disorders not resulting from a physical impairment, disabling or not, to be obvious.¹⁴⁶ While Ms. Parker had argued in her opposition to the motion to dismiss that medical research was showing that gender dysphoria may have biological roots, the court dismissed these arguments on procedural grounds because Ms. Parker had failed to raise them in her com-

¹³⁶ *Id.* at 749–50.

¹³⁷ *Id.* at 750.

¹³⁸ *Id.*

¹³⁹ *Id.* at 750–51.

¹⁴⁰ *See id.* at 753–61.

¹⁴¹ *Id.* at 755–56.

¹⁴² *Id.* at 753–54.

¹⁴³ *Id.* at 754; *see also* Plaintiff’s Memorandum in Opposition to Defendant’s Motion to Dismiss at 23–25, *Strawser Constr.*, 307 F.Supp.3d 744 (S.D. Ohio Oct. 19, 2017) (No. 2:17CV00541), ECF No. 27.

¹⁴⁴ *Strawser Constr.*, 307 F.Supp.3d at 754.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* The court also noted that the “majority” of federal cases have concluded as much. *Id.*

plaint.¹⁴⁷ Even if she had properly pled such a theory, however, the court noted that it was “not convinced” by such a line of reasoning.¹⁴⁸ In just a few paragraphs, the *Strawser* court exemplified the resistance to these arguments that advocates and litigants continue to face in some courts. The *Strawser* court portends the looming appellate challenges to these arguments lying ahead, which could ultimately wend their way to the Supreme Court.

Arrisi and *Mass. DOC* represent just two of the ways in which the ADA can be leveraged on behalf of trans individuals—such as to fight bureaucratically-mandated surgical interventions and to achieve safer prisons—and show the vast, under-realized potential of this new frontier of civil rights. *Strawser*, following on the heels of *Blatt*, however, suggests the need for vigilance amongst advocates in the field and demonstrates the likelihood that some courts will continue to resist this logical reading of the ADA. This continued resistance by some courts may lead to a similar Supreme Court standoff to the one this term in *Harris Funeral Homes*, and remains an important variable to watch as the fight for equal rights continues.

VI. THE LIMITS OF THE ADA AS A VEHICLE FOR TRANS RIGHTS

Both theoretical critiques and practical concerns may arise when pursuing trans rights under disability law. The theoretical critiques, while quite prevalent in academia, tend to misunderstand the nature of the claims or draw on ableist arguments, and thus should cause no concern moving forward. “Ableism is a complex system of cultural, political, economic, and social practices that facilitate, construct, or reinforce the subordination of people with disabilities in a given society.”¹⁴⁹ Distilled to the basics, ableism is the ways in which discrimination against disabled people is manifested in every facet of society. However, some practical concerns—both with the limits of disability law jurisprudence and the lurking constitutional concerns underpinning this area of the law—should remain in the minds of advocates as they continue to pursue relief for trans clients.

a. Theoretical Critiques

Some critique the pursuit of trans rights under a disability framework by charging that this further pathologizes being trans. Pathologization impacts trans people in two major ways. First, pathologization casts trans identity itself as an “impairment” in need of a “cure” and creates troubling implications that trans people are sick or otherwise abnormal. Second, pathologization may compound and augment the harms already faced by

¹⁴⁷ *Id.* at 755.

¹⁴⁸ *Id.*

¹⁴⁹ Jamelia N. Morgan, *Reflections on Representing Incarcerated People with Disabilities: Ableism in Prison Reform Litigation*, 96 DENV. L. REV. 973, 980 (2019).

trans people, through increased stigmatization and potential ramifications and loss of rights that may accompany a formal diagnosis. Both angles raise compelling critiques; however, many of these critiques parallel similar issues also faced by the disability rights community and suggest the need for solidarity rather than further marginalizing disabled people by trading in problematic ableism.

Pathologization of trans identity and its potential intrinsic harms to trans individuals' concepts of identity has long been a subject of discourse. Advocates have expressed concerns that pursuing a disability claim requires one to engage with the medical apparatus and to seek a diagnosis of gender dysphoria in a way that they fear ultimately legitimizes the idea that trans rights must be *dependent* upon gender dysphoria and contributes to a "regime of coercive binary gender."¹⁵⁰ By diagnosing trans identity as something in need of treatment and/or a cure, pathologization reifies the idea that to be cisgender is to be normal and healthy. Society already defines normality as "'able-bodied/minded', white, [cisgender] male, heterosexual, young and financially secure."¹⁵¹ Those who stray from any of these "dominant" categories, whether by being trans or disabled, are rendered "Other," and to be both trans and disabled would cause one to be "rendered multiply Other."¹⁵² For trans individuals who already experience marginalization on account of being trans, being further marginalized on account of being considered disabled may only add further harm. In the words of the gender theorist and philosopher Judith Butler, "[t]o be diagnosed . . . is to be found, in some way, to be ill, sick, wrong, out of order, abnormal, and to suffer a certain stigmatization as a consequence of the diagnosis being given at all."¹⁵³ Historically, such diagnoses have often not been the product of savvy legal strategy but have "been given to people against their will."¹⁵⁴ The very process of receiving a diagnosis itself, even under the "improved" DSM-V, also presupposes the gender binary norm by asking whether such norms are being embodied or challenged in any particular instance.¹⁵⁵ It also must be questioned, whether the very act of submitting to diagnosis results in "internalizing some aspect of the diagnosis, conceiving of oneself as mentally ill or 'failing' in normality . . . even as one seeks to take a purely instrumental attitude toward these terms."¹⁵⁶ The current approach to trans rights through

¹⁵⁰ See Dean Spade, *Resisting Medicine, Re/modeling Gender*, 18 BERKELEY WOMEN'S L.J. 15, 35 (2003).

¹⁵¹ Ayesha Vernon, *Multiple Oppression and the Disabled People's Movement*, in THE DISABILITY READER: SOCIAL SCIENCE PERSPECTIVES 201, 201 (Tom Shakespeare ed., 2005).

¹⁵² *Id.*

¹⁵³ Judith Butler, *Undiagnosing Gender*, in TRANSGENDER RIGHTS, *supra* note 110, at 275.

¹⁵⁴ *Id.* at 276.

¹⁵⁵ See *id.* at 279, 287 ("One has to submit to labels and names, to incursions, to invasions, one has to be gauged against measures of normalcy, and one has to pass the test.")

¹⁵⁶ *Id.* at 280.

the ADA appears to hinge distinctively on the growing support in medical research for a physical (or biological) etiology for gender dysphoria, which may create troubling associations, rejected by feminist and queer theorists, that biology is the determinative factor in the “making of the gendered . . . body.”¹⁵⁷ Such critiques line up with critiques of the medical model of disability, which focuses on “curing” disabled people, views “disability as an infirmity of the individual to be responded to with treatment and pity,” and perpetuates stigma and social prejudice by viewing disabled people as inherently inferior.¹⁵⁸

However, this side of the pathologization critique ignores the lived realities and needs of many trans people, specifically the need for strong, immediate legal protections against the pernicious discrimination faced daily by the community. A world without pathologization may indeed be ideal, but fighting for trans rights using the provisions of the ADA may provide necessary relief to individuals who live in the current world and not an idealized future world.¹⁵⁹ Some trans people desire medical interventions and rely upon a formal diagnosis to access treatments that could otherwise be inaccessible because of bureaucratic policies or cost.¹⁶⁰ The ADA itself does not require a formal diagnosis to gain protection and can even encompass individuals who are “regarded as” being disabled but who do not consider themselves to be so.¹⁶¹ Eschewing a disability framework altogether may ignore the reality that “different forms of social oppression,” such as for being transgender or being perceived as disabled, “are not invariably experienced at the same time on a daily basis.”¹⁶² Federal disability law’s broad definition

¹⁵⁷ Helen Meekosha, *Body Battles: Bodies, Gender, and Disability*, in *THE DISABILITY READER*, *supra* note 151, at 174.

¹⁵⁸ Levi & Klein, *supra* note 110, at 77; *see also Disabilityqueer*, *supra* note 26, at 30 (“The newly amended ADA underscores that disability is not something wrong with some of us—it is something wrong with the way society may treat any of us.”); *see also* Meekosha, *supra* note 151, at 174 (“Disability theorists . . . have similarly rejected biology as the determining factor in the making of the disabled body. They have questioned the dominance of the medical and rehabilitation paradigms which seek to transform and normalize, indeed ‘cure’ the disabled body.”); Alison Kafer, *Introduction: Imagined Futures*, in *FEMINIST QUEER CRIP* 1, 5 (2013) (“The medical model of disability frames atypical bodies and minds as deviant, pathological, and defective, best understood and addressed in medical terms. . . . Solving the problem of disability, then, means correcting, normalizing, or eliminating the pathological individual, rendering a medical approach to disability the only appropriate approach.”).

¹⁵⁹ *See* Butler, *supra* note 153, at 280 (“Although there are strong criticisms to be made of the diagnosis . . . it would nevertheless be wrong to call for its eradication without first putting into place a set of structures through which transitioning can be paid for and legal status attained . . . [Diagnosis] cannot be simply disposed of without finding other, durable ways to achieve those same results.”).

¹⁶⁰ *See id.* at 275; *see also* Kafer, *Introduction*, *supra* note 158, at 7 (noting the limits of a purely social model that could serve to “marginalize those . . . who are interested in medical interventions or cures”).

¹⁶¹ Jennifer L. Levi, *Clothes Don’t Make the Man (or Woman), but Gender Identity Might*, 15 *COLUM. J. GENDER & L.* 90, 106 (2006); *see also* Barry, *Disabilityqueer*, *supra* note 26, at 42–43 (discussing the ADAAA’s sweeping coverage).

¹⁶² Vernon, *supra* note 151, at 203–04.

of disability “is broad and flexible enough to encompass many different visions of transgender identity.”¹⁶³ These laws “are intended to cover both persons whose lives are impacted ‘naturally’ by their physical or mental health conditions,” but also “those whose lives are impacted by the social consequences” of having such conditions.¹⁶⁴ Advocates should, however, remain vigilant¹⁶⁵ in future litigation that pursuit of rights for some within the medical framework does not jeopardize the ability for others in the future to seek rights *without* engaging with a medical framework.

Critics have also raised compelling arguments that the additional pathologization of trans identity could increase extrinsic harms already associated with being trans, such as further stigmatization and a potential loss of rights. Linking diagnosis to trans identity may create difficulties for individuals to change their name or legal gender if they do not wish to pursue medical interventions; “[i]t seems contradictory that for a civil, legal, and administrative matter there must be a medical diagnosis.”¹⁶⁶ The diagnosis, a means to pursue a more authentic self, “takes on a life of its own, . . . mak[ing] life harder for those who suffer by being pathologized and who lose certain rights and liberties, including child custody, employment, and housing, by virtue of the stigma attached to the diagnosis.”¹⁶⁷ Pathologization could jeopardize equal access to healthcare and economic opportunity.¹⁶⁸ It is this very same type of discrimination—discrimination from diagnosis or perception of a disability—that the disability rights movement, and the ADA itself, seeks to rectify. Many disability rights advocates adopt a social model of disability, which is embedded in the ADA and understands that society’s prejudice against the disabled, not any physical or mental impairment,

¹⁶³ Levi & Klein, *supra* note 110, at 80.

¹⁶⁴ *Id.* at 82–83.

¹⁶⁵ See Spade, *supra* note 150, at 35 (arguing advocates “have to skate this delicate line, de-medicalizing legal approaches to gender identity where we can, educating medical providers on how to provide medical services to gender transgressive people in ways that respect and encourage individual expression rather than conformity to binary gender.”).

¹⁶⁶ Marisa Elisa Castro-Peraza et al., *Gender Identity: The Human Right of Depathologization*, 16 INT. J. ENVIRON. RES. PUBLIC HEALTH, at *9 (2019), <https://www.mdpi.com/1660-4601/16/6/978/pdf> [<http://perma.cc/3UYR-CBW9>].

¹⁶⁷ Butler, *supra* note 153, at 285. Examples of pathologization leading to loss of personal rights and liberties can be found throughout history in family court disputes. See, e.g., Robert D. Zaslow, *Child Custody, Visitation, and the HIV Virus: Revisiting the Best Interests Doctrine to Ensure Impartial Parental Rights Determinations for HIV-Infected Parents*, 3 J. PHARMACY & L. 61, 75–78 (1994) (exploring the denial of child custody to parents diagnosed with HIV in the 1990s); Robyn M. Powell, *Family Law, Parents with Disabilities, and the Americans with Disabilities Act*, 57 FAMILY CT. REV. 37, 38 (2019) (arguing that parents with disabilities “face substantial and persistent bias within the family law system”); Charlotte Jayne Cooper, *Too Stupid: Intellectual Disability as a Statutory Ground for Termination of Parental Rights*, 11 MODERN AM. 102, 115 (2018) (arguing that majority of states use overbroad statutes in allowing termination of parental rights of a child on grounds of a parent’s intellectual disability).

¹⁶⁸ Kat Hache, *Transgender Pathologization*, THE TRANS ADVOCATE (2014), https://www.transadvocate.com/transgender-pathologization_n_12247.htm [<https://perma.cc/8FRQ-9J4C>].

causes disadvantage and discrimination.¹⁶⁹ Scholars recognize that “[t]he barriers to equal opportunity . . . are found not in physical incapacity or inferiority but in the prejudice, hostility, and misunderstanding of others about their health conditions.”¹⁷⁰ This is true for both disabled people and trans people: it is stigma resulting from identity, not anything pernicious or wrong with the identity itself, that is the problem to be solved. ADA coverage would not *further* pathologization of individuals with gender dysphoria, and to avoid “relying on disability law for protections because of stigma would exacerbate the problem the laws seek to redress.”¹⁷¹ Embracing federal disability rights laws, and the social model embedded therein, would acknowledge that the issues with being trans do not “reside[] in the minds or bodies of individuals but in . . . social patterns that exclude or stigmatize particular kinds of bodies, minds, and ways of being.”¹⁷² Trans individuals, including those with gender dysphoria who seek a diagnosis for gender-affirming treatment, are already stigmatized by society, but coverage under the ADA, including under its “regarded as” prong, would finally give them a powerful tool to fight such discrimination.

A latent element of the pathologization critique boils down to the notion that trans rights should not be pursued under disability law because disability law is reserved for those who are inferior and “Other,” notions that ultimately sound in ableism. Some trans individuals and advocates have resisted the use of disability law claims for a core, visceral reason: they do not want to be considered disabled because they believe it connotes that trans people are flawed and fear the ways in which this concept of trans identity could further marginalize and stigmatize the community.¹⁷³ There is a fear that pursuit of justice via a disability framework “will perpetuate social myths and stereotypes that transgender people are sick, abnormal, or inferior.”¹⁷⁴ These visceral reactions to disability law, a powerful and appropriate tool, likely stem from ableist presumptions of what disability is and “exacerbate[] the stigma that disability laws seek to redress while ignoring

¹⁶⁹ See Levi & Klein, *supra* note 110, at 79.

¹⁷⁰ *Id.* at 75.

¹⁷¹ Levi, *supra* note 161, at 106 (acknowledging serious impairment for some trans individuals does not “universalize that experience or suggest that to be the case for every-one who identifies as transgender”).

¹⁷² Kafer, *Introduction*, *supra* note 158, at 6.

¹⁷³ Spade, *supra* note 150, at 34; see also Levi, *supra* note 161, at 105 (“[P]eople have a reflexive aversion to being included within the stigmatized community of disability.”); Kafer, *Introduction*, *supra* note 158, at 2 (“If disability is conceptualized as a terrible unending tragedy, then any future that includes disability can only be a future to avoid. A better future, in other words, is one that excludes disability and disabled bodies; indeed, it is the very *absence* of disability that signals this better future.”). Some disability advocates have expressed concern that the inclusion of trans issues under a disability umbrella would lead to an overall dilution in the struggle for disability rights. See, e.g., Alison Kafer, *Accessible Futures, Future Coalitions*, in *FEMINIST QUEER CRIP*, *supra* note 158, at 156.

¹⁷⁴ Levi & Klein, *supra* note 110, at 74.

the reality of the transgender condition and identity for many individuals.”¹⁷⁵ These concerns and hesitations about associating with disability law arise because of “the stigma still associated with the term disability, which in its colloquial sense is all too often misunderstood to mean physical infirmity, debilitation, or inability to work.”¹⁷⁶ In fearing the stigma associated with the disability community, trans advocates may marginalize another community in the exact same way they fear marginalization of their own community: trading on “bias, bigotry, and misunderstanding.”¹⁷⁷ Some disability theorists and advocates are emphasizing the importance of melding both the medical and social models in a way that may resonate for some trans people.¹⁷⁸ As Professor Helen Meekosha notes, “The rigid dualism of either a socially constructed disability or a disability grounded in biology is being disputed in the subjective discourse—the lived experience.”¹⁷⁹ The social model of disability “does not explore a changing body image or identity and functioning” or the fact that some may choose “solutions which may improve or remove their impairment to improve their bodily functioning to achieve harmony between body and mind in distress.”¹⁸⁰ A rigid dualism pitting social constructions of gender against an individual’s lived experience of dysphoria, rather than acknowledging the interplay between these two elements, may likewise harm trans people.

Jennifer L. Levi and Bennett H. Klein have suggested that “[t]ransgender activists and supporters would do well to learn from the disability movement, rather than to adopt and perpetuate social myths and stigmas about disabilities.”¹⁸¹ Both the trans community and the disability community may benefit from working together under a new model that recognizes both societal discrimination and lived experiences of impairment. A unified front on shared sites of oppression, particularly the bathroom, may result in substantial victories for both disabled and trans people. As Alison Kafer observes, an individual’s gender non-conformity may result in an experience of inaccessibility with regards to a public bathroom, just as narrow doorways may bar access to disabled people.¹⁸² People in Search of Safe and

¹⁷⁵ Levi, *supra* note 161, at 105.

¹⁷⁶ Levi & Klein, *supra* note 110, at 74.

¹⁷⁷ *Id.* at 77.

¹⁷⁸ Vernon, *supra* note 151, at 208 (“[T]he social model of disability has significance for all disabled people despite the fact that for many disabled people it does not account for the whole of their experience. . . . [T]he problem lies in how the social model is being applied. That is, if the ensuing discussion does not take account of the fact that for the majority of disabled people their experience of oppression is shaped by additional dimensions of their lives, then the application of that methodology needs to be examined, for it represents only a partial picture.”); Levi & Klein, *supra* note 110, at 79 (“[A] new concept of disability ‘must acknowledge the existence of functional impairments, but it must also focus on ways society can reasonably adapt to a wider range of mental and physical differences than the handicapped-or-normal dichotomy has permitted.’”).

¹⁷⁹ Meekosha, *supra* note 157, at 175.

¹⁸⁰ *Id.*

¹⁸¹ Levi & Klein, *supra* note 110, at 89.

¹⁸² Kafer, *Accessible Futures*, *supra* note 173, at 155.

Accessible Restrooms (PISSAR), a coalition movement founded at UC-Santa Barbara, is linking disability and gender access by providing guidelines for disability-accessibility “right alongside its genderqueer-accessibility” guidelines.¹⁸³ Solidarity on issues of inaccessible public spaces, sexuality, stigma, and over-medicalization could create a world that is more accessible to both disabled people and trans people.¹⁸⁴ Whichever path is chosen, trans individuals and advocates should be wary of falling prey to and continuing to perpetuate ableist notions in deciding on a course of legal action.

b. *Doctrinal Limits of Disability Law*

Disability law’s protections are under fire not only in the courts but also in Congress; any trans plaintiff with gender dysphoria will contend with the regular hurdles that ADA plaintiffs face, as well as the possibility that Congress may eviscerate some of the ADA’s vital protections. Battles over Article III standing to bring a claim are often fought in the federal courts but are especially contentious in suits under the ADA.¹⁸⁵ The Supreme Court’s recent decision in *Spokeo, Inc. v. Robins*¹⁸⁶ may make standing an even more contested battle for plaintiffs bringing claims under Title III of the ADA against places of public accommodation.¹⁸⁷ Disability rights are quite distinct in terms of movement lawyering, with cases often staying far from the Supreme Court, and thus, the struggles faced by ADA plaintiffs and their advocates often remain hidden from public view.¹⁸⁸ Disability rights advocates tend to view the Supreme Court as inhospitable to the disabled, especially following the 1999 trio of cases (known as the *Sutton* trilogy) that so curtailed rights under the ADA that it prompted Congress to pass the ADAAA.¹⁸⁹ How the current Supreme Court will rule on an ADA case remains unknown: since the amendment of the ADA in 2008, no ADA cases have come before the Supreme Court.¹⁹⁰ Critiques of the ADA and its limits

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 156.

¹⁸⁵ See generally Elizabeth Keadle Markey, Note, *The ADA’s Last Stand?: Standing and the Americans with Disabilities Act*, 71 *FORDHAM L. REV.* 185 (2002) (discussing the hurdles to standing for plaintiffs seeking injunctive relief).

¹⁸⁶ 136 S. Ct. 1540 (2016).

¹⁸⁷ John W. Egan, *Spokeo May Raise the Bar for Standing in ADA Title III Cases*, SEYFARTH SHAW (June 1, 2016), <https://www.adatitleiii.com/2016/06/spokeo-may-raise-the-bar-for-standing-in-ada-title-iii-cases/> [<https://perma.cc/VY44-NF6V>].

¹⁸⁸ Michael Ashley Stein, Michael Waterstone & David B. Wilkins, *Cause Lawyering for People with Disabilities*, 124 *HARV. L. REV.* 1658, 1664 (2010) (arguing that the disability rights bar should attempt a strategy “designed to present the Supreme Court with an appropriate—and appropriately compelling—case to elaborate some of the key elements of the ADA that have still received relatively little judicial attention”).

¹⁸⁹ See Michael Waterstone, *Backlash, Courts, and Disability Rights*, 95 *B.U. L. REV.* 833, 842 (2015).

¹⁹⁰ Nicole Buonocore Porter, *Mixed Signals: What Can We Expect from the Supreme Court in this Post-ADA Amendments Act Era?*, 35 *TOURO L. REV.* 435, 435 (2019). As

fall into “three broad camps: that the statute is poorly written and structurally flawed; that the ADA has been betrayed by judicial backlash; or that disability-based workplace accommodations are inefficient.”¹⁹¹ Title II claims against state and local governments, as well as Title III claims against places of public accommodation, have been somewhat successful, but scholars question the vitality of the law’s sweeping promises.¹⁹² Professors Michael Ashley Stein, Michael Waterstone, and David B. Wilkins argue that the disability rights community is wanting for a cohesive litigation strategy in the Supreme Court that will allow the community to achieve progress despite its internal contradictions.¹⁹³

Currently, in Congress, a bill misleadingly titled the “ADA Education and Reform Act of 2017” has passed the House and been received in the Senate.¹⁹⁴ This bill would create even more “onerous red tape” for potential ADA plaintiffs by imposing a notice requirement to public accommodations not in compliance and giving that entity time to make “substantial progress” before a suit could be filed—even though they have been obligated to be ADA-compliant since 1990.¹⁹⁵ In essence, this proposed reform “outlaws discrimination but permits entities to discriminate with impunity until victims experience that discrimination and educate the entities perpetrating it about their obligations not to discriminate. Such a regime is absurd, and would make people with disabilities second-class citizens.”¹⁹⁶ Thus, while there are significant opportunities for trans plaintiffs under the ADA, these plaintiffs must not be mistaken that ADA claims are not necessarily easy to succeed on, nor safe from congressional curtailment.

noted in the aforementioned article, two disability law cases decided by the Court in 2017, brought under statutes other than the ADA, could be characterized as “very plaintiff-friendly” and were also unanimous decisions. *Id.* However, Nicole Buonocore Porter concludes her analysis by opining that the current Court will likely be unfriendly to disability interests in future ADA cases, as it has not interpreted the ADA as broadly as it has other disability law statutes. *See id.* at 460. She also explores the potential role of Justice Gorsuch’s presence on the court, based on his previous employer-friendly decisions. *See id.* at 444–50.

¹⁹¹ Stein, Waterstone & Wilkins, *supra* note 188, at 1659.

¹⁹² *Id.*

¹⁹³ *Id.* at 1664. Stein, Waterstone, and Wilkins also note that disability-cause lawyers may be engaging in “healthy skepticism about using the Supreme Court as a tool to change the lived experiences of a targeted group.” *Id.* at 1691.

¹⁹⁴ *H.R. 620 – ADA Education and Reform Act of 2017*, CONGRESS.GOV (Feb. 26, 2018), <https://www.congress.gov/bill/115th-congress/house-bill/620/text> [<https://perma.cc/JF2E-VDYA>].

¹⁹⁵ Eliza Schultz, Rebecca Cokley & Rebecca Vallas, *The Quiet Attack on the ADA Making Its Way Through Congress*, CTR. FOR AM. PROGRESS (Sept. 22, 2017), <https://www.americanprogress.org/issues/disability/news/2017/09/22/439464/quiet-attack-ada-making-way-congress/> [<https://perma.cc/L249-CJQJ>].

¹⁹⁶ Letter from Consortium for Citizens with Disabilities to Steve King and Steve Cohen (Apr. 10, 2017), http://www.ndrn.org/images/Images/Issues/ADA/UPDATED_Letter_of_Opposition_for_ADA_Education_and_Reform_Act_of_2017_H.R._620_-_April_10_2017.pdf [<https://perma.cc/2AG4-T4KH>].

c. *Lurking Constitutional Challenges*

Currently, the only court to have rendered a decision on the availability of ADA coverage to plaintiffs with gender dysphoria adopted a narrow reading of ADA's coverage exclusion, discussed *supra*, in order to avoid needing to dispose of a larger constitutional challenge to that exclusion. However, other courts may not continue to interpret the clause so narrowly and thus will need to face a plaintiff's constitutional claims regarding the exclusion head-on. Judge Richard G. Stearns, presiding over *Doe v. Mass. DOC*, alluded at oral argument that he did not think he could settle the dispute without making a constitutional determination and certified the constitutional question to the DOJ; the court will delay ruling on the merits of the motion to dismiss at least until the time has elapsed for the DOJ to intervene on this issue.¹⁹⁷ If the court does rule on the constitutional issue, scholars suspect that the issue could end up before the Supreme Court.¹⁹⁸ It is currently unknown what level of scrutiny a constitutional challenge to a classification based on one's transgender status would face.¹⁹⁹ Advocates have argued that such classifications would fail under all standards of review.²⁰⁰ Because transgender advocacy groups have filed briefs in all pending trans litigation under the ADA, the argument has been advanced in all cases that the exclusion of individuals with GIDs is a case of "moral animus" that cannot withstand even rational basis review, the least demanding level of judicial scrutiny.²⁰¹ Transgender groups have also deftly argued that transgender individuals, in line with footnote four in *Carolene Products*, are a suspect class deserving of the highest level of judicial scrutiny.²⁰² While the result of constitutional challenges in the Supreme Court can be hard to predict, a ruling on trans classifications would provide much-needed clarification to trans people and their advocates as they continue the struggle for trans civil rights in the courts.

¹⁹⁷ See Personal Conversation, *supra* note 122; see also Memorandum and Order, *supra* note 122, at 2–3.

¹⁹⁸ See Kevin M. Barry, Brian Farrell, Jennifer L. Levi & Neelima Vanguri, *A Bare Desire to Harm: Transgender People and the Equal Protection Clause*, 57 B.C. L. REV. 507, 509 (2016).

¹⁹⁹ See *id.* at 509 (discussing general uncertainty about the applicable standard of review).

²⁰⁰ See, e.g., Plaintiff's Memorandum of Law in Opposition to Defendant's Partial Motion to Dismiss, *Blatt*, *supra* note 81, at 34 ("GID's exclusion from the ADA still fails [the] less stringent form of judicial scrutiny"); *Arrisi* Amici Curiae Brief, *supra* note 109, at 1 (summarizing standards of review applied in various cases).

²⁰¹ See Barry, Farrell, Levi & Vanguri, *supra* note 198, at 574–77; see also various court filings, *supra* note 200.

²⁰² See Barry, Farrell, Levi & Vanguri, *supra* note 198, at 550–67; see also various court filings, *supra* note 200.

VII. CONCLUSION

Utilizing the ADA to fight for trans civil rights represents an enormous opportunity to achieve meaningful change for plaintiffs nationwide. Advocates, building on the landmark victory in *Blatt*, should continue to bring ADA claims in other contexts, especially in light of the fact that the Supreme Court will soon decide whether Title VII even offers transgender plaintiffs any protection. Challenges could be brought to meaningfully improve trans lives by suing schools, homeless shelters, businesses, and social services, for starters, under Titles II and III. Advocates should also look anew at the Fair Housing Act's exclusions of GIDs as a way to further combat discrimination faced in the realm of housing.²⁰³ However, advocates must also keep a wary eye on similar litigation to see when the lurking constitutional claims may surface in the Supreme Court. The DOJ, even after a change in administration, has maintained its position that the ADA exclusions can and should be read narrowly to avoid the constitutional problem while also providing coverage for trans people with gender dysphoria.²⁰⁴ At present, there has been no indication of a change in course by the DOJ, but a changed position by the DOJ in a future case may prove weighty. It seems likely that courts will continue to read the GID exclusion of the ADA narrowly, but at least one federal court in *Strawser* has vehemently dismissed this reading as lacking "support, textual or otherwise."²⁰⁵ Litigants and advocates should prepare for the possibility of a circuit split, and both the trans and disability communities should play a vital role in shaping the litigation of this issue—together. In a time of great uncertainty, trans plaintiffs should not be discouraged from filing lawsuits under the ADA. It may very well come to pass in the next few years that expansive protections for gender dysphoria under the ADA will become the norm due to continued narrow statutory interpretation or, hopefully, the Supreme Court's recognition of the validity of trans and disabled lives.

²⁰³ See Barry & Levi, *supra* note 67, at 392. Nearly one-quarter of trans individuals faced housing discrimination in the past year, and one in eight trans individuals have been homeless *because* they are transgender. See JAMES ET AL., *supra* note 12, at 13.

²⁰⁴ See Stat. of Int. of the United States at 2–3, *Doe v. Dzurenda*, No. 3:16-CV-1934 (D. Conn. Oct. 27, 2017), ECF No. 57.

²⁰⁵ *Parker v. Strawser Constr., Inc.*, 307 F. Supp. 3d 744, 754 (S.D. Ohio 2018).