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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

JANE DOE, Plaintiff, v. ARRISI, et al., Defendants.	:	Hon. Michael A. Shipp, U.S.D.J. Hon. Douglas E. Arpert, U.S.M.J. Civil Action No. 3:16-CV-08640 **BRIEF OF *AMICI CURIAE* BAY AREA LAWYERS FOR INDIVIDUAL FREEDOM, GAY & LESBIAN ADVOCATES & DEFENDERS, GENDER JUSTICE, INTERSEX & GENDERQUEER RECOGNITION PROJECT, THE LGBT BAR ASSOCIATION OF GREATER NEW YORK, NATIONAL CENTER FOR LESBIAN RIGHTS, THE NATIONAL CENTER FOR TRANSGENDER EQUALITY, NATIONAL LGBT BAR ASSOCIATION, NATIONAL LGBTQ TASK FORCE, TRANSGENDER LEGAL DEFENSE & EDUCATION FUND, TRANS UNITED, AND WHITMAN-WALKER CLINIC, INC. IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS**

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STATEMENT OF INTEREST OF *AMICI CURIAE*

Bay Area Lawyers for Individual Freedom ("BALIF") is a bar association of about 500 lesbian, gay, bisexual, and transgender ("LGBT") members of the San Francisco Bay Area legal community. As the nation's oldest and one of the largest LGBT bar associations, BALIF promotes the professional interests of its members and the legal interests of the LGBT community at large. To accomplish this mission, BALIF actively participates in public policy debates concerning the rights of LGBT people. For more than thirty years, BALIF has appeared as *amicus curiae* in cases where it believes it can provide valuable perspective and argument that will inform court decisions on matters of broad public importance.

Gay & Lesbian Advocates & Defenders ("GLAD") is a New England-wide legal rights organization that seeks equal justice for all persons under the law regardless of their sexual orientation, gender identity, or HIV/AIDS status. The Transgender Rights Project of GLAD seeks to establish clear legal protections for the transgender community through public impact litigation and law reform. *See, e.g., Rosa v. Park West Bank*, 214 F.3d 213 (1st Cir. 2000); *Doe v. Yunits*, No. 001060A, 2000 WL 33162199 (Mass. Super. Oct. 11, 2000); *O'Donnabhain v. Commissioner*, 134 T.C. 34 (T.C. 2010); *Doe v. Regional School Unit 26*, 86 A.3d 600; *In re Mallon, Transsexual Surgery*, DAB No. 2576 (2014).

Gender Justice is a non-profit advocacy organization based in the Midwest that works to eliminate gender barriers, whether linked to sex, sexual orientation, gender identity, or gender expression. Through impact litigation, policy advocacy, and education, Gender Justice targets the root causes of gender discrimination. As part of its impact litigation program, Gender Justice provides legal advocacy as *amicus curiae* in cases that have an impact in the region and nationally.

Intersex & Genderqueer Recognition Project ("IGRP") is a national non-profit legal organization engaged in litigation, education, and advocacy to address the rights of transgender

and intersex people who have a non-binary gender identity. IGRP has an interest in this Court's consideration of discrimination on the basis of Gender Identity Disorder and Gender Dysphoria which directly affects its members.

The LGBT Bar Association of Greater New York ("LeGaL") was one of the first bar associations of the LGBT community in the nation and continues to be one of the largest and most active organizations of its kind. Serving the New York metropolitan area, LeGaL is dedicated to improving the administration of the law, ensuring full equality for members of the LGBT community, and promoting the expertise and advancement of LGBT legal professionals.

The National Center for Lesbian Rights ("NCLR") is a national non-profit law firm with headquarters in San Francisco and an office in Washington, D.C. NCLR seeks legal protection for lesbian, gay, bisexual, and transgender people through impact litigation, public policy advocacy, public education, direct legal services, and collaboration with other social justice organizations and activists. Each year, NCLR serves more than 500 people in California, and more than 5,000 people in all fifty states.

The National Center for Transgender Equality ("NCTE") is a national social justice organization devoted to ending discrimination and violence against transgender people through education and advocacy on issues of national importance to transgender people. Founded in 2003, NCTE advocates for policy reform at the federal level on a wide range of issues affecting transgender people, including employment discrimination; provides technical assistance to organizations and institutions at the state and local levels; and works to create greater public understanding of issues affecting transgender people.

The National LGBT Bar Association ("LGBT Bar") is a non-partisan, membership-based professional association of lawyers, judges, legal academics, law students, and affiliated lesbian,

gay, bisexual and transgender legal organizations. The LGBT Bar is committed to fighting discrimination against lesbian, gay, bisexual, and transgender people, and to promoting justice in and through the legal profession for the lesbian, gay, bisexual, and transgender community in all its diversity.

Since 1973, the National LGBTQ Task Force ("Task Force") has worked to build power, take action, and create change to achieve freedom and justice for lesbian, gay, bisexual and transgender people and their families. As a progressive social justice organization, the Task Force works toward a society that values and respects the diversity of human expression and identity and achieves equity for all.

Founded in 2003, Transgender Legal Defense & Education Fund ("TLDEF") is a non-profit whose mission is to end discrimination and achieve equality for transgender people. TLDEF's strategies include path-breaking trans rights cases and *amicus* briefs challenging discrimination in the areas of employment, health care, education, and public accommodations.

Trans United ("TU") is a national organization that partners with visionary transgender leaders and organizations to build the collective capacity of the trans community and to improve the lives of transgender people, their families, and their allies. TU advocates for trans equality by supporting inclusive, non-discrimination measures and addressing issues related to HIV/AIDS, immigration, violence, unemployment, and healthcare disparities, which disproportionately impact trans and gender expansive communities.

Whitman-Walker Clinic, Inc., d/b/a Whitman-Walker Health ("Whitman-Walker"), is a nonprofit, community-based Federally Qualified Health Center serving the Washington, D.C. metropolitan area, Suburban Maryland, and Northern Virginia. Established in 1973, Whitman-Walker was one of the first to engage in HIV/AIDS treatment and prevention research and is

nationally renowned for its commitment to LGBT health. Whitman-Walker is also home to one of the nation's oldest medical-legal partnerships and is active in legal matters of concern to the LGBT community, including access to healthcare, protections against discrimination, and transgender legal issues. In calendar year 2016, Whitman-Walker provided health care services to more than 1,200 patients who identified as transgender, and legal assistance to more than 650 individuals who identified as transgender or gender nonconforming. Since 2012, Whitman-Walker has offered monthly name and gender change clinics to the transgender community that have served almost 800 unique individuals to date.

Amici respectfully submit this brief in opposition to Defendants' Motion to Dismiss to address the vital importance of allowing individuals to bring claims under the ADA when such individuals have been discriminated against on the basis of Gender Identity Disorders and Gender Dysphoria. Few published court decisions have addressed, and none have analyzed, the ADA's exclusion of "transsexualism . . . [and] gender identity disorders not resulting from physical impairments," 42 U.S.C. § 12211(b), in a case brought by a transgender litigant. As a result, no reported court decision has addressed: the legislative history of the ADA surrounding the exclusion; the application of the exclusion to the new diagnosis of Gender Dysphoria, particularly in light of the United States' November 16, 2015 Second Statement of Interest in *Blatt v. Cabela's Retail, Inc.*, stating that "gender dysphoria . . . [is] not . . . excluded from the definition of 'disability,'" Sec. Statement of Int. of U.S. at 6, Blatt v. Cabela's Retail, Inc., No. 5:14-CV-04822 (E.D. Pa. Nov. 16, 2015), ECF No. 67; and the fact that neither Gender Identity Disorders (including transsexualism) nor Gender Dysphoria is a sexual behavior disorder. In addition, no reported court decision has addressed the moral animus behind the exclusion and whether such exclusion violates equal protection. Analysis of these issues supports the argument that the ADA's

exclusion of Gender Identity Disorders (including transsexualism) does not apply to the new diagnosis of Gender Dysphoria or, in the alternative, is unconstitutional.

A motion requesting leave to file was submitted in tandem with this brief. No party's counsel authored this brief in whole or in part, and *amici* and its counsel have not received any remuneration for their participation in this proceeding from either party or other interested individuals.

INTRODUCTION

Tucked away in the last title of the ADA, entitled "Miscellaneous Provisions," is a set of exclusions from the ADA's definition of disability. Specifically, the ADA excludes from its definition of disability "homosexuality and bisexuality" because they "are not impairments and as such are not disabilities."[1] This exclusion is well-supported in medicine and law. Indeed, it is consistent with the American Psychiatric Association's (APA) removal of the diagnosis of homosexuality from its *Diagnostic and Statistical Manual of Mental Disorders* (DSM) in 1973.[2] It is also consistent with courts' recognition that homosexuality and bisexuality were not "impairments" under the ADA's precursor, the Rehabilitation Act of 1973.[3]

The ADA also excludes from coverage "gender identity disorders not resulting from physical impairments" and "transsexualism" (collectively, "GIDs," and the "GIDs Exclusion"),[4] but it does so for a very different reason. Unlike homosexuality and bisexuality, the ADA does not exclude GIDs because they "are not impairments." Indeed, from 1980 until 2013, the DSM repeatedly classified GIDs as serious medical conditions. Although the fifth edition of the DSM, published in 2013, changed the underlying diagnosis by replacing GIDs with "Gender Dysphoria," the DSM did not remove the diagnosis. Simply put, the ADA excludes GIDs not because they are

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[1] 42 U.S.C. § 12211; *see also* Christine Michelle Duffy, *The Americans with Disabilities Act of 1990 and the Rehabilitation Act of 1973, in* GENDER IDENTITY AND SEXUAL ORIENTATION DISCRIMINATION IN THE WORKPLACE: A PRACTICAL GUIDE ch. 16 (Christine Michelle Duffy ed. Bloomberg BNA 2014).

[2] AMERICAN PSYCHIATRIC ASSOCIATION, POSITION STATEMENT ON DISCRIMINATION AGAINST TRANSGENDER AND GENDER VARIANT INDIVIDUALS 2 (2012), http://www.dhcs.ca.gov/services/MH/Documents/2013_04_AC_06d_APA_ps2012_Transgen_Disc.pdf.

[3] *See* H.R. REP. NO. 101-596, at 88 (1990) (Conf. Rep.) ("The Senate bill restates current policy under section 504 of the Rehabilitation Act of 1973 that the term 'disability' does not include homosexuality and bisexuality.").

[4] 42 U.S.C. § 12211. As discussed below, the DSM considered transsexualism to be a subtype of GIDs until 1994, when it removed the diagnosis of transsexualism altogether.

not impairments, but rather because of the moral opprobrium of two senior senators, conveyed in the eleventh hour of a marathon day-long floor debate, who erroneously believed that GIDs were "sexual behavior disorders" undeserving of legal protection.[5]

The ADA's GIDs Exclusion is without foundation in either medicine or law. As discussed below, the exclusion is inconsistent with the opinion of the national and international medical community, which has always recognized GIDs—and now, Gender Dysphoria—as serious medical conditions that involve an incongruence between gender identity and assigned sex, not a disorder of sexual behavior. It is also inconsistent with courts' recognition of GIDs—and now, Gender Dysphoria—as serious medical conditions entitled to protection under disability antidiscrimination law and other laws.

Transgender people face severe and pervasive discrimination in nearly every aspect of their lives. Indeed, our society has so devalued transgender lives that many transgender individuals contemplate taking their own.[6] The ADA should be part of the solution to this discrimination, not part of the problem. By maintaining this exclusion, the ADA perpetuates the very thing it seeks to dismantle: "the prejudiced attitudes or ignorance of others" and the "inferior status" that people with disabilities occupy in our society.[7] *Amici* urge this Court to find that Gender Dysphoria is

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[5] *See, e.g.*, Duffy, *supra* note 1, at 16-38 to -39; Kevin Barry, *Disabilityqueer: Federal Disability Rights Protection for Transgender People*, 16 YALE HUM. RTS. & DEV. L.J. 1, 12-26 (2013); Ruth Colker, *Homophobia, AIDS Hysteria, and the Americans with Disabilities Act*, 8 J. GENDER RACE & JUST. 33, 36-38, 42-44, 50 (2004).

[6] *See* JAIME M. GRANT ET AL., INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY, NAT'L CTR. FOR TRANSGENDER EQUALITY AND NAT'L GAY AND LESBIAN TASKFORCE 82 (2011), *available at* http://www.thetaskforce.org/static_html/downloads/reports/reports/ntds_full.pdf, *cited in Brocksmith v. United States*, 99 A.3d 690, 698 n.8 (D.C. 2014).

[7] 42 U.S.C. § 12101(a)(6); *Sch. Bd. of Nassau Cnty., Fla. v. Arline*, 480 U.S. 273, 284 (1987); *see also* 42 U.S.C. § 12101(a)(3) (finding that "society has tended to isolate and segregate individuals with disabilities").

not excluded from the ADA's definition of disability or, alternatively, that the GIDs Exclusion violates equal protection under the Due Process Clause of the Fifth Amendment. Either result would provide sorely needed, comprehensive antidiscrimination protection to transgender people. It would also eliminate a source of blatant, legally-sanctioned prejudice against them.[8]

STATEMENT OF FACTS

Amici adopt and incorporate in their entirety the Complaint's factual allegations. *See* Compl. ¶¶ 31-79.

ARGUMENT

I. GIDs AND GENDER DYSPHORIA ARE SERIOUS MEDICAL CONDITIONS.

To understand the diagnoses of GIDs and Gender Dysphoria, it is first helpful to understand the meaning of "transgender." A transgender person is someone whose gender identity—that is, an individual's internal sense of being male or female—does not align with his or her assigned sex at birth.[9] Usually, people born with the physical characteristics of males psychologically identify as men, and those with the physical characteristics of females psychologically identify as women. However, for a transgender person, this is not true; the person's body and the person's gender identity do not match.[10] A growing body of medical research suggests that this incongruence is

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[8] *Amici* agree with Plaintiff that this Court should further hold that Plaintiff Jane Doe has stated a claim that the Defendants' refusal to permit the Plaintiff to change the gender marker on her birth certificate "without proof that [she] has undergone Sexual Reassignment Surgery" violates due process, equal protection, and the ADA. Compl. ¶ 3. This brief does not address those arguments.

[9] *See, e.g.*, AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 451 (5th ed. 2013) [hereinafter "DSM-5"]; U.S. OFFICE OF PERSONNEL MANAGEMENT, GUIDANCE REGARDING THE EMPLOYMENT OF TRANSGENDER INDIVIDUALS IN THE FEDERAL WORKPLACE [hereinafter "OPM GUIDANCE"], http://www.opm.gov/policy-data-oversight/diversity-and-inclusion/reference-materials/gender-identity-guidance/; *see also* app. A (compiling sections of DSM-5).

[10] DSM-5, *supra* note 9, at 452-53.

caused by "genetics and/or in utero exposure to the 'wrong' hormones during the development of the brain, such that the anatomic physical body and the brain develop in different gender paths."[11]

For many transgender people, this incongruence between gender identity and assigned sex does not interfere with their lives; they are completely comfortable living just the way they are.[12] For some transgender people, however, the incongruence results in gender dysphoria—i.e., a feeling of stress and discomfort with one's assigned sex.[13] Such gender dysphoria, if clinically significant and persistent, is a serious medical condition and has been regarded as such for well over fifty years.

A. GIDs and Gender Dysphoria are widely recognized by the national and international medical community as serious medical conditions.

The concept of gender dysphoria as a serious medical condition first emerged in the 1950's.[14] At that time, Dr. Harry Benjamin, a New York endocrinologist, began treating people struggling with gender identity issues by providing them with hormonal therapy and referrals for

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[11] Duffy, *supra* note 1, at 16-77 (discussing recent medical studies); *see also* DSM-5, *supra* note 9, at 457 (discussing genetic and, possibly, hormonal contribution to Gender Dysphoria); *id.* at 20 (defining "mental disorders" to include dysfunctions of "biological" and "developmental"—as well as "psychological"—processes underlying mental functioning).

[12] *See* Duffy, *supra* note 1, at 16-10; *see also* DSM-5, *supra* note 9, at 453 (stating that, in addition to a marked incongruence between gender identity and assigned sex, individuals with gender dysphoria exhibit "distress about this incongruence").

[13] DSM-5, *supra* note 9, at 451 ("Gender dysphoria as a general descriptive term refers to an individual's affective/cognitive discontent with the assigned gender but is more specifically defined when used as a diagnostic category.").

[14] *See* Jack Drescher et al., *Minding the body: Situating gender identity diagnoses in the ICD-11*, INTERNATIONAL REVIEW OF PSYCHIATRY, at 569 (Dec. 2012), *available at* http://atme-ev.de/download/psychoszuICD11.pdf; Dallas Denny, *Transgender Communities of the United States in the Late Twentieth Century, in* TRANSGENDER RIGHTS 175 (2006). Although psychiatric and medical theorizing about gender dysphoria began in the Western world in the 19th century, and physicians in Europe began performing gender reassignment surgery as early as the 1920's, gender dysphoria and gender reassignment surgery remained little known until 1952, when the U.S. media sensationally reported ex-G.I. George Jorgensen undergoing gender reassignment surgery in Denmark and returning to the U.S. as Christine Jorgensen. Drescher et al., *supra* note 14, at 569.

surgery.[15] In 1966, in his influential treatise, "The Transsexual Phenomenon," Dr. Benjamin defined "transsexualism" as a "syndrome" that results in one's being "deeply unhappy as a member of the sex (or gender) to which he or she was assigned by the anatomical structure of the body, particularly the genitals."[16] In 1969, a medical protocol for gender reassignment was developed and, in the ensuing decade, over forty university-affiliated gender programs sprang up across the U.S., providing treatment to individuals with gender identity issues.[17]

In 1980, the American Psychiatric Association introduced the GIDs diagnosis in the third edition of the DSM. The DSM-III, as it was called, defined GIDs as "an incongruence between anatomic sex and gender identity," and created three GID subtypes: one for adolescents and adults ("Transsexualism"), another for children ("GID of Childhood"), and a third for conditions that did not fit the diagnostic criteria of the first two: "Atypical GID."[18] In 1987, a revised version of the DSM, known as the DSM-III-R (which was the version in effect at the time the ADA was being debated), retained these three diagnoses[19] and added a fourth: "GID of adolescence or adulthood, nontranssexual type."[20] In 1994, the DSM-IV combined the diagnoses of Transsexualism and GID

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[15] Denny, *supra* note 14, at 175.

[16] HARRY BENJAMIN, M.D., THE TRANSSEXUAL PHENOMENON 11-12 (1966), *available at* http://www.mut23.de/texte/Harry%20Benjamin%20-%20The%20Transsexual%20Phenomenon.pdf.

[17] Denny, *supra* note 14, at 175-76.

[18] AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 261-66 (3rd ed. 1980).

[19] AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 71-78 (3rd ed., rev. 1987) [hereinafter "DSM-III-R"]. The DSM-III-R renamed "Atypical GID" "GID Not Otherwise Specified." *Id.* at 77-78.

[20] *Id.* at 76-77.

of Childhood into the single overarching diagnosis of "GID in children and in adolescents or adults."[21]

In 2013, the DSM-5 changed the GIDs diagnosis in four important ways: it renamed the diagnosis, it revised the diagnostic criteria underlying the diagnosis, it re-categorized the diagnosis within the DSM, and it referenced new science supporting the physiological etiology of the diagnosis. These changes are discussed in greater detail in Section II, below.

The international medical community's recognition of GIDs has traced a similar path. The International Classification of Diseases (ICD), published by the World Health Organization pursuant to a consensus of 194 member states, has classified GID as a mental health condition since 1975.[22] The eleventh edition of the ICD, which is expected to be published in 2018, will rename "transsexualism"—the ICD's GID diagnosis for adolescents and adults—"Gender Incongruence," characterized by "a marked and persistent incongruence between an individual's experienced gender and the assigned sex."[23]

According to the DSM-5, Gender Dysphoria is characterized by: (1) a marked incongruence between one's gender identity and one's assigned sex, which is often accompanied

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[21] AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 532-38 (4th ed.1994) [hereinafter "DSM-IV"]. With its removal in 1994, transsexualism is no longer considered to be a mental health condition under the DSM.

[22] Drescher et al., *supra* note 14, at 570. The ICD-9, published in 1975, classified "transsexualism" as a mental health condition. *Id.* The most current edition of the ICD, ICD-10, published in 1990, includes the classification "Gender Identity Disorders," and uses "transsexualism" to refer specifically to the GID diagnosis for adults and adolescents. *See* WORLD HEALTH ORGANIZATION, INTERNATIONAL CLASSIFICATION OF DISEASES F64 (10th rev. 2015) [hereinafter "ICD-10"], *available at* http://apps.who.int/classifications/icd10/browse/2015/en#/F60-F69.

[23] World Health Organization, *WPATH ICD-11 Consensus Meeting*, at 5 (2013), http://www.wpath.org/uploaded_files/140/files/ICD%20Meeting%20Packet-Report-Final-sm.pdf; *see also* ICD-11, *Beta Draft, HA70 Gender Incongruence of Adolescence or Adulthood* (2017), http://apps.who.int/classifications/icd11/browse/lm/en#/http%3a%2f%2fid.who.int%2ficd%2fentity%2f90875286.

by a strong desire to be rid of one's primary and secondary sex characteristics and/or to acquire primary/secondary sex characteristics of the other gender; and (2) intense emotional pain and suffering resulting from this incongruence.[24] Among adolescents and adults, Gender Dysphoria often begins in early childhood, around the ages of 2-3 ("Early onset gender dysphoria"), but it may also occur around puberty or even later in life ("Late-onset gender dysphoria").[25] If left medically untreated, Gender Dysphoria can result in debilitating depression, anxiety and, for some people, suicidality and death.[26]

Like other medical conditions, Gender Dysphoria can be ameliorated through medical treatment.[27] There is no single course of medical treatment that is appropriate for every person with Gender Dysphoria. Instead, the World Professional Association For Transgender Health, Inc. ("WPATH") (formerly known as "The Harry Benjamin International Gender Dysphoria Association, Inc."), has established internationally accepted Standards of Care ("SOC") for the treatment of Gender Dysphoria.[28] The SOC were originally approved in 1979 and have undergone seven revisions through 2012. As part of the SOC, many transgender individuals with Gender

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[24] *See* DSM-5, *supra* note 9, at 452; *see also id.* ("The condition is associated with clinically significant distress or impairment in social, occupational, or other important areas of functioning."); *id.* at 453 (stating that, in addition to marked incongruence, "[t]here must also be evidence of distress about this incongruence").

[25] *Id.* at 455-56.

[26] *Id.* at 454-55.

[27] *See* WORLD PROFESSIONAL ASSOCIATION FOR TRANSGENDER HEALTH, STANDARDS OF CARE 5 (7th ed. 2012) [hereinafter "SOC"], *available at* https://s3.amazonaws.com/amo_hub_content/Association140/files/Standards%20of%20Care%20V7%20-%202011%20WPATH%20(2)(1).pdf ("Gender dysphoria can in large part be alleviated through treatment."); *see also* DSM-5, *supra* note 9, at 451 (stating that "many [individuals] are distressed *if* the desired physical interventions by means of hormone and/or surgery are not available") (emphasis added).

[28] *See* SOC, *supra* note 27, at 1.

Dysphoria undergo a medically-recommended and supervised gender transition in order to live life consistent with their gender identity.[29]

The current SOC recommend an individualized approach to gender transition, consisting 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.[30] To complete their medical transition, some transgender individuals may only need to live part time or full time in their desired gender role without undergoing hormone therapy or surgery.[31] Others may decide with their health care provider that it is medically necessary for them to undergo hormone therapy and/or gender reassignment surgery as well.[32]

The correct course of treatment for any given individual—in order for the patient to achieve genuine and lasting comfort with his or her sex—can only be determined by the treating physician and the patient.[33] According to the SOC:

> [W]hile many individuals need both hormone therapy and surgery to alleviate their gender dysphoria, others need only one of these treatment options and some need neither. . . . Often with the help of psychotherapy, some individuals integrate their trans- or cross-gender feelings into the gender role they were assigned at birth and do not feel the need to feminize or masculinize their body. For others, changes in gender role and expression are sufficient to alleviate gender dysphoria. Some patients may need hormones, a possible change in gender role, but not surgery;

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[29] *See id.* at 9-10; *see also* OPM GUIDANCE, *supra* note 9 (discussing gender transition).
[30] SOC, *supra* note 27, at 9.
[31] *Id.* at 8 ("[W]hile many individuals need both hormone therapy and surgery to alleviate their gender dysphoria, others need only one of these treatment options and some need neither."); *see also* DSM-5, *supra* note 9, at 454 (discussing those who resolve incongruence between gender identity and assigned sex "*without* seeking medical treatment to alter body characteristics") (emphasis added).
[32] SOC, *supra* note 27, at 10; *see also* DSM-5, *supra* note 9, at 453 (recognizing "cross-sex medical procedure[s] or treatment regimen[s]—namely, regular cross-sex hormone treatment or gender reassignment surgery confirming the desired gender").
[33] SOC, *supra* note 27, at 5 ("Treatment is individualized: What helps one person alleviate gender dysphoria might be very different from what helps another person.").

> others may need a change in gender role along with surgery, but not hormones. In other words, treatment for gender dysphoria has become more individualized.[34]

Significantly, "[i]n addition (or as an alternative) to the[se] psychological and medical treatment options . . . , other options [that] can be considered to help alleviate gender dysphoria" include "[c]hanges in name and gender marker on identity documents."[35]

The American Medical Association (AMA), the American Psychiatric Association, and the American Psychological Association, among others, have each acknowledged the necessity of medical interventions to assist transgender individuals. According to the AMA,

> An established body of medical research demonstrates the effectiveness and medical necessity of mental health care, hormone therapy and sex reassignment surgery as forms of therapeutic treatment for many people diagnosed with GID . . . . Health experts in GID, including WPATH, have rejected the myth that such treatments are "cosmetic" or "experimental" and have recognized that these treatments can provide safe and effective treatment for a serious health condition.[36]

B. GIDs are widely recognized by courts as serious medical conditions.

Federal courts have consistently recognized GIDs as serious medical conditions under federal disability antidiscrimination law and other laws.

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[34] SOC, *supra* note 27, at 8-9.

[35] *Id.* at 10.

[36] AMERICAN MEDICAL ASSOCIATION, REMOVING FINANCIAL BARRIERS TO CARE FOR TRANSGENDER PATIENTS 1 (2008), *available at* http://www.tgender.net/taw/ama_resolutions.pdf; *accord.* AMERICAN PSYCHIATRIC ASSOCIATION, POSITION STATEMENT ON ACCESS TO CARE FOR TRANSGENDER AND GENDER VARIANT INDIVIDUALS (2013), *available at* http://www.aglp.org/pages/LGBTPositionStatements.php; AMERICAN PSYCHOLOGICAL ASSOCIATION, TRANSGENDER, GENDER IDENTITY, & GENDER EXPRESSION NON-DISCRIMINATION (2008), *available at* http://www.apa.org/about/policy/transgender.aspx; *see also* LAMBDA LEGAL, PROFESSIONAL ORGANIZATION STATEMENTS SUPPORTING TRANSGENDER PEOPLE IN HEALTH CARE (2012), http://www.lambdalegal.org/sites/default/files/publications/downloads/fs_professional-org-statements-supporting-trans-health_1.pdf.

1. *Federal courts' recognition of GIDs under pre-ADA federal disability antidiscrimination law*

Prior to the ADA's passage in 1990, federal disability antidiscrimination law recognized GIDs as impairments that may constitute a disability under the ADA's precursor, the Rehabilitation Act of 1973. For example, in *Doe v. United States Postal Service,* the plaintiff, a transgender woman, had her conditional job offer revoked after she disclosed her intent to transition and suggested that she be allowed to work as a woman rather than changing her physical appearance during her employment.[37] The plaintiff brought suit under the Rehabilitation Act. The United States District Court for the District of Columbia denied the United States Postal Service's motion to dismiss and held that the plaintiff "alleged the necessary 'physical or mental impairment'" to state a claim for disability discrimination under the Rehabilitation Act.[38]

In 1990, Congress wrote GIDs out of federal disability antidiscrimination law, depriving many transgender individuals of the protections they once enjoyed.[39] Congress' complete reversal with respect to GIDs is in stark contrast to its consistent treatment of homosexuality and bisexuality, whose exclusion from the ADA "was consistent with the treatment of sexual orientation under the Rehabilitation Act."[40]

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[37] No. CIV. A. 84-3296, 1985 WL 9446, at *2-3 (D.D.C. June 12, 1985).

[38] *Id.*; *see also* Duffy, *supra* note 1, at 16-111 to -120 (discussing cases holding that GID is disability under state disability antidiscrimination law).

[39] After passing the ADA (with its GIDs exclusion) in 1990, Congress passed an identical exclusion to the Rehabilitation Act two years later. *See* H.R. REP. NO. 102-973, at 158 (1992) (Conf. Rep.).

[40] *See* H.R. REP. NO. 101-596, at 88 (1990) (Conf. Rep.) ("The Senate bill restates current policy under section 504 of the Rehabilitation Act of 1973 that the term 'disability' does not include homosexuality and bisexuality.").

2. Federal courts' recognition of GIDs outside of the disability antidiscrimination context

Federal courts have recognized GIDs as serious medical conditions in a variety of other contexts. For example, in the prisoner context, all eight of the U.S. Courts of Appeals that have been presented with the question have found that GID poses a "serious medical need" for purposes of the Eighth Amendment—a determination with which the United States Department of Justice has agreed.[41] Many federal courts have ruled likewise in the context of civil commitment.[42] And the United States Tax Court held that GID "is a serious, psychologically debilitating condition" within the meaning of the Tax Code and that the costs of gender reassignment surgery are deductible—a decision in which the IRS subsequently acquiesced.[43]

II. THE ADA's DEFINITION OF "DISABILITY" DOES NOT EXCLUDE GENDER DYSPHORIA.

Although the ADA excludes GIDs, it is silent as to Gender Dysphoria. No court has addressed whether the ADA's exclusion of GIDs extends to Gender Dysphoria as a matter of statutory interpretation. Bearing in mind that "[r]emedial legislation is traditionally construed

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[41] *See O'Donnabhain v. C.I.R.*, 134 T.C. 34, 62 (2010) (citing cases in Fourth, Ninth, Second, Tenth, Sixth and Seventh Circuits); *White v. Farrier,* 849 F.2d 322, 325 (8th Cir. 1988) (stating that "transsexualism is a serious medical need" under Eighth Amendment); *accord. Houston v. Trella*, No. CIVA 04-1393 JLL, 2006 WL 2772748, at *5 (D.N.J. Sept. 25, 2006) (relying on *Wolfe v. Horn,* 130 F. Supp. 2d 648, 652 (E.D. Pa. 2001)); Statement of Int. of U.S. at 8, Diamond v. Owens, No. 5:15-cv-50 (M.D. Ga. April 3, 2015), ECF No. 29, *available at* https://www.justice.gov/sites/default/files/crt/legacy/2015/06/05/diamondsoi.pdf ("Courts have routinely held that gender dysphoria is a serious medical need under the Eighth Amendment.").

[42] *See, e.g.*, *Battista v. Clarke*, 645 F.3d 449, 455 (1st Cir. 2011).

[43] *O'Donnabhain*, 134 T.C. at 61, *acquiesced in by* IRS Announcement Relating to *O'Donnabhain*, 2011-47 I.R.B. 789 (IRS ACQ 2011). On May 30, 2014, the U.S. Department of Health and Human Services Departmental Appeals Board invalidated its 1989 determination denying Medicare coverage of all gender reassignment surgery. U.S. Dep't of Health & Human Servs. Dept'l App. Bd., NCD 140.3, DAB No. 2576, 2014 WL 2558402, at *1, *7-8 (H.H.S. May 30, 2014) (acknowledging that "GID is a serious medical condition").

broadly, with exceptions construed narrowly,"[44] the ADA's text and legislative history strongly support the ADA's inclusion of Gender Dysphoria, for three reasons.

A. Gender Dysphoria is not a GID.

As the ADA's legislative history makes clear, the ADA's 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.[45] Because the DSM-5's Gender Dysphoria diagnosis bears little resemblance to the GIDs diagnosis (including its subtype, transsexualism) in all prior versions of the DSM, Gender Dysphoria is outside the scope of the GIDs Exclusion.

Under the DSM-III-R, GIDs referred to one of four separate diagnoses. "Transsexualism," the GID diagnosis for adolescents and adults, required: "(a) [p]ersistent discomfort and sense of inappropriateness about one's assigned sex; (b) [p]ersistent preoccupation for least two years with getting rid of one's primary and secondary sex characteristics and acquiring the secondary sex characteristics of the other sex; [and] (c) [t]he person has reached puberty."[46] In the next two versions of the DSM, the DSM-IV (1994) and DSM-IV-TR (2000), the transsexualism and

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[44] *Richards v. Gov't of Virgin Islands*, 579 F.2d 830, 833 (3d Cir. 1978) (citing *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967)); *see also Disabled in Action of Pennsylvania v. Se. Pennsylvania Transp. Auth.*, 539 F.3d 199, 208 (3d Cir. 2008) ("[T]he ADA is a remedial statute, designed to eliminate discrimination against the disabled in all facets of society, and as such, it must be broadly construed to effectuate its purposes.") (internal quotations and citations omitted); *cf. Brian S. v. Delgadillo*, No. H033935, 2010 WL 2933624, at *35-36 (Cal. Ct. App. July 28, 2010) (unpublished) (narrowly interpreting state statute's definition of "autism" to cover only those with Autistic Disorder as defined in DSM-IV-TR (2000), and rejecting expansion of definition to cover those with Autism Spectrum Disorders under DSM-5 (2013)).

[45] H.R. REP. NO. 101-485(IV), at 81 (1990) (Energy and Commerce Committee) (dissenting views of Rep. William E. Dannemeyer, Rep. Joe Barton, and Rep. Don Ritter) (referencing DSM-III-R); *accord.* 135 CONG. REC. S11173-78, 1989 WL 183785 (daily ed. Sept. 14, 1989) (statement of Sen. Armstrong); *see also* Barry, *Disabilityqueer*, *supra* note 5, at 23 (discussing lead advocate Chai Feldblum's recollection of "four pages of mental impairments literally copied from the pages of the DSM-III-R.").

[46] DSM-III-R, *supra* note 19, at 76.

childhood subtypes were combined into a single diagnosis, "GID in children, adolescents, and adults."[47] This diagnosis required that a person have a "strong and persistent cross-gender identification" and a "persistent discomfort with his or her sex or sense of inappropriateness in the gender role of that sex" that "causes clinically significant distress or impairment in social, occupational, or other important areas of functioning."[48]

The DSM-5's Gender Dysphoria diagnosis differs substantially from the GIDs diagnosis (including the transsexualism subtype). First and most obviously, the name of the diagnosis is different. For well over thirty years, incongruence between one's identity and assigned sex was considered to be a "disorder" of identity, that is, something non-normative with the individual.[49] This is no longer the case. Under the DSM-5, incongruence is not the problem in need of treatment—dysphoria is.[50] By "focus[ing] on dysphoria as the clinical problem, not identity per se," the change from GIDs to Gender Dysphoria destigmatizes the diagnosis.[51]

Second, the diagnostic criteria are different. Gender Dysphoria replaces the previous showing of a "strong and persistent cross-gender identification" and a "persistent discomfort" with

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[47] DSM-IV, *supra* note 21, at 532-38, 785; AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 576-82 (4th ed., rev. 2000) [hereinafter "DSM-IV-TR"].

[48] DSM-IV, *supra* note 21, at 537-38; DSM-IV-TR, *supra* note 47, at 581.

[49] *See* AMERICAN PSYCHIATRIC ASSOCIATION, GENDER DYSPHORIA (2013), http://www.dsm5.org/documents/gender%20dysphoria%20fact%20sheet.pdf (stating that GID connoted "that the patient is 'disordered'").

[50] *Id.* ("It is important to note that gender nonconformity is not in itself a mental disorder. The critical element of gender dysphoria is the presence of clinically significant distress associated with the condition.").

[51] DSM-5, *supra* note 9, at 451; AMERICAN PSYCHIATRIC ASSOCIATION, GENDER DYSPHORIA, *supra* note 49 ("Part of removing stigma is about choosing the right words. Replacing 'disorder' with 'dysphoria' in the diagnostic label is not only more appropriate and consistent with familiar clinical sexology terminology, it also removes the connotation that the patient is 'disordered.'"); *see also Kosilek v. Spencer*, 740 F.3d 733, 737 (1st Cir. 2014), *reh'g en banc granted, opinion withdrawn on other grounds* (Feb. 12, 2014) ("DSM–5 replaces the term gender identity disorder with gender dysphoria to avoid any negative stigma.").

one's sex or "sense of inappropriateness" in the gender role of that sex, with a "marked incongruence" between gender identity and assigned sex.[52] The criteria also include a "post-transition specifier for people who are living full-time as the desired gender (with or without legal sanction of the gender change)."[53] According to the DSM-5, this specifier was "modeled on the concept of full or partial remission," which acknowledges that hormone therapy and gender reassignment surgery may largely relieve the distress associated with the diagnosis.[54] Significantly, this specifier expands the diagnosis to those who may not formerly have been diagnosed with GID—i.e., those *without* distress "who continue to undergo hormone therapy, related surgery, or psychotherapy or counseling to support their gender transition."[55]

Third, the categorization of the Gender Dysphoria diagnosis is different. In every version of the DSM prior to 2013, GIDs were a subclass of some broader classification, such as "Disorders Usually First Evident in Infancy, Childhood, or Adolescence," alongside other subclasses, such as Developmental Disorders, Eating Disorders, and Tic Disorders.[56] For the first time ever, the DSM categorizes the diagnosis separately from all other conditions. Under the DSM-5, Gender Dysphoria is now literally in a class all its own.

Lastly, medical research supporting the Gender Dysphoria diagnosis is different. Unlike the DSM's treatment of GIDs, the DSM-5 includes a section entitled "Genetics and Physiology,"

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[52] DSM-5, *supra* note 9, at 452; *id.* at 814 (stating that DSM-5 "emphasiz[es] the phenomenon of 'gender incongruence' rather than cross-gender identification per se, as was the case in DSM-IV gender identity disorder").
[53] AMERICAN PSYCHIATRIC ASSOCIATION, GENDER DYSPHORIA, *supra* note 49; *see also* DSM-5, *supra* note 9, at 453.
[54] DSM-5, *supra* note 9, at 815; *see id.* at 451 ("[M]any are distressed *if* the desired physical interventions by means of hormone and/or surgery are not available.") (emphasis added); *see also id.* at 453, 814-15 (discussing addition of posttransition specifier).
[55] AMERICAN PSYCHIATRIC ASSOCIATION, GENDER DYSPHORIA, *supra* note 49.
[56] DSM-III-R, *supra* note 19, at 3-4. For a graphic depiction of the organization of GIDs and Gender Dysphoria in the various editions of the DSM, see app. B.

which explicitly discusses the genetic and, possibly, hormonal contributions to Gender Dysphoria.[57] These findings, together with numerous recent medical studies,[58] strongly suggest that physical impairments contribute to gender incongruence and, in turn, Gender Dysphoria. Simply put, Gender Dysphoria has physical roots that neither GIDs nor transsexualism share. This is significant, because the ADA does not exclude all GIDs—only those that "do *not* result from physical impairments."[59] Because the burgeoning medical research underlying Gender Dysphoria points to a physical etiology, Gender Dysphoria is vastly different from GIDs and instead more akin to GIDs resulting from physical impairments, the latter of which have always been covered by the ADA.[60]

B. Even if Gender Dysphoria is a GID, it results from a physical impairment.

The ADA excludes "transsexualism . . . [and] gender identity disorders *not resulting from physical impairments*."[61] Therefore, even if this Court were to disregard the significant differences between Gender Dysphoria and GIDs, and determine that the former is a type of GID, Gender Dysphoria would still fall outside the scope of the GIDs Exclusion because it "result[s] from [a]

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[57] DSM-5, *supra* note 9, at 457 ("For individuals with gender dysphoria . . . some genetic contribution is suggested by evidence for (weak) familiality of transsexualism among nontwin siblings, increased concordance for transsexualism in monozygotic compared with dizygoticsame-sex twins, and some degree of heritability of gender dysphoria."); *id.* (stating that, although "there appear to be increased androgen levels in . . . 46,XX individuals . . . current evidence is insufficient to label gender dysphoria . . . as a form of intersexuality limited to the central nervous system").

[58] Duffy, *supra* note 1, at 16-72 to -74 & n.282 (citing numerous medical studies conducted in past eight years that "point in the direction of hormonal and genetic causes for the in utero development of gender dysphoria").

[59] 42 U.S.C. § 12211(b)(1) (emphasis added).

[60] Duffy, *supra* note 1, at 16-52, 16-76 (noting similarities between Gender Dysphoria and physical conditions with complex etiologies not fully understood by the medical community that are nevertheless protected by the ADA, including polycystic ovary syndrome, cerebral palsy, strabismus, dyslexia, microvascular angina, stuttering, and Tourette syndrome—the latter two of which were once believed to be purely mental conditions).

[61] 42 U.S.C. § 12211(b)(1) (emphasis added).

physical impairment[]."[62] As the United States recently opined in the case of *Blatt v. Cabela's Retail, Inc.*:

> While no clear scientific consensus appears to exist regarding the specific origins of gender dysphoria (i.e., whether it can be traced to neurological, genetic, or hormonal sources), the current research increasingly indicates that gender dysphoria has physiological or biological roots. . . . In light of the evolving scientific evidence suggesting that gender dysphoria may have a physical basis, along with the remedial nature of the ADA and the relevant statutory and regulatory provisions directing that the terms "disability" and "physical impairment" be read broadly, the GID Exclusion should be construed narrowly such that gender dysphoria falls outside its scope.[63]

Therefore, regardless of whether this Court concludes that Gender Dysphoria is not a GID, or that Gender Dysphoria is a type of GID that results from a physical impairment, the result is the same: Gender Dysphoria falls outside the scope of the GIDs Exclusion.

C. Gender Dysphoria is not a sexual behavior disorder.

A third reason that Gender Dysphoria falls outside the scope of the GIDs Exclusion is that it is not a sexual behavior disorder. The ADA excludes "transsexualism . . . gender identity disorders not resulting from physical impairments, or *other* sexual behavior disorders."[64] The use

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[62] *Id.*

[63] *See* Sec. Statement of Int. of U.S. at 4-5, Blatt v. Cabela's Retail, Inc., No. 14-4822, 2015 WL 9872493 (E.D. Pa. Nov. 16, 2015), ECF No. 67. Under no circumstances, however, should this Court require the Plaintiff to *prove* that her Gender Dysphoria results from a physical impairment in order to claim protection under the ADA. Adding a fourth element to Plaintiff's showing of disability—i.e., (1) a physical or mental impairment (2) that substantially limits (3) a major life activity, and (4) which has a physical, as opposed to mental, etiology—would raise significant legal and practical concerns. First, the physical-etiology showing would apply only to transgender people, thereby raising equal protection concerns. Second, although the DSM-5 and numerous recent medical studies support the physical etiology of Gender Dysphoria, the burden of proving etiology would fall on the Plaintiff, consuming a substantial amount of attorney resources for discovery and the preparation of expert reports and requiring courts to delve into a thicket of medical evidence and opine on etiology, with the attendant risk of different courts reaching differing results in similar cases. And lastly, if Plaintiff could not show that her Gender Dysphoria had a physical basis, the constitutionality of excluding such a condition would have to be adjudicated.

[64] 42 U.S.C. § 12211(b)(1) (emphasis added).

of the word "other" is significant. As the ADA's legislative history plainly demonstrates, certain legislators intended to exclude GIDs (and the transsexualism subtype) because they believed these conditions were sexual behavior disorders undeserving of protection.[65] These legislators were wrong.[66] GIDs were never sexual behavior disorders; their exclusion was based on a mischaracterization of the medical literature, namely, the erroneous conflation of sexual behavior disorders with GIDs.

Since its inception in 1952 and continuing through to the present, the DSM has included a classification for "Sexual Deviations," now referred to as "Paraphilic Disorders."[67] According to the DSM-5, Paraphilic Disorders refer to "any intense and persistent sexual interest"—other than sexual interest in "copulation or equivalent interaction" with "a physically mature, consenting human partner"—which either causes distress or "entail[s] personal harm or risk of harm, to others."[68]

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[65] *See, e.g.*, H.R. REP. NO. 101-485(IV), at 80-81 (1990) (Energy and Commerce Committee) (dissenting views of Rep. William E. Dannemeyer, Rep. Joe Barton, and Rep. Don Ritter); 135 CONG. REC. S11175, 1989 WL 183785 (daily ed. Sept. 14, 1989) (statement of Sen. Armstrong) (labeling "Transsexualism" a "Sexual Disorder"); 135 CONG. REC. S10772, 1989 WL 183216 (daily ed. Sept. 7, 1989) (statement of Sen. Helms) (discussing exclusion of "sexually deviant behavior or unlawful sexual practices"); *id.* (statement of Sen. Armstrong) (offering amendment characterizing GIDs and transsexualism as "sexual behavior disorders"); *see also* Duffy, *supra* note 1, at 16-88, 16-125 to -126; app. C (compiling ADA legislative history).

[66] Legislators on both sides of the debate admitted that they did not have knowledge of the impairments they were excluding. *See* 135 CONG. REC. S10772, 1989 WL 183216 (daily ed. Sept. 7, 1989) (statement of Sen. Armstrong) ("I am simply not learned enough or well enough informed to suggest an amendment . . . list[ing] the specific protected categories" that the managers wish "to afford civil rights protection."); 135 CONG. REC. S10753, 1989 WL 183115 (daily ed. Sept. 7, 1989) (statement of Sen. Harkin) ("Well, obviously I am not familiar with these disorders."); *see also* app. C (compiling ADA legislative history).

[67] DSM-5, *supra* note 9, at 685.

[68] *Id.* at 685-86. The DSM-5 lists eight Paraphilic Disorders: "voyeuristic disorder (spying on others in private activities), exhibitionistic disorder (exposing the genitals), frotteuristic disorder (touching or rubbing against a nonconsenting individual), sexual masochism disorder (undergoing humiliation, bondage, or suffering), sexual sadism disorder (inflicting humiliation, bondage, or suffering), pedophilic disorder (sexual focus on children), fetishistic disorder (using nonliving

While the placement and name of the GIDs diagnosis in the DSM has changed over time,[69] the diagnosis has never been classified as a disorder of sexual behavior; the diagnosis has always been grouped separately from the Paraphilic Disorders.[70] In fact, the DSM-III-R, the version in effect at the time of the ADA's passage, viewed "GID" as a disorder "usually first evident in infancy, childhood, or adolescence," alongside eating disorders and developmental disorders—a classification hardly suggestive of a sexual behavior disorder.[71] Two successive editions of the DSM, the DSM-IV (1994) and DSM-IV-TR (2000), carried this distinction forward, viewing Gender Dysphoria as a condition that implicates gender, not sexual behavior.[72]

In sweeping fashion, the DSM-5 sharply disassociates Gender Dysphoria from all other conditions, including Paraphilic Disorders.[73] In so doing, the DSM-5 makes abundantly clear that Gender Dysphoria, in a class all its own, is not a disorder of sexual behavior. In fact, by substituting Gender Dysphoria for GIDs, the DSM-5 makes clear that Gender Dysphoria is not a "disorder" at all—it is a dysphoria. Because Gender Dysphoria is clearly not a sexual behavior disorder, Congress plainly did not intend to exclude it from the ADA.[74]

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objects or having a highly specific focus on nongenital body parts), and transvestic disorder (engaging in sexually arousing cross-dressing)." Transvestic Disorder, formerly known as "Transvestic Fetishism" or "Transvestism," is different from Gender Dysphoria; those with Transvestic Disorder "do not report an incongruence between their experienced gender and assigned gender nor a desire to be the other gender; and they typically do not have a history of childhood cross-gender behaviors." *Id.* at 704; *see also* app. A (compiling sections of DSM-5).

[69] *See* Duffy, *supra* note 1, at 16-153 to -158.

[70] *See id.* The ICD-10, published in 1990, likewise distinguishes "Gender Identity Disorder" from "Disorders of Sexual Preference," such as "Fetishism," "Fetishistic transvestism," "Exhibitionism," "Voyeurism," "Paedophilia," and "Sadomasochism." ICD-10, *supra* note 22.

[71] *See* Duffy, *supra* note 1, at 16-153 to -158.

[72] *See id.*

[73] *See id.*

[74] Alternatively, this Court should find that GIDs are not—and never have been—sexual behavior disorders, and strike down the GIDs Exclusion altogether.

III. THE GIDs EXCLUSION IS A TRANSGENDER CLASSIFICATION THAT VIOLATES EQUAL PROTECTION.

Even if Gender Dysphoria is excluded from the ADA's definition of disability, the GIDs Exclusion violates equal protection under the Due Process Clause of the Fifth Amendment because it discriminates against transgender people, that is, those whose gender identity does not conform to their assigned sex at birth.[75] Although the ADA does not use the words "transgender," it explicitly excludes three medical conditions (GIDs, transsexualism, and transvestism)—indeed, the *only* three medical conditions—closely associated with transgender people. Because the defining feature of these three conditions is nonconformity between gender identity and assigned sex at birth, everyone with these conditions is necessarily "transgender."[76] Accordingly, the GIDs Exclusion is a transgender classification.

A. The ADA's Transgender Classification Fails Heightened Scrutiny.

The ADA's transgender classification should be subject to strict or intermediate scrutiny (collectively, "heightened scrutiny"). As several federal district courts have recently held, transgender classifications warrant heightened scrutiny because transgender people are a suspect/quasi-suspect class based on the U.S. Supreme Court's four-factor test.[77] First,

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[75] *See, e.g.*, Pl.'s Mem. Law in Opp'n Def.'s Part'l Mot. Dismiss, Blatt v. Cabela's Retail, Inc., No. 14-4822, 2015 WL 1360179 (E.D. Pa. Jan. 20, 2015), ECF No. 23 [hereinafter Pl.'s Mem. Law in Opp'n] (discussing ADA's transgender classification); *see also* Kevin M. Barry et al., *A Bare Desire to Harm: Transgender People and the Equal Protection Clause*, 57 B.C. L. REV. 507, 549-50 (2016) (same); Duffy, *supra* note 1, at 16-129 to -131.

[76] *See Lawrence v. Texas*, 539 U.S. 558, 583 (2003) (O'Connor, J., concurring) (stating that "homosexual conduct . . . is conduct that is closely correlated with being homosexual" and, therefore, law targeting such conduct "was directed toward gay persons as a class").

[77] *See, e.g.*, *Adkins v. City of N.Y.*, 143 F. Supp. 3d 134, 139-40 (S.D.N.Y. 2015) (holding that "transgender people are a quasi-suspect class" entitled to heightened scrutiny under the Supreme Court's four-factor test); *accord. Bd. of Educ. of the Highland Local Sch. Dist. v. United States Dep't of Educ.*, No. 2:16-CV-524, 2016 WL 5372349, at *17 (S.D. Ohio Sept. 26, 2016); *see also* Barry et. al., *A Bare Desire to Harm*, *supra* note 75, at 551-73 (discussing heightened scrutiny of transgender classifications); Duffy, *supra* note 1, at 16-131 to -142.

transgender people have suffered a history of discrimination. As the District of Columbia Court of Appeals recently observed, "the hostility and discrimination that transgender individuals face in our society today is well-documented."[78] Second, transgender people have the ability to participate in and contribute to society. Like the characteristics of other suspect/quasi-suspect classes, the incongruence between a transgender person's assigned sex and gender identity "bears no relation to ability to contribute to society."[79] Third, transgender people exhibit immutable distinguishing characteristics. Incongruence between one's assigned sex and one's gender identity is neither chosen nor changeable; it is immutable and, often, quite obvious.[80] Lastly, transgender people are a minority and lack political power.[81] Transgender people make up approximately 0.3% of the adult population, and they are woefully underrepresented in government.[82]

Although the Supreme Court's four-factor test decidedly points toward heightened scrutiny of transgender classifications because transgender people are a suspect/quasi-suspect class, heightened scrutiny is warranted for a second reason. Transgender classifications are necessarily based on sex—a type of classification long subjected to intermediate scrutiny.[83] Transgender classifications are sex-based classifications for two reasons. First, transgender people do not

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[78] *Brocksmith*, 99 A.3d at 698; *see, e.g.*, *Adkins*, 143 F. Supp. 3d at 139.
[79] *Adkins*, 143 F. Supp. 3d at 139.
[80] *See, e.g.*, *id.* at 139 (stating that transgender status is "a sufficiently discernible characteristic"); *Norsworthy v. Beard*, 87 F. Supp. 3d 1104, 1119 n.8 (N.D. Cal. 2015) (discussing immutability of transgender identity); *see also* Jennifer L. Levi & Bennett H. Klein, *Pursuing Protection for Transgender People Through Disability Laws, in* TRANSGENDER RIGHTS 79, 89 (2006) (stating that transgender status is "a quintessentially stigmatic condition that . . . engender[s] fear and discomfort in others").
[81] *See, e.g., Adkins*, 143 F. Supp. 3d at 140.
[82] *See, e.g.*, *id.* (discussing underrepresentation); *see also* GARY J. GATES, WILLIAMS INSTIT., HOW MANY PEOPLE ARE LESBIAN, GAY, BISEXUAL, AND TRANSGENDER? 1 (2011), http://williamsinstitute.law.ucla.edu/research/census-lgbt-demographics-studies/how-many-people-are-lesbian-gay-bisexual-and-transgender/.
[83] *See Craig v. Boren*, 429 U.S. 190, 197 (1976).

conform to stereotypes associated with their assigned sex at birth and the sex with which they identify.[84] For example, a male-to-female transgender person who wears a dress and requires ongoing electrolysis to remove facial hair defies stereotypical assumptions about her birth sex (e.g., that men do not typically wear dresses) and the sex with which she identifies (e.g., that women do not typically require ongoing electrolysis to remove facial hair). For well over fifteen years, courts have recognized with "near-total uniformity" that transgender discrimination is sex discrimination based on sex stereotyping.[85]

A second reason that transgender classifications are sex-based classifications derives not from stereotypical assumptions about the sexes, but rather from the sex with which men and women identify.[86] Transgender people, by definition, have gender identities that do not align with their assigned sex at birth (e.g., a person born with a female anatomy who identifies as a man). Therefore, transgender classifications necessarily implicate sex: the assigned sex with which the transgender person does not identify, and another sex with which the person does identify. Federal

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[84] *See* Barry et al., *A Bare Desire to Harm*, *supra* note 75, at 568-69 (discussing adverse treatment based on transgender people's nonconformance with sex stereotypes as form of sex discrimination).

[85] *E.g.*, *Glenn v. Brumby,* 663 F.3d 1312, 1317-18 n.5 (11th Cir. 2011) (citing cases); *see also G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 727 (4th Cir. 2016), *cert. granted in part*, 137 S. Ct. 369 (2016) (citing "the weight of circuit authority concluding that discrimination against transgender individuals constitutes discrimination 'on the basis of sex'"); *Smith v. City of Salem,* 378 F.3d 566, 577 (6th Cir. 2004); Barry et al., *A Bare Desire to Harm*, *supra* note 75, at 570-71 (citing cases). *But see Johnston v. Univ. of Pittsburgh of Com. Sys. of Higher Educ.*, 97 F. Supp. 3d 657, 671 & n.14 (W.D. Pa. 2015) (relying on line of cases overruled by U.S. Supreme Court in *Price Waterhouse v. Coopers*, 490 U.S. 228, 256 (1989), to hold that transgender discrimination is not sex discrimination).

[86] *See* Barry et al., *A Bare Desire to Harm*, *supra* note 75, at 569-70 (discussing adverse treatment based on transgender people's identification with another sex as form of sex discrimination).

agencies have espoused this more straightforward theory of transgender discrimination as discrimination based on sex, and several courts have followed suit.[87]

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Applying heightened scrutiny, the ADA's transgender classification fails because it is not narrowly tailored or substantially related to the achievement of a compelling or important governmental interest. The GIDs Exclusion is rooted in moral animus against transgender people, and such animus is plainly insufficient to constitute a compelling or important governmental interest.[88]

B. The ADA's Transgender Classification Fails the Rational Basis Test.

If heightened scrutiny does not apply, the ADA's transgender classification nevertheless fails even the most minimal level of scrutiny: rational basis review. As the U.S. Supreme Court stated in 1973, in *U.S. Department of Agriculture v. Moreno*, and as it has reiterated on multiple occasions since that time, "a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest."[89] Direct evidence of animus in the ADA's legislative history, together with evidence supporting an inference of animus, drawn from the GIDs Exclusion's

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[87] *Compare Macy v. Holder*, 2012 WL 1435995, at *1 (E.E.O.C Apr. 20, 2012), *and* Memorandum from U.S. Attorney Gen. to U.S. Attorneys 2 (Dec. 15, 2014), http://www.justice.gov/file/188671/download, *with Fabian v. Hosp. of Cent. Connecticut*, 172 F. Supp. 3d 509, 526-27 (D. Conn. 2016) (relying on *Macy* and related judicial decisions to hold that "employment discrimination on the basis of transgender identity is employment discrimination 'because of sex'").

[88] *See, e.g.*, Barry et al., *A Bare Desire to Harm*, *supra* note 75, at 574 ("Senators Armstrong, Helms, and Rudman repeatedly invoked immorality as the justification for the transgender exclusions, decrying the ADA's coverage of "sexually deviant behavior.") (quoting ADA's legislative history); *see also* app. C (compiling ADA legislative history).

[89] 413 U.S. 528, 534 (1973); *accord. U.S. v. Windsor*, 133 S. Ct. 2675, 2693 (2013) (quoting *Moreno*).

structure and its practical effect on transgender people, confirm that the classification was founded upon nothing more than "a bare desire to harm" transgender people.[90]

CONCLUSION

This Court should deny Defendants' Motion to Dismiss and hold that Gender Dysphoria is not excluded from the ADA's definition of disability or, alternatively, that the GIDs Exclusion violates equal protection under the Due Process Clause of the Fifth Amendment. This Court should further hold that the Defendants' refusal to permit the Plaintiff to change the gender marker on her birth certificate without proof that she has undergone Sexual Reassignment Surgery violates due process, equal protection, and the ADA.

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[90] *See, e.g.*, Pl.'s Mem. Law in Opp'n, *supra* note 75 (discussing ADA's legislative history); Barry et al., *A Bare Desire to Harm*, *supra* note 75, at 574-76 (discussing legislative history, structure, and effect of GIDs Exclusion); *see also* app. C (compiling ADA legislative history).