IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

KATE LYNN BLATT	:	**CIVIL ACTION NO.: 14-4822**
	:	
Plaintiff,	:	
v.	:	
	:	
CABELA'S RETAIL, INC.	:	**HONORABLE JEFFREY L. SCHMEHL**
	:	**ELECTRONICALLY FILED**
Defendant.	:	

BRIEF OF *AMICI CURIAE* GAY & LESBIAN ADVOCATES & DEFENDERS, MAZZONI CENTER, NATIONAL CENTER FOR LESBIAN RIGHTS, NATIONAL CENTER FOR TRANSGENDER EQUALITY, NATIONAL LGBTQ TASK FORCE, AND TRANSGENDER LAW CENTER IN OPPOSITION TO DEFENDANT'S PARTIAL MOTION TO DISMISS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Congressional Record & Reports

Federal Statutes

Federal Regulations

Other Authorities

STATEMENT OF INTEREST OF AMICI CURIAE

Amici submit this brief in accordance with applicable case law and pursuant to the requirements of Federal Rule of Appellate Procedure 29. A motion requesting leave to file and permission to exceed the page limit 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.

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).

Mazzoni Center is the only health care provider in the Philadelphia region specifically targeting the unique health care and legal needs of people who are lesbian, gay, bisexual, and transgender (LGBT). Founded in 1979, Mazzoni Center has expanded over time to meet the needs of the LGBT community, now offering a full array of primary health care services, mental and behavioral health services, and LGBT-focused legal services. Mazzoni Center's Legal Services Department provides direct legal assistance and representation to LGBT Pennsylvanians in a wide range of substantive areas.

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.

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.

Transgender Law Center ("TLC") is the nation's largest organization dedicated to advancing the rights of transgender and gender nonconforming people. TLC works to change law, policy, and attitudes so that all people can live safely, authentically, and free from discrimination regardless of their gender identity or expression. TLC has served as counsel or amicus curiae in a number of key transgender discrimination cases, including representing the complainant Mia Macy in the case that led to groundbreaking EEOC decision Macy v. Holder, App. No. 0120120821 (E.E.O.C. 2012).

Amici respectfully submit this brief in opposition to Defendant's Partial Motion to Dismiss to address the vital importance of allowing individuals to bring claims under the ADA when they have been discriminated against on the basis of Gender Identity Disorders and Gender Dysphoria. Very few courts have addressed, and none have analyzed, the ADA's exclusion of Gender Identity Disorders and transsexualism in a case brought by a transgender litigant. As a result, no court has ever considered the legislative history of the ADA surrounding the exclusion, the application of the exclusion to the new diagnosis of Gender Dysphoria, the fact that neither Gender Identity Disorders (including transsexualism) nor Gender Dysphoria is a sexual behavior disorder, or the moral animus behind the exclusion. Analysis of these issues supports the argument that the ADA's exclusion of Gender Identity Disorders and transsexualism is unconstitutional or, in the alternative, the exclusion does not apply to the new diagnosis of Gender Dysphoria.

Accordingly, *Amici* urge this Court to deny Defendant Cabela's Retail, Inc.'s Partial Motion to Dismiss and hold that the ADA's exclusion of Gender Identity Disorders and transsexualism violates equal protection under the Due Process Clause of the Fifth Amendment or, in the alternative, Gender Dysphoria is outside the scope of the exclusion as a matter of statutory interpretation. This Court should further hold that Plaintiff Blatt has stated a claim that the Defendant violated the ADA by discriminating against her on the basis of GD, failing to accommodate her GD, and retaliating against her for requesting a reasonable accommodation and opposing unlawful disability discrimination in the workplace.

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"),[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" ("GD"), the DSM did not remove the diagnosis. Simply put, the ADA excludes GIDs not because they

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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 GID until 1994, when it removed the diagnosis of transsexualism altogether.

are 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 exclusion of GIDs 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, GD—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, GD—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. *Amici* concur with Plaintiff Blatt's argument that the ADA's GIDs exclusion violates equal protection under the Due Process Clause of the Fifth Amendment and urge this Court to invalidate the exclusion on constitutional grounds. *See* Pl.'s Mem. Opp'n. Def.'s Part'l Mot. Dismiss, at pp. 15-39.[7] In the alternative, *Amici* urge this Court

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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] Although *Amici* agree with Plaintiff Blatt's equal protection argument, this brief does not address that argument.

to find that GD is outside the scope of the GIDs exclusion as a matter of statutory interpretation. 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.

STATEMENT OF FACTS

Amici adopt and incorporate in its entirety Plaintiff Blatt's Statement of Facts and Procedural History in her brief. *See* Pl.'s Mem. Opp'n. Def.'s Part'l Mot. Dismiss, at pp. 3-7.

ARGUMENT

I. GIDs AND GD ARE SERIOUS MEDICAL CONDITIONS.

To understand the diagnoses of GIDs and GD, 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.[8] 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.[9] A growing body of medical research suggests that this incongruence is caused by "genetics and/or in utero exposure to the 'wrong' hormones during the

[8] *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.
[9] DSM-5, *supra* note 8, at 452-53.

development of the brain, such that the anatomic physical body and the brain develop in different gender paths."[10]

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.[11] For some transgender people, however, the incongruence results in gender dysphoria—i.e., a feeling of stress and discomfort with one's assigned sex.[12] 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 GD 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.[13] 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

[10] Duffy, *supra* note 1, at 16-77 (discussing recent medical studies); *see also* DSM-5, *supra* note 8, at 457 (discussing genetic and, possibly, hormonal contribution to GD); *id.* at 20 (defining "mental disorders" to include dysfunctions of "biological" and "developmental"—as well as "psychological"—processes underlying mental functioning).

[11] *See* Duffy, *supra* note 1, at 16-10; *see also* DSM-5, *supra* note 8, 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").

[12] DSM-5, *supra* note 8, 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.").

[13] *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 13, at 569.

surgery.[14] 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."[15] 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.[16]

In 1980, the American Psychiatric Association introduced the GID 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."[17] 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[18] and added a fourth: "GID of adolescence or adulthood, nontranssexual type."[19] In 1994, the DSM-IV combined the diagnoses

[14] Denny, *supra* note 13, at 175.
[15] HARRY BENJAMIN, M.D., THE TRANSSEXUAL PHENOMENON 11-12 (1966), *available at* http://www.mut23.de/texte/Harry%20Benjamin%20-%20The%20Transsexual%20Phenomenon.pdf.
[16] Denny, *supra* note 13, at 175-76.
[17] AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 261-66 (3rd ed.1980).
[18] 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.
[19] *Id.* at 76-77.

of Transsexualism and GID of Childhood into the single overarching diagnosis of "GID in children and in adolescents or adults."[20]

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 GID 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.[21] The eleventh edition of the ICD, which is expected to be published in 2017, will rename "transsexualism"—the ICD's GID diagnosis for adolescents and adults—"Gender Incongruence," characterized by "a marked and persistent incongruence between an individual's experienced gender and the assigned sex."[22]

According to the DSM-5, GD is characterized by: (1) a marked incongruence between one's gender identity and one's assigned sex, which is often accompanied by a strong desire to be rid of one's primary and secondary sex characteristics and/or to acquire primary/secondary

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[20] 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.

[21] Drescher et al., *supra* note 13, 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.

[22] 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.

sex characteristics of the other gender; and (2) intense emotional pain and suffering resulting from this incongruence.[23] Among adolescents and adults, GD 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").[24] If left medically untreated, GD can result in debilitating depression, anxiety and, for some people, suicidality and death.[25]

Like other medical conditions, GD can be ameliorated through medical treatment.[26] There is no single course of medical treatment that is appropriate for every person with GD. 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 people with GID.[27] The SOC were originally approved in 1979 and have undergone seven revisions through 2012. As part of the SOC, many transgender individuals with GD undergo a medically-recommended and supervised gender transition in order to live life consistent with their gender identity.[28]

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[23] *See* DSM-5, *supra* note 8, at 452 ("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").

[24] DSM-5, *supra* note 8, at 455-56.

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

[26] *See* WORLD PROFESSIONAL ASSOCIATION FOR TRANSGENDER HEALTH, STANDARDS OF CARE 5 (7th ed., 2012) [hereinafter "SOC"], *available at* http://admin.associationsonline.com/uploaded_files/140/files/Standards%20of%20Care,%20V7%20Full%20Book.pdf ("Gender dysphoria can in large part be alleviated through treatment."); *see also* DSM-5, *supra* note 8, 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).

[27] *See* SOC, *supra* note 26, at 1.

[28] *See id.* at 9-10; *see also* OPM GUIDANCE, *supra* note 8 (discussing gender transition).

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.[29] Living consistent with one's desired gender role consists of "present[ing] consistently, on a day-to-day basis and across all settings of life, in [one's] desired gender role," which is "based on expert clinical consensus that this experience provides ample opportunity for patients to experience and socially adjust in their desired gender role, before undergoing irreversible surgery."[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] This was the treatment course followed by Plaintiff Blatt, who, consistent with the SOC, took steps to "alter her physical appearance to conform to her female gender identity, including dressing in feminine attire, growing long hair, and engaging in hormone therapy in order to change her physical features." Compl. at ¶ 11. She also changed her name from "James" to "Kate Lynn." *Id.* The correct course of treatment for any given individual—in order for the

[29] SOC, *supra* note 26, at 9.
[30] *Id.* at 60-61.
[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 8, at 454 (discussing those who resolve incongruence between gender identity and assigned sex "*without* seeking medical treatment to alter body characteristics").
[32] SOC, *supra* note 26, at 10; *see also* DSM-5, *supra* note 8, 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 . . . .").

patient to achieve genuine and lasting comfort with his or her sex—can only be determined by the treating physician and the patient.[33]

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.[34]

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.

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

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[33] SOC, *supra* note 26, at 5 ("Treatment is individualized: What helps one person alleviate gender dysphoria might be very different from what helps another person.").

[34] 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.

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.[35] 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.[36]

In 1990, Congress wrote GIDs out of federal disability antidiscrimination law, depriving many transgender individuals of the protections they once enjoyed.[37] 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."[38]

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 seven of the U.S. Courts of Appeals that have been presented with the question have found that GID poses a "serious medical need" for

[35] No. CIV.A. 84-3296, 1985 WL 9446, at *2-3 (D.D.C. June 12, 1985).
[36] *Id.*; *see also* Duffy, *supra* note 1, at 16-111 to -120 (discussing cases holding the GID is disability under state disability antidiscrimination law).
[37] After passing the ADA (with its GID 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.).
[38] *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.").

purposes of the Eighth Amendment.[39] Many federal courts have ruled likewise in the context of civil commitment.[40] 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.[41]

II. THE ADA DOES NOT EXCLUDE GD AS A MATTER OF STATUTORY INTERPRETATION.

Although the ADA excludes GIDs, it is silent as to GD.[42] No agency charged with enforcing the ADA, nor any court, has addressed whether the ADA's exclusion of GIDs extends to GD as a matter of statutory interpretation. Bearing in mind that "[r]emedial legislation is traditionally construed broadly, with exceptions construed narrowly,"[43] the ADA's text and legislative history strongly support the ADA's inclusion of GD, for two reasons.

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[39] *See, e.g., O'Donnabhain v. C.I.R.*, 134 T.C. 34, 62 (2010) (citing cases); *see also Wolfe v. Horn*, 130 F. Supp. 2d 648, 652-53 (E.D. Pa. 2001) (holding that fact question precluded summary judgment as to whether defendants "were deliberately indifferent to treating Wolfe's gender identity disorder," and acknowledging that courts "have consistently considered transsexualism a 'serious medical need' for purposes of the Eighth Amendment.").

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

[41] *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").

[42] Plaintiff Blatt alleges that, "[i]n or about October of 2005, [she] was diagnosed with Gender Dysphoria, also known as Gender Identity Disorder." Compl. at ¶ 10. Although GD was not listed in the DSM until 2013, Plaintiff Blatt alleges that her 2005 GID diagnosis also meets the 2013 GD diagnostic criteria.

[43] *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)); *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)).

A. GD is not the same as GIDs.

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.[44] Because the DSM-5's GD diagnosis bears little resemblance to the GIDs diagnosis (including its subtype, transsexualism) in all prior versions of the DSM, GD 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."[45] In the next two versions of the DSM, the DSM-IV (1994) and DSM-IV-TR (2000), the transsexualism and childhood subtypes were combined into a single diagnosis, "GID in children, adolescents, and adults."[46] 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

[44] H.R. REP. NO. 101-485(IV), at 81 (May 15, 1990) (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.").

[45] DSM-III-R, *supra* note 18, at 76.

[46] DSM-IV, *supra* note 20, at 532-38, 785; AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 576-82 (4th ed., rev. 2000) [hereinafter "DSM-IV-TR"].

significant distress or impairment in social, occupational, or other important areas of functioning."[47]

The DSM-5's GD 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.[48] This is no longer the case. Under the DSM-5, incongruence is not the problem in need of treatment—dysphoria is.[49] By "focus[ing] on dysphoria as the clinical problem, not identity per se," the change from GID to GD destigmatizes the diagnosis.[50]

Second, the diagnostic criteria are different. GD replaces the previous showing of a "strong and persistent cross-gender identification" and a "persistent discomfort" with one's sex or "sense of inappropriateness" in the gender role of that sex, with a "marked incongruence" between gender identity and assigned sex.[51] 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

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[47] DSM-IV, *supra* note 20, at 537-38; DSM-IV-TR, *supra* note 46, at 581.
[48] *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.'").
[49] *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.").
[50] DSM-5, *supra* note 8, at 451; AMERICAN PSYCHIATRIC ASSOCIATION, GENDER DYSPHORIA, *supra* note 48 ("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.").
[51] DSM-5, *supra* note 8, 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.").

gender change)."[52] 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.[53] 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."[54]

Third, the categorization of the GD 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.[55] For the first time ever, the DSM categorizes the diagnosis separately from all other conditions. Under the DSM-5, GD is now literally in a class all its own.

Lastly, medical research supporting the GD diagnosis is different. Unlike the DSM's treatment of GIDs and transsexualism, the DSM-5 includes a section entitled "Genetics and Physiology," which explicitly discusses the genetic and, possibly, hormonal contributions to

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[52] AMERICAN PSYCHIATRIC ASSOCIATION, GENDER DYSPHORIA, *supra* note 48; *see also* DSM-5, *supra* note 8, at 453.
[53] DSM-5, *supra* note 8, 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."); *see also id.* at 453, 814-15 (discussing addition of posttransition specifier).
[54] AMERICAN PSYCHIATRIC ASSOCIATION, GENDER DYSPHORIA, *supra* note 48.
[55] DSM-III-R, *supra* note 18, at 3-4. For a graphic depiction of the organization of GIDs and GD in the various editions of the DSM, see Duffy, *supra* note 1, at 16-153 to -158; *see also* app. B.

GD.[56] These findings, together with numerous recent medical studies,[57] strongly suggest that physical impairments contribute to gender incongruence and, in turn, GD. Simply put, GD 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."[58] Because the burgeoning medical research underlying GD points to a physical etiology, GD is vastly different from GIDs and transsexualism and instead more akin to GIDs resulting from physical impairments, the latter of which have always been covered by the ADA.

B. GD is not a sexual behavior disorder.

The ADA excludes "transsexualism . . . gender identity disorders not resulting from physical impairments, or *other* sexual behavior disorders."[59] The use of the word "other" is significant. As discussed in Plaintiff Blatt's memorandum, *see* Pl.'s Mem. Opp'n. Def.'s Part'l Mot. Dismiss, at pp. 25-26, 30-32, the ADA's legislative history plainly demonstrates that certain legislators intended to exclude GIDs (and the transsexualism subtype) because they believed these conditions were sexual behavior disorders undeserving of protection.[60] These

[56] DSM-5, *supra* note 8, 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.").

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

[58] 42 U.S.C. § 12211(b)(1).

[59] *Id.* (emphasis added).

[60] *See, e.g.*, H.R. REP. NO. 101-485(IV), at 80-81 (May 15, 1990) (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

legislators were wrong.[61] 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."[62] 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."[63]

While the placement and name of the GIDs diagnosis in the DSM has changed over time,[64] the diagnosis has never been classified as a disorder of sexual behavior; the diagnosis has

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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.

[61] 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.

[62] DSM-5, *supra* note 8, at 685.

[63] *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 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 GD; 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.

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

always been grouped separately from the Paraphilic Disorders.[65] 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.[66] Two successive editions of the DSM, the DSM-IV (1994) and DSM-IV-TR (2000), carried this distinction forward, viewing GD as a condition that implicates gender, not sexual behavior.[67]

In sweeping fashion, the DSM-5 sharply disassociates GD from all other conditions, including Paraphilic Disorders.[68] In so doing, the DSM-5 makes abundantly clear that GD, in a class all its own, is not a disorder of sexual behavior. In fact, by substituting GD for GIDs, the DSM-5 makes clear that GD is not a "disorder" at all—it is a dysphoria. Because GD is clearly not a sexual behavior disorder, Congress plainly did not intend to exclude it from the ADA.[69]

III. THE ADA SHOULD NOT EXCLUDE GIDs OR GD AS A MATTER OF PUBLIC POLICY.

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."[70] As discussed in Plaintiff Blatt's memorandum, transgender people are disproportionately at risk for discrimination in almost all aspects of life, including employment, housing, education, public accommodations, and access to government services. *See* Pl.'s Mem. Opp'n. Def.'s Part'l Mot.

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[65] *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 21.
[66] *See* Duffy, *supra* note 1, at 16-153 to -158.
[67] *See id.*
[68] *See id.*
[69] Alternatively, this Court should find that GIDs are not—and never have been—sexual behavior disorders, and strike down the GIDs exclusion altogether.
[70] *Brocksmith*, 99 A.3d at 698.

Dismiss, at pp. 19-21.[71] Removing the ADA's GIDs exclusion on constitutional grounds or, in the alternative, interpreting the ADA not to exclude GD, would strengthen legal protections for transgender people for several reasons.

A. The ADA's inclusion of GIDs and GD would eliminate a source of blatant, legally-sanctioned prejudice against transgender people.

As one scholar has commented, "[f]ederal law has an important expressive function, especially concerning the messages it sends about disadvantaged groups."[72] The fact that Congress went out of its way to exclude GIDs, along with a variety of distinctly different conditions that the *DSM* classified as sexual behavior disorders and/or that the law treats as criminal or reckless, sends a strong symbolic message: transgender people have no civil rights worthy of respect.[73] 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.[74]

B. The ADA's inclusion of GIDs and GD would provide comprehensive antidiscrimination protection to many transgender people.

The ADA was enacted to "establish a clear and comprehensive prohibition of discrimination on the basis of disability."[75] In order to claim protection under the ADA, a person must show that he or she is disabled—i.e., that he or she (1) actually has, (2) has a record of

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[71] *See, e.g.*, GRANT ET AL., *supra* note 6, at 82.
[72] Michael Waterstone, *Returning Veterans and Disability Law,* 85 NOTRE DAME L. REV. 1081**,** 1122 (2010).
[73] *Cf. Cain v. Hyatt,* 734 F. Supp. 671, 680 (E.D. Pa. 1990) ("The particular associations AIDS shares with sexual fault, drug use, social disorder, and with racial minorities, the poor, and other historically disenfranchised groups accentuates the tendency to visit condemnation upon its victims.").
[74] 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").
[75] ADA Amendments Act of 2008 § 2(a)(1), Pub. L. No. 110-325, 122 Stat. 3553 (2008).

having, or (3) is regarded by others as having a "physical or mental impairment that substantially limits one or more major life activities."[76]

The first two prongs of the ADA's definition require the plaintiff to show that he or she has—or had—an impairment that substantially limits major life activities. Most transgender people are not substantially limited in any major life activity and therefore are not protected under the ADA. Those who *are* substantially limited, however, should have the same right as others to protection under the ADA. For example, some transgender people experience clinically significant dysphoria that may "substantially limit" their ability to care for themselves within the meaning of the ADA because they require regular, ongoing, and life-long medical treatment, such as ongoing psychotherapy and counseling sessions, periodic hormone treatment, long-term electrolysis sessions, and outpatient body-contouring procedures.[77] Transgender people who experience distress, such as depression and anxiety,[78] as a result of the incongruence between their gender identity and assigned sex may be substantially limited in a variety of other major life activities, including thinking, concentrating, sleeping, and interacting with others.[79] Transgender people may also be substantially limited in the major life activity of reproduction, either because they literally cannot reproduce as a result of hormone treatments or genital surgery that renders them infertile or sterile, or they choose not to reproduce because their gender identity is not consistent with their reproductive organs.[80]

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[76] 42 U.S.C. § 12102(1).
[77] *See* Jennifer L. Levi & Bennett H. Klein, *Pursuing Protection for Transgender Through Disability*, *in* TRANSGENDER RIGHTS 85-86 (2006); *see also* Duffy, *supra* note 1, at 16-80 to -81 (citing cases).
[78] *See* DSM-5, *supra* note 8, at 459.
[79] *See* Duffy, *supra* note 1, at 16-81 to -82 (citing cases).
[80] *See id.* at 16-82 to -83 (citing cases).

The third prong of the ADA's definition of disability (the "regarded-as" prong) is different from the first two, because it covers those whose impairments are not substantially limiting and even non-existent. The limitations with which the regarded-as prong is concerned derive not from the individual's impairment, but rather from the "negative reactions" of others.[81] As the Supreme Court stated in the seminal case of *School Board of Nassau County v. Arline*, Congress' inclusion of the "regarded as" prong was an acknowledgment that "society's accumulated myths and fears about disabilities . . . are as handicapping as are the physical limitations that flow from actual impairment."[82] Under the regarded-as prong, many transgender people may be substantially limited not as the inherent result of an impairment, but rather as a result of others' negative reactions—namely fear, discomfort, lack of understanding, and animus.[83]

In 2008, the ADA Amendments Act greatly expanded the ADA's definition of disability in two ways, making it easier for transgender people to claim protection under the law. First, under the first two prongs of the definition, the Amendments added numerous cascading rules of construction that significantly reduce the threshold showing of substantial limitation of a major life activity, and also expanded the list of "major life activities."[84] Under these new rules of construction, more transgender people would be found to be substantially limited in a major life

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[81] *Arline*, 480 U.S. at 283.
[82] *Id.* at 284.
[83] *See* Levi & Klein, *supra* note 77, at 89; *see, e.g.*, *Cain*, 734 F. Supp. at 678 (holding that employee with AIDS was "handicapped" because "societal prejudices deem persons with AIDS as having . . . an impairment" that substantially major life activities) (interpreting Pennsylvania civil rights statute that mirrors ADA).
[84] *See* 42 U.S.C. § 12102(2), (4); *see generally* Kevin M. Barry, *Exactly What Congress Intended?*, 17 EMP. RTS. & EMP. POL'Y J. 5, 24-25 (2013) (discussing ADAAA's changes to first and second prongs of disability definition).

activity.[85] Second, the Amendments clarify that coverage under the "regarded as" prong turns on adverse treatment, not the difficult-to-prove perception of an employer. The more expansive "regarded as" prong protects nearly anyone who is adversely treated based on any impairment—whether the impairment is actual or perceived, and functionally limiting or not.[86] Simply put, virtually any person who is treated adversely based on GID or GD, whether real or perceived, would be covered under the ADA's regarded-as prong, as amended.[87]

Because the discrimination at issue in this case took place in 2006 and 2007, the Amendments to the ADA, which were enacted in 2009, do not apply. Nevertheless, because the Amendments clarify that Congress originally intended the ADA to cover nearly all impairments, not just those typically considered to be "disabilities," they bolster the conclusion that GIDs and GD belong within that broad scope of coverage.[88]

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[85] Under the ADA, as amended, a court cannot consider the corrective effects of mitigating measures, such as hormone therapy, *see* 42 U.S.C. § 12102(4)(E); it must look at GID or GD as though the condition is currently causing distress, *see id.* § 12102(4)(D); it must construe the definition of disability broadly, *see id.* § 12102(4)(A)-(B); and it must consider the impact of GIDs or GD on a newly expanded list of "major life activities" and the operation of "major bodily functions." 42 U.S.C. 12102(2)(A)-(B); *cf.* 29 C.F.R. 1630.2(j)(3)(ii) (21012) (listing mental health conditions that "will, as a factual matter, virtually always be found to impose a substantial limitation on a major life activity.").

[86] *See* 42 U.S.C. § 12102(3)(A); *see also* ADA Amendments Act of 2008 § 2(b)(2) (stating that purpose of Amendments is "to reinstate the reasoning of [*Arline*], which set forth a broad view of the third prong of the definition of [disability]"); *see generally* Barry, *Exactly What Congress Intended*, *supra* note 84, at 21-22 (discussing ADAAA's changes to "regarded as" prong of disability definition).

[87] *See* 42 U.S.C. § 12102(3)(A).

[88] *See Rohr v. Salt River Project Agric. Imp. & Power Dist.*, 555 F.3d 850, 861-62 (9th Cir. 2009) ("[T]he ADAAA sheds light on Congress' original intent when it enacted the ADA. . . . While we decide this case under the ADA, and not the ADAAA, the original congressional intent as expressed in the amendment bolsters our conclusions.").

C. The ADA's inclusion of GIDs and GD would allow transgender workers to request reasonable accommodations while undergoing gender transition.

Unlike other civil rights laws, the ADA explicitly defines discrimination to include the failure of an employer to "mak[e] reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability."[89] Reasonable accommodations include "making existing facilities used by employees readily accessible to and usable by individuals with disabilities," as well as "part-time or modified work schedules," "appropriate adjustment or modifications of . . . policies,"[90] and "[p]ermitting the use of accrued paid leave, or unpaid leave."[91]

For transgender workers, a reasonable accommodation might include modifying policies governing restroom usage and dressing and grooming standards, as well as modifying a person's work schedule or granting a person leave to seek counseling, hormone therapy, electrolysis, reassignment surgery, or other treatment. Although an "employer does not have to provide a reasonable accommodation that would cause an 'undue hardship' to the employer,"[92] most accommodations for transgender workers are modest and impose no costs. Indeed, the federal government has adopted accommodations for dress codes and gender-segregated facilities as a matter of right for federal employees,[93] and numerous states have done likewise.[94]

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[89] 42 U.S.C. § 12112(b)(5)(A).
[90] 42 U.S.C. § 12111(9)(A)-(B).
[91] U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ENFORCEMENT GUIDANCE: REASONABLE ACCOMMODATION AND UNDUE HARDSHIP UNDER THE AMERICANS WITH DISABILITIES ACT (2002), http://www.eeoc.gov/policy/docs/accommodation.html#leave.
[92] *Id.*
[93] *See* OPM GUIDANCE, *supra* note 8; *see also* Duffy, *supra* note 1, at 35-23 to -26, 36-19 to -21.
[94] *See* Duffy, *supra* note 1, 35-18 to -22, 36-21 to -27.

CONCLUSION

This Court should deny Defendant Cabela's Retail, Inc.'s Partial Motion to Dismiss and hold that the ADA's exclusion of GIDs and transsexualism violates equal protection under the Due Process Clause of the Fifth Amendment or, in the alternative, GD is outside the scope of the exclusion as a matter of statutory interpretation. This Court should further hold that Plaintiff Blatt has stated a claim that the Defendant violated the ADA by discriminating against her on the basis of GD, failing to accommodate her GD, and retaliating against her for requesting a reasonable accommodation and opposing unlawful disability discrimination in the workplace. Such a result is the correct result under the law. It would also provide sorely needed, comprehensive antidiscrimination protection to transgender people and eliminate a source of blatant, legally-sanctioned prejudice against them.

Respectfully Submitted,

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