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**
	:	**JURY TRIAL DEMANDED**
Defendant.	:	

ORDER

AND NOW, this day of , 2015, upon consideration of the Partial Motion of Defendant Cabela's Retail, Inc. to Dismiss Plaintiff's First Amended Complaint, and Plaintiff's Memorandum of Law in Opposition thereto, it is ORDERED that said motion is DENIED.

BY THE COURT:

_____
Honorable Jeffrey L. Schmehl, J.

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Defendant.	:	

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S PARTIAL MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT

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I. PRELIMINARY STATEMENT

Many transgender individuals cannot bring claims under the Americans with Disabilities Act, 42 U.S.C. §12191, *et seq.* ("ADA"), in the law's current form. This is due to Section 12211 (b)(1) of the landmark civil rights law, which states, in no uncertain terms:

> Under this chapter, the term "disability" shall not include-
>
> (1) Transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders…

The medical community denotes "Gender Identity Disorder" ("GID") as the medical diagnosis for transgender status, although the term was replaced by "Gender Dysphoria" by the Fifth and most recent edition of the Diagnostic and Statistical Manual of Mental Disorders ("DSM"). *See American Psychiatric Association, Diagnostics and Statistical Manual of Mental Disorders*, 451-59, 451-53 (5th ed. 2013). Transgender individuals who are formally diagnosed with GID are not protected under the ADA if their diagnosis does not result from a physical impairment. In the case at hand, the Defendant's Partial Motion to Dismiss rests, in large part, on this exact premise, namely that Plaintiff Blatt's Gender Dysphoria does not constitute a disability under the ADA because it is specifically excluded from the ADA's definition of disability. (*See* Defendant's Partial Motion to Dismiss ("PMTD") at pp. 2, 5-6, 9-11).

This Court should find the ADA's exclusion of "transsexualism . . . [and] gender identity disorders not resulting from physical impairments" (collectively referred to as "GID exclusion")[1]

[1] The exclusions of GID and transsexualism (the so-called GID exclusion) from the ADA prohibit someone from bringing a claim under that law where the claim is based on the fact that the person (1) either has a diagnosis because of the clinical distress they experience as result of the incongruence between their gender identity and their assigned birth sex; or (2) lives or dresses as a gender different than the sex they were assigned. Both of these categories equate to exclusions for transgender people. In sum, the exclusion prohibits transgender people from bringing claims where the claim is based on the person's transgender identity. That means the GID exclusions create a transgender classification. The fact that not all transgender people have a GID diagnosis does not affect the conclusion that all people excluded by the ADA's GID exclusion are transgender.

unconstitutional and inapplicable to Plaintiff Blatt, as it stands in clear violation of the Equal Protection Clause of the Fourteenth Amendment, as reverse incorporated and applied to the federal government through the Fifth Amendment. *See* U.S.Const., Amdt. V, XIV; *Bolling v. Sharpe*, 347 U.S. 497 (1954). Upon an investigation into Congress' justifications for the GID exclusion, the Congressional Record reveals nothing more than constitutionally impermissible discrimination, devoid of any compelling, important, or legitimate governmental interest. As will be shown *infra*, the GID exclusion in the ADA was the result of moral animus on behalf of a small group of United States Senators, who, in a feverish attempt to exclude the mental impairments they deemed morally unfit, unconstitutionally deprived transgender individuals from the ADA's protection.

As such, the GID exclusion violates the Equal Protection Clause because it fails strict, intermediate, and rational basis scrutiny. Plaintiff Blatt's lack of protection under the ADA is merely the byproduct of a legislative classification founded upon moral animus, thereby violating the constitutional proposition that "equality must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot justify disparate treatment of that group." *Department of Agriculture v. Moreno*, 413 U.S. 528, 534-35 (1973).

Importantly, similar to the Supreme Court's admonition in *United States v. Windsor*, 133 S. Ct. 2675 (2013), the GID exclusion injures *the very class of people* the ADA seeks to protect.[2] That is, among Congress' findings in enacting the ADA, it noted: "Congress finds that . . . historically society had tended to isolate and segregate individuals with disabilities, and despite some improvements, such forms of discrimination against individuals with disabilities continue

[2] Notably, Attorney General Eric Holder and President Obama's rationales for no longer defending DOMA equally apply to not enforcing the GID exclusion. *See* Letter From Eric H. Holder, Jr., U.S. Attorney General, to John A. Boehner, Speaker, U.S. House of Representatives, regarding the Defense of Marriage Act, 2011 WL 641582 (Feb. 23, 2011) (available at www.justice.gov/opa/pr/2011/February/11-ag-223.html).

to be a serious and pervasive social problem." 42 U.S.C. §12101(a)(2). Indeed, Plaintiff Blatt will demonstrate that the GID exclusion preserves the pervasive social problem many transgender individuals experience because of their serious medical condition. As such, the ADA isolates, segregates, and injures those transgender individuals that the ADA should protect.[3]

Accordingly, Plaintiff Blatt respectfully requests that this Court declare the ADA's exclusion of GID to be unconstitutional and deny the arguments in the Defendant's Partial Motion to Dismiss founded upon 42 U.S.C. §12211(b)(1). Additionally, as set forth in Section IV(D) of this brief, this Court should likewise deny the arguments in the Defendant's Partial Motion to Dismiss that are not dependent on the constitutionality of the GID exclusion.

II. STATEMENT OF FACTS

Plaintiff, Kate Lynn Blatt ("Plaintiff Blatt"), is a transgender female. *See* Amended Complaint at ¶¶ 9-11. At the time of her birth, Plaintiff Blatt's sex was designated male and her parents gave her the male name "James." *Id.* at¶ 9. Plaintiff Blatt's male gender designation assigned to her at birth does not conform to her female gender identity. *Id.* Correspondingly, in or about October of 2005, she was formally diagnosed with Gender Dysphoria. *Id.* at ¶ 10. Thereafter, Plaintiff Blatt 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. *Id.* Additionally, she changed her name from "James" to "Kate Lynn" in order to conform to the gender with which she identifies. *Id.*

[3] However, Plaintiff Blatt emphasizes at the outset of this constitutional challenge that "being transgender" does not equate to the notion that one's transgender status is, or should be considered, a disability *per se* under the ADA. In other words, assuming the ADA exclusion at issue is unconstitutional, transgendered individuals who seek to bring claims under the ADA must still meet the law's three-pronged definition of disability in order to state a legally cognizable cause of action.

On or about September 17, 2006, Plaintiff Blatt commenced employment with Cabela's Retail, Inc. ("Defendant"). *Id.* at ¶ 12. During the course of her employment with the Defendant, Plaintiff Blatt held the position of Seasonal Stocker. *Id.* at ¶ 13. At the commencement of Plaintiff Blatt's employment, Defendant required Plaintiff Blatt to attend a two (2) to three (3) day orientation. During the orientation, Plaintiff Blatt dressed in female attire and used the female restroom without issue. *Id.* at ¶ 15.

Immediately subsequent to orientation, Defendant required Plaintiff Blatt to order a uniform. In turn, Plaintiff Blatt requested a female uniform as a reasonable accommodation for her disability, as other female employees wore female uniforms. After failing to receive a response from the Defendant regarding her request for a female uniform, Plaintiff Blatt ordered and began to wear a female uniform. Additionally, Plaintiff Blatt requested a nametag that displayed her name as "Kate Lynn." *Id.* at ¶ 16. Shortly thereafter, Sandy Gates ("Gates"), Human Resources Director, flatly denied Plaintiff Blatt's request for said nametag. *Id.* at ¶ 17. Further, in retaliation for requesting said accommodation, Gates forced Plaintiff Blatt to wear a nametag stating that her name was "James," allegedly because employees were prohibited from wearing nametags depicting "fictitious" names. Gates also informed Plaintiff Blatt that she could obtain a nametag reading "Kate Lynn" when her name and gender marker were legally changed. *Id.* Curiously, numerous non-transgender, male employees wore nametags depicting nicknames, such as "Rocky," "Bob," and "Jim." Moreover, Gates required all employees of the Defendant to refer to Plaintiff Blatt as "James" or face termination. *Id.*

Additionally, Gates prohibited Plaintiff Blatt from using the female restroom as a reasonable accommodation, as she previously had, until she provided Gates with documentation that her gender marker had been legally changed from male to female, thereby evidencing her

discriminatory and retaliatory intentions. *Id.* at ¶ 19. Accordingly, Defendant required Plaintiff Blatt to use the male restroom, a situation that was extremely uncomfortable for her, as she identified and presented herself as female. Plaintiff Blatt reluctantly agreed, despite the fact that other female employees were at all times permitted to use the female restroom. *Id.*

Thereafter, and continuing until her termination, the Defendant subjected Plaintiff Blatt to multiple instances of invidious discrimination on the basis of her transgender status, including, but not limited to, Defendant's employees commonly referring to her as "he/she," "ladyboy," "fag," "sinner," and "freak." Moreover, Defendant often subjected Plaintiff Blatt to offensive inquiries, such as "Do you have a penis?" *See id.* at ¶¶ 21-26. In response, Plaintiff Blatt continually reported the discriminatory conduct, both verbally and in writing, to Lou Bowers ("Bowers"), Supervisor, who, upon information and belief, reported her complaints to the Defendant's upper level management, and to Gates. However, Defendant failed to conduct an investigation or take steps to cause said discriminatory conduct to cease. *Id.* at ¶ 22.

On or about January 29, 2007, an Order was entered in the Schuylkill County Court of Common Pleas to both legally change Plaintiff Blatt's name from "James Benjamin Blatt" to "Kate Lynn Blatt," and change her gender designation from male to female. *Id.* at ¶ 27. Immediately thereafter, Plaintiff Blatt provided Gates with documentation confirming the legal change of both her name and gender designation. She then reiterated her request to use the female restroom as reasonable accommodation, as well as a new nametag depicting her legal name. In response, Gates informed Plaintiff Blatt that she would need to send the information to Defendant's corporate office and receive a response before Plaintiff Blatt could start being treated as a woman. Said response came as an unwelcome surprise to Plaintiff Blatt, as Gates had

previously assured her that she would be able to change her nametag and use the female restroom as soon as her gender designation was legally changed. *Id.* at ¶ 28.

As further discrimination and retaliation, Gates eventually denied Plaintiff Blatt's request to use the female restroom, noting that because Plaintiff Blatt had not taken any time off from work, she could not have undergone sex reassignment surgery. Gates expressed her unfounded concern that because Plaintiff Blatt was not anatomically female, she could potentially rape or sexually assault a person while accessing the female restroom. *Id.* at ¶ 29. In connection thereto, Bowers informed Plaintiff Blatt that staff members suggested that Plaintiff Blatt utilize the restroom at a Dunkin Donuts establishment across the street from Respondent's store. *Id.* at ¶ 30.

As an alternative "solution," however, Gates reluctantly permitted Plaintiff Blatt to use the unisex "family" restroom in the front of Defendant's store. *Id.* Said restroom was located approximately 400 to 500 feet away from Plaintiff Blatt's work area, which was significantly further than the employee restrooms and less sanitary than the employee restrooms. *Id.* at ¶ 31. Further, being required to walk to the family restroom caused Plaintiff Blatt severe embarrassment and emotional distress. *Id.*

Thereafter, Defendant issued Plaintiff Blatt three (3) nametags with an incorrect name before providing her with a nametag reading "Kate Lynn," her legal name, in an attempt to embarrass and degrade her. *Id.* at ¶ 32. Although Defendant eventually issued Plaintiff Blatt a "Kate Lynn" nametag, Plaintiff Blatt was forced to repeatedly complain to Gates in an effort to attain the nametag. *Id.*

On or about February 26, 2007, Plaintiff Blatt was involved in an argument with Mercedes Ramirez ("Ramirez"), Maintenance Technician, while at work. During the argument, Plaintiff Blatt amicably approached Ramirez and asked her a question regarding her cleaning

schedule. Ramirez responded by berating Plaintiff Blatt for causing a change in the restroom cleaning schedule, and verbally attacked her by yelling various offensive remarks and obscenities including, but not limited to, "You're not a real woman and you never will be!" Plaintiff Blatt was extremely upset and humiliated as a result of Ramirez's verbal attack. In response, Plaintiff Blatt immediately reported the discriminatory remarks to Bowers. *Id.* at ¶ 33.

Shortly thereafter, on or about March 1, 2007, the Defendant abruptly terminated Plaintiff Blatt's employment with the Respondent, allegedly for threatening Ramirez's son during the aforementioned incident. However, at no time did Plaintiff Blatt make any threats toward Ramirez or her son, and in fact, was unaware that Ramirez even had a son. *Id.* at ¶ 34. Plaintiff Blatt believes that Defendant's articulated reason for her termination was pretextual and that her employment was actually terminated based on her sex, her actual and/or perceived disability and/or record of impairment, and in retaliation for opposing unlawful discrimination in the workplace and requesting a reasonable accommodation for her disability. *Id.* at ¶ 36. The instant lawsuit followed.

III. PROCEDURAL HISTORY

On August 22, 2007, Plaintiff Blatt dual filed Charges of Discrimination with the Pennsylvania Human Relations Commission ("PHRC") and the Equal Employment Opportunity Commission ("EEOC'). On May 19, 2014, a Notice of Right to Sue was issued by the EEOC. On August 15, 2014, Plaintiff Blatt filed a Civil Action Complaint in this Court, alleging claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000(e), *et seq.*, as amended by the Civil Rights Act of 1991, at 42 U.S.C. §1981(a) ("Title VII"), the Americans with Disabilities Act, and the Pennsylvania Human Relations Act ("PHRA"), 43 P.S. §951 *et seq.* On October 22, 2014, the Defendant filed a Partial Motion to Dismiss Plaintiff Blatt's Complaint. On November

5, 2014, Plaintiff Blatt filed a First Amended Complaint and Jury Demand, withdrawing her claims under the PHRA, but reasserting her Counts under the ADA and Title VII. On November 18, 2014, the Defendant filed a second Partial Motion to Dismiss, only challenging Plaintiff Blatt's claims under the ADA. The instant argument follows.

IV. ARGUMENT

A. LEGAL STANDARD

A Rule 12(b)(6) motion tests the sufficiency of the complaint against the pleading requirements of Federal Rule of Civil Procedure 8(a). Federal Rule of Civil Procedure 8(a)(2) merely requires that a complaint contain a short and plain statement of the claim showing that the pleader is entitled to relief, "in order to give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). "[S]tating such a claim requires a complaint with enough factual matter (taken as true) to suggest [the required element]." *Id.* at 556. "[A] complaint may not be dismissed merely because it appears unlikely that the plaintiff can prove those facts or will ultimately prevail on the merits." *Phillips*, 515 F.3d at 231 (citing *Twombly*, 550 U.S. at 554-55, 563 n.8).

When ruling on a motion to dismiss a complaint pursuant to Federal Rule of Civil Procedure 12(b)(6), a court must "accept all factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief." *Phillips v. County of Allegheny*, 515 F.3d 224, 231 (3d Cir. 2008) (quoting *Pinker v. Roche Holdings Ltd.*, 292 F.3d 361, 374 n.7 (3d Cir. 2002)).

B. PERTINENT LEGISLATIVE HISTORY

Plaintiff Blatt asserts that the Federal government had neither a compelling, important, nor legitimate interest in excluding GID from the ADA. In support thereof, it is necessary to examine the legislative history that preceded the codification of the GID exclusion into law.

1. The Senate Floor Debate of the ADA in 1989

On May 9, 1989, the Americans with Disabilities Act, "S.933," was introduced in the Senate by Senator Thomas Harkin and Senator Ted Kennedy, along with thirty-two other cosponsors. *See* S. 933, 101st Cong., 1st Sess., 135 Cong. Rec. S4984-98 (daily ed. May 9, 1989).[4] From May of 1988 through August of 1989, Congress held numerous hearings to consider the ADA, debating, among other issues, how it would affect the American workplace. *See Hearings on S. 933 Before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Human Resources*, 101st Cong., 1st Sess. (May 9, 10, 16 & June 22, 1989). While there was early support for not including or excluding any particular impairment from the ADA, *see* S. Rep. No. 101-116, at 20 (1989) ("It is not possible to include in the legislation a list of all the specific conditions, diseases, or infections that would constitute physical or mental impairments because of the difficulty of ensuring the comprehensiveness of such a list . . . .), the notion that the ADA's definition of "disability" would encompass all mental impairments abruptly when the bill moved to the Senate Floor on September 7, 1989.

Late in the day, Senator William Armstrong took to the Senate floor to discuss his concerns regarding the ADA's definition of disability and its purported coverage of certain mental impairments. *See* 135 Cong. Rec. S10753 (daily ed. Sep. 7, 1989). Specifically, Senator

[4] S. 933 was actually the second version of the ADA. In April of 1988, Senators Lowell Weicker, Harkin, and Congressman Tony Coelho introduced the first version of the ADA, "S. 2345" and "H.R. 4498", to Congress. *See* S. 2345, 100th Cong. (1988); 134 Cong. Rec. 9375 (April 28, 1988); H.R. 4498, 100th Cong. (1988), 134 Cong. Rec. 9600 (April 29, 1988). However, the bill failed when the 100th Congress adjourned on October 22, 1988.

Armstrong addressed what he deemed to be the moral repercussions of defining "disability" in a broad, all-encompassing manner. *See id.* (statement of Sen. Armstrong).

Senator Armstrong articulated that he "could not imagine the sponsors would want to provide a protected legal status to somebody who has such [mental] disorders, particularly those [that] might have a moral content to them or which in the opinion of some people have moral content." *Id.* In connection therewith, Senator Armstrong informed Senator Harkin that he would submit a list of what he deemed to be the morally questionable mental impairments if "there [was] any doubt" as to their exclusion from the ADA. *Id.* Thereafter, Senator Warren Rudman joined the debate, echoing Senator Armstrong's morality-based concerns:

> A diagnosis of certain types of mental illness is frequently made on the basis of a pattern of socially unacceptable behavior and lacks any physiological basis. *In short, we are talking about behavior that is immoral, improper, or illegal and which individuals are engaging in of their own volition, admittedly for reasons we do not fully understand.* Where we as a people have through a variety of means, including our legal code, expressed disapproval of certain conduct, I do not understand how Congress can create the possibility that employers are legally liable for taking such conduct into account when making employment-related decisions. In principle, I agree with the concept that the mentally ill should be protected from invidious discrimination just as the physically handicapped should be. However, people must bear some responsibility for the consequences of their own actions.

Id. at S10796 (statement of Sen. Rudman) (emphasis added). Subsequently, Senator Jesse Helms entered the debate and explicitly challenged the ADA's purported coverage of the following individuals: "homosexuals;" "transvestites;" [illegal drug users and alcoholics]; "people who are HIV positive or have active AIDS disease;" and those with "psychosis, neurosis, or other mental psychological diseases or disorders," namely pedophilia, schizophrenia, kleptomania, manic depression, intellectual disabilities, and psychotic disorders. *Id.* at S10765 (statement of Sen. Helms). In support thereof, Senator Helms stated the following:

> If this were a bill involving people in a wheelchair or those who have been injured in the war, that is one thing. But how in the world did you get to the place that you did not even

> exclude transvestites? How did you get into this business of classifying people who are HIV positive, most of whom are drug addicts or homosexuals or bisexuals, as disabled? ... *What I get out of all of this is here comes the U.S. Government telling the employer that he cannot set up any moral standards for his business by asking someone if he is HIV positive, even though 85 percent of those people are engaged in activities that most Americans find abhorrent... . He cannot say, look I feel very strongly about people who engage in sexually deviant behavior or unlawful sexual practices.*

Id. at S10768, S10772 (emphasis added). By including the aforesaid impairments, Senator Helms made it clear that the ADA would deprive an employer of "the right to run his company as he sees fit . . . [by] making a judgment about [its] employees . . . [based on its] own moral standards." *Id.* at S10765.

In response to Senator Helms' specific concerns regarding the coverage of homosexuality, Senator Harkin clarified that the ADA's protection would not extend to homosexual individuals, as "behavior characteristics [such as] homosexuality and bisexuality are not disabilities under any medical standards." *Id.* at S10786. Thereafter, in response to Senator Helms' recommendation that transvestism be excluded from the definition of disability under the ADA, Senator Harkin adopted Senator Helms's argument for its exclusion, citing Helms' amendment excluding transvestites from the Fair Housing Act in 1988. *See id.* at S10765.

Subsequently, Senator Armstrong attempted to craft a legal justification for excluding mental impairments from the definition of disability under the ADA, noting that "[civil rights laws traditionally deal] with very clear-cut, readily discernible categories [like] race, religion, and sex... . A person is or is not a man or a woman. A person is or is not a Catholic, a Jew, a Mormon, whatever, a Baptist, a Presbyterian. That is something we can readily determine. A person either is or is not Irish, Italian, and so on." *Id.* at S10772. Rather than "listing the specific protected categories," Senator Armstrong clarified, the ADA "proceeds from an entirely different point of view" by including "a very broad vague definition" of disability that extends civil rights protection "in a very broad and [] unquantified way." Specifically, the ADA "protects all mental

impairments that substantially limit a major life activity," which, according to Armstrong, meant that a "vast numbers of mental disorders" contained in that "great, fat book called the [DSM-III-R]" were "in" the ADA unless Congress took them out. *Id.* at S10768. Joining Senator Armstrong, Senator Helms thereafter stated that he intended to propose an amendment to the ADA "that will take voyeurism and some other things out." *Id.* at S10772-73.

Furthermore, Senators Armstrong, Helms, Rudman, and Humphrey discussed what they predicted would be a flood of litigation following the passage of an all-inclusive definition of disability in the ADA impairments. *See id.* at S10783, 10796, 11174-75 (statements of Sen. Armstrong, Sen. Helms, Sen. Humphrey, Sen. Rudman). Specifically, Senator Helms noted that the broad coverage of the ADA would prompt "the persecution of some small businessman [by] a horde of bureaucrats." *Id.* at S10755. Senator Humphrey added that the ADA's protection of "drug addicts and alcoholics . . . schizophrenics, manic depressives, and persons with extremely low IQ's[,] . . . persons with deadly infectious diseases, like AIDS . . . [and people with] virtually any mental or physical shortcoming . . . will deter employers from preserving high standards of fitness, safety, and efficiency with their work force." *Id.* at S10783. Conclusively, Senator Rudman stated, "as a matter of law, this country has always granted employers a wide degree of latitude in making employment-related decisions, including the right to make judgments based on non-work related behavior. To limit this right based on the diagnosis of a mental illness or chemical dependency may be opening up a Pandora's box." *Id.* at S10796.

Following the aforementioned divisive debate on the ADA's definition of disability, Senator Armstrong distributed a proposed amendment to the ADA's sponsors which delineated a "long list of various kinds of conduct . . . extracted from the DSM III[-R]." *Id.* at S10772 (daily ed. Sept 7, 1989) (statement of Sen. Kennedy). Senator Armstrong introduced Amendment No.

722, which represented the list of excluded mental impairments that addressed Senator Armstrong's "most obvious concerns." *Id.* at S10785. Amendment No. 722 included "gender identity disorders." *Id.*

2. Senator Armstrong's September 14, 1989 Statement Following the Senate's Passage of the ADA

On September 14, 1989, seven days after the Senate passed the ADA but still prior to its passage in the House of Representatives, Senator Armstrong further addressed his unease regarding the ADA's coverage of mental impairments. *See* 135 Cong. Rec. S11174-76 (daily ed. Sep. 14, 1989). In his statement, entitled "ADA, Mental Impairments, And The Private Sector," *id.*, Senator Armstrong repeated his concern about the potential floodgate of litigation to accompany a broad definition of "disability" under the ADA. Specifically, Senator Armstrong noted:

> All mental impairments that substantially limit a major life activity will have the most far-reaching and potentially disruptive effects on private decision makers . . . The private sector will be swamped with mental disability litigation . . .
>
> . . .
>
> Private employers, prepare yourselves for lawsuits based on the following types of mental conditions!: "compulsive gambling" . . . "acrophobia (fear of heights)" . . . "depressive neurosis" . . . "paranoid schizophrenia" . . . "manic depression" . . . "borderline personality disorder" . . . "sexuality disorders" . . . "transvestism and transsexualism" . . . "schizoid personality disorder" . . . "stress disorders" . . . [and] "miscellaneous mental disorders[.]"

Id. at S11174-76. For each condition, Senator Armstrong cited case law in which the courts at issue found that plaintiffs alleging discrimination based on one of the aforesaid conditions were protected under the Rehabilitation Act of 1973. *See id.*

Under the heading "Sexual Disorders," Senator Armstrong cited two cases that acknowledged "transsexualism" and "transvestism" as covered disabilities under the

Rehabilitation Act:[5] *Doe v. United States Postal Service*, 1985 WL 9446 (D.D.C. June 12, 1985), and *Blackwell v. U.S. Department of the Treasury*, 656 F. Supp. 713 (D.D.C. 1986).[6]

Concluding his statement, following the case summaries he deemed to support his viewpoint, Senator Armstrong confirmed his 'floodgate' mentality:

> Mr. President, if ADA [sic] is enacted the private sector will be swamped with mental disability litigation. My amendment excludes some of the mental disorders that would have created the more egregious lawsuits, but my amendment does no more than brush away a handful of the vast numbers of mental disorders and potential mental disorders . . . The amendment is narrow and necessary. If it has a shortcoming it is that it is too narrow, for my amendment will not address many of the mental disorders that are discussed in this speech.

Id. at S11176.

3. The ADA in the House of Representatives and its Subsequent Passage into Law

Ultimately, the Senate's final version of the bill excluded "gender identity disorders" from the definition of "disability" under the ADA. 135 Cong. Rec. S10802 (daily ed. Sept 7, 1989). However, when the bill moved from the Senate to the House of Representatives for debate, the House modified the exclusion of "gender identity disorders" to "gender identity disorders not

[5] Notably, when Congress amended the Rehabilitation Act two years after it passed the ADA, it "added the exclusion set forth in the Americans with Disabilities Act for certain groups." H.R. Rep. No. 102-973, at 158 (1992) (Conf. Rep.). Thus, as it stands today, the Rehabilitation Act similarly excludes GIDs.

[6] In *Doe*, the plaintiff informed her employer of her intent to transition from male to female. 1985 WL 9446 at *1. Correspondingly, the plaintiff requested permission to work as a woman. *Id.* at *2. Upon receipt of this request, the defendant revoked the plaintiff's conditional job offer. *Id.* The United States District Court for the District of Columbia denied the defendant's motion to dismiss the plaintiff's disability claim under the Rehabilitation Act, concluding that the plaintiff had sufficiently stated a claim for disability discrimination. *Id.* at *2.

In *Blackwell*, the plaintiff, a transvestite male who dressed in feminine clothing, alleged that the defendant refused to hire him based on his transvestism, in violation of the Rehabilitation Act. 656 F. Supp. at 714. As evidence of discrimination, the plaintiff noted that the supervisor who interviewed him abruptly canceled a job vacancy just hours after the interview, at which the plaintiff was dressed in feminine attire. *Id.* Despite the plaintiff's clear and substantial qualifications for the job, the supervisor "changed the rules to avoid the inevitable administrative hassle that would occur if he declined a qualified applicant." *Id.* at 715. The court deemed that the supervisor "knew [the] plaintiff could do the job and had no sound basis for even refusing to accept him for the job." *Id.* Ultimately, the court dismissed the plaintiff's claim, as it viewed the supervisor's true motive for the discriminatory conduct to be "[the supervisor's belief that] he was a homosexual (a condition not protected under the Rehabilitation Act), and not because he was a transvestite (a protected condition)." *Id.*

resulting from physical impairments." 136 Cong. Rec. H2638-39, 2653 (daily ed. May 22, 1990). Interestingly, the House Committee on the Judiciary provided no justification for the change in its May 15, 1990 report, instead noting, without explanation, that it had made "only minor clarifying changes" to the Senate language. H.R. Rep. No. 101-485 pt. 3, p.76 (May 15, 1990).

In July of 1990, the House of Representatives and the Senate held a conference to finalize and resolve the differences between the two bills, during which Congress adopted the House's wording of the exclusionary list of mental impairments from the definition of disability. H.R. Rep. No. 101-596, p.88 (July 12, 1990), reprinted in 136 Cong. Rec. H4582, 4605-06 (daily ed. July 12, 1990). As a result, the final version of the ADA maintained "gender identity disorders not resulting from physical impairments" as an excluded disability. 136 Cong. Rec. H4629-30 (daily ed. July 12, 1990) (House vote to accept the conference report); 136 Cong. Rec. S9695 (daily ed. July 13, 1990) (Senate vote to accept the conference report).

C. THE EXCLUSION OF GENDER IDENTITY DISORDER FROM THE AMERICANS WITH DISABILITES ACT VIOLATES THE EQUAL PROTECTION CLAUSE OF THE UNITED STATES CONSTITUTION ON BEHALF OF TRANSGENDER INDIVIDUALS[7]

"The Equal Protection Clause directs that 'all persons similarly circumstanced shall be treated alike.'" *Plyler v. Doe*, 457 U.S. 202, 216 (1982) (citation omitted). The Supreme Court has long held that the Fifth Amendment impresses the same obligation on the Federal government. *See Bolling*, 347 U.S. at 500. The ADA's exclusion of GID as a covered disability violates Plaintiff Blatt's right to the equal protection of the laws because it constitutes

[7] *But see* Brief for the National Center for Lesbian Rights, Transgender Law Center, National Center for Transgender Equality, The Task Force, Gay & Lesbian Advocates & Defenders as *Amici Curiae*, at pp. 11-15. Plaintiff Blatt directs this Court to an alternative argument set forth by her *Amici Curiae* involving the ADA's inclusion of "Gender Dysphoria" as a matter of statutory interpretation. While the GID exclusion is nonetheless unconstitutional on Equal Protection grounds, this Court should take note of the *Amici Curiae*'s statutory argument as a means to avoid addressing Plaintiff Blatt's constitutional argument on the merits.

discriminatory federal legislation directed at a historically and politically marginalized class of people based on an immutable characteristic, irrelevant to their ability to contribute to society. Indeed, the Equal Protection component of the Fifth Amendment is designed to guard against the stereotype-based thinking and animus underlying Congress' justifications for excluding GID, and, as a result, this Court should declare GID's excision from the ADA unconstitutional.

In an Equal Protection challenge to a legislative classification created by a facially discriminatory federal law, the Supreme Court has established a framework which is used to evaluate whether the classification in question is constitutional. *See generally City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439-42 (1985); *Moreno*, 413 U.S. at 534-535 (1973). First, the court must determine appropriate level of judicial scrutiny to be applied to the legislative classification. *Id.* There are three levels of judicial scrutiny in an equal protection challenge, referred to as strict, intermediate, or rational basis scrutiny. *Cleburne*, 473 U.S. at 439-42. Determining which level of scrutiny is appropriate for the legislative classification at issue involves, in part, establishing whether the group in question represents a "discrete and insular [minority]," incapable of seeking legal redress through normal political processes. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938). For these classifications, a court will apply either strict or intermediate review. The former requires the government to show that the legislative classification is "[narrowly] tailored to serve a compelling state interest." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 224-25 (1995). The latter requires the government to show that the legislative classification is "substantially related to the achievement of [important governmental objectives]." *United States v. Virginia*, 518, U.S. 515, 533 (1996). For all other types of classifications, such as those based on economic legislation, the burden is on the

challenger of the law to show that the classification is not "rationally related to a legitimate government interest." *Cleburne*, 473 U.S. at 440.

For the reasons set forth below, strict or intermediate scrutiny (collectively referred to as "heightened scrutiny")[8] is the appropriate standard of review for the transgender classification created by the GID exclusion, as legislative classifications based on transgender status implicate the four factors to which the Supreme Court has pointed in determining that classifications based on race, sex, illegitimacy, alienage, and national origin or ancestry demand a more probing form of judicial scrutiny. Here, the federal government cannot meet its burden under heightened scrutiny.

Alternatively, assuming *arguendo* that this court does not apply heightened scrutiny, the GID exclusion is nonetheless unconstitutional as it minimally fails rational basis review because it is not rationally related to any legitimate governmental interest. The Supreme Court has found legislative classifications to be irrational when they target an unpopular or disfavored group solely for disparate treatment. *See Romer v. Evans*, 517 U.S. 620, 633 (1996). The GID exclusion in the ADA violates this basic constitutional principle.

1. Transgender Classifications Require Heightened Review

The Supreme Court has noted that courts normally "will not presume that any given legislative action . . . is rooted in considerations that the Constitution will not tolerate," *Cleburne*, 473 U.S. at 446, and therefore "[t]he general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state

[8] Although Plaintiff Blatt contends that the legislative classification at issue merits strict scrutiny review, Plaintiff Blatt avers that this Court need not distinguish whether strict scrutiny or intermediate scrutiny applies, as the exclusion of GID from the ADA minimally fails the less stringent standard imposed by intermediate scrutiny, rendering it equally void, *ipso facto*, under strict scrutiny. As such, these standards are analyzed co-extensively and together referred to as "heightened scrutiny/review."

interest." *Id.* at 440 (citations omitted). However, the Supreme Court has also made clear that certain legislative classifications are much "more likely than others to reflect deep-seated prejudice rather than legislative rationality in pursuit of some legitimate objective." *Plyler*, 457 U.S. at 216 n.14.

As such, the Supreme Court has held that particular legislative classifications necessitate a more exacting form of judicial scrutiny: namely, classifications based on race, sex, illegitimacy, alienage, and nation origin or ancestry. *See e.g.*, *Clark v. Jeter*, 486 U.S. 456, 461 (1988); *City of New Orleans v. Dukes*, 427 U.S. U.S. 297, 303 (1976); *Graham v. Richardson*, 403 U.S. 365, 371-72 (1971); *J. E. B.* v. *Alabama ex rel. T. B.*, 511 U.S. 127, 136-37 (1994). These classifications have been separated into two groups, commonly referred to as "suspect" and "quasi-suspect" classifications. *See e.g.*, *Miss. Univ. for Women v. Hogan,* 458 U.S. 718, 724 (1982).

(a) The Supreme Court's Four-Factor Test Establishes the Proposition that Legislative Classifications Founded Upon Transgender Status Warrant Heightened Review

In a long line of cases, the Supreme Court has relied upon four factors as a guideline in determining whether a novel legislative classification should be treated with the type of suspicion normally accorded to suspect and quasi-suspect classifications:

> 1) whether the group has suffered a history of purposeful unequal treatment; 2) whether the group is comprised of individuals who exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group, 3) whether the group is a minority or politically powerless; and 4) whether the characteristic bears little relation the group's ability to perform or contribute to society.

See e.g., Bowen v. Gilliard, 483 U.S. 587, 602-03 (1987); *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 313 (1976); *Cleburne*, 473 U.S. at 441; *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973)); *Windsor v. United States*, 699 F.3d 169, 181-82 (2d Cir.2012), *aff'd*, 570 U.S.__, 133 S.

Ct. 2675 (2013); *Whitewood, et al. v. Wolf*, 992 F. Supp. 2d 410, 427 (M.D. Pa 2014) (internal citations and quotations omitted throughout).

Here, a methodical application of these factors to transgender individuals indicates that legislative classifications based on transgender status clearly merit heightened review.

(i) Transgender Individuals Have Faced and Been Subject to Consistent Historical Discrimination[9]

This Court has to go no further than the present case to see the type of purposeful, typical discrimination that transgender individuals are continually subjected to in society. Indeed, 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." *Brocksmith v. United States*, 99 A.3d 690, 698 (D.C. 2014). Transgender individuals find themselves discriminated against in almost all aspects of life, including employment, housing, education, public accommodations, and access to government services. *Id.* Employment discrimination, in particular, is widespread for transgender individuals. According to The National Transgender Discrimination Survey Report ("National Survey"), the most extensive survey of transgender discrimination ever taken, 90% of nearly 6,500 transgender respondents experienced harassment or mistreatment on the job or took actions like hiding their gender transition to avoid such treatment, and 47% of respondents lost their jobs, were denied a promotion, or were denied a job

[9] This Court may make findings of fact with regard to constitutional challenges to federal statutes. *See Lamprecht v. FCC*, 958 F.2d 382, 392 fn.2 (D.C. Cir. 1992) (J. Thomas) ("We know of no support . . . for the proposition that if the constitutionality of a statute depends in part on the existence of certain facts, a court may not review a legislature's judgment that the facts exist. If a legislature could make a statute constitutional simply by 'finding' that black is white or freedom, slavery, judicial review would be an elaborate farce. At least since *Marbury v. Madison* . . . that has not been the law.").

as a result of being transgender.[10] In fact, survey respondents experienced unemployment at twice the rate of the general population. *See National Survey* at 2.

Moreover, in places of public accommodation, transgender individuals frequently experience discrimination, from outright denial of services (44%), to verbal harassment (53%), to physical assault (8%). *Id.* at 125-28. For example, in doctor's offices, hospitals, emergency rooms, and mental health clinics, 28% of respondents experienced harassment and 19% were denied services altogether. *Id.* at 129. In retail stores, discrimination was even worse, with 37% of respondents reporting harassment and 32% reporting denial of services. *Id.* at 131. Eight percent of respondents reported physical assaults while using public transportation. *Id.* at 138-9.

Additionally, because transgender individuals are more likely to be the victims of violent crime, to be on the street due to homelessness, or to work in the underground economy, they are also more likely to interact with police. *Id.* at 158-167. These interactions often involve discrimination. *Id.* By way of elaboration, 22% of respondents reported harassment by police, including being profiled as sex workers and arrested (a practice known colloquially as "Walking While Transgender"), and 20% reported being denied services by the police. *Id.* at 158. Six percent of respondents reported being physically assaulted by police and 2% reported being sexually assaulted by police. *Id.* Not surprisingly, this discrimination has a significant chilling effect, with 46% of respondents reporting being uncomfortable seeking police assistance. Incarcerated transgender individuals also experience discrimination in the form of harassment by correctional officers (37%) and other inmates (35%), physical and sexual assault (16% and 15%, respectively), and even the denial of routine health care (12%). *Id.* at 163.

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[10] *See* Grant, Jaime M., Lisa A. Mottet, Justin Tanis, Jack Harrison, Jody L. Herman, and Mara Keisling. *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey.* Washington: National Center for Transgender Equality and National Gay and Lesbian Task Force, at 3, 2011. (available at http://endtransdiscrimination.org/PDFs/NTDS_Report.pdf).

These statistics both evince and prove that transgender individuals have been subject to a long history of discrimination. Indeed, the authors of the National Survey concluded:

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

Id. at 8. Moreover, historical discrimination against transgender individuals is epitomized by the very fact that its exclusion from the ADA was retained subsequent to the ADA Amendments Act of 2008 ("ADAAA"). Simply put, the exclusion of GID represents government-sanctioned discrimination against the transgender people because it codifies their unequal status in the ADA. Moreover, it promotes discrimination by including GID in the "sexual behavior disorders" exclusion, while GID is not, and never has been, a "sexual behavior disorder."

In sum, it is extremely difficult to imagine how the federal government, or any group for that matter, could dispute the history of discrimination suffered by transgender individuals.

(ii) Transgender Individuals have the Ability to Participate in and Contribute to Society

A classification based on a "characteristic" that "frequently bears no relation to ability to perform or contribute to society" is another factor a court will evaluate in determining whether heightened scrutiny is permissible. *Frontiero*, 411 U.S. at 686; *see also Cleburne*, 473 U.S. at 440-41 (classifications that do not "rest on meaningful considerations" require heightened scrutiny).

Similar to the Second Circuit's finding in *Windsor* that "the [discrimination] homosexuals experience has nothing to do with aptitude or performance," 699 F.3d at 182-83, there have been numerous judicial decisions in which courts have intimated that the transgender status of the

respective plaintiff bore no relation to his or her ability to carry out the essential functions of the job at issue. *See e.g. Blackwell*, 656 F. Supp. at 715 ("The [Defendant] offers a justification for failure to hire which is not supported by the proof as a whole . . . [The Defendant] knew plaintiff could do the job and had no sound basis for even refusing to accept him for the job."); *Sommers v. Iowa Civil Rights Comm'n*, 337 N.W.2d 470, 477 (Iowa 1983) ("Although a transsexual may have difficulty in obtaining and retaining employment, the commission could reasonably believe that difficulty is the result of discrimination based on societal beliefs that the transsexual is undesirable, rather than from beliefs that the transsexual is impaired physically or mentally as that term is used in the statute and defined in the rule."); *Oiler v. Winn-Dixie La., Inc.*, 2002 WL 31098541, at *6 (E.D. La. 2002) ("In holding that defendant's actions are not proscribed by Title VII, the Court recognizes that many would disagree with the defendant's decision [to terminate plaintiff] and its rationale. The plaintiff was a long-standing employee of the defendant. He never cross-dressed at work and his cross-dressing was not criminal or a threat to public safety.")

Moreover, in *Barnes v. City of Cincinnati*, 2002 U.S. Dist. LEXIS 26207 (S.D. Ohio 2002), the plaintiff, a male-to-female transsexual police officer, brought an action under Title VII and 42 U.S.C. §1983 following the defendant's harassing and discriminatory conduct. In denying the defendant's Motion for Summary Judgment, the Honorable Susan Dlott noted:

> Defendant argues, excluding transsexuals as a class is rationally related to the legitimate government interest of promoting only competent and capable police officers. Implicit in this argument is the assumption that any "rare psychiatric disorder" prevents the suffering individual from being a competent and capable police officer. Defendant has come forward with no evidence that supports this assumption generally, nor has it shown that Plaintiff's transsexuality impeded his performance as sergeant. In fact, when Captain Demasi sent Plaintiff for a psychological evaluation during his probation, Plaintiff was found fit for duty. As such, Defendant's legitimate interest in promoting only competent and capable police officers to the rank of sergeant is not rationally related to a classification based on transsexuality.

Id. at *29-30. Indeed, *Blackwell*, *Sommers* , *Oiler*, and *Barnes* clearly dispel the notion that transgender individuals, viewed as a whole, are "unable to contribute to society." Indeed, whether one's transgender status truly affects his or her ability to contribute to society -- or, in terms of the ADA, can "perform the essential functions of the job" -- is a fact-specific, individualized inquiry. As such, this factor weighs heavily in favor of finding classifications based on transgender status worthy of heightened review.

(iii) Transgender Individuals Maintain Obvious, Immutable, and Distinguishing Characteristics

Next, the Court must determine whether the classification at issue maintains "obvious, immutable, or distinguishing characteristics that define [it] as a discrete group." *Bowen*, 483 U.S. at 602; *see also Watkins v. U.S. Army*, 875 F.2d 699, 725 (9th Cir. 1989) (Norris, J. concurring) (immutability describes "traits that are so central to a person's identity that it would be abhorrent for the government to penalize a person for refusing to change them.").

First, there is medical evidence that suggests transgender status is not a "correctable" characteristic, and is therefore, correspondingly, immutable. *See e.g.* Harry Benjamin, *The Transsexual Phenomenon* 53 (Symposium 1999) (1966) ("Psychotherapy with the aim of curing transsexualism, so that the patient will accept himself as a man, it must be repeated here, is a useless undertaking with present available methods."); *Hernandez-Montiel v. INS*, 2000 U.S. App. LEXIS 21403, at **20-21 (9th Cir. 2000) ("Sexual orientation and sexual identity are immutable; they are so fundamental to one's identity that a person should not be required to abandon them."); *Kosilek v. Maloney*, 221 F. Supp. 2d 156, 163 (D. Mass. 2002) ("The consensus of medical professionals is that transsexualism is biological and innate. It is not a freely chosen 'sexual preference' or produced by an individual's life experience."); *Doe v.*

McConn, 489 F. Supp. 76, 78 (S.D. Tex. 1980) ("Most, if not all, specialists in gender identity are agreed that the transsexual condition establishes itself very early, before the child is capable of elective choice in the matter, probably in the first two years of life; some say even earlier, before birth during the fetal period. These findings indicate that the transsexual has not made a choice to be as he is, but rather that the choice has been made for him through many causes preceding and beyond his control. Consequently, it has been found that attempts to treat the true adult transsexual psychotherapeutically have consistently met with failure.").

Furthermore, in the recent case of *Norsworthy v. Beard,* 2014 U.S. Dist. LEXIS 171371, at * 33 n.7 (N.D. Cal. 2014), the plaintiff, a male-to-female transsexual prison inmate diagnosed with GID, brought an Equal Protection claim under 42 U.S.C. §1983 alleging that the defendants discriminated against her on the basis of her transgender status by improperly denying her sex reassignment surgery. The Court held that "discrimination based on transgender status independently qualifies as a suspect classification under the Equal Protection Clause because transgender persons meet the indicia of a "suspect" or "quasi-suspect classification" identified by the Supreme Court." *Id.* at *33. It further stated:

> [T]he Ninth Circuit's conclusion that heightened scrutiny should be applied to Equal Protection claims involving discrimination based on sexual orientation . . . applies with at least equal force to discrimination against transgender people, *whose identity is equally immutable and irrelevant to their ability to contribute to society*, and who have experienced even greater levels of societal discrimination and marginalization.

Id. at * 33 n.7 (internal citations omitted) (emphasis added).

In sum, it is abundantly clear that an individual's transgender status is a trait central to his or her identity. The GID exclusion in the ADA represents government action that penalizes transgender individuals for, indeed, being transgender. As such, this factor cuts in favor of finding heightened review.

(iv) Transgender Individuals Are a Minority and Lack Political Power

As a final factor in determining whether heightened review applies, a court will evaluate whether the group in question is a political minority. *See e.g., Windsor*, 699 F.3d 181-82; *Whitewood*, 992 F. Supp. 2d at 427. Furthermore, "[whether the discrete group is a minority or lacks political power] centers on relative political influence and inquires whether the discrimination is unlikely to be soon rectified by legislative means." *Whitewood*, 992 F. Supp. 2d at 429 (quoting *Cleburne*, 473 U.S. at 440) (internal citation omitted). Additionally, "while germane, this factor is not essential for recognition as a suspect or quasi suspect class." *Id.* (internal citations omitted).

Researchers estimate that transgender individuals make up approximately 0.3% of the adult population,[11] and no transgender person has ever been elected to office in the United States Congress.[12] Furthermore, the exclusion of GID from the ADA epitomizes the transgender community's minority and politically fragile status. To quote Professor Ruth Colker:

> The language concerning transvestites and transsexualism is also extremely derogatory. Transsexual and transvestite individuals are lumped together with individuals who have "sexual behavior disorders." Certainly, many individuals who are transgender do not consider themselves to have a "sexual behavior disorder." Additionally, the Legislation excluded transvestites from coverage twice. . . . That redundancy is itself derogatory because it highlights the legislators' extreme desire to prevent this group from having legal protection . . . The best that the gay rights community was able to achieve was to take "homosexuality" and "bisexuality" out of the sentence that listed "sexual behavior disorders." This was not much of a victory.

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[11] *See* Gary J. Gates, *How many people are lesbian, gay, bisexual, and transgender?*, Williams Institute (April 2011), (available at http://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-How-Many-People-LGBT-Apr-2011.pdf).

[12] *See, e.g.*, Williams Institute, *Documenting Discrimination on the Basis of Sexual Orientation and Gender Identity in State Employment* (2009), (available at http://williamsinstitute.law.ucla.edu/research/workplace/documenting-discrimination-on-the-basis-of-sexual-orientation-and-gender-identity-in-state-employment/).

Ruth Colker, *Homophobia, AIDS Hysteria, and the Americans with Disabilities Act,* 8 J. Gender Race & Just. 33, 50 (2004). In other words, GID exclusion in the ADA serves as direct proof that transgender individuals did not have the same level of political support in comparison to its LGB counterparts in combating Senator Armstrong's proposed amendment on September 7, 1989. While disability advocates fought to have homosexuality and bisexuality deemed as non-impairments under the ADA, they were nonetheless content to accept Senator Armstrong's placement of GID among the list of excluded "sexual behavior disorders," despite its widespread recognition as a medical condition. Not only does this distinction evidence the animus underlying the GID exclusion, it also serves as strong proof that transgender individuals were unable to "adequately protect themselves from the discriminatory wishes of the majoritarian public," *Windsor*, 699 F.3d at 186, during the ADA's passage.

* * *

Conclusively, legislative classifications based on transgender status satisfy the four factors relevant to determining if a given classification deserves heightened review: 1) transgendered individuals as a group have historically suffered discrimination; 2) transgender status has no relation to aptitude or ability to contribute to society; 3) transgendered individuals are a discernible group with obvious, immutable, and distinguishing characteristics; and 4) transgendered individuals remain a politically weakened minority. Therefore, the GID exclusion in the ADA should be subject to heightened scrutiny, shifting the burden to the government to show that the legislative classification at issue is, at a minimum, substantially related to achieving an important government interest.

b) Alternatively, the Exclusion of Gender Identity Disorder is a Sex-Based Classification and Therefore Warrants Intermediate Scrutiny

Assuming this Court determines that the aforesaid factors do not cut in favor of implementing heightened review to classifications based on transgender status, the GID exclusion also represents a sex-based classification, thereby rendering it within the scope of intermediate scrutiny. The Supreme Court has long held that sex-based classifications are subject to intermediate scrutiny. *See e.g., Craig v. Boren*, 429 U.S. 190, 197 (1976); *Virginia*, 518 U.S. at 531-56.

The transgender classification in the ADA is a sex-based classification because being transgender, that is, having an inconsistency between a person's sex and one's gender identity, inherently relates to a person's sex. Therefore, because the GID exclusion bars transgender individuals based on the defining aspect of the GID medical condition (gender incongruity), it results in disparate treatment against transgender individuals based on their sex.

In other words, in order for the GID exclusion to be characterized as one based on sex, warranting intermediate scrutiny, the discriminatory intent underlying the GID exclusion can be 1) rooted in sex stereotypes; *see Price Waterhouse v. Hopkins*, 490 U.S. 228, 25 (1989) ("In the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender."); 2) because it relates to "change of sex;" *see Schroer v. Billington*, 577 F. Supp. 2d 293, 306-07 (D.D.C. 2007) ("Discrimination 'because of religion' easily encompasses discrimination because of a change of religion[, so, too does discrimination because of sex encompass discrimination because of a change in sex.]"); or 3) because of the discordance between a person's sex and their gender identity; *see Mia Macy v. Holder*, 2012 WL 1435995, at *11 (EEOC Apr. 20, 2012).

While courts have interpreted transgender discrimination to be sex discrimination in the Title VII context, *see Glenn v. Brumby,* 663 F.3d 1312, 1317 (11th Cir. 2011) ("discrimination

against a transgender individual because of her gender-nonconformity is sex discrimination, whether it's described as being on the basis of sex or gender"), an exclusion based on GID in the ADA also excludes transgender people, as a class, from pursuing federal disability law protection based on the main feature of the defining medical condition, which, as noted, centers on the sex of a transgender individual.

Therefore, in the alternative, the GID exclusion in the ADA should be subject to intermediate scrutiny based on its status as a sex-based classification, again shifting the burden to the government to show that the legislative classification at issue is substantially related to achieving an important government interest.

2. The ADA's Exclusion of Gender Identity Disorders is Neither Narrowly Tailored to Serve a Compelling Government Interest, Nor Substantially Related to an Important Government Interest

Assuming this Court determines the GID exclusion is subject to heightened scrutiny, the burden falls on the government to show, at a minimum, that the classification is "substantially related to an important governmental objective." *Clark*, 486 U.S. at 461. The Supreme Court has also explained that, under heightened review, the government must show an "exceedingly persuasive justification" for the classification. *Miss. Univ for Women*, 458 U.S. at 724 (internal citations omitted).[13]

Notably, under heightened review, *post hoc* rationalizations or justifications for the classification in question are impermissible. *See Virginia*, 518 U.S. at 535-36 The statute at issue must instead by defended by "the actual [governmental] purposes [behind the law, and not different] rationalizations." *Id.* In other words, "the [government] must show that the alleged

[13] As noted above, the government cannot meet its burden under intermediate scrutiny, rendering the GID exclusion equally insufficient under strict scrutiny. Therefore, this Court need not make a specific determination of whether strict or intermediate scrutiny applies.

objective was the legislature's actual purpose for the discriminatory classification," *Shaw v. Hunt*, 517 U.S. 899, 908 n.4 (1996) and not "hypothesized or invented *post hoc* in response to litigation." *Virginia*, 518 U.S. at 533.

(a) Congress' Justifications for the Exclusion of Gender Identity Disorders are Constitutionally Inadequate

In identifying Congress' justifications for excluding GID, the "governmental interests" at issue can be readily categorized into two groups: (1) moral disapproval of specific mental impairments for which Senators Helms and Armstrong desired express exclusion from the ADA; and (2) the fear of a slippery slope, i.e. the presumption that a broad definition of disability in the ADA would invite a floodgate of litigation in the private sector. [14] As such, the government cannot meet its burden to demonstrate that the ADA's exclusion of transgender individuals is narrowly tailored or substantially related to the advancement of any important, much less compelling, governmental interest.

(i) Moral Disapproval Is Neither a Compelling Nor an Important Government Interest

As the Supreme Court has long noted, "'[e]qual protection of the laws is not achieved through indiscriminate imposition of inequalities.'" *Sweatt v. Painter*, 339 U.S. 629, 635 (1950) (quoting *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948)). Moreover, it bears repeating that "if the constitutional conceptions of equal protection of the laws means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot

[14] It is important to note that, at this point in the procedural posture of the case, the federal government has not yet intervened to defend the constitutionality of the ADA. Concurrent with the filing of this motion, Plaintiff Blatt will serve a "Notice of Constitutional Question" on the government pursuant to Rule 5.1 of the Federal Rules of Civil Procedure. Yet, in order to pose this constitutional argument, Plaintiff Blatt must proffer her characterization of the government's justifications for excluding GID from the ADA in order to argue that they are constitutionally inadequate. These justifications are derived from Congressional Record and are also reasonable inferences drawn therefrom. While the government may ultimately disagree with what Plaintiff Blatt deems its interests were in excluding GID, Plaintiff Blatt can only argue, at present, to what is so seemingly apparent in the Congressional Record from September of 1989. If, upon intervention, the government disagrees with Plaintiff Blatt's characterization of its interests in excluding GID, Plaintiff Blatt requests leave to file a sur-reply brief.

constitute a legitimate governmental interest." *Windsor*, 133 S. Ct. at 2693 (quoting *Moreno*, 413 U.S. at 534-535 (1973)) (internal quotations omitted); *see also Lawrence v. Texas,* 539 U.S. 558 (2003) (O'Connor, J., concurring) ("Moral disapproval of a group cannot be a legitimate governmental interest under the Equal Protection Clause because legal classifications must not be drawn for the purpose of disadvantaging the group burdened by the law.'" (quoting *Romer*, 517, U.S. at 633)). Moreover, "negative attitudes, or fear, unsubstantiated by factors which are properly cognizable . . . , are not permissible bases [for disparate treatment]." *Cleburne*, 473 U.S. at 448, 450; *see also Moreno*, 413 U.S. at 534.

As is clear from the ADA's legislative history, Senators Armstrong and Helms deemed the ADA's coverage of transgender individuals to be equivalent to legal protection founded upon immorality. Indeed, the moral animus with which Senators Armstrong, Helms, and Rudman presented their arguments has been forever preserved in the annals of the Congressional Record. In fact, to argue that moral animus was not the primary motivation for excluding the subset of mental impairments that these Senators viewed as morally problematic runs contrary to the words explicitly spoken on the Senate Floor on September 7, 1989. *See e.g,* 135 Cong. Rec. S10753 (daily ed. Sep. 7, 1989) (statement of Sen. Armstrong) ("I could not imagine the [ADA] sponsors would want to provide a protected legal status to somebody who has such [mental] disorders, *particularly those* [that] *might have a moral content.*") (emphasis added); *id.* at S10796 (statement of Sen. Rudman) ("In short, we are talking about behavior that is *immoral, improper, or illegal* and which individuals are engaging in of their own volition, admittedly for reasons we do not fully understand.").

Moreover, the September 7, 1989 morals debate evidences that the specific exclusion of GID, contained in the "sexual behavior disorders" provision of the ADA, was certainly not the

result of careful, reasoned congressional analysis or understanding of GID. As clear proof, one has to look no further than how the edition of the DSM on which these Senators were relying at the time -- DSM-III-R -- characterizes and describes GID. That is, the DSM-III-R *does not* list GIDs (including transsexualism) as sexual behavior disorders despite the ADA's inclusion of these impairments in the "sexual behavior disorder" exclusion.[15] Additionally, the fact that both GIDs and transsexualism were listed as separate terms in the exclusion provides evidence that Senators Helms and Armstrong did not understand that transsexualism is actually a GID subtype. *See DSM-III*, 261-66 (1980).[16]

Senator Armstrong's amendment to the ADA, excluding "sexual behavior disorders," failed to account for the medical science that places GIDs in the DSM-III-R. As Christine Duffy articulates:

> The categorizations by Senators Armstrong and Helms of GIDs (including transsexualism) as "sexual behavior disorders" and as conditions worthy of moral condemnation were without foundation and based on ignorance in view of the etiology of GIDs and the usual development of Gender Dysphoria in childhood (as opposed to later in life as are some behaviors they deemed "sexual perversions").
>
> . . .

[15] In 1987, the American Psychiatric Association released DSM-III-R, a revised version of the third edition of the DSM ("DSM-III"). DSM-III defines GID as "an incongruence between anatomical sex and gender identity," and created three GID diagnoses: one for adolescents and adults ("Transsexualism"), another for children ("Gender Identity Disorder of Childhood"), and a third for conditions that did not fit the diagnostic criteria of the first two: "Atypical Gender Identity Disorder." *DSM-III*, 261-66 (1980). DSM-III-R added a fourth GID diagnosis: "GID of adolescence or adulthood, nontranssexual type." *DSM-III-R*, 76 (1987).

[16] Notably, the ADA actually excludes "Transvestism" twice. *Compare* 42 U.S.C. §12208 (". . . the term "disabled" or "disability" shall not apply to an individual solely because that individual is a transvestite."); *with* 42 U.S.C. §12211 (b)(1) ("Under this chapter, the term "disability shall not include - Transvestism . . . ."). While Plaintiff Blatt is not a "transvestite" and "transvestism" (or "transvestic fetishism," *DSM-III-R*, at 288-89) is not a GID, both terms have historically been used colloquially to denote certain members of the transgender community, i.e., males who cross-dress and those who have undergone gender transition. *See* Ray Blanchard, *The DSM Diagnostic Criteria for Transvestic Fetishism*, at 364-65 (Am. Psych. Assoc. ed., Sept. 16, 2009) (discussing transvestism).Therefore, the dual-exclusion of "transvestites" and "transvestism" serves as further evidence of Senator Helms and Armstrong's moral animus against transgender people. *See also* Ruth Colker, *Homophobia, AIDS Hysteria, and the Americans with Disabilities Act,* 8 J. Gender Race & Just. 33, 50 (2004) ("[this] redundancy is itself derogatory because it highlights the legislators' extreme desire to prevent this group from having legal protection.").

> [Senators Armstrong and Helms' inclusion of GIDs (including transsexualism) as sexual behavior disorders] is a reflection of the rampant misinformation and social stereotypes that have been imposed on transgender individuals . . . it was precisely this sort of stereotyping, reliance on prejudice, and failure to take the time to understand a specific medical condition that the ADA was designed to overcome.

Gender Identity and Sexual Orientation Discrimination in the Workplace: a Practical Guide, at 16-146 (Bloomberg BNA 2014). Clearly, Senators Armstrong and Helms misconstrued the DSM-III-R in their attempt to codify their animus against transgender individuals.

In short, the legislative history indicates that the GID exclusion was premised on the very kind of "negative attitudes" and "fear" that the *Cleburne* Court deemed to be impermissible bases for legislative differentiation. In fact, the only objective that the GID exclusion was intended to achieve is moral condemnation of those transgender individuals who fall within its scope. The Supreme Court has cast aside moral animus and moral disapproval as compelling, important, or legitimate governmental reasons for imposing a legislative classification. As such, the GID exclusion is unconstitutional.

(ii) Senator Armstrong's September 14, 1989 Statement to the Senate was Merely a Pretext to Further his Underlying Motivation for Excluding Certain Mental Impairments: Moral Disapproval

Senator Armstrong's September 14, 1989 statement to the Senate contains the only other cognizable governmental interest for the GID exclusion. *See* 135 Cong. Rec. S11174-76 (daily ed. Sep. 14, 1989). The underlying thrust of the statement involved Senator Armstrong's fear that such a broad definition of disability would "swamp the private sector with mental disability litigation." *Id.* at S11174. In support thereof, Senator Armstrong cited case law in his apparent attempt to buttress the notion that mental impairment litigation would lead to a floodgate of frivolous lawsuits. However, this argument, construed as a purported governmental interest, is proven hollow because it was not a good faith attempt by Senator Armstrong to provide

legitimate reasons behind his exclusionary amendment to the ADA. Rather, the statement serves as additional evidence of Senator Armstrong's underlying moral-based motivation to exclude the mental impairments he deemed unworthy of the ADA's protection.

By way of explanation, Senator Armstrong characterized the *Doe* and *Blackwell* cases as "egregious," noting that they would swamp the private sector leading to "litigation that is costly and time-consuming." Yet, it is clear that Senator Armstrong failed to thoroughly evaluate the facts of either case, as neither lend support to this proposition. Instead, Senator Armstrong viewed the mere fact that a transvestite or transsexual would dare to assert his or her rights under the Rehabilitation Act as egregious in and of itself. Indeed, implicit in Senator Armstrong's case summaries is the notion that law suits centered on mental impairments are inherently frivolous. Yet, Senator Armstrong curiously failed to discuss why it was within the *Doe* and *Blackwell* defendants' legitimate business discretion to discriminate against the plaintiffs based on their transvestitism and transsexualism, notwithstanding the fact that both were qualified to perform the jobs in question.

It is reasonable to infer that Senator Armstrong used this "floodgate" argument not to express a good faith governmental interest in excluding conditions, but instead to conceal his moral objections to the mental impairments set forth in his September 14, 1989 statement. Indeed, throughout the statement, Senator Armstrong strongly implies that his "floodgate" presumption was founded upon the very *moral nature* of the mental impairments at issue. This assertion is compounded by his September 7, 1989 commentary on the Senate floor.

As a result, the legislative classification created by the GID exclusion fails strict and intermediate scrutiny because the underlying governmental interests in question cannot be characterized as compelling or important, as they were nothing more "than a bare congressional

desire to harm" transgender people diagnosed with a DSM condition. Senator Helms and Armstrong's principal purpose was to impose inequality on those who suffer from the mental impairments they deemed morally unfit, rendering their justifications for its exclusion afoul of the Supreme Court's admonitions in *Plyler, Cleburne, Moreno*, *Romer*, *Lawrence*, and *Windsor*. The Equal Protection Clause was enacted to shield discrete groups of people like transgender individuals against this animus-based governmental reasoning, and the GID exclusion should therefore be declared unconstitutional.

3. Even Under Rational Basis Scrutiny, the ADA's Exclusion of Gender Identity Disorders is Unconstitutional

Assuming *arguendo* that this Court finds that the transgender classification at issue does not merit heightened review, when analyzed under the rational basis standard, GID's exclusion from the ADA still fails this less stringent form of judicial scrutiny.

(a) The Rational Basis Standard

Under rational basis scrutiny, a legislative classification must "bear a rational relationship to an independent and legitimate legislative end." *Romer*, 517 U.S. at 633; *see also Cleburne*, 473 U.S. at 440. Yet, "even in the ordinary equal protection case calling for the most deferential of standards, [a court will] insist on knowing the relation between the classification adopted and the object to be attained." *Romer*, 517 U.S. at 632. Furthermore, a classification fails rational basis scrutiny if its nexus to the governmental purpose is "so attenuated as to render the distinction arbitrary or irrational." *Cleburne*, 473 U.S. at 446. Moreover, the Supreme Court has held that a legislative classification fails rational basis review when the actual purpose of the law is illegitimate, as such a classification cannot be adopted "for the purpose of disadvantaging the group burdened by the law." *Romer*, 517 U.S. at 633; *see also Cleburne*, 473 U.S. at 450; *Moreno*, 413 U.S. at 534.

When a legislative classification is chosen "because of,' [and] not merely 'in spite of,' its adverse effects upon an identifiable group," the question becomes whether the classification serves a rational purpose beyond a bare desire to harm the group at issue. *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979). If this were not the case, then "any discrimination subject to rational relation level of scrutiny could be justified simply on the ground that it favored one group at the expense of another." *Metro. Life Ins. Co. v. Ward*, 470 U.S. 869, 882 n.10 (1985). Additionally, "mere negative attitudes, or fear," or the "bare congressional desire to harm a politically unpopular group," are impermissible governmental justifications and have been held to fail rational basis review. *See Cleburne*, 473 U.S. at 448, 450; *Moreno*, 413 U.S. at 534. Significantly, when the legislative classification is "inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests." *Romer*, 517 U.S. at 633.

(b) *Romer v. Evans* and *United States v. Windsor* Invalidate the ADA's Exclusion of Gender Identity Disorders

In *Romer v. Evans*, the Supreme Court was faced with an amendment to Colorado's state constitution which called for a ban on antidiscrimination protection for homosexual individuals in cities that desired to provide them special protection. 517 U.S. at 635. Colorado's proffered interests in enacting the amendment centered on the promotion of "respect for other citizens' freedom of association . . . in particular the liberties of landlords or employers who have personal or religious objections to homosexuality, [and the State's] interest in conserving resources to fight discrimination against other groups." *Id.* In striking the amendment on Equal Protection grounds, the Supreme Court held that these interests were "so far removed from these particular justifications [that it was] impossible to credit them." *Id.* at 635. Finding these interests to be a pretext for moral animus, the Court concluded that the legislative classification at issue in *Romer*

"classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else." *Id.*

More recently, in *United States v. Windsor*, the Supreme Court struck down Section 3 of the Defense of Marriage Act ("DOMA"), defining marriage on a federal level as only that between a man and a woman, on similar Equal Protection grounds to those at issue in the instant action. 133 S. Ct. at 2693. While the Court did not clarify the specific level of scrutiny it applied to DOMA's classification based on sexual orientation, the majority appears to have analyzed the law under the more probing *Romer* form of rational basis review.[17] The majority noted that DOMA was unconstitutional because "no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity." *Id.* at 2696. In so holding, the Court explained the negative criminal, financial, and familial effects DOMA imposed on gay couples and their progeny. *Id.* at 2694. In summing up DOMA's deleterious impact, the Court declared "[t]he principal purpose [of DOMA] is to impose inequality, not for other reasons like governmental efficiency." *Id.*

Implicit in the Court's ruling was its determination that the federal government's interests in enacting DOMA failed rational basis review. However, by focusing on the harm caused by DOMA, rather than the sufficiency of the government's interests in passing the law, the majority viewed the moral animus component of DOMA, or DOMA's "purpose and effect to injure [same sex couples,]" as far outweighing any purported governmental interest set forth by the Bipartisan Legal Advisory Group ("BLAG"). In finding DOMA violated the Fifth Amendment, the Court necessarily viewed these justifications as illegitimate and irrational due to DOMA's underlying moral component.

[17] Legal scholars refer to the rational basis test used in *Romer* as "rational basis with bite." *See* Kenji Yoshino, *The New Equal Protection*, 124 Harvard L. Rev. 747, 761-62 (2011).

In the case at bar, the GID exclusion from the ADA's definition of disability fails rational basis review, as it is "inexplicable by anything but animus toward the class it affects[, lacking] a rational relationship to legitimate [governmental] interests." *Romer*, 517 U.S. at 633. Indeed, Senators Armstrong and Helms' desires to bar the transgender from the ADA's protection based on moral opprobrium falls squarely within the proposition that this exclusion was chosen "because of,' [and] not merely 'in spite of,' its adverse effects upon" transgender individuals. *Feeney*, 442 U.S. at 279.

Importantly, the Supreme Court's evaluation of the state and governmental interests set forth by Colorado and the BLAG in *Romer* and *Windsor*, respectively, buttress Plaintiff Blatt's claim that the GID exclusion in the ADA violates the most basic equal protection principles. Namely, in *Romer*, the Court was faced with a state interest concerning the right of landlords and employers to utilize moral judgment in the housing and employment context with respect to homosexual individuals. 517 U.S. at 635. Similarly, Senators Armstrong and Helms clearly supported the seemingly identical proposition that employers "[should have the right to make judgments] about [their] employees . . . [based on their] own moral standards." *Id.* at S10765. Finding that the amendment was "too narrow and too broad [because it] identifies persons by a single trait and then denies them protection across the board," the *Romer* majority noted that the legislative classification, "[raised] the inevitable inference that [amendment] is born of animosity toward the class it affects." 517 U.S. at 633.

Correspondingly, the GID exclusion from the ADA is not rationally related to the government's interest in protecting employers from litigation based on mental illness discrimination because it is far too narrow and under-inclusive to achieve Senator Armstrong's alleged desire to protect the private sector from a deluge of frivolous lawsuits. *See* 135 Cong.

Rec. S11176 (daily ed. Sep. 14, 1989) (statement of Sen. Armstrong) ("If [the amendment] has a shortcoming it is that it is too narrow . . . .") This is evidenced by the fact that the provision in which the GID exclusion is found, § 12211 (b)(1), only addressed those conditions of which Senator Armstrong morally disapproved. If his true, genuine motivation was to limit a deluge of claims, he should have submitted a more encompassing analysis of mental impairments in his September 14, 1989 statement, rather than a limited list of the disorders he explicitly described, seven days earlier, as having "moral content." *Doe* and *Blackwell* certainly do not establish the proposition that ADA claims based on transsexualism and transvestism would lead to a deluge of frivolous suits. Instead, the GID exclusion "raises the inevitable inference that it [was] born of animosity" toward the transgender because it far too narrow to be considered rationally related to the government's interest in protecting employers from litigation based on mental illness discrimination.

Likewise, in *Windsor*, the Supreme Court cast aside the purportedly rational government interests set forth by BLAG, instead holding that "DOMA seeks to injure the very class [state law permitting same sex marriage] seeks to protect." 133 S. Ct. at 2693. Similar to the *Windsor* majority's determination that the harm resulting from DOMA's underlying moral component invalidated BLAG's proffered interests, this Court should likewise invalidate the government's only alleged non-moral based justification for the GID exclusion (protecting the private sector). As discussed above, this lone "justification" was instead a pretext for permitting government sanctioned moral animus. Indeed, the result of the morals debate on September 7, 1989 was an imposition of unjustified disparate treatment against individuals who suffer from what these Senators deemed to be morally "improper" impairments. This governmental rationale for the GID exclusion cannot stand in light of *Windsor*, as the moral component of the GID exclusion

grossly outweighs any actual, or theoretical, governmental interest.

In conclusion, the legislative classification created by the GID exclusion in the ADA fails rational basis scrutiny because its nexus to the governmental purpose, a combination of moral disapproval and the fear of a flood of litigation, is "so attenuated as to render the distinction arbitrary or irrational." The ADA's failure to provide protection to the transgender individuals who fall within the ambit of the GID exclusion was "drawn for the purpose of disadvantaging" transgender individuals, and it cannot stand in light of our country's most foundational constitutional principles.

D. ASSUMING THIS COURT STRIKES THE EXCLUSION OF GENDER IDENTITY DISORDER FROM THE AMERICANS WITH DISABILITIES ACT ON EQUAL PROTECTION GROUNDS, PLAINTIFF BLATT HAS SUFFICIENTLY PLEAD HER CLAIMS

1. Plaintiff Blatt is Actually Disabled Under the ADA Assuming the Exclusion of Gender Identity Disorders is Unconstitutional

Assuming *arguendo* that this Court strikes the GID exclusion from the ADA on Equal Protection grounds, rendering it inoperable, Plaintiff Blatt has plead with sufficient particularity, that she is disabled under the ADA.

An individual is disabled if he or she has a physical or mental impairment that substantially limits one or more major life activities; has a record of such an impairment; or is regarded as having an impairment. *See* 42 U.S.C. § 12191(2). Here, Plaintiff Blatt alleged that her Gender Dysphoria "substantially impairs one or more of her major life activities, including, but not limited to, interacting with others, reproducing, and social and occupational functioning." *See* Amended Complaint at ¶10. Reproduction has been recognized by the Supreme Court and the Third Circuit as a "major life activity" in terms of the ADA. *See Bragdon v. Abbott*, 524 U.S. 624, 638 (1998) (ADA public accommodation case) ("Reproduction and the sexual dynamics

surrounding it are central to the life process itself."); *Fiscus v. Wal-Mart Stores, Inc.*, 385 F.3d 378 (3d Cir. 2004) (analyzing *Bragdon* and adopting its holding). As such, accepting these factual allegations as true and construing the Amended Complaint in a light most favorable to her, Plaintiff Blatt has plead with sufficient particularity that she is disabled under the ADA, assuming the exemption at issue is unconstitutional and therefore inapplicable.[18]

2. Assuming *Arguendo* that Plaintiff Blatt Does Not Have an Actual Disability Due to the ADA's Exclusion of Gender Identity Disorders, Defendant Nonetheless Regarded Her as Disabled

Plaintiff Blatt has likewise alleged sufficient facts in her Amended Complaint to state a claim that the Defendant regarded her as disabled. For a plaintiff to be "regarded as" having a disability under 42 U.S.C. §12102(2)(C), she must establish that she had a non-limiting impairment that defendant mistakenly believed substantially limited a major life activity. *Keyes v. Catholic Charities of the Archdiocese of Phila.*, 415 Fed. Appx. 405, 410 (3d Cir. Pa. 2011) (internal citations omitted).

Plaintiff Blatt has plead sufficient facts to establish that the Defendant mistakenly perceived her to suffer from a mental infirmity[19] that substantially impaired several of her major life activities, namely her ability to think clearly and interact with others. Said major life activities have been recognized as such in pre-ADAAA cases. *See McAlindin v. County of San Diego*, 192 F.3d 1226 (9th Cir. 1999) (interacting with others is a major life activity); *Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296, 306 (3d Cir. 1999) (thinking is a major life activity).

By way of example, the Defendant required that Plaintiff Blatt remain secluded from

[18] This argument also applies to the Defendant's contention that Plaintiff Blatt has not plead sufficient facts to state a claim for disability discrimination under the ADA based upon a record of impairment. *See* Defendant's Motion at p. 8 ("In any event, because gender identity disorder is not a disability or condition covered by the ADA, there can be no claim for disability discrimination based upon having a record of impairment.") (internal citation omitted).

[19] Should the Court deem it necessary, Plaintiff Blatt respectfully requests leave of court to amend her Complaint to include "mental infirmity" as the disability from which the Defendant perceived Plaintiff Blatt to suffer.

other employees in one area of the store, forcing her to only stock items in its "Gifts Department" rather than other areas in which non-disabled Stockers were permitted to work. *See* Amended Complaint at ¶23. This evidences the Defendant's perception that Plaintiff Blatt could not interact with others. Further, the Defendant prohibited Plaintiff Blatt from working in teams, requiring her instead to work alone on third shift at all times. *Id.* at ¶¶23-24.

Moreover, Plaintiff Blatt applied for, and was denied, several promotions for which she was objectively qualified. Significantly, Bowers informed Plaintiff Blatt that Defendant's corporate office had explicitly instructed him not to promote Plaintiff Blatt, although he felt that she was well-qualified for the positions. *Id.* at ¶25. Furthermore, after applying for a promotion to the position of Maintenance Technician, Plaintiff Blatt overheard the Maintenance Manager state to Bowers, "Can you believe this cross-dressing gay fruit wants a job in my department? The confused sicko can't figure out that he is gay and admit it. I won't interview him under any circumstances." *Id.* at ¶26. Likewise, these allegations evidence the Defendant's perception that Plaintiff Blatt's ability to think clearly was impaired.

Moreover, when Gates blatantly denied Plaintiff Blatt's request to use the female restroom as reasonable accommodation, she expressed her completely unfounded concern that because Plaintiff Blatt was not anatomically female, she could potentially rape or sexually assault a person in the female restroom. *Id.* at ¶29. Similarly, these facts illustrate the Defendant's perception that Plaintiff Blatt's abilities to interact with others and think clearly were substantially impaired. These allegations, viewed in a light most favorable to Plaintiff Blatt, clearly establish that the Defendant mistakenly viewed Plaintiff Blatt to suffer from a mental infirmity that substantially impaired her ability to interact with others and think.

As such, Plaintiff Blatt has stated a "regarded-as" disability claim in this case because she has sufficiently plead that she had a non-limiting impairment that Defendant mistakenly believed substantially limited a major life activity.

3. Plaintiff Blatt has Set Forth Sufficient Facts to State a Failure to Accommodate Claim

Likewise, Plaintiff Blatt has stated a "failure to accommodate claim" under the ADA. The Defendant contends that it only had to accommodate the disabilities of employees who are actually impaired, relying on the primary argument that Plaintiff Blatt is not disabled. *See* Defendant's PMTD at p. 9. As noted, the resolution of this argument depends, as noted above, on this Court's review of the constitutionality of the GID exclusion. The Defendant ignores the Third Circuit's ruling in *Williams v. Phila. Hous. Auth. Police Dep't*, 380 F.3d 751, 774 (3d Cir. 2004), where the Court noted:

> While we do not rule out the possibility that there may be situations in which applying the reasonable accommodation requirement in favor of a "regarded as" disabled employee would produce "bizarre results," we perceive no basis for an across-the-board refusal to apply the ADA in accordance with the plain meaning of its text. Here, and in what seem to us to be at least the vast majority of cases, a literal reading of the Act will not produce such results.

Indeed, even if the Court rejects Plaintiff Blatt's constitutional argument, the Defendant still maintains the duty to accommodate Plaintiff Blatt if the Court likewise finds that the Defendant perceived her as disabled.

4. Plaintiff Blatt has Sufficiently Plead her Retaliation Claims under the ADA

Finally, the Defendant erroneously alleges that Plaintiff Blatt's ADA retaliation claims are legally insufficient. *See* Defendant's PMTD at pp. 9-12. To establish a *prima facie* case of retaliation under the ADA, a plaintiff must demonstrate the following elements: "(1) that she engaged in an ADA-protected activity; (2) she suffered an adverse employment action by the

defendant employer, either after or contemporaneous with the protected activity; and (3) that there exists a causal connection between the protected activity and the adverse employment action." *Kaniuka v. Good Shepherd Home*, 2006 U.S. Dist. LEXIS 57403 (E.D. Pa. Aug. 15, 2006). The Defendant contends that Plaintiff Blatt failed to engage in any protected activity, i.e. she failed to oppose unlawful disability discrimination, and she did not request an accommodation for a disability. *See* Defendant's PMTD at pp. 10-11. Further, the Defendant posits that it never took an adverse action against Plaintiff Blatt for requesting an accommodation, citing a lack of a causal connection between Plaintiff's requests and her termination. *Id.* at 11-12.

However, contrary to the Defendant's contentions, Plaintiff Blatt has set forth sufficient facts to establish her twofold claim of retaliation under the ADA for (1) opposing unlawful disability discrimination; and (2) and for requesting reasonable accommodations. First, Plaintiff Blatt has sufficiently plead that she opposed unlawful disability discrimination. Specifically, Plaintiff Blatt's Amended Complaint states that she continually reported the degrading and discriminatory comments on the basis of her transgender status to which the Defendant's employees subjected her, verbally and in writing, to Bowers. *Id.* at ¶22. Importantly, if this Court deems Plaintiff Blatt's transgender status to be a disability due to the unconstitutionality of the GID exclusion, then Plaintiff Blatt inherently complained about unlawful disability discrimination. At the very least, the Court should permit discovery on this issue to ascertain whether Plaintiff Blatt's complaints constitute legally cognizable opposition to unlawful disability discrimination.[20]

[20] Moreover, the Defendant's contention that Plaintiff Blatt made reasonable requests for accommodations on the basis of gender, rather than disability, is equally unpersuasive. Plaintiff Blatt has plead, continually through her Amended Complaint, that she requested accommodations for her disability in the form of 1) a nametag; 2) a female uniform; 3) use of the female restroom. (*See* Amended Complaint at ¶¶ 16, 18, 19, 29-31).

Finally, the Defendant contends that because Plaintiff Blatt cannot establish a causal connection between her requests for accommodations and the termination of her employment, she cannot meet the third element of the *prima facie* case: the inference of retaliation. However, the Third Circuit has noted that "temporal proximity between the employee's protected activity and the adverse employment action [can suggest the necessary retaliatory inference]." *Kachmar v. Sungard Data Sys.*, 109 F.3d 173, 177 (3d Cir. 1997) (internal citations omitted). Furthermore, "circumstantial evidence of a "pattern of antagonism" following the protected conduct can also give rise to the inference" of retaliation. *Id.*

It is undeniable that the Amended Complaint contains allegations indicating a pattern of antagonism to which Plaintiff Blatt was subjected for requesting accommodations for her transgender status. To reiterate just a few examples, 1) Gates forced Plaintiff Blatt to wear a nametag stating that her name was "James" following her request wear a name-tag denoting her female name, Amended Complaint at ¶18; and 2) Gates refused to allow Plaintiff Blatt to utilize the female restroom until she submitted proof that her gender marker had been changed, after which Gates persisted in denying Plaintiff Blatt access because of her fear that Plaintiff Blatt could potentially rape or sexually assault a female employee in the restroom. *Id.* at ¶29. These allegations undoubtedly comprise a pattern of antagonism, fulfilling the third element of the prima facie case for Plaintiff Blatt's ADA retaliation claims.

IV. CONCLUSION:

For the reasons set forth above, Plaintiff Blatt respectfully requests that the Court deny the Defendant's Partial Motion to Dismiss in its entirety.

Respectfully submitted,

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Date: January 20, 2015

CERTIFICATE OF SERVICE

I hereby certify that on this date I caused a true and correct copy of Plaintiff's Memorandum of Law in Opposition to the Partial Motion of Defendant Cabela's Retail, Inc. to Dismiss Plaintiff's First Amended Complaint, to be served by ECF and/or United States Mail, First Class Service, properly addressed and postage prepaid, upon the following:

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