

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

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| KATE LYNN BLATT | : | |
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| Plaintiff, | : | |
| v. | : | CASE NO.: 5:14-CV-04822-JLS |
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| CABELA'S RETAIL, INC. | : | |
| | : | |
| Defendant. | : | |

STATEMENT OF *AMICI CURIAE* GAY & LESBIAN ADVOCATES & DEFENDERS,
MAZZONI CENTER, NATIONAL CENTER FOR LESBIAN RIGHTS, NATIONAL
CENTER FOR TRANSGENDER EQUALITY, NATIONAL LGBTQ TASK FORCE,
AND TRANSGENDER LAW CENTER IN RESPONSE TO SECOND STATEMENT OF
INTEREST OF THE UNITED STATES OF AMERICA

Amici Curiae Gay & Lesbian Advocates & Defenders, Mazzoni Center, National Center for Lesbian Rights, National Center for Transgender Equality, National LGBTQ Task Force, and Transgender Law Center (“*Amici*”), submit this Statement in accordance with the Court’s Order of November 24, 2015 (ECF No. 70).

In its Second Statement of Interest, dated November 16, 2015, the United States takes the position that 42 U.S.C. § 12211(b)’s exclusion of “transsexualism . . . [and] gender identity disorders not resulting from physical impairments” (the “GID Exclusion”) “should be construed narrowly such that gender dysphoria falls outside its scope,” based upon “the evolving scientific evidence suggesting that gender dysphoria may have a physical basis, along with the remedial nature of the ADA and the relevant statutory and regulatory provisions directing that the terms ‘disability’ and ‘physical impairment’ be read broadly.” *See* Sec. Statement of Int. of U.S. at 5 (ECF No. 67). Although the United States leaves for another day whether “*all* known [gender identity disorders] ‘result[] from physical impairments’” and thus similarly fall outside the scope

of the GID Exclusion,¹ *id.* at 5 n.3 (emphasis added), its position regarding Gender Dysphoria is clear: “gender dysphoria . . . [is] not . . . excluded from the definition of ‘disability.’” *Id.* at 6.

Amici agree with the thrust of the United States’ position, which reaches the same result as that urged by *Amici*, albeit by way of different analysis. The United States argues that Gender Dysphoria is a type of Gender Identity Disorder that results from a physical impairment and, as a result, is not excluded from the definition of “disability.” *See id.* at 5. *Amici*, by contrast, argue that Gender Dysphoria is not a Gender Identity Disorder at all; it is a new and different diagnosis that does not fall within the letter or spirit of the GID Exclusion and, as a result, is not excluded from the definition of “disability.” *See Br. of Amici Curiae* at 11-17 (ECF No. 33). Although the United States’ interpretation disregards the significant differences between Gender Identity Disorder and the new diagnosis of Gender Dysphoria, the conclusions reached by the United States and *Amici* are identical: Gender Dysphoria falls outside the scope of the GID Exclusion.

Amici reject any suggestion that the United States’ position should be interpreted more narrowly to require an individual plaintiff to prove that his or her Gender Dysphoria results from a physical impairment in order to claim protection under the ADA. *Cf. Sec. Statement of Int. of U.S.* at 2, 6 (ECF No. 67) (stating that “*Plaintiff’s* gender dysphoria falls outside of the scope of the GID Exclusion” and “would not be excluded from the ADA’s definition of ‘disability’”) (emphasis added). By adding a fourth element to the plaintiff’s showing of disability—i.e., (1) a physical or mental impairment (2) that substantially limits (3) a major life activity, and (4) which has a physical, as opposed to mental, etiology—this interpretation of the United States’ position

¹ *Amici* are not aware of what these other “gender identity disorders” might be. In 2013, the DSM-5 eliminated the diagnosis of Gender Identity Disorder and added the diagnosis of “Gender Dysphoria.” *See Br. of Amici Curiae* at 6, 12-15. It is *Amici’s* position that, in the wake of publication of the DSM-5, there is no Gender Identity Disorder or “gender identity disorders”; there is only Gender Dysphoria.

raises significant legal and practical concerns. First, the physical-etiology showing would apply only to transgender people, thereby raising equal protection concerns. *See generally* Pl.'s Opp'n to Def.'s Mot. to Dismiss (ECF No. 23). Second, although the DSM-5 and numerous recent medical studies support the physical etiology of Gender Dysphoria, the burden of proving etiology would fall on individual plaintiffs, consuming a substantial amount of attorney resources for discovery and the preparation of expert reports and requiring courts to delve into a thicket of medical evidence and opine on etiology, with the attendant risk of different courts reaching differing results in similar cases. *See* Sec. Statement of Int. of U.S. at 3-4 (ECF No. 67) (discussing medical research underlying Gender Dysphoria's physical etiology); Br. of Amici Curiae at 3-4, 14-15 (ECF No. 33) (same). And lastly, if the plaintiff could not show that his or her Gender Dysphoria had a physical basis, the constitutionality of excluding such a condition would have to be adjudicated.

For these reasons, *Amici* agree with the United States that Gender Dysphoria falls outside the scope of the GID Exclusion. Should this Court disagree and hold that Gender Dysphoria is the same as Gender Identity Disorder, and that an individual plaintiff must prove that his or her Gender Dysphoria results from a physical impairment, *Amici* respectfully request that this Court hold the GID Exclusion unconstitutional as a violation of equal protection. *See generally* Pl.'s Opp'n to Def.'s Mot. to Dismiss (ECF No. 23).

Respectfully Submitted,

/s/ Kevin M. Barry

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On behalf of Amici Curiae

December 1, 2015

CERTIFICATE OF SERVICE

I hereby certify that on December 1, 2015, the foregoing Statement of *Amici Curiae* in Response to Second Statement of Interest of United States of America was filed electronically. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

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