Bostock's Effect on the Future of the ADA's Gender Identity Disorder Exclusion: Transgender Civil Rights and Beyond

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I. INTRODUCTION

"We're human beings. We deserve the same basic human rights as everyone else has. That's all we're asking for."[1] Until June 2020, many transgender Americans lacked protection from discrimination in employment based on their gender identity.[2] In the landmark case, *Bostock v. Clayton County*, the United States Supreme Court ruled that Title VII of the Civil Rights Act of 1964 protects gay and transgender employees from discrimination.[3] Title VII prohibits discrimination against any individual on the basis of race, color, religion, sex, or national origin,[4] and the Court ruled that the word "sex" includes discrimination based on an individual's sexual orientation or gender identity.[5] Justice Gorsuch, writing for the majority

1. Tim Teeman, *Trans Woman Aimee Stephens May Die Before Supreme Court Rules on Landmark LGBTQ Rights Case*, DAILY BEAST (May 12, 2020, 4:06 PM), https://www.thedailybeast.com/trans-woman-aimee-stephens-may-die-before-supreme-court-rules-on-landmark-lgbtq-rights-case [https://perma.cc/F2ZY-V22M] (quoting Aimee Stephens). Aimee Stephens is one of the plaintiffs in the three cases consolidated before the Supreme Court in *Bostock v. Clayton County*. *Id.*; Bostock v. Clayton County, 140 S. Ct. 1731, 1734 (2020). Stephens worked as a funeral director for R.G and G.R Harris Funeral Homes, and after informing her boss that she would be dressing in accordance with the female dress code, Stephens was fired. Teeman, *supra*.

2. Erwin Chemerinsky, *Chemerinsky: Gorsuch Wrote His 'Most Important Opinion' in SCOTUS Ruling Protecting LGBTQ Workers*, ABA J. (July 1, 2020, 8:00 AM), https://www.abajournal.com/news/article/chemerinsky-justice-gorsuch-just-wrote-his-most-important-opinion [https://perma.cc/X64C-VB3C]. Chemerinsky noted that prior to this decision, only half of the states had protections in place to prevent discrimination against individuals based on their sexual orientation and gender identity. *Id.*

3. *Bostock*, 140 S. Ct. at 1731. Because only half of the country had sexual orientation and gender identity discrimination protections in place, *Bostock* was an extremely impactful decision that provided protection from discrimination for millions of people. *See* Chemerinsky, *supra* note 2.

4. 42 U.S.C. § 2000e-2(a)(1).

5. *Bostock*, 140 S. Ct. at 1747.

opinion, used a strict textualist approach to interpret the statutory language.[6] Although transgender individuals have this new avenue for protection in the workplace, transgender individuals also have protection under the Americans with Disabilities Act (ADA), which provides protection against disability discrimination even beyond the scope of employment.[7]

The ADA prohibits discrimination against individuals based on actual or perceived disabilities.[8] However, the ADA excluded certain conditions from the Act, such as "transvestism," "transsexualism," and "gender identity disorders (GID) not resulting from physical impairments."[9] This exclusion is commonly referred to as the "GID exclusion."[10] Since the passage of the ADA, the Diagnostic and Statistical Manual of Mental Disorders has reclassified gender identity disorder as gender dysphoria (GD),[11] which is a "marked difference between the individual's expressed/experienced gender and the gender others would assign him or her . . . ."[12] Historically, the GID exclusion was unchallenged and transgender litigants who did attempt to invoke protection for gender dysphoria under the ADA were unsuccessful.[13]

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6. *See generally id.* Justice Gorsuch is known as a "rigorous textualist." Max Alderman & Duncan Pickard, *Justice Scalia's Heir Apparent?: Judge Gorsuch's Approach to Textualism and Originalism*, 69 STAN. L. REV. ONLINE 185, 185 (2017). Justice Gorsuch stated in an opinion, "it's a 'fundamental canon of statutory construction' that words generally should be 'interpreted as taking their ordinary, contemporary, common meaning . . . at the time Congress enacted the statute.'" Wis. Cent. Ltd. v. United States, 128 S. Ct. 2067, 2074 (2018) (quoting Perrin v. United States, 444 U.S. 37, 42 (1979)).

7. *See* 42 U.S.C. § 12101(b)(1).

8. *Id.* §12102(3)(A).

9. *Id.* §12211(b); Kevin M. Barry, *Disabilityqueer: Federal Disability Rights Protection for Transgender People*, 16 YALE HUM. RTS. & DEV. L.J., no. 1, 2013, at 1, 11 (discussing the floor debates leading up to the enactment of the ADA and the senators' morality views on mental impairments).

10. *See* Barry, *supra* note 9, at 5.

11. *See* Camille Beredjick, *DSM-V to Rename Gender Identity Disorder 'Gender Dysphoria,'* ADVOCATE (July 23, 2012, 8:00 PM), https://www.advocate.com/politics/transgender/2012/07/23/dsm-replaces-gender-identity-disorder-gender-dysphoria [https://perma.cc/A9F8-N7MT].

12. AM. PSYCHIATRIC ASS'N, GENDER DYSPHORIA 1 (2013). Until 2019, the World Health Organization classified identifying as transgender a mental disorder. *A Major Win for Transgender Rights: UN Health Agency Drops 'Gender Identity Disorder', as Official Diagnosis*, UN NEWS (May 30, 2019), https://news.un.org/en/story/2019/05/1039531 [https://perma.cc/EM5P-UP3S]. WHO updated the International Classification of Diseases (ICD-11) to classify identifying as transgender as "gender incongruence." *Id.*

13. Taylor Payne, *A Narrow Escape: Transcending the GID Exclusion in the Americans with Disabilities Act*, 83 MO. L. REV. 799, 800 (2018); *see also* Kevin Barry & Jennifer Levi, *A Landmark Victory for Trans Rights—Under the Americans with*

However, in 2017, a transgender woman challenged the GID exclusion and the district court held that individuals with gender dysphoria may receive protection under the ADA.[14] Since then, several other transgender litigants have been able to survive motions to dismiss.[15] Nonetheless, despite some transgender litigants' recent successes, the Supreme Court has yet to interpret the GID exclusion.[16] However, the Supreme Court's close reading and textualist approach in *Bostock* to interpret a federal discrimination statute will likely have implications on the interpretation of the ADA's GID exclusion, which, in turn, should expand the ADA's protection of individuals with gender dysphoria.

Part II of this Comment discusses disability and transgender discrimination, as well as the diagnosis of gender dysphoria. It reviews the Supreme Court's decision in *Bostock* and sets forth the textualist approach of the majority opinion. Part III introduces the causation standard typically used in claims brought under the ADA and analyzes the impact that the *Bostock* opinion should have on the ADA causation standard moving forward, regardless of the protected identity. Part IV analyzes *Bostock*'s effect on transgender litigants under the Equal Protection Clause. Because the Court in *Bostock* linked discrimination of gender identity to sex discrimination, the GID exclusion discriminates based on sex and should be subject to intermediate scrutiny. Part V explores the implications of the strict textualist approach taken in *Bostock* on arguments by plaintiffs with gender dysphoria. Based on the plain text of the statute, gender dysphoria falls *outside* of the GID exclusion.[17] Further, plaintiffs will be able to more effectively rebut defenses about the interpretation of the exclusion based on the legislative intent behind the ADA, as well the subsequent legislative history. Lastly, Part VI applies the textualist approach in *Bostock* to arguments made by plaintiffs that gender dysphoria results from a physical impairment, allowing gender dysphoria to fall *under* the protection of the ADA.

Disabilities Act, SLATE (May 24, 2017, 12:27 PM), https://slate.com/human-interest/2017/05/a-landmark-victory-for-trans-rights-under-the-ada.html [https://perma.cc/3L4J-4QVT].

14. Blatt v. Cabela's Retail, Inc., No. 5:14-CV-04822, 2017 WL 2178123, at *2–4 (E.D. Pa. May 18, 2017). This holding does not mean that being transgender is considered a disability. *See Breakthrough: Americans with Disabilities Act Can't Exclude Gender Dysphoria*, TRANSGENDER EQUAL. (May 22, 2017), https://transequality.org/blog/breakthrough-americans-with-disabilities-act-can-t-exclude-gender-dysphoria [https://perma.cc/6JFF-PJ9F].

15. *See generally* Edmo v. Idaho Dep't of Corr., No. 1:17-CV-0051-BLW, 2018 WL 2745898 (D. Idaho June 7, 2018); Tay v. Dennison, No. 19-cv-00501-NJR, 2020 WL 2100761 (S.D. Ill. May 1, 2020); Doe v. Triangle Doughnuts, LLC, 472 F. Supp. 3d 115 (E.D. Pa. 2020).

16. *See* Murray v. Mayo Clinic, 934 F.3d 1101 (9th Cir. 2019), *cert. denied*, 140 S. Ct. 2720; Natofsky v. City of New York, 921 F.3d 337 (2d Cir. 2019), *cert. denied*, 140 S. Ct. 2668 (2020).

17. 42 U.S.C. § 12211(b)(1).

Although *Bostock* held that discriminating against an employee because of their gender identity or sexual orientation is a form of prohibited sex discrimination, transgender individuals with gender dysphoria still do not have protection under the ADA as it pertains to reasonable accommodations. For example, an individual with gender dysphoria may request accommodations, such as the use of a male uniform, the use of the male restroom, the use of male pronouns, medical leave, or a modified work schedule to allow an individual the opportunity to receive hormone therapy or gender reassignment surgery.[18] Therefore, the expansion of coverage under the ADA is necessary to provide an "affirmative obligation" on behalf of employers to individuals with gender dysphoria.[19] Based on the textualistic framework in *Bostock*, courts will likely begin to construe gender dysphoria as falling under protection of the ADA, which will give thousands of people with gender dysphoria access to reasonable accommodations.

II. BACKGROUND

A. Disability Discrimination in General

Negative attitudes toward people with disabilities have plagued society for centuries.[20] This section highlights some of those disparities and introduces the ADA, which prohibits discrimination on the basis of a disability. About 20% of the United States' population consists of people with disabilities,[21] yet people with disabilities continue to face barriers in their everyday

18. Ali Szemanski, *When Trans Rights are Disability Rights: The Promises and Perils of Seeking Gender Dysphoria Coverage Under the Americans with Disabilities Act*, 43 HARV. J.L. & GENDER 137, 145 (2020); *see, e.g.*, *Blatt*, 2017 WL 2178123, at *2, *4.

19. Szemanski, *supra* note 18, at 145. The reasonable accommodation requirement differs from other federal anti-discrimination statues that prohibit adverse employment actions based on protected characteristics. Stephen F. Befort & Tracey Holmes Donesky, *Reassignment Under the Americans with Disabilities Act: Reasonable Accommodation, Affirmative Action, or Both?*, 57 WASH. & LEE L. REV. 1045, 1047 (2000). The ADA goes beyond a mere prohibition of disability discrimination and requires employers to treat individuals with disabilities with preferential treatment. *Id.* at 1048.

20. *See* SUZANNE C. SMELTZER, BETTE MARIANI & COLLEEN MEAKIM, NAT'L LEAGUE FOR NURSING, BRIEF HISTORICAL VIEW OF DISABILITY AND RELATED LEGISLATION 1 (2017); *see also* Danielle D. Fox & Irmo Marini, *History of Treatment Toward Persons with Disabilities in America*, *in* THE PSYCHOLOGICAL AND SOCIAL IMPACT OF ILLNESS AND DISABILITY 3–12 (Irmo Marini & Mark A. Stebnicki eds., 7th ed. 2017).

21. *Nearly 1 in 5 People Have a Disability in the U.S., Census Bureau Reports*, U.S. CENSUS BUREAU (July 25, 2012), https://www.census.gov/newsroom/releases/archives/miscellaneous/cb12-134.html [https://perma.cc/E3FF-R4N7].

lives. People with disabilities face attitude barriers, such as people assuming that those with disabilities are unhealthy or have a poor quality of life.[22] People with disabilities that affect hearing, speaking, reading, and writing face communication barriers, and people with disabilities affecting their mobility face physical barriers, such as steps or a medical office lacking a scale that can accommodate a wheelchair.[23] Additionally, individuals with disabilities face social barriers.[24] For example, in 2019, 19.3% of people with a disability were employed, whereas 66.3% of people without a disability were employed.[25] Further, Americans with disabilities earn less than people without disabilities.[26] In 2015, people with disabilities earned a median of $21,572, whereas people without a disability earned $31,872.[27]

To combat these inequalities, Congress passed the Americans with Disabilities Act of 1990 (ADA), which recognizes disability as a protected

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22. *Common Barriers to Participation Experienced by People with Disabilities*, CDC (Sept. 4, 2019), https://www.cdc.gov/ncbddd/disabilityandhealth/disability-barriers.html [https://perma.cc/CR4W-2KLP]. For a discussion on the effect of disabilities on well-being and assumptions concerning the impact of disabilities on relationships, see generally David Wasserman et al., *Disability: Health, Well-Being, and Personal Relationships*, STAN. ENCYCLOPEDIA PHIL., Winter 2016, at 1.

23. *Common Barriers to Participation Experienced by People with Disabilities*, *supra* note 22; *see also* Joseph Piekarski, *Major American Cities Still Pose Problems for People with Disabilities*, DISABILITY CAN HAPPEN (Apr. 17, 2017), https://blog.disabilitycanhappen.org/american-cities-problems-people-with-disabilities/ [https://perma.cc/EGR6-L8RL] (discussing physical barriers); Robyn Correll, *Challenges That Still Exist for the Deaf Community*, VERYWELL HEALTH (July 7, 2020), https://www.verywellhealth.com/what-challenges-still-exist-for-the-deaf-community-4153447 [https://perma.cc/Q55T-L83B] (discussing barriers faced by people who are deaf or hard of hearing).

24. *Common Barriers to Participation Experienced by People with Disabilities*, *supra* note 22. One report finds that 19% of individuals with disabilities experienced anxiety and lack of confidence as employment opportunity barriers. *See* OFF. FOR DISABILITY ISSUES, LIFE OPPORTUNITIES SURVEY: WAVE ONE RESULTS 2009/11, at 10 (2011).

25. U.S. BUREAU OF LAB. STAT., U.S. DEP'T OF LAB., PERSONS WITH A DISABILITY: LABOR FORCE CHARACTERISTICS—2020, at 1 (2021). In 2010, 41% of people aged 21-64 with a disability were employed, compared to 79% of people in the same category with no disability. *See Nearly 1 in 5 People Have a Disability in the U.S., Census Bureau Reports*, *supra* note 21.

26. Kristen Bialik, *7 Facts About Americans with Disabilities*, PEW RSCH. CTR. (July 26, 2017), https://www.pewresearch.org/fact-tank/2017/07/27/7-facts-about-americans-with-disabilities/ [https://perma.cc/SZ5F-P4UN].

27. *Median Earnings in the Past 12 Months (in 2015 Inflation-Adjusted Dollars) By Disability Status By Sex for the Civilian Noninstitutionalized Population 16 Years and Over with Earnings*, U.S. CENSUS BUREAU, https://data.census.gov/cedsci/table?tid=ACSDT1Y2015.B18140&q=B18140 [https://perma.cc/QC9A-JKXZ]. In 2019, workers with a disability earned 87 cents for every dollar earned by those without a disability. Jennifer Cheeseman Day & Danielle Taylor, *In Most Occupations, Workers With or Without Disabilities Earn About the Same*, U.S. CENSUS BUREAU (Mar. 21, 2019), https://www.census.gov/library/stories/2019/03/do-people-with-disabilities-earn-equal-pay.html [https://perma.cc/DF49-36EG].

class and prohibits discrimination based on disability in employment, government services, public transportation, and public accommodation.[28] The ADA describes the term "disability" as "a physical or mental impairment that substantially limits one or more major life activities of such individual; a record of such impairment; or being regarded as having such impairment."[29] Under Title I of the ADA, people with disabilities are protected against discrimination in the workplace, which includes hiring, advancement, and the privileges of employment.[30] The ADA also requires employers to provide reasonable accommodations for any "qualified individual with a disability," and failure to do so is a form of discrimination.[31]

In 2008, Congress amended the ADA in response to Supreme Court decisions that limited the rights of individuals with disabilities.[32] The ADA Amendments Act of 2008 (ADAAA) expanded the ADA's list of "major life activities" and included "major bodily functions" within the scope of major life activities.[33] Additionally, the ADAAA clarifies that

28. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101–12213). Section 504 of the 1973 Rehabilitation Act, which prohibited disability discrimination by recipients of federal funds, was the precursor to the ADA. *See* Shirley Wilcher, *The Rehabilitation Act of 1973: 45 Years of Activism and Progress*, INSIGHT INTO DIVERSITY (Sept. 17, 2018), https://www.insightintodiversity.com/the-rehabilitation-act-of-1973-45-years-of-activism-and-progress/ [https://perma.cc/7HE2-8DT9]; Rehabilitation Act Amendments of 1993, Pub. L. No. 103-73, 107 Stat. 718.

29. Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12213. The Americans with Disabilities Act Amendments Act redefined the "regarded as" prong to allow an employee to "only show that he or she: (1) actually has or is perceived by an employer as having, an impairment; and (2) was subjected to adverse action . . . because of the actual or perceived impairment." Kevin Barry, Brian East & Marcy Karin, *Pleading Disability After the ADAAA*, 31 HOFSTRA LAB. & EMP. L.J. 1, 10–11 (2013).

30. 42 U.S.C. §§ 12111–12117.

31. *Id.* § 12112(b)(5)(A). The ADA states that discrimination includes "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability . . . unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity." *Id.* An undue hardship may include an excessive cost or the restructuring of job tasks. Nicole Buonocore Porter, *A New Look at the ADA's Undue Hardship Defense*, 84 MO. L. REV. 121, 139, 144 (2019).

32. ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (codified as amended at 42 U.S.C. §§ 12101–12213) (amending Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327); *see also A Brief History of Civil Rights in the United States: ADA Amendments Acts of 2008*, GEO. L. (June 3, 2021, 9:52 PM), https://guides.ll.georgetown.edu/c.php?g=592919&p=4230126 [https://perma.cc/SX77-YXP9].

33. 42 U.S.C. § 12102.

individuals who claim they are "regarded as having such an impairment" may bring an ADA claim "whether or not the impairment limits or is perceived to limit a major life activity," and it is irrelevant whether the impairment can be mitigated by medication.[34] Most importantly, the ADA now reads that "[t]he definition of 'disability' . . . shall be construed in favor of broad coverage of individuals under this chapter, to the maximum extent permitted by the terms of this chapter."[35]

In addition to the prohibition of discrimination based on disability, the ADA mandates "reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability," unless the accommodation would impose an undue hardship on the employer.[36] Reasonable accommodations may include job restructuring, modified work schedules, reassignment, modification of equipment, or interpreters.[37] In determining whether an accommodation would create an undue hardship, the factors include the cost of the accommodation needed, the financial resources of the facility and employer, number of employees, and the type of operation of the employer.[38]

B. Transgender Discrimination and the Gender Identity Disorder Exclusion

Another group of individuals that face negative attitudes and marginalization in the United States are transgender individuals, and this attitude is demonstrated by Section 12211 of the ADA, which excludes several conditions.[39] The term "transgender" is an "umbrella term for people whose gender identity is different from the sex assigned" to them at birth.[40] In

34. *Id.* The "mitigating measures" issue was a source of many individuals losing protection of the ADA, as workers were fired for "being too disabled to perform their respective jobs." Evan Sauer, *The ADA Amendments Act of 2008: The Mitigating Measures Issue, No Longer a Catch-22*, 36 OHIO N.U. L. REV. 215, 231 (2010). Yet, when these workers bring suit for this discrimination, the courts rule against them and hold that they are not disabled enough to be protected by the ADA." *Id.*

35. 42 U.S.C. § 12102(4)(A).

36. *Id.* § 12112(b)(5)(A).

37. *Id.* § 12111(9); *see also Accommodations*, U.S. DEP'T OF LAB., https://www.dol.gov/agencies/odep/program-areas/employers/accommodations [https://perma.cc/9HRB-U5QZ].

38. 42 U.S.C. § 12111(10).

39. Barry, *supra* note 9, at 26–27 (arguing that gender identity disorder was excluded from the ADA because several senators in the 1980s believed that gender non-comformity was morally harmful).

40. *Understanding the Transgender Community*, HUM. RTS. CAMPAIGN, https://www.hrc.org/resources/understanding-the-transgender-community [https://perma.cc/8TQ9-BSQU]; *see also What Does Trans Mean?*, STONEWALL (Mar. 27, 2019), https://www.stonewall.org.uk/what-does-trans-mean [https://perma.cc/456X-P72J].

2016, the estimated number of transgender individuals in the United States was 1.4 million, which was double the amount estimated in 2011.[41] According to a survey conducted by the National Center for Transgender Equality, one in ten respondents who were "out" to their immediate family reported that a family member was violent toward them because they were transgender, and 46% of respondents were verbally harassed because of their gender identity.[42] Further, 30% of respondents who had a job in the past year reported being fired, denied a promotion, or experienced mistreatment related to their gender identity, such as being forced to use a restroom that did not match their gender identity.[43]

Transgender people continue to face stigma and discrimination. Members of the LGBTQ community are often seen as mentally ill, socially deviant, and sexually predatory.[44] This is demonstrated by the placement of the GID exclusion in the ADA.[45] Although the ADA provides a broad description and coverage of disability, several conditions are specifically excluded from the ADA. In Section 12211, placed in between disorders such as "pedophilia, exhibitionism, voyeurism . . . kleptomania, or pyromania," it states that "homosexuality and bisexuality are not impairments," and specifically excludes "transvestism, transsexualism . . . [and] gender identity disorders not resulting from physical impairments" from protection.[46]

Many argue this exclusion was motivated by moral concerns.[47] During a Senate floor debate on the ADA in 1989, Senator William Armstrong argued that "mental disorders," such as "homosexuality and bisexuality . . . exhibitionism, pedophilia," should not be included, and Senator Warren Rudman agreed that "mental illness" that involves immoral, improper, or

41. ANDREW R. FLORES ET AL., HOW MANY ADULTS IDENTIFY AS TRANSGENDER IN THE UNITED STATES? 3, 6 (2016).

42. SANDY E. JAMES ET AL., THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY 4–5 (2016). The 2013 study by the National Coalition of Anti-Violence Programs found that transgender individuals were seven times more likely to experience physical violence when interacting with police compared to cisgender individuals, and more than two-thirds of the 2013 homicide victims were transgender women. NAT'L COAL. OF ANTI-VIOLENCE PROGRAMS ET AL., HATE VIOLENCE AGAINST TRANSGENDER COMMUNITIES 1 (2013).

43. JAMES ET AL., *supra* note 42, at 4.

44. *Understanding the Transgender Community*, *supra* note 40.

45. Barry, *supra* note 9, at 11.

46. 42 U.S.C. § 12211; *see also* Barry, *supra* note 9, at 10–11.

47. *See generally* Barry, *supra* note 9 (discussing the events that led to the GID exclusion); Kevin M. Barry & Jennifer L. Levi, *The Future of Disability Rights Protections for Transgender People*, 35 TOURO L. REV. 25 (2019).

illegal behavior should not be protected from discrimination.[48] Thus, one scholar argued that "GID is explicitly excluded from the ADA not because people with GID are not impaired, but rather because, in 1989, several members of Congress believed that people with GID were morally bankrupt, dangerous, and sick."[49] Despite these outdated beliefs, transgender litigants had no success bringing claims under the ADA due to the GID exclusion for over two decades.[50]

C. Understanding Gender-Related Terms

To understand the recent debates regarding the GID exclusion, it is important to understand the differences between each term, status, and condition. A transgender individual is an individual whose gender identity is different from the sex assigned to them at birth.[51] Gender identity is a person's internal sense of being a man or a woman, and for some people, their gender identity does not fit into the choice of male or female.[52] Most transgender people try to align their bodies with their gender identity, and this is known as a transition.[53] When the ADA was passed, gender identity disorder was previously described in the DSM as "a strong and persistent cross-gender identification" and "persistent discomfort about one's assigned sex or a sense of inappropriateness in the gender role of that sex."[54]

However, when the DSM (fifth edition) was updated in 2013, gender identity disorder was replaced with "gender dysphoria," which included clarifications for the criteria of gender dysphoria.[55] When a transgender individual cannot live in alignment with their gender identity, this can lead

48. Barry, *supra* note 9, at 12–14 (quoting 135 Cong. Rec. S10,753, S10,796 (daily ed. Sept. 7, 1989)). The "Armstrong Amendment," named after Senator Armstrong, enacted in 1988, created an "exemption to sexual orientation nondiscrimination protections contained in the D.C. Human Rights Act, thereby allowing education institutions affiliated with religious organizations to discriminate based on sexual orientation." John Riley, *Council Repeals Armstrong Amendment*, METRO WEEKLY (Dec. 5, 2014), https://www.metroweekly.com/2014/12/council-repeals-armstrong-amendment/ [https://perma.cc/8BWG-KGED].

49. Barry, *supra* note 9, at 4.

50. Barry & Levi, *supra* note 13, at 42.

51. *See Understanding the Transgender Community*, *supra* note 40.

52. *Transgender FAQ,* GLAAD, https://www.glaad.org/transgender/transfaq [https://perma.cc/2S29-HNU7].

53. *Id.*

54. *Gender Identity Disorder*, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (4th ed. 2000). The GID exclusion includes the words "not resulting from physical impairments." 42 U.S.C. § 12211(b)(1). Thus, the ADA presumably covers intersex individuals who experience GID because intersex conditions affect reproductive anatomy. *See generally* Yamuna Menon, *The Intersex Community and the Americans with Disabilities Act*, 43 CONN. L. REV. 1221 (2011).

55. *See* AM. PSYCHIATRIC ASS'N, *supra* note 12.

to a condition known as gender dysphoria.[56] The DSM-5 defines gender dysphoria as "[a] marked difference between the individual's expressed/ experienced gender and the gender others would assign him or her, and it must continue for at least six months," and is accompanied by "clinically significant distress" or problems functioning.[57] Thus, the new condition of gender dysphoria recognized that a difference between one's gender identity and sex assigned at birth was "not necessarily pathological."[58] Rather, it is the "clinically significant distress" that many transgender people experience due to the misalignment of their gender identity and sex assigned at birth.[59] Many transgender people do not experience distress or anxiety as a result of the difference between their gender identity and sex at birth.[60] Thus, not all transgender people experience gender dysphoria; however, only transgender individuals can be diagnosed with gender dysphoria.[61]

It is important to note that this Comment does not suggest that transgender individuals are disabled and thus should be protected under the ADA. In fact, some transgender advocates are concerned that allowing gender dysphoria to fall under ADA protection further "pathologizes being trans" by casting transgender identity as an "impairment in need of a cure" and compounds the harms already facing transgender individuals.[62] However, others argue that because gender dysphoria is separate from transgender

56. *Gender Dysphoria*, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (5th ed. 2013). Reports estimate that as many as 521 in 100,000 males (.05%) and 265 in 100,000 females (.027%) experience gender dysphoria. Madeleine Foreman et al., *Genetic Link Between Gender Dysphoria and Sex Hormone Signaling*, 104 J. CLINICAL ENDOCRINOLOGY & METABOLISM 390, 391 (2019).

57. DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, *supra* note 56; AM. PSYCHIATRIC ASS'N, *supra* note 12.

58. Francine Russo, *Where Transgender is No Longer a Diagnosis*, SCI. AM. (Jan. 6, 2017), https://www.scientificamerican.com/article/where-transgender-is-no-longer-a-diagnosis/ [https://perma.cc/VTC2-H3V6].

59. AM. PSYCHIATRIC ASS'N, *supra* note 12.

60. *See Frequently Asked Questions About Transgender People*, NAT'L CTR. FOR TRANSGENDER EQUAL. (July 9, 2016), https://transequality.org/issues/resources/frequently-asked-questions-about-transgender-people [https://perma.cc/Q8LA-957H]. For a personal commentary on being transgender with gender dysphoria and the many ways people identify as transgender *without* gender dysphoria, see Jessie Earl, *Do You Need Gender Dysphoria To Be Trans?*, ADVOCATE (Jan. 18, 2019, 5:28 AM), https://www.advocate.com/commentary/2019/1/18/do-you-need-gender-dysphoria-be-trans [https://perma.cc/UY5W-XRML].

61. *See Frequently Asked Questions About Transgender People*, *supra* note 60.

62. Szemanski, *supra* note 18, at 159–60; *see also* Kevin Barry & Jennifer Levi, Blatt v. Cabela's Retail, Inc. *and a New Path for Transgender Rights*, 127 YALE L.J. F. 373, 386–88 (2017).

identity, which is not a medical condition, and gender dysphoria is a highly stigmatized medical condition, it ought to be protected.[63] Generally, most transgender advocates are "strongly in favor of ADA coverage of gender dysphoria."[64] Nonetheless, this Comment does not aim to suggest that gender dysphoria coverage under the ADA outweighs the concerns. Rather, this Comment analyzes *Bostock*'s effect on the adjudication of gender dysphoria claims brought under the ADA.

D. Bostock v. Clayton County*: A Textualist Approach*

Until June 2020, transgender individuals did not have protection against discrimination under Title VII. However, in the landmark case, *Bostock v. Clayton County*, the Supreme Court held that Title VII provided protection against sex discrimination on the basis of sexual orientation and gender identity. This section discusses the Court's opinion, as well as their emphasis and reliance on textualism.

Despite public opinion of LGBTQ rights shifting in the United States over the past few decades, the United States' legal protections of the LGBTQ community still have a way to go.[65] Prior to *Bostock*, only twenty-three states provided statutory protections for sexual orientation, and only twenty-two states provided protections for gender identity.[66] However, in the Equal Employment Opportunity Commission's (EEOC) decision in *Macy v. Holder*, the EEOC held that discrimination against an individual because that individual is transgender is discrimination because of sex.[67] Thus, the EEOC began investigating claims of gender identity discrimination

63. Barry & Levi, *supra* note 62, at 386–87.

64. *Id.* at 389; *see also* Brief for Gay & Lesbian Advocates & Defenders et al. as Amici Curiae in Opposition to Defendant's Partial Motion to Dismiss, Blatt v. Cabela's Retail, Inc., No. 5:14-CV-04822, 2017 WL 2178123 (E.D. Pa. May 18, 2017) (No. 33), 2015 WL 13215247.

65. *See generally* Charles Kenny, *Attitudes Toward Gays and Lesbians Are Changing in the Developing World Too*, CTR. FOR GLOB. DEV. (Oct. 19, 2017), https://www.cgdev.org/blog/attitudes-toward-gays-and-lesbians-are-changing-developing-world-too [https://perma.cc/6FER-7XTM].

66. Jim Paretti, Michael Hui & Julie Stockton, *Supreme Court Rules that Gay, Lesbian, and Transgender Individuals Are Protected Under Title VII of the Civil Rights Act*, LITTLER (June 15, 2020), https://www.littler.com/publication-press/publication/supreme-court-rules-gay-lesbian-and-transgender-individuals-are [https://perma.cc/W9P7-YC6T]. The following states provide protection for sexual orientation and gender expression in the workplace: California, Colorado, Connecticut, Delaware, District of Columbia, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oregon, Rhode Island, Utah, Vermont, Virginia, and Washington. *Id.*

67. Macy v. Holder, No. 0120120821, 2012 WL 1435995 (E.E.O.C. Apr. 20, 2012).

in 2012.[68] Moreover, a change in societal attitudes toward members of the LGBTQ community can be seen in the landmark decision of *Bostock v. Clayton County*, as well as cases leading up to the decision.[69] In 1989, the Supreme Court held that discrimination based on an employee's failure to conform to sex stereotypes is a form of sex discrimination,[70] and in 2015, the Supreme Court struck down state laws that banned same-sex marriage.[71] Despite the changes in societal attitudes, courts utilized the "analytical tool of textualism," which was associated with the conservative legal movement.[72] Much of this textualist approach was sparked by Justice Antonin Scalia.[73] For instance, in *Oncale v. Sundowner Offshore Services*, the Court held that same-sex harassment is actionable, and Justice Scalia famously stated:

> male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII. But statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.[74]

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68. *See Processing Complaints Alleging Sexual Orientation or Gender Identity Discrimination by Federal Employees*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/federal-sector/management-directive/processing-complaints-discrimination-lesbian-gay-bisexual-and [https://perma.cc/5W9C-A3DH] (recommending complaints of sexual orientation discrimination should be brought under the federal sector EEO complaint process at 29 C.F.R. § 1614.01).

69. *Id.*

70. Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

71. Obergefell v. Hodges, 576 U.S. 644 (2015).

72. Kate Sedey et al., Bostock v. Clayton County*: Historical Perspectives and Implications for Employment Rights and Responsibilities*, AM. BAR ASS'N (Sept. 10, 2020), https://www.americanbar.org/events-cle/ecd/ondemand/402998442/ [https://perma.cc/S858-NFUX].

73. *See* Jonathan R. Siegel, *Legal Scholarship Highlight: Justice Scalia's Textualist Legacy*, SCOTUS BLOG (Nov. 14, 2017, 10:48 AM), https://www.scotusblog.com/2017/11/legal-scholarship-highlight-justice-scalias-textualist-legacy/amp/ [https://perma.cc/4XQA-DN8N]; Jonathan Skrmetti, *Symposium: The Triumph of Textualism: "Only the Written Word Is the Law,"* SCOTUS BLOG (June 15, 2020, 9:04 PM), https://www.scotusblog.com/2020/06/symposium-the-triumph-of-textualism-only-the-written-word-is-the-law/ [https://perma.cc/55X9-GB9L] (containing Justice Elena Kagan's famous quote in her eulogy remarks of Justice Scalia, "[w]e are all textualists now."); *see also* Sedey et al., *supra* note 72.

74. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79 (1998). For a discussion on Justice Scalia's textualist approach and legacy, see generally Jonathan R. Siegel, *The Legacy of Justice Scalia and His Textualist Ideal*, 85 GEO. WASH. L. REV. 857 (2017).

On June 15, 2020, the Supreme Court resolved cases from three different circuits and held that LGBTQ employees are protected from workplace discrimination under Title VII of the Civil Rights Act of 1964.[75] In *Bostock*, the Court was tasked with interpreting the meaning of the word "sex" in Title VII, which prohibits discrimination "because of . . . sex."[76] This opinion has been hailed as a "textualist triumph" and a "textualist's dream."[77] Plaintiff Gerald Bostock's attorney, Brian J. Sutherland, noted that during oral arguments before the Supreme Court in October 2019, "some commentators and journalists posed that it would be a test of whether the conservative members of the Court truly believed in textualism."[78] To many people's surprise, the Court passed this test with a 6-3 decision, written by Justice Neil Gorsuch, in favor of Bostock and the other plaintiffs.[79]

Throughout the decision, Justice Gorsuch applied a textualistic approach in finding that Title VII's protection extends to sexual orientation and gender identity.[80] Justice Gorsuch noted that a statutory term is normally interpreted in accordance with the "ordinary public meaning" at the time of the statute's enactment.[81] Upon a plain reading of the statute, the Court held that firing a person because of their sexual orientation or gender identity is necessarily sex discrimination because one cannot consider a person's

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75. Bostock v. Clayton County, 140 S. Ct. 1731, 1737 (2020).

76. *Id.*; 42 U.S.C. § 2000e-2(a).

77. *See* Ezra Ishmael Young, *Bostock Is a Textualist Triumph*, JURIST (June 25, 2020, 3:53 PM), https://www.jurist.org/commentary/2020/06/ezra-young-bostock-textualist-triumph/ [https://perma.ccT694-A29V]; Hunter Poindexter, *A Textualist's Dream: Reviewing Justice Gorsuch's Opinion in* Bostock v. Clayton County, U. CIN. L. REV. (June 23, 2020), https://uclawreview.org/2020/06/23/a-textualists-dream-reviewing-justice-gorsuchs-opinion-in-bostock-v-clayton-county/#_edn39 [https://perma.cc/9GYB-EW9U]. Conversely, others have been highly critical of the *Bostock* opinion, stating that *Bostock* suggests "that any interpretation of a statutory text that its words can bear is a legally sufficient basis for adopting that interpretation." Nelson Lund, *Unleashed and Unbound: Living Textualism in* Bostock v. Clayton County, FEDERALIST SOC'Y REV. (Aug. 6, 2020), https://fedsoc.org/commentary/publications/unleashed-and-unbound-living-textualism-in-bostock-v-clayton-county [https://perma.cc/J7KS-DYZT]; *see also* Michael Ramsey, *Intentionalist and Textualist Critiques of* Bostock v. Clayton County, ORIGINALISM BLOG (July 9, 2020), https://originalismblog.typepad.com/the-originalism-blog/2020/07/intentionalist-and-textualist-critiques-of-bostock-v-clayton-countymichael-ramsey.html [https://perma.cc/PU2T-M5SY].

78. Sedey et al., *supra* note 72; *see also* Richard Primus, *The Supreme Court Case Testing the Limits of Gorsuch's Textualism*, POLITICO (Oct. 15, 2019), https://www.politico.com/magazine/story/2019/10/15/lgbt-discrimination-supreme-court-gorsuch-textualism-229850/ [https://perma.cc/2HUH-ZF8H] ("[I]f Gorsuch were to write that employers are able to discriminate on the basis of gender identity or sexual orientation—whether because of a concern about precipitating social change or otherwise—critics will surely charge that his textualism is more rhetorical than real.").

79. *Bostock*, 140 S. Ct. at 1731.

80. *Id.*; *see generally* Skrmetti, *supra* note 73.

81. *Bostock*, 140 S. Ct. at 1738.

sexual orientation without first considering the person's sex.[82] The Court provides an example of an employer with two employees, both of whom are attracted to men.[83] If the employer fires the male employee for being attracted to men, then the employer discriminates against the male employee for traits the employer tolerates in the female employee.[84] Moreover, the Court ruled that by discriminating against transgender individuals, the employer unavoidably discriminates against individuals with "one sex identified at birth and another today."[85] The Court rejected the argument that Congress did not intend to have Title VII extend to sexual orientation or gender identity; thus, the statute should be interpreted based on the expected application of the drafters.[86] The Court noted, "the limits of the drafters' imagination supply no reason to ignore the law's demands. When the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law."[87]

While the dissenters, Justice Brett Kavanaugh and Justice Samuel Alito, joined by Justice Clarence Thomas, agreed that the Court should enforce the plain meaning of the statute, the dissenters disagreed on the meaning.[88] In Justice Alito's dissent, he contends:

> The Court attempts to pass off its decision as the inevitable product of the textualist school of statutory interpretation championed by our late colleague Justice Scalia, but no one should be fooled. The Court's opinion is like a pirate ship. It sails under a textualist flag, but what it actually represents is a theory of statutory interpretation

82. *See id.* at 1741.

83. *Id.* Some argue that the Court's failure to mention bisexual individuals was "bisexual erasure" because the Court's analysis focused on gay and transgender individuals. *See generally* Nancy C. Marcus, Bostock v. Clayton County *and the Problem of Bisexual Erasure*, 115 NW. U. L. REV. 223 (2020); William N. Eskridge Jr. & Christopher R. Riano, Bostock*: A Statutory Super-Precedent for Sex and Gender Minorities*, AM. CONST. SOC'Y (July 1, 2020), https://www.acslaw.org/expertforum/bostock-a-statutory-super-precedent-for-sex-and-gender-minorities/ [https://perma.cc/6QA4-JQ27].

84. *Bostock*, 140 S. Ct. at 1741. For a detailed explanation on the examples used in the Court's opinion, see Guha Krishnamurthi & Peter Salib, Bostock *and Conceptual Causation*, YALE J. ON REGUL. (July 22, 2020), https://www.yalejreg.com/nc/bostock-and-conceptual-causation-by-guha-krishnamurthi-peter-salib/ [https://perma.cc/BF3P-57FG].

85. *Bostock*, 140 S. Ct. at 1746.

86. *Id.* at 1737; *see also* Sedey et al., *supra* note 72; Skrmetti, *supra* note 73.

87. *Bostock*, 140 S. Ct. at 1737.

88. *Id.* at 1755.

> that Justice Scalia excoriated—the theory that courts should "update" old statutes so that they better reflect the current values of society.[89]

Justice Alito contends that at the time Title VII was enacted, "sex" meant discrimination "because of the genetic and anatomical characteristics that men and women have at the time of birth," and no dictionary definition defined "sex" to mean sexual orientation or gender identity.[90] On the other hand, Justice Kavanaugh stressed the distinction between ordinary meaning, which courts must adhere to, and literal meaning.[91] Justice Kavanaugh contends that there is a difference between sex discrimination and sexual orientation discrimination, and that the majority incorrectly interpreted "sex" as a means to "usurp the role of Congress."[92] Despite the disagreement over the interpretation of "sex" among the Justices, the second major takeaway from *Bostock* is that "textualism is here to stay."[93]

A third major takeaway from the *Bostock* decision was the analysis of what Title VII means when it states "because of" sex.[94] In the past, many employment discrimination claims were dismissed on the basis that an employer had other business reasons for an adverse employment action.[95] Some courts held that an employee cannot recover unless the employee demonstrates that their protected characteristic was the *only* reason the

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89. *Id.* at 1755–56 (Alito, J., dissenting); *see also* Stephanie C. Generotti & Caren Skversky Marlowe, *Supreme Court Justices Dissent: The Opposition to Extending Title VII's Protections to Gay and Transgender Employees*, OGLETREE DEAKINS (June 18, 2020), https://ogletree.com/insights/supreme-court-justices-dissent-the-opposition-to-extending-title-viis-protections-to-gay-and-transgender-employees/ [https://perma.cc/38C9-EV23]; Ed Whelan, *A 'Pirate Ship' Sailing Under a Textualist Flag*, NAT'L REV. (June 15, 2020, 1:01 PM), https://www.nationalreview.com/bench-memos/a-pirate-ship-sailing-under-a-textualist-flag/ [https://perma.cc/DAK6-X465].

90. *Bostock*, 140 S. Ct. at 1756 (Alito, J., dissenting); *see also* Andrew Koppelman, Bostock*: What Two Conservatives Realized and Three Dissenters Missed*, AM. PROSPECT (June 15, 2020), https://prospect.org/justice/bostock-what-two-conservatives-realized-and-three-dissenters-missed/ [https://perma.cc/6AZH-4837].

91. *Bostock*, 140 S. Ct. at 1824 (Kavanaugh, J., dissenting).

92. *Id.* at 1835–36.

93. Sedey et al., *supra* note 72; *see also* Skrmetti, *supra* note 73.

94. *See* Whelan, *supra* note 89.

95. *See generally* Marjorie Johnson, *But-for Causation, Not Motivating Factor Standard, Applies to ADA Bias Claims*, WOLTERS KLUWER (Aug. 23, 2019), https://lrus.wolterskluwer.com/news/employment-law-daily/but-for-causation-not-motivating-factor-standard-applies-to-ada-bias-claims/91612/ [https://perma.cc/PD5E-ZUJM]; *Supreme Court Adopts "But For" Causation Standard for Title VII Retaliation Claims*, PROSKAUER (June 26, 2013), https://www.proskauer.com/alert/supreme-court-adopts-but-for-causation-standard-for-title-vii-retaliation-claims [https://perma.cc/MKH6-E439]; Univ. Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 362–63 (2013) (rejecting the Fifth Circuit's less burdensome "motivating factor" test and holding that a plaintiff in a Title VII retaliation claim must prove that retaliation was "the but for" cause of the employer's adverse action).

employer discriminated against them.[96] However, Justice Gorsuch provided a clarification on the "but for" standard of causation by stating that sexual orientation and gender identity only need to be "*a* but-for" cause of discrimination, not "*the* but-for" cause.[97] Thus, an employer cannot escape liability by citing other factors that contributed to its challenged employment decision.[98] As long as the employer's "sex was one but-for cause of that decision, that is enough to trigger the law."[99]

III. IMPLICATIONS OF *BOSTOCK*'S NEW "BUT FOR" CAUSATION STANDARD ON THE ADA'S "ON THE BASIS" OF CAUSATION STANDARD

The Supreme Court has yet to provide a definitive causation standard under the ADA; however, the clarification of the "but for" standard under *Bostock* will likely change the causation standard for cases brought under the ADA. Given the similarities between the antidiscrimination statutes that affect employment—Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967 (ADEA), and the ADA—courts' analyses under each of these statutes are often applicable to each other.[100] Thus, the Court's clarification in *Bostock* that *a* "but-for" factor need not be *the only* factor in an employment decision will have implications on all other civil rights statutes' causation standards, including the ADA.

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96. James G. Petrie & Christopher T. Page, Bostock v. Clayton County, Georgia*: A Turning Point for LGBTQ+ Employees and Other Federal Employment Discrimination Principles*, BRICKER & ECKLER (July 13, 2020), https://www.bricker.com/insights-resources/publications/bostock-v-clayton-county-georgia-a-turning-point-for-lgbtq-employees-and-other-federal-employment-discrimination-principles [https://perma.cc/BUL7-CLKL].

97. *Bostock*, 140 S. Ct. at 1740 (emphasis added).

98. *Id.* at 1739; *see also* Price Waterhouse v. Hopkins, 490 U.S. 228, 241 (1989) (noting that Title VII was "meant to condemn even those decisions based on a mixture of legitimate and illegitimate considerations").

99. *Bostock*, 140 S. Ct. at 1739; *see also* Kelly S. Hughes, *'But-For' Causation under* Bostock, OGLETREE DEAKINS (June 24, 2020), https://ogletree.com/insights/but-for-causation-under-bostock/ [https://perma.cc/C49R-FWF8].

100. *See generally* Kari E. Levine, Nassar*'s Effect on the Causation Standard*, EMP. L. STRATEGIST (L.J. Newsls.), Dec. 2013; *U.S. Supreme Court Issues Two Decisions on Causation Standard Under Anti-Discrimination Statutes*, KUTAKROCK (Apr. 24, 2020), https://www.kutakrock.com/newspublications/publications/2020/04/supreme-court-issues-decisions-causation-standard [https://perma.cc/S5DB-SXB4]; McNely v. Ocala Star-Banner Corp., 99 F.3d 1068 (11th Cir. 1996) (analyzing the ADA using Supreme Court precedent interpreting "because of" in Title VII cases).

A. Current Causation Standard Under the ADA

In 2005, the Ninth Circuit addressed in *Head v. Glacier Northwest* "whether the ADA's use of the causal language 'because of,' 'by reason of,' and 'because' means that discriminatory and retaliatory conduct is proscribed only if it was *solely* because of" an employee's disability.[101] The Ninth Circuit held that under the plain language of the ADA, "solely [was] not the appropriate causal standard," and concluded that a motivating factor standard was "most consistent with the plain language of the ADA."[102]

However, in 2009, the Supreme Court, in *Gross v. FBL Financial Services*, held that the causation standard under the ADEA was the "but for" standard.[103] The Court compared the statutory language of the ADEA with that of Title VII and concluded that discrimination "because of" an individual's age requires the plaintiff to "prove that age was the 'but-for' cause of the employer's adverse decision."[104] The Court declined to apply the "motivating factor" standard that had been used in other federal discrimination cases.[105] Four years later, in *University of Texas Southwestern Medical Center v. Nassar*, the Supreme Court also declined to extend the "motivating factor" standard to Title VII retaliation claims and held that the causation standard was "but for," like the ADEA.[106]

Given the judicial landscape after *Gross* and *Nassar*, in 2019, the Ninth Circuit overruled its precedent in *Head* and held that the "but for" causation standard applied to discrimination claims under the ADA, not the motivating factor standard.[107] In *Murray v. Mayo Clinic*, Murray sued his employer for discrimination in violation of the ADA and claimed his employment was terminated because of his disability.[108] At trial, Murray

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101. Head v. Glacier Nw. Inc., 413 F.3d 1053, 1063–64 (9th Cir. 2005), *abrogated by* Murray v. Mayo Clinic, 934 F.3d 1101 (9th Cir. 2019).

102. *Id.* at 1065.

103. Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 180 (2009). For a discussion on how *Gross* eroded older workers' protection, see generally Michael Foreman, Gross v. FBL Financial Services – *Oh So Gross!*, 40 U. MEM. L. REV. 681 (2010).

104. *Gross*, 557 U.S. at 177–78.

105. *Id.* at 180. *See generally* Bran Noonan, *The Impact of* Gross v. FBL Financial Services, Inc. *and the Meaning of the But-For Requirements*, 43 SUFFOLK U. L. REV. 921 (2010) (discussing the impact of *Gross* on litigation brought under the ADEA).

106. Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 362 (2013).

107. Murray v. Mayo Clinic, 934 F.3d 1101, 1105 (9th Cir. 2019); *see also* Braden Campbell, *The Court Won't Lower Bar for Workers in ADA Cases*, LAW360 (Apr. 27, 2020, 6:20 PM), https://www.law360.com/articles/1267692/high-court-won-t-lower-bar-for-workers-in-ada-cases [https://perma.cc/6B4B-3S9Y] ("The disabled plaintiff faces the virtually impossible task of attributing the employer's conduct to the plaintiff's disability status, to the exclusion of all other causes, while the employer is permitted simply to ignore the disability and offer up any number of reasons for termination.").

108. *Murray*, 934 F.3d at 1102.

requested jury instructions that stated he only had to show his disability was a "motivating factor" in his termination, which meant that his disability did not need to be the only or main reason he was terminated.[109] Murray relied on the Ninth Circuit's decision in *Head v. Glacier Northwest, Inc.*, wherein the court held that a plaintiff need only show that the plaintiff's disability was a motivating factor in the employer's adverse employment action.[110] The trial court ruled that the "but for" standard was the correct standard based on the *Gross* and *Nassar* decisions.[111] On appeal, the Ninth Circuit held that *Head* was no longer good law because "*Head's* reasoning is clearly irreconcilable with *Gross* and *Nassar*," and a plaintiff bringing a claim under the ADA "must show the adverse employment action would not have occurred but for the disability."[112] The Ninth Circuit in *Murray* held that the ADA, similar to the retaliation section of the ADEA, "does not contain any explicit 'motivating factor' language."[113] The Supreme Court has declined to resolve the causation standard under the ADA.[114]

B. A New, Clarified "But-For" Standard

Despite the Supreme Court declining to resolve the causation standard under the ADA, the Court's clarification in *Bostock* of the "but for" causation standard under Title VII should have implications for the ADA's causation standard because many circuit courts have adopted the "but for" standard of causation under the ADA.[115] The majority opinion in *Bostock*

109. *Id.*
110. *Id.*
111. *Id.* at 1103. *See generally* Andrew Verstein, *The Jurisprudence of Mixed Motives*, 127 YALE L.J. 1106 (2018) (discussing the law's many motive tests and rationales).
112. *Murray*, 934 F.3d at 1105. The Second Circuit also rejected its prior "mixed motive" precedent and adopted the "but for" causation standard in disability discrimination cases brought under the ADA. Natofsky v. City of New York, 921 F.3d 337, 349 (2d Cir. 2019). The Second Circuit joined the Fourth, Sixth, and Seventh Circuits in adopting the "but for" standard. *See* Gentry v. E.W. Partners Club Mgmt. Co. Inc., 816 F.3d 228, 235 (4th Cir. 2016); Lewis v. Humboldt Acquisition Corp., 681 F.3d 312, 318 (6th Cir. 2012); Serwatka v. Rockwell Automation, Inc., 591 F.3d 957, 962 (7th Cir. 2010).
113. *Murray*, 934 F.3d at 1106.
114. Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 343 (2013); *see also* Jennifer Carsen, *Supreme Court Won't Define ADA's Discrimination Standard*, HR DIVE (May 1, 2020), https://www.hrdive.com/news/supreme-court-wont-define-adas-discrimination-standard/577085/ [https://perma.cc/4CB3-8ELP].
115. *See* Joseph Benincasa & Valerie Timmerman, *The Future of Title VII Claims After Bostock*, ST. JOHN'S LAB. & EMP. L.F. (Sept. 1, 2020), http://stjclelblog.org/2020/09/the-future-of-title-vii-claims-after-bostock/ [https://perma.cc/FYG8-34QC].

clarifies that workers do not need to prove that their protected characteristic was the sole cause of the adverse employment action under the "but for" standard.[116] Thus, a protected characteristic is a "but for" factor even if it is not the *only* factor for the employment action.[117] In regards to Title VII, the traditional but-for causation standard means that an employer cannot defend its employment action by simply citing another reason that contributed to its employment decision.[118] Part of the Court's reasoning was that "Congress could have taken a more parsimonious approach" and "could have added 'solely' to indicate that actions taken 'because of' the confluence of multiple factors do not violate the law," as Congress has in other statutes.[119]

Title VII's language that prohibits discrimination "because of" certain traits closely resembles the ADA's language, which prohibits discrimination "on the basis of" disability.[120] It is highly anticipated that plaintiffs will use the *Bostock* ruling in other federal discrimination law cases where the "but for" standard applies, such as the ADA and the ADEA, to argue for a different causation standard.[121] Additionally, attorneys who focus on federal employment discrimination laws anticipate that many more cases brought under the ADA will be able to survive summary judgment.[122] The ADEA uses similar language to Title VII and states that it is unlawful to discriminate "because of" an individual's age.[123]

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116. Bostock v. Clayton County, 140 S. Ct. 1731, 1748 (2020). On the other hand, in another Supreme Court opinion that came out in 2020, the Court held that the causation standard in section 1981 cases is the "but for" standard. Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media, 140 S. Ct. 1009, 1015 (2020); *see also* Sandra Sperino, Comcast *and* Bostock *Offer Clarity on Causation Standard*, AM. BAR ASS'N (Jan. 12, 2021), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/civil-rights-reimagining-policing/comcast-and-bostock-offer-clarity-on-causation-standard/ [https://perma.cc/73GX-PULM].

117. *See* Braden Campbell, *Justices' LGBT Ruling May Mean More Bias Cases Reach Trial*, LAW360 (June 19, 2020, 7:08 PM), https://www.law360.com/articles/1285042 [https://perma.cc/LD27-A8E6].

118. *Bostock*, 140 S. Ct. at 1739.

119. *Id.*; *see, e.g.*, 11 U.S.C. § 525(a) ("[A] governmental unit may not . . . discriminate with respect to employment against, a person that is or has been a debtor under this title or a bankrupt . . . solely because such bankrupt or debtor is or has been a debtor under this title . . . .").

120. 42 U.S.C. §§ 2000e-2(a)(1), 12102; *see also* Campbell, *supra* note 117.

121. *See* Campbell, *supra* note 117; *see also* Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 176 (2009) (holding that the standard of causation for ADEA claims is "but for").

122. *See* Campbell, *supra* note 117; *see generally* Michelle E. Phillips & Paul Patten, Bostock *and Beyond: Legal Compliance with the Supreme Court's Mandates*, JACKSONLEWIS (Sept. 17, 2020), https://www.jacksonlewis.com/event/bostock-and-beyond-legal-compliance-supreme-courts-mandates [https://perma.cc/7T54-A6G8].

123. 29 U.S.C. § 623(a). However, Justice Gorsuch specifically rejected the motivating factor causation standard in section 1981 cases. Comcast Corp. v. Nat'l Ass'n of Afr.

In a case decided by the Seventh Circuit Court of Appeals in July 2020, the court held that the appellant failed to meet the burden that, "but for her disability," the employer would not have terminated the appellant's employment.[124] The appellant did not argue for another causation standard and both parties conceded that the appellant must show that her employer would not have fired her but for her disability.[125] Nonetheless, the court noted that the causation standard "is still technically an open one" and "[t]here seems little doubt that our sister circuits' approach is the correct one," upon citing *Bostock*'s proposition that the "ordinary meaning of 'because of' is 'by reason of' or 'on account of.'"[126] Although the court did not resolve the question of the causation standard post-*Bostock*, the court's nod to *Bostock* indicates that courts will begin to grapple with Justice Gorsuch's clarification of the "but for" standard.[127]

Additionally, in the Sixth Circuit Court of Appeals, the plaintiff appealed the lower court's order to grant defendant's motion for summary judgment because the plaintiff provided insufficient evidence to prove that age discrimination was the "but for" cause of her termination.[128] The trial court held that under *Gross*, the plaintiff must do more than "show that age was a motivating factor in the adverse action."[129] In the appellant's brief, the appellant contended that given the recent *Bostock* opinion, "there is a real question as to whether the 'but for' standard in ADEA cases is still the law."[130] The appellant argued that because the ADEA contains identical

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Am.-Owned Media, 140 S. Ct. 1009, 1017–18 (2020). Nonetheless, the language of section 1981 does not mirror Title VII, as it reads, "All persons within the jurisdiction of the United States shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens . . . ." 42 U.S.C. § 1981(a).

124. McCann v. Badger Mining Corp., 965 F.3d 578, 582 (7th Cir. 2020); *see also* Murray v. Mayo Clinic, 934 F.3d 1101, 1106 n.6 (9th Cir. 2019) (noting that the change in language under the ADAAA from prohibiting employers from discriminating "because of a disability" to "on the basis of disability" did not alter the causation standard).

125. *McCann*, 965 F.3d at 588.

126. *Id.* at 588 n.46 (quoting Bostock v. Clayton County, 140 S. Ct. 1731, 1739 (2020)). The "but-for test directs us to change one thing at a time and see if the outcome changes. If it does, we have found a but-for cause." *Bostock*, 140 S. Ct. at 1739.

127. *McCann*, 965 F.3d at 588 n.46; *see also* Campbell, *supra* note 117.

128. Pelcha v. MW Bancorp, Inc., 455 F. Supp. 3d 481 (S.D. Ohio 2020), *rev'd*, Pelcha v. MW Bancorp, Inc., 988 F.3d 318 (6th Cir. 2021), *cert. denied sub nom.* Pelcha v. Watch Hill Bank, 142 S. Ct. 461 (2021).

129. *Id.* at 496 (quoting Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 177–78 (2009)).

130. Brief of Appellant at 17–18, Pelcha v. MW Bancorp, Inc., 988 F.3d 318 (6th Cir. 2021) (No. 20-3511). In January 2020, the House passed the Protecting Older Workers Against Discrimination Act, which would allow for mixed-motive claims to be brought under

"because of" language, the "legal analysis of Justice Gorsuch's majority opinion in *Bostock* must extend to workplace discrimination suits" under the ADEA.[131] Therefore, a plaintiff should be able to survive summary judgment if the plaintiff can submit evidence that would allow a jury to find that age was *a* "but for" cause of the plaintiff's termination, even if the employer had other reasons for the termination.[132] However, the causation standard under Title VII was not an issue to be decided in *Bostock* and may not be binding on lower courts.[133] Nonetheless, the Sixth Circuit reversed the trial court's decision, and post-*Bostock*, more cases brought under the ADA will likely survive summary judgment and go to trial.[134]

IV. *BOSTOCK*'S IMPACT ON TRANSGENDER INDIVIDUALS UNDER THE EQUAL PROTECTION CLAUSE

This section analyzes the effect of *Bostock* on the Equal Protection Clause and argues that the GID Exclusion violates equal protection. As Justice Alito predicted in his dissent, *Bostock* will and already has "exert[ed] a gravitational pull in constitutional cases," including cases brought under the Equal Protection Clause.[135] The Equal Protection Clause of the Fourteenth Amendment provides that every person shall have equal protection of the laws.[136] When courts review a challenge to a law under

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the ADEA and alter the causation standard. *See* Allen Smith, *House Passes Protecting Older Workers Against Discrimination Act*, SHRM (Jan. 16, 2020), https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/house-passes-protecting-older-workers-against-discrimination-act.aspx [https://perma.cc/37ZC-LCFB]. However, the bill was never passed by the Senate. *H.R. 1230 (116th): Protecting Older Workers Against Discrimination Act*, GOVTRACK, https://www.govtrack.us/congress/bills/116/hr1230 [https://perma.cc/W5D7-QN6M].

131. Brief of Appellant, *supra* note 130, at 23.

132. *Id.*; *see also* Jessica Asbridge, *Eleventh Circuit Raises Bar for Employers Seeking Summary Judgment in Discrimination Cases*, JD SUPRA (June 14, 2018), https://www.jdsupra.com/legalnews/eleventh-circuit-raises-bar-for-62779/ [https://perma.cc/KH9V-MHAF] (noting that an Eleventh Circuit decision wherein the court held that the *McDonnell Douglas* burden-shifting framework does not apply when a plaintiff offers direct evidence of discrimination as part of a "recent trend of reducing the burden on employment discrimination plaintiffs at the summary judgment stage, making it easier for them to proceed to trial before a jury").

133. *Has the U.S. Supreme Court Turned the Proof Standard in Title VII and Other Federal Employment Laws on its Head?*, BELL NUNNALLY (Aug. 24, 2020), https://www.bellnunnally.com/has-the-us-supreme-court-turned-the-proof-standard-in-title-vii-and-other-federal-employment-on-its-head [https://perma.cc/7DCP-M54S].

134. *See* Campbell, *supra* note 117; Phillips & Patten, *supra* note 122.

135. Bostock v. Clayton County, 140 S. Ct. 1731, 1783 (2020) (Alito, J., dissenting).

136. U.S. CONST. amend. XIV, § 1.

the Equal Protection Clause, the level of judicial scrutiny depends on the type of classification.[137]

A. Background: Judicial Scrutiny Under the Equal Protection Clause

The level of scrutiny applied in courts analyzing statutes under the Equal Protection Clause are "strict," "intermediate," or "rational basis."[138] Classifications based on race, religion, and national origin are considered "suspect"; thus, strict scrutiny applies.[139] The government must show that it has a "compelling interest that justifies the law" and that the law "is narrowly tailored such that there are no less restrictive means available to effectuate the desired end."[140] Intermediate scrutiny applies to classifications based on gender and "illegitimat[e]" children, and these groups are often called "quasi-suspect groups."[141] Under this standard, the classification must "be substantially related to an important governmental objective."[142] Classifications subject to strict or intermediate scrutiny are often referred to collectively as "heightened scrutiny," and given the government's burden of proof, they are usually found unconstitutional.[143] All other government classifications that do not target suspect classes or fundamental government interests are subject to rational basis review.[144] Under this standard of

137. 16B AM. JUR. 2D *Constitutional Law* § 849 (2021); *see also Levels of Scrutiny Under the Equal Protection Clause*, EXPLORING CONST. L., http://law2.umkc.edu/faculty/projects/ftrials/conlaw/epcscrutiny.htm [https://perma.cc/8L5P-D645].

138. 16B AM. JUR. 2D *Constitutional Law* § 849 (2021); *see also* Kevin M. Barry et al., *A Bare Desire to Harm: Transgender People and the Equal Protection Clause*, 57 B.C. L. REV. 507, 541 (2016).

139. 16B AM. JUR. 2D *Constitutional Law* § 854 (2021).

140. *Id.*

141. *Id.* §§ 853, 859. *See generally* Craig v. Boren, 429 U.S. 190 (1976); Eric J. Stockel, United States v. Virginia*: Does Intermediate Scrutiny Still Exist?*, 13 TOURO L. REV. 229 (1996) (discussing gender discrimination jurisprudence and the heightened scrutiny standard).

142. 16B AM. JUR. 2D *Constitutional Law* § 853 (2021). A party seeking to uphold a statute that classifies individuals based on their gender must demonstrate an "exceedingly persuasive justification" for the classification. Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982) (quoting Kirchberg v. Feenstra, 450 U.S. 455, 461 (1981)). *See generally* Peter S. Smith, United States v. Virginia*: The United States Supreme Court Applied Heightened Scrutiny to Gender Discrimination in Ruling that Virginia's Only Single-Sex Public Undergraduate Institution Violates Equal Protection Guarantees*, 23 J. CONTEMP. L. 279 (1997) (discussing the heightened scrutiny under *United States v. Virginia*).

143. Barry et al., *supra* note 138, at 542.

144. 16B AM. JUR. 2D *Constitutional Law* § 850 (2021). *But see* Anita K. Blair, *Constitutional Equal Protection, Strict Scrutiny, and the Politics of Marriage Law*, 47

review, government action does not violate the Equal Protection Clause when it "rationally furthers the purpose identified by the state."[145] Given this relaxed standard, courts hardly ever conclude that a government action violates the Fourteenth Amendment.[146] To determine whether a classification warrants heightened scrutiny, the court considers four factors: "(1) the lack of relevance of the characteristic upon which the classification is based, (2) a history of discrimination against those with the characteristic, (3) the immutability of the characteristic, and (4) the minority status or political powerlessness of those with the characteristic."[147]

Most federal courts have held that transgender individuals are not members of a suspect class under the Equal Protection Clause; thus, rational basis review applies.[148] In *Romer v. Evans* in 1996, the Supreme Court invalidated a state constitutional amendment that banned protections for lesbian, gay, and bisexual individuals, but used the rational basis standard of review.[149] In 2013, in *United States v. Windsor*, the Supreme Court invalidated a section of the Defense of Marriage Act that excluded same-sex marriages.[150] However, the Court did not state which level of scrutiny applied.[151] In *Obergefell v. Hodges* in 2015, the Court struck down state laws that prohibited marriage equality because the laws violated gay and lesbian couples' right to marriage under the Due Process and Equal Protection Clauses.[152] Once again, the Court did not explicitly invoke heightened scrutiny on the basis

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CATH. U. L. REV. 1231, 1234 ("Strict scrutiny does not create an irrebuttable presumption of unconstitutionality; by its own terms, it allows some limited forms of legal discrimination.").

145. 16B AM. JUR. 2D *Constitutional Law* § 850 (2021).

146. *Id.* Critiques have called the rational basis test "toothless" and an "effectively irrebuttable presumption of constitutionality." *The Notorious RBT (Rational Basis Test)*, INST. FOR JUST., https://ij.org/center-for-judicial-engagement/programs/the-notorious-rbt-rational-basis-test/ [https://perma.cc/X4XT-Z455]. Between the 1971 and 2014 Terms, the Supreme Court only held seven laws in violation of equal protection under the rational-basis review. Raphael Holoszyc-Pimentel, *Reconciling Rational-Basis Review: When Does Rational Basis Bite?*, 90 N.Y.U. L. REV. 2070, 2071 (2015).

147. Barry et al., *supra* note 138, at 542.

148. Jennifer Cobb & Myra McKenzie-Harris, *"And Justice for All" . . . Maybe: Transgender Employee Rights in America*, 34 ABA J. LAB. & EMP. L. 91, 101 (2019).

149. Romer v. Evans, 517 U.S. 620, 635–36 (1996).

150. United States v. Windsor, 570 U.S. 744, 775 (2013); *see also* Lee-ford Tritt, United States v. Windsor*: The Marital Deduction That Changed Marriage*, 42 ACTEC L.J. 113, 113–15, 117 (2016) (discussing *Windsor*'s impact beyond tax law and estate planning).

151. *See generally Windsor*, 570 U.S. 744; *see also* Chemerinsky, *supra* note 2.

152. Obergefell v. Hodges, 576 U.S. 644, 675 (2015).

that same-sex couples were a suspect or quasi-suspect class.[153] Rather, the heightened scrutiny was based on marriage as a fundamental right.[154]

The majority opinion in *Bostock* held that discrimination based on sexual orientation and gender identity is sex discrimination,[155] and sex discrimination has been subject to intermediate scrutiny.[156] In *United States v. Virginia* in 1996, the Supreme Court held that sex discrimination is permissible only if the government can demonstrate an "exceedingly persuasive government justification."[157] Therefore, *Bostock* has implications for the level of scrutiny used in sexual orientation and gender identity discrimination cases under equal protection because intermediate scrutiny applies to sex discrimination cases.[158]

B. The GID Exclusion Should Be Subject to Heightened Scrutiny: Transgender Discrimination is Sex Discrimination

While a few cases have addressed the ADA's GID exclusion, no cases have addressed the constitutionality of the exclusion.[159] Even before *Bostock*, transgender litigants argued that the ADA's exclusion of gender identity disorders not resulting from physical impairments is in violation of the Equal Protection Clause.[160] In 2017 in *Blatt v. Cabela's Retail*, Blatt, a transgender woman with gender dysphoria, sued her employer,

153. *See id.*; Sharita Gruberg, *Beyond* Bostock*: The Future of LGBTQ Civil Rights*, CTR. FOR AM. PROGRESS (Aug. 26, 2020, 9:01 AM), https://www.americanprogress.org/issues/lgbtq-rights/reports/2020/08/26/489772/beyond-bostock-future-lgbtq-civil-rights/ [https://perma.cc/L8UE-SX9G]; Barry et al., *supra* note 138, at 548.

154. Gruberg, *supra* note 153; *Obergefell*, 576 U.S. at 675. *See generally* Peter Nicolas, Obergefell*'s Squandered Potential*, 6 CAL. L. REV. CIR. 137 (2015) (discussing the Court's failure to declare sexual orientation as a suspect or quasi-suspect classification as a "squandered opportunity").

155. Bostock v. Clayton County, 140 S. Ct. 1731, 1743 (2020).

156. *See generally* Craig v. Boren, 429 U.S. 190 (1976). For a discussion on why sex discrimination should be subject to strict scrutiny, see generally Deborah L. Brake, *Sex as a Suspect Class: An Argument for Applying Strict Scrutiny to Gender Discrimination*, 6 SETON HALL CONST. L.J. 953 (1996). Some argue that the application of strict scrutiny to sex discrimination will not only increase the effectiveness of challenging state action, but the symbolism and political message will also affect legal decision-making. *See* Ann Shalleck, *Revisiting Equality: Feminist Thought About Intermediate Scrutiny*, 6 AM. U. J. GENDER & L. 31, 31–33 (1997).

157. United States v. Virginia, 518 U.S. 515, 531 (1996) (quoting Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724 (1986)); *see also* Chemerinsky, *supra* note 2.

158. Chemerinsky, *supra* note 2.

159. Barry et al., *supra* note 138, at 540.

160. *See, e.g.*, Blatt v. Cabela's Retail, Inc., No. 5:14-CV-04822, 2017 WL 2178123, at *2 (E.D. Pa. May 18, 2017).

Cabela's, for workplace discrimination under Title VII and the ADA.[161] Cabela's moved to dismiss the ADA claim based upon the ADA's GID exclusion, and Blatt provided three arguments for why the GID exclusion violated equal protection.[162] First, Blatt argued that the GID exclusion should be subject to heightened scrutiny because discrimination against transgender individuals constitutes a suspect class under the Supreme Court's four-factor test: (1) transgender individuals have been subject to consistent discrimination; (2) transgender individuals have the ability to participate in and contribute to society; (3) transgender individuals maintain "obvious, immutable, and distinguishing characteristics"; and (4) transgender individuals are a minority and lack political power.[163] Second, Blatt argued that the GID exclusion is a sex-based classification, which requires intermediate scrutiny.[164] Lastly, Blatt contended that even under rational basis scrutiny, the exclusion violates equal protection because the exclusion was founded upon "moral animus" toward transgender individuals and does not rationally relate to a government interest.[165] As will be discussed in more detail in Part IV, the court interpreted the ADA's exclusion of "gender identity disorder" narrowly and concluded that the exclusion did not include "a condition like Blatt's gender dysphoria."[166] The court noted that interpreting the ADA to discriminate against transgender individuals would give rise to "a serious doubt of constitutionality" under the Equal Protection Clause and could be avoided under constitutional-avoidance.[167]

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161. *Id.*

162. *See* Plaintiff's Memorandum of Law in Opposition to Defendant's Partial Motion to Dismiss Plaintiff's First Amended Complaint at 17, 28, 34, Blatt v. Cabela's Retail, Inc., No. 5:14-CV-04822, 2017 WL 2178123 (E.D. Pa. May 18, 2017). For a discussion on the exclusion of gender dysphoria from the ADA as violating the dignitary rights of transgender individuals, see Katie Aber, *When Anti-Discrimination Law Discriminates: A Right to Transgender Dignity in Disability Law*, 50 COLUM. J.L. & SOC. PROBS. 299 (2017).

163. Plaintiff's Memorandum of Law, *supra* note 162, at 17–26. Several litigants have also argued that discrimination based on transgender status constitutes a suspect classification regarding President Trump's ban on transgender service members. *See, e.g.*, Doe v. Trump, 275 F. Supp. 3d 167, 208 (D.D.C. Oct. 30, 2017) (noting that transgender individuals "appear to satisfy the criteria of at least a quasi-suspect classification").

164. Plaintiff's Memorandum of Law, *supra* note 162, at 26–28.

165. *Id.* at 34–39. The history of the enactment of the ADA also reveals significant animus toward individuals with HIV. *See* Ruth Colker, *Homophobia, AIDS Hysteria, and the Americans with Disabilities Act*, 8 J. GENDER, RACE & JUST. 33, 36–39 (2004).

166. *Blatt*, 2017 WL 2178123, at *2–3.

167. *Id.* at *2 (quoting United States. v. Witkovich, 353 U.S. 194, 201–02 (1957)). The doctrine of constitutional avoidance states that "[w]hen the validity of an act of Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that [the court] will first ascertain whether a construction of the statute of fairly possible by which the question may be avoided." *Witkovich*, 353 U.S. at 201–02 (quoting Crowell v. Benson, 285 U.S. 22, 62 (1932)). In *Blatt*, the court held that a

In *Doe v. Massachusetts Department of Correction*, a transgender plaintiff with transgender dysphoria who was serving a sentence for a non-violent drug offense sued the Massachusetts Department of Correction for incorrectly housing her in a men's prison, in violation of the ADA.[168] The plaintiff also alleged that the GID exclusion is in violation of the Equal Protection Clause.[169] Similar to *Blatt*, the plaintiff argued that transgender individuals are a suspect class under the four-factor test.[170] Additionally, the plaintiff argued that a statute that "excludes all transgender people warrants heightened scrutiny because a transgender classification is sex-based."[171] The court noted a trend in recent cases in applying heightened scrutiny to classifications based on transgender status, and even cited to one of the cases consolidated in *Bostock*, *EEOC v. G.R. Harris Funeral Homes*.[172] The court held that the pairing of gender identity disorders with conduct that is criminal or lewd, such as pedophilia and voyeurism, in the ADA "raises a serious question as to the light in which the drafters of this exclusion viewed transgender persons,"[173] and that the plaintiff met her burden of demonstrating that the Department of Correction's prison assignment policy as it "applies to transgender inmates in a sex-based classification that warrants heightened, intermediate scrutiny."[174] Thus, the court denied the defendant's motion to dismiss because the court believed that the plaintiff "may very well prevail on her ADA and Equal Protection claims."[175]

"fairly possible" interpretation of section 12211 was to read gender dysphoria as a separate condition from gender identity disorder. *Blatt*, 2017 WL 2178123, at *2.

168. Doe v. Mass. Dep't of Corr., No. 17-12255-RGS, 2018 WL 2994403, at *1 (D. Mass. June 14, 2018). In 1998, the Supreme Court held that Title II of the ADA, which states that no individual with a disability shall be discriminated against by a public entity, applies to prisons. Pa. Dep't of Corr. v. Yeskey, 524 U.S. 206, 213 (1998).

169. *Mass. Dep't of Corr.*, 2018 WL 2994403, at *6.

170. Memorandum of Law in Support of Plaintiff Jane Doe's Motion for Preliminary Injunction at 23–24, Doe v. Mass. Dep't of Corr., No. 17-12255-RGS, 2018 WL 2994403 (D. Mass. June 14, 2018).

171. *Id.* at 25. Plaintiffs that have been successful arguing that discrimination based on transgender status is a violation of equal protection have done so under the *Price Waterhouse* framework. *See* Payne, *supra* note 13, at 815; *see, e.g.*, Whitaker v. Kenosha Unified Sch. Dist., 858 F.3d 1034, 1050 (7th Cir. 2017); Glenn v. Brumby, 663 F.3d 1312, 1320–21 (11th Cir. 2011).

172. *Mass. Dep't of Corr.*, 2018 WL 2994403, at *9.

173. *Id.* at *7. *See generally* Barry, *supra* note 9.

174. *Mass. Dep't of Corr.*, 2018 WL 2994403, at *10.

175. *Id.* at *12. Despite district courts not reaching a conclusion on the issue of equal protection, the EEOC held in 2012 that Title VII forbids discrimination based on gender

A case challenging the ADA's GID exclusion as violating the Equal Protection Clause has yet to be decided following the Supreme Court's *Bostock* opinion. However, the effects of *Bostock* have already been seen in determining whether laws that discriminate against transgender individuals are in violation of equal protection. Although Justice Gorsuch declined to resolve issues related to bathrooms and locker rooms,[176] Justice Alito was correct in his dissent that "[u]nder the Court's decision . . . transgender persons will be able to argue that they are entitled to use a bathroom or locker room that is reserved for persons of the sex with which they identify."[177] In a case recently decided by the Eleventh Circuit Court of Appeals, *Adams v. St. Johns County School Board*, in August 2020, the Court ruled that a school district's policy banning a transgender male student from the boys' restroom and requiring him to use a single, gender-neutral restroom violated the student's rights under the Equal Protection Clause and Title XI.[178] In deciding whether the policy violated equal protection, the Court held that the "policy places a special burden on transgender students because their gender identity does not match their sex assigned at birth."[179] The Court quoted *Bostock* in their reasoning for applying heightened scrutiny to the bathroom policy: "it is impossible to discriminate against a person for being transgender without discriminating against that individual based on sex."[180]

In *Grimm v. Gloucester County School Board* in August 2020, the Fourth Circuit Court of Appeals also held that a school district violated the Equal Protection Clause and Title IX when it excluded Grimm from using the

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identity or sexual orientation. Macy v. Holder, No. 0120120821, 2012 WL 1435995 (E.E.O.C. Apr. 20, 2012).

176. Bostock v. Clayton County, 140 S. Ct. 1731, 1753 (2020). Schools are advised to enact policies that permit transgender students and employees to use facilities that match their gender identity and "consider making a sufficient number of single-user options available to all students." Rina Grassotti & Sheila Willis, *What the Supreme Court's LGBTQ Decision May Mean for Bathroom and Locker Room Access in Title IX Schools: A 4-Step Best Practices Guide*, FISHER PHILLIPS (July 15, 2020), https://www.fisherphillips.com/resources-alerts-what-the-supreme-courts-lgbtq-decision-may [http://perma.cc/GQ9X-8NKZ].

177. *Bostock*¸ 140 S. Ct. at 1779 (Alito, J., dissenting).

178. Adams v. Sch. Bd. of St. Johns Cnty., 968 F.3d 1286, 1310–11 (11th Cir. 2020). In a 2015 survey, 60% of transgender students surveyed stated that they were required to use a bathroom that corresponded with their legal sex. GLSEN, THE 2015 NATIONAL SCHOOL CLIMATE SURVEY: THE EXPERIENCES OF LESBIAN, GAY, BISEXUAL, TRANSGENDER, AND QUEER YOUTH IN OUR NATION'S SCHOOLS 38 (2015).

179. *Adams*, 968 F.3d at 1296.

180. *Id.* (quoting *Bostock*, 140 S. Ct. at 1741). Adams was diagnosed with gender dysphoria, and to treat his disorder, his psychiatrist recommended socially transitioning to a boy, which included, "cutting his long hair short, dressing in more masculine clothing, wearing a chest binder to flatten breast tissue, adopting the personal pronouns 'he' and 'him,' and using the men's restroom in public." *Id.* at 1292.

boys' restroom.[181] The Court concluded that heightened scrutiny applied because the school's bathroom policy "rests on sex-based classifications *and* because transgender people constitute at least a quasi-suspect class."[182] The Court held that the policy constituted sex discrimination because it punished transgender people who failed to conform to sex-based stereotypes. The majority also held that transgender persons constitute a suspect class because they have been historically subject to discrimination, being transgender bears no relation to the ability to contribute to society, transgender people have immutable characteristics, and are a minority group lacking political power.[183] Additionally, in *Hecox v. Little* in August 2020, a federal judge issued a preliminary injunction on an Idaho law that banned transgender women from sports teams.[184] In the court's reasoning for applying heightened scrutiny, the court cited *Bostock*, stating that one cannot discriminate against a transgender person without discriminating against that person based on sex.[185]

In a currently pending case, *Lange v. Houston County*, the plaintiff, a transgender woman with gender dysphoria, brought claims against her employer under the ADA, as well as several other statutes, because her employer's health plan expressly excludes coverage of treatments for gender dysphoria.[186] The plaintiff relies on *Bostock* and the Eleventh Circuit's

181. Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 619–20 (4th Cir. 2020). Grimm began his legal fight in 2015 when he was a sophomore in high school. *Fourth Circuit Court of Appeals Again Rules in Favor of Gavin Grimm*, ACLU (Aug. 26, 2020), https://www.aclu.org/press-releases/fourth-circuit-court-appeals-again-rules-favor-gavin-grimm [https://perma.cc/Z5YX-2NA8]. In response to his 2020 victory, Grimm stated, "All transgender students should have what I was denied: the opportunity to be seen for who we are by our schools and our government. Today's decision is an incredible affirmation for not just me, but for trans youth around the country." *Id.*

182. *Grimm*, 972 F.3d at 607.

183. *Id.* at 610–12.

184. Hecox v. Little, 479 F. Supp. 3d 930, 943 (D. Idaho 2020).

185. *Id.* at 974. Despite several circuit courts using Title VII to construe sex discrimination under Title IX, the United States Department of Education's Office of the General Counsel released a memorandum stating that *Bostock* does not affect the meaning of "sex" under Title IX and that schools do not violate the law by refusing to allow transgender students to use the restroom that corresponds with their gender identity. Memorandum for Kimberley M. Richey Acting Assistant Secretary of the Office for Civil Rights, Re: Bostock v. Clayton County 1 (Jan. 8, 2021).

186. Lange v. Houston County, 499 F. Supp. 1258, 1263 (M.D. Ga. 2020). In a 2015 survey, 55% of transgender respondents who sought transition-related surgery were denied and 25% were denied coverage for hormones. NAT'L CTR. FOR TRANSGENDER EQUAL., THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY 10 (2016).

analysis of *Bostock* in *Adams v. School Board of St. Johns County*, to make her argument.[187] The plaintiff argues that in *Adams*, the policy that deprived a transgender male the use of the male bathroom violated his equal protection; thus, the employer's policy that denies transgender employees coverage of medically-necessary healthcare violates the Equal Protection Clause because the plaintiff would not have been denied coverage if they had not been transgender.[188] The healthcare plan covers medically-necessary surgeries, such as hormone therapy and mastectomies for the purposes of treating an illness or disease, but the exclusion in the plan withdraws coverage of these services for a "sex change."[189] Thus, employees without gender dysphoria can access services under the plan, but individuals with gender dysphoria, which are only transgender employees, are excluded from coverage.[190] Therefore, using the equal protection analysis under *Bostock* and *Adams*, the exclusion violates equal protection because the policy exclusion applies to people because they are transgender.[191]

Lange v. Houston County sets forth the foundation for an argument that is sure to increase claims brought under the ADA by transgender litigants. The ADA GID exclusion excludes "gender identity disorders not resulting from physical impairment," now classified as gender dysphoria.[192] Because gender dysphoria is the marked difference between one's assigned sex at birth and one's gender identity that results in emotional distress, only transgender

187. *Lange*, 499 F. Supp. at 1275.

188. Surreply in Opposition to Defendants' Motion to Dismiss at 2, Lange v. Houston County, 499 F. Supp. 1258 (M.D. Ga. 2020) (No. 83). Although *Bostock* only addresses the hiring and firing of employees, Title VII also prohibits discrimination when providing fringe benefits. Nancy K. Campbell & Matthew P. Chiarello, *Supreme Court Holds Employers Cannot Discriminate Against LGBTQ Employees: Are Your Employee Benefit Plans Up to Snuff?*, SNELL & WILMER (June 19, 2020), https://information.swlaw.com/REACTION/2020/Newsletters/SWBenefits/0619_SWBenefitsUpdate_WEB.html [https://perma.cc/5YUK-Y4Q6]. Thus, employers should reevaluate their health insurance plans to ensure that they, for example, provide medically necessary mental health benefits and hormone therapy for transgender employees, does not charge transgender employees a higher premium, and covers family planning benefits if those benefits are provided to different-sex couples. *Id.*

189. Amended Complaint at 18, Lange v. Houston County, 499 F. Supp. 1258, 1263 (M.D. Ga. 2020) (No. 56).

190. *Id.* at 11, 17–18, 30, 32, 34. *See generally* Campbell & Chiarello, *supra* note 188.

191. Surreply in Opposition to Defendants' Motion to Dismiss, *supra* note 188, at 1–3. Employers are advised to review their benefit plans for potential sex discrimination, review coverage for gender-affirmation surgery or gender dysphoria, and review eligibility for same-sex spouses. Jacob M. Mattinson, Judith Wethall & Philip Shecter, *LGBTQ Title VII Ruling May Impact Your Employee Benefit Plan*, MCDERMOTT WILL & EMERY (June 22, 2020), https://www.mwe.com/insights/lgbtq-title-vii-ruling-may-impact-your-employee-benefit-plan/ [https://perma.cc/8GYF-SPHW].

192. 42 U.S.C. §12211; AM. PSYCHIATRIC ASS'N, *supra* note 12, at 2.

individuals can be diagnosed with gender dysphoria.[193] Because the gender identity disorder carve out only applies to transgender individuals, the exclusion violates equal protection and is subject to a heightened scrutiny. However, this argument will be significantly strengthened because the Court held in *Bostock* that an employer who discriminates against employees for being transgender intentionally discriminates against those employees on the basis of their sex.[194] As Erwin Chemerinsky, a legal expert in constitutional law, predicts, "[i]f discrimination based on sexual orientation and gender identity are seen as sex discrimination, then it would seem that intermediate scrutiny should be used under the Constitution when there is a challenge to government discrimination against gay, lesbian, and transgender individuals."[195] Thus, the ADA GID exclusion is likely in violation of the Equal Protection Clause and should be subject to heightened scrutiny because the exclusion discriminates against transgender individuals, on the basis of sex.

V. THE EFFECT OF *BOSTOCK*'S TEXTUALISM ON GENDER DYSPHORIA AS SEPARATE FROM GENDER IDENTITY DISORDER

As previously discussed, one of the major takeaways from *Bostock* is the importance of textualism, and the opinion has been hailed a "textualist triumph."[196] This section argues that the strict textualistic approach taken in *Bostock* will have several implications on arguments by plaintiffs with gender dysphoria that gender dysphoria falls outside of the ADA gender identity disorder exclusion based on the plain language of the ADA. First, based on the plain text of the statute, Section 12211 does not exclude gender dysphoria because the term is not explicitly mentioned in the exclusion. Second, plaintiffs will be able to effectively rebut a defendant's argument that gender dysphoria should be excluded from coverage because the drafters of the ADA intended to exclude gender dysphoria. Lastly, gender dysphoric plaintiffs will invalidate a defendant's argument that if Congress wanted

193. AM. PSYCHIATRIC ASS'N, *supra* note 12, at 1–2; *Frequently Asked Questions About Transgender People*, *supra* note 60.

194. Bostock v. Clayton County, 140 S. Ct. 1731, 1737 (2020).

195. Chemerinsky, *supra* note 2. This affirmation of transgender and gay employment rights is imperative to LGBTQ equality as the Court has granted First Amendment rights to individuals who refuse to serve or include LGBTQ individuals. *See, e.g.*, Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719 (2018); Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000).

196. Young, *supra* note 77.

to include coverage of gender dysphoria, then Congress would have amended the ADA to include it.

In analyzing the issue of whether sex discrimination encompasses discrimination based on sexual orientation and gender identity in *Bostock*, Justice Gorsuch stuck to a strict textualistic approach.[197] Justice Gorsuch's first task was to determine the "ordinary public meaning" of Title VII's text "at the time of its enactment."[198] The Court noted that "only the words on the page constitute the law adopted by Congress and approved by the President";[199] thus, Title VII set forth a "straightforward rule" that an "employer violates Title VII when it intentionally fires an individual employee based in part on sex,[200] and discrimination based on sexual orientation or gender identity is necessarily discrimination based on sex.[201]

Additionally, the majority opinion rejected the employers' arguments that the drafters would not have expected Title VII to protect transgender persons.[202] Justice Gorsuch concluded that legislative history is only relevant to ambiguous statutory language, but no ambiguity existed in Title VII.[203] The Court held that "'it is ultimately the provisions of' those legislative commands 'rather than the principal concerns of our legislators by which we are governed,'"[204] and "the limits of the drafters' imagination supply

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197. *Id.*

198. *Bostock*, 140 S. Ct. at 1738. Textualist Justices have condemned "retroactive legislation." Landgraf v. USI Film Prods., 511 U.S. 244, 265 (1994) ("As Justice Scalia has demonstrated, the presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic. . . . [I]ndividuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectation should not be lightly disrupted. For that reason, the 'principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal.'" (quoting Kaiser Aluminum v. Bonjorno, 494 U.S. 827, 855 (1990) (Scalia, J., concurring))).

199. *Bostock*, 140 S. Ct. at 1738.

200. *Id.* at 1741. Academic estimates found that 9% of LGBTQ individuals are unemployed, compared to 5% of non-LGBTQ individuals. *LGBT Data & Demographics*, WILLIAMS INST. (Jan. 2019), https://williamsinstitute.law.ucla.edu/visualization/lgbt-stats/?topic=LGBT#density [https://perma.cc/9H8M-EZLQ].

201. *Bostock*, 140 S. Ct. at 1747 (addressing Justice Alito's and Justice Kavanaugh's dissenting opinions and providing explanations for why later Congresses chose to adopt other laws referencing sexual orientation but did not amend Title VII's list of protected characteristics).

202. *Id.* at 1749. To allow "exclusions based on original expectations . . . is simply an argument for allowing historical subjective beliefs to override statutory text." Katie R. Eyer, *Understanding the Role of Textualism and Originalism in the LGBT Title VII Cases*, AM. CONST. SOC'Y (Apr. 26, 2019), https://www.acslaw.org/expertforum/understanding-the-role-of-textualism-and-originalism-in-the-lgbt-title-vii-cases/ [https://perma.cc/8NAF-S5KR].

203. *Bostock*, 140 S. Ct. at 1749.

204. *Id.* (quoting Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79 (1998)); *see also* John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM.

no reason to ignore the law's demands."[205] Although Justice Alito's and Justice Kavanaugh's dissents came to different conclusions as to the reading of the statute, each analysis from the unanimous Court identifies "textualism as the sole appropriate method for resolving an important statute's meaning."[206]

A. A Plain Reading of the GID Exclusion

Due to the textualistic approach taken in *Bostock*, gender dysphoria should be excluded from the ADA's gender identity disorder exclusion and thus fall under the protection of the ADA. Based on the ordinary meaning of "gender identity disorders" in 1990 when the ADA was enacted, gender dysphoria is a separate condition.

1. Blatt v. Cabela's Retail*: The ADA Protects Gender Dysphoria*

Blatt v. Cabela's Retail was the first case where a plaintiff was successful in arguing that gender dysphoria falls under protection of the ADA.[207] The court avoided the question of whether Section 12211 violated the Equal Protection Clause by reading the exclusion narrowly to only refer to gender identity disorders, not gender dysphoria.[208] Blatt argued that while the ADA excludes gender identity disorders, it does not exclude gender dysphoria as a matter of statutory interpretation.[209] Blatt contended that at the time the ADA was written, the DSM-III was in effect, which referred to gender identity disorder in adolescents and adults as "transsexualism," and required "(a) [p]ersistent discomfort and sense of inappropriateness about one's assigned sex; (b) [p]ersistent preoccupation for least two years with getting rid of one's primary and secondary sex characteristics and acquiring the secondary sex characteristics of the other sex; [and] (c) [t]he person has reached puberty."[210] On the other hand, in 2013, the DSM-5 revised gender

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L. REV. 673, 675 (1997) (noting that the use of legislative intent contradicts a "well-settled element of the separation of powers—the prohibition against legislative self-delegation.").

205. *Bostock*, 140 S. Ct. at 1737. For a discussion on the different approaches to textualism used in *Bostock*, see generally Tara Leigh Grove, *Which Textualism?*, 134 HARV. L. REV. 265 (2020).

206. Skrmetti, *supra* note 73.

207. Payne, *supra* note 13, at 812.

208. Blatt v. Cabela's Retail, Inc., No. 5:14-CV-04822, 2017 WL 2178123, at *3 (E.D. Pa. May 18, 2017). *See supra* note 161 and accompanying text.

209. Brief for Gay & Lesbian Advocates & Defenders et al., *supra* note 64, at 11.

210. *Id.* at 12 (quoting AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 76 (3d ed. 1987)).

identity disorder.[211] First, the name of the diagnosis was changed.[212] Previously, incongruence between one's identity and their sex assigned at birth was considered a disorder, but in the DSM-5, the APA focuses on dysphoria as the "clinical problem, not [the] identity per se," to destigmatize the diagnosis.[213] Second, the diagnostic criteria of gender dysphoria are different.[214] The new diagnosis replaces "the previous showing of a 'strong and persistent cross-gender identification' and a 'persistent discomfort' with one's sex with a 'marked incongruence' between gender identity and assigned sex"[215] that is accompanied with "clinically significant distress."[216] Lastly, gender dysphoria is categorized differently.[217] In every version prior to the DSM-5, gender identity disorders were a subclass of a broader classification, whereas in the DSM-5, gender dysphoria is a diagnosis separate from all other conditions.[218]

The district court in *Blatt* noted that Congress defined "disability" broadly and only provided a few exceptions to the ADA's coverage.[219] Additionally, the Third Circuit Court of Appeals mandated that "as a remedial statute, designed to eliminate discrimination against the disabled in all facets of society, . . . [the ADA] must be broadly construed to effectuate its purposes."[220]

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211. *See Gender Dysphoria*, *supra* note 12. Some transgender advocacy groups argue that gender dysphoria should be removed from the DSM entirely. *See* Kayley Whalen, *(In)validating Transgender Identities: Progress and Trouble in the DSM-5*, NAT'L LGBTQ TASK FORCE, https://www.thetaskforce.org/invalidating-transgender-identities-progress-and-trouble-in-the-dsm-5/ [https://perma.cc/U9XA-8BQT]. *But see infra* note 227.

212. Brief for Gay & Lesbian Advocates & Defenders et al., *supra* note 64, at 6.

213. *Id.* at 13 (quoting AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 451 (5th ed. 2013)).

214. *Id.*; *Gender Dysphoria*, *supra* note 12. As the debate around gender dysphoria continues, the need for accommodations is as important as ever, with the number of transgender individuals doubling in approximately five years. Jan Hoffman, *Estimate of U.S. Transgender Population Doubles to 1.4 Million Adults*, N.Y. TIMES (June 30, 2016), https://www.nytimes.com/2016/07/01/health/transgender-population.html [https://perma.cc/3BJY-PKUK].

215. Brief for Gay & Lesbian Advocates & Defenders et al., *supra* note 64, at 13 (quoting AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 581 (4th ed. 2000)).

216. *Gender Dysphoria*, *supra* note 12. Despite transgender advocates arguing for the removal of gender dysphoria from the DSM, they recognize that "because there is no other medical diagnosis available for transgender people to seek reimbursement of medical expenses under, we recommend[] that some version of gender dysphoria appear in DSM-5 as a stop-gap measure." Whalen, *supra* note 211.

217. Brief for Gay & Lesbian Advocates & Defenders et al., *supra* note 64, at 14.

218. *Id.*

219. Blatt v. Cabela's Retail, Inc., No. 5:14-04822, 2017 WL 2178123, at *2 (E.D. Pa. May 18, 2017).

220. *Id.* at *3 (quoting Disabled in Action of Pa. v. Se. Pa. Transp. Auth., 539 F.3d 199, 208 (3d Cir. 2008)). Congress was clear when enacting the ADA that it was to be "comprehensive" legislation. *See Policy Brief Series – No. 4, Broad or Narrow Construction*

Thus, any exceptions to the ADA "should be read narrowly in order to permit the statute to achieve broad reach."[221] Thus, using statutory interpretation, the Court held that it is reasonable to interpret the term "gender identity disorders" narrowly to only refer to the condition of identifying with a different gender, which would not exclude disabling conditions for people who identify with a different gender, such as gender dysphoria, which goes beyond merely gender non-conformity and substantially limits several major life activities.[222]

In *Doe v. Massachusetts Dept. of Correction*, a transgender woman with gender dysphoria brought claims under the ADA.[223] Disability rights, mental health law, and transgender rights organizations submitted an amicus brief in support of the plaintiff, which was the first time disability and transgender rights organizations came together to advocate for ADA coverage of gender dysphoria.[224] The plaintiff once again argued that the ADA does not exclude

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of the Americans with Disabilities Act, NAT'L COUNCIL ON DISABILITY (Dec. 16, 2002), https://ncd.gov/publications/2002/Dec162002 [https://perma.cc/UW7F-M46E].

221. *Blatt*, 2017 WL 2178123, at *3. The definition of "disability" under the ADA "shall be construed in favor of broad coverage of individuals under this chapter, to the maximum extent permitted by the terms of this chapter." 42 U.S.C. § 12102(4)(A).

222. *Blatt*, 2017 WL 2178123, at *4. EEOC guidance notes that the term "substantially limits" should be construed broadly in favor of expansive coverage and the "determination of disability should not require extensive analysis," such as the use of scientific, medical, or statistical evidence. *Questions and Answers on the Final Rule Implementing the ADA Amendments Act of 2008*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (Mar. 25, 2011), https://www.eeoc.gov/laws/guidance/questions-and-answers-final-rule-implementing-ada-amendments-act-2008 [https://perma.cc/U9L5-CL54].

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

224. Barry & Levi, *supra* note 47, at 59. Gay and Lesbian Advocates & Defenders (GLAD) uses litigation to "create a just society free of discrimination based on gender identity and expression, HIV status, and sexual orientation." *About*, GLAD, https://www.glad.org/about/ [https://perma.cc/24K3-XTF7]. The Mazzoni Center provides "quality comprehensive health and wellness services in an LGBTQ-focused environment . . . ." *About Us*, MAZZONI CTR., https://www.mazzonicenter.org/about-us [https://perma.cc/M42G-YFX8]. The National Center for Lesbian Rights seeks to advance the "civil and human rights of lesbian, gay, bisexual, and transgender people and their families through litigation, legislation, policy, and public education." *About Us*, NAT'L CTR. FOR LESBIAN RTS., https://www.nclrights.org/about-us/ [https://perma.cc/M55D-5LC7]. The National Center for Transgender Equality "advocates to change policies and society to increase understanding and acceptance of transgender people." *About Us*, NAT'L CTR. FOR TRANSGENDER EQUAL., https://transequality.org/about [https://perma.cc/69YW-GEL8]. The National LGBTQ Task Force "advances full freedom, justice and equality for LGBTQ people." *About*, NAT'L LGBTQ TASK FORCE, https://www.thetaskforce.org/about.html [https://perma.cc/U5FZ-2JBH]. The Transgender Law Center is a trans-led organization that "changes law, policy, and

gender dysphoria because the ADA is "silent as to [g]ender [d]ysphoria."[225] The Department of Correction argued that gender dysphoria "for all practical purposes" is the same as gender identity disorder.[226] The Court held that a "further distinction" can be made between the definition in the DSM-4 of gender identity disorders and the definition of gender dysphoria in the DSM-5, and noted that the diagnosis of gender dysphoria requires disabling physical symptoms and clinically significant emotional distress.[227]

Although several cases have survived motions for summary judgment in the district courts,[228] other courts remain unconvinced. In *Parker v. Strawser Construction*, a transgender employee diagnosed with gender dysphoria brought a claim against her former employer for disability discrimination under the ADA.[229] Parker argued that gender dysphoria was not encompassed by the Section 12211 exclusion and cited to *Blatt*, wherein the court determined that gender dysphoria was disabling.[230] The court held that the exclusion applies to all gender identity disorders not resulting from physical impairments, regardless of whether the disorder is

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attitudes so that all people can live safely, authentically, and free from discrimination regardless of their gender identity or expression." *About Us*, TRANSGENDER L. CTR., https://transgenderlawcenter.org/about [https://perma.cc/65Y4-8RNQ].

225. Memorandum of Law in Support of Plaintiff Jane Doe's Motion for Preliminary Injunction at 20, Doe v. Mass. Dep't of Corr., No. 17-12255-RGS, 2018 WL 2994403 (D. Mass. June 14, 2018).

226. *Mass. Dep't of Corr.*, 2018 WL 2994403, at *6.

227. *Id.* Although some transgender advocates favor the removal of gender dysphoria from the DSM, others argue that having a diagnosis is the only way that inmates can receive necessary medical attention. *See* Chase Strangio, *Debating 'Gender Identity Disorder' and Justice for Trans People*, HUFFINGTON POST (Feb. 2, 2016, 6:01 PM), https://www.huffpost.com/entry/gender-identity-disorder-dsm_b_2247081 [https://perma.cc/9SFR-54ZY] ("[F]or incarcerated transgender individuals, the availability of a GID diagnosis creates an important framework for meeting Eighth Amendment and statutory requirements for challenging the deliberate indifference of prison medical staff. The recognition and disordering of gender through the DSM has been a vital tool for incarcerated individuals to access hormones, surgery, and other trans health care.").

228. *See* Tay v. Dennison, No. 19-CV-00501-NJR, 2020 WL 2100761, at *3 (S.D. Ill. May 1, 2020) (allowing a claim for gender dysphoria coverage under the ADA to proceed because "the Court cannot categorically say that gender dysphoria falls within the ADA's exclusionary language . . . ."); Edmo v. Idaho Dep't of Corr., No. 1:17-CV-00151-BLW, 2018 WL 2745898, at *8 (D. Idaho June 7, 2018) (holding that "the issue of whether Edmo's diagnosis falls under a specific exclusion of the ADA presents a genuine dispute of material fact" and denying the defendant's motion to dismiss); Doe v. Triangle Doughnuts, LLC, 472 F. Supp. 3d 115, 135 (E.D. Pa. 2020) (declining to dismiss the plaintiff's hostile work environment claim under the ADA "based on her alternative theories of disability related to either gender dysphoria or some other neuroanatomical disability related to her gender identity").

229. Parker v. Strawser Constr., Inc., 307 F. Supp. 3d 744, 750 (S.D. Ohio 2018).

230. *Id.* at 754.

disabling.[231] Lastly, the court stated that the "clear result is that Congress intended to exclude from the ADA's protection both disabling and non-disabling gender identity disorders that do not result from a physical impairment."[232] In *Doe v. Northrop Grumman Systems*, an employee with gender dysphoria brought an action against his former employer for violating the ADA by denying his request to transfer to a different department and eventually terminating his employment.[233] The Court held that the terms "gender identity disorder" and "gender dysphoria" are "legally synonymous for purposes of the present motion" to dismiss.[234]

*2. The GID Exclusion Post-*Bostock*: Gender Dysphoria is a Separate Condition*

The decision in *Bostock* put forward a rigorous textualist standard when interpreting a federal discrimination statute.[235] The textualist analysis and language in *Bostock* will likely expand the protection of gender dysphoria under the ADA. As successfully argued in *Blatt*, plaintiffs should argue that based on the plain text of the statute, Section 12211 does not exclude gender dysphoria.[236] Justice Gorsuch poignantly stated in *Bostock*, "[o]nly the written word is the law,"[237] and because Section 12211 does not mention gender dysphoria, gender dysphoria must be covered under the ADA. When interpreting the text of a statute, the Court interprets a statute in accord with the "ordinary public meaning of its terms at the time of its enactment."[238] At the time of the ADA's enactment in 1990, gender identity disorders were a "(a) [p]ersistent discomfort and sense of inappropriateness about one's assigned sex; (b) persistent preoccupation for at least two years with getting rid of one's primary and secondary sex characteristics and

231. *Id.* Although the court found against coverage of gender dysphoria under the ADA, the court held that Title VII protects against transgender discrimination. *Id.* at 755–56; *see also* Szemanski, *supra* note 18, at 158.

232. *Parker*, 307 F. Supp. 3d at 754. For an argument on why the court's reasoning was mistaken, see Barry & Levi, *supra* note 47, at 54–55.

233. Doe v. Northrop Grumman Sys. Corp., 418 F. Supp. 3d 921, 924–26 (N.D. Ala. 2019).

234. *Id.* at 929.

235. Young, *supra* note 77.

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

237. Bostock v. Clayton County, 140 S. Ct. 1731, 1737 (2020).

238. *Id.* at 1738.

acquiring the sex characteristics of the other sex; and (c) the person has reached puberty."[239]

These characteristics were the diagnostic criteria for "transsexualism, which was the [gender identity disorder] diagnosis in adolescents and adults."[240] Thus, in 1990, the ordinary meaning of gender identity disorder was the persistent discomfort about one's assigned sex, which focused on cross-gender identification alone to sustain a diagnosis.[241]

In 2013, the DSM-5 removed gender identity disorders and added gender dysphoria, which is the "marked incongruence between one's experienced/ expressed gender and assigned gender," and "associated with clinically significant distress or impairment in social, occupational, or other important areas of functioning."[242] Therefore, when plaintiffs with gender dysphoria argue for coverage under the ADA, they will likely draw comparisons to Justice Gorsuch's approach in *Bostock*, wherein "[i]f judges could . . . update . . . old statutory terms, [they] would risk amending statutes outside the legislative process reserved for the people's representatives," which would "deny the people the right to continue to rely on the original meaning of the law."[243] In 1990, gender non-conformity was sufficient to sustain a diagnosis of gender identity disorder; however, gender dysphoria focuses on the significant mental distress that may be associated with

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239. Christine Michelle Duffy, Lynn A. Kappelman & Seth A. Marmin, *The Americans with Disabilities Act of 1990 and the Rehabilitation Act of 1973*, *in* GENDER IDENTITY AND SEXUAL ORIENTATION DISCRIMINATION IN THE WORKPLACE: A PRACTICAL GUIDE 16-6, 16-102 (Christine Michelle Duffy & Denise M. Visconti eds., 2014) (citing AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 76 (3d ed. 1987)).

240. *Id.* In the DSM-III, transsexualism was placed under the category of "psychosexual disorders." Anne Vitale, *Rethinking the Gender Identity Disorder Terminology in the Diagnostic and Statistical Manual of Mental Disorders IV*, TRANSHEALTH (May 28, 2005), http://www.trans-health.com/2005/rethinking-gid-terminology-dsm/ [https://perma.cc/V5JE-JB82].

241. Szemanski, *supra* note 18, at 151. Some found the most obvious issue with the DSM-III and DSM-IV description to be the "listing of stereotypical cross-gender behaviors as 'symptoms,'" such as boys dressing in girls' clothing or playing with a Barbie doll. Vitale, *supra* note 240. A psychologist writes, "the description of childhood behaviors meant to describe an abnormal gender identity development, is not in fact representative of a majority of genetic male individuals who present in their adult years for gender reassignment assessment." *Id.*

242. Duffy, Kappelman & Marmin, *supra* note 239, at 16-105, 16-108 (quoting AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 451–53 (5th ed. 2013)).

243. *Bostock*, 140 S. Ct. at 1738. Although Justice Gorsuch is a conversative and may disagree with the policy result of his opinion, he noted that "a judge who likes every result he reaches is very likely a bad judge, reaching for results he prefers rather than those the law compels." Clint Bolick, *The Case for Legal Textualism*, HOOVER INST. (Feb. 27, 2018), https://www.hoover.org/research/case-legal-textualism [https://perma.cc/SBE7-J47N] (quoting A.M. v. Holmes, 830 F.3d 1123, 1170 (10th Cir. 2016) (Gorsuch, J., dissenting)).

gender non-conformity.[244] Just as the Court in *Bostock* relied on the dictionary definition of "sex" in the 1960s, so should the courts interpreting the plain meaning of gender identity disorders in 1990. Thus, gender dysphoria falls outside of the meaning of gender identity disorders, as they were understood in 1990, which would allow gender dysphoria to be protected by the ADA.

B. Legislative Intent is Irrelevant

Plaintiffs will also be able to more effectively rebut a defendant's argument that gender dysphoria should be excluded from coverage because the drafters of the ADA intended to exclude gender dysphoria.[245] The *Bostock* majority opinion makes it very clear: legislative intent is only relevant when interpreting ambiguous statutory language.[246] Justice Alito argued in his dissent that the central question was whether people in 1964 would have thought the term "sex" would include sexual orientation and gender identity.[247] However, the majority opinion held that the relevant question is what the words "because of sex" meant and how these terms were interpreted in the 1960s.[248]

Just as the term "sex" was unambiguous,[249] the term "gender identity disorder" is unambiguous, as the DSM-3 sets forth a detailed definition.[250] Defendant's may argue, and as the district court held in *Strawser*, that "Congress intended to exclude both disabling and non-disabling gender identity disorders that do not result from physical impairment,"[251] and that because Congress would not have anticipated the ADA to apply to gender

244. Szemanski, *supra* note 18, at 147.
245. *Bostock*, 140 S. Ct. at 1749.
246. *Id.* Although Justice Gorsuch is a "rigorous textualist," when the language of a statute is ambiguous, "[Justice] Gorsuch turns to sources that Justice Scalia decried." Alderman & Pickard, *supra* note 6, at 185.
247. *Bostock*, 140 S. Ct. at 1755 (Alito, J., dissenting). Justice Alito and Justice Kavanaugh noted that the majority opinion went against precedent, ignored legislative history, and failed to consider other federal statutes, presidential directives, and state statutes. Grove, *supra* note 205, at 284–85.
248. *Bostock*, 140 S. Ct. at 1738.
249. *Id.* at 1749.
250. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 71–74 (3d ed. 1987).
251. Parker v. Strawser Constr., Inc., 307 F. Supp. 3d 744, 754 (S.D. Ohio 2018). For legislative history surrounding the GID exclusion and the founding Senators' animus toward LGBTQ individuals, see Barry & Levi, *supra* note 47, at 36–42.

dysphoria, gender dysphoria cannot possibly be protected. However, as Justice Gorsuch stated in *Bostock*, "'the fact that [a statute] has been applied in situations not expressly anticipated by Congress' does not demonstrate ambiguity; instead, it simply 'demonstrates [the] breadth' of a legislative command."[252]

In fact, in *Bostock*, the Court explained their reasoning for rejecting unexpected applications by comparing the application of the ADA.[253] The ADA states that "'no public entity'" can discriminate against an individual with a disability.[254] The Court noted that "no one batted an eye" when the application was applied to a post office, but when the statute was applied to prisons in *Pennsylvania Department of Corrections v. Yeskey*, "Pennsylvania argued that 'Congress did not "envisio[n] that the ADA would be applied to state prisoners."'"[255] The Supreme Court in *Yeskey* held that because the text of the ADA was unambiguous, legislative intent is irrelevant.[256] Justice Gorsuch noted that "applying protective laws to groups that were politically unpopular at the time of the law's passage—whether prisons in the 1990s or homosexual or transgender employees in the 1960s—often may be unexpected," but refusing to enforce laws on that basis "would tilt the scales of justice in favor of the strong and popular and neglect the promise that all persons are entitled to the benefit of the law's terms."[257]

Thus, plaintiffs with gender dysphoria should be able to overcome defenses about unexpected applications. *Bostock* reinforces that coverage should not be denied simply because the drafters of the ADA would not have expected protection from disability discrimination to apply to transgender people with gender dysphoria.

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252. *Bostock*, 140 S. Ct. at 1749 (quoting Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 499 (1985)).

253. *Id.* at 1751.

254. *Id.* (quoting Pa. Dep't of Corr. v. Yeskey, 524 U.S. 206, 208 (1998)). A public entity includes state and local government and "any department or agency of the state or local government," such as public transportation, the court system, and public housing. *Disability Discrimination by Public Entities*, LEGAL AID AT WORK, https://legalaidatwork.org/factsheet/disability-discrimination-by-public-entities/ [https://perma.cc/2CJR-C5SH].

255. *Bostock*, 140 S. Ct. at 1751 (quoting *Yeskey*, 524 U.S. at 212). The Court held that Title II of the ADA covers state prisoners because "[s]tate prisons fall squarely within the statutory definition of 'public entity . . . .'" *Yeskey*, 524 U.S. at 210.

256. *Yeskey*, 524 U.S. at 212. As Justice Gorsuch stated during his opening statement at his 2017 confirmation hearings, "[Justice Scalia] reminded us that words matter—that the judge's job is to follow the words that are in the law—not replace them with words that aren't." *Here's Judge Gorsuch's Full Opening Statement*, NBC NEWS (Mar. 20, 2017, 12:35 PM), https://www.nbcnews.com/news/us-news/here-s-judge-gorsuch-s-full-opening-statement-n735961 [https://perma.cc/PZ4A-SP8R].

257. *Bostock*, 140 S. Ct. at 1751.

C. Subsequent Legislative History is Irrelevant

Bostock rejected the defendant's argument that the Court should look to legislative history to interpret a statute.[258] Therefore, this will greatly weaken a defendant's argument that if Congress wanted to include coverage of gender dysphoria, then Congress would have amended the ADA to include it. In *Doe v. Massachusetts Department of Correction*, the Department of Correction contended that when Congress amended the ADA and enacted the ADAAA, Congress left the GID exclusion in place.[259] Thus, if Congress wanted to include coverage of gender dysphoria under the ADA, Congress would have eliminated the GID exclusion.[260]

However, the Court in *Bostock* rejected this same argument that Congress' failure to add sexual orientation to Title VII's list of protected activities should be taken into consideration.[261] Justice Gorsuch stated that speculation about why Congress did not amend legislation is a "'particularly dangerous' basis on which to rest an interpretation of an existing law a different and earlier Congress did adopt."[262] Therefore, when defendants argue that Congress' failure to amend or purge the ADA of the GID exclusion is evidence that the exclusion should be interpreted to include gender dysphoria, plaintiffs should point to *Bostock*, wherein Justice Gorsuch quoted textualism's leading proponent, the late Justice Scalia, "[a]rguments based on subsequent legislative history . . . should not be taken seriously, not even in a footnote."[263]

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258. *Id.* at 1747. Textualists objected to reliance on legislative history because it is "so vast and mixed that a judge could virtually always find something to support a given interpretation." Grove, *supra* note 205, at 274.

259. Memorandum of Law in Support of Defendant's Motion to Dismiss at 10, Doe v. Mass. Dep't of Corr., No. 17-12255-RGS, 2018 WL 10611709 (D. Mass. June 14, 2018).

260. *Id.*; *see also* ERIC S. DREIBAND & BRETT SWEARINGEN, JONES DAY, THE EVOLUTION OF TITLE VII—SEXUAL ORIENTATION, GENDER IDENTITY, AND THE CIVIL RIGHTS ACT OF 1964, at 12 (2015) (discussing the Equality Act and the Employment Non-Discrimination Act that attempted to prohibit discrimination based on sexual orientation under Title VII).

261. *Bostock*, 140 S. Ct. at 1747.

262. *Id.* (quoting Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 650 (1990)). The Employment Non-Discrimination Act lost support in Congress in part due to LGBTQ organizations withdrawing their support because of the Act's broad religious exemption. DREIBAND & SWEARINGEN, *supra* note 260, at 12.

263. *Bostock*, 140 S. Ct. at 1747 (quoting Sullivan v. Finkelstein, 496 U.S. 617, 632 (1990) (Scalia, J., concurring)). This Comment does not seek to address whether gender dysphoria falling under the ADA does more harm than good on the transgender community. While some argue that the gender dysphoria likens to the DSM's former inclusion of homosexuality as a disorder, which "medicalizes them and treats them as diseased," others

VI. THE EFFECT OF *BOSTOCK*'S TEXTUALISM ON GENDER DYSPHORIA AS A PHYSICAL IMPAIRMENT

Assuming *arguendo* that a court determined gender dysphoria and gender identity disorder to be the same, plaintiffs have argued that the ADA only excludes "gender identity disorders *not resulting from physical impairments*,"[264] and gender dysphoria results from a physical impairment, which is protected by the ADA.[265] This section explores the textualist argument that given recent medical research, gender dysphoria has physical roots, which allows gender dysphoria to fall outside of the GID exclusion. However, issues may arise when plaintiffs try to assert that the biological or physiological basis conforms to the plain meaning of "impairment."

Using a strict textualist approach, according to Justice Gorsuch, judges utilize a close reading of the statute, dictionaries, and rules of grammar to interpret the language of a statute.[266] In *Bostock*, both the majority and dissenting opinions relied on the dictionary definition of sex.[267] The employers contended that in 1964, sex referred to "status as either male or female [as] determined by reproductive biology," and the employees argued that the term was more broad to include norms regarding gender identity and sexual orientation.[268] The Court proceeded in their analysis based on the definition that sex refers to only biological distinctions between male and female, and "the majority opinion was anchored in dictionary definitions and canons of statutory construction.[269] Next, the Court sought to determine

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argue that the diagnosis "provide[s] financial and institutional support for medical, surgical, and psychological care for some transgender people." Alice Dreger, *Why Gender Dysphoria Should No Longer Be Considered a Medical Disorder*, PAC. STANDARD (June 14, 2017), https://psmag.com/social-justice/take-gender-identity-disorder-dsm-68308 [perma.cc/K32P-DER6].

264. 42 U.S.C. §12211(b)(1) (emphasis added).

265. Doe v. Mass. Dep't of Corr., No. 17-12255-RGS, 2018 WL 2994403, at *6 (D. Mass. June 14, 2018).

266. *See* Garrett Epps, *What 'Because of Sex' Really Means*, ATLANTIC (June 16, 2020), https://www.theatlantic.com/ideas/archive/2020/06/what-because-of-sex-really-means/613099/ [https://perma.cc/6YF8-G5GK]. In 2006, when the Supreme Court had to decide which wetlands and waterways "made up the 'waters of the U.S.,'" Justice Scalia used the Webster's New International Dictionary to determine the meaning of "waters." Rapanos v. United States, 547 U.S. 715, 732 (2006).

267. *See generally Bostock*, 140 S. Ct. 1731. In Justice Alito's dissent, he emphasized that not a single dictionary defined sex to include gender identity or sexual orientation. *Id.* at 1756 (Alito, J., dissenting). Justice Alito consulted four dictionaries: Webster's New International Dictionary, American Heritage Dictionary, Random House Dictionary, and Oxford English Dictionary. *Id.*

268. *Id.* at 1739 (majority opinion).

269. Poindexter, *supra* note 77; *see also Bostock*, 140 S. Ct. at 1739 ("[W]e proceed on the assumption that 'sex' signified what the employers suggest, referring only to biological distinctions between male and female.").

what "discriminate against" and "individual" meant in 1964.[270] Based on dictionary definitions, the majority concluded that discriminating against a person is treating that person worse because of sex, and that the Court must look at the employer's treatment of a particular individual, rather than the treatment of a group.[271]

In *Blatt*, Blatt argued that in light of scientific evidence that suggests gender dysphoria has physical roots, gender dysphoria falls within protection of the ADA because the ADA only excludes gender identity disorders "not resulting from physical impairments."[272] After multiple transgender organizations urged the Department of Justice (DOJ) to argue that the GID exclusion was unconstitutional, the DOJ urged the court to avoid the constitutional issue, and in the DOJ's second statement of interest, the DOJ argued a different approach.[273] The DOJ noted that the exclusion has two categories of gender identity disorders: "those that have a physical cause and those that do not."[274] The DOJ contended that although gender dysphoria is not separate from a gender identity disorder, emerging scientific research "increasingly indicates that gender dysphoria has physiological or biological roots."[275]

As the Court in *Bostock* was tasked with defining statutory terms, the DOJ sought to define the term "physical impairment."[276] Although the ADA does not define the phrase, the DOJ pointed to the federal regulations that

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270. *Bostock*, 140 S. Ct. at 1740.

271. *Id.* at 1740–41.

272. Brief for Gay & Lesbian Advocates & Defenders et al., *supra* note 64, at 15.

273. *See* Barry & Levi, *supra* note 47, at 47–48. The Gay & Lesbian Advocates & Defenders (GLAD) was disappointed in the DOJ's decision to decline to weigh into the constitutionality of the GID exclusion and noted that "given the rank animus behind it, the exclusion serves to marginalize and stigmatize a minority group that the DOJ has recognized needs and deserves legal protections." Chris Johnson, *DOJ Slammed for Ducking on Trans Exclusion in ADA*, WASH. BLADE (July 27, 2015, 6:17 PM), https://www.washingtonblade.com/2015/07/27/doj-slammed-for-ducking-on-trans-exclusion-in-ada/ [https://perma.cc/L29L-EFS6].

274. Second Statement of Interest of the United States of America at 3, Blatt v. Cabela's Retail, Inc., No. 5:14-CV-04822, 2017 WL 2178123 (E.D. Pa. May 18, 2017) (No. 67).

275. *Id.* at 4. The DOJ is responsible for enforcing laws by "investigating and prosecuting those who violate it," and defend the law by bringing and opposing lawsuits, and counseling the federal government on what is permissible. *Restoring Integrity and Independence at the U.S. Justice Department*, CTR. FOR AM. PROGRESS (Aug. 13, 2020, 9:01 AM), https://www.americanprogress.org/issues/criminal-justice/reports/2020/08/13/489387/restoring-integrity-independence-u-s-justice-department/ [https://perma.cc/S3JL-VPB2].

276. *See generally* Second Statement of Interest, *supra* note 274.

apply to the ADA, which defines a physical impairment as "any physiological disorder or condition" that affects one or more body systems, such as "neurological," "reproductive," "genitourinary," or "endocrine."[277] The DOJ contended that the statutory background makes clear that "physical impairment" encompasses gender identity disorders "rooted in biology or physiology, even if the precise etiology is not yet definitely understood."[278] The *amici curiae* asserted that numerous medical studies suggest that gender dysphoria has physical roots, such as "hormonal and genetic causes for the in utero development of gender dysphoria," and since *Blatt*, several other studies have observed endocrinological and neurological underpinnings.[279]

Due to the recent medical observations, plaintiffs arguing that gender dysphoria is a gender identity disorder resulting from a "physical impairment" should apply the textualist methods in *Bostock* by referring to the plain meaning of the statutory terms and dictionary definitions. Plaintiffs must first set forth the meaning of "physical impairment" as it was understood in 1990. In 1990, the term "physical" meant "[o]f or pertaining to material nature, or the phenomenal universe perceived by the senses; pertaining to

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277. *Id.* at 2–3 (quoting 28 C.F.R. § 35.108(b)(1)(i)). The definition provided in 28 C.F.R. § 35.108 was derived from regulations implementing the Rehabilitation Act, which explained that "broad coverage of the term 'physical impairment' was designed to include 'any condition which is . . . physical but whose precise nature is not at present known,' thus leaving room for new scientific developments." *Id.* at 3 (quoting 42 Fed. Reg. 22,676, 22,686 (May 4, 1997) (to be codified at 45 C.F.R. pt. 84)).

278. *Id.* at 3. It is important to note that research in this area is still developing and researchers are just beginning to "yield clues to possible underpinnings of" gender dysphoria and "a definitive neural signature of gender has yet to be found." Shawna Williams, *Are the Brains of Transgender People Different from Those of Cisgender People?*, SCIENTIST (Mar. 1, 2018), https://www.the-scientist.com/features/are-the-brains-of-transgender-people-different-from-those-of-cisgender-people-30027 [https://perma.cc/CV9R-CU8M].

279. Duffy, Kappelman & Marmin, *supra* note 239, at 16-72. *See generally* Gunter Heylens et al., *Gender Identity Disorder in Twins: A Review of the Case Report Literature*, 9 J. SEXUAL MED. 751 (2012) (concluding that genetic factors play a role in the development of gender identity disorders); Matthew Leinung & Christina Wu, *The Biological Basis of Transgender Identity: 2D:4D Finger Length Ratios Implicate a Role for Prenatal Androgen Activity*, 23 ENDOCRINE PRAC. 669 (2017) (concluding that there is likely a biological basis for transgender identity and female to male gender identity is affected by prenatal androgen activity); Joselyn Cortes-Cortes et al., *Genotypes and Haplotypes of Estrogen Receptor a Gene (ESR1) Are Associated with Female-to-Male Gender Dysphoria*, 14 J. SEXUAL MED. 464 (2017) (concluding that the ESR1 gene is associated with gender dysphoria and different genetic programs are associated with gender dysphoria in men and women); Amirhossein Manzouri & Ivanka Savic, *Possible Neurological Underpinnings of Homosexuality and Gender Dysphoria*, 29 CEREBRAL CORTEX 2084, 2094–95 (2019) (finding that people with gender dysphoria had greater cortical thickness "compared with controls bilaterally in the mesial prefrontal cortex, in the cenues-precuneus, and in the left later occipito-temporal cortex," and their observations suggest that gender dysphoria "is associated with specific neuroanatomical and connectivity traits along the cerebral midline").

or connected with matter; material."[280] In 1990, the term "impairment" meant "[t]he action of impairing, or fact of being impaired; deterioration; injurious lessening or weakening."[281]

Next, plaintiffs should present medical evidence that demonstrates gender dysphoria results from a physical impairment and argue that it falls within the meaning of those terms, as understood in 1990.[282] In *Doe v. Massachusetts Department of Correction*, the plaintiff submitted an expert affidavit prepared by Dr. Randi Ettner, a clinical and forensic psychologist with a specialization in gender dysphoric individuals.[283] Dr. Ettner asserted that there is "a significant body of scientific and medical research that gender dysphoria has physiological and biological roots. It has been demonstrated that transgender women, transgender men, non-transgender women, and non-transgender men have different brain composition, with respect to the white matter of the brain, the cortex (central to behavior), and subcortical structures."[284] Moreover, Dr. Ettner presented a study that concluded that gender dysphoria could result from a decrease in testosterone level during intrauterine brain development, which might result in "incomplete masculinization of the brain . . . resulting in a more feminized brain and a female gender identity."[285]

The difficulty in this argument arises when the plaintiff seeks to prove that these biological and physiological differences are an "impairment." The term "impairment" meant "deterioration; injurious lessening or

280. *Physical*, OXFORD ENGLISH DICTIONARY (2d ed. 1989).

281. *Impairment*, OXFORD ENGLISH DICTIONARY (2d ed. 1989).

282. *See* Memorandum of Law in Support of Plaintiff Jane Doe's Motion for Preliminary Injunction at 22, Doe v. Mass. Dep't of Corr., No. 17-12255-RGS, 2018 WL 2994403 (D. Mass. June 14, 2018) (No. 35).

283. Affidavit of Randi Ettner, Doe v. Mass. Dep't of Corr., No. 17-12255-RGS, 2018 WL 2994403 (D. Mass. June 14, 2018) (No. 35–2).

284. *Id.* at 5. Dr. Ettner asserted that members of the scientific community believe that gender dysphoria results "from the interaction of the developing brain and sex hormones." *Id.* at 6. One study found that "[d]uring the intrauterine period a testosterone surge masculinizes the fetal brain, whereas the absence of such a surge results in a feminine brain," and because the development of sexual differentiation of the genitals occurs at a later stage, these processes can be influenced independently of each other. *Id.* (quoting Ai-Min Bao & Dick F. Swaab, *Sexual Differentiation of the Human Brain: Relation to Gender Identity, Sexual Orientation and Neuro-Psychiatric Disorders*, 32 FRONTIERS NEUROLOGY 214, 214 (2011)).

285. *Id.* at 7 (quoting Lauren Hare et al., *Androgen Receptor Repeat Length Polymorphism Associated with Male-to-Female Transsexualism*, 65 BIOLOGICAL PSYCHIATRY 93, 95 (2009)).

weakening" in 1990.[286] Although medical studies indicate that gender dysphoria is biologically based, it is a problematic argument to assert that an "incomplete masculiniz[ed] brain" or a "more feminized brain"[287] is an "injurious lessening" or "weakening."[288] In fact, in *Parker v. Strawser Construction*, the court was "not convinced that a mere difference in brain structure or physiology, by itself, is necessarily a 'physical impairment'" because "not every physical difference between two groups implies that one of the groups is impaired in some way."[289] Moreover, in *Blatt*, the *amici curiae* submitted a response to the DOJ's second statement of interest and urged the court to reject the DOJ's position that the exclusion should be read to interpret gender dysphoria as a gender identity disorder resulting from a physical impairment.[290] The *amici curiae* contend that although recent medical studies support the biological basis of gender dysphoria, "the burden of proving etiology would fall on individual plaintiffs," such as preparing expert reports and requiring the court to "delve into a thicket of medical evidence and opine on etiology."[291] Therefore, several problems arise in utilizing a strict textualist approach to argue that gender dysphoria results from a physical impairment and thus should fall under protection of the ADA. Given the constraints of the definition of the term "impairment," plaintiffs will likely be more successful in arguing that gender dysphoria is a separate condition from gender identity disorders.

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286. OXFORD ENGLISH DICTIONARY, *supra* note 281. As one researcher explained, his goal in researching the roots of gender dysphoria is simply to make gender identity a less charged issue: "This is just part of the biology, the same way as I have black hair and somebody has red hair." Williams, *supra* note 278.

287. Affidavit of Randi Ettner, *supra* note 283, at 7 (quoting Hare et al., *supra* note 285, at 95).

288. OXFORD ENGLISH DICTIONARY, *supra* note 281.

289. Parker v. Strawser Constr., Inc., 307 F. Supp. 3d 744, 755 (S.D. Ohio 2018). The National LGBTQ Taskforce argues that an identity framework rather than a disease framework is the most ethical method to serve the mental health needs of transgender individuals. Whalen, *supra* note 211. However, "[t]o ensure that transgender people are able to get the care that they need, there should be some type of medical diagnosis, such as an endocrinology-based one, for health insurance purposes. But ultimately, as science and our movement advances, we fully expect both 'Gender Dysphoria' and 'Transvestic Disorder' to be removed from the DSM-6 and will continue to work for that future." *Id.*

290. Statement of Amici Curiae Gay and Lesbian Advocates and Defenders et al. in Response to Second Statement of Interest of the United States of America at 2, Blatt v. Cabela's Retail, Inc., No. 5:14-CV-04822, 2017 WL 2178123 (E.D. Pa. Dec. 1, 2015) (No. 73).

291. *Id.* at 3; *see also* Williams, *supra* note 278 (discussing several studies of the biological underpinnings of gender identity and gender dysphoria and notes that the answers remain largely elusive).

VII. SOLUTIONS

The purpose of the ADA is to protect all people from discrimination based on a disability, but the GID exclusion undermines this purpose by denying protection to transgender individuals with gender dysphoria. Transgender individuals have even lacked protection from discrimination in the workplace until June 2020. However, plaintiffs have the ability to combat these inequalities and protect individuals with gender dysphoria through the court system.

First, the GID exclusion violates equal protection. In *Bostock*, the Court held that discrimination based on sexual orientation and gender identity is sex discrimination, which is subject to intermediate scrutiny.[292] Because only transgender individuals can be diagnosed with gender dysphoria, the GID exclusion targets transgender individuals.[293] Thus, the exclusion should be subject to heightened scrutiny because the exclusion discriminates against transgender individuals, which is discrimination based on sex. Therefore, the classification must "be substantially related to an important governmental objective."[294]

Second, transgender plaintiffs have put forward two arguments that allow gender dysphoria to be covered under the ADA: (1) gender dysphoria is a separate condition from gender identity disorder, and (2) gender dysphoria is a gender identity disorder resulting from a physical impairment.[295] One of the major takeaways from *Bostock* is the Court's emphasis on textualism —interpreting the plain, ordinary meaning of the statute.[296] Using the strict textualist approach in *Bostock*, gender dysphoria falls outside of the GID exclusion because the exclusion is silent as to gender dysphoria coverage and gender dysphoria is a separate condition from gender identity disorders.[297] Additionally, transgender litigants will likely apply a textualist approach to argue that, based on the plain text of the statute, gender dysphoria results from a physical impairment, which allows the condition to fall under

292. Bostock v. Clayton County, 140 S. Ct. 1731, 1743 (2020).
293. *See* Memorandum of Law in Support of Plaintiff Jane Doe's Motion for Preliminary Injunction, *supra* note 282, at 19–20.
294. 16B AM. JUR. 2D *Constitutional Law* § 849 (2021).
295. *See* Memorandum of Law in Support of Plaintiff Jane Doe's Motion for Preliminary Injunction, *supra* note 282, at 22.
296. *Bostock*, 140 S.Ct. at 1766.
297. *See* Memorandum of Law in Support of Plaintiff Jane Doe's Motion for Preliminary Injunction, *supra* note 282, at 22.

protection of the ADA. However, this argument poses several challenges. Therefore, plaintiffs should proceed with the first approach.

VIII. CONCLUSION

The several cases that have survived summary judgment at the district court level under the ADA have demonstrated a legal shift. The *Bostock* opinion was a massive step toward protecting individuals based on their sexual orientation and gender identity in the workplace and cases of gender dysphoria discrimination brought under the ADA will be another avenue for transgender litigants to advocate for their rights. The analysis of a federal anti-discrimination law in *Bostock* will likely further the progress of affording transgender individuals protection under the ADA, which will allow individuals with gender dysphoria access to reasonable accommodations.