WORKPLACE ACCOMMODATIONS FOR TRANSGENDER PERSONS

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ABSTRACT

Unlike Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act ("ADA") requires that employers provide reasonable accommodations to covered workers. For transgender persons experiencing gender dysphoria, defined as clinically significant distress resulting from the incongruence between a person's gender identity and the sex they were assigned at birth, reasonable workplace accommodations would include use of their preferred name and pronouns, gender identity-consistent access to sex-segregated facilities, and gender identity-consistent compliance with sex-differentiated dress codes. To date, however, transgender persons have eschewed the ADA because only individuals with disabilities are eligible for the statute's protections, and the ADA defines "disability" to exclude "gender identity disorders." This Article refutes the notion that the ADA does not afford employment protections to transgender people and instead demonstrates that the ADA's reasonable accommodations provision represents transgender persons' best hope of achieving authentic, lived equality in the workplace.

INTRODUCTION

Bathrooms, pronouns, and dress codes. This trifecta is at the heart of current debates over the extent of Title VII's employment protections for transgender persons.[1] Whereas the Supreme Court previously held that an employer who fires someone simply for being transgender has engaged in impermissible sex discrimination,[2] the Court has not addressed whether Title VII requires secular[3] employers to refer to transgender persons by their

* Professor of Legal Studies, University of Georgia. The author would like to thank attendees of the 2023 Academy of Legal Studies in Business conference and 2022 Southeastern Academy of Legal Studies in Business conference for their insightful feedback on earlier drafts. The author gratefully acknowledges receipt of funding for this project through a Terry-Sanford Research Award from the University of Georgia.

[1] J. Edward Morno & Roberto Iafolla, *LGBT Battle for Bathroom Access, Pronouns Pivots to Worker Suits*, BL (July 19, 2022), https://news.bloomberglaw.com/daily-labor-report/lgbt-battle-for-bathroom-access-pronouns-pivots-to-worker-suits [https://perma.cc/X9VZ-TT6P]; Christian N. Thoroughgood, Katina Sawyer & Jennica Webster, *Creating a Trans-Inclusive Workplace*, HARV. BUS. REV., Mar.–Apr. 2020, https://hbr.org/2020/03/creating-a-trans-inclusive-workplace [https://perma.cc/K6J6-Y8DJ].

[2] Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1737 (June. 15, 2020) (No. 17-1618).

[3] Whether and under what circumstances religious employers may be required to provide reasonable accommodations to transgender workers is beyond the scope of this Article as it implicates four highly contentious and deeply unsettled areas of federal law: (1) Title VII's religious organization exemption, (2) the Americans with Disabilities Act's ("ADA") religious organization defense, (3) the First Amendment's ministerial exception, (4) and the Religious Freedom Restoration Act of 1993 ("RFRA"). For a detailed discussion of Title VII's religious organization exemption and how it compares to the ADA's religious organization defense, see Alex Reed, *Religious Organization Staffing Post*-Bostock, 43 BERKELEY J. EMP. & LAB. L. 201, 223–25 (2022). For thoughtful post-*Bostock* analysis of the First Amendment's ministerial exception, see Damonta D. Morgan & Austin Piatt, *Making Sense of the Ministerial Exception in the Era of* Bostock, 2022 U. ILL. L. REV. ONLINE 26, 27 (2022). For a recent

preferred names and pronouns or whether transgender workers must be permitted to use sex-segregated facilities and adhere to sex-differentiated dress codes consistent with their gender identity.[4] Nor are these uncertainties likely to be resolved anytime in the foreseeable future as it will likely be years—if not decades—before cases presenting these issues make their way back to the Supreme Court, and it is unclear how the Court might rule when they do. The Civil Rights Act of 1964[5] is not the only means of attaining true workplace equality for transgender persons, however.

Unlike Title VII, the Americans with Disabilities Act ("ADA") requires that secular[6] employers provide reasonable accommodations to covered employees so that these workers receive the same benefits and privileges of employment as their noncovered colleagues.[7] For transgender persons experiencing gender dysphoria—defined as clinically significant distress resulting from the incongruence between a person's gender identity and the sex they were assigned at birth[8]—reasonable accommodations would include use of their preferred names and pronouns, gender identity-consistent access to sex-segregated facilities, and gender identity-consistent compliance with sex-differentiated dress codes.[9] To date, however, many transgender people have eschewed the ADA because only individuals with disabilities are eligible for the statute's protections, and the ADA defines "disability" to exclude "gender identity disorders not resulting from physical impairments."[10]

This Article refutes the notion that the ADA does not afford employment protections to transgender people and instead demonstrates that the ADA's reasonable accommodations provision represents transgender persons' best hope of achieving authentic, lived equality in the workplace. Part I provides necessary background information, beginning with a demographic overview of the transgender community and then examining the prevalence of transgender-related employment discrimination in the United States. Part II analyzes the Supreme Court's decision in *Bostock v. Clayton County* and, in particular, a colloquy between Justices Gorsuch and Alito as to whether, post-*Bostock*, employers must adopt certain transgender-inclusive practices and policies. Part III considers the Equal Employment Opportunity Commission's expansive interpretation of *Bostock* in subsequently issued technical guidance and the various legal challenges that led to the guidance being enjoined. Part IV establishes that, notwithstanding decades of precedent to the contrary, most transgender persons are eligible for protection under the ADA,[11] in which case the statute's reasonable

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examination of RFRA's application to employment nondiscrimination laws generally and Title VII specifically, see Alex Reed, *The Title VII Amendments Act: A Proposal*, 59 AM. BUS. L.J. 339, 367–81 (2022).

[4] *Bostock*, 140 S. Ct. at 1778–83 (Alito, J., dissenting).

[5] Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in sections of 28 and 42 U.S.C.).

[6] *See supra* note 3 and accompanying text.

[7] 42 U.S.C. § 12112(b)(5)(A); 29 C.F.R. § 1630.2(o)(1)(iii) (2024).

[8] *See infra* note 150.

[9] *See infra* Section IV.D.

[10] 42 U.S.C. § 12211(b)(1). A separate rationale for declining to contest transgender-related discrimination under the ADA is that some transgender persons do not consider themselves, nor wish to be regarded as, "disabled." *See infra* pp. 11–12 and note 90.

[11] *See* Press Release, Cedars-Sinai Medical Center, *Most Gender Dysphoria Established by Age 7, Study Finds*, CEDARS SINAI (June 16, 2020), https://www.cedars-sinai.org/newsroom/most-gender-dysphoria-established-by-age-7-study-finds [https://perma.cc/V7W7-5JSQ] (finding that approximately

accommodations provision offers the simplest, most direct means of ensuring that transgender persons' fundamental human dignity is recognized and respected in the workplace.

I. THE TRANSGENDER COMMUNITY: DEMOGRAPHICS AND DISCRIMINATION

To understand the consequences of transgender-related discrimination, one must have a sense for the transgender community generally and the prevalence of anti-transgender employment bias specifically. Because a common vocabulary is essential to both endeavors, this Part begins by defining certain key terms. Specifically, "cisgender" refers to people whose gender identity aligns with their sex assigned at birth, while "gender identity" denotes a person's internal sense of gender, whether that be as a man, a woman, a blend of both, or neither.[12] Conversely, "transgender" is an umbrella term for people whose gender identity differs from the sex they were assigned at birth.[13] Many, but not all, transgender persons undergo a process of "gender transition," whereby they seek to align their lived reality with their gender identity by changing their clothes and appearance, altering their mannerisms and behaviors, adopting new names and pronouns, pursuing medical interventions such as hormone therapy and gender-affirming surgeries, or some combination thereof.[14] A person assigned the male sex at birth but having a female gender identity is a "transgender woman," whereas an individual assigned the female sex at birth but having a male gender identity is a "transgender man."[15] Lastly, although the two are sometimes conflated, "sexual orientation" is distinct from and independent of gender identity, so that being transgender, like being cisgender, does not connote any particular sexual orientation.[16]

A. WHAT DO WE KNOW ABOUT THE TRANSGENDER COMMUNITY?

According to a recent study, the U.S. transgender community is larger and more diverse than previously recognized. Among the study's key findings: (1) approximately 1.3 million adults and 300,000 youth identify as transgender; (2) among transgender adults, 38.5% are transgender women, 35.9% are transgender men, and 25.6% identify as gender nonconforming; (3) youth ages thirteen to seventeen are four times more likely to identify as transgender than adults sixty-five or older; (4) the racial and ethnic backgrounds of transgender persons mirror that of the U.S. population generally; (5) the geographic concentration of transgender persons ranges from 1.2% in the Midwest to 1.8% in the Northeast for youth and from 0.4%

75% of transgender persons experience gender dysphoria by age seven); *cf.* Williams v. Kincaid, 45 F.4th 759, 768 (4th Cir. 2022) (observing that gender dysphoria "is a disability suffered by many," but not all, transgender people).

[12] David Baboolall, Sarah Greenberg, Maurice Obeid & Jill Zucker, *Being Transgender at Work*, MCKINSEY Q. 4 (Nov. 10, 2021), https://www.mckinsey.com/featured-insights/diversity-and-inclusion/being-transgender-at-work [https://perma.cc/BY9E-SEL6].

[13] *Id.*

[14] *Id.*

[15] NAT'L CTR. FOR TRANSGENDER EQUAL., FREQUENTLY ASKED QUESTIONS ABOUT TRANSGENDER PEOPLE 1 (July 9, 2016), https://transequality.org/sites/default/files/docs/resources/Understanding-Trans-Full-July-2016_0.pdf [https://perma.cc/2RT5-SAX4].

[16] *Id.* at 2.

in the Midwest to 0.6% in the Northeast for adults; and (6) at the state level, the concentration of transgender persons ranges from 0.6% in Wyoming to 3% in New York for youth and from 0.2% in Missouri to 0.9% in North Carolina for adults.[17] Differences in age and geography aside, the transgender community shares a single, unenviable trait: they experience hardship at much higher rates and to a far greater extent than cisgender persons.[18]

Relative to the general population, transgender people are more likely to have difficulty supporting themselves financially, securing a place to live, and accessing medical care.[19] Nearly one-third (29%) of transgender persons live in poverty compared to 12% of the U.S. population overall, and almost 30% of transgender people experience homelessness at some point in their lives.[20] The community's economic vulnerability stems in part from transgender persons' high unemployment rate—which is more than double that of cisgender persons[21]—and the fact that transgender people are almost twice as likely as cisgender persons to work part time.[22] Because most Americans rely on employer-sponsored healthcare plans to receive and pay for medical treatment, high rates of unemployment, underemployment, and part-time work necessarily restrict transgender persons' access to healthcare. Indeed, transgender adults are more than twice as likely as their cisgender counterparts to lack any form of health insurance and almost twice as likely to forego needed medical treatment due to cost.[23] The latter figures are particularly troubling given that, relative to the general population, transgender people are eight times more likely to experience serious psychological distress and nine times more likely to attempt suicide at some point during their lives.[24]

B. How Prevalent is Transgender-Related Employment Discrimination?

Decades of research have shown that transgender persons experience rampant mistreatment, harassment, and discrimination in the workplace. Per a recent study, 70% of transgender workers experienced some form of gender identity-related discrimination or harassment within the past year.[25] These findings are consistent with a 2015 survey in which 67% of transgender people reported not being hired, being denied a promotion, or being fired or

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[17] Jody L. Herman, Andrew R. Flores & Kathryn K. O'Neill, *How Many Adults and Youth Identify as Transgender in the United States?*, UCLA L.: Williams Inst., 4, 9–12 (2022), https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-Pop-Update-Jun-2022.pdf [https://perma.cc/H7ZE-79BQ].

[18] Sandy E. James, Jody L. Herman, Susan Rankin, Mara Keisling, Lisa Mottet & Ma'ayan Anafi, Nat'l Ctr. for Transgender Equal., The Report of the 2015 U.S. Transgender Survey 4 (2016), https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf [https://perma.cc/S7SJ-APDP].

[19] *Id.*

[20] *Id.* at 5.

[21] Baboolall et al., *supra* note 12.

[22] Caroline Medina & Lindsay Mahowald, *Discrimination and Barriers to Well-Being: The State of the LGBTQI+ Community in 2022*, Ctr. for Am. Progress (Jan. 12, 2023), https://www.americanprogress.org/article/discrimination-and-barriers-to-well-being-the-state-of-the-lgbtqi-community-in-2022/ [https://perma.cc/ZYF8-PGKM].

[23] *Id.*

[24] James et al., *supra* note 18, at 103, 114.

[25] Medina & Mahowald, *supra* note 22.

forced to resign due to anti-transgender bias.[26] Furthermore, the latter survey found that 15% of the transgender population has been physically attacked, sexually assaulted, or verbally harassed in the workplace within the past year.[27]

More than three-quarters of transgender persons report taking steps to avoid mistreatment in the workplace, such as not applying for certain jobs, concealing their transgender identities, delaying their gender transitions, or quitting their jobs altogether.[28] Notably, only 32% of transgender people say they are comfortable being their authentic selves at work, and among those who are out, only one-third report feeling safe in the workplace.[29] Safety concerns, likewise, lead many transgender persons to forego job opportunities in industries that are perceived as unwelcoming.[30] While furthering the immediate goal of self-protection, these behaviors stand to undermine transgender persons' long-term career prospects by limiting their opportunities for professional advancement.[31] Nor are these practices likely to change post-*Bostock* given the narrowness of the Court's holding and the litany of issues left unresolved.

II. THE *BOSTOCK* DECISION

Although captioned *Bostock v. Clayton County*, the Supreme Court's decision resolved three distinct cases. Two of the cases, including *Bostock*, sought to determine whether discrimination based on an individual's sexual orientation is actionable under Title VII as a form of sex discrimination,[32] while the third posed a similar question, albeit in the context of gender identity discrimination.[33] After the cases were consolidated on appeal, the Court granted certiorari "to resolve at last the disagreement among the courts of appeals over the scope of Title VII's protections for homosexual and transgender persons."[34]

In holding that "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex," the Court reasoned that an employer who terminates an employee simply for being homosexual or transgender necessarily fires that individual for conduct or characteristics it would have permitted in persons of a different sex.[35] Two hypotheticals were offered in support of this conclusion. In the first, an employer regards two employees, both of whom are attracted to men, as "materially identical in all respects, except that one is a man and the other a woman."[36] According to the Court, "[i]f the employer fires the male employee for no reason other than the fact he is attracted to

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[26] JAMES ET AL., *supra* note 18, at 150.
[27] *Id.* at 153.
[28] *Id.* at 154; Baboolall et al., *supra* note 12.
[29] Baboolall et al., *supra* note 12, at 9, 11.
[30] *Id.* at 9.
[31] *Id.* at 11–12.
[32] Bostock v. Clayton Cnty. Bd. of Comm'rs, 723 Fed. Appx. 964, 964 (11th Cir. 2018), *cert. granted*, 140 S. Ct. 1731 (June. 15, 2020) (No. 17-1618); Zarda v. Altitude Express, Inc., 883 F.3d 100, 112 (2d Cir. 2018), *cert. granted*, 139 S. Ct. 1599 (Apr. 22, 2019) (No. 17-1623).
[33] Equal Emp. Opportunity Comm'n v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 674–75 (6th Cir. 2018), *cert. granted*, 139 S. Ct. 1599 (Apr. 22, 2019) (No. 18-107).
[34] Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1737–38 (2020).
[35] *Id.* at 1741.
[36] *Id.*

men, the employer discriminates against him for traits or actions it tolerates in his female colleague."[37] Similarly, should an employer fire a transgender employee who—despite being assigned a male sex at birth—identifies as female while retaining "an otherwise identical employee" assigned a female birth sex, "the employer intentionally penalizes a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth."[38] After conceding that Title VII's drafters could not have anticipated that the statute would one day be interpreted to bar discrimination against gay and transgender persons, the Court declared congressional intent irrelevant given the text's explicit, unconditional proscription of sex discrimination.[39]

Nor was the Court swayed by the supposed adverse policy implications of a pro-LGBTQ ruling. In their briefs, the employers warned that "redefining sex discrimination"[40] to protect gay and transgender persons would "overthrow[] important, long-standing employment policies and practices" such as sex-segregated facilities, sex-differentiated dress codes, and workplace speech policies promoting open and honest discussion.[41] Writing for the majority, Justice Gorsuch observed that none of these issues were before the Court in *Bostock* such that he and the other five justices in the majority declined to prejudge them.[42]

Justice Alito, in a dissent joined by Justice Thomas, excoriated the majority's "brusque refusal to consider the consequences of its reasoning" and condemned *Bostock* as a threat to heterosexual, cisgender employees' safety and privacy interests, as well as their ability to speak freely and candidly in the workplace.[43] With regard to sex-segregated facilities, Justice Alito warned that transgender employees would invoke *Bostock* to argue that they are entitled to use bathrooms and locker rooms consistent with their gender identity irrespective of their birth-assigned sex.[44] Indeed, he noted the majority "provides no clue why a transgender person's claim to such bathroom or locker room access might not succeed" and emphasized that transgender persons had already been successful advancing such arguments under Title IX.[45] In terms of workplace speech, Justice Alito cautioned that transgender persons would cite *Bostock* for the proposition that employers must use transgender workers' preferred names and pronouns, as

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[37] *Id.*
[38] *Id.*
[39] *Id.* at 1737.
[40] Brief for the Petitioner at 45, R.G. & G.R. Harris Funeral Homes, Inc. v. Equal Emp. Opportunity Comm'n, 140 S. Ct. 1731 (2020) (No. 18-107), 2019 WL 3958416, at *45.
[41] Brief for Petitioners Altitude Express, Inc., and Ray Maynard at 55, Altitude Express, Inc. v. Zarda, 140 S. Ct. 1731 (2020) (No. 17-1623), 2019 WL 3958415, at *55 [hereinafter Altitude Express Brief]; *see also* Brief of Amici Curiae Business Organizations in Support of the Employers at 10, 15–17, 20–22, Bostock v. Clayton Cnty., 140 S. Ct. 1731 (2020) (Nos. 17-1618, 17-1623, 18-107), 2019 WL 4054621, at *1, *10, *15–17, *20–22 [hereinafter Business Organizations Brief] (discussing a pro-LGBTQ ruling's "destabilizing effects on businesses").
[42] *Bostock*, 140 S. Ct. at 1753.
[43] *Id.* at 1778–79, 1782–83 (Alito, J., dissenting).
[44] *Id.* at 1779.
[45] *Id.*

deadnaming[46] or misgendering[47] would constitute impermissible sex discrimination.[48] He further speculated that employers may feel pressure "to suppress any statements by employees expressing disapproval of . . . sex reassignment procedures" for fear they will give rise to harassment claims.[49] After considering various other implications of the majority's decision, Justice Alito concluded his dissent with a terse admonition: "Although the Court does not want to think about the consequences of its decision, we will not be able to avoid those issues for long. The entire Federal Judiciary will be mired for years in disputes about the reach of the Court's reasoning."[50]

III. THE EEOC ISSUES *BOSTOCK*-RELATED GUIDANCE

Perhaps heeding Justice Alito's warning, the Equal Employment Opportunity Commission ("EEOC" or "the Commission") thereafter published a new "technical assistance document" (the "Document")[51] with the goal of "help[ing] the public understand the *Bostock* decision and established EEOC positions on the laws the agency enforces."[52] The Document's stated purpose was to (1) "[e]xplain[] the significance of the *Bostock* ruling"; (2) "[c]ompile[] in one location information about sexual orientation and gender identity discrimination"; (3) "reiterate[, consistent with *Bostock*,] the EEOC's established positions on basic Title VII concepts, rights, and responsibilities as they pertain to discrimination based on sexual orientation and gender identity"; and (4) "[p]rovide[] information about the EEOC's role in enforcing Title VII and protecting employees' civil rights."[53] Importantly, the Commission emphasized that the Document "itself does not have the force and effect of law and is not meant to bind the public in any way."[54]

The Document was written in a question-and-answer format covering thirteen discrete topics, three of which addressed transgender-specific issues.[55] The first considered whether an employer may require a transgender

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[46] Deadnaming is speaking of or addressing a transgender person by their birth name rather than their preferred name. *Deadname*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/deadname [https://perma.cc/SZV2-CVLQ] (last visited Mar. 7, 2024). *See generally* Chase Strangio, *A Transgender Person's Deadname is Nobody's Business. Not Even a Reporter's*, NBC NEWS (May 14, 2020, 11:55 AM), https://www.nbcnews.com/think/opinion/transgender-person-s-deadname-nobody-s-business-not-even-reporter-ncna1206721 [https://perma.cc/4FEB-TTMF] (explaining why deadnaming is both offensive and irrelevant).

[47] Misgendering is identifying the gender of a person incorrectly, "as by using an incorrect label or pronoun." *Misgender*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/misgender [https://perma.cc/UFF2-E6QC] (last visited Mar. 7, 2024). *See generally* Karolyn Wilson, *Misgendering is Not a Lightweight 'Mistake'*, AP NEWS (Dec. 30, 2018, 3:57 AM), https://apnews.com/article/fc39633c66ea47a1b803462af95bff84 [https://perma.cc/69HH-BTCB] (detailing the harmful effects of misgendering).

[48] *Bostock*, 140 S. Ct. at 1782 (Alito, J., dissenting).

[49] *Id.* at 1783.

[50] *Id.*

[51] U.S. EQUAL EMP. OPPORTUNITY COMM'N, NVTA-2021-1, PROTECTIONS AGAINST EMPLOYMENT DISCRIMINATION BASED ON SEXUAL ORIENTATION OR GENDER IDENTITY (June 15, 2021), https://www.eeoc.gov/laws/guidance/protections-against-employment-discrimination-based-sexual-orientation-or-gender [https://perma.cc/R4SL-T68B] [hereinafter EEOC TAD].

[52] Press Release, U.S. Equal Emp. Opportunity Comm'n, EEOC Announces New Resources about Sexual Orientation and Gender Identity Workplace Rights (June 15, 2021), https://www.eeoc.gov/newsroom/eeoc-announces-new-resources-about-sexual-orientation-and-gender-identity-workplace-rights [https://perma.cc/VJV2-T8GD].

[53] *Id.*

[54] EEOC TAD, *supra* note 51.

[55] *See id.* (referencing questions nine, ten, and eleven).

employee to dress in accordance with the employee's birth-assigned sex.[56] Answering in the negative, the Document declared that "[p]rohibiting a transgender person from dressing or presenting consistent with that person's gender identity would constitute sex discrimination."[57] The second item addressed whether employers may maintain separate, sex-segregated facilities for employees.[58] After acknowledging that such distinctions are generally permissible, the Document clarified that—pursuant to a 2015 EEOC decision—employers cannot discriminate based on employees' gender identity.[59] Thus, "if an employer has separate bathrooms, locker rooms, or showers for men and women, all men (including transgender men) should be allowed to use the men's facilities and all women (including transgender women) should be allowed to use the women's facilities."[60] The final item considered whether deadnaming or misgendering someone may constitute unlawful harassment.[61] Responding in the affirmative, the Commission explained that whereas "accidental misuse of a transgender employee's preferred name and pronouns does not violate Title VII, intentionally and repeatedly," doing so could create a hostile work environment.[62]

Shortly after the Document's publication, twenty-one state attorneys general wrote a letter to President Biden asserting that the Document violated the Administrative Procedure Act ("APA") and misrepresented the Supreme Court's ruling in *Bostock* (the "State Attorneys General Letter" or "SAG Letter").[63] In terms of procedural flaws, the SAG Letter noted that the Document had been issued unilaterally by the EEOC's Chairperson outside of a duly convened meeting and without the input or approval of her fellow Commissioners.[64] It further observed that the EEOC had failed to issue a notice of proposed rulemaking consistent with the APA, which would have given the public an opportunity to review and provide feedback on the Document before its publication.[65] Separately, the SAG Letter asserted that "[t]he EEOC's purported 'guidance' fundamentally misconstrues and improperly extends *Bostock*," since the Court's decision declined to address the legality of sex-differentiated dress codes, sex-segregated facilities, or intentional misgendering relative to transgender persons.[66] While the state attorneys general expressed a desire to work with the Biden Administration to resolve these concerns informally in the SAG Letter,[67] twenty of the states

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[56] *See id.* (referencing question nine).
[57] *Id.*
[58] *See id.* (referencing question ten).
[59] *Id.*
[60] *Id.*
[61] *See id.* (referencing question eleven).
[62] *Id.*
[63] Letter from Herbert H. Slatery et al., Att'y Gen. of the State of Tenn., to Joseph R. Biden, President of the U. S. (July 7, 2021), https://www.tn.gov/content/dam/tn/attorneygeneral/documents/pr/2021/pr21-23-letter.pdf [https://perma.cc/2QZJ-RRFJ] [hereinafter SAG Letter].
[64] *Id.* at 2.
[65] *Id.* For a general overview of the rulemaking process, see OFF. OF THE FED. REG., A GUIDE TO THE RULEMAKING PROCESS (2011), https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf [https://perma.cc/3DAG-H7FB].
[66] SAG Letter, *supra* note 63, at 2.
[67] *Id.* at 5.

thereafter filed a lawsuit in which they sought a preliminary and permanent injunction against the Document's enforcement.[68]

On July 15, 2022, the U.S. District Court for the Eastern District of Tennessee granted the states' motion for a preliminary injunction after finding that all four of the relevant factors favored the states.[69] First, the states had demonstrated a likelihood of success on their claim that the Document is a legislative rule subject to the APA's notice-and-comment provisions and that the EEOC failed to comply with those requirements.[70] In response to the EEOC's contention that the Document does not establish new policy but merely offers interpretive guidance, the court emphasized that several of the Document's topics were referenced, but not resolved in *Bostock*:

> The Supreme Court only held that Title VII prohibits an employer from "fir[ing] someone simply for being homosexual or transgender." The Court expressly declined to "prejudge" other issues that might be implicated by Title VII, such as "sex-segregated bathrooms, locker rooms, and dress codes." Interestingly, the [Document] recognizes that "[*Bostock*] explicitly reserved some issues for future cases." Yet, the [Document] then purports to explain what Title VII requires of covered employers with regard to the exact conduct *Bostock* declined to address (i.e., bathrooms, locker rooms, dress codes).[71]

Having established that the Document seeks to impose new legal obligations on employers and, thus, constitutes a legislative rule issued in contravention of the APA, the court proceeded to consider the second factor: Whether the states would be irreparably injured absent an injunction.[72] The court found this factor, too, weighed in the states' favor as they would "face substantial pressure to change their [conflicting] state laws" in response to any future EEOC enforcement action.[73] The third and fourth factors examining whether an injunction would harm the EEOC and whether an injunction is in the public interest, respectively, were ostensibly closer calls but again deemed to support the states' argument.[74] In a win for the EEOC, however, the court declined to apply the injunction nationwide, instead limiting its scope to the twenty named plaintiffs.[75]

Although a signatory of the SAG Letter, Texas did not join the litigation brought by its sister states and instead filed its own lawsuit asking that the Document be vacated and declared unlawful.[76] On October 1, 2022, the U.S. District Court for the Northern District of Texas granted the State's requested relief after finding that the Document is a legislative rule subject to the APA's

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[68] Complaint for Declaratory & Injunctive Relief at 3, Tennessee v. U.S. Dep't of Educ., 615 F. Supp. 3d 807 (E.D. Tenn. 2022) (No. 3:21-cv-308), 2021 WL 3861204.

[69] Tennessee v. U.S. Dep't of Educ., 615 F. Supp. 3d 807, 819–21 (E.D. Tenn. 2022).

[70] *Id.* at 837–40.

[71] *Id.* at 838–40.

[72] *Id.* at 840–41.

[73] *Id.* at 841.

[74] *See id.* at 841–42 (acknowledging "there is no question that an injunction will harm Defendants" and that "Defendants certainly have a public interest in enforcing Titles VII and IX to the fullest extent permissible" but finding that on balance these factors support the issuance of a preliminary injunction).

[75] *Id.* at 842 n.18.

[76] Complaint at 17, Texas v. Equal Emp. Opportunity Comm'n, 633 F. Supp. 3d 824 (N.D. Tex. Sept. 20, 2021) (No. 2:21-cv-194-Z), 2021 WL 4263405.

notice-and-comment requirements and that its issuance exceeded the EEOC's statutory authority.[77] In rejecting the EEOC's assertion that the Document is interpretive guidance outside the purview of the APA, the court observed that the Document does not simply clarify the Supreme Court's decision in *Bostock* but instead seeks to expand it by imposing new "dress-code, bathroom, and pronoun accommodations" on employers.[78] Hence, the EEOC's failure to comply with the APA's notice-and-comment provisions rendered the Document void.[79] Separately, the EEOC's promulgation of a de facto legislative rule was found to exceed its authority under Title VII, pursuant to which the EEOC may issue procedural, but not legislative, rules and regulations.[80] Moreover, the Document's issuance outside of a duly convened meeting at which a quorum of commissioners were present and voting in the affirmative was deemed to violate the EEOC's procedures to the extent that the Document announced new legal positions rather than simply reiterating established policies.[81]

Regardless of how these lawsuits play out—at the time of this Article's publication, the EEOC had appealed the Eastern District of Tennessee's preliminary injunction to the Sixth Circuit[82] but declined to challenge the Northern District of Texas's decision declaring the Document void[83]—they cannot and will not definitively resolve the trifecta of transgender-related issues left open in *Bostock*. That is because the cases are limited to examining the procedures by which the Document was issued rather than determining the substantive rights afforded by Title VII. Accordingly, should the Supreme Court rule in the EEOC's favor and find that the Document is merely an interpretive rule such that its unilateral issuance by the Commission's chairperson was permissible, it would not guarantee transgender people the right to use sex-segregated facilities and comply with sex-differentiated dress codes based on their gender identity or ensure they are called by their preferred names and pronouns in the workplace.

Nor could this uncertainty be abated through further EEOC action. Indeed, even if the EEOC were to vote to reissue the Document as formal guidance rather than mere technical assistance,[84] it still would not be binding

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[77] Texas v. Equal Emp. Opportunity Comm'n, 633 F. Supp. 3d 824, 838 (N.D. Tex. Oct. 1, 2022).
[78] *Id.* at 840.
[79] *Id.* at 840–42.
[80] *Id.* at 839.
[81] *Id.* at 843.
[82] Tennessee v. U.S. Dep't of Educ., No. 22-5807 (6th Cir. argued Apr. 26, 2023).
[83] *See* Press Release, Ken Paxton, Attorney General of Texas, Paxton Leads Effort to Stop Biden Administration from Forcing Left-Wing "Sexual Orientation" and "Gender Identity" Policies on States (Feb. 1, 2023), https://www.texasattorneygeneral.gov/news/releases/paxton-leads-effort-stop-biden-administration-forcing-left-wing-sexual-orientation-and-gender [https://perma.cc/D9UP-753S] (asserting "the federal government acknowledged defeat when it opted not to appeal the ruling.").
[84] *See* Anne Cullen, *4 More Things the EEOC Could Do to Help LGBTQ Workers*, LAW360 (Apr. 1, 2022, 7:26 PM), https://www.law360.com/employment-authority/articles/1479927/4-more-things-the-eeoc-could-do-to-help-lgbtq-workers [https://perma.cc/AVH8-Z4KH] ("[EEOC] leadership handed down these instructions as technical assistance, rather than guidance, likely in part because Republican commissioners still hold three spots on the five-seat agency. . . . and the [EEOC]'s Republican leaders objected to the agency's positioning in the Bostock document."); George Weykamp, *Democrats' New EEOC Majority Will Spur Action on Priorities*, BL (July 17, 2023, 5:25 AM), https://news.bloomberglaw.com/daily-labor-report/democrats-new-eeoc-majority-will-spur-momentum-on-priorities [https://perma.cc/RFB2-733S] ("Democrats have regained a majority on the EEOC with the confirmation of Kalpana Kotagal, a long-awaited development that will break the panel's partisan deadlock and likely propel stalled regulatory work forward."); Nick Niedzwiadek, *EEOC Dems Get Their Chance*, POLITICO (July 17, 2023, 10:00 AM), https://www.politico.com/newsletters/weekly-shift/2023/07/17/eeoc-dems-get-their-chance-00106556 [https://perma.cc/4YH3-7UMP] ("EEOC

on federal courts.[85] Consequently, if transgender persons are to achieve authentic, lived equality in the workplace, they will need to look to existing federal statutes rather than hypothetical and ostensibly ineffectual EEOC guidance.

IV. THE AMERICANS WITH DISABILITIES ACT AS AN ALTERNATIVE TO TITLE VII

Unlike Title VII, the Americans with Disabilities Act requires secular[86] employers to provide reasonable accommodations to covered employees.[87] For transgender persons, such accommodations would include the right to be called by their preferred name and pronouns as well as the ability to use sex-segregated facilities and adhere to sex-differentiated dress codes consistent with their gender identity.[88] The ADA, thus, is uniquely well-suited for transgender persons seeking to attain practical, lived equality in the workplace.[89] Historically, however, the transgender community has eschewed the ADA in favor of Title VII for two reasons: first, they did not view themselves as nor wish to be regarded as disabled;[90] and second, they believed a transgender-inclusive interpretation of the ADA was impossible under a plain reading of the statutory text.[91] Although the first rationale is beyond the scope of this Article, it is important to note that there is disagreement within the transgender community as to whether the perceived inaccuracy and potential stigma of being designated "disabled" warrants foregoing an otherwise viable litigation strategy.[92] To understand the second

observers also anticipate [the new Democratic majority] will move to solidify previous actions that were issued without [C]ommission approval, such as language interpreting the Supreme Court's 2020 decision in *Bostock* . . . ."); *see also* Vin Gurrieri, *4 Questions After Judge Nixes EEOC* Bostock *Guidance*, LAW360 (Oct. 5, 2022, 9:10 PM), https://www.law360.com/employment-authority/articles/1536368/4-questions-after-judge-nixes-eeoc-bostock-guidance [https://perma.cc/8GX7-7VUB] (noting the EEOC may respond to the Document's invalidation by issuing one or more compliance manual updates, which do not go through formal APA notice-and-comment rulemaking procedures or otherwise have the force of law, but do require majority approval by the Commission).

[85] *See* Young v. United Parcel Serv., 575 U.S. 206, 224–25 (2015) (declining to follow EEOC guidance after applying *Skidmore* deference); Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 360–61 (2013) (same);

see also Ryan H. Nelson, *Substantive Pay Equality: Tips, Commissions, and How to Remedy the Pay Disparities They Inflict*, 40 YALE L. & POL'Y REV. 149, 177–78 (2021) ("Although the EEOC lacks statutory authority to promulgate interpretations of Title VII carrying the force of law, its Compliance Manual and similar guidelines may earn [*Skidmore*] deference" if they are found persuasive.) (footnotes omitted); James J. Brudney, Chevron *and* Skidmore *in the Workplace: Unhappy Together*, 83 FORDHAM L. REV. 497, 507 (2014) (observing that "the Court has never relied on *Chevron* when reviewing EEOC interpretations of Title VII text," but rather "has opined on a number of occasions that agency interpretations of Title VII are entitled only to *Skidmore* deference").

[86] *See supra* note 3.

[87] 42 U.S.C. § 12112(b)(5). For analysis of how the ADA stands to provide transgender persons certain evidentiary advantages relative to Title VII, see Alok K. Nadig, *Ably Queer: The ADA as a Tool in LGBT Antidiscrimination Law*, 91 N.Y.U. L. REV. 1316, 1347–48 (2016) ("[R]easonable accommodation claims avoid what some consider the most formidable obstacle that confronts plaintiffs in employment discrimination cases: the demand for comparator evidence.").

[88] *See infra* Section IV.D.

[89] Provided they experience gender dysphoria. *See supra* note 11.

[90] 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, 159–65 (2020); Kevin M. Barry, *Disabilityqueer: Federal Disability Rights Protection for Transgender People*, 16 YALE HUM. RTS. & DEV. L.J. 1, 34–35, 41–48 (2013).

[91] Kevin Barry & Jennifer Levi, Blatt v. Cabela's Retail, Inc. *and a New Path for Transgender Rights*, 127 YALE L.J. F. 373, 381 (2017).

[92] *See* Press Release, GLAD Legal Advocates & Defenders, U.S. Fourth Circuit Court of Appeals Affirms Transgender People are Protected Under the Americans with Disabilities Act (Aug. 16, 2022),

rationale, one must become familiar with the ADA's statutory text and the context in which the statute was debated, amended, and enacted.

A. AN OVERVIEW OF THE ADA

The ADA makes it unlawful for an employer to discriminate against an otherwise qualified individual based on disability.[93] Per the statute, "discriminate" includes "not making reasonable accommodations to the known . . . limitations of an otherwise qualified individual with a disability."[94] A "qualified individual," in turn, is someone "who, with or without reasonable accommodation, can perform the essential functions of the [job],"[95] while a person is deemed to have a "disability" and thus be "a person with a disability" under the ADA if they have "a physical or mental impairment that substantially limits one or more major life activities" or have "a record of such impairment."[96] Certain conditions are explicitly excluded from the definition of "disability," however.[97] These include pyromania, kleptomania, and compulsive gambling; psychoactive substance use disorders resulting from current illegal drug use; and pedophilia, exhibitionism, voyeurism, transvestism, transsexualism, "gender identity disorders not resulting from physical impairments, [and] other sexual behavior disorders."[98]

The motivation for excluding the specified conditions is readily apparent from the floor debates that preceded the statute's adoption.[99] As the Senate began debating the bill that would ultimately become the ADA, Senator William Armstrong revealed that he was having second thoughts about supporting the legislation.[100] Senator Armstrong indicated that while he was in favor of helping "people in wheelchairs" or individuals with "some kind of a physical disability," he was concerned that the bill's definition of "disability" would "include some things . . . we would not expect to be included," particularly "disorders . . . hav[ing] a moral content."[101] Senator Armstrong then engaged in a brief colloquy with the bill's sponsor, in which he inquired whether various conditions would constitute a disability as that term was then defined in the bill, including homosexuality, bisexuality, exhibitionism, pedophilia, voyeurism, and compulsive kleptomania.[102] The bill's sponsor replied that none of the named conditions would receive

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https://www.glad.org/appeals-court-transgender-people-are-protected-under-the-ada/ [https://perma.cc/4U8P-PP4E] (lauding a gender dysphoria-inclusive interpretation of the ADA on behalf of various LGBTQ advocacy organizations). Notably, GLAD's Transgender Rights Project Director acknowledged the ostensible stigma associated with gender dysphoria when she observed that "[i]t would turn disability law upside down to exclude someone from its protection because of having a stigmatized medical condition." *Id.*

[93] Americans with Disabilities Act of 1990 42 U.S.C. § 12112(a).

[94] *Id.* § 12112(b)(5)(A).

[95] *Id.* § 12111(8).

[96] *Id.* § 12102(1)(A)–(B). Individuals "regarded as having such an impairment" are also considered "disabled" for the purposes of the ADA, however, they are not entitled to reasonable accommodations. *Id.* §§ 12102(1)(C), 12201(h).

[97] *Id.* § 12211.

[98] *Id.* § 12211(b).

[99] For the ADA's legislative history generally, see Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified at 42 U.S.C. § 12101), *reprinted in* H. COMM. ON EDUC. & LAB., 101ST CONG., LEGISLATIVE HISTORY OF PUBLIC LAW 101-336, THE AMERICANS WITH DISABILITIES ACT (1991).

[100] 135 CONG. REC. 19852–53 (1989) (statements of Sen. Armstrong).

[101] *Id.*

[102] *Id.* at 19853 (colloquy between Sens. Armstrong and Harkin).

protection, but Senator Armstrong was unpersuaded and continued to express reservations regarding the bill's expansive definition of "disability."[103]

Senator Armstrong took the floor again a few hours later to cast doubt on a co-sponsor's assurance that voyeurism would not be a protected disability.[104] He noted that the bill's definition of "disability" had been copied verbatim from the Rehabilitation Act of 1973 ("RA"), and that courts interpreting the RA had relied on the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders* ("DSM") to determine whether a particular condition is covered.[105] Because voyeurism was a recognized mental impairment in the DSM, Senator Armstrong believed that courts would be inclined to follow suit and treat voyeurism as a protected disability under the ADA.[106] After acknowledging he did not know whether the DSM was "a good reference" or "the best source of information," Senator Armstrong emphasized that "it is the source of information which the courts use."[107] He then announced he would introduce an amendment later that evening to "take voyeurism and some other things" out of the bill.[108]

Senator Armstrong thereafter introduced his amendment with the grudging support of the bill's proponents.[109] The amendment's text was relatively brief, providing, "the term 'disability' does not include 'homosexuality,' 'bisexuality,' 'transvestism,' 'pedophilia,' 'transsexualism,' 'exhibitionism,' 'voyeurism,' ['']compulsive gambling,' 'kleptomania,' or 'pyromania,' 'gender identity disorders,' current 'psychoactive substance use disorders,' current 'psychoactive substance-induced organic mental disorders,' as defined by DSM-III-R, which are not the result of medical treatment, or 'other sexual behavior disorders.' "[110] Senator Tom Harkin, the bill's primary sponsor, stated that while he did not believe the amendment was necessary or particularly appropriate, he was prepared to accept it to ensure the broader bill's passage.[111] After being adopted on a voice vote, the Armstrong Amendment was subjected to additional post hoc discussion.[112]

One of the ADA's proponents sought clarification of a statement Senator Armstrong made just before the amendment's adoption.[113] That statement provided, in relevant part, "it should not be assumed by anybody, including someone who might read the Record of this proceeding, that because we have failed to exclude [a particular condition from the ADA's coverage] it is necessarily included" in the ADA.[114] Senator Armstrong explained that his statement was intended to convey that "there is no presumption [a condition] is in or out [of the bill] as a result of this amendment except for those things

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[103] *Id.*
[104] *Id.* at 19871 (response of Sen. Armstrong to Sen. Kennedy).
[105] *Id.* (statement of Sen. Armstrong).
[106] *Id.*
[107] *Id.*
[108] *Id.*
[109] *Id.* at 19884–85 (statements of Sen. Harkin).
[110] *Id.* at 19884 (Sen. Armstrong quoting the text of Amendment No. 722).
[111] *Id.* at 19885 (statements of Sen. Harkin).
[112] *Id.* at 19885–86.
[113] *Id.* at 19885 (colloquy between Sens. Domenici and Armstrong).
[114] *Id.* at 19884 (statement of Sen. Armstrong).

which are mentioned."[115] Senator Armstrong's colleague responded by invoking the legal maxim of *expressio unius est exclusio alterius*, which provides that the mention of one or more things implies the exclusion of other things not mentioned[116]—the implication being that any condition not explicitly excluded from the bill would be eligible for protection.[117]

Senator Armstrong countered that although the maxim may be useful in interpreting text for which the drafter's intentions are unclear, he was affirmatively disavowing its application.[118] He stated, "I have clarified [the bill] to some extent by my amendment, but I do not represent . . . that I have provided clarity on subjects that I have not directly addressed."[119] Hence, according to Senator Armstrong, "[t]he fact that we have excluded some items does not automatically put something else in."[120] No further debate was had on the Armstrong Amendment, and the Senate thereafter passed the ADA by a vote of 76-8.[121]

Like its Senate counterpart, the House bill initially did not seek to exclude certain conditions from the statute's coverage.[122] As it was making its way through the Chamber, however, the House Judiciary Committee took note of the Armstrong Amendment and chose to include its provisions in the House bill, subject to a formatting change.[123] The list of excluded conditions was bifurcated into "Homosexuality and Bisexuality" and "Certain Conditions," with the latter category consisting of three subparts: "(1) transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, and other sexual behavior disorders; (2) compulsive gambling, kleptomania, or pyromania; or (3) psychoactive substance use disorders resulting from current illegal drug use."[124] The Committee explained that homosexuality and bisexuality warranted separate treatment because they "are not impairments and as such are not disabilities."[125] Conversely, the Committee acknowledged that the other conditions "are physical or mental impairments and would have been included under the ADA, but for this provision."[126] The House subsequently passed the bill as amended,[127] and a conference committee was formed to reconcile differences between the House and Senate versions.[128] Because the Senate acceded to the House language regarding excluded conditions,[129] the bill signed into law by President Bush includes verbatim the provision adopted by the House Judiciary Committee.[130]

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[115] *Id.* at 19885.
[116] *Expressio unius est exclusio alterius*, BLACK'S LAW DICTIONARY (11th ed. 2019).
[117] 135 CONG. REC. 19885 (1989) (statement of Sen. Domenici).
[118] *Id.* at 19885–86 (statement of Sen. Armstrong).
[119] *Id.* at 19886.
[120] *Id.*
[121] *Id.* at 19903 (rollcall vote on S. 933).
[122] H.R. 2273, 101st Cong. (as introduced in the House of Representatives, May 9, 1989).
[123] COMM. ON THE JUDICIARY, 101ST CONG., H.R. REP. NO. 101-485, pt. 3 (1990).
[124] *Id.*
[125] *Id.*
[126] *Id.*
[127] 136 CONG. REC. 11466-67 (1990) (rollcall vote no. 123 on H.R. 2273).
[128] *Id.* at 13050 (statement of Sen. Harkin).
[129] COMM. ON THE JUDICIARY, 101ST CONG., H.R. REP. NO. 101-596, at 88 (1990) (Conf. Rep.).
[130] 42 U.S.C. § 12211.

As the conditions included in the Armstrong Amendment were "literally copied from" the DSM[131]—which Senator Armstrong identified as "the book" courts consult to determine "what constitutes a [protected] mental impairment"[132]—familiarity with that text is essential to understanding why, today, ADA-covered employers must make reasonable accommodations for transgender people.

B. SUBSEQUENT REVISIONS TO THE DSM

Three years before the ADA's enactment, the American Psychiatric Association published a revised third edition of its *Diagnostic and Statistical Manual of Mental Disorders* ("DSM-III-R").[133] "Gender Identity Disorders" ("GID") were listed as a subclass of "Disorders Usually First Evident in Infancy, Childhood, or Adolescence."[134] According to DSM-III-R, "[t]he essential feature" of a GID was "an incongruence between assigned sex (i.e., the sex that is recorded on the birth certificate) and gender identity."[135] Four possible diagnoses were specified: transsexualism (for adults wishing to acquire the physical sex characteristics of the other sex), GID of adolescence or adulthood, nontranssexual type (for persons engaging in recurrent cross-dressing), GID of childhood (for children desiring to be or insisting they are of the other sex), and GID not otherwise specified (a residual category).[136]

When the fourth edition of the DSM was published in 1994 ("DSM-IV"), "Gender Identity Disorders" were no longer included among "Disorders Usually First Diagnosed in Infancy, Childhood, or Adolescence," having been moved to "Sexual and Gender Identity Disorders" alongside the "Sexual Dysfunctions" and "Paraphilias" subclasses.[137] The GID diagnostic group, too, was revised to consist of only two possible diagnoses: GID (for persons experiencing strong cross-gender identification and persistent discomfort regarding assigned sex, with distinct criteria for children and adults) and GID not otherwise specified (for persons having concurrent congenital intersex conditions).[138] The text noted that "adults with [GID] are uncomfortable being regarded by others as, or functioning in society as, a member of their designated sex," such that "[t]o varying degrees, they adopt the behavior, dress, and mannerisms of the other sex."[139] Depression, suicidal ideation, and substance-related disorders were listed as common comorbidities for GID.[140]

In 2013, the American Psychiatric Association ("Association") issued a press release announcing that "in the [DSM's] upcoming fifth edition" ("DSM-V"), "people whose gender at birth is contrary to the one they

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[131] Barry, *supra* note 90, at 23 (quoting Professor Chai Feldblum).
[132] 135 CONG. REC. 19871 (1989).
[133] AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (3d ed. rev. 1987) [hereinafter DSM-III-R]. DSM-III-R was the version Senator Armstrong used to compile his list of excluded conditions. Barry, *supra* note 90, at 23.
[134] *Id.* at 3–4. Other subclasses included developmental disorders, disruptive behavior disorders, anxiety disorders, eating disorders, and tic disorders. *Id.*
[135] *Id.* at 71.
[136] *Id.* at 71–77.
[137] AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 493 (4th ed. 1994).
[138] *Id.* at 532–38.
[139] *Id.* at 533.
[140] *Id.* at 535.

identify with will be diagnosed with gender dysphoria" rather than GID.[141] The Association explained that "replacing 'disorder' with 'dysphoria' in the diagnostic label is not only more appropriate and consistent with familiar clinical sexology terminology, [but] also removes the connotation that the patient is 'disordered.' "[142] Indeed, the Association was careful to note that "gender nonconformity is not in itself a mental disorder."[143] Rather, the "critical element" of a gender dysphoria diagnosis "is the presence of clinically significant distress," that is, dysphoria.[144] The press release also disclosed that, unlike GID in DSM-IV, gender dysphoria would not be grouped with "Sexual Dysfunctions" and "Paraphilic Disorders" in DSM-V but would instead have its own chapter.[145]

DSM-V was published later that year, and its chapter on gender dysphoria began with a subtle, but significant observation: "The current term [gender dysphoria] is more descriptive than the previous DSM-IV term *gender identity disorder* and focuses on dysphoria as the clinical problem, not identity per se."[146] The diagnostic criteria for gender dysphoria were listed as follows: (1) "[a] marked incongruence between one's experienced/expressed gender and assigned gender" that continues for at least six months; and (2) "clinically significant distress or impairment in social, [occupational], or other important areas of functioning."[147] Moreover, the text noted that gender dysphoria in adults "is often, but not always, accompanied by a desire to be rid of primary and/or secondary sex characteristics and/or a strong desire to acquire some primary and/or secondary sex characteristics of the other gender," either through behavior modification, medical intervention, or both.[148]

Significantly, DSM-V was the first edition to address the genetic and physiological factors contributing to GID/gender dysphoria. In doing so, the text differentiated between gender dysphoria without a disorder of sex development ("DSD") and gender dysphoria in association with a DSD, in which DSDs "denote conditions of inborn somatic deviations of the reproductive tract from the norm and/or discrepancies among the biological indicators of male and female."[149] Therefore, transgender persons with congenital development of ambiguous genitalia, incomplete development of sex anatomy, sex chromosome anomalies, or disorders of gonadal development would be categorized as having gender dysphoria in association with a DSD[150]—or what Senator Armstrong would have called a GID "resulting from a physical impairment" so as to be eligible for protection under the ADA.[151] Whereas transgender persons without such conditions

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[141] Press Release, American Psychiatric Association, Gender Dysphoria (2013), https://www.psychiatry.org/file%20library/psychiatrists/practice/dsm/apa_dsm-5-gender-dysphoria.pdf [https://perma.cc/6WWF-ZFSB].

[142] *Id.*

[143] *Id.*

[144] *Id.*

[145] *Id.*

[146] AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 451 (5th ed. 2013) [hereinafter DSM-V].

[147] *Id.* at 452.

[148] *Id.* at 454.

[149] *Id.* at 451, 457.

[150] AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 511 (5th ed. text rev. 2022) [hereinafter DSM-V-TR].

[151] *See* Williams v. Kincaid, 45 F.4th 759, 788 n.7 (4th Cir. 2022) (Quattlebaum, J., dissenting) ("The language of § 12211(b)(1) makes clear that Congress contemplated that some gender identity disorders

would be classified as having gender dysphoria without a DSD. Because only the latter group is explicitly excluded from the ADA's coverage, any evidence of a genetic or physiological basis for gender dysphoria without a DSD has the potential to bring this group within the purview of the ADA as a type of GID resulting from physical impairments.

According to DSM-V, such evidence exists, although it is not yet conclusive.[152] Per the text, "[r]esearch suggests that gender dysphoria [without a DSD] has a polygenetic basis involving interactions of several genes and polymorphisms that may affect in utero sexual differentiation of the brain."[153] It also notes that transgender men without a DSD exhibit increased levels of male sex hormones relative to cisgender women.[154] Nevertheless, DSM-V acknowledges that "current evidence is insufficient to label gender dysphoria without a [DSD] as a form of intersexuality."[155]

For transgender persons seeking reasonable workplace accommodations, there are thus two possible arguments for why gender dysphoria is a protected disability under the ADA. First, "gender dysphoria" does not appear among the ADA's list of explicitly excluded conditions nor could it as the diagnosis did not exist at the time of the ADA's enactment. Second, even if "gender dysphoria" is deemed synonymous with "gender identity disorder," it should be understood to result from a physical impairment—and therefore be eligible for protection—given the role that genetic or physiological factors stand to play in the condition's onset and prolongation. Although these arguments have not been raised in the context of transgender workers' right to be called by their preferred name and pronouns, or their ability to access sex-segregated facilities and adhere to sex-differentiated dress codes consistent with their gender identity, they have been raised to varying degrees in other settings, with mixed results.[156]

C. RELEVANT CASE LAW

Presently, courts are in "significant disagreement" as to whether gender dysphoria is eligible for ADA protection.[157] Some hold that gender dysphoria is synonymous with,[158] or a subclass of,[159] GIDs so that to be protected, a plaintiff's gender dysphoria must result from a physical impairment.[160] They often then dismiss the complaint because it fails to allege that the plaintiff's

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result from physical impairments [e.g., intersexuality or genetic or physical abnormalities] and others do not."); *see also* Brief for GLBTQ Legal Advocates & Defenders et al. as Amici Curiae in Support of Plaintiff-Appellant at 19 n.51, Williams v. Kincaid, 45 F.4th 759 (4th Cir. 2022) (No. 21-2030) (noting that "at the time the ADA was being debated, Congress most likely believed that some forms of GID had mental etiologies and others had physical etiologies," which may explain the ADA's exclusion of GID "not resulting from physical impairments").

[152] DSM-V, *supra* note 146, at 457.

[153] DSM-V-TR, *supra* note 150, at 517.

[154] DSM-V, *supra* note 146, at 457.

[155] *Id.*

[156] *See infra* Section IV.C.

[157] London v. Evans, No. 19-559 (MN), 2019 WL 5726983, at *6 n.3 (D. Del. Nov. 5, 2019).

[158] *E.g.*, Doe v. Northrop Grumman Sys., 418 F. Supp. 3d 921, 929 (N.D. Ala. 2019); Parker v. Strawser Const., Inc., 307 F. Supp. 3d 744, 753–54 (S.D. Ohio 2018).

[159] *E.g.*, Duncan v. Jack Henry & Assocs., 617 F. Supp. 3d 1011, 1056–57 (W.D. Mo. 2022); Lange v. Houston Cnty., 608 F. Supp. 3d 1340, 1362 (M.D. Ga. 2022).

[160] *But see* Gulley-Fernandez v. Wis. Dep't of Corr., No. 15-CV-995, 2015 WL 7777997, at *2–3 (E.D. Wis. Dec. 1, 2015) (using "gender dysphoria" and "gender identity disorder" synonymously and declaring unequivocally that GID is not a disability under the ADA without considering whether it results from a physical impairment).

gender dysphoria is the result of a specific physical impairment[161] or because it seeks to rely on medical literature the court deems inconclusive or overbroad.[162] Conversely, courts allowing gender dysphoria claims to proceed often cite the unsettled state of the law as counseling in plaintiffs' favor[163] or deny defendants' motion to dismiss after finding that the plaintiff has raised a plausible inference their gender dysphoria results from a physical impairment.[164] To date, virtually all of the latter cases have been brought by transgender inmates alleging they were denied the benefit of certain services, programs, or activities administered by state prison systems[165] in contravention of Title II,[166] whereas almost all of the former cases have been brought by transgender workers alleging they were subjected to employment discrimination[167] in violation of Title I.[168]

Notably, the first and only circuit court to address this issue did so in the context of a Title II claim.[169] A brief recitation of the case's facts and procedural history follows. Kesha Williams, a transgender woman, alleged that she was subjected to gender dysphoria-related discrimination by various prison officials during the six months of her incarceration.[170] Specifically, Williams claimed she was forced to wear a male uniform and live and shower with male inmates, was subjected to intentional misgendering and pervasive harassment, and was denied medically necessary hormone therapy.[171] While Williams alleged multiple violations of state and federal law, her ADA claim was predicated on prison officials' denial of her request to be searched by female, rather than male, deputies and her request she be given access to private shower facilities and female undergarments—all of which, Williams

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[161] *E.g.*, *Duncan*, 617 F. Supp. 3d at 1057; *Northrop*, 418 F. Supp. 3d at 930.

[162] *E.g.*, *Parker*, 307 F. Supp. 3d at 754–55; *cf. Lange*, 608 F. Supp. 3d at 1362–63 (granting defendants' summary judgment motion).

[163] *See, e.g.*, Griffith v. El Paso Cnty., No. 21-cv-00387-CMA-NRN, 2023 WL 2242503, at *17 (D. Colo. Feb. 27, 2023); Venson v. Gregson, No. 3:18-CV-2185-MAB, 2021 WL 673371, at *3 (S.D. Ill. Feb. 22, 2021); Tay v. Dennison, No. 19-cv-00501-NJR, 2020 WL 2100761, at *3 (S.D. Ill. May 1, 2020); *see also* Iglesias v. True, 403 F. Supp. 3d 680, 687–88 (S.D. Ill. 2019) (interpreting identical language in the Rehabilitation Act).

[164] *See, e.g.*, Doe v. Pa. Dep't of Corr., No. 1:20-cv-00023-SPB-RAL, 2021 WL 1583556, at *12–13 (W.D. Pa. Feb. 19, 2021); Doe v. Mass. Dep't of Corr., No. 17-12255-RGS, 2018 WL 2994403, at *6–7 (D. Mass. June 14, 2018); *see also* Shorter v. Barr, No. 4:19cv108-WS/CAS, 2020 WL 1942785, at *9 (N.D. Fla. Mar. 13, 2020) (interpreting identical language in the Rehabilitation Act); *cf.* Edmo v. Idaho Dep't of Corr., No. 1:17-cv-00151-BLW, 2018 WL 2745898, at *8 (D. Idaho June 7, 2018) (denying motion to dismiss in which plaintiff raised a genuine dispute of fact whether gender dysphoria is specifically excluded from the ADA).

[165] *But see* Blatt v. Cabela's Retail, Inc., No. 5:14-cv-04822, 2017 WL 2178123, at *4 (E.D. Pa. May 18, 2017) (allowing worker's claim that she had been subjected to employment discrimination on the basis of her gender dysphoria to proceed after concluding that "gender identity disorders" should be "read narrowly to refer to only the condition of identifying with a different gender, not to encompass . . . a condition like [plaintiff]'s gender dysphoria, which goes beyond merely identifying with a different gender and is characterized by clinically significant stress"); Doe v. Triangle Doughnuts, LLC, 472 F. Supp. 3d 115, 134–35 (E.D. Pa. 2020) (applying *Blatt*'s reasoning in a subsequent employment discrimination case).

[166] *See* 42 U.S.C. § 12132 (prohibiting disability discrimination by public entities).

[167] *But see* Gulley-Fernandez v. Wis. Dep't of Corr., No. 15-CV-995, 2015 WL 7777997, at *3 (E.D. Wis. Dec. 1, 2015) (rejecting transgender inmate's claim that prison failed to accommodate her gender dysphoria on the grounds that "gender identity disorder is not a 'disability' under the [ADA]").

[168] *See* 42 U.S.C. § 12112(a) (prohibiting disability discrimination by covered employers).

[169] Khorri Atkinson, *Gender Dysphoria Poised to be New Disability Rights Battleground*, BL (July 11, 2023, 8:49 AM), https://news.bloomberglaw.com/daily-labor-report/gender-dysphoria-poised-to-be-new-disability-rights-battleground [https://perma.cc/7GJA-XTG5].

[170] Amended Complaint & Demand for Jury Trial, Williams v. Kincaid, No. 1:20-cv-1397 (E.D. Va. June 7, 2021) 2021 WL 2324162, ECF No. 21.

[171] *Id.* at 7–15.

asserted, were necessary "to ensure her health, safety, and welfare."[172] In a brief three-page opinion, the district court dismissed Williams' ADA claim on the grounds she had failed to allege that her gender dysphoria resulted from a specific physical impairment, ostensibly drawing no distinction between gender dysphoria and GIDs.[173] Williams thereafter filed a timely notice of appeal.[174]

In a 2-1 decision, the Fourth Circuit reversed, holding that Williams had stated a cognizable ADA claim.[175] The court first considered whether gender dysphoria constitutes a GID for the purposes of the ADA.[176] After examining the various revisions to the DSM in the decades since the ADA's enactment, the court concluded that the distinction between gender dysphoria and GIDs is substantive rather than semantic:

> The [American Psychiatric Association]'s removal of the "gender identity disorder" diagnosis and the addition of the "gender dysphoria" diagnosis to the DSM-5 reflected a significant shift in medical understanding. The obsolete diagnosis focused solely on cross-gender identification; the modern one on clinically significant distress. The DSM-5 itself emphasizes this distinction, explaining that the gender dysphoria diagnosis "focuses on dysphoria as the clinical problem, not identity per se." Put simply, while the older DSM pathologized the very existence of transgender people, the recent DSM-5's diagnosis of gender dysphoria takes as a given that being transgender is not a disability and affirms that a transgender person's medical needs are just as deserving of treatment and protection as anyone else's.[177]

Accordingly, the court held that gender dysphoria is not a GID subject to the ADA's "physical impairment" requirement.[178]

Although that determination alone would have been sufficient to overturn the district court, the Fourth Circuit proceeded to consider a second, independent argument for reversal: that Williams' gender dysphoria was a protected GID because it resulted from a physical impairment.[179] Given that "physical impairment" is not defined in the statute, the court consulted EEOC regulations, which "defin[e] the term expansively as 'any physiological disorder or condition . . . affecting one or more body systems, such as neurological . . . and endocrine.' "[180] That definition, together with an ADA rule of construction mandating that "disability" be interpreted broadly,[181] led the Fourth Circuit to again find in Williams' favor:

> Williams alleges that the medical treatment for *her* gender dysphoria "consisted primarily of a hormone therapy, which she used to effectively manage and alleviate the gender dysphoria she

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[172] *See id.* at 23–25 (alleging "failure to accommodate" in Count III).
[173] *Williams*, 2021 WL 2324162, at *2.
[174] William v. Kincaid, 45 F.4th 759, 765 (4th Cir. 2022).
[175] *Id.* at 779–80 (4th Cir. 2022).
[176] *Id.* at 766–70.
[177] *Id.* at 769.
[178] *Id.*
[179] *Id.* at 770–72.
[180] *Id.* at 770 (citing 28 C.F.R. § 35.108(b)(1)(i) (2024)).
[181] *Id.* (citing 42 U.S.C. § 12102(4)(A)).

> experienced," and that she had received this medical treatment for fifteen years. Thus, contrary to the dissent's assertion, Williams does not merely allege that gender dysphoria may require physical treatment such as hormone therapy; she maintains that her gender dysphoria requires it. Indeed, she invokes her need for hormone treatment in her complaint upwards of ten times. She explains that hormone treatment enables "feminization or masculinization of the body." And she alleges that without it, when the prison failed to provide this treatment, she experienced, inter alia, "emotional, psychological, and *physical* distress."
>
> These allegations suffice to raise "the reasonable inference" that Williams' gender dysphoria results from a physical impairment. In particular, the need for hormone therapy may well indicate that her gender dysphoria has some physical basis. That Williams did not "specifically allege that her gender dysphoria is rooted in some physical component" by using those particular words does not render implausible the inference that her gender dysphoria has a physical basis.
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> . . . .
>
> Our approach today "acknowledges that courts typically lack sufficient expertise in physiology, etiology, psychiatry, and other potentially relevant disciplines to determine the cause or causes of gender dysphoria." Especially at this early stage, to dismiss a case based on such "*unknowns*" would be wholly "premature and speculative." Williams' complaint, as it stands, permits the plausible inference that her condition "resulted from a physical impairment." Her allegations need not include either those precise words or a scientific analysis explaining the precise biomechanical processes by which her condition arose.[182]

The court declared that a contrary ruling "would return us to 'the hypertechnical, code-pleading regime of a prior era,' eliding Rule 8's straightforward focus on the plausibility of a claim."[183]

The Fourth Circuit also held that a gender dysphoria-inclusive interpretation was compelled by the doctrine of constitutional avoidance.[184] The court observed that gender dysphoria and GID are closely connected to transgender identity so that "a law excluding from ADA protection *both* 'gender identity disorders' *and* gender dysphoria would discriminate against transgender people as a class, implicating the Equal Protection Clause of the Fourteenth Amendment."[185] According to the court, the only possible motivation for such a law would be to harm transgender persons, which would not constitute a legitimate governmental interest under the Supreme Court's equal protection jurisprudence.[186] Nevertheless, the court observed

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[182] *Id.* at 770–72.
[183] *Id.* at 771 (citations omitted).
[184] *Id.* at 772–74.
[185] *Id.* at 772.
[186] *Id.* at 773. The court found substantial evidence of anti-transgender animus in the ADA's legislative history, as reflected in the statements of Senators Armstrong and Helms, as well as in the inclusion of "gender identity disorders" among conditions such as pedophilia and voyeurism, the manifestations of which harm third parties. *Id.* at 772–73.

that an alternative, nondiscriminatory interpretation of the ADA was available so that it need not address the underlying constitutional question.[187] Specifically, the court noted that the ADA's exclusion of "gender identity disorders not resulting from physical impairments" may be read as not encompassing gender dysphoria at all or as not encompassing gender dysphoria because it is a type of GID that does, in fact, result from a physical impairment.[188]

The defendants' motion for rehearing en banc was subsequently denied,[189] as was their petition for a writ of certiorari, over the scathing dissent of Justice Alito.[190] Echoing his remarks in *Bostock*, Justice Alito warned that "this decision will raise a host of important and sensitive questions regarding such matters as . . . access to single-sex restrooms and housing, [and] the use of traditional pronouns."[191]

Hence, the only federal appellate court to have addressed the question held that gender dysphoria is eligible for protection under the ADA, albeit in the context of a transgender inmate's Title II claim. As discussed in the next Section, however—and as implied by Justice Alito's dissent from the denial of certiorari[192]—there is no reason the Fourth Circuit's analysis in *Williams v. Kincaid* should be limited to Title II claims such that persons experiencing gender dysphoria are entitled to the full range of protections afforded by the ADA, including reasonable accommodations in the workplace.

D. Reasonable Accommodations for Transgender Workers

Whereas virtually all the cases adopting a gender dysphoria-inclusive interpretation of the ADA have arisen in the context of transgender inmates' Title II claims, their rationale is equally persuasive as applied to transgender workers' Title I claims.[193] That is because the ADA's list of excluded conditions is consistent across titles.[194] Consequently, a court considering whether a transgender person may be said to have a disability so as to be protected against public services discrimination under Title II interprets the same provision as a court assessing whether a transgender individual is protected against employment discrimination under Title I. In both instances, the court must determine whether the plaintiff's gender dysphoria constitutes a "gender identity disorder not resulting from physical impairments" such that it is explicitly excluded from the ADA's coverage.[195]

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[187] *Id.* at 773.
[188] *Id.* at 773–74.
[189] *See* Williams v. Kincaid, 50 F.4th 429 (4th Cir. 2022) (voting 8-6 against rehearing en banc).
[190] Kincaid v. Williams, 143 S. Ct. 2414 (2023) (denying the petition for a writ of certiorari).
[191] *Id.* at 2414 (Alito, J., dissenting).
[192] *See id.* at 2415 (contending the Fourth Circuit's rationale cannot be cabined to Title II claims such that transgender persons may bring cognizable employment discrimination claims under Title I and public accommodations claims under Title III).
[193] *See* cases cited *supra* notes 163–164; *see also Williams*, 50 F.4th at 432 (Quattlebaum, J., dissenting) (characterizing the *Williams* panel decision as applying to "any employer covered by the ADA"); Atkinson, *supra* note 169 ("[L]awyers say employers should review their disability accommodation policies [post-*Williams*] and ensure that transgender and nonbinary employees' concerns are addressed in order to avoid potential liability."); *cf.* Marble v. Tennessee, 767 Fed. Appx. 647, 651 (6th Cir. 2019) (observing "other circuits have likewise relied on cases from Titles I and III to inform Title II cases").
[194] *See* 42 U.S.C. § 12211 (appearing in "Title IV-Miscellaneous Provisions").
[195] *Id.* § 12211(b)(1).

Significantly, most cases rejecting transgender workers' Title I claims have been predicated on pleading deficiencies in plaintiffs' complaints, rather than adverse rulings on the merits.[196] After finding that gender dysphoria is synonymous with or a subclass of GID, courts in the handful of Title I cases brought by transgender persons have generally faulted the complaints for failing to allege that plaintiffs' gender dysphoria was the result of a specific physical impairment or for attempting to establish such a connection by reference to medical literature the court deemed inconclusive or overbroad.[197] Similarly, in rejecting the plaintiffs' argument that a gender dysphoria-inclusive interpretation of the ADA is required by the canon of constitutional avoidance, courts have typically faulted the complaints for failing to allege a specific constitutional violation or not pleading the violation with sufficient particularity to warrant the canon's application.[198] As demonstrated in *Williams v. Kincaid* and numerous district court decisions,[199] however, these obstacles can be overcome through careful pleading so that there is no reason transgender litigants cannot enjoy the same degree of success under Title I as they do under Title II.

This bodes well for transgender workers' "reasonable accommodation" claims under Title I, as courts have generally been receptive to transgender inmates' "reasonable modification" claims under Title II.[200] In relevant part, Title II provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity."[201] Accordingly, prisons must "make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the [prison] can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity."[202] To date, courts have allowed transgender inmates' failure-to-modify claims to proceed based on allegations they were denied access to gender identity-consistent clothing and undergarments,[203] called by incorrect names or pronouns,[204] or denied access to gender identity-consistent housing and restroom facilities.[205]

Each of the requested modifications, moreover, is consistent with accepted treatment protocols for gender dysphoria as developed by the World

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[196] *See* Duncan v. Jack Henry & Assocs., 617 F. Supp. 3d 1011, 1053, 1057 (W.D. Mo. 2022); Doe v. Northrop Grumman Sys., 418 F. Supp. 3d 921, 930 (N.D. Ala. 2019); Parker v. Strawser Const., Inc., 307 F. Supp. 3d 744, 755 (S.D. Ohio 2018).

[197] *See Duncan*, 617 F. Supp. 3d at 1056–57; *Northrop*, 418 F. Supp. 3d at 929–30; *Parker*, 307 F. Supp. 3d at 753–55.

[198] *See Duncan*, 617 F. Supp. 3d at 1056 n.34; *Northrop*, 418 F. Supp. 3d at 930.

[199] *See* cases cited *supra* notes 164, 174.

[200] *See* cases cited *infra* notes 203–05.

[201] 42 U.S.C. § 12132.

[202] 28 C.F.R. § 35.130(b)(7)(i) (2024).

[203] Griffith v. El Paso Cnty., No. 21-cv-00387-CMA-NRN, 2023 WL 2242503, at *18 (D. Colo. Feb. 27, 2023).

[204] *Id.*; *see also* Doe v. Mass. Dep't of Corr., No. 17-12255-RGS, 2018 WL 2994403, at *8 (D. Mass. June 14, 2018) (alleging prison officials denied inmate's request "that she be addressed . . . in a manner consistent with her gender identity"); *cf.* Tay v. Dennison, No. 19-cv-00501-NJR, 2020 WL 2100761, at *3 (S.D. Ill. May 1, 2020) (alleging prison officials declined to treat inmate "in a manner consistent with her gender identity").

[205] *See Griffith*, 2023 WL 2242503, at *18; Venson v. Gregson, No. 3:18-CV-2185-MAB, 2021 WL 673371, at *3 (S.D. Ill. Feb. 22, 2021); Doe v. Pa. Dep't of Corr., No. 1:20-cv-00023-SPB-RAL, 2021 WL 1583556, at *13 (W.D. Pa. Feb. 19, 2021); *Tay*, 2020 WL 2100761, at *3; *Doe v. Mass. Dep't of Corr.*, 2018 WL 2994403, at *8.

Professional Association for Transgender Health ("WPATH").[206] These protocols seek to alleviate the clinically significant distress associated with gender dysphoria and are recognized by numerous courts—including multiple circuit courts—as the authoritative standards of care.[207] After acknowledging that "[m]uch of the evidence in support of proper care of [transgender] persons comes from carceral settings," WPATH recommends that transgender persons in prisons and correctional facilities be allowed to wear gender identity-consistent clothing and hairstyles, obtain and use gender identity-appropriate hygiene and grooming products, specify their preferred names and pronouns, and have input in their sex-segregated housing and restroom assignments.[208] Compliance with these protocols has a "significant beneficial effect on the mental health" of transgender persons, while noncompliance leads to an increased risk of depression, anxiety, self-harm, and suicidal ideation.[209] WPATH's treatment protocols are not limited to carceral settings, however, such that they are equally relevant in the workplace.

Indeed, WPATH recognizes that "social transition can be extremely beneficial to many [transgender] people."[210] Social transition "is the process of [transgender] persons beginning and continuing to express their gender identity in ways that are authentic and socially perceptible."[211] The process "often . . . involves behavior and public presentation differing from what is usually expected" of people based on their assigned birth sex.[212] According to WPATH, social transition frequently includes some combination of the following: name change, pronoun change, gender identity-consistent grooming and dressing, gender identity-consistent use of sex-segregated facilities, and sex marker changes on legal documents and medical records.[213] Consequently, employees who are socially transitioning or whose social transition is complete will likely request workplace accommodations for their gender dysphoria consistent with WPATH's treatment protocols.

Before analyzing transgender workers' accommodation requests in detail, a brief refresher on Title I and its implementing regulations is warranted. Title I provides that "no covered entity shall discriminate against a qualified individual on the basis of disability," in which "discriminate" includes "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability."[214] Federal regulations, meanwhile, define "reasonable accommodation" to encompass not only "modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed," but also "modifications or adjustments that

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[206] WORLD PROFESSIONAL ASSOCIATION FOR TRANSGENDER HEALTH, STANDARDS OF CARE FOR THE HEALTH OF TRANSGENDER AND GENDER DIVERSE PEOPLE (8th ed. 2022) [hereinafter SOC], https://www.wpath.org/publications/soc [https://perma.cc/ETC2-H7V9].

[207] *See* Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 595 (4th Cir. 2020) (collecting cases).

[208] SOC, *supra* note 206, at S104, S107–08.

[209] *Id.* at S107.

[210] *Id.* at S39.

[211] *Id.* at S107.

[212] *Id.*

[213] *Id.* at S76; *see also* Brief for Medical, Public Health, and Mental Health Organizations as Amici Curiae Supporting Plaintiff-Appellee at 14, Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586 (4th Cir. 2020) (No. 19-1952) (identifying common elements of social transition and noting that the process "is often a critically important part of treatment"), 2019 WL 6341094.

[214] 42 U.S.C. § 12112(a), (b)(5)(A).

enable a covered entity's employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities."[215] Collectively, these are the provisions that would allow employees experiencing gender dysphoria to use sex-segregated facilities consistent with their gender identity, ensure they are called by their preferred names and pronouns, and permit gender identity-consistent compliance with sex-differentiated dress codes.[216]

Nevertheless, employers' duty to accommodate workers' disabilities is not absolute. Title I exempts employers from making any accommodation that "would impose an undue hardship on the operation of the [employer's] business."[217] Per federal regulations, "undue hardship means . . . significant difficulty or expense" considering the following five factors:

> (i) The nature and net cost of the accommodation, taking into consideration the availability of tax credits and deductions, and/or outside funding;
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> (ii) The overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation, the number of persons employed at such facility, and the effect on expenses and resources;
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> (iii) The overall financial resources of the [employer], the overall size of the business of the [employer] with respect to the number of its employees, and the number, type and location of its facilities;
>
> (iv) The type of operation or operations of the [employer], including the composition, structure and functions of the workforce of such [employer], and the geographic separateness and administrative or fiscal relationship of the facility or facilities in question to the [employer]; and
>
> (v) The impact of the accommodation upon the operation of the facility, including the impact on the ability of other employees to perform their duties and the impact on the facility's ability to conduct business.[218]

Because accommodations relating to bathrooms, dress codes, and pronouns stand to be relatively simple to implement and entail little or no expense—much less "significant difficulty or expense," as contemplated by federal law—most secular[219] employers would be required to provide such accommodations under a gender dysphoria-inclusive interpretation of the ADA.

1. Sex-Segregated Facilities

For most employers, allowing transgender persons to use sex-segregated facilities consistent with their gender identity would not impose an undue hardship per the relevant factors. Whereas the first three factors, to varying

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[215] 29 C.F.R. § 1630.2(o)(1) (2024).

[216] *See also id.* § 1630.2(o)(2) (observing "reasonable accommodation" may include "making existing facilities used by employees readily accessible to and usable by individuals with disabilities" as well as "appropriate adjustment or modifications of . . . policies").

[217] 42 U.S.C. § 12112(b)(5)(A).

[218] 29 C.F.R. § 1630.2(p)(1)–(2) (2024).

[219] *See supra* note 3.

degrees, consider an accommodation's cost relative to the employer's size and financial resources, there are no costs associated with transgender persons' use of gender identity-consistent facilities. The accommodation does not require the construction of new facilities or retrofitting of extant facilities but simply the use of existing facilities. Moreover, any facilities-related costs that an employer expected or planned to incur would be irrelevant, as voluntary construction of unisex or single-occupancy facilities for transgender workers risks perpetuating, rather than eliminating, stigma.[220] Indeed, unless offered in addition to—rather than in lieu of—sex-segregated facilities, such amenities risk exacerbating transgender persons' gender dysphoria by "very publicly brand[ing] [them] with a scarlet 'T.' "[221]

The fourth factor, likewise, counsels against a finding of undue hardship as permitting transgender persons to use gender identity-consistent facilities should not have any effect on an employer's operations.

The fifth factor, on the other hand, stands to be a closer call. Because some cisgender workers may object to transgender colleagues' use of sex-segregated restrooms, locker rooms, and showers consistent with their gender identity,[222] a transgender-inclusive facilities policy could be seen as undermining the employer's ability to conduct business.[223] While these objections may stem from sincere privacy concerns,[224] on balance they are likely insufficient to establish undue hardship. In the analogous educational context, multiple courts have held that transgender students' use of gender identity-consistent facilities does not violate cisgender students' privacy rights:

> [W]e do not intend to minimize or ignore testimony suggesting that some of the [cisgender] appellants now avoid using the restrooms and reduce their water intake in order to reduce the number of times they need to use restrooms under the new [transgender-inclusive] policy. Nor do we discount the surprise the [cisgender] appellants reported feeling when in an intimate space with a student they understood was of the opposite biological sex. We cannot, however, equate the situation the appellants now face with the very drastic consequences that the transgender students must endure if the school were to ignore the latter's needs and concerns.[225]

Provided cisgender students have access to other facilities, schools' transgender-inclusive policies have been upheld even when the alternatives "appear inferior and less convenient."[226]

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[220] *Cf.* Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 599, 609, 617–18 (4th Cir. 2020) (affirming summary judgment for a transgender student on equal protection and Title IX claims where school built single-stall restrooms for "students with gender identity issues" such that the student was segregated and stigmatized on the basis of sex); Whitaker v. Kenosha Unified Sch. Dist. No. 1, 858 F.3d 1034, 1041–42, 1045 (7th Cir. 2017) (finding a transgender student would suffer irreparable harm if forced to use gender-neutral restrooms because it would signal that he was different from other boys and lead to stigmatization).

[221] Doe v. Boyertown Area Sch. Dist., 897 F.3d 518, 530 (3d Cir. 2018).

[222] Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1778–79 (2020) (Alito, J., dissenting).

[223] Business Organizations Brief, *supra* note 41, at 1–2, 10.

[224] *Id.* at 11–17.

[225] *Boyertown*, 897 F.3d at 529–30; *see also Grimm*, 972 F.3d at 613–15.

[226] Parents for Priv. v. Barr, 949 F.3d 1210, 1225 (9th Cir. 2020).

By this logic, if an employer already offers workers multiple options with respect to sex-segregated facilities or currently provides access to single-occupancy restrooms, showers, and changing rooms, implementation of a gender identity-consistent facilities policy should not hamper cisgender employees' ability to perform their duties. Conversely, employers having a single pair of sex-segregated restrooms, showers, or locker rooms for which there is not a single-occupancy option would have a relatively compelling argument that allowing transgender persons to use gender identity-consistent facilities may prove disruptive to the employers' business. Yet, many of the latter employers are likely to be small firms exempt from the ADA altogether, in which case the fifth factor—and the question of undue hardship generally—is irrelevant.[227] For all other employers, allowing transgender persons to use sex-segregated facilities consistent with their gender identity would almost certainly represent a reasonable accommodation entailing little, if any, difficulty or expense.

2. Sex-Differentiated Dress Codes

Permitting gender identity-consistent dress code compliance would not be an undue hardship for most employers. As with sex-segregated facilities, assessing sex-differentiated dress code compliance on the basis of gender identity rather than birth-assigned sex should not impose any financial costs on employers such that the first three factors again support the accommodation. And just as allowing transgender persons to use gender identity-consistent facilities should not have any bearing on an employer's operations, the same is true of gender identity-consistent dress code enforcement, such that the fourth factor also favors the accommodation.

Concerning the fifth factor, some employers may assert that permitting transgender persons to comply with sex-differentiated dress codes consistent with their gender identity could be disconcerting to other employees and the businesses' customers.[228] Although there is no case law directly on point, the Sixth Circuit's decision in *EEOC v. R.G. & G.R. Harris Funeral Homes* is instructive.[229] There, a funeral home director was fired after informing her employer that she identified as transgender and planned to begin presenting as a woman at work.[230] The EEOC thereafter sued the employer for engaging in sex discrimination contrary to Title VII of the Civil Rights Act of 1964.[231] In rejecting the employer's argument that continuing to employ the worker would harm its business, the Sixth Circuit observed:

> The Funeral Home's alleged burden—that Stephens will present a distraction that will obstruct [the Home's] ability to serve grieving families—is premised on presumed biases. As the EEOC observes,

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[227] *See* 42 U.S.C. § 12111(5)(A) (defining an "employer" as having "15 or more employees" such that businesses with 14 or fewer employees are not "employers" subject to the ADA).

[228] *Cf.* Altitude Express Brief, *supra* note 41, at 56 (observing dress codes and grooming standards "advance a core interest of many organizations—how the entity presents itself to the world."); Brief for Christian Employers Alliance as Amici Curiae Supporting Petitioner at 14, R.G. & G.R. Harris Funeral Homes v. Equal Emp. Opportunity Comm'n, 139 S. Ct. 1599 (2019) (No. 18-107), 2019 WL 4167075, at *14 (noting customers may choose to patronize a business "precisely because the message conveyed by the dress code is what they desire as consumers.").

[229] Equal Emp. Opportunity Comm'n v. R.G. & G.R. Harris Funeral Homes, 884 F.3d 560 (6th Cir. 2018), *cert. granted*, 139 S. Ct. 1599 (Apr. 22, 2019) (No. 18-107).

[230] *Id.* at 568–69.

[231] *Id.* at 569.

> the Funeral Home's argument is based on "a view that Stephens is a 'man' and would be perceived as such even after her gender transition," as well as on the "assumption that a transgender funeral director would so disturb clients as to 'hinder healing.' " The factual premises underlying this purported burden are wholly unsupported in the record. [Thomas Rost, the Home's owner and operator] testified that he has never seen Stephens in anything other than a suit and tie and does not know how Stephens would have looked when presenting as a woman [in attire consistent with the Funeral Home's sex-differentiated dress code]. Rost's assertion that he believes his clients would be disturbed by Stephens's appearance during and after her transition to the point that their healing from their loved ones' deaths would be hindered at the very least raises a material question of fact as to whether his clients would actually be distracted.[232]

Significantly, even if the employer's contention had found support in the record it likely would not have changed the outcome, as courts interpreting Title VII have recognized that "it would be totally anomalous . . . to allow the preferences and prejudices of the customers to determine whether the discrimination was valid."[233]

Courts adjudicating ADA claims have likewise acknowledged that "an employer's accommodation of the discriminatory preferences of other employees, clients, or customers could, under certain circumstances, expose the employer to liability" for disability discrimination.[234] And EEOC guidance similarly provides that "[a]n employer cannot claim undue hardship based on employees' (or customers') fears or prejudices toward [an] individual's disability."[235] Hence, there is every reason to believe that gender identity-consistent dress code compliance would be required under a gender dysphoria-inclusive interpretation of the ADA notwithstanding any adverse impact on customers or coworkers.

3. Names and Pronouns

For most employers, it would not be an undue hardship to call transgender persons by their preferred names and pronouns. As with sex-segregated facilities and sex-differentiated dress codes, using transgender

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[232] *Id.* at 586.

[233] Diaz v. Pan Am. World Airways, 442 F.2d 385, 389 (5th Cir. 1971); *accord* Fernandez v. Wynn Oil Co., 653 F.2d 1273, 1276–77 (9th Cir. 1981). *But see* Emily Gold Waldman, *The Preferred Preferences in Employment Discrimination Law*, 97 N.C. L. REV. 91, 91 (2018) (asserting that in theory customer preferences cannot justify employment discrimination, but in reality, employment law creates several openings for customer preferences to establish defenses that would otherwise constitute actionable discrimination). Furthermore, federal regulations provide that the preferences of coworkers, clients, or customers cannot be used to justify sex discrimination, while EEOC guidance separately avers that "customer fears or prejudices do not amount to undue hardship" to excuse religious accommodations otherwise required by Title VII. *See* 29 C.F.R. § 1604.2(a)(1)(iii) (2024); U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC-CVG-2021-3, COMPLIANCE MANUAL, SECTION 12: RELIGIOUS DISCRIMINATION (2021).

[234] Equal Emp. Opportunity Comm'n v. C.R. England, Inc., 644 F.3d 1028, 1039 (10th Cir. 2011). *But see* Craig Westergard, *Unfit to be Seen: Customer Preferences and the Americans with Disabilities Act*, 34 BYU J. PUB. L. 179, 196 (2019) (contending courts are more tolerant of customer preference-related defenses under the ADA than they are under Title VII or the Age Discrimination in Employment Act).

[235] U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC-CVG-2003-1, ENFORCEMENT GUIDANCE ON REASONABLE ACCOMMODATION AND UNDUE HARDSHIP UNDER THE ADA (2002) (section on "Undue Hardship Issues").

persons' preferred names and pronouns should not impose any financial costs on employers such that the first three factors again support accommodations. And just as allowing transgender persons to use gender identity-consistent facilities and comply with gender identity-consistent dress codes should not have any effect on an employer's operations, the same holds for using transgender persons' preferred names and pronouns so that the fourth factor, likewise, favors accommodation.

The fifth factor, by comparison, is considerably more complex. As a preliminary matter, employers may assert that gender identity-consistent name and pronoun usage threatens to sow confusion and breed uncertainty in the workplace, thus undermining the firm's ability to conduct business.[236] With consistent usage and periodic reminders, though, any such confusion should be nominal and abate relatively quickly. Indeed, a worker changing their name is not an unusual occurrence, whether due to marriage, legal proceedings, or personal preference. In each instance, the individuals' coworkers—and by extension their employers—can adapt with minimal disruption, just as they would to using gender identity-consistent names and pronouns when referring to transgender persons.

Separately, employers may fear that customers will object to using transgender persons' preferred names and pronouns such that the accommodation will harm their business by decreasing revenues.[237] This argument is inapt for the same reasons discussed in Section IV.D.2—"it would be totally anomalous to allow the preferences and prejudices of the customers to determine whether the discrimination was valid."[238]

Alternatively, employers may worry that some coworkers will object, on purely secular grounds, to using pronouns inconsistent with—or names not traditionally associated with—an individual's birth-assigned sex.[239] As the Supreme Court has observed in the analogous religious accommodation context, however:

> An employer who fails to provide an [religious] accommodation [under Title VII] has a defense only if the hardship is "undue," and a hardship that is attributable to [coworker] animosity to a particular religion, to religion in general, or to the very notion of accommodating religious practice cannot be considered "undue."[240]

Otherwise, the Court warned, Title VII "would be at war with itself."[241] And the same is true of disability-related accommodations under the ADA. To permit coworker animosity to establish undue hardship would turn the ADA on its head and allow invidious bias to authorize the very discrimination the ADA seeks to eliminate.

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[236] Business Organizations Brief, *supra* note 41, at 20–21.

[237] *Cf.* Doe v. Triangle Doughnuts, LLC, 472 F. Supp. 3d 115, 122 (E.D. Pa. 2020) (noting certain customers did not want to use transgender worker's specified pronouns so that they preferred to interact with her cisgender colleagues).

[238] Diaz v. Pan Am. World Airways, 442 F.2d 385, 389 (5th Cir. 1971).

[239] *Cf. Triangle Doughnuts*, 472 F. Supp. 3d at 122 (implying coworkers' repeated misgendering of transgender colleague stemmed from secular bias); *see also* Eller v. Prince George's Cnty. Pub. Schs., 580 F. Supp. 3d 154, 172 (D. Md. 2022) (noting coworkers' continuous misgendering of transgender colleague was accompanied by "sexually degrading epithets like 'tranny' [and] 'shemale' ").

[240] Groff v. DeJoy, 143 S. Ct. 2279, 2296 (2023).

[241] *Id.*

Nor should that change when coworkers' objections are predicated on religious, rather than personal, convictions. Similar to the ADA's undue hardship standard for disability-related accommodations, Title VII requires that employers accommodate workers' religious beliefs unless doing so would cause undue hardship.[242] Unlike the ADA, though, Title VII was long understood to excuse accommodations imposing more than a de minimis cost on employers.[243] It was under this now repudiated interpretation of Title VII that the first and only circuit court to address the issue of pronoun usage rejected a religious employee's failure-to-accommodate claim.[244] There, a high school music teacher objected to his employer's new policy mandating that students be addressed by their preferred names and pronouns, citing his sincerely held religious belief that "it is sinful to promote gender dysphoria."[245] After initially accommodating the teacher's request that he be allowed to call students exclusively by their last names, the school withdrew the accommodation once "it became apparent that the practice was harming students and negatively impacting the learning environment for transgender students."[246] Because these adverse consequences were found to impose more than de minimis costs on the school system, continued accommodation was not required under Title VII's then-prevailing undue hardship standard.[247]

In 2023, however, the Supreme Court disavowed the "more than a de minimis cost" interpretation of Title VII's undue hardship standard.[248] The Court held that to demonstrate undue hardship, "an employer must show that the burden of granting [a religious] accommodation would result in substantial increased costs in relation to the conduct of its particular business."[249] Writing for the majority, Justice Alito declared that "courts must apply the test in a manner that takes into account all relevant factors in the case at hand, including the particular accommodations at issue and their practical impact in light of the nature, 'size and operating cost of [an] employer.' "[250] While not identical to the ADA's "significant difficulty or expense" standard, Title VII's undue hardship analysis now approximates that of the ADA.[251] Consequently, if the aforementioned case were to arise today, the teacher may well be entitled to a "last name only" accommodation despite the negative repercussions for his students.[252] Nevertheless, the

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[242] *See* 42 U.S.C. § 2000e-2(a)(1) (prohibiting employment discrimination on the basis of religion); *Id.* § 2000e(j) (defining "religion" to "include[] all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.").

[243] *Groff*, 143 S. Ct. at 2292.

[244] Kluge v. Brownsburg Cmty. Sch. Corp., 64 F.4th 861 (7th Cir. 2023), *vacated*, No. 21-2475, 2023 WL 4842324 (7th Cir. July 28, 2023).

[245] *Id.* at 866–67.

[246] *Id.* at 864, 868–69.

[247] *Id.* at 886–87, 891.

[248] *Groff*, 143 S. Ct. at 2294.

[249] *Id.* at 2295.

[250] *Id.*

[251] Khorri Atkinson, *Supreme Court Raises Bar in Religious Accommodation Test*, BLOOMBERG L. (June 29, 2023, 7:18 AM PDT), https://news.bloomberglaw.com/daily-labor-report/supreme-court-guts-long-standing-religious-accommodation-test-3 [https://perma.cc/7JLY-YGLK].

[252] Shortly after the Supreme Court's ruling in *Groff v. DeJoy*, the Seventh Circuit vacated its opinion in *Kluge v. Brownsburg Community School Corp.* and remanded the case for further proceedings in light of *Groff*. Kluge v. Brownsburg Cmty. Sch. Corp., No. 21-2475, 2023 WL 4842324 (7th Cir. July 28, 2023).

accommodation would be limited to the named plaintiff so that other teachers would be required to use transgender students' preferred names and pronouns consistent with school policy.

The availability of enhanced accommodations for religious workers under Title VII, in turn, supports robust accommodation of transgender workers per the ADA. Because employees with sincerely held religious beliefs are now themselves entitled to heightened accommodation under Title VII, a policy mandating that transgender persons be referred to by their preferred names and pronouns should not impair religious workers' ability to perform their jobs or the employer's ability to conduct its business, thereby obviating any undue hardship defense.

A gender dysphoria-inclusive interpretation of the ADA, therefore, would ensure that employers operationalize *Bostock's* rhetoric of equality by using transgender employees' preferred names and pronouns, permitting gender identity-consistent access to sex-segregated facilities, and allowing gender identity-consistent compliance with sex-differentiated dress codes.

CONCLUSION

Whereas virtually all the cases adopting a gender dysphoria-inclusive interpretation of the ADA arose in the context of transgender inmates' Title II claims, their rationale is equally persuasive as applied to transgender workers' Title I claims. That is because a court considering whether a transgender person may be said to have a disability so that they are protected against public services discrimination under Title II interprets the same provision as a court assessing whether a transgender individual is protected against employment discrimination under Title I. In both instances, the court must determine whether the plaintiff's gender dysphoria is a GID not resulting from physical impairments such that it is excluded from the statute's coverage.

Significantly, three compelling arguments exist for why gender dysphoria is an ADA-protected condition. First, rather than being synonymous with or a subclass of GIDs, gender dysphoria is a distinct diagnosis that does not seek to pathologize the very existence of transgender people but instead focuses on the clinically significant distress they experience due to the incongruence between their gender identity and the sex they were assigned at birth. Second, even if gender dysphoria is deemed a type of GID, it should be understood to have a physical basis given that its symptoms can be alleviated through hormone therapy and in light of emerging evidence that genetic and physiological factors play a role in the condition's onset and prolongation. Third, a gender dysphoria-inclusive interpretation is compelled by the canon of constitutional avoidance, because a contrary construction would have the effect of discriminating against transgender persons as a class in violation of the Equal Protection Clause.

Employers, therefore, must be prepared to accommodate the needs of transgender workers consistent with the ADA. Because accommodations relating to bathrooms, dress codes, and pronouns stand to be relatively simple to implement and entail little or no expense—much less significant difficulty or expense as contemplated by federal law—most employers would have to provide this trifecta of transgender-affirming accommodations to persons experiencing gender dysphoria. Consequently, the ADA promises

to grant transgender persons what they were implicitly denied in *Bostock*—authentic, lived equality in the workplace.