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ACCOMMODATING TRANS RIGHTS

SUSAN V. HAZELDEAN*

ABSTRACT

In the last few years, state legislatures have advanced a record number of bills aimed at restricting the rights of transgender and gender non-conforming people. In the 2023 legislative session alone, 510 bills were introduced across the nation that would ban gender-affirming healthcare, weaken protection from discrimination in employment, public accommodations, and hospitals, censor drag shows, limit access to books about LGBTQ people, and exclude trans people from bathrooms and locker rooms, among other things. To many, these proposed bills are efforts to exclude transgender people from public life and effectively legislate them out of existence. Such attacks are likely to fall hardest on the most marginalized and vulnerable LGBTQ people who must exist in state-run spaces such as schools, prisons, hospitals, group homes, and homeless shelters.

This Article argues that the Americans with Disabilities Act (ADA) has the potential to be a particularly effective tool for transgender people in fighting to be treated fairly in such places. Until recently, transgender people marginalized on account of their gender identity had no recourse under the ADA because Congress excluded “gender identity disorders” from the qualifying disabilities under the Act. But recently, some courts have found that Gender Dysphoria, a condition that many transgender people experience, is a covered disability under the ADA. This may allow transgender people to seek redress under the ADA when they face violent mistreatment in institutional settings. Not only does the ADA apply to many areas of life, the definition of discrimination used by the law—namely, that facially neutral policies with a disparate impact on disabled people as well as failure to provide reasonable accommodations both constitute discrimination—is also a particularly appropriate tool for addressing the barriers that many trans people face.

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INTRODUCTION

The U.S. is in the midst of an intense backlash against LGBTQ rights.¹ In the last few years, state legislatures have advanced a record number of bills aimed at restricting the rights of LGBTQ individuals, particularly those who are transgender and gender non-conforming people. In the 2023 legislative session alone, 510 bills were under consideration seeking to ban gender-affirming healthcare, weaken anti-discrimination laws regulating employers, businesses, and hospitals, censor drag shows, limit access to books about LGBTQ people, and exclude trans people from bathrooms and locker rooms, among other things.² To many, it appears that these are efforts to exclude LGBTQ people, particularly trans people, from public life and effectively legislate them out of existence.

Even when bills do not pass, the effort to limit LGBTQ rights has a profound impact. Trans youth are experiencing a mental health crisis: a 2022 survey by the Trevor Project found that 86 percent of trans or nonbinary youth reported negative effects on their mental health stemming from the political debate around trans issues, and nearly half had seriously considered suicide in the past year.³ Hate crimes and online harassment against LGBTQ people have increased, and many transgender people face threats to their basic physical safety.⁴ A 2021 study found that transgender Americans are four times more likely to be victims of violent crime than their cisgender peers.⁵ Libertarian narratives might suggest freedom and equality for LGBTQ people can be achieved just by getting the government to leave us alone. But the reality is that many of the most marginalized and vulnerable LGBTQ people must exist in spaces that are entirely controlled by the state such as schools, prisons, hospitals, group homes, and homeless shelters. In such contexts, there is no way to exclude the government, because the state is running the program.

One tool that may assist transgender people in fighting to be treated fairly in such places is the Americans with Disabilities Act (ADA). Enacted in 1990 to address the widespread discrimination disabled Americans faced in almost every sphere of life, the ADA had a “transformative” effect in making many programs, workplaces, and public buildings more accessible, although discrimination

1. *Mapping Attacks on LGBTQ Rights in U.S. State Legislatures in 2023*, ACLU (Dec. 21, 2023), <https://www.aclu.org/legislative-attacks-on-lgbtq-rights-2023> [<https://perma.cc/E28J-6HD5>].

2. *Id.*

3. *2022 National Survey on LGBTQ Youth Mental Health*, TREVOR PROJECT (2022), <https://www.thetrevorproject.org/survey-2022/> [<https://perma.cc/3QG8-GNF7>].

4. *Transgender People over Four Times More Likely than Cisgender People to be Victims of Violent Crime*, WILLIAMS INST. (Mar. 23, 2021), <https://williamsinstitute.law.ucla.edu/press/ncvs-trans-press-release/> [<https://perma.cc/7RNA-HSX8>].

5. *Id.*

against disabled people persists.⁶ But until recently the ADA had not been a tool to address discrimination against transgender people because Congress excluded “gender identity disorders” from the qualifying disabilities under the Act.⁷ Recently, however, courts have found that Gender Dysphoria, a condition that many, though not all, transgender people experience is a covered disability under the ADA.⁸ This is a very positive development, which may allow the ADA to become an important resource in addressing the violent mistreatment of trans people in institutional settings. Not only does the ADA apply to many areas of life and so should cover many trans people facing mistreatment, the definition of discrimination used by the law—namely, that failure to provide reasonable accommodations constitutes discrimination—is also a particularly appropriate tool for addressing the barriers that many trans people face.

I. THE AMERICANS WITH DISABILITIES ACT

The ADA was enacted in 1990.⁹ It was heralded as “the world’s first comprehensive declaration of equality for people with disabilities.”¹⁰ Signing the bill into law, then-President George H. W. Bush said its purpose is to “ensure that people with disabilities are given the basic guarantees for which they have worked so long and so hard. Independence, freedom of choice, control of their lives, the opportunity to blend fully and equally into the rich mosaic of the American mainstream.”¹¹ The statute was written to protect disabled people from discrimination in many areas of life, including employment, government services, and public accommodations.¹² As such it is much broader in

6. Joseph R. Biden Jr., *Proclamation on the Anniversary of the Americans with Disabilities Act*, WHITE HOUSE (July 25, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/07/25/proclamation-on-the-anniversary-of-the-americans-with-disabilities-act/#:~:text=On%20July%2026%2C%201990%2C%20with,equality%20for%20people%20with%20disabilities> [https://perma.cc/5RFP-4ZZ8].

7. *See infra* part II.

8. *Id.*

9. *Id.*

10. Biden, *supra* note 6.

11. *Transcript of Remarks by the President During Ceremony for the Signing of the Americans with Disabilities Act of 1990*, NAT’L ARCHIVES (July 26, 1990), <https://www.archives.gov/research/americans-with-disabilities/transcriptions/naid-6037492-remarks-by-the-president-during-ceremony-for-the-signing-of-the-americans-with-disabilities-act-of-1990.html> [https://perma.cc/WFM2-E6BN]. In emphasizing disabled people’s desire for “independence,” this signing statement echoes a strain of support for the ADA that embraced a libertarian narrative, arguing that protection from discrimination would allow disabled people to access employment and thus become self-sufficient and no longer in need of government benefits or support. *See* Arlene S. Kanter, *The Americans with Disabilities Act at 25 Years: Lessons to Learn from the Convention on the Rights of People with Disabilities*, 63 DRAKE L. REV. 819, 822–23 (2015) (“[T]he ADA, as a narrowly drawn antidiscrimination law, sought only to move a segment of the disabled population from reliance on government benefits to employment.”).

12. 42 U.S.C. § 12101(b).

application than civil rights statutes that came before, such as Title VII of the Civil Rights Act of 1964, which addresses only employment discrimination. The ADA was also drafted broadly in terms of coverage: rather than including only a specific list of disabilities, the statute defines a covered “disability” as “a physical or mental impairment that substantially limits one or more major life activities.”¹³ Major life activities include, but are not limited to, sleeping, thinking, and communicating.¹⁴

As comprehensive as the statute was, however, the ADA initially did not address anti-trans discrimination because it categorically excluded “transvestism,” “transsexualism,” and “gender identity disorders not resulting from physical impairments” from the definition of “disability.”¹⁵ As Professor Kevin M. Barry has documented, this exclusion was the result of homophobic and anti-transgender animus.¹⁶ These diagnoses were listed along with “pedophilia, exhibitionism, voyeurism . . . [and] other sexual behavior disorders excluded from coverage.”¹⁷ During debate on the ADA Senator William Armstrong (R-CO) decried the idea of providing “a protected legal status to somebody who has . . . [mental] disorders, particularly those [that] might have a moral content to them” such as drug abuse, “homosexuality and bisexuality . . . exhibitionism, pedophilia, voyeurism . . . compulsive kleptomania, or other impulse control disorders . . . conduct disorder, [and] any other disruptive behavior disorder.”¹⁸ Senator Jesse Helms (R-NC) argued that covering “homosexuals” and “transvestites” under the law would take away employers’ ability to “set up any moral standards for [their] business[es],” forcing them to hire “people who engage in sexually deviant behavior or unlawful sexual practices.”¹⁹ Senator Armstrong ultimately introduced an amendment to the ADA²⁰ that added an exclusionary clause stating “gender identity disorders not resulting from physical impairments” were not covered disabilities under the law.²¹ As Professor Barry points out, with these exclusions the ADA effectively

13. 42 U.S.C. § 12102(1)(A).

14. 42 U.S.C. § 12102(2).

15. The relevant exclusionary clause of the ADA states:

“(b) Certain conditions

Under this chapter, the term ‘disability’ shall not include—

(42) transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders;”

42 U.S.C. § 12211(b)(1).

16. Kevin M. Barry, *Disabilityqueer: Federal Disability Rights Protection for Transgender People*, 16 YALE HUM. RTS. & DEV. L.J. 1, 4 (2013).

17. *Id.*

18. 135 Cong. Rec. S19784 at 19853 (Sept. 7, 1989) (statement of Sen. Armstrong).

19. 135 Cong. Rec. S19784 at 19870 (Sept. 7, 1989) (statement of Sen. Helms).

20. 135 Cong. Rec. S19784 at 19884.

21. 42 U.S.C. § 12211(b)(1).

became a “moral code: ‘disability’ coverage applies to those we pity, not those we despise.”²²

For decades, transgender people could not obtain redress under the ADA for the discrimination they faced because of this exclusionary language.²³ When the ADA was adopted in 1990, the Diagnostic and Statistical Manual of the American Psychiatric Association (APA) then in effect, DSM-III-R, had a classification called “Gender Identity Disorders” that included four diagnoses: “Transsexualism,” “Gender Identity Disorders of Childhood,” “Gender Identity Disorder of Adolescence or Adulthood, Non-Transsexual Type,” and “Gender Identity Disorder Not Otherwise Specified.”²⁴ The diagnostic criteria for “transsexualism” were: “Persistent discomfort and sense of inappropriateness about one’s assigned sex,” and “persistent preoccupation, for at least two years, with getting rid of one’s primary and secondary sex characteristics and acquiring the sex characteristics of the other sex.”²⁵ The APA adopted a new version of the DSM in 1994. The DSM-IV “replaced the diagnosis of ‘Transsexualism’ with Gender Identity Disorder [(GID)].”²⁶ A person qualified for a GID diagnosis under the DSM-IV if they had a strong desire to be the other gender and had “clinically significant distress or impairments in social, occupational, or other important areas of functioning.”²⁷ While a person with GID by definition had an “impairment” that might otherwise qualify as a disability under the ADA, the language excluding “gender identity disorders” from coverage meant they could not obtain the law’s protection.

But in 2013, the APA adopted the DSM-5, which no longer contained GID as a diagnosis and articulated explicitly that “gender non-conformity is not in itself a mental disorder.” Rather, the DSM-5 contained a new diagnosis of Gender Dysphoria (GD), with different diagnostic criteria.²⁸ Instead of focusing on the person’s identity, as the prior diagnoses of “transsexualism” and “gender identity disorder” had done, the GD diagnosis is grounded in the clinically significant distress, or dysphoria, a person experiences when their gender

22. Barry, *supra* note 16, at 25.

23. 135 Cong. Rec. S19784 at 19884.

24. AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS: DSM-III-R 71, 74, 76, 77 (3d ed. 1987).

25. AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS: DSM-III-R 74 (3d ed. 1987).

26. *Supra* note 15.

27. AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS: DSM-IV 537-38 (4th ed. 1994).

28. American Psychiatric Association, *Gender Dysphoria Diagnosis*, APA, <https://www.psychiatry.org/psychiatrists/diversity/education/transgender-and-gender-nonconforming-patients/gender-dysphoria-diagnosis> [<https://perma.cc/FU4J-UHRC>].

identity does not match their assigned birth sex.²⁹ A person cannot qualify for a GD diagnosis solely because there is an incongruence between their sex assigned at birth and their gender identity; “[t]here must also be evidence of distress about this incongruence[.]”³⁰ “The critical element of gender dysphoria is the presence of clinically significant distress associated with the condition.”³¹ DSM-5 also contained a section entitled “Genetics and Physiology” which suggested that gender dysphoria may have physical causes such as genetics and hormones.³²

II. RECONSIDERING GENDER DYSPHORIA AS A COVERED DISABILITY UNDER THE ADA

Following the adoption of the DSM-5, courts began to reconsider whether the ADA might prohibit discrimination against transgender people. While most courts still hold that the exclusionary language in the statute expresses Congress’s intent “to exclude from the ADA’s protection both disabling and non-disabling gender identity disorders that do not result from a physical impairment,”³³ including GD, some courts allowed transgender plaintiffs’ claims to proceed.

A federal district court first ruled that transgender people could be protected from discrimination by the ADA in *Blatt v. Cabela’s Retail, Inc.* in 2017.³⁴ The *Blatt* court held that the gender identity disorders exclusion in the ADA did not apply to GD. The court found that the exclusion should be “read narrowly to

29. Gender dysphoria “focuse[s] the diagnosis on the gender identity-related distress that some transgender people experience (and for which they may seek psychiatric, medical, and surgical treatments) rather than on transgender individuals or identities themselves.” *Id.*

30. AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS: DSM-V 453 (5th ed. 2013).

31. See Am. Psychiatric Ass’n, *supra* note 29.

32. Am. Psychiatric Ass’n, *supra* note 30, at 457 (“For individuals with gender dysphoria . . . some genetic contribution is suggested by evidence for (weak) familiarity of gender dysphoria among nontwin siblings, increased concordance for gender dysphoria in monozygotic compared with dizygotic same-sex twins, and some degree of heritability of gender dysphoria.”); *id.* (stating “there appear to be increased androgen levels in . . . 46.XX individuals”).

33. *Parker v. Strawser Constr., Inc.*, 307 F. Supp. 3d 744, 754 (S.D. Ohio 2018) (gender dysphoria not resulting from physical impairment is within the ADA’s exclusionary language). See also *Michaels v. Akal Sec., Inc.*, 2010 WL 2573988, at *6 (D. Colo. June 24, 2010) (gender dysphoria is a gender identity disorder and therefore excluded); *Gulley-Fernandez v. Wis. Dep’t of Corr.*, 2015 WL 7777997, at *3 (E.D. Wis. Dec. 1, 2015) (gender dysphoria is a gender identity disorder and, therefore, is not a “disability” under the Americans with Disabilities Act or the Rehabilitation Act); *Mitchell v. Wall*, 2015 WL 10936775, at *2 (W.D. Wis. Aug. 6, 2015) (gender identity disorders expressly excluded from coverage under the ADA); *Diamond v. Allen*, 2014 WL 6461730, at *4 (M.D. Ga. Nov. 17, 2014) (same); *Kastl v. Maricopa Cnty. Cmty. Coll. Dist.*, 2004 WL 2008954, at *4, *4 n. 2 (D. Ariz. June 3, 2004) (equating “gender identity disorder” and “gender dysphoria” and holding them to be expressly excluded from definition of “disability”).

34. *Blatt v. Cabela’s Retail, Inc.*, No. 5:14-cv-04822, 2017 WL 2178123, *5 (E.D. Pa. May 18, 2017).

refer to only the condition of identifying with a different gender, . . . [and] not to encompass (and therefore exclude from ADA protection) . . . Blatt's gender dysphoria."³⁵ When the ADA was adopted, the diagnostic criteria in the DSM for the "gender identity disorder" called "transsexualism" concerned whether they had "[p]ersistent discomfort and sense of inappropriateness about [their] assigned sex," or "persistent preoccupation . . . with . . . acquiring the sex characteristics of the other sex."³⁶ As such, the *Blatt* court noted, diagnosis was premised solely on the patient's gender identity.³⁷ GD, by contrast, is more than "merely identifying with a different gender and is characterized by clinically significant stress and other impairments that may be disabling."³⁸ Since GD had such different diagnostic criteria than "gender identity disorders" had at the time the ADA was adopted, the court held, GD is not a "gender identity disorder" subject to the ADA exclusion.

Several other courts also declined to dismiss transgender plaintiffs' ADA claims for a slightly different reason. Those decisions focused on the fact that the ADA exclusion only applied to "gender identity disorders *not resulting from physical impairments*."³⁹ Since transgender plaintiffs argued that GD might have a physical cause, those courts found they "cannot categorically say that gender dysphoria falls within the ADA's exclusionary language."⁴⁰ Since "a physical etiology underlying gender dysphoria may exist to place the condition outside of the exclusion for gender identity disorders 'not resulting from physical impairments'" these courts declined to dismiss transgender plaintiffs'

35. *Id.* at *2.

36. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS: DSM-III-R 27, 76 (1987).

37. *Blatt*, No. 5:14-cv-04822, at *2.

38. *Id.* at *3.

39. The relevant exclusionary clause of the ADA states:

"(b) Certain conditions

Under this chapter, the term "disability" shall not include—

(1) transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders";

42 U.S.C. § 12211(b)(1).

40. *Tay v. Dennison*, 2020 WL 2100761, at *3 (S.D. Ill. May 1, 2020) (slip copy). *See also* *Edmo v. Idaho Dep't of Corr.*, No. 1:17-cv-00151-BLW, 2018 WL 2745898, at *8 (D. Idaho June 7, 2018) (declining to dismiss ADA claim based on gender dysphoria); *Doe v. Mass. Dep't of Corr.*, 2018 WL 2994403, at *6 (holding that "the decision to treat 'Gender Dysphoria' in DSM-V as a freestanding diagnosis . . . reflects an evolving re-evaluation by the medical community of transgender issues and the recognition that GD involves far more than a person's gender identification."); *Iglesias v. True*, 403 F. Supp. 3d 680, 688 (S.D. Ill. 2019) (denying motion to dismiss based on ADA's transgender exclusion); *Tate v. Wexford Health Sources, Inc., et al.*, No. 16-cv-92-NJR, 2016 WL 687618, at *5 (S.D. Ill. Feb. 18, 2016) (allowing transgender plaintiff to proceed on claim under the ADA).

ADA claims and allowed them to proceed.⁴¹ These decisions note that GD could have a physical cause such as genetics or hormones that result in gender incongruence developing in utero, and therefore determined that “courts should rarely hold as a matter of law, based on a plaintiff’s complaint alone, that a plaintiff’s gender dysphoria is or is not the result of a physical impairment.”⁴²

The Fourth Circuit was the First Court of Appeals to hold that GD is a covered disability for ADA purposes.⁴³ In *Williams v. Kincaid*, the court ruled that a trans woman prisoner had stated a valid claim for disability discrimination under ADA.⁴⁴ Ms. Williams alleged she was denied adequate medical care, housed with men, insulted, demeaned, and mistreated on account of her gender identity.⁴⁵ A federal district court dismissed her ADA claim, however, finding that GD was not a covered disability under the ADA.⁴⁶

Williams appealed, and the Fourth Circuit reversed, finding that GD was distinct from GID as defined by the DSM-III and so did not fall within the statute’s exclusion of “gender identity disorders.”⁴⁷ Whereas the DSM-III GID pathologized gender variance itself, and classified a person as “disordered” for having a gender identity that did not accord with the sex they were assigned at birth, the Court noted that a GD diagnosis is only appropriate when incongruence between one’s gender identity and gender assigned at birth is accompanied by the presence of clinically significant distress.⁴⁸ “[A] diagnosis of gender dysphoria, unlike that of ‘gender identity disorder[]’, concerns itself primarily with *distress* and other disabling symptoms, rather than simply being transgender.”⁴⁹ The Court also noted that GD may have a physical basis, which would mean it “result[s] from physical impairment” and is thus not excluded from ADA coverage.⁵⁰ Finally, the *Williams* court held that the ADA exclusion

41. Doe v. Pa. Dep’t of Corr., No. 120CV00023SPBRAL, 2021 WL 1583556, at *9 (W.D. Pa. Feb. 19, 2021), *report and recommendation adopted*, No. CV 20-23, 2021 WL 1115373 (W.D. Pa. Mar. 24, 2021). *See also* Mass. Dep’t of Corr., 2018 WL 2994403, at *6 (declining to dismiss Plaintiff’s ADA claim because there is some medical evidence that GD diagnoses have a physical etiology), Shorter v. Barr, 2020 WL 1942785, at *9 (N.D. Fla. Mar. 13, 2020) *report and recommendation adopted*, 2020 WL 1942300 (Apr. 22, 2020) (The Rehab “Act exempts from the definition of disability not all gender identity disorders but only those ‘gender identity disorders not resulting from physical impairments.’”).

42. Doe v. Pa. Dep’t of Corr., No. 120CV00023SPBRAL, 2021 WL 1583556, at *9 (W.D. Pa. Feb. 19, 2021), *report and recommendation adopted*, No. CV 20-23, 2021 WL 1115373 (W.D. Pa. Mar. 24, 2021).

43. *Williams v. Kincaid*, 45 F.4th 759, 774 (4th Cir. 2022), *cert. denied*, 143 S. Ct. 2414 (2023) (“[W]e reverse the district court’s dismissal of Williams’ ADA claims.”).

44. *Id.*

45. *Id.* at 778-79.

46. *Id.* at 765.

47. *Id.* at 770.

48. *Id.* at 768.

49. *Id.*

50. *Id.* at 774.

should be read narrowly so as not to encompass GD because doing so would avoid interpreting the law in a way that might render it unconstitutional.⁵¹ If the ADA were read not to cover gender dysphoria because of its transphobic exclusion of “gender identity disorders,” the law would discriminate against transgender people and potentially violate the Equal Protection Clause. To avoid rendering the ADA unconstitutional, the Fourth Circuit held the exclusion should be read narrowly and did not encompass GD, which rather is a covered disability under the ADA.

The Supreme Court denied certiorari on the *Williams* case in 2023, leaving the Fourth Circuit ruling to stand. So, courts within the Fourth Circuit’s jurisdiction, in Maryland, Virginia, West Virginia, North Carolina, and South Carolina, are now bound by the *Williams* ruling that GD is a covered disability under the ADA. Of course, it remains to be seen whether other Courts of Appeal will follow the Fourth Circuit and similarly determine that the ADA covers GD. But to the extent courts continue to permit claims for GD discrimination under the Act, the statute has tremendous potential to address the exclusion and mistreatment many trans people face.

III. REASONABLE ACCOMMODATIONS FOR GENDER VARIANCE

The ADA is a potentially powerful tool to address anti-transgender discrimination for two reasons. First, the statute covers many aspects of life. Unlike Title VII, which forbids discrimination only in employment, the ADA forbids discrimination based on disability in employment, government programs and services, and public accommodations as well. Under the ADA “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, or be subjected to discrimination by any such entity.”⁵² This means that transgender people who face discrimination at school, in welfare offices, homeless shelters, or prisons⁵³ could have recourse under the ADA because it covers such programs.

Second, the definition of discrimination under the ADA is particularly well-suited to addressing the mistreatment that many trans people face. Under the ADA, discrimination is not just treating someone differently on account of their disability; it also includes enforcing seemingly neutral policies that have a disparate impact on disabled people and failure to make “reasonable

51. *Id.* at 773.

52. 42 U.S.C. § 12132. The phrase “service, program, or activity” under Title II of the ADA, like “program or activity” under Section 504 of the Rehab Act, is “extremely broad in scope and includes ‘anything a public entity does.’” Disability Rights N.J., Inc. v. Comm’r, N.J. Dep’t of Hum. Servs., 796 F.3d 293, 301 (3d Cir. 2015).

53. *See* Pa. Dep’t of Corr. v. Yeskey, 524 U.S. 206, 213 (1998) (“Title II of the ADA unambiguously extends to state prison inmates.”).

accommodations” to allow a person with a disability to work at the business, access the government program, or partake of the public accommodation.⁵⁴ That is, employers, governments, shopkeepers, and others can be required to treat the disabled person differently or alter the requirements of the job or program or public accommodation to allow them to participate. For example, under the ADA, failure to have doors wide enough so that wheelchair users can enter⁵⁵ is just as discriminatory as hanging a sign that says, “no disabled people allowed.” Policies and actions that appear nondiscriminatory and neutral but nevertheless operate to exclude and demean disabled people are impermissible and violate the statute.⁵⁶

For example, under the ADA’s prohibition on employment discrimination, a worker can show that an employer breached its duty to provide a reasonable accommodation, if he demonstrates: “(1) that he was disabled and his employer knew it; (2) he requested an accommodation or assistance; (3) his employer did not make a good faith effort to assist; and (4) he could have been reasonably accommodated.”⁵⁷ A defendant can defeat such a reasonable accommodation claim only by showing that “the plaintiff’s propos[ed accommodation] is either clearly ineffective or outlandishly costly.”⁵⁸

Jane Doe is an HIV+ transgender woman of color who worked as a cashier at a Dunkin’ Donuts in Bethlehem, Pennsylvania from March 2018 until May 2018.⁵⁹ Throughout her employment, Doe’s coworkers and supervisors misgendered her, “us[ing] Doe’s male legal name, male pronouns, and ‘dude’ when referring to Doe, despite Doe’s requests for [them] to use female pronouns and a preferred female name.”⁶⁰ Doe faced similar harassment from customers,

54. See, e.g., *Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296, 306 (3d Cir. 1999) (“Discrimination under the ADA encompasses not only adverse actions motivated by prejudice and fear of disabilities, but also includes failing to make reasonable accommodations for a plaintiff’s disabilities.”).

55. Under Title III of the ADA, which governs public accommodations, facilities built or altered after the ADA went into effect must be designed to be readily accessible to individuals with disabilities to the “maximum extent possible” while older buildings must remove architectural barriers if doing so is “readily achievable.” 42 U.S.C. §§ 12182(b)(2)(A)(ii-iv) & 12182(b)(2)(B)(i).

56. See Linda Hamilton Krieger, *Foreword—Backlash Against the ADA: Interdisciplinary Perspectives and Implications for Social Justice Strategies*, 21 BERKELY J. EMP. & LAB. L. 1, 4 (2000) (“The ADA require[s] not only that disabled individuals [are] treated no worse than non-disabled individuals with whom they were similarly situated, but also direct[s] that in certain contexts they be treated differently, arguably better, to achieve an equal effect.”).

57. *Reyer v. Saint Francis Country House*, 243 F. Supp. 3d 573, 595 (E.D. Pa. 2017) (citing *Armstrong v. Burdette Tomlin Mem’l Hosp.*, 438 F.3d 240, 246 (3d Cir. 2006)).

58. *Walton v. Mental Health Ass’n of Southeastern Pa.*, 168 F.3d 661, 670 (3d Cir. 1999). Employers can escape liability only if the proposed accommodation creates an “undue hardship” for it, for example by imposing significant difficulty or expense. 42 U.S.C. § 12111(10)(A).

59. *Doe v. Triangle Doughnuts, LLC*, 472 F. Supp. 3d 115, 122 (E.D. Pa. 2020).

60. *Id.*

but rather than preventing customers from misgendering Doe, her supervisors reassigned her to duties that were out of the view of customers and told her not to use the women's bathroom because customers "don't feel comfortable with you going in there."⁶¹ Doe's employer also required her to groom in a masculine way, forcing her to wear her hair in a ponytail and forbidding her from wearing nail polish or makeup to work.⁶² Customers and coworkers also physically attacked and verbally abused Doe, calling her homophobic slurs and threatening to kill her.⁶³ When Doe reported this harassment to the police, she was told to go home and was subsequently terminated.⁶⁴

Doe filed suit under the ADA,⁶⁵ alleging that she had faced illegal discrimination because she was fired although capable of performing the duties of her cashier position with "reasonable accommodations — being treated consistent with her gender identity, being referred to as female, and being allowed to use the female restroom — and that she in fact requested and was denied these reasonable accommodations."⁶⁶ The court denied a motion to dismiss Doe's claim,⁶⁷ holding that she had adequately stated an ADA hostile work environment claim based on her GD disability because she was

"frequently misgendered, was prevented from using the women's bathroom, had her duties changed so as to be kept out of the view of customers, was asked probing questions about her anatomy and gender identity, was subject to a stricter dress code than other female and cisgender employees, and was ultimately terminated."⁶⁸

Doe's employer could have tried to argue that requiring Ms. Doe to answer to her legal, male name, use the men's restroom, groom in a masculine way, and answer to male pronouns was not discriminatory because it simply treated Ms. Doe like any other employee who was assigned male at birth.⁶⁹ But the ADA required the employer to do more than treat Doe like her cisgender male colleagues. It mandated that the employer offer Doe "reasonable

61. *Id.*

62. *Id.* at 123.

63. *Id.*

64. *Id.*

65. *Id.* at 127. Doe made additional claims under Title VII, 42 U.S.C. 1981, the Pennsylvania Human Relations Act and the Bethlehem exam Human Relations and Non-Discrimination Ordinance.

66. *Id.* at 124.

67. *Id.* at 135 ("[T]he Court declines at this stage of the proceeding to dismiss Doe's hostile work environment claim under the ADA based on her alternative theories of disability related to either gender dysphoria or some other neuroanatomical disability related to her gender identity.").

68. *Id.*

69. But note that the Supreme Court held in *Bostock v. Clayton County* that such policies constitute unlawful sex discrimination under Title VII of the 1964 Civil Rights Act. *Bostock v. Clayton Cnty.*, 140 S.Ct. 1731, 1741 (2020) ("[I]t is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.").

accommodations” unless doing so would be so expensive as to constitute an “undue hardship.” Clearly, using Doe’s chosen, female name and female pronouns to refer to her, and permitting her to use the women’s restroom and wear makeup and nail polish would not have been unduly costly or burdensome. As a result, the court found that she had stated a claim for discrimination under the ADA.

The “reasonable accommodations” conception of discrimination is also particularly suited to addressing the systemic mistreatment of the most vulnerable and marginalized trans persons who must struggle to survive in homeless shelters, prisons, schools, foster homes,⁷⁰ and other institutions. The libertarian ethos that has often been used to advance the rights of LGBTQ people seeks to expand and defend “the spheres of our lives and existence ... where the State should not be a dominant presence.”⁷¹ But as Professor Carlos Ball points out, the existence of such spheres is only protective if you have sufficient wealth and privilege to enjoy a life outside the supervision of the state.⁷² People who spend much, or all, of their time in state custody have no choice but to accept the state as a dominant presence in their lives. And many times, the rules and policies in those spaces that operate to demean and punish trans people for being trans appear neutral and nondiscriminatory. They are not explicitly designed to single out trans people but nevertheless oppress and exclude them.

Transgender woman Kaabar Venson sued prison officials after another prisoner attacked her while incarcerated in a men’s prison in the Illinois Department of Corrections.⁷³ She alleged that the defendants had violated the ADA by assigning her to a male prison and placing her in a cell with cisgender male inmates, which put her at risk for physical and sexual abuse.⁷⁴ Then, after Ms. Venson asked for protection, she was put in isolation where she could not access therapy or educational programs, which harmed her mental health.⁷⁵ The court found these allegations “sufficient to support an ADA claim” and denied the defendants’ motion to dismiss.⁷⁶ No doubt the Illinois Department of Corrections would argue that, in placing Ms. Venson in a men’s prison with a cisgender male cellmate, it was simply treating her the same as any other

70. *Cf. Matter of Doe v. Bell*, 754 N.Y.S.2d 846, 853 (N.Y. 2003) (holding that Gender Identity Disorder is a covered disability under New York state’s human rights law and a foster care agency discriminated against a transgender young person when it required her to wear masculine clothing because she was assigned male at birth).

71. *Lawrence v. Texas*, 539 U.S. 558, 562 (2003).

72. Carlos Ball, *Progressive Constitutionalism and Its Libertarian Discontents: The Case of LGBTQ Rights*, 68 St. LOUIS U. L.J. (forthcoming 2024).

73. *Venson v. Gregson*, No. 3:18-CV-2185-MAB, 2021 WL 673371, at *1 (S.D. Ill. Feb. 22, 2021).

74. *Id.* at *3.

75. *Id.*

76. *Id.* at *3, *5.

prisoner who was assigned male at birth. But the court's decision declining to dismiss her claim indicates that treating Ms. Venson the same as an inmate without GD was arguably insufficient; the Department of Corrections had an obligation to provide reasonable accommodations to address her needs as a transgender woman. For example, they could have granted her a single-occupancy cell, or assigned her a transgender woman cellmate, or housed Ms. Venson in a women's prison. By failing to make any accommodations for Ms. Venson's GD, prison officials arguably violated the ADA.

Similarly, in *Doe v. Massachusetts Department of Corrections*, the court declined to dismiss a transgender woman's complaint against prison officials who subjected her to strip searches by male guards who "frequently groped her breasts," forced her to strip naked in front of other prisoners, and required her to shower in view of male inmates.⁷⁷ Ms. Doe also claimed that corrections officers refused to use her chosen, female name or female pronouns to refer to her and made demeaning, transphobic remarks, calling her and other transgender prisoners "chicks with dicks" and "wannabe women."⁷⁸ The Department of Corrections argued that Ms. Doe's "ADA claim [could not] stand because she [was] not complaining of her *exclusion* or *denial* from services, programming, or activities available at [the men's prison where she was housed],"⁷⁹ but the court found that she had made out a viable claim. First, the "DOC's biological sex-based assignment policy" violated the ADA because the rule disproportionately impacted disabled people.⁸⁰ Forcing Ms. Doe and other transgender women to live in men's prisons had a "disparate impact on inmates with GD because it injects them into a prison environment that is contrary to a critical aspect of their prescribed treatment," namely that they be allowed to live in accordance with their gender identities.⁸¹ Second, the court held that failing to place Ms. Doe in a women's prison or address her in a manner consistent with her gender identity would constitute the denial of a reasonable accommodation to her disability.⁸² Alleging that the Department of Corrections failed to grant her these accommodations was sufficient to state a claim under the ADA, the court found.⁸³ While the defendants argued that they had treated Doe in a neutral and nondiscriminatory manner and that she had been granted the same opportunity to participate in services, programming, and activities as any other inmate in the men's prison where she was placed, that was not sufficient.⁸⁴

77. *Doe v. Mass. Dep't of Correction*, No. CV 17-12255-RGS, 2018 WL 2994403, at *3-4 (D. Mass. June 14, 2018).

78. *Id.* at *4.

79. *Id.* at *8.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

The ADA's requirement to provide reasonable accommodations and avoid applying rules or policies that disproportionately impact persons with disabilities may allow transgender people to challenge seemingly neutral policies that are used to demean and exclude them. For example, in many state prison systems, a transgender prisoner who legally changes their name while incarcerated will still be referred to by the name they had at the time they were sent to prison.⁸⁵ Even after a prisoner legally changes their name, they still have to use their former "commitment" name on correspondence, and answer to it when summoned by staff.⁸⁶ Incarcerated people are typically issued identification cards by the prison and required to wear these cards on their person while they move about the facility.⁸⁷ So, a prisoner who legally changes their name must still wear a card showing the former name at all times.⁸⁸ Such policies do not explicitly single out transgender people for worse treatment than other inmates. But the effect is clearly discriminatory because being able to use a name that reflects one's gender identity is a key part of socially transitioning, and ameliorating gender dysphoria.⁸⁹ A transgender prisoner who is not allowed to change their name to reflect their true gender identity and who is required to answer to their former name and wear it on an ID card on their person at all times will likely experience humiliation, distress and increased gender dysphoria. So, while state laws and

85. *See, e.g.*, State of Alabama Department of Corrections Administrative Regulation No. 450: Inmate Legal Name Changes, <https://doc.alabama.gov/docs/AdminRegs/AR450.pdf> [<https://perma.cc/U8RA-XVPU>] ("The inmate's central or facility records shall not be changed because of a legal name change; these records shall continue to reflect the inmate's commitment name[.]"); Ark. Code § 9-2-102 (2012), ("Any person whose name may be so changed by judgment or decree of any of the circuit courts shall afterward be known . . . by the name thus conferred, except that records of persons under the jurisdiction and supervision of the Department of Correction shall continue to reflect the name as committed to the department's jurisdiction and supervision by the various circuit courts of the State of Arkansas.").

86. *Id.*

87. *See, e.g.*, Nebraska Department of Correctional Services, Policy No. 204.02: Incarcerated Individual Identification Cards, available at https://corrections.nebraska.gov/system/files/rules_reg_files/204.02_2023.pdf [<https://perma.cc/3XJL-WLBK>]. (stating that inmate identification cards "must be worn whenever outside of the incarcerated individual's assigned room except when going to and from the shower.") include[] the incarcerated individual's photograph, committed name, legal name (if different), physical description, and facility identification number.").

88. *See id.*, requiring that inmate identification cards "include[] the incarcerated individual's photograph, committed name, legal name (if different), physical description, and facility identification number.").

89. World Professional Association for Transgender Health, Position Statement on the Medical Necessity of Treatment, Sex Reassignment, and Insurance Coverage in the U.S.A, 2-3 (Dec. 21 2016) www.wpath.org/media/cms/Documents/Web%20Transfer/Policies/WPATH-Position-on-Medical-Necessity-12-21-2016.pdf [<https://perma.cc/V2P6-SWJ4>] ("Treatment [for gender dysphoria] includes legal name and sex or gender changes on identity documents . . . changes to documentation so that identity documents reflect the individual's current lived expression and experience are crucial aids to social functioning, and can be a necessary component of the social transition[.]").

policies that refuse to authorize or recognize prisoners' name changes do not explicitly single out transgender people, they nevertheless denigrate and demean trans inmates. The ADA should require prison systems to allow trans prisoners to adopt a name that reflects their true gender identity even if there is a prison policy to the contrary because doing so is a reasonable accommodation to prevent mistreatment and exclusion on the basis of the inmates' gender dysphoria. Similarly, failure to grant transgender prisoners access to gender-affirming medical care may also violate the ADA,⁹⁰ as could school policies that do not allow trans students to use the bathroom that accords with their gender identity or homeless shelters that insist on housing people according to their sex assigned at birth.

IV. CONCERNS ABOUT USING THE ADA TO REMEDY ANTI-TRANS DISCRIMINATION

I do not want to suggest, however, that the ADA is a panacea or that transgender plaintiffs' claims are guaranteed to succeed. Most ADA plaintiffs do not prevail on their claims. In 1999, Professor Ruth Colker called the ADA a "windfall for defendants," noting that "[d]efendants prevailed in 448 of 475 [ADA] cases (94%) at the trial court level and in 376 of 448 instances (84%) in which plaintiffs appealed these adverse judgments."⁹¹ These rates were far worse than in other kinds of civil rights actions.⁹² Indeed, ADA plaintiffs met with such strenuous resistance in the courts during the first 18 years of the statute that the ADA "became one of a limited number of civil rights statutes to inspire a statutory intervention by Congress to broaden its scope."⁹³ Congress passed the ADA Amendments Act (ADAAA) in 2008,⁹⁴ explicitly seeking to overturn the courts' restrictive interpretations of the ADA and expand the scope of the Act. In particular, Congress clarified when a person "regarded as" having a disability was covered by the ADA to expand the number of people covered by the act. Following the amendments, a person can bring an ADA claim if they have been "subjected to an action prohibited under this chapter because of an actual or perceived physical or mental impairment whether or not the

90. See, e.g., *Williams v. Kincaid*, 45 F.4th at 768, (reversing grant of motion to dismiss inmate's claims that denial of gender affirming medical care violated the ADA).

91. Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 108 (1999).

92. But see *id.* at 100 n.10 (noting that plaintiffs prevailed in 53% of voting rights cases and 22% of employment discrimination cases, but only 14% of prisoners' rights cases).

93. Elizabeth F. Emens, *Getting It: The ADA After Thirty Years*, 71 SYRACUSE L. REV. 637, 640 (2021).

94. ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (codified at 42 U.S.C. § 12101-12213 (2012)) (amending Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327).

impairment limits or is perceived to limit a major life activity.”⁹⁵ The Act was also changed to explicitly state: “[t]he definition of disability in this chapter shall be construed in favor of broad coverage of individuals under this chapter, to the maximum extent permitted by the terms of this chapter.”⁹⁶

Even following the passage of the ADAAA, however, many plaintiffs have still struggled to prevail in ADA litigation. For example, as Professor Prianka Nair points out, “federal courts have created doctrinal barriers to success in claims brought by incarcerated people with disabilities” that have limited the ADA’s reach and made it very difficult for prisoners to win ADA claims.⁹⁷ For example, “the majority of circuit courts require that when seeking compensatory damages under the ADA or section 504, the plaintiff prove that the defendant was ‘deliberately indifferent’ to a federally protected right [of the person] to participate in the programs, services, and activities,”⁹⁸ which requires showing the defendant knew that harm to a federally protected right was likely, and that the defendant failed to act on that likelihood.⁹⁹ This requirement appears nowhere in the statute, but has been applied by courts in ways that are highly deferential to prison officials.¹⁰⁰ Similarly, some federal courts have held that corrections officers are not liable for ADA violations if they had a legitimate penological interest that justified their conduct, even though this rule, first imposed in the context of inmates’ constitutional claims,¹⁰¹ also appears nowhere in the statute.¹⁰²

In the employment context, scholars have similarly criticized courts for applying the ADA in an overly restrictive way, so that disabled people still rarely prevail on their discrimination claims. As Professor Arlene Kanter puts it, “the ADA has had limited success, particularly in the area of employment.”¹⁰³

All this suggests that while cases recognizing GD as a covered disability under the ADA may allow transgender plaintiffs to bring claims when they face discrimination, that does not mean they will prevail in those cases or win

95. 42 U.S.C. § 12102(3)(A-B) (An impairment does not qualify for coverage, however, if it is transitory and minor. “A transitory impairment is an impairment with an actual or expected duration of 6 months or less.”).

96. 42 U.S.C. § 12102(4)(A).

97. Prianka Nair, *The ADA Constrained: How Federal Courts Dilute the Reach of the ADA in Prison Cases*, 71 SYRACUSE L. REV. 791, 840 (2021).

98. *Id.* at 809.

99. *Barber v. Colorado*, 562 F.3d 1222, 1228-29 (10th Cir. 2009).

100. Nair, *supra* note 97, at 811.

101. *Turner v. Safley*, 482 U.S. 78, 89 (1986).

102. *See, e.g., Norfleet v. Walker*, No. 3:09-cv-00347-JPG-PMF, 2011 U.S. Dist. LEXIS 132181, at *9 (S.D. Ill. Nov. 16, 2011) (citing *Bell v. Wolfish*, 441 U.S. 520, 547-48 (1979)) (Prison officials must be “accorded wide-ranging deference in the adoption and execution of policies that . . . are needed to preserve internal order and discipline.”).

103. Arlene S. Kanter, *The Americans with Disabilities Act at 25 Years: Lessons to Learn from the Convention on the Rights of People with Disabilities*, 63 DRAKE L. REV. 819, 831 (2015).

meaningful relief. Like other people with disabilities, they may find courts reluctant to embrace the transformative potential of the ADA and eager to rule so narrowly that meaningful relief is not available. While these challenges are important to acknowledge, however, the fact that some transgender plaintiffs have brought claims under the ADA that survived motions to dismiss does suggest that transgender plaintiffs' claims may succeed under the statute.

A different concern arises from some advocates who are concerned that disability-rights claims on behalf of transgender people may be harmful even when they succeed. Some suggest that by framing GD as a disability, ADA claims on behalf of transgender plaintiffs "will entrench the idea that being transgender is evidence of a medical condition, and by extension, something that needs to be 'cured.'"¹⁰⁴ But as noted above, a person does not qualify for a GD diagnosis based solely on their gender identity. Rather, GD is concerned with the serious, profound distress a person can experience when their gender identity is not affirmed or accepted. In that sense, GD is not the product of the person's gender identity at all, but rather the result of people having to live in a society that reinforces a rigid gender binary and violently mistreats those who do not conform to those restrictive gender expectations. The "problem" is not transgender people's identities, but the fact that society does not accept them for who they are, and that such rejection understandably causes many trans and gender nonconforming people significant distress.

For many years, disability scholars and advocates have argued that disabilities can be viewed as social, rather than medical, in nature.¹⁰⁵ While the "medical model" of disability places the onus on the disabled person, viewing their condition as a medical problem in need of a cure, the "social model" of disability recognizes that the real problem is a society that does not offer the accommodations and supports necessary for all people to fully participate.¹⁰⁶ Viewed in that light, being transgender is no more an individual deficit in need of a cure than any other disability. Instead, it is the social exclusion and marginalization transgender people suffer that should be addressed through comprehensive anti-discrimination protection, including access to reasonable accommodations that allow people with GD to fully participate in society.

104. S.E. Smith, *Is Being Trans a Disability Rights Issue?*, BUSTLE (June 12, 2017), <https://www.bustle.com/p/is-being-trans-a-disability-rights-issue-60576> [https://perma.cc/7UU7-TXF4].

105. See Doron Dorfman, *Disability as Metaphor in American Law*, 170 U. Penn. L. Rev. 1757, 1790 ("The construction of normality and human difference has been fundamental for disability scholars and activists, who adopted the social model and view disability not as an inherent disadvantage but rather as a legitimate variation of human diversity.").

106. See Tom Shakespeare, *The Social Model of Disability*, *The Disability Studies Reader* 216 (Routledge 3d. ed. 2010) ("The social model is distinguished from the medical or individual model. Whereas the former defines disability as a social creation – a relationship between people with impairment and a disabling society – the latter defines disability in terms of individual deficit.").

Others object to utilizing the ADA to address anti-transgender discrimination for more practical reasons. Access to gender-affirming medical care is severely limited in many communities, especially for young people, who are now banned from accessing gender-affirming medical care in several states. Transgender people are also disproportionately likely to live in poverty and to lack health insurance.¹⁰⁷ Finding a supportive physician who can make a GD diagnosis is therefore extremely challenging, if not impossible, for many transgender people.¹⁰⁸ There is no question that access to healthcare is a huge issue for transgender people, who often lack the means to pay for care¹⁰⁹ and face horrific discrimination in healthcare settings when they do seek medical help.¹¹⁰ Inability to obtain a GD diagnosis, however, does not necessarily prevent a person from bringing a claim under the ADA. A person who experienced discrimination because they were “regarded as” having a disability is also eligible to bring an ADA claim.¹¹¹ Discrimination based upon a “perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity”¹¹² is prohibited by the statute. A transgender plaintiff who faced discrimination by a defendant who perceived her as having GD may be able to bring an ADA claim, even if she has never actually been diagnosed with GD.¹¹³

107. Wyatt Koma et al., *Demographics, Insurance Coverage, and Access to Care Among Transgender Adults*, KFF Oct. 21, 2020), <https://www.kff.org/affordable-care-act/issue-brief/demographics-insurance-coverage-and-access-to-care-among-transgender-adults/> [https://perma.cc/6A5S-KVSL] (noting that “transgender adults are more likely to be uninsured (19% vs. 12%) and report cost-related barriers to care (19% vs. 13%) than cisgender adults” and 25% of transgender adults report an annual household income under \$20,000 versus 15% of cisgender adults”).

108. See Dean Spade, *Resisting Medicine, Re/modeling Gender*, 18 BERKELEY WOMEN’S L.J. 15, 33, 35 (2003) (Arguing against using disability laws to challenge anti-transgender discrimination since “I do not want to make trans rights dependent upon GID diagnoses, because such diagnoses are not accessible to many low income people.”).

109. Koma, *supra* note 107.

110. Fenit Nirappil, *For Trans People, Medical Visits Can be More Traumatizing than Healing*, Washington Post (March 24, 2024), <https://www.washingtonpost.com/health/interactive/2023/transgender-health-care/> [https://perma.cc/D72Q-ZQCK] (“Transgender Americans often face subtle discrimination, outright hostility and ill-informed medical professionals in their interactions with the health-care system.”).

111. See 42 U.S.C. § 1202(1)I (extending ADA coverage to people who experience discrimination because they are “regarded as having [a qualifying] impairment.”).

112. 42 U.S.C. § 12102(3)(A)-(B). An impairment does not qualify for coverage, however, if it is transitory and minor. “A transitory impairment is an impairment with an actual or expected duration of 6 months or less.” *Id.*

113. But note that a person who qualifies for ADA coverage on the basis of being “regarded as” having a disability is not entitled to reasonable accommodations. See 42 U.S.C. § 12201(h) (“[A] public entity . . . need not provide a reasonable accommodation or a reasonable modification to policies, practices, or procedures to an individual who meets the definition of disability in section 12102(1) solely under subparagraph (C) of such section.”).

CONCLUSION

For decades, transgender people were not protected from discrimination under the ADA because of exclusionary language added to the law at the time of its adoption. But recently, some courts have held that transgender people do qualify for ADA protection. The addition of GD to the DSM-V, with different diagnostic criteria than “gender identity disorders” such as “transsexualism” that appeared in the DSM-III when the ADA was adopted, as well as changing scientific understanding that GD may have a physical etiology, have led some courts to conclude that GD is not excluded as a disability under the ADA. As a result, the ADA now has the potential to be an important tool to address the marginalization of transgender people, particularly because it defines discrimination to include disparate impact and failure to provide reasonable accommodations. This conception of discrimination is well-suited to address the mistreatment that transgender people face, because it can be used to challenge supposedly neutral policies that have the effect of excluding transgender individuals. Given the tremendous discrimination that transgender people continue to face, especially at this moment of tremendous backlash against LGBT people generally and transgender persons in particular, the protection of the ADA is desperately needed.

