



Anti-Transgender Discrimination Under the ADA





SEPARATE ISSUE: NEEDS OF TRANS PEOPLE WITH DISABILITIES

- Transgender people are more likely to be disabled
- Quick facts on trans disabled people:
 - 45% in poverty
 - ~5x more likely to be unemployed than U.S. population
 - Nearly 2/3 have been sexually assaulted and nearly 2/3 experienced intimate partner violence
- Unique barriers to health care, legal autonomy, acceptance



ANTI-TRANS DISCRIMINATION UNDER THE ADA

Separate question: **Is discrimination based on being trans or related conditions covered under the ADA?**

- Growing # of courts say yes
- Even though there's a broad exclusion under the ADA
- No consensus yet
- Can open up important avenues for many-but not all-trans people who face discrimination



GENDER DYSPHORIA

- Being trans itself is not a disability
- Gender dysphoria:
 - The *distress associated with* the difference between gender identity and the gender someone was thought to be at birth
- Many (but not all) trans people have gender dysphoria



ADA EXCLUSION

- Last-minute amendment excluding stigmatized conditions from definition of disability

(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;**
- (2) compulsive gambling, kleptomania, or pyromania; or**
- (3) psychoactive substance use disorders resulting from current illegal use of drugs.**

42 U.S. Code § 12211



CONSTITUTIONAL ARGUMENT

- Excluding trans people violates the Equal Protection Clause
- Driven by a “bare congressional desire to harm” trans people
- Singles them out for moral disapproval



STATUTORY ARGUMENT

- Exclusion should be read narrowly so that gender dysphoria is covered as a disability

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(1) transvestism, transsexualism, ... gender identity disorders not resulting from physical impairments

Remember:

- Constitutional avoidance
- ADAAA: disability should be broadly construed



STATUTORY ARGUMENT

Under this chapter, the term “disability” shall not include—
(1) transvestism, transsexualism, ... gender identity disorders not resulting from physical impairments

- Exclusion applies to discrim based on being trans, but not based on gender dysphoria
- “Transsexualism” and “gender identity disorders” ≠ “gender dysphoria”
- Gender dysphoria may result from “physical impairments”



MOVEMENT IN COURTS

- *Blatt v. Cabela's Retail, Inc.*: gender dysphoria not categorically excluded
- *Doe v. Arrisi* (changes to birth certificates)
- *Doe v. Dzurenda* (prisons)



WHAT THIS MEANS

- Potential new avenue for some trans plaintiffs, in addition to sex discrimination laws
- Protections in areas not covered by federal sex discrim laws, including businesses, government services, prisons/jails, government-funded programs (via Rehabilitation Act)
- Requires reasonable accommodations