

ARTICLES

Challenging Inaccurate Sex Designations on Birth Certificates Through Disability Rights Law

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I. INTRODUCTION	314
II. TRANSGENDER STATUS AND GENDER DYSPHORIA	317
III. THE REFUSAL TO CHANGE THE SEX DESIGNATION ON A BIRTH CERTIFICATE ABSENT PROOF OF GCS VIOLATES TITLE II OF THE ADA AND SECTION 504	320
<i>A. A Person with Gender Dysphoria is a Qualified Individual with a Disability Under the ADA and Section 504</i>	321
1. Gender Dysphoria is Not Excluded Under the ADA or Section 504	322
a. No Exclusion for Gender Dysphoria Appears Anywhere in the Text of the ADA or Section 504	322
b. Even if Gender Dysphoria is a “Gender Identity Disorder,” the GIDs Exclusion Does Not Apply to All Claims Based on that Condition	324
c. The GIDs Exclusion is a Transgender Classification that Violates Equal Protection	325
2. A Person with Gender Dysphoria Meets the Definition of Disability Under the ADA and Rehabilitation Act	328
3. A Person Who Transitions Without GCS and Seeks an Amended Birth Certificate is a “Qualified Individual”	329
<i>B. The GCS Requirement Discriminates Based on Disability</i>	330
1. The GCS Requirement is Intentionally Discriminatory Because It Denies an Accurate Birth Certificate to a Subclass	

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of People with Gender Dysphoria.....	331
2. The GCS Requirement is Discriminatory in Effect Because It Screens Out a Subclass of People with Gender Dysphoria from Obtaining an Accurate Birth Certificate	333
3. The State’s Refusal to Issue an Accurate Birth Certificate Absent GCS Constitutes a Failure to Make Reasonable Modifications for a Subclass of People with Gender Dysphoria	334
IV. COUNTERARGUMENTS	336
A. “ <i>The GCS Requirement is Not Discriminatory Because It Does Not Result in ‘Inaccurate’ Birth Certificates</i> ”	336
B. “ <i>Even if the GCS Requirement Discriminates, It Does Not Do So Based on ‘Disability’</i> ”	337
C. “ <i>Eleventh Amendment Immunity Bars Claims for Monetary Damages Under Title II of the ADA</i> ”	338
1. A Plaintiff May Maintain a Suit for Damages Under Title II of the ADA for Conduct That “Actually Violates” § 1 of the Fourteenth Amendment	339
2. A Plaintiff May Maintain a Suit for Damages Under Title II of the ADA Provided that There is “Congruence and Proportionality” Between the Injury to be Prevented or Remedied and the Means Adopted to that End	340
V. CONCLUSION	342
APPENDIX: COMPARISON OF STATE LAWS REGARDING CHANGES TO SEX DESIGNATIONS ON BIRTH CERTIFICATES	345

I. INTRODUCTION

Despite the growing visibility and acceptance of transgender people in recent years, transgender people remain a “historically persecuted and politically powerless” class who “face discrimination, harassment, and violence because of their gender identity.”¹ Nowhere is this more evident than in the actions of the

1. *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1051 (7th Cir. 2017); *Doe 1 v. Trump*, 275 F. Supp. 3d 167, 176 (D.D.C. 2017), *vacated by Doe 2 v. Shanahan*, No. 18-5257, 2019 WL 102309 (D.C. Cir. Jan. 4, 2019); *see generally* NAT’L CTR. FOR TRANSGENDER EQUAL., THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY, EXECUTIVE SUMMARY 4 (2016), <https://www.transequality.org/sites/default/files/docs/USTS-Full-Report-FINAL.PDF> (surveying nearly 28,000 transgender people and finding “startling disparities between transgender people in the survey and the U.S. population when it comes to the most basic elements of life, such as finding a job, having a place to live, accessing medical care, and enjoying the support of family and community. Survey respondents also experienced harassment and violence at alarmingly high rates.”); *id.* at 3 (“Nearly one-third (29%) of respondents were living in poverty, compared to 12% in the U.S. population. A major contributor to the high rate of poverty is likely respondents’ 15% unemployment rate—three times higher than the

Trump administration, which has relentlessly pursued policies to the detriment of transgender people. These policies include: attempting to rescind regulations that protect transgender people from healthcare discrimination under the Affordable Care Act in 2016;² reinstating a ban on military service by transgender service members who, according to the President, are a “burden[.]” and a “disruption;”³ and rescinding a policy that prohibits schools from denying transgender students access to gender-appropriate restroom facilities.⁴

But there is one area of the law where an opposite trend has emerged: Disability rights law. People with gender dysphoria—the clinically significant distress experienced by transgender people who cannot live consistent with their gender identity⁵—have secured protection under the Americans with Disabilities Act of 1990 (“ADA”) and its predecessor, Section 504 of the Rehabilitation Act (“Section 504”),⁶ despite decades-old language excluding various transgender-related conditions.⁷ In 2017, for example, a transgender worker named Kate Lynn Blatt successfully claimed protection under the ADA for discrimination she experienced on the job, and in 2018, a transgender inmate successfully claimed protection under the ADA and Section 504 for discrimination she experienced while incarcerated.⁸

More disability rights challenges await—including challenges to restrictive birth certificate laws that require people to undergo gender confirmation surgery

unemployment rate in the U.S. population at the time of the survey (5%). . . . [N]early one-third (30%) of respondents have experienced homelessness at some point in their lifetime”)

2. See *Trump Administration Plan to Roll Back Health Care Nondiscrimination Regulation: Frequently Asked Questions*, NAT’L CTR. FOR TRANSGENDER EQUAL., <https://transequality.org/HCRL-FAQ> (last visited Apr. 21, 2019) (discussing Trump administration’s plan to roll back healthcare antidiscrimination regulations); see generally 45 C.F.R. § 92.4 (2019).

3. Doe I, 275 F. Supp. 3d at 183.

4. See Rebecca Hersher & Carrie Johnson, *Trump Admin. Rescinds Obama Rule On Transgender Students’ Bathroom Use*, NPR (Feb. 22, 2017, 7:37 PM), <https://www.npr.org/sections/thetwo-way/2017/02/22/516664633/trump-administration-rescinds-obama-rule-on-transgender-students-bathroom-use> (discussing 2017 guidance from U.S. Department of Justice and U.S. Department of Education rescinding 2016 guidance).

5. AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 451–53 (5th ed. 2013) [hereinafter DSM-5] (“Gender dysphoria refers to the distress that may accompany the incongruence between one’s experienced or expressed gender and one’s assigned gender. Although not all individuals will experience distress as a result of such incongruence, many are distressed if the desired physical interventions by means of hormones and/or surgery are not available.”).

6. The Rehabilitation Act applies to state governments because of their receipt of federal funds. See *infra* Part III (discussing Section 504).

7. See *infra* Section III.A.1 (discussing transgender exclusion under ADA and Section 504).

8. See generally *Doe v. Mass. Dep’t of Corr.*, No. 17-12255, 2018 WL 2994403 (D. Mass. June 14, 2018); *Blatt v. Cabela’s Retail, Inc.*, No. 5:14-cv-4822-JFL, 2017 WL 2178123 (E.D. Pa. May 18, 2017). The United States Department of Justice has not opposed such protection. See Notice by the United States of Decision Not to Intervene to Defend Constitutionality of a Federal Statute, *Doe v. Mass.*, No. 17-12255, at 1 (D. Mass. May 30, 2018); Second Statement of Interest of the United States of America, *Blatt v. Cabela’s Retail, Inc.*, No. 5:14-CV-04822 (E.D. Pa. Nov. 16, 2015).

(“GCS”) in order to change the sex designation on their birth certificates.⁹ Although vulnerable to attack on substantive due process and equal protection grounds,¹⁰ restrictive state birth certificate laws plainly violate the ADA and

9. Approximately seventeen states have GCS requirements. *See infra* Appendix (listing seventeen states that explicitly require GCS (Alabama, Arizona, Arkansas, Colorado, Georgia, Kansas, Kentucky, Louisiana, Maine, Michigan, Missouri, Nebraska, North Carolina, Ohio, Tennessee, Virginia, and Wisconsin) and twelve states that may require GCS (Indiana, Iowa, Mississippi, New Hampshire, North Dakota, Oklahoma, South Carolina, South Dakota, Texas, Utah, West Virginia, and Wyoming); *see also Changing Birth Certificate Sex Designations: State-By-State Guidelines*, LAMBDA LEGAL, <https://www.lambdalegal.org/know-your-rights/article/trans-changing-birth-certificate-sex-designations> (last visited Apr. 20, 2019) (collecting state statutes regarding changing sex designations on birth certificates); *ID Documents Center*, TRANSGENDER LAW CTR., <https://transequality.org/documents> (last visited Apr. 21, 2019) [hereinafter *ID Documents*] (same); *Identity Document Laws and Policies*, MOVEMENT ADVANCEMENT PROJECT, http://www.lgbtmap.org/equality-maps/identity_document_laws (last visited Apr. 21, 2019) (same); *see, e.g.*, ALA. CODE § 22-9A-19 (2013) (“Upon receipt of a certified copy of an order of a court of competent jurisdiction indicating that the sex of an individual born in this state has been changed by surgical procedure and that the name of the individual has been changed, the certificate of birth of the individual shall be amended as prescribed by rules to reflect the changes.”).

10. Restrictive birth certificate laws violate substantive due process by infringing various fundamental rights, including: (1) The right to privacy by disclosing that a person is transgender and exposing the person to discrimination and bodily harm, *see* Scott Skinner-Thompson, *Outing Privacy*, 110 NW. U. L. REV. 159, 191–92 (2015) (“[P]urportedly vanilla policies requiring individuals to provide proof of surgery before changing gender designations on government-issued identification documents directly infringe on transgender individuals’ informational privacy. For the many transgender people who are unable or choose not to have gender confirmation surgery, the government’s surgery requirement publicly outs the individual to anyone (such as an employer) who observes the dissonance between the person’s identification and gender presentation, subjecting them to potential discrimination”); (2) the right to refuse unwanted medical treatment by forcing a person to undergo medical procedures that may not be medically appropriate or available in order to change the sex designation on their birth certificate, *see, e.g.*, *Skinner v. Oklahoma*, 316 U.S. 535, 545 (1942) (invalidating state law that permitted involuntary sterilization of people convicted of crimes of moral turpitude); and (3) the right to gender autonomy—to live one’s life consistent with the gender identity with which one identifies, *see, e.g.*, *Obergefell v. Hodges*, 135 S. Ct. 2584, 2593 (2015) (“The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity.”); *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992) (“At the heart of liberty is the right to define one’s own concept of existence Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.”); *see also* Jillian Todd Weiss, *Protecting Transgender Students: Application of Title IX to Gender Identity or Expression and the Constitutional Right to Gender Autonomy*, 28 WIS. J.L. GENDER & SOC’Y 331, 339–40 (2013) (arguing “that there is a right to ‘gender autonomy,’ that protects people with transgender and transsexual identity, as well as those of traditional gender identity, from restrictions based on gender identity. This right to ‘gender autonomy’ is the right of self-determination of one’s gender, free from state control, and the right to self-identify as that gender, free from state contradiction.”).

Restrictive birth certificates also violate equal protection by denying accurate birth certificates to transgender people who do not undergo gender confirmation surgery. Heightened scrutiny applies because transgender people are a suspect/quasi-suspect class or because discrimination against transgender people is sex-based. *See, e.g.*, *Doe 1*, 275 F. Supp. 3d at 208–10 (applying “intermediate level of scrutiny” because “discrimination on the basis of someone’s transgender identity is a quasi-suspect form of classification that triggers heightened scrutiny” and also because such discrimination is “on the basis of gender, which is itself subject to intermediate scrutiny”).

Section 504 because they discriminate against people with gender dysphoria who do not undergo surgery.¹¹

This Article considers the disability rights challenge to discriminatory birth certificate laws. Part II provides context for this challenge by discussing transgender status and its relationship to the diagnosis of gender dysphoria. Building on the briefing in several district court cases,¹² Part III analyzes why a state's refusal to change the sex designation on a birth certificate absent proof of GCS violates Title II of the ADA and Section 504. Part IV addresses several counterarguments, and Part V offers some concluding remarks.

II. TRANSGENDER STATUS AND GENDER DYSPHORIA

To understand why restrictive state birth certificate laws discriminate based on gender dysphoria, it is first helpful to understand the meaning of “transgender.” A transgender person is someone whose gender identity does not align with one's assigned sex at birth.¹³ For example, most people born with the physical characteristics of males psychologically identify as men, and most people born with the physical characteristics of females psychologically identify as women. However, for a transgender person, this is not true; the person's assigned sex at birth and the person's gender identity do not match.¹⁴ Although there is not yet one definitive explanation for what determines gender identity, biological factors, most notably sexual differentiation in the brain, have a role in gender identity development.¹⁵

11. Given courts' obligation to avoid a constitutionally suspect interpretation of a statute in favor of a constitutionally uncontroversial interpretation, statutory disability claims will figure prominently in courts' analysis of restrictive birth certificates. *See Doe v. Mass. Dep't of Corr.*, No. 17-12255-RGS, 2018 WL 2994403, at *5–6 (D. Mass. June. 14, 2018) (“[A] court has a duty where ‘a serious doubt of constitutionality is raised’ with respect to a statutory provision to ‘first ascertain whether a construction of the statute is fairly possible by which [a constitutional] question may be avoided.’”) (citing *Crowell v. Benson*, 285 U.S. 22, 62 (1932)); *see also* *United States v. Dwinells*, 508 F.3d 63, 70 (1st Cir. 2007) (“[A]s between two plausible constructions of a statute, an inquiring court should avoid a constitutionally suspect one in favor of a constitutionally uncontroversial alternative.”).

12. *See* Plaintiff's Brief in Opposition to Defendant's Motion to Dismiss at 12–20, *Doe v. Mass. Dep't of Corr.*, No. 1:17-cv-12255-RGS (D. Mass. Feb. 2, 2018); Brief of Amici Curiae in Opposition to Defendants' Motion to Dismiss Plaintiff's Amended Complaint at 2–28, *Doe v. Arrisi*, No. 3:16-cv-08640.

13. U.S. EQUAL EMP'T OPPORTUNITY COMM'N, BATHROOM/FACILITY ACCESS AND TRANSGENDER EMPLOYEES, <https://www.eeoc.gov/eeoc/publications/fs-bathroom-access-transgender.cfm> (last visited Apr. 21, 2019) (“‘Transgender’ refers to people whose gender identity and/or expression is different from the sex assigned to them at birth.”); DSM-5, *supra* note 5, at 451 (stating that gender identity “refers to an individual's identification as male, female, or . . . some category other than male or female.”). In addition to transgender men and women, the transgender community includes “people who are non-binary, which is a term that is often used to describe people whose gender identity is not exclusively male or female, including those who identify as having no gender, a gender other than male or female, or more than one gender.” NAT'L CTR. FOR TRANSGENDER EQUAL., *supra* note 1, at 6–7.

14. DSM-5, *supra* note 5, at 452–53.

15. *See, e.g.*, CHRISTINE MICHELLE DUFFY, GENDER IDENTITY AND SEXUAL ORIENTATION DISCRIMINATION IN THE WORKPLACE: A PRACTICAL GUIDE 16–77 (Christine Michelle Duffy ed., 2014) (discussing recent medical studies pointing to biological etiology for transgender identity); Randi

For transgender individuals who cannot live consistent with their gender identity, this incongruence between their birth sex and their gender identity may result in gender dysphoria—i.e., a feeling of stress and discomfort with one’s assigned sex.¹⁶ Such gender dysphoria, if clinically significant and persistent, is a serious medical condition.¹⁷ According to the fifth version of the American Psychiatric Association’s *Diagnostic and Statistical Manual of Mental Disorders*, gender dysphoria is characterized by: (1) a marked incongruence between one’s gender identity and one’s assigned sex, which is often accompanied by a strong desire to be rid of one’s primary and secondary sex characteristics and/or to acquire primary/secondary sex characteristics of the other gender; and (2) intense emotional pain and suffering resulting from this incongruence.¹⁸ Among adolescents and adults, gender dysphoria often begins in early childhood, around the ages of two to three (“early onset gender dysphoria”), but it may also occur around puberty or even later in life (“late-onset gender dysphoria”).¹⁹ If left medically untreated, gender dysphoria can result in debilitating depression, anxiety, and for some people, suicidality and death.²⁰ In addition to the negative health conditions directly attributable to gender dysphoria, people with gender dysphoria are frequently subjected to discrimination in multiple areas of their lives

Kaufman, *Introduction to Transgender Identity and Health*, FENWAY GUIDE TO LESBIAN, GAY, BISEXUAL, AND TRANSGENDER HEALTH 331, 337–38 (Harvey J. Makadon et al., 2d. ed. 2008) (“The predominating biological theory suggests that a neurohormonal disturbance takes place in the brain during embryological development. While the genitalia of the human embryo become differentiated as male or female during the 12th week of fetal development, the gender identity portion of the brain differentiates around the 16th week. If there is a hormonal imbalance during this four-week period, gender identity may not develop along the same lines as the genitalia.”); Milton Diamond, *Biased-Interaction Theory of Psychosexual Development: “How Does One Know if One Is Male or Female?”*, 55 SEX ROLES 589, 596 (2006) (“During prenatal development the nervous system, the brain in particular, is programmed along a track that is usually concomitant with the development of other sex appropriate structures like genitals and reproductive organs. The brain, however, as in other [i]ntersex conditions, can develop along one sex/gender path while other organs develop along another. Put simply, the brain can develop as male while other parts of the body develop as female.”); see also Second Statement of Interest of the United States of America at 3–4, *Blatt v. Cabela’s Retail, Inc.*, No. 5:14-CV-04822-JFL (E.D. Pa. Nov. 16, 2015) [hereinafter DOJ *Blatt* Statement] (compiling studies supporting “biologic etiology for transgender identity”); Aruna Saraswat, Jamie D. Weinand & Joshua D. Safer, *Evidence Supporting the Biologic Nature of Gender Identity*, 21 ENDOCRINE PRAC. 199, 199–202 (Feb. 2, 2015) (providing a review of data in support of a “fixed, biologic basis for gender identity” and concluding that “current data suggest a biologic etiology for transgender identity”).

16. DSM-5, *supra* note 5, at 451 (“Gender dysphoria as a general descriptive term refers to an individual’s affective/cognitive discontent with the assigned gender but is more specifically defined when used as a diagnostic category.”).

17. *Id.* at 454 (“For natal adult males, prevalence ranges from 0.005% to 0.014%, and for natal females, from 0.002% to 0.003%. Since not all adults seeking hormone treatment and surgical reassignment attend specialty clinics, these rates are likely modest underestimates.”).

18. *See id.* at 452 (“The condition is associated with clinically significant distress or impairment in social, occupational, or other important areas of functioning.”).

19. *Id.* at 455–56.

20. *Id.* at 454–55.

(e.g., housing, employment, school, healthcare, interactions with police and other government officials) that exacerbates these negative health outcomes.²¹

Like other medical conditions, gender dysphoria can be ameliorated through medical treatment.²² There is no single course of medical treatment that is appropriate for every person with gender dysphoria. Instead, the World Professional Association for Transgender Health, Inc. (“WPATH”) (formerly known as “The Harry Benjamin International Gender Dysphoria Association, Inc.”), has established internationally accepted Standards of Care (“SOC”) for the treatment of gender dysphoria.²³ The SOC were originally approved in 1979 and have undergone seven revisions through 2012.²⁴ As part of the SOC, many transgender individuals with gender dysphoria undergo a medically-recommended and supervised gender transition in order to live life consistent with their gender identity.²⁵

The current SOC recommend an individualized approach to gender transition, consisting primarily of a medically-appropriate combination of “living part time or full time in another gender role, consistent with one’s gender identity,” hormone therapy, and surgery.²⁶ To complete their medical transition, some transgender individuals may live in their desired gender role without undergoing hormone therapy or surgery.²⁷ Others may decide with their health care provider that it is

21. *Id.* at 458 (“Gender dysphoria . . . is associated with high levels of stigmatization, discrimination, and victimization, leading to negative self-concept, increased rates of mental disorder comorbidity, school dropout, and economic marginalization, including unemployment, with attendant social and mental health risks, especially in individuals from resource-poor family backgrounds. In addition, these individuals’ access to health services and mental health services may be impeded by structural barriers, such as institutional discomfort or inexperience in working with this patient population.”); see also JAIME M. GRANT ET AL., NAT’L CTR. FOR TRANSGENDER EQUAL. AND NAT’L GAY AND LESBIAN TASK FORCE, INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY 2 (2011), https://transequality.org/sites/default/files/docs/resources/NTDS_Report.pdf [hereinafter NATIONAL SURVEY] (discussing discrimination against transgender people in a range of settings, including “in childhood homes, in school systems that promise to shelter and educate, in harsh and exclusionary workplaces, at the grocery store, the hotel front desk, in doctors’ offices and emergency rooms, before judges and at the hands of landlords, police officers, health care workers and other service providers”).

22. See WORLD PROF’L ASS’N FOR TRANSGENDER HEALTH, STANDARDS OF CARE 5 (7th ed. 2012), [https://s3.amazonaws.com/amo_hub_content/Association140/files/Standards of Care V7 - 2011 WPATH \(2\)\(1\).pdf](https://s3.amazonaws.com/amo_hub_content/Association140/files/Standards of Care V7 - 2011 WPATH (2)(1).pdf) (last visited Apr. 21, 2019) [hereinafter SOC]; see also DSM-5, *supra* note 5, at 451 (stating that “many [individuals] are distressed *if* the desired physical interventions by means of hormone and/or surgery are not available”) (emphasis added).

23. See SOC, *supra* note 22, at 1.

24. *Id.*

25. See *id.* at 9–10; see also OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, A GUIDE TO RESTROOM ACCESS FOR TRANSGENDER WORKERS, <https://www.osha.gov/Publications/OSHA3795.pdf> (last visited Apr. 21, 2019) (discussing gender transition).

26. SOC, *supra* note 22, at 9.

27. *Id.* at 8 (“[W]hile many individuals need both hormone therapy and surgery to alleviate their gender dysphoria, others need only one of these treatment options and some need neither.”).

medically necessary for them to undergo hormone therapy and/or surgery as well.²⁸ In addition to these medical treatment options, “other options [that] can be considered to help alleviate gender dysphoria” include “[c]hanges in name and gender marker on identity documents.”²⁹

In sum, the correct course of treatment for any given individual, in order for a person to achieve genuine and lasting comfort with one’s sex, “is individualized: What helps one person alleviate gender dysphoria might be very different from what helps another person.”³⁰ GCS is one of *several* medical treatments for gender dysphoria; for many people with gender dysphoria, non-surgical interventions are all that is necessary to alleviate their condition. Furthermore, even if GCS is otherwise necessary to alleviate a person’s gender dysphoria, there are many reasons why that person may not undergo it. For example, it may be contraindicated by a preexisting health condition, such as obesity, high blood pressure, heart disease, smoking history, obstructive sleep apnea, or allergies to anesthesia, or the person may not be able to afford it.³¹

III. THE REFUSAL TO CHANGE THE SEX DESIGNATION ON A BIRTH CERTIFICATE ABSENT PROOF OF GCS VIOLATES TITLE II OF THE ADA AND SECTION 504

A state’s refusal to change the sex designation on a birth certificate absent proof of GCS violates Title II of the ADA and Section 504.³² To prevail under these statutes, a person must establish that: (1) One is a qualified individual with a disability; (2) one was excluded from participation in, denied the benefits of, or was subjected to discrimination by reason of one’s disability; (3) such discrimination occurred in the context of a service, program, or activity; and (4) the defendant is a “public entity” under the ADA or receives federal financial

28. *Id.* at 9–10; *see also* DSM-5, *supra* note 5, at 453 (recognizing “cross-sex medical procedure[s] or treatment regimen[s] namely, regular cross-sex hormone treatment or gender reassignment surgery confirming the desired gender”).

29. *Id.* at 10.

30. *See* SOC, *supra* note 22, at 5.

31. Compare AM. SOC’Y OF ANESTHESIOLOGISTS, *Preparing for Surgery: Risks*, <https://www.asahq.org/whensecondscount/preparing-for-surgery/risks> (last visited Apr. 21, 2019) (discussing preexisting health conditions that may increase the risk of surgery, including “high blood pressure, heart disease . . . diabetes, stroke, seizures or other neurological disorders, obesity, obstructive sleep apnea, lung conditions [such as asthma] . . . kidney problems, allergies to anesthesia or a history of adverse reactions to anesthesia,” as well as “[s]moking, or drinking two or more alcoholic beverages a day”), with NATIONAL SURVEY, *supra* note 21, at 138 (“The costs of transition-related surgeries, which are rarely covered by health insurance, are beyond the reach of most transgender people, particularly because the community experiences such high rates of employment discrimination and poverty.”).

32. *See* 42 U.S.C. § 12132 (2012) (stating, in relevant part, 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, or be subjected to discrimination by any such entity.”); 29 U.S.C. § 794(a) (2012) (stating, in relevant part, that “[n]o otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. . .”).

assistance pursuant to Section 504.³³ Given the similarities between the two laws, “[t]he law developed under section 504 of the Rehabilitation Act is applicable to Title II of the ADA.”³⁴

In the birth certificate context, there is no dispute as to the third and fourth elements: State agencies that issue birth certificates are without question “public entities” under the ADA and recipients of federal funding for purposes of Section 504, and their issuance of accurate birth certificates is a service, program, or activity.³⁵ Two questions remain: (A) whether a person who once had, currently has, or is regarded as having gender dysphoria is a “qualified individual with a disability;” and (B) whether a State discriminates based on disability when it denies an accurate birth certificate to a person who does not undergo GCS to treat gender dysphoria. This Article addresses both questions in turn.

*A. A Person with Gender Dysphoria is a Qualified Individual
with a Disability Under the ADA and Section 504*

A person with gender dysphoria is a qualified individual with a disability under the ADA and Rehabilitation Act because: (1) gender dysphoria is not excluded from the definition of disability; (2) gender dysphoria meets the definition of disability; and (3) the person meets the essential eligibility requirements for receipt of an accurate birth certificate, with or without reasonable accommodation.

33. See, e.g., *Muhammad v. Ct. of Common Pleas of Allegheny Cty.*, 483 Fed. App'x 759, 762 (3d Cir. 2012) (discussing nearly identical analyses of ADA and Section 504); *accord Yeskey v. Pa. Dep't of Corr.*, 118 F.3d 168, 170 (3d Cir. 1997), *aff'd*, 524 U.S. 206 (1998).

34. *Helen L. v. Didario*, 46 F.3d 325, 330 n.7 (3d Cir. 1994); see also *Bragdon v. Abbott*, 524 U.S. 624, 632 (1998) (stating that Congress required courts “to construe the ADA to grant at least as much protection as provided by the regulations implementing the Rehabilitation Act”) (citing 42 U.S.C. § 12201(a)); *Frederick L. v. Dep't of Pub. Welfare*, 364 F.3d 487, 491 (3d Cir. 2004) (“We have construed the provisions of the [Rehabilitation Act] and the ADA in light of their close similarity of language and purpose.”).

35. *Compare* 42 U.S.C. § 12131(1) (2012) (defining “public entity” to mean “any State or local government” and “any department, agency . . . or other instrumentality of a State or States or local government”), *and* 29 U.S.C. § 794(a) (2012) (applying Section 504’s nondiscrimination mandate to entities receiving federal financial assistance), *with* *Noel v. N.Y. City Taxi & Limousine Comm’n*, 687 F.3d 63, 68 (2d Cir. 2012) (“[T]he phrase ‘services, programs, or activities’ has been interpreted to be ‘a catch-all phrase that prohibits all discrimination by a public entity.’”), *Hason v. Med. Bd. of Cal.*, 279 F.3d 1167, 1172–73 (9th Cir. 2002) (“[T]he ADA’s broad language brings within its scope anything a public entity does.”), *and Yeskey*, 118 F.3d at 170–71 (stating that “[t]he statutory definition of ‘[p]rogram or activity’ in Section 504 indicates that the terms were intended to be all-encompassing,” and broadly interpreting Section 504 and Title II of the ADA to “appl[y] to anything a public entity does”) (citing DOJ regulations under the Rehabilitation Act and ADA).

1. Gender Dysphoria is Not Excluded Under the ADA or Section 504

The ADA and Section 504 expressly exclude from protection “gender identity disorders not resulting from physical impairments” and “transsexualism,”³⁶ the latter of which has always been understood to be either interchangeable with, or a subtype of, gender identity disorder (collectively, the “GIDs Exclusion”).³⁷ Importantly, the GIDs Exclusion, does not apply to the new diagnosis of gender dysphoria in the fifth edition of the American Psychiatric Association’s *Diagnostic and Statistical Manual of Mental Disorders* (“DSM-5”), which was published in 2013.³⁸ As two federal district courts have held, as the U.S. Department of Justice has concluded in three separate cases in Pennsylvania, New Jersey, and Connecticut, and as the ADA’s text and legislative history make clear, gender dysphoria is not excluded under the ADA and Section 504.³⁹ Assuming that gender dysphoria were excluded, this interpretation would result in a categorical exclusion of transgender people from coverage under the ADA and Section 504 in violation of constitutional guarantees of equal protection.⁴⁰ Such an interpretation is to be avoided under basic principles of statutory interpretation.⁴¹

a. No Exclusion for Gender Dysphoria Appears Anywhere in the Text of the ADA or Section 504

In 2013, gender dysphoria replaced gender identity disorder in the DSM-5. This replacement was more than semantic, reflecting a substantive difference between the medical conditions themselves. The GIDs Exclusion does not apply to gender dysphoria because the two conditions differ in several key ways.

First, unlike the outdated diagnosis of gender identity disorder, the hallmark or presenting feature of gender dysphoria is *not* a person’s gender identity. Rather, it is the clinically significant distress, termed dysphoria, that a person experiences as a result of the mismatch between a person’s gender identity and one’s assigned

36. 42 U.S.C. § 12211(b)(1) (2012) (ADA) (excluding transgender-related conditions from the definition of disability). After excluding “gender identity disorders not resulting from physical impairments” from the ADA in 1990, Congress passed an identical exclusion to the Rehabilitation Act two years later. See Rehabilitation Act Amendments Act of 1992, Pub. L. No. 102–569, 106 Stat. 4344 (exclusion codified at 29 U.S.C. § 705(20)(F)(i) (2012)).

37. See DUFFY, *supra* note 15, at 16–48 (“It was not uncommon at the time [the ADA was being debated] for people to use the terms ‘transsexualism’ and ‘GID’ interchangeably.”); see also *id.* at 16–98 to 16–103 (explaining that, beginning in 1980, successive versions of the DSM referred to transsexualism as a subtype of gender identity disorder applicable to adults and adolescents, until 1994, when transsexualism was removed from the DSM). Because the now obsolete diagnosis of transsexualism merely referred to gender identity disorder in adolescents and adults, the ADA’s exclusion of *transsexualism* does not apply to gender dysphoria for the very same reasons that the ADA’s exclusion of *gender identity disorders* does not apply to gender dysphoria.

38. See DSM-5, *supra* note 5, at 452–53.

39. See *infra* Section III.A.1.i-ii and accompanying text.

40. See *infra* Section III.A.1.iii. and accompanying text (discussing constitutional challenge).

41. See *supra* note 11 and accompanying text (discussing constitutional avoidance canon).

sex.⁴² Reflecting this distinction, the diagnostic criteria for gender dysphoria in the DSM-5 are different than those for gender identity disorder. Gender identity disorder was characterized by a “strong and persistent cross-gender identification” and a “persistent discomfort” with one’s sex or “sense of inappropriateness” in the gender role of that sex.⁴³ In contrast, gender dysphoria is defined as a “marked incongruence” between gender identity and assigned sex, rather than a cross-gender identification *per se*.⁴⁴ Even though both gender identity disorder and gender dysphoria require clinical distress as an accompanying feature of the diagnosis, gender dysphoria focuses on the incongruity of a person’s identity and sex and not on cross-gender identification, a significant change in the presenting feature of the diagnosis.

Next, the criteria for gender dysphoria, unlike gender identity disorder, include a “post-transition specifier for people who are living full-time as the desired gender.”⁴⁵ The specifier was “modeled on the concept of full or partial remission,” recognizing that someone diagnosed with gender dysphoria who undergoes gender transition to alleviate one’s distress—putting the person in remission—can still have a gender dysphoria diagnosis.⁴⁶ Significantly, this substantive change means there are people with gender dysphoria that would not meet the criteria for gender identity disorder, underscoring that gender dysphoria is a different diagnosis.

Lastly, inclusion of a new and different diagnosis rests upon a growing body of new scientific research showing that gender dysphoria has a physical cause. DSM-5 includes a new section entitled “Genetic and Physiological,” which specifically discusses the genetic and hormonal underpinnings of gender dysphoria.⁴⁷ These findings, together with numerous recent medical studies, strongly suggest that gender dysphoria results from physical impairments, i.e., an atypical interaction of sex hormones and the brain.⁴⁸

In sum, even if the GIDs Exclusion could be interpreted to exclude all persons with *gender identity disorder* from bringing claims, it does not apply to persons diagnosed with *gender dysphoria*, a new and distinct diagnosis. As the District of Massachusetts recently held in *Doe v. Massachusetts Department of Corrections*, the ADA and Section 504 do not exclude gender dysphoria, in part, because it “is not merely another term for ‘gender identity disorder,’” but is rather a distinct

42. See AM. PSYCHIATRIC ASS’N, GENDER DYSPHORIA 2 (2013), https://www.psychiatry.org/File%20Library/Psychiatrists/Practice/DSM/APA_DSM-5-Gender-Dysphoria.pdf [hereinafter APA, GENDER DYSPHORIA] (stating that gender identity disorder connoted “that the patient is ‘disordered’”).

43. See DSM-5, *supra* note 5, at 581.

44. *Id.* at 452; see also *id.* at 814 (stating that DSM-5 “emphasiz[es] the phenomenon of ‘gender incongruence’ rather than cross-gender identification *per se*, as was the case in DSM-IV gender identity disorder”).

45. GENDER DYSPHORIA, *supra* note 42, at 1.

46. DSM-5, *supra* note 5, at 815; see also *id.* at 451.

47. See DSM-5, *supra* note 5, at 457.

48. See DUFFY, *supra* note 15, at 16–72 to 16–74 & n.282 (citing numerous medical studies that “point in the direction of hormonal and genetic causes” of gender dysphoria).

diagnosis with different diagnostic criteria.⁴⁹ This interpretation is also consistent with the 2008 amendments to the ADA and Section 504, which clarify Congress' intent that the definition of disability should "be construed in favor of broad coverage of individuals . . . to the maximum extent permitted."⁵⁰

b. Even if Gender Dysphoria is a "Gender Identity Disorder," the GIDs Exclusion Does Not Apply to All Claims Based on that Condition

The ADA and Section 504 exclude "gender identity disorders *not resulting from physical impairments*."⁵¹ Therefore, even if a court were to disregard the significant differences between gender dysphoria and gender identity disorder, gender dysphoria is nevertheless protected by the ADA and Section 504 because the burgeoning medical research underlying gender dysphoria points to a physical etiology—namely, an atypical interaction of sex hormones and the developing brain that results in a person being born with circulating hormones inconsistent with the person's brain sex.⁵² This atypical interaction of sex hormones and the

49. *Doe v. Mass. Dep't of Corr.*, No. 17-12255, 2018 WL 2994403, at *7 (D. Mass. June 14, 2018); *id.* at *6 ("In contrast to DSM-IV, which had defined 'gender identity disorder' as characterized by a 'strong and persistent cross gender-identification' and a 'persistent discomfort' with one's sex or 'sense of inappropriateness' in a given gender role, the diagnosis of GD in DSM-V requires attendant disabling physical symptoms, in addition to manifestations of clinically significant emotional distress."); *see also id.* (expressing agreement with plaintiff's argument that "the decision to treat 'Gender Dysphoria' in DSM-V as a freestanding diagnosis is more than a semantic refinement. Rather, it 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."). *But see* *Parker v. Strawser Constr., Inc.*, 307 F. Supp. 3d 744, 754 (S.D. Ohio 2018) (erroneously conflating gender dysphoria with gender identity disorders, and concluding that plaintiff's *gender dysphoria* was not protected by the ADA because "Congress intended to exclude from the ADA's protection both disabling and non-disabling *gender identity disorders* that do not result from a physical impairment") (emphasis added).

50. 42 U.S.C. § 12102(4)(A) (2012) (ADA); *see also* 29 U.S.C. § 705(9)(B), (20)(B) (2012) (cross-referencing ADA definition of disability under Section 504).

In *Blatt v. Cabela's Retail, Inc.*, the Eastern District of Pennsylvania advanced a separate reason for why the GIDs Exclusion does not apply to gender dysphoria. According to the court, "gender identity disorders," as used in the ADA, refers not to a medical condition but rather to "the condition of identifying with a different gender," i.e., being transgender. *Blatt v. Cabela's Retail, Inc.*, No. 5:14-cv-04822, 2017 WL 2178123, at *2 (E.D. Pa. May 18, 2017). Like being gay, lesbian, or bisexual, the court reasoned, being transgender is, by itself, not a medical condition and therefore is not a disability under the ADA. *See id.* at *3. Gender dysphoria, by contrast, *is* a medical condition. "[A] condition like Blatt's gender dysphoria," the court concluded, "goes beyond merely identifying with a different gender and is characterized by clinically significant stress and other impairments." *Id.* at *2. Simply put, the GIDs Exclusion "exclud[es] certain *sexual identities* from the ADA's definition of disability"—not the *medical conditions* "that persons of those identities might have." *Id.* at *3 (emphasis added); *see also* Kevin Barry & Jennifer Levi, *Blatt v. Cabela's Retail, Inc. and a New Path for Transgender Rights*, 127 *YALE L. J. F.* 373, 385 (2017) (discussing *Blatt's* holding). *But see supra* note 49 (discussing erroneous interpretation of *Blatt's* holding in *Parker v. Strawser Constr., Inc.*, 307 F. Supp. 3d 744, 754 (S.D. Ohio 2018)).

51. 42 U.S.C. § 12211(b)(1) (2012) (emphasis added); *see also* 29 U.S.C. § 705(20)(F)(i) (2012).

52. *See* DUFFY, *supra* note 15, at 16–72 to 16–74 & n.282 (citing studies showing physical etiology of gender dysphoria); *see also* DSM-5, *supra* note 5, at 457 (discussing genetic and, possibly, hormonal contribution to gender dysphoria); Elesline Hoekzema et al., *Regional Volumes and Spatial Volumetric*

brain is a “physiological . . . condition . . . affecting one or more body systems,” including “neurological . . . [and] endocrine” systems.⁵³ As the United States recently opined in the case of *Blatt v. Cabela’s Retail, Inc.*, and as it has maintained in two additional cases:

While no clear scientific consensus appears to exist regarding the *specific* origins of gender dysphoria (*i.e.*, whether it can be traced to neurological, genetic, or hormonal sources), the current research increasingly indicates that gender dysphoria has physiological or biological roots. . . . In light of the evolving scientific evidence suggesting that gender dysphoria may have a physical basis, along with the remedial nature of the ADA and the relevant statutory and regulatory provisions directing that the terms “disability” and “physical impairment” be read broadly, the GIDs Exclusion should be construed narrowly such that gender dysphoria falls outside its scope.⁵⁴

The District Court of Massachusetts has similarly concluded that “[w]hile medical research in this area remains in its initial phases,” the plaintiff had “point[ed] to recent studies demonstrating that [the gender dysphoria] diagnoses have a physical etiology, namely hormonal and genetic drivers contributing to the in-utero development of dysphoria.”⁵⁵

c. The GIDs Exclusion is a Transgender Classification that Violates Equal Protection

If a court were to interpret the GIDs Exclusion to apply to gender dysphoria, such an interpretation would create a facially discriminatory classification that violates equal protection. Specifically, by excluding a medical condition that is closely associated with transgender people (indeed, only transgender people have gender dysphoria), the GIDs Exclusion is a transgender classification that is not

Distribution of Gray Matter in the Gender Dysphoric Brain, 55 PSYCHONEUROENDOCRINOLOGY 59, 60 (2015) (discussing biological factors contributing to gender dysphoria).

53. 28 C.F.R. § 42.540(k)(2)(i) (DOJ Section 504 regulations); 28 C.F.R. § 35.108(b)(1) (DOJ ADA regulations).

54. Second Statement of Interest of U.S. at 5–6, *Blatt v. Cabela’s Retail, Inc.*, No. 5:14-CV-04822, (E.D. Pa. Nov. 16, 2015) (emphasis added); *accord* Statement of Interest of U.S. at 2–3, *Doe v. Dzurenda*, No. 3:16-CV-1934 (D. Conn. Oct. 27, 2017); Statement of Interest of U.S. at 2, *Doe v. Arrisi*, No. 3:16-cv-08640 (D.N.J. July 17, 2017); *see also* DUFFY, *supra* note 15, at 16–52, 16–76 (noting similarities between gender dysphoria and physical conditions with complex etiologies not fully understood by the medical community that are nevertheless protected by the ADA and Section 504, including polycystic ovary syndrome, cerebral palsy, strabismus, dyslexia, microvascular angina, stuttering, and Tourette syndrome—the latter two of which were once believed to be purely mental conditions).

55. *See Doe v. Mass. Dep’t of Corr.*, No. 17-12255, 2018 WL 2994403, at *6 (D. Mass. June 14, 2018) (“Doe has raised a dispute of fact that her GD may result from physical causes.”). Notably, the plaintiff in *Parker* failed to allege that gender dysphoria results from a physical impairment. *Parker v. Strawser Constr., Inc.*, 307 F. Supp. 3d 744, 755 (S.D. Ohio 2018).

narrowly tailored or substantially related to the achievement of a compelling or important governmental interest and, therefore, fails heightened scrutiny.⁵⁶ Under well-settled law, such an interpretation must be avoided.⁵⁷

There are two theories under which courts have applied heightened scrutiny to transgender classifications. First, by targeting transgender individuals for exclusion, the GIDs Exclusion constitutes a suspect/quasi-suspect classification under the United States Supreme Court's four-factor test and is therefore subject to strict or intermediate scrutiny (collectively, "heightened scrutiny").⁵⁸ Specifically, "transgender people have suffered a history of persecution and discrimination";⁵⁹ an incongruence between a transgender person's assigned sex and gender identity "bears no relation to ability to contribute to society";⁶⁰ transgender people exhibit immutable distinguishing characteristics that are core to a person's identity⁶¹; and transgender people are a minority at 0.6 percent of the adult population and lack political power.⁶² A growing number of lower courts have applied heightened scrutiny to facially discriminatory transgender classifications based on these four factors.⁶³

Second, apart from the four-factor test, Defendants' construction of the statute to exclude transgender people warrants heightened scrutiny because a transgender

56. See *infra* notes 58–64 and accompanying text (discussing heightened scrutiny).

57. See *supra* note 11 and accompanying text (discussing constitutional avoidance canon).

58. See *infra* note 58–63 and accompanying text (discussing Supreme Court's four-factor test).

59. *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1051 (7th Cir. 2017) ("There is no denying that transgender individuals face discrimination, harassment, and violence because of their gender identity."); *accord Doe v. Trump*, No. 17–1597, 2017 WL 4873042, at *27 (D.D.C. Oct. 30, 2017) ("As a class, transgender individuals have suffered, and continue to suffer, severe persecution and discrimination."); *Adkins v. City of New York*, 143 F. Supp. 3d 134, 139 (S.D.N.Y. 2015); *Brocksmith v. United States*, 99 A.3d 690, 698 n.8 (D.C. 2014) ("The hostility and discrimination that transgender individuals face in our society today is well-documented.")

60. *Trump*, 2017 WL 4873042, at *27 ("[T]he Court is aware of no argument or evidence suggesting that being transgender in any way limits one's ability to contribute to society."); *Adkins*, 143 F. Supp. 3d at 139.

61. *Adkins*, 143 F. Supp. 3d at 139.

62. *Id.* at 139; *Trump*, 2017 WL 4873042, at *27 ("[T]ransgender people as a group represent a very small subset of society lacking the sort of political power other groups might harness to protect themselves from discrimination.")

63. See, e.g., *Karnoski v. Trump*, No. C17-1297-MJP, 2018 WL 1784464 at *11 (W.D. Wash. Apr. 13, 2018) (holding that transgender classifications "must satisfy strict scrutiny" because "transgender people constitute a suspect class"); *Stone v. Trump*, 280 F. Supp. 3d 747, 768 (D. Md. 2017) (applying "intermediate scrutiny" because "transgender individuals appear to satisfy the criteria of at least a quasi-suspect classification"); *Doe 1*, 275 F. Supp. 3d at 208–09 (applying "intermediate level of scrutiny" because "discrimination on the basis of someone's transgender identity is a quasi-suspect form of classification that triggers heightened scrutiny"); *Adkins*, 143 F. Supp. 3d at 139–40 (applying "intermediate scrutiny" because "transgender people are a quasi-suspect class"); *accord Evancho v. Pine-Richland Sch. Dist.*, No. CV 2:16-01537, 2017 WL 770619, at *13 (W.D. Pa. Feb. 27, 2017) (applying "intermediate standard"); *Bd. Of Educ. of the Highland Local Sch. Dist. V. United States Dep't of Educ.*, 208 F. Supp. 3d 850, 874 (S.D. Ohio 2016) (applying "heightened scrutiny"); cf. *Fabian v. Hosp. of Cent. Conn.*, 172 F. Supp. 3d 509, 524 n.8 (D. Conn. 2016) (citing *Adkins* for proposition that "transgender people are a 'quasi-suspect' class and therefore . . . disparate treatment alleged to violate the Equal Protection Clause is subject to the elevated 'intermediate scrutiny' standard").

classification is necessarily sex-based. A wall of established precedent recognizes that transgender-based classifications are sex-based—either because they reflect sex-stereotypes, or because the root of the discrimination is based on a person’s change of sex or assigned sex at birth.⁶⁴

Additionally, the GIDs Exclusion fails under any level of review because it is rooted in moral animus against transgender people, and such “a bare [congressional] desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest”—much less a compelling or important one.⁶⁵ The legislative history associated with the GIDs Exclusion is replete with evidence of animus of U.S. senators who erroneously equated medical conditions associated with being transgender with moral failure. For example, Senator William Armstrong, the architect of the GIDs Exclusion, “could not imagine the [ADA] sponsors would want to provide a protected legal status to somebody who has such [mental] disorders, particularly those [that] might have a moral content”⁶⁶ According to Senator Jesse Helms, “the U.S. Government” had no right to “tell[]

64. See, e.g., *Whitaker*, 858 F.3d at 1051 (holding that school district’s restroom policy that discriminated against transgender students was “inherently based upon a sex-classification” in violation of equal protection); *Glenn v. Brumby*, 663 F.3d 1312, 1316–18 & n.5 (11th Cir. 2011) (“[S]ex discrimination includes discrimination against transgender persons because of their failure to comply with stereotypical gender norms.”); *Smith v. City of Salem*, 378 F.3d 566, 577 (6th Cir. 2004) (holding that transgender employee’s “claims of gender discrimination . . . easily constitute a claim of sex discrimination grounded in the Equal Protection Clause”); *Stone*, 280 F.Supp.3d at 768 (applying “intermediate scrutiny” because transgender classification was “a form of discrimination on the basis of gender”); *Doe v. Trump*, 2017 WL 4873042, at *27–28 (holding that transgender discrimination is “a form of discrimination on the basis of gender, which is itself subject to intermediate scrutiny”); *Norsworthy v. Beard*, 87 F. Supp. 3d 1104, 1119 (N.D. Cal., 2015) (“[D]iscrimination against transgender individuals is a form of gender-based discrimination subject to intermediate scrutiny.”); *accord* *Stockman v. Trump*, 331 F. Supp. 3d 990, 1002 (2018).

Numerous circuit and district courts have similarly held that transgender discrimination is sex-based discrimination pursuant to statute. See, e.g., *Whitaker*, 858 F.3d at 1049 (holding that transgender discrimination is sex-based discrimination under Title IX); *accord* *Schwenk v. Hartford*, 204 F.3d 1187, 1200–02 (9th Cir. 2000) (Gender Motivated Violence Act); *Rosa v. Park W Bank Trust Co.*, 214 F.3d 213, 215–16 (1st Cir. 2000) (Equal Credit Opportunity Act); *Schroer v. Billington*, 577 F. Supp. 2d 293, 308 (D.D.C. 2008) (Title VII); *Fabian*, 172 F. Supp. 3d at 527 (Title VII); *Examples of Court Decisions Supporting Coverage of LGBT-Related Discrimination Under Title VII*, U.S. EQUAL EMP’T OPPORTUNITY COMM’N, https://www.eeoc.gov/eeoc/newsroom/wysk/lgbt_examples_decisions.cfm (last visited Apr. 21, 2019) (compiling federal court decisions holding that discrimination against transgender people is sex-based discrimination). These statutory sex discrimination cases are significant because they inform the equal protection analysis. See, e.g., *Glenn*, 663 F.3d at 1316–18 (relying on Title VII case law in holding that discrimination against transgender employee was sex discrimination in violation of Equal Protection Clause); *accord* *Smith*, 378 F.3d at 577; see also *Duffy*, *supra* note 15, at 15–5 (“Constitutional discrimination claims by LGBT employees often rely significantly on case law interpreting federal statutes that prohibit sex discrimination, including Title VII.”).

65. *Romer v. Evans*, 517 U.S. 620, 634–35 (1996) (emphasis in original) (quoting *U.S. Department of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973)); see also *City of Cleburne, Texas v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 446 (1985) (“The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational.”).

66. See, e.g., 135 Cong. Rec. S10734-02 (daily ed. Sep. 7, 1989) (statement of Sen. Armstrong), 1989 WL 183115.

the employer that he cannot set up any moral standards for his business.”⁶⁷ And Senator Warren Rudman similarly concluded that the ADA should not protect “behavior that is immoral, improper, or illegal, and which individuals are engaging in of their own volition, admittedly for reasons we do not fully understand.”⁶⁸ According to the District of Massachusetts, the exclusion of gender dysphoria under the ADA and Section 504 would be “constitutionally suspect,” particularly given “the pairing of gender identity disorders with conduct that is criminal or viewed by society as immoral or lewd,” which raised “a serious question as to the light in which the drafters of this exclusion viewed transgender persons.”⁶⁹

2. A Person with Gender Dysphoria Meets the Definition of Disability Under the ADA and Rehabilitation Act

Assuming that gender dysphoria is protected by the ADA and Section 504, a showing of “disability” is straightforward. Under both statutes, as amended by the ADA Amendments Act of 2008, the definition of disability is to be construed broadly in favor of expansive coverage.⁷⁰ In determining whether an impairment substantially limits a major life activity, impairments must be assessed “without regard to the ameliorative effects of mitigating measures,” such as medication, therapy, and reasonable accommodations; impairments that are “episodic or in remission” must be assessed in their active state; and a “major life activity” includes “the operation of a major bodily function,” including neurological, brain, endocrine, and reproductive functions.⁷¹

67. 135 Cong. Rec. S10765-01 (daily ed. Sep. 7, 1989) (statement of Sen. Helms), 1989 WL 183216.

68. *Id.* (statement of Sen. Rudman); see also Kevin M. Barry et al., *A Bare Desire to Harm: Transgender People and the Equal Protection Clause*, 57 B.C. L. REV. 507, 574 (2016) (“Senators Armstrong, Helms, and Rudman repeatedly invoked immorality as the justification for the transgender exclusions, decrying the ADA’s coverage of ‘sexually deviant behavior.’”) (quoting legislative history); accord DUFFY, *supra* note 15, at 16–38 to 16–39 (compiling ADA’s legislative history); Ruth Colker, *Homophobia, AIDS Hysteria, and the Americans with Disabilities Act*, 8 J. GENDER RACE & JUST. 33, 36–38, 42–44, 50 (2004) (same).

69. See *Doe v. Mass. Dep’t of Corr.*, No. 17-12255, 2018 WL 2994403, at *7 (D. Mass. June 14, 2018) (citing, *inter alia*, *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938)); see also *id.* at *8 (“It is virtually impossible to square the exclusion of otherwise bona fide disabilities [like gender dysphoria] with the remedial purpose of the ADA, which is to redress discrimination against individuals with disabilities based on antiquated or prejudicial conceptions of how they came to their station in life.”).

70. 42 U.S.C. §§ 12102(4)(A)–(B) (2012) (ADA); see also 28 C.F.R. §§ 35.108(a)(2)(i), (d)(1)(i) (2016) (DOJ ADA regulations); see also ADA Amendments Act of 2008, Pub. L. No. 110–325, 122 Stat. 3553 § 2(b)(1) (2009) (“reinstating a broad scope of protection to be available under the ADA”). The definition of disability under the ADA and Rehabilitation Act is identical; the expanded definition of “disability” under the ADA applies with equal force to both statutes. Compare 42 U.S.C. § 12102 (2012) (defining “disability”), with 29 U.S.C. §§ 705(9)(B), (20)(B) (2012) (cross-referencing ADA definition of “disability”); see also ADA Amendments Act of 2008, Pub. L. No. 110–325, § 7, 122 Stat. 3553 (2008) (codified at 29 U.S.C. § 705) (conforming Section 504 of Rehabilitation Act’s definition of “disability” to definition of disability “in section 3 of the Americans with Disabilities Act of 1990”).

71. 42 U.S.C. §§ 12102(2)(B) (2012) (“major bodily function”), (4)(D) (“episodic or in remission”), (4)(E)(i) (2012) (“mitigating measures”).

People who have gender dysphoria (or who would, absent treatment, have gender dysphoria), and those who once had gender dysphoria and have successfully treated it, easily meet the definition of disability under all three prongs of the ADA. The person is disabled under the first and second prongs of the definition of disability because gender dysphoria,⁷² *when considered in its active state and without regard to the ameliorative effects of treatment*, substantially limits the person in a range of major life activities, including the ability to care for oneself, eating, sleeping, learning, concentrating, thinking, communicating, interacting with others, and reproducing.⁷³ Gender dysphoria also substantially limits the operation of major bodily functions, including neurological function, brain function, and reproductive function.⁷⁴

Additionally, a person who transitions without GCS, and who is denied an accurate birth certificate as a result, also “meets the requirement of ‘being regarded as having’ an impairment that substantially limits one or more major life activities” because the person “has been subjected to an action prohibited under th[e ADA]” because of gender dysphoria—namely, the State’s refusal to issue an accurate birth certificate absent GCS.⁷⁵

3. A Person Who Transitions Without GCS and Seeks an Amended Birth Certificate is a “Qualified Individual”

A person who seeks an amended birth certificate, absent GCS, as part of one’s transition is a “qualified individual” within the meaning of Title II of the ADA because the person “meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity,” “with or without reasonable modifications to rules, policies, or practices.”⁷⁶ According to the DOJ, “[t]he ‘essential eligibility requirements’ for participation in many activities of public entities” are exceedingly minimal.⁷⁷ That is the case here. Generally speaking, the only essential eligibility requirement for receipt of an accurate birth certificate is simply that one be born in the state.⁷⁸

72. Gender dysphoria, a diagnosis listed in the DSM-5, is undoubtedly a “physical or mental impairment” under the ADA and Section 504. *See* 28 C.F.R. §§ 35.108(b)(1) (2016) (DOJ ADA regulations); *see also* 28 C.F.R. § 42.540 (2004) (DOJ Section 504 regulations).

73. *See* 42 U.S.C. § 12102(1)(A)–(B), (2), (4) (2012).

74. *Id.* § 12102(2)(B).

75. *Id.* § 12102(3)(A); *see also* 28 C.F.R. § 35.108(a)(1)(iii) (2016) (“[T]he ‘regarded as’ prong of the definition of ‘disability’ . . . does not require a showing of an impairment that substantially limits a major life activity or a record of such an impairment.”).

76. 42 U.S.C. § 12131(2) (2012).

77. *See* U.S. DEP’T. OF JUSTICE, THE AMERICANS WITH DISABILITIES ACT: TITLE II TECHNICAL ASSISTANCE MANUAL II-2.8000 (2015), <https://www.ada.gov/taman2.html> (“For example, most public entities provide information about their programs, activities, and services upon request. In such situations, the only ‘eligibility requirement’ for receipt of such information would be the request for it.”) (last visited Apr. 21, 2019) [hereinafter DOJ TITLE II MANUAL].

78. *See, e.g.*, N.J. STAT. ANN. § 26:8–23 (2007) (“The Department of Health shall . . . procure the prompt and accurate registration of . . . [births].”) (emphasis added); *see also id.* § 26:8–25 (“The local

Even if the presence of particular external genitalia is considered to be an eligibility requirement for receiving an accurate birth certificate, it is not an “essential” one.⁷⁹ Such a requirement can easily be modified, as demonstrated by the over twenty states that do not require GCS in order to amend the sex designation on birth certificates, the federal government’s and nearly forty states’ refusal to require GCS in order to amend the sex designation on a host of other official documents (e.g., social security cards, U.S. passports, and state driver’s licenses), and the fact that external genitalia are merely one of a number of verifiable characteristics—including gender identity, hormones, and secondary sex characteristics—that come together to define one’s sex.⁸⁰

B. The GCS Requirement Discriminates Based on Disability

In passing the ADA, Congress acknowledged the “inferior status” that people with disabilities, as a group, occupy in our society, and the “various forms of discrimination” that they experience—from outright intentional exclusion typified by architectural and communication barriers, to more subtle forms of discrimination, such as overprotective rules and the failure to modify existing practices.⁸¹ Accordingly, Title II of the ADA and Section 504 broadly prohibit a public entity from discriminating against a qualified person with a disability by “exclud[ing]” the person “from participation in” or “deny[ing] the benefits of” a “public service, program, or activity,” or by “subject[ing]” the person “to discrimination.”⁸² DOJ regulations reiterate this general prohibition and also provide a list of specific actions that constitute discrimination.⁸³ Under Title II and its implementing regulations, a person may prove a violation of the ADA in one of three ways: “(1) [S]howing disparate treatment, also termed intentional

registrar shall . . . make a complete *and accurate* copy of each birth . . . on a form or in a manner prescribed by the State registrar . . .”) (emphasis added).

79. DOJ Title II Manual, *supra* note 77, at II-3.7200 (“Whether a specific requirement is ‘essential’ will depend on the facts of the particular case.”).

80. See generally TRANSGENDER LAW CENTER, *infra* note 103, at 5, 25 (discussing federal laws); *ID Documents*, *supra* note 9 (collecting state birth certificate laws with no surgery requirement); see also *infra* Sections III.B and IV.A (discussing characteristics that define one’s sex).

81. 42 U.S.C. § 12101(a)(5)–(6) (2012); see also ADA Amendments Act of 2008 § 2(a)(2), Pub. L. No. 110–325, 122 Stat. 3553 (2008) (codified at 42 U.S.C. §§ 12101–13) (“[I]n enacting the ADA, Congress recognized that . . . people with physical or mental disabilities are frequently precluded from [fully participating in all aspects of society] because of prejudice, antiquated attitudes, or the failure to remove societal and institutional barriers.”); Kevin M. Barry & Jennifer L. Levi, *Symposium: Contemporary Issues In Disability Rights Law—The Future of Disability Protections for Transgender People*, 35 TOURO L. REV. 25, 26–34 (2019) (discussing prejudice, stereotypes, and neglect targeted by ADA and Section 504).

82. 42 U.S.C. § 12132 (2012) (ADA); 29 U.S.C. § 794(a) (2012) (Section 504).

83. Compare 28 C.F.R. § 35.130(a) (2016) (ADA), and § 42.503(a) (2003) (Section 504), with *id.* § 35.130(b) (2016) (DOJ ADA regulations), and § 42.503(b) (2003) (DOJ Section 504 regulations); see also *Helen L. v. DiDario*, 46 F.3d 325, 330 (3d. Cir. 1995) (“Because Title II was enacted with broad language and directed the Department of Justice to promulgate regulations . . . , the regulations which the Department promulgated are entitled to substantial deference.”) (emphasis in original).

discrimination, (2) showing disparate impact, or (3) showing a refusal to make reasonable accommodations.”⁸⁴ A state’s refusal to change the sex designation on a birth certificate absent proof of GCS constitutes discrimination based on gender dysphoria under each of these three theories.

1. The GCS Requirement is Intentionally Discriminatory
Because It Denies an Accurate Birth Certificate to a
Subclass of People with Gender Dysphoria

When the State designates a transgender man “female” on a birth certificate based on external genitalia, the State creates an inaccurate birth certificate. The same is true for a transgender woman who is classified as “male.” In either case, the person’s gender identity—the primary determinant of sex—is not reflected on the birth certificate. A transgender female who has undergone hormone therapy, for example, has sex hormones circulating in her body that are comparable to non-transgender women, and, as a result of such therapy, she also has female secondary sex characteristics, such as breasts.⁸⁵ The same is true for a transgender man who has undergone hormone therapy: He has sex hormones circulating in his body that are comparable to a man who was assigned the male sex at birth and, as a result, he will experience increased muscle mass, a deepened voice, and a cessation of menses.⁸⁶

By classifying transgender people as the wrong sex on their birth certificates—i.e., the sex assigned to them at birth on the basis of external genitalia alone, rather than the sex that accords with their gender identity (which is the primary determinant of sex) and with other aspects of sex such as hormones and secondary sex characteristics—the GCS requirement discriminates against people with gender dysphoria. Specifically, the GCS requirement denies an accurate birth certificate to a subset of people with gender dysphoria who do not treat their condition through GCS. As a result, people with gender dysphoria who do not undergo GCS are the *only* people who are refused an accurate birth certificate. All others receive an accurate birth certificate—namely, non-transgender people who, by definition, are accurately identified at birth, and transgender people who treat their gender dysphoria through GCS and are thus able to obtain an accurate birth certificate after undergoing surgery.

The GCS requirement is therefore facially discriminatory because it provides “different or separate aids, benefits, or services”—namely, inaccurate as opposed to accurate birth certificates—“to . . . [a] *class of individuals with disabilities* than

84. *Lapid Ventures, LLC v. Twp. Of Piscataway*, No. Civ. 10-6219 (WJM), 2011 WL 2429314, at *5 (D.N.J. June 13, 2011); *accord Doe v. Mass. Dep’t of Corr.*, No. 17-12255, 2018 WL 2994403 at *8 (D. Mass. June 14, 2018).

85. SOC, *supra* note 22, at 36 (discussing physical effects of hormone therapy).

86. *Id.*; *see also infra* Section IV.A (discussing characteristics that define one’s sex).

is provided to others.”⁸⁷ Numerous cases support the conclusion that such conduct constitutes intentional discrimination based on disability.⁸⁸

Importantly, the consequences of such discrimination are significant. An inaccurate birth certificate discloses to all the world that a person with gender dysphoria is transgender and accordingly exposes that person to the risk of violence and other adverse treatment.⁸⁹ In order to avoid such disclosure, some people with gender dysphoria may seek invasive surgery that is not otherwise medically indicated or may even be contraindicated. Such discrimination therefore places a subclass of people with gender dysphoria in a double bind: Transition without GCS and risk violence and other adverse treatment, or undergo invasive

87. 28 C.F.R. § 35.130(b)(1)(iv) (2016) (DOJ ADA regulations) (emphasis added); *accord* 28 C.F.R. § 42.503(b) (2003) (DOJ Section 504 regulations). Other DOJ Title II regulations likewise support this theory of intentional discrimination. *See, e.g.*, 28 C.F.R. §§ 35.130(b)(1), (d) (2016); *id.* pt. 35, app. B (“[T]hese provisions are intended to prohibit exclusion and segregation of individuals with disabilities and the denial of equal opportunities enjoyed by others, based on, among other things, presumptions, patronizing attitudes, fears, and stereotypes about individuals with disabilities.”).

88. *See, e.g.*, *New Directions Treatment Servs. v. City of Reading*, 490 F.3d 293, 305 (3d Cir. 2007) (holding that Pennsylvania zoning law that “facially singles out methadone clinics, and thereby methadone patients, for different treatment, thereby render[s] the statute facially discriminatory”); *id.* at 301 (stating that “a statute that facially discriminates against disabled individuals” faces a “skeptical inquiry under the ADA and Rehabilitation Act”); *Rodde v. Bonta*, 357 F.3d 988, 997–98 (9th Cir. 2004) (holding that closure of hospital providing “rehabilitative services and treatment for complex and disabling medical conditions, such as paralysis and conditions associated with severe diabetes” likely violated ADA because it “would deny certain disabled individuals meaningful access to government-provided services because of their unique needs, while others would retain access to the same class of services”); *id.* at 997 (stating that closure of hospital “that provides services disproportionately required by the disabled and available nowhere else in the County [wa]s simply *not* [a] . . . facially neutral reduction” of services); *Mass. Dep’t of Corr.*, 2018 WL 2994403, at *8 (holding that inmate with gender dysphoria stated claim for disparate treatment because “she was assigned to a men’s prison by virtue of her gender assignment at birth and denied access to facilities and programs that would correspond with her gender identification”); *Galloway v. Superior Court of the District of Columbia*, 816 F. Supp. 12, 16–19 & n.5 (D.D.C. 1993) (rejecting “the assumption that visual observation is an essential function or attribute of a juror’s duties,” and holding that categorical exclusion of blind people from juries violated Rehabilitation Act and ADA based, in part, on: lack of evidence that visual capacity is an essential function of a juror that cannot be reasonably modified in individual cases, such as through “word pictures”; laws in ten states forbidding the exclusion of blind jurors; and no similar exclusion of *deaf* jurors); *see also* DOJ Title II Manual, *supra* note 77, at II-3.2000–3000 (stating that discrimination would include: The refusal “to admit an individual to a city council meeting that is open to the public merely because the individual is deaf”; the requirement that applications to participate in a government program be filed “in a second-floor office of a building without an elevator” that is inaccessible to people who use wheelchairs; or “the use of printed information alone” that is inaccessible to people with vision impairments); *cf. Helen L.*, 46 F.3d at 335 (“The ADA is intended to insure that qualified individuals receive services in a manner consistent with basic human dignity rather than a manner which shunts them aside, hides, and ignores them.”) (citation omitted).

89. *See* NATIONAL SURVEY, *supra* note 21 at 138, 154 (“Legal and bureaucratic barriers to amending transgender people’s identity documents marginalize and stigmatize transgender people. . . . Whenever people with incongruent identification documents must produce them, they are potentially revealed as transgender, whether to an employer, clerk, police officer, or airport personnel. Each of these ‘outings’ presents the possibility for disrespect, harassment, discrimination or violence”); *accord. Adkins v. City of New York*, 143 F. Supp. 3d 134, 139 (S.D.N.Y. 2015) (“A mismatch between the gender indicated on the [birth certificate] and the gender of the holder calls down discrimination.”).

medical surgery that one otherwise would not need in order to avoid such risk. Furthermore, because obtaining an accurate birth certificate is often part of the process of medical transition that helps “to alleviate [one’s] gender dysphoria,” the GCS requirement literally interferes with life-saving, medically necessary treatment.⁹⁰ In recognition of the negative consequences of inaccurate birth certificates for people who do not need or undergo GCS, the American Medical Association has called for the “elimination of any requirement that individuals undergo gender affirmation surgery in order to change their sex designation on birth certificates and supports modernizing state vital statistics statutes to ensure accurate gender markers on birth certificates.”⁹¹

2. The GCS Requirement is Discriminatory in Effect Because It Screens Out a Subclass of People with Gender Dysphoria from Obtaining an Accurate Birth Certificate

By prohibiting a subclass of people with gender dysphoria—i.e., those who do not undergo GCS—from obtaining accurate birth certificates, the GCS requirement is also discriminatory in effect. Specifically, the requirement violates the ADA’s prohibition on “utiliz[ing] criteria or methods of administration . . . [t]hat *have the effect of* subjecting qualified individuals with disabilities to discrimination on the basis of disability,” as well as the ADA’s prohibition on “eligibility criteria that screen out or tend to screen out . . . any class of individuals with disabilities from fully and equally enjoying any service, program, or activity, unless such criteria can be shown to be necessary for the provision of the service, program, or activity being offered.”⁹² Many cases have recognized that conduct that imposes a disparate impact on people with disabilities violates the ADA.⁹³

90. SOC, *supra* note 22, at 10; *see also* DSM-5, *supra* note 5, at 454–55 (stating that, when left untreated, gender dysphoria can result in debilitating depression, anxiety and, for some people, suicidality and death).

91. *Conforming Birth Certificate Policies to Current Medical Standards for Transgender Patients H-65.967*, AM. MED. ASS’N., <https://policysearch.ama-assn.org/policyfinder/detail/transgender?uri=%2FAMADoc%2FHOD.xml-0-5096.xml> (last visited Apr. 21, 2019); *see also* Press Release, AMA Calls for Modernizing Birth Certificate Policies: Requirements for Changing Sex Designations Do Not Reflect Current Medical Options, AM. MED. ASS’N. (June 9, 2014), <http://www.marketwired.com/press-release/ama-calls-for-modernizing-birth-certificate-policies-1918754.htm> (stating that gender confirmation surgery “should not be a government requirement to amend a sex designation on a birth certificate”).

92. 28 C.F.R. § 35.130(b)(1)(3)(i) (2016) (DOJ ADA regulations) (emphasis added), (b)(8); *accord*. 28 C.F.R. § 42.503(b)(3) (2004) (DOJ Section 504 regulations).

93. *See, e.g.*, *Crowder v. Kitagawa*, 81 F.3d 1480, 1483–84 (9th Cir. 1996) (concluding that “Congress intended to prohibit outright discrimination, as well as those forms of discrimination which deny disabled persons public services disproportionately due to their disability,” and holding that state’s animal quarantine law violated ADA because it “burdens visually-impaired persons [with service animals] in a manner different and greater than it burdens others[,] . . . effectively den[ying] these persons . . . meaningful access to state services, programs, and activities while such services, programs, and activities remain open and easily accessible by others”); *Helen L. v. DiDario*, 46 F.3d 325, 335 (3d Cir. 1995) (declining to construe ADA “to proscribe only conduct fueled by a discriminatory intent,” and stating that “the ADA

A public entity is, of course, free to impose appropriate restrictions, such as requiring that a person with gender dysphoria submit documentation to confirm that the person has undergone gender transition as medically indicated for that individual.⁹⁴ But a GCS requirement is not an appropriate or tailored restriction—it is a blanket denial of an accurate birth certificate to all people with gender dysphoria who do not undergo the State’s preferred form of medical treatment.

3. The State’s Refusal to Issue an Accurate Birth Certificate Absent GCS Constitutes a Failure to Make Reasonable Modifications for a Subclass of People with Gender Dysphoria

Lastly, a state’s failure to modify its GCS requirement to permit a subclass of people with gender dysphoria—those who do not need or undergo surgery—to receive an accurate birth certificate constitutes a failure to “make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability.”⁹⁵ A state can satisfy its reasonable modification obligation in a variety of ways, such as requiring documentation that a person has undergone hormonal or other treatment clinically appropriate for the purpose of gender transition, or simply requiring a person to

evolved from an attempt to remedy the effects of ‘benign neglect’ resulting from the ‘invisibility’ of the disabled”); *Doe v. Mass. Dep’t of Corr.*, No. 17-12255, 2018 WL 2994403 at *8 (D. Mass. June 14, 2018) (holding that inmate with gender dysphoria “made out a claim that the DOC’s biological sex-based assignment policy has 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 (that they be allowed to live as, in [the plaintiff’s] case, a woman)”; *see also* DOJ TITLE II MANUAL, *supra* note 77, at II-3.7200 (“[A public entity’s blanket denial of] a license to all individuals who have missing limbs, for example, would be discriminatory if an individual who could operate a vehicle safely without use of the missing limb were denied a license. A public entity, however, could impose appropriate restrictions as a condition to obtaining a license, such as requiring an individual who is unable to use foot controls to use hand controls when operating a vehicle.”); 28 C.F.R. pt. 35, app. B (2016) (“[R]equiring presentation of a driver’s license as the sole means of identification for purposes of paying by check would violate this section in situations where, for example, individuals with severe vision impairments or developmental disabilities or epilepsy are ineligible to receive a driver’s license and the use of an alternative means of identification, such as another photo I.D. or credit card, is feasible.”).

94. *See, e.g.* CONN. GEN. STAT. ANN. § 19a-42 (2015) (“The commissioner shall issue a new birth certificate to reflect gender change upon receipt of the following documents submitted in the form and manner proscribed by the commissioner: . . . (2) A notarized affidavit by a physician . . . stating that the applicant has undergone surgical, hormonal, or other treatment clinically appropriate for the applicant for the purpose of gender transition”).

95. 28 C.F.R. § 35.130(b)(7)(i) (2016). The “demonstration that a disability makes it difficult for a plaintiff to access benefits that are available to both those with and without disabilities is sufficient to sustain a claim for a reasonable accommodation.” *Henrietta D. v. Bloomberg*, 331 F.3d 261, 277 (2d Cir. 2003) (quoting *Baxter v. Pa. Dep’t of Corr.*, 661 F. App’x 754, 757 (3d Cir. 2016)); *see also id.* at 276 (“[T]he statute itself does not literally require a showing of ‘discrimination.’ A plaintiff can prevail either by showing ‘discrimination’ *or* by showing ‘deni[al of] the benefits’ of public services.”) (emphasis added).

attest to the non-fraudulent purpose for which the birth certificate is sought.⁹⁶ A state's failure to meet this obligation is discrimination under the ADA.⁹⁷

Importantly, a state may avoid liability if it can “demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.”⁹⁸ There is no fundamental alteration here. Indeed, of the approximately seventeen states that explicitly require GCS for changes to birth certificates, approximately two-thirds—eleven states—do not require GCS for other official documents, such as driver's licenses.⁹⁹ In these eleven states, removal of the GCS requirement in the birth certificate context is entirely consistent with—not a fundamental alteration of—the services offered by the State. Moreover, regardless of whether a state has abandoned the GCS requirement in like contexts, the failure to require GCS to amend a birth certificate in over twenty states plus the District of Columbia, together with the federal government's removal of the GCS requirement for social security cards and U.S. passports, severely undermines the assertion that removal of the GCS requirement is fundamentally unworkable.¹⁰⁰

96. Compare CONN. GEN. STAT. ANN. §19a-42 (2015) (requiring clinically appropriate treatment), with N.J. STAT. ANN. § 26:8-40.12 (2019) (requiring non-fraudulent purpose). “[T]he question of whether a proposed accommodation is reasonable is a question of fact.” *Williams v. Phila. Hous. Auth. Police Dep't*, 380 F.3d 751, 771 (3d Cir. 2004).

97. See, e.g., *Doe v. Mass. Dep't of Corr.*, 2018 WL 2994403, at *8 (holding that inmate with gender dysphoria stated claim that the State discriminated against her by denying her the “reasonable accommodation of a transfer to a woman's prison, as well as that she be addressed by prison personnel in a manner consistent with her gender identity”).

98. 28 C.F.R. § 35.130(b)(7)(i) (2016); see also *Hindel v. Husted*, 875 F.3d 344, 347 (6th Cir. 2017) (“‘Fundamental alteration’ is an affirmative defense under the ADA . . .”).

99. See *ID Documents*, *supra* note 9 (collecting state driver's license laws with no surgery requirement). Arizona, Arkansas, Colorado, Kansas, Maine, Michigan, Missouri, Nebraska, North Carolina, Ohio, and Virginia require GCS for changes to birth certificates but not for driver's licenses. *Id.*

100. See TRANSGENDER LAW CENTER, *ID PLEASE CA: FULL GUIDE TO CHANGING CALIFORNIA AND FEDERAL IDENTITY DOCUMENTS* 5, 25 (2018), <http://transgenderlawcenter.org/wp-content/uploads/2019/02/ID-Please-Final-January-2019.pdf> (including no surgery requirement for amending sex designation on social security card or U.S. passport); *ID Documents*, *supra* note 9 (collecting state birth certificate laws with no surgery requirement); see, e.g., *Bloomberg*, 331 F.3d at 279–80 (stating that “Title II seeks principally to ensure that disabilities do not prevent access to public services where the disabilities can reasonably be accommodated,” and holding that accommodation designed to facilitate people with HIV's access to public services was reasonable because, *inter alia*, “it does not appear to impose costs that obviously outweigh its benefits”); *Helen L. v. DiDario*, 46 F.3d 325, 337–38 (3d Cir. 1995) (holding that modification of state policy to permit plaintiff to receive health care services at home rather than in a nursing home did not constitute a “fundamental alteration” of services); *Strathie v. Dep't of Transp.*, 716 F.2d 227, 232–34 (3d Cir. 1983) (rejecting state's arguments in support of categorical exclusion of hearing aid wearers from obtaining school bus driver's licenses, and remanding for determination of whether driver's license requirement could be reasonably modified under Rehabilitation Act); *Soto v. Newark*, 72 F. Supp. 2d 489, 496 (D.N.J. 1999) (holding that state violated ADA by refusing to reasonably modify its municipal wedding program by providing sign-language interpreters, and stating that such modification “would impose little burden. Indeed, the Municipal Court routinely supplies sign-language interpreters for other Municipal Court functions. . . .”); *Galloway v. Superior Court of the District of Columbia*, 816 F. Supp. 12, 16–20 & n.5 (D.D.C. 1993) (holding that categorical exclusion of blind people from juries, “without even considering or offering accommodation,” violated Rehabilitation Act and ADA).

IV. COUNTERARGUMENTS

This Part considers several counterarguments to a disability rights challenge to the GCS requirement and why they are not persuasive.

A. *“The GCS Requirement is Not Discriminatory Because It Does Not Result in ‘Inaccurate’ Birth Certificates”*

A state might argue that the GCS requirement does not discriminate because it creates no inaccuracy. Birth certificates reflect a person’s “sex,” the argument goes, and “sex” means external genitalia—not “gender identity.”¹⁰¹ Rather than treating a subset of people with gender dysphoria differently, the GCS requirement therefore treats everyone the same, that is, consistent with their external genitalia.

This argument is as offensive as it is wrong because it relies on a hard-and-fast distinction between “sex” and “gender identity” that does not exist.¹⁰² As the burgeoning scientific literature explains, “sex” and “gender identity” are closely intertwined.¹⁰³ Since the beginning of the twentieth century, researchers have established that external genitalia alone does not establish one’s sex.¹⁰⁴ Instead, an

101. See, e.g., Motion to Dismiss Plaintiff’s Amended Complaint at 32, *Doe v. Arrisi*, 2017 WL 7805785 (D.N.J. Nov. 6, 2017) (No. 3:16-CV-08640) (“[B]irth certificates reflect sex, and not gender. . .”).

102. The fact that many states use the terms “sex” and “gender” interchangeably throughout their statutory and administrative codes demonstrates the fallacy of the argument that “sex” refers only to external genitalia, not to gender identity as well. Compare, e.g., N.J. STAT. ANN. § 39:3-10h (2012) (listing information contained in New Jersey driver’s license, including, among other things, “gender”) (emphasis added), with N.J. MOTOR VEHICLE COMM’N, DECLARATION OF GENDER DESIGNATION CHANGE FOR NEW JERSEY MOTOR VEHICLE COMMISSION (MVC) DRIVER LICENSE OR IDENTIFICATION CARD (2019) <https://www.state.nj.us/mvc/pdf/license/genderchange.pdf> (requiring person seeking to “change the gender designation on [one’s] driver license/identification card” to certify that the “request for change of sex designation is for the purpose of making my driver license identification card reflect my gender identity,” and requiring physician to certify that “the applicant’s gender identity is . . . Male [or] Female and can reasonably be expected to continue as such for the foreseeable future”) (emphasis added).

103. See generally DUFFY, *supra* note 15, at 16–55 to 57 (compiling scientific studies demonstrating “multifaceted nature of a person’s sex”).

104. See P.T. Cohen-Kettenis & L.J.G. Gooren, *Transsexualism: A Review of Etiology, Diagnosis and Treatment*, 46 J. OF PSYCHOSOMATIC RES. 315, 318 (1999) (“[T]he process of sexual differentiation, of becoming male or female, is not completed with the formation of external genitalia (the criterion for a newborn child’s gender assignment). Also, the brain undergoes a differentiation into male or female . . .”) [hereinafter Cohen-Kettenis & Gooren]; HANDBOOK OF SEXUAL AND GENDER IDENTITY DISORDERS 327 (David L. Rowland & Luca Incrocci eds., 2008) (“[W]e [have] come to realize that an endpoint as seemingly simple as our sex . . . represents a continuum consisting of many dimensions: the biological, the psychological, the social, and the cultural.”), quoted in DUFFY, *supra* note 15, at 16–55; DUFFY, *supra* note 15, at 16–55 to 56 (“Today, ‘sex’ is understood as a mosaic of characteristics that come together to define our sex.”); cf. G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd., 822 F.3d 709, 721 (4th Cir. 2016), *vacated and remanded on other grounds*, 137 S. Ct. 1239 (2017) (“[T]he [dictionary] definitions [of ‘sex’] also suggest that a hard-and-fast binary division on the basis of reproductive organs—although useful in most cases—was not universally descriptive.”); *Schroer v. Billington*, 424 F. Supp. 2d 203, 213 (D.D.C. 2006) (“[S]cientific observation may well confirm . . . that sex is not a cut-and-dried matter of chromosomes.”) (citation omitted).

individual's "sex" depends primarily on "gender identity,"¹⁰⁵ which is an individual's internal sense of being male, female, or some category other than male or female.¹⁰⁶ Other factors, such as hormones and secondary-sex characteristics, also play a role.¹⁰⁷ Because external genitalia are but one component of sex and not always determinative of a person's sex, and because gender identity is the primary factor in establishing one's sex, a transgender man's sex is male and a transgender woman's sex is female. A birth certificate that reflects otherwise is plainly inaccurate. Notably, birth certificates that designate "sex" do *not* contain a narrower classification for "external genitalia" and the corresponding options of "penis" and "vagina." Assuming that states have a legitimate interest in accurately recording their citizens' external genitalia (although it is exceedingly difficult to imagine what that interest would be), they must be more specific.¹⁰⁸

*B. "Even if the GCS Requirement Discriminates,
It Does Not Do So Based on 'Disability'"*

A state might also argue that, even if its refusal to change the sex classification on a person's birth certificate absent GCS results in inaccurate birth certificates for a subset of people, this is not "discrimination" under the ADA and Section 504 because it is not based on a person's *disability*; rather, it is based on a person's failure to undergo GCS. After all, the argument goes, the GCS requirement does not deny accurate certificates to *all* people with gender dysphoria—just those who forego surgery. This argument is unavailing.

105. See Baudewijntje P.C. Kreukels & Antonio Guillamon, *Neuroimaging Studies in People with Gender Incongruence*, 28 INT'L REV. PSYCHIATRY 120, 120 (2016) ("[T]he largest difference [between men and women] may be found in gender identity . . ."); Cohen-Kettenis & Gooren, *supra* note 104, at 318 (stating that "the process of sexual differentiation" includes "brain sexual differentiation"); see also Diamond, *supra* note 15, at 596 n.13 (2006) ("It is not the presence or absence of a penis but the sex of the brain—how it has developed—that determines how one comes to identify as male or female and how one wants to live.").

106. See, e.g., DSM-5, *supra* note 5, at 451.

107. See DUFFY, *supra* note 15, at 16–60 to 16–62 (stating that "'sex' is composed of a multitude of factors. . . Perhaps the greatest irony in this discussion is that the 'traditional,' at-birth indicator of sex—does the newborn have a clitoris or penis?—may well be the least important indicator, whereas gender identity may be the most important.").

108. Even assuming (incorrectly) that "sex" refers only to external genitalia, and that the sex designation on the birth certificate of a person who transitions without surgery is therefore "accurate," one might reasonably argue that the State's refusal to change the sex designation absent surgery is nevertheless discriminatory because it subjects the person to adverse treatment not experienced by others. The adverse treatment is three-fold. The person carries a birth certificate that outs the person as being transgender, thereby exposing the person to the risk of violence and other mistreatment. Furthermore, to avoid being outed, the law requires the person to undergo medical treatment that may not be medically appropriate or available. And, lastly, the law interferes with medical treatment by preventing a person from obtaining an amended birth certificate, which is often part of the process of medical transition. Critically, those without gender dysphoria, and those who alleviate their gender dysphoria by undergoing surgery, are not similarly treated: The State does not out them, require them to undergo unwanted medical treatment, or interfere with their medical treatment.

By requiring GCS in order to receive an accurate birth certificate, the State discriminates against people based on how they *treat* their disability, i.e., without surgery.¹⁰⁹ Just as differential treatment because of a person's *failure to treat* a condition is discrimination based on disability, so too is discrimination based on the *type of treatment* someone pursues for a medical condition.

In short, a covered entity cannot force a person to treat a medical condition—or treat a medical condition in a preferred way—in order to receive a benefit.¹¹⁰ This is exactly what restrictive birth certificate laws do: They force people to treat gender dysphoria with a form of medical intervention that may be unnecessary, contraindicated, or infeasible in order to receive an accurate birth certificate. A state cannot escape this conclusion by claiming that the GCS requirement is not based on disability.¹¹¹

C. “Eleventh Amendment Immunity Bars Claims for Monetary Damages Under Title II of the ADA”

States may attempt to defend an ADA challenge to the GCS requirement by invoking sovereign immunity under the Eleventh Amendment, which generally prohibits claims for monetary damages against state governments in federal courts.¹¹² Although Supreme Court case law in this area “has been conflicting and inconsistent,” the Court has recognized two ways in which Congress can validly

109. See, e.g., U.S. EQUAL EMP'T OPPORTUNITY COMM'N, ENFORCEMENT GUIDANCE: REASONABLE ACCOMMODATION AND UNDUE HARDSHIP UNDER THE AMERICANS WITH DISABILITIES ACT, NO. 915.002 (2002), at ¶ 38 & n.106 (stating that differential treatment based on one's failure “to take medication, to obtain medical treatment, or to use an assistive device (such as a hearing aid)” is discrimination based on disability, and noting that “[t]here are many reasons why a person would choose to forgo treatment, including expense and serious side effects”); cf. *Henrietta D. v. Bloomberg*, 331 F.3d 261, 279 (2d Cir. 2003) (holding that district court “did not clearly err in concluding, in effect, that the plaintiffs' disabilities were a substantial cause of their inability to obtain services, or that that inability was not so remotely or insignificantly related to their disabilities as not to be ‘by reason’ of them”).

110. See U.S. EQUAL EMP'T OPPORTUNITY COMM'N, *supra* note 109 at ¶ 38 & n.106.

111. Cf. *Sch. Bd. of Nassau Cty. v. Arline*, 480 U.S. 273, 281–82 (1987) (rejecting defendants' argument that termination of employee based on others' fears of contagiousness did not constitute discrimination based on “disability” under Rehabilitation Act).

112. See ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 188 (5th ed. 2015) [hereinafter CHERMERINSKY]. The Eleventh Amendment does not preclude a person from suing state officers under the ADA for *injunctive* relief (here, for example, discontinuance of the GCS requirement). See *id.* at 208 (discussing *Ex Parte Young* doctrine). Additionally, the Eleventh Amendment does not preclude a person from suing a state under *Section 504* for monetary damages. Compare 42 U.S.C. § 2000d-7A (2012) (“A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973 . . .”), with *Lane v. Pena*, 518 U.S. 187, 200 (1996) (recognizing “unambiguous waiver of the States' Eleventh Amendment immunity” under 42 U.S.C. § 2000d-7A), and *Nihiser v. Ohio Envtl. Prot. Agency*, 269 F.3d 626, 628 (6th Cir. 2001) (“States waive their Eleventh Amendment immunity with regard to Rehabilitation Act claims when they accept federal funds . . .”) (collecting cases).

abrogate Eleventh Amendment immunity.¹¹³ First, as the Court held in *United States v. Georgia*, Congress can abrogate Eleventh Amendment immunity by creating a private right of action for money damages against the State for “conduct that *independently* violate[s] the provisions of § 1 of the Fourteenth Amendment.”¹¹⁴ Second, pursuant to its “broad” enforcement power under § 5 of the Fourteenth Amendment, “Congress may enact so-called prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct.”¹¹⁵ As the Court stated in *City of Boerne v. Flores*, “Section 5 legislation is valid if it exhibits ‘a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.’”¹¹⁶ Both theories of abrogation—namely, (1) *Georgia*’s theory of abrogation regarding state conduct that “actually violates” the Fourteenth Amendment, and (2) *Boerne*’s “congruence and proportionality” theory—support claims for monetary damages against the State for discriminating against people with gender dysphoria under Title II of the ADA.¹¹⁷

1. A Plaintiff May Maintain a Suit for Damages Under Title II of the ADA for Conduct That “Actually Violates” § 1 of the Fourteenth Amendment

Eleventh Amendment immunity does not bar claims for monetary damages under Title II of the ADA if the plaintiff demonstrates that the State’s conduct “actually violates” § 1 of the Fourteenth Amendment in addition to the ADA.¹¹⁸ In *United States v. Georgia*, an inmate with paraplegia challenged the conditions of his confinement under both Title II of the ADA and the Eighth Amendment.¹¹⁹ The Supreme Court reversed the Eleventh Circuit’s decision dismissing the Title II ADA claim as barred by sovereign immunity, holding that “insofar as Title II creates a private cause of action for damages against the States for conduct that

113. CHEMERINSKY, *supra* note 112, at 188; *see also* Alaska v. EEOC, 564 F.3d 1062, 1067–68 (9th Cir. 2009) (discussing two ways in which Congress abrogates sovereign immunity); *accord* Nat’l Ass’n of Bds. of Pharm. v. Bd. of Regents of the Univ. Sys., 633 F.3d 1297, 1315–16 (11th Cir. 2011) (same).

114. *United States v. Georgia*, 546 U.S. 151, 154–55 (2006) (emphasis added); *see also id.* at 159 (holding that Eleventh Circuit erred in dismissing ADA claims that were based on conduct that “also violated the Fourteenth Amendment”).

115. *Tennessee v. Lane*, 541 U.S. 509, 518 (2004) (citation omitted).

116. *See id.* at 520 (quoting *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997)); *see also Georgia*, 546 U.S. at 157–58 (distinguishing abrogation for state conduct that “independently violates” § 1 of the Fourteenth Amendment, from abrogation pursuant to § 5 of the Fourteenth Amendment for “prophylactic” legislation).

117. Before reaching the question of whether Congress’s abrogation of sovereign immunity violated the Eleventh Amendment, a court must first determine whether “Congress unequivocally expressed its intent to abrogate the States’ sovereign immunity in the statute at issue.” *Lane*, 541 U.S. at 517. In *United States v. Georgia*, the Supreme Court held that Congress “unequivocal[ly] . . . intend[ed] to abrogate state sovereign immunity” in enacting the ADA. 546 U.S. at 154 (citing 42 U.S.C. §§ 12101(b)(4), 12202).

118. *Georgia*, 46 U.S. at 158 (recognizing Congress’s power “to enforce . . . the provisions of the [Fourteenth] Amendment by creating private remedies against the States for *actual* violations of those provisions”) (emphasis in original).

119. *See id.* at 154–56.

actually violates the Fourteenth Amendment, Title II validly abrogates state sovereign immunity.”¹²⁰ Accordingly, under *Georgia*, a person may maintain a damages action against the State for requiring GCS in violation of Title II of the ADA so long as the person adequately alleges that the GCS requirement also violates Fourteenth Amendment rights, namely, substantive due process and/or equal protection.¹²¹

2. A Plaintiff May Maintain a Suit for Damages Under Title II of the ADA Provided that There is “Congruence and Proportionality” Between the Injury to be Prevented or Remedied and the Means Adopted to that End

Even if a person has not adequately alleged a substantive due process or equal protection violation pursuant to the *Georgia* theory of abrogation, Eleventh Amendment immunity does not bar claims for monetary damages under Title II of the ADA because Title II is “congruent and proportional” prophylactic legislation under *Boerne’s* tripartite test.¹²² The “congruence and proportionality” test requires a determination of: “(1) The constitutional right or rights that Congress sought to enforce when it enacted the ADA, (2) whether there was a history of unconstitutional discrimination to support Congress’s determination that prophylactic legislation was necessary; and (3) whether Title II is an appropriate response to this history and pattern of unequal treatment.”¹²³ According to the Supreme Court, a court should determine “congruence and proportionality” only

120. *Id.* at 159 (emphasis in original); *see also id.* at 157 (noting that “the Due Process Clause of the Fourteenth Amendment incorporates the Eighth Amendment’s guarantee against cruel and unusual punishment” at issue in *Georgia*).

121. *See, e.g.,* Black v. Wigington, 811 F.3d 1259, 1269 (11th Cir. 2016) (“[A]brogation is a valid exercise of Congress’s authority under section 5 of the Fourteenth Amendment when a plaintiff complains about conduct that violates both Title II and the Fourteenth Amendment.”) (citing *United States v. Georgia*, 546 U.S. 151 (2006)); *id.* (“easily answer[ing] in the affirmative” the question of whether “Congress abrogated sovereign immunity when a plaintiff alleges a simultaneous violation of Title II and the Equal Protection Clause”); *Alaska v. EEOC*, 564 F.3d 1062, 1068 (9th Cir. 2009) (“The merits of these claims (and [the State’s] various defenses) aren’t before us; we consider only whether each claim alleges conduct that, if it occurred and wasn’t justified by a valid defense, would have violated the Fourteenth Amendment.”); *id.* at 1068–71 (holding that public employees’ statutory claims were not barred by Eleventh Amendment immunity because employees adequately alleged actual violations of Fourteenth Amendment); SAMUEL R. BAGENSTOS, *DISABILITY RIGHTS LAW: CASES AND MATERIALS* 453–54 (2d ed. 2014) (stating that, pursuant to *United States v. Georgia*, “[w]hen a plaintiff alleges that the state violated Title II in a way that also violated her Fourteenth Amendment rights (including her rights under the Bill of Rights provisions incorporated into the Fourteenth Amendment), the statute will be valid enforcement legislation as applied to her case”) (emphasis added).

122. *See Tennessee v. Lane*, 541 U.S. 509, 531 (2004) (applying *Boerne’s* congruence and proportionality test and holding that Title II of the ADA validly abrogated state sovereign immunity); *see also id.* at 521 (distinguishing *Board of Trustees of University of Alabama v. Garrett*, 531 U.S. 356, 374 (2001), which held that Eleventh Amendment immunity barred claims for monetary damages under Title I (but not Title II) of the ADA because Title I was not congruent and proportional legislation under *Boerne*).

123. *Ass’n for Disabled Ams., Inc. v. Fla. Intern. Univ.*, 405 F.3d 954, 957 (11th Cir. 2005) (citing *Boerne* and *Garrett*); *accord Alaska*, 564 F.3d at 1077.

if it concludes that the plaintiff has not adequately alleged an independent constitutional violation under *Georgia*.¹²⁴

The first question is easily answered: The Supreme Court in *Tennessee v. Lane* concluded that “Title II seeks to enforce the Fourteenth Amendment’s prohibition on irrational disability discrimination,” as well as “a variety of other basic constitutional guarantees, infringements of which are subject to more searching judicial review.”¹²⁵ These rights include equal access to government services under the Fourteenth Amendment.¹²⁶

Regarding the second question, the *Lane* Court noted that Congress had documented “pervasive unequal treatment in the administration of state services and programs, including systematic deprivations of fundamental rights,” which justified Congress’s enactment of a prophylactic remedy.¹²⁷ *Lane*’s reasoning plainly applies to the discriminatory denial of accurate birth certificates—a quintessential public service that marks one’s status as a living person—based on disability.¹²⁸ Indeed, the “widespread exclusion”¹²⁹ of people with gender dysphoria from receiving accurate birth certificates reflects the historical “isolat[ion] and segregat[ion],” denial of “access to public services,” and “exclusionary qualification standards and criteria, segregation, and relegation to lesser services” that Congress explicitly sought to deter.¹³⁰

As to the third question, the *Lane* Court explained that the congruence and proportionality of remedies must be judged based on the constitutional rights at stake in the particular class of cases at issue.¹³¹ Here, Title II is congruent and proportional legislation as applied to the class of cases implicating equal access to

124. See *United States v. Georgia*, 546 U.S. 151, 159 (2006) (instructing Eleventh Circuit on remand to determine “insofar as [the State’s] misconduct violated Title II *but did not [independently] violate the Fourteenth Amendment*, whether Congress’s purported abrogation of sovereign immunity as to that class of conduct is *nevertheless valid*” under *Boerne*) (emphasis added); see also *Alaska*, 564 F.3d at 1068 (“As *Georgia* indicates by its method, when legislation provides a direct remedy for unconstitutional conduct [i.e., under *Georgia*’s theory of abrogation], the *Boerne* [congruence and proportionality] inquiry is superfluous.”).

125. *Lane*, 541 U.S. at 523–24. The Supreme Court “did not specify the need for a fundamental right to be at stake in order to satisfy this prong of the inquiry.” *Disabled Ams., Inc.*, 405 F.3d at 957 n.2. *Irrational* discrimination is sufficient.

126. See, e.g., *City of Cleburne, Texas v. Cleburne Living Center, Inc.*, 473 U.S. 432, 450 (1985) (holding that a city ordinance that irrationally required a special permit for the operation of a group home for people with intellectual disabilities violated equal protection); *Skinner v. Oklahoma*, 316 U.S. 535, 536 (1942) (holding that state law that permitted involuntary sterilization of people convicted of crimes of moral turpitude violated substantive due process, implicitly overruling *Buck v. Bell*, 274 U.S. 200 (1927), which upheld the involuntary sterilization of people with intellectual disabilities).

127. *Lane*, 541 U.S. at 525; see also *Disabled Ams., Inc.*, 405 F.3d at 958 (citing *Lane*).

128. See *Lane*, 541 U.S. at 525.

129. *Id.* at 529.

130. 42 U.S.C. § 12101(a)(2), (3), (5) (2012).

131. See *Lane*, 541 U.S. at 531 (“Title II unquestionably is valid § 5 legislation as it applies to the class of cases implicating the accessibility of judicial services”); see also *Disabled Ams., Inc.*, 405 F.3d at 958 (“[C]ongruence and proportionality of the remedies in Title II should be judged on an individual or ‘as-applied’ basis in light of the particular constitutional rights at stake in the relevant category of public services.”).

accurate birth certificates. Given the history of state discrimination against people with disabilities in the delivery of public services, “Congress reasonably concluded that there was a substantial risk for future discrimination” and enacted Title II as a prophylactic remedy to prevent it.¹³² Importantly, Congress chose a limited remedy. “Title II only prohibits discrimination by reason of disability. . . . Therefore, States retain their discretion to exclude persons from programs, services, or benefits for any lawful reason unconnected with their disability.”¹³³ Furthermore, Title II requires only “reasonable modifications that would not fundamentally alter the nature of the service provided.”¹³⁴

As the Supreme Court stated in *Lane*, the validity of § 5 legislation turns not only on the pervasiveness of discrimination, but also on the “gravity of the harm [the law] seeks to prevent.”¹³⁵ Here, the consequences are grave. As discussed above, an inaccurate birth certificate outs a person with gender dysphoria as transgender and accordingly exposes that person to the risk of violence and other adverse treatment. It also impinges on medical decision-making by forcing a person with gender dysphoria to undergo invasive medical surgery that may not be medically appropriate or available in order to avoid being outed. Furthermore, because obtaining an accurate birth certificate may be part of the medical transition process that helps to alleviate one’s gender dysphoria, the GCS requirement interferes with life-saving, medically necessary treatment.¹³⁶

V. CONCLUSION

As Justice Thurgood Marshall memorably stated in his partial concurrence in the landmark case of *City of Cleburne v. Cleburne Living Center*, which struck down a local ordinance that discriminated against people with intellectual disabilities:

[T]he case of what once was a “natural” and “self-evident” ordering later comes to be seen as an artificial and invidious constraint on human potential and freedom. Shifting cultural, political, and social patterns at times come to make past practices appear inconsistent with fundamental principles upon which American society rests.¹³⁷

For this proposition, Justice Marshall cited no less than *Brown v. Board of Education*, which overturned *Plessy v. Ferguson*’s “separate but equal” doctrine.¹³⁸ The GCS requirement implicates a similar constraint on the potential and freedom

132. *Disabled Ams., Inc.*, 405 F.3d at 959.

133. *Id.*

134. *Id.* (quoting *Lane*, 541 U.S. at 532).

135. *Lane*, 541 U.S. at 523.

136. See *supra* note 90 and accompanying text.

137. *City of Cleburne, Texas v. Cleburne Living Center, Inc.*, 473 U.S. 432, 466 (1985) (Marshall, J., concurring in part and dissenting in part).

138. *Id.*

of transgender people with gender dysphoria; by denying people with gender dysphoria an accurate sex designation on their birth certificates, the GCS requirement forever marks such people as something they are not. This Article argues that such treatment constitutes disability discrimination.

Some might go further, arguing that birth certificates' designation of sex is, itself, illegitimate; states should not be in the business of recording sex on birth certificates at all.¹³⁹ This view is almost certainly right and may well be accepted by a substantial number of states in the future.¹⁴⁰ But we are not there yet. In the meantime, if states are going to designate a person's "sex," they must do so accurately and non-discriminatorily. By requiring GCS in order to change the sex designation on one's birth certificate, states fail this obligation.

139. See, e.g., Heath Fogg Davis, *It's Time to Remove Sex-Identity from Birth Certificates*, THE WEEK (June 29, 2017), <https://theweek.com/articles/707021/time-remove-sexidentity-from-birth-certificates> ("Our governments have some good reasons for collecting and keeping sex identity information about us in the aggregate for the purposes of demographic studies, public health, and affirmative-action measures. But the sex markers on state-issued birth certificates are not necessary for

In fact, a government has no business collecting information about our *personal* sex identities at birth, or keeping track of the decisions we might make about our sex identities over the course of our lifetimes.").

140. Cf. Fiona Kelly & Hannah Robert, *Explainer: Why Removing Sex from Birth Certificates Matters to Gender Diverse People*, THE CONVERSATION (Oct. 25, 2018, 12:52 AM), <https://theconversation.com/explainer-why-removing-sex-from-birth-certificates-matters-to-gender-diverse-people-105571> ("The Canadian provinces of Ontario and Saskatchewan, for instance, recently amended their laws to permit individuals to opt out of displaying a sex designation on their birth certificate.").

APPENDIX: COMPARISON OF STATE LAWS REGARDING
CHANGES TO SEX DESIGNATIONS ON BIRTH CERTIFICATES¹⁴¹

State	Is Gender Confirmation Surgery Required?	Relevant Authority
Alabama	Yes Statutorily Required	ALA. CODE § 22-9A-19 (2013)
Alaska	Not Required	ALASKA STAT. ANN. § 18.50.290 (2007) ¹⁴²
Arizona	Yes Statutorily Required	ARIZ. REV. STAT. ANN. § 36-337(A)(3) (2016)
Arkansas	Yes Statutorily Required	ARK. CODE ANN. § 20-18-307 (2011)
California	Not Required	CAL. HEALTH & SAFETY CODE § 103426 (2018)

141. Information based on *ID Documents Center*, NAT'L CTR. FOR TRANSGENDER EQUAL., <https://transequality.org/documents> (last visited Apr. 21, 2019); LAMBDA LEGAL, *Changing Birth Certificate Sex Designations: State-By-State Guidelines* (Sept. 17, 2018), <https://www.lambdalegal.org/know-your-rights/article/trans-changing-birth-certificate-sex-designations>; MOVEMENT ADVANCEMENT PROJECT, *Identity Document Laws and Policies*, http://www.lgbtmap.org/equality-maps/identity_document_laws; and phone calls to state departments of vital records or the state equivalent. For ease of reference on legal and non-legal search engines, websites and certain citations are not in Bluebook format.

142. *Health Analytics & Vital Records*, THE STATE OF ALA. DEP'T OF HEALTH AND HUMAN SERVS., http://www.transequality.org/sites/default/files/docs/id/Sex%20Change%20Letter_Name%20Change.pdf (last visited Apr. 21, 2019).

Colorado	Yes Statutorily Required	COLO. REV. STAT. § 25-2-115 (2017)
Connecticut	Not Required	CONN. GEN. STAT. ANN. § 19a-42 (2015)
District of Columbia	Not Required	D.C. CODE § 7- 231.22 (2001)
Delaware	Not Required	16 DEL. ADMIN. CODE 4205-10.0 (2017)
Florida	Not Required	FLA. ADMIN. CODE ANN. r. 64V-1.003 (2018) ¹⁴³
Georgia	Yes Statutorily Required	GA. CODE ANN. § 31- 10-23 (2012)
Hawaii	Not Required	HAW. REV. STAT. ANN. § 338-17.7
Idaho	Not Required	IDAHO ADMIN. CODE r. 16.02.08.201 (2006)
Illinois	Not Required	410 ILL. COMP. STAT. 535/17(1)(d) (2018)

143. *Step 5 – Update Birth Certificate*, FLA. NAME CHANGE, <https://www.floridanamechange.org/step-5---birth-certificate-gender.html> (last visited Apr. 21, 2019).

Indiana	Unclear Statute Silent; Indiana Department of Health Requires Court Order ¹⁴⁴	IND. CODE ANN. § 16-37-2-10 (2006)
Iowa	Unclear Statute Requires “Surgery or Other Treatment”	IOWA CODE ANN. § 144.23 (2014)
Kansas	No Change Permitted Statute Silent, but Interpreted by Court to Prohibit Changes to Sex Designation ¹⁴⁵	KAN. STAT. ANN. § 65-2422c (2008)
Kentucky	Yes Statutorily Required	KY. REV. STAT. ANN. § 213.121 (2006)
Louisiana	Yes Statutorily Required	LA. STAT. ANN. § 40:62 (2012)
Maine	Yes Statute Silent; Administratively Required	ME. REV. STAT. ANN. tit. 22, § 2705 (2004) & ME ADC 10-146 Ch. 2, § 11 (2018)

144. *Correct/Amend a Birth Certificate*, IND. STATE DEP’T OF HEALTH, <https://www.in.gov/isdh/26808.htm> (last visited Apr. 21, 2019).

145. *In re Estate of Gardiner*, 29 Kan. App. 2d 92 (Kan. App. Ct. 2001). Current regulations permit changes to sex designations on birth certificates based on “the registrant’s affidavit . . . that the sex was incorrectly recorded and medical records substantiating the registrant’s sex at the time of birth.” KAN. ADMIN. REGS. § 28-17-20(b)(1)(A)(i) (2015).

Maryland	Not Required	MD. CODE ANN., HEALTH-GEN. § 4-211 (2015)
Massachusetts	Not Required	MASS. GEN. LAWS ANN. ch. 46, § 13(e) (2015)
Michigan	Yes Statutorily Required	MICH. COMP. LAWS ANN. § 333.2831 (2016)
Minnesota	Not Required	MINN. R. 4601.1100 (2007)
Mississippi	Unclear Statute Silent; Regulations Require Court Order and “Medical Statement,” but Mississippi Department of Health Reportedly Accepts Physician’s Letter Attesting to Surgical Reassignment <i>or</i> Hormonal Therapy ¹⁴⁶	MISS. CODE ANN. § 41-57-21 (2013) & 15 MISS. ADMIN. CODE Pt. 5, Subpt. 85, R. 3.21 (2016)
Missouri	Yes Statutorily Required	MO. REV. STAT. § 193.215 (2016)
Montana	Not Required	MONT. ADMIN. R. 37.8.311 (2017)

146. Information provided by agency during phone calls with author on February 26 and 27, 2019.

Nebraska	Yes Statutorily Required	NEB. REV. STAT. ANN. § 71-604.01 (2009)
Nevada	Not Required	NV ADC 440.030 (2018)
New Hampshire	Unclear Statute Requires “Sex Change” and Court Order	N.H. REV. STAT. ANN. § 5-C:87 (2013)
New Jersey	Not Required	N.J. STAT. ANN § 26:8-40.12 (2019)
New Mexico	Not Required	N.M. STAT. ANN. § 24-14-25 (2019)
New York	Not Required	N.Y. COMP. CODES R. & REGS. tit. 10, § 35.2 (2019) ¹⁴⁷
North Carolina	Yes Statutorily Required	N.C. GEN. STAT. § 130A-118 (2017)

147. *ID Documents Center: New York*, NAT’L CTR. FOR TRANSGENDER EQUAL., <https://transequality.org/documents/state/new-york> (last visited Apr. 21, 2019).

North Dakota	Unclear Administratively Required, but the North Dakota Health Department will Reportedly Accept “Appropriate Clinical Treatment” that Does Not Include GCS ¹⁴⁸	N.D. ADMIN. CODE § 33-04-12-02 (2008)
Ohio	No Change Permitted Statute Silent; Statute Requires Court Order, but Interpreted by Court to Prohibit Changes to Sex Designation ¹⁴⁹	OHIO REV. CODE ANN. § 3705.15 (2006)
Oklahoma	Unclear Statute Silent; Regulations Require Adjudicative Order	OKLA. STAT. ANN. tit. 63, § 1-321 (2016) & OKLA. ADMIN. CODE 310:105-3-3 (2018)
Oregon	Not Required	OR. REV. STAT. § 432.235 (2011) & OR. ADMIN. R. 333-011-0272 (2018)

148. Information provided by agency during phone calls with author on February 26 and 27, 2019.

149. *In re Ladrach*, 513 N.E.2d 528 (Ohio Prob. Ct. 1987). When contacted on February 26, 2019 regarding amending sex designations on Ohio birth certificates, a representative from the Ohio Bureau of Vital Statistics responded, “Those people will just need to stay the way God made them.”

Pennsylvania	Not Required	35 PA. ST. AND CONS. STAT. ANN. § 450.603 (2017) ¹⁵⁰
Rhode Island	Not Required	216 R.I. CODE R. § 10-10-1.37 (2019)
South Carolina	Unclear Statute Silent; Regulations Require Court Order	S.C. CODE ANN. § 44-63-150 (2017) & S.C. CODE ANN. REGS. 61-19 (2006)
South Dakota	Unclear Regulations Require Court Order, but South Dakota Department of Health Also Accepts Documentation that is at Least Seven Years Old Attesting to Gender ¹⁵¹	S.D. ADMIN. R. 44:09:05:02 (2000)
Tennessee	No Change Permitted “The sex of an individual will not be changed on the original certificate of birth as a result of sex change surgery.”	TENN. CODE ANN. § 68-3-203(d) (2016)

150. *ID Documents Center: Pennsylvania*, NAT’L CTR. FOR TRANSGENDER EQUAL., <https://transequality.org/documents/state/pennsylvania> (last visited Apr. 21, 2019).

151. Information provided by agency during phone calls with author on February 26 and 27, 2019; *Amendments and Court Orders*, S.D. DEP’T OF HEALTH, <http://doh.sd.gov/records/amendments.aspx> (last visited Apr. 21, 2019).

Texas	Unclear Statute Silent; Texas Department of State Health and Human Services Requires Court Order ¹⁵²	TEX. HEALTH & SAFETY CODE ANN. § 191.028 (2017)
Utah	Unclear Statute Silent; Statute Requires Court Order	UTAH CODE ANN. § 26-2-11 (2014)
Vermont	Not Required	VT. STAT. ANN. tit. 18, § 5112 (2011)
Virginia	Yes Statute Requires “Medical Procedure”; Regulations Require GCS	VA. CODE ANN. § 32.1-269 (2015) & 12 VA. ADMIN. CODE 5-550-320 (2018)
Washington	Not Required	WASH. ADMIN. CODE § 246-490-075 (2018)
West Virginia	Unclear Statute & Regulations Silent; Court Order Required	W. VA. CODE ANN. § 16-5-25 (2016) & W. VA. CODE ST. R. § 64-32-12 (2019)

152. *Birth and Death Amendments*, TEX. DEP’T OF STATE HEALTH SERVS., <https://www.dshs.state.tx.us/vs/reqproc/amendment.shtm> (last visited Apr. 21, 2019).

Wisconsin	Yes Statutorily Required	WIS. STAT. ANN. § 69.15(4) (2014)
Wyoming	Unclear Statute Silent; Regulations Require Court Order, but Wyoming Department of Vital Statistics Reportedly Requires Physician's Letter Confirming GCS ¹⁵³	WYO. STAT. ANN. § 35-1-424 (2012) & WY ADC 048.0059.10 § 4 (2019)

153. Information provided by agency during phone calls with author on February 26 and 27, 2019.