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Symposium: "The Doctrinal Viability and Future of the Disparate Impact Doctrine":

Chasing the Unicorn: Anti-Subordination and the ADAAA

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I. INTRODUCTION

At a recent talk, a prominent critic of disparate impact theory[1] denounced what she termed society's "disparate impact mentality"—the idea that a workforce should mirror the population's diversity.[2] In support of her criticism, she quoted a faculty member at a prestigious medical school who likened the search for a decanal candidate of color to "chasing a unicorn." This is a provocative view of disparate impact theory, and of

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[†] Professor of Law, Quinnipiac University School of Law. This text is adapted from remarks originally delivered at a symposium sponsored by the University of Connecticut Public Interest Law Journal, entitled, "The Doctrinal Viability and Future of the Disparate Impact Doctrine." This Article is the third in a series of articles examining case law and regulatory changes under the ADAAA. For further information, see generally Kevin Barry, Brian East & Marcy Karin, *Pleading Disability After the ADAAA*, 31 HOFSTRA LAB. & EMP. L.J. 1 (2013), and Kevin M. Barry, *Exactly What Congress Intended?*, 17 EMP. RTS. & EMP. POL'Y J. 5, 8 (2013). Thanks to Paola Arango for editorial assistance.

[1] In the employment context, disparate impact holds that a facially neutral hiring criterion "is discriminatory if it has a significantly disproportionate impact on a group defined by race or sex and if the employer cannot show that it is 'job related . . . and consistent with business necessity.'" Samuel R. Bagenstos, Book Review, *Bottlenecks and Antidiscrimination Theory Bottlenecks: A New Theory of Equal Opportunity*, by Joseph Fishkin, New York, New York: Oxford University Press, 2014, 93 TEX. L. REV. 415, 423 (2014) (citing 42 U.S.C.A. § 2000e-2). The Americans with Disabilities Act contains similar disparate impact provisions. *See* 42 U.S.C.A. §§ 12112(b)(3), (6) (prohibiting "standards, criteria, or methods of administration . . . that have the effect of discrimination on the basis of disability" and "qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity").

[2] University of Connecticut Public Interest Law Journal Symposium: "The Doctrinal Viability and Future of the Disparate Impact Doctrine," October 17, 2014 (comments of Prof. Amy Wax).

antidiscrimination law more generally. It is also a shortsighted one. The antidiscrimination project, best understood, is not about a particular individual, or an individual at all; it is about the achievement of a society that does not subordinate.[3] Highly desirable, and ever elusive, anti-subordination is the unicorn.

The Americans with Disabilities Act of 1990 ("ADA"), which turns twenty-five this year, is one of the ways in which society has chosen to give chase to anti-subordination in the disability context. The ADA Amendments Act of 2008 (ADAAA), which expanded the ADA's definition of disability to protect far more people, teaches that we are at last running in the right direction—though we are not out of the woods yet.

This Article discusses anti-subordination as the foundation for disability civil rights law, and offers three observations on its relationship to the ADA Amendments Act of 2008 (ADAAA). The first observation considers one of the upsides of anti-subordination under the ADAAA—the exclusion of reverse discrimination claims. Unlike Title VII of the Civil Rights Act of 1964, which permits reverse discrimination claims based on race, color, sex, religion, and national origin, people who are treated adversely for *not* having an impairment have no recourse under the ADA. The second observation considers one of the obvious downsides of anti-subordination under the ADAAA—the tendency of (a thankfully small minority of) courts to narrowly construe the ADA's definition of disability, particularly with respect to orthopedic and mental impairments. A case in point is the Ninth Circuit's 2014 decision in *Weaving v. City of Hillsboro*, the first published circuit level case narrowly interpreting the ADA's definition of disability post-ADAAA.[4] The third observation turns from anti-subordination under the ADA to subordination—specifically, the ADA's subordination of transgender people through its pernicious exclusion of Gender Identity Disorder, and the first-ever lawsuit challenging the constitutionality of the exclusion.

II. ANTI-SUBORDINATION, GENERALLY

Disability civil rights law is a response to subordination—to systematic adverse treatment in a range of activities in public and private life such as going to the movies, going to vote, receiving medical treatment, getting on the bus, getting an education, and getting a paycheck.[5] All of us experience adverse treatment in our private and public lives at one time or

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[3] The proper goal of antidiscrimination law is, of course, highly contested. *See generally* Bagenstos, Book Review, *supra* note 1, at 415–16 (discussing ongoing debate over the proper goal of antidiscrimination law, particularly with respect to disparate impact and affirmative action).

[4] Weaving v. City of Hillsboro, 763 F.3d 1106 (9th Cir. 2014).

[5] *See* Samuel R. Bagenstos, *Subordination, Stigma, and Disability,* 86 VA. L. REV. 397, 478–79 (2000).

another. Take, for example, the story of the car salesman who was fired for wearing a Green Bay Packers tie to his workplace in Chicago back in 2011, the day after the Packers beat the Bears in the NFC Championship.[6] This type of adverse treatment is occasional, unusual. We call it "bad luck," or maybe even "our own damn fault."

This type of treatment is not subordination. As Professor Samuel Bagenstos has written, subordination is adverse treatment that is systematic, and it takes three forms: prejudice, stereotypes, and neglect.[7] Prejudice refers to animus-based attitudes: "I don't like people like [that]."[8] Stereotypes refer to overbroad generalizations: "People like [that] are malingerers." And neglect refers to historical exclusion of "people like [that]."[9] It means ignoring—never even thinking about—people with certain traits.[10] Think of buildings without ramps; websites without closed captioning; paper money, indistinguishable to a person with impaired vision; work policies that do not allow for job coaches at the hiring or training stages.

Not all of us experience prejudice, stereotypes, and neglect; not all of us are subordinated.[11] Only *some* of us experience subordination: those with traits that are stigmatized—that "type people who have them as 'abnormal or defective in mind or body.'"[12]

Chai Feldblum, U.S. Equal Employment Opportunity Commissioner and former Georgetown Law professor, offers a useful visual for understanding subordination.[13] Imagine a world where the ground is nice and level. This is where the majority lives.[14] This is where people like the author live: white, male (in identity and anatomy), straight, non-disabled, citizen, upper-middle-class. Importantly, the ground is not level for the majority by accident. It got that way by affirmative actions taken by the majority over the years that have helped people, like the author, stand happily upright.[15]

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[6] *Salesman Fired for Wearing Packers Tie*, ESPN (Jan. 26, 2011), http://sports.espn.go.com/chicago/nfl/news/story?id=6056888.

[7] Bagenstos, *supra* note 5, at 418 (stating that "impairment-based subordination" results from "prejudice, stereotypes, and widespread neglect. . . "); *see also* ADA Amendments Act of 2008 §2(a)(2), Pub. L. No. 110–325, 122 Stat. 3553 (2008) ("[P]eople with physical or mental disabilities are frequently precluded from [participating in all aspects of society] because of prejudice, antiquated attitudes, or the failure to remove societal and institutional barriers.").

[8] *See id.* at 423.

[9] *See id.* at 423–25.

[10] *Id.* at 425–26 n. 104.

[11] *See* Kevin Barry, *Toward Universalism: What the ADA Amendments Act of 2008 Can and Can't Do for Disability Rights*, 31 BERKELEY J. EMP. & LAB. L. 203, 214 (2010).

[12] Bagenstos, *supra* note 5, at 444.

[13] Chai R. Feldblum, *Rectifying the Tilt: Equality Lessons from Religion, Disability, Sexual Orientation, and Transgender*, 54 ME. L. REV. 159, 182 (2002).

[14] *Id.*

[15] *Id.* at 181.

The majority is like the man in the Packers tie. We do not experience systematic prejudice, stereotypes, and neglect based on a stigmatized trait, and so we are not subordinated. When we experience adverse treatment, it is an occasional, anomalous affair—nothing more.[16]

But now assume there are people with particular traits different than the majority's. They are not white, they have physical or mental impairments, they love people from the same gender, their gender identity does not match their anatomical sex. For people with these traits, the ground is on a tilt because the affirmative actions and decisions of the majority were taken without their input.[17] That lack of input may have been intentional (reflecting prejudice or stereotypes) or perhaps unintentional (reflecting neglect). But in either case, those actions and decisions make it more difficult for these groups of people to live.[18] Subordination is the tilt.[19]

There is a range of possible policy solutions for addressing subordination. In the disability context, one possibility is cash benefits.[20] If, for example, employers generally do not trust Autistic people or believe them to be unreliable workers, the government might simply pay Autistic people not to work. Now, that probably strikes many people as an unwise policy for a host of reasons. One might be concerned about the stigmatizing message that such a policy would send to Autistic people and the rest of society: enabling Autistic people to fulfill their capabilities is not worth offending employers' sensibilities.[21] One might also doubt the wisdom of such a policy for financial reasons: cash benefits are appropriate for people with disabilities who are not physically or mentally able to work, but those who *can* work *should* work.[22]

Laws providing rehabilitation services are similarly inadequate for remedying subordination.[23] Although they help people overcome the physical and mental limitations imposed by their impairments, such laws

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[16] *See* Barry, *Universalism*, *supra* note 11, at 214.

[17] *See* Feldblum, *supra* note 13, at 181.

[18] *See id.* at 182. ("These may be people who use a wheelchair, people who keep the Sabbath on Saturday and cannot work on that day, or people who love others of the same gender. For these people, it will be hard to get into the buildings built by society, work at the jobs created by society, and benefit from the social systems set up by the society.").

[19] *See id.*

[20] Barry, *Universalism*, *supra* note 11, at 210–11 (discussing cash benefits).

[21] *See* 42 U.S.C. §12101(a)(1) (2012) ("[P]hysical or mental disabilities in no way diminish a person's right to fully participate in all aspects of society, yet many people with physical or mental disabilities have been precluded from doing so because of discrimination.").

[22] *See* 42 U.S.C. §12101(a)(8) (2012) ("[T]he continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities which our free society is justifiably famous, and costs the Unites States billions of dollars in unnecessary expenses resulting from dependency and non-productivity.").

[23] *See* Barry, *Universalism*, *supra* note 11, at 210–11 (discussing rehabilitation).

do little to remove barriers to employment that exist outside of one's body—in others' attitudes and in the built environment.[24]

In 1973, Congress passed the Rehabilitation Act, which increased federal support for vocational and rehabilitation programs.[25] To remedy prejudice, stereotypes, and neglect concerning people with disabilities, Congress added Section 504, an approximately forty-word antidiscrimination provision that prohibited federally funded entities from discriminating against people with disabilities.[26] Adopted with little fanfare (and no legislative history), Section 504 represented a dramatic change in policy toward disability—from cash benefits and rehabilitation services targeting bodily limitations, to a civil rights law targeting subordination.[27] The Department of Health, Education, and Welfare's Section 504 regulations, issued in 1977, clarified the antidiscrimination mandate by prohibiting discrimination in education, health benefits and services, and employment,[28] and requiring that all programs and activities be accessible to and usable by people with disabilities.[29]

Although Section 504 broadly targeted discrimination against people with disabilities, it was of limited impact because it applied only to recipients of federal funds.[30] Seventeen years later, in 1990, Congress passed the ADA, and in so doing, extended comprehensive anti-discrimination protection to the private sector, including private employees.[31]

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[24] *See* 42 U.S.C. § 12101(a)(5)–(6) (2012) ("[P]eople with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally. . . . [I]ndividuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities.").

[25] Rehabilitation Act of 1973, Pub. L. No. 93-112 §§ 3–503, 87 Stat. 355, 357–94 (codified as amended at 29 U.S.C. § 701 et seq. (2012)).

[26] Rehabilitation Act of 1973 § 504 (codified as amended at 29 U.S.C. § 794 (2012)).

[27] Barry, *Universalism*, *supra* note 11, at 210–11 (discussing rehabilitation); *see also* Chai R. Feldblum, *Definition of Disability Under Federal Anti-Discrimination Law: What Happened? Why? And What Can We Do About It*, 21 BERKELEY J. EMP. & LAB. L. 91, 97 (2000) ("The medical, rehabilitation, and support models of disability—which, of course, co-existed with continuing models of pity and exclusion regarding disability—began to be challenged in the 1960s as the modern civil rights movements for African-Americans and for women gathered momentum. These movements were premised on the principle that all individuals deserve to be treated equally and with dignity in our society, regardless of race, gender, or religion.").

[28] *See* 45 C.F.R. §§ 84.21–84.54 (1977).

[29] *See id.* § 84.21–23.

[30] *See* 29 U.S.C. § 794 (prohibiting discrimination by "any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.").

[31] *See* Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12111–17 (2006) (workplace); §§ 12131–65 (state and local government); §§ 12181–89 (public accommodations); *see also* § 42 U.S.C.A. § 12101(b)(1) ("It is the purpose of this chapter . . . to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.").

III. ANTI-SUBORDINATION'S UPSIDE: NO REVERSE DISCRIMINATION

Importantly, neither Section 504 nor the ADA protects *everyone* from discrimination based on disability.[32] These laws are not what one might call "anti-classification" laws, which protect all people from discrimination based on a protected classification—for example, Title VII's protection of people of any race (including white people), any gender (including men), any national origin (including those from English-speaking countries), and any religion (including Christianity and those with no religion at all).[33] Instead, disability civil rights laws are "anti-subordination" laws; they protect a class of people who are subordinated—i.e., people with "disabilities."[34] The definition of disability is, then, a proxy for subordination.[35] As discussed in Part III below, there is a definite downside to protecting only people with "disabilities"—not everyone who *should* be covered *will* be covered.[36] There is, however, an upside; unlike Title VII, the ADA prohibits "reverse discrimination" claims, that is, claims brought by those who are not subordinated.[37] To understand this upside, some background on the definition of disability is instructive.

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[32] *Compare* 29 U.S.C. § 794 (prohibiting discrimination against an "otherwise qualified individual with a disability"), *with* 42 U.S.C. § 12112(a) (Title I) (prohibiting discrimination "against a qualified individual on the basis of [such individual's] disability" in employment), 42 U.S.C.A. § 12132(a) (Title II) (prohibiting discrimination against a "qualified individual with a disability" in public services), *and* § 12182(a) (prohibiting discrimination against an individual "on the basis of [such individual's] disability"). Title I originally prohibited discrimination "against a qualified individual with a disability because of the disability of such individual." 42 U.S.C. § 12112(a) (2006). The ADAAA deleted this cumbersome language and substituted in its place: "qualified individual on the basis of disability." 42 U.S.C. § 12112(a) (2009); *see* Barry, *Universalism*, *supra* note 11, at 267 (discussing ADAAA's changes to § 12112(a)). Because ADA Title III and the newly amended Title I contain rules of construction prohibiting discrimination against an "individual with a disability," those Titles are best read to require the same showing that Title II requires—i.e., that the individual have a "disability" in order to invoke the ADA's protections. *See* Bagenstos, *supra* note 5, at 404 n.18 (making this point with respect to Title III). Lest there be any doubt that the ADA protects only individuals with past, present, and perceived "disabilities," the ADAAA added a provision, discussed below, which expressly prohibits reverse-discrimination claims, 42 U.S.C. § 12201(g).

[33] *See* Bradley A. Areheart, *The Anticlassification Turn in Employment Discrimination Law*, 63 ALA. L. REV. 955, 957–58 (2012) (distinguishing disability law's "anti-subordination" approach, which protects some people from discrimination based on the protected characteristic, from Title VII's "anti-classification" (or "anti-differentiation") approach, which protects all people from discrimination based on the protected characteristic); *see also McDonald v. Santa Fe Trail Trans. Co.*, 427 U.S. 273, 280 (1976) (holding that Title VII affords protection from racial discrimination in private employment to white persons as well as nonwhites).

[34] *See* Areheart, *supra* note 33, at 957–58.

[35] *See* SAMUEL BAGENSTOS, LAW AND THE CONTRADICTIONS OF THE DISABILITY RIGHTS MOVEMENT 50 (2009) ("The 'disability' category in the ADA is obviously an administrative proxy designed to target the statute's protections to the intended beneficiaries."); *see also* Barry, *Universalism*, *supra* note 11, 223–24 (2010) (discussing same).

[36] *See infra* Part III.

[37] *See, e.g.*, Areheart, *supra* note 33, at 975 ("[O]nly 'individuals with disabilities' may bring a claim under the ADA; there is no 'reverse' discrimination within disability jurisprudence."); Bagenstos, *supra* note 5, at 402–03 ("Unlike [other civil rights laws], the ADA does not simply forbid particular

Under the ADA, the definition of disability has three prongs.[38] A person with a disability is defined as one who currently has (prong one), previously had (prong two), or is regarded as having an impairment that "substantially limits" a "major life activity."[39] The first two prongs of the definition identify people that one would normally think of as being subordinated—those whose impairments impose significant limitations on bodily functions and are therefore stigmatized.[40] They are the ones who are the targets of animus—think of U.S. Supreme Court Justice Oliver Wendell Holmes's diatribe in *Buck v. Bell* proclaiming that compulsory sterilization of people with (alleged) intellectual disabilities did not violate due process because "three generations of imbeciles are enough."[41] Those whose impairments impose significant limitations on bodily functions are also the targets of stereotypes—think of some employer's attitudes about people with mobility or mental impairments ("They're going to miss work and cost our business money"),[42] or the perception of Autistic people following the tragic murders at Sandy Hook Elementary School in Connecticut ("Autistic people are dangerous").[43] In 2008, the ADAAA lowered the threshold for qualifying as disabled under the first two prongs in sweeping fashion, but it did not remove the requirement that a person show substantial limitation in a major life activity.[44] Anti-subordination therefore remains at the heart of the definition of disability's first two prongs.

The "regarded-as" prong, however, is different.[45] As interpreted by the U.S. Department of Health, Education, and Welfare and, later, the EEOC, the regarded-as prong protects those who do not have a substantially

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kinds of classifications. Rather, it expressly limits its reach to members of a protected class—people with a "disability."); Ruth Colker, *Affirmative Protections for People with Disabilities, Illness and Parenting Responsibilities Under United States Law*, 9 YALE J.L. & FEMINISM 213, 221 (1997) ("Claims of [disability] discrimination are therefore available only to members of an historically disadvantaged group; there is no such thing as a 'reverse' discrimination disability claim.").

[38] *See* 42 U.S.C. § 12102(1).

[39] 42 U.S.C. § 12102(1).

[40] *See* 42 U.S.C. § 12102(1); *see also* Barry, *Universalism*, *supra* note 11, at 224–28, 278–80 (discussing prong one and two's protection of stigmatized minority).

[41] Buck v. Bell, 274 U.S. 200, 207 (1927).

[42] *See* 29 C.F.R. 1630 app. (2006) (discussing § 1630.2(l)) ("As the [ADA's] legislative history notes, sociologists have identified common attitudinal barriers that frequently result in employers excluding individuals with disabilities. These include concerns regarding productivity, safety, insurance, liability, attendance, cost of accommodation and accessibility, workers' compensation costs, and acceptance by coworkers and customers.").

[43] Amy S.F. Lutz, *Don't Be Afraid of People With Autism: They are Not Cold Blooded Killers*, SLATE (Dec. 17, 2012, 6:51 PM), http://perma.cc/7M2M-75WC.

[44] *See* 42 U.S.C. § 12102(1)(A)–(B); *see also* Barry, *Universalism*, *supra* note 11, at 280 ("While the ADAAA maintains the minority group approach under its first and second prongs by retaining the words 'substantially limits' a 'major life activit[y],' it expands that 'minority' by forbidding narrow interpretations of those terms.").

[45] Barry, *Universalism*, *supra* note 11, at 278–79 (discussing regarded-as prong's nearly universal protection).

limiting impairment but who are nonetheless substantially limited "only as a result of the attitudes of others."[46] In 1987, in *School Board of Nassau County v. Arline*, the U.S. Supreme Court endorsed this view, stating that "society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment," and that a person may therefore be disabled "as a result of the negative reactions of others."[47]

By including those who are limited only as a result of others' negative reactions, the regarded-as prong represents a broad interpretation of the word "disability" and, correspondingly, a weak version of subordination.[48] Coverage under this prong is nearly universal; systematic disadvantage is not required.[49] The ADA's regarded-as prong applies to almost anyone treated negatively based on an impairment—i.e., those who are mistakenly perceived to have a substantially limiting (stigmatized) impairment as well as those with non-stigmatized impairments who are nevertheless treated adversely because of the impairment.[50]

Think of the student who does not have Ebola but is refused admission to school out of fear that she may have it because of a recent trip to the west coast of Africa,[51] the veteran without PTSD who is refused a job because he is believed to have the condition,[52] the non-Autistic but socially awkward person who is refused a job because he is believed to have the condition, or the person with a hand tremor who is terminated because she is believed to have Parkinson's Disease.[53] Or think of a person with a non-

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[46] *Compare* 45 C.F.R. § 84.3(j)(2)(iv) (1977) (HEW), *with* 29 C.F.R. § 1630 app. (2006) (EEOC) (discussing § 1630.2(l)(2)).

[47] Sch. Bd. of Nassau Cnty., Fla. v. Arline, 480 U.S. 273, 284–85 (1987); *see also* Barry, *Universalism*, *supra* note 11, at 234–36 (discussing *Arline*).

[48] *See Arline*, 480 U.S. at 284–85; *see also* Barry, *Universalism*, *supra* note 11, at 225–27 (discussing breadth of regarded-as prong, as interpreted by *Arline*).

[49] Barry, *Universalism*, *supra* note 11, at 226 ("Under this broad formulation of the 'regarded as' prong, it is specific treatment of an individual based on an impairment, not the stigma that society as a whole assigns to the impairment, which creates 'disability.' By focusing exclusively on the limitations imposed by society's treatment of impairments, as opposed to the limitations imposed by the impairments themselves, this formulation embraces the universal approach.") (emphasis added).

[50] Barry, *Universalism*, *supra* note 11, at 224–25 (discussing ADA's coverage of those "regarded as having an impairment that substantially limits a major life activity" as well as those treated adversely based on "any impairment, regardless of stigma"), 232–33 (discussing regarded-as prong's coverage of "those perceived as having stigmatized impairments, that is, impairments that substantially limit major life activities, distinguish people from the 'norm,' and result in systematic disadvantage" as well as those adversely treated based on non-stigmatized impairments).

[51] *See* Ray Sanchez, *Connecticut Girl Barred From School Amid Ebola Fears; Family Sues*, CNN (Oct. 29, 2014, 6:19 PM), http://perma.cc/YLJ5-GFZW.

[52] *See* Michael Waterstone, *Returning Veterans and Disability Law*, 85 NOTRE DAME L. REV. 1081, 1131 (2010) (citing 2004 New England Journal of Medicine study that found that "roughly one in six soldiers who had served in Iraq suffered from major depression, general anxiety, or posttraumatic stress disorder").

[53] Kevin M. Barry, *Disabilityqueer: Federal Disability Rights Protection for Transgender People*, 16 YALE HUM. RTS. & DEV. L.J. 1, 49 (2013) (discussing so-called "Autistic cousins," i.e., "non-

stigmatized impairment that is minor, such as psoriasis or dysthymia (low-grade depression), or that is temporary, such as a broken leg, appendicitis, or staph infection, who is treated adversely based on the impairment.[54] Vacationers to Africa who do not have Ebola, veterans without PTSD, socially awkward people without Autism, and people with hand tremors who do not have Parkinson's Disease are not the type of people we normally think of as being subordinated. Their lives are not characterized by animus, stereotypes, and neglect. Neither are people with non-stigmatized impairments like psoriasis, dysthymia, broken legs, appendicitis, and staph infections. Nevertheless, the regarded-as prong protects all of these people.[55]

The ADAAA underscores the breadth of the regarded-as prong. As amended, the regarded-as prong covers almost anyone treated adversely based on an impairment—regardless of whether the impairment is "actual or perceived" and "whether or not the impairment limits or is perceived to limit a major life activity."[56] Nearly anyone treated adversely based on impairment is covered—even if the impairment is non-existent or non-stigmatized.[57]

While expanding the bounds of subordination, the regarded-as prong stops short of Title VII's universal, anti-classification protection by prohibiting reverse-discrimination claims.[58] It does so in two ways. First, the regarded-as prong does not apply to claims based on a lack of disability.[59] The regarded-as prong protects only those treated adversely because of an impairment they have or are erroneously believed to have[60]

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autistic people with significant social and communication abnormalities that render them significantly 'autistic-like'"); Barry, *Universalism*, *supra* note 11, at 224 (discussing people regarded as having Parkinson's Disease).

[54] The author's spouse was refused service by a dentist after disclosing to the dentist that she had MRSA, an antibiotic-resistant staph infection.

[55] *See* Barry, *Universalism*, *supra* note 11, at 224–25 (discussing broad coverage under regarded-as prong).

[56] *See* 42 U.S.C. § 12102(3)(A) (2012); Barry, *Universalism*, *supra* note 11, at 278–79; *see also* Michelle A. Travis, *Impairment as Protected Status: A New Universality for Disability Rights*, 46 GA. L. REV. 937 (2012).

[57] *See* 29 C.F.R. § 1630 app. ("Where an employer bases a prohibited employment action on an actual or perceived impairment that is not 'transitory and minor,' the employer regards the individual as disabled, whether or not myths, fears, or stereotypes about disability motivated the employer's decision."); *see also* Barry, *Disabilityqueer*, *supra* note 53, at 5 (explaining that regarded-as prong "protects all of us who are treated unfairly based on impairment, whether or not our impairments are typically thought of as 'disabilities.'").

[58] *See* Elizabeth F. Emens, *Disabling Attitudes: U.S. Disability Law and the ADA Amendments Act*, 60 AM. J. COMP. L. 205, 226 (2012) ("The ADAAA makes explicit that this statutory regime will not tolerate so-called reverse discrimination claims.").

[59] *See* 42 U.S.C. § 12201(g) ("Claims of no disability . . . Nothing in this chapter shall provide the basis for a claim by an individual without a disability that the individual was subject to discrimination because of the individual's lack of disability.") (emphasis added). This provision also prohibits reverse discrimination claims under prongs 1 and 2 of the definition of disability.

[60] *See* 29 C.F.R. § 1630.2(g)(1)(iii).

—not those treated adversely because they do not have an impairment.[61] Second, the regarded-as prong does not apply to claims of discrimination based on "transitory and minor" impairments.[62] This provision is perhaps best understood as an extension of the lack-of-disability provision—it prohibits claims by people whose impairments are so brief in duration and minor in impact that they are, in effect, not impairments at all.[63]

Think of the medical school faculty candidate without depression who is not hired for a position in the school's department of psychiatry, the student without dyslexia who wants extra time on an exam, the nurse without a nocturnal seizure disorder who is required to work the night shift, a person without a mobility impairment who cannot park directly in front of the entrance to a government building because of accessible parking spaces, or the secretary without a vision impairment who is laid off while another secretary with a vision impairment retains his position. Although each of these people may believe, rightly or wrongly, that they were treated adversely based on disability (i.e., denied benefits given to people with disabilities), the regarded-as prong does not protect any of them.[64] The adverse treatment they allege is not based on impairments they had or were erroneously perceived to have; it is based on the *lack* of such impairments.[65] People who are treated adversely because of the lack of an impairment are not subordinated by any stretch; they are the proverbial Man in the Packer's Tie. So is the person with the flu who is fired. As such, they have no claim for discrimination under the ADA.[66]

As these provisions demonstrate, anti-subordination still reigns under the ADA's regarded-as prong. People treated adversely for not having an impairment , or for having only a transitory and minor impairment, surely are not subordinated. As a result, they are not covered under the regarded as prong.[67] In the race context, the corollary to these provisions would be a provision in Title VII stating that, "Nothing in this Act shall provide the

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[61] *See* 42 U.S.C. § 12201(g).

[62] *See* 42 U.S.C. § 12102(3)(B) ("[The regarded-as prong] shall not apply to impairments that are transitory and minor. A transitory impairment is an impairment with an actual or expected duration of 6 months or less."). Importantly, the regarded-as prong does not apply to reasonable accommodation claims, which must be brought pursuant to prongs 1 or 2 of the definition. *See* 42 U.S.C. § 12201(h) ("A covered entity under subchapter I, a public entity under subchapter II, and any person who owns, leases (or leases to), or operates a place of public accommodation under subchapter III, need not provide a reasonable accommodation or a reasonable modification to policies, practices, or procedures to an individual who meets the definition of disability in section 12102(1) of this title solely under [the regarded-as prong].").

[63] *See* Barry, *Universalism*, *supra* note 11, at 266 ("While this language carves back the universal approach because it excludes certain types of impairments, disability rights advocates believed that individuals with these impairments were not likely to encounter barriers to access and therefore not likely to be "disabled.").

[64] *See* 42 U.S.C. §§ 12102(3)(B), 12201(g).

[65] *See* 42 U.S.C. §§ 12102(3)(B), 12201(g).

[66] *See* 42 U.S.C. §§ 12102(3)(B), 12201(g).

[67] *See* 42 U.S.C. §§ 12102(3)(B), 12201(g).

basis for a claim by [a white person] that the individual was subject to discrimination because of the individual's [race]."[68] Title VII contains no such provision,[69] nor could it. The Supreme Court has interpreted Title VII to permit reverse discrimination claims,[70] and a prohibition on Title VII reverse discrimination claims would almost certainly violate the Equal Protection Clause.[71] Not so under the ADA.[72]

The ADA, as amended, retains its anti-subordination orientation because not *all* are covered by the law.[73] The definition's first two prongs still require a showing of "substantial limitation" (albeit a drastically lowered one).[74] And, although the ADA's regarded-as prong broadly defines disability, it still falls short of universal coverage by excluding reverse discrimination claims.[75] These limitations on coverage create an inevitable tension between anti-subordination principles and broad coverage, a topic to which this Article now turns.

IV. ANTI-SUBORDINATION'S DOWNSIDE: THE NARROWING OF COVERAGE

Notwithstanding the breadth of the regarded-as prong, disability civil rights' anti-subordination orientation invites a narrow construction from courts bent on distinguishing the "truly" subordinated minority from everyone else.[76] Although courts consistently interpreted the definition of disability broadly under Section 504, this changed with the passage of the ADA in 1990.[77] In a series of decisions, the U.S. Supreme Court narrowly interpreted the definition of disability under the ADA so that only the most

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[68] *See* 42 U.S.C. § 12201(g).

[69] *See* 42 U.S.C. § 2000e-2(a).

[70] *See* McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 280 (1976) ("We therefore hold today that Title VII prohibits racial discrimination against the white petitioners in this case upon the same standards as would be applicable were they Negroes and Jackson white.").

[71] *See* Ricci v. DeStefano, 557 U.S. 557, 594 (2009) (Scalia, J., concurring) (stating that Equal Protection Clause "surely" prohibits remedial race-based action under Title VII).

[72] *See* Elizabeth F. Emens, *Disabling Attitudes: U.S. Disability Law and the ADA Amendments Act*, 60 AM. J. COMP. L. 205, 227 (2012) (stating that "there is no constitutional impediment" to ADA's exclusion of reverse discrimination claims because, "[f]or better and worse, disability does not have the constitutional problem presented by race and sex, both of which are subject to heightened scrutiny").

[73] *Compare* 42 U.S.C. § 12102(3)(B) (excluding claims based on "transitory and minor" impairments under regarded-as prong), *and* 42 U.S.C. § 12201(g) (excluding claims based on lack of impairment under regarded-as prong), *with* 42 U.S.C. § 12102(1)(A)–(B) (requiring that impairment "substantially limit[] one or more major life activities" under prongs 1 and 2).

[74] *See* 42 U.S.C. § 12102(1)(A)–(B).

[75] *Id.* §§ 12102(3)(B), 12201(g).

[76] *See* Bagenstos, *supra* note 5, at 466; *see also* Chai R. Feldblum, *Definition of Disability Under Federal Anti-Discrimination Law: What Happened? Why? And What Can We Do About It?*, 21 BERKELEY J. EMP. & LAB. L. 91, 140 (2000) ("In the area of disability, the instinctive understanding displayed by most courts is that 'disability' is synonymous with 'inability to work or function,' and that people with disabilities are significantly different from the norm. Hence, it has been difficult for courts to grasp that Congressional intent under the ADA may have been to capture a much broader range of individuals with physical and mental impairments.").

[77] *See* Kevin Barry, *Exactly What Congress Intended?*, 17 EMP. RTS. & EMP. POL'Y J. 5, 8 (2013).

physically or mentally limited people were considered disabled and thus covered by the ADA.[78]

In its 1999 decision in *Sutton v. United Airlines, Inc.*, the Supreme Court held that corrective measures had to be considered in determining who was protected by the ADA.[79] *Sutton* was devastating for people with disabilities who used corrective measures, such as medication and therapy, to manage their condition. Consider Michael McMullin—career law enforcement officer—who was fired from his job as a court security officer because an examining physician determined that his clinical depression and use of medication disqualified him from his job.[80] Even though Mr. McMullin's employer fired him because of his use of medication, the court ruled that he was not disabled "enough"—on account of his taking medication—to challenge the discrimination under the ADA.[81]

In its 2002 decision in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, the Supreme Court held that the definition of disability needed to be interpreted strictly to create a "demanding standard" for qualifying as disabled.[82] After *Toyota*, only impairments that "prevent[ed] or severely restrict[ed]" major life activities qualified as "disabilities."[83] Few were able to meet this standard, including Charles Littleton, a twenty-nine-year old man who was diagnosed with an intellectual disability as a young child.[84] Mr. Littleton applied for a cart-pusher position at Wal-Mart, but when he got to the interview, Wal-Mart refused to allow his job coach into the interview as previously agreed upon.[85] The interview did not go well for Mr. Littleton and he did not get the job.[86] When Mr. Littleton challenged Wal-Mart's decision, the court held that Mr. Littleton was not "disabled" under the ADA, in part, because he could read, drive a car, and communicate with words.[87]

For nearly twenty years, the ADA was not as effective as it otherwise might have been in prohibiting discrimination, especially in the employment context.[88] In 2008, Congress responded to these decisions by

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[78] *Id.* at 10–16.

[79] *See* Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999).

[80] *See* McMullin v. Ashcroft, 337 F. Supp. 2d 1281, 1288–89 (D. Wyo. 2004); *see also* Chai R. Feldblum, Kevin Barry & Emily A. Benfer, *The ADA Amendments Act of 2008*, 13 TEX. J. C.L. & C.R. 187, 219 (2008) (discussing *McMullin*).

[81] *Id.* at 1295–96.

[82] Toyota Motor Mfg., Ky, Inc. v. Williams, 534 U.S. 184, 196–97 (2002).

[83] *Id.* at 198.

[84] *See* Littleton v. Wal-Mart Stores, Inc., 231 Fed. App'x. 874, 875 (11th Cir. 2007); *see also* Feldblum et al., *supra* note 80, at 224 (discussing *Littleton*).

[85] *Littleton*, 231 Fed. App'x. at 875.

[86] *Id.*

[87] *Id.* at 877.

[88] *See* Feldblum et al., *supra* note 80, at 188 ("[T]he Supreme Court—with lower courts following in its lead, barricaded the door that the ADA had opened by interpreting the definition of 'disability' in the ADA to create an overly demanding standard for coverage under the law.").

passing the "ADA Amendments Act of 2008."[89] Although the ADAAA did not remove the words "substantially limits" a "major life activity" as many disability rights advocates had hoped, it did the next best thing, adding rules of construction that explicitly overruled Supreme Court and lower court decisions narrowing the definition of disability.[90] Of particular significance were the following changes:

- the definition of disability must be interpreted broadly;[91]
- the corrective effects of mitigating measures must not be considered;[92]
- episodic impairments must be looked at in their active state;[93]
- impairments need not limit a person in sleeping, eating, concentrating, or other life activities—limitation in neurological function or other bodily functions is sufficient;[94] and
- subject to the two caveats discussed in Part II above, in cases in which there is no request for accommodation, one is regarded as having a disability if the individual is adversely treated based on an impairment.[95]

The EEOC's March 2011 regulations further emphasized the reduced threshold for showing "disability," and also listed a number of impairments that, according to the EEOC, "will, in virtually all cases, result in a determination of coverage under the ADA."[96]

Notwithstanding the significant legal changes wrought by the ADAAA, the statute appears to be, for some circuit and district courts, the tree that fell in the woods and made no sound.[97] These courts remain stubbornly fixed to an outmoded and unduly narrow conception of disability, displaying a striking disregard for Congress's extension of civil

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[89] *See* ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008).

[90] *Id.*; *see also* Barry, *Exactly What Congress Intended?*, *supra* note 77, at 21–27 (discussing changes). By broadening the definition of disability, the ADAAA has implications for disability rights more generally. A forthcoming article will discuss the "disability rights taxonomy" erected by the ADAAA, as amended, which suggests a variable definition of "disability" based on the anti-discrimination obligation imposed—i.e., simple discrimination (broad definition), reasonable accommodation (more tailored definition of disability), and affirmative action under the Rehabilitation Act (agency-created list of disabilities).

[91] *See* 42 U.S.C. §§ 12102(4)(A)–(B).

[92] 42 U.S.C. § 12102(4)(E)(i).

[93] 42 U.S.C. § 12102(4)(D).

[94] 42 U.S.C. § 12102(2)(B).

[95] 42 U.S.C. § 12102(3); *see supra* notes 59–62 (discussing exceptions to regarded-as prong's broad coverage)

[96] 29 C.F.R. § 1630.2(j)(3)(ii) (2012).

[97] *See, e.g.*, Blackard v. Livingston Parish Sewer Dist., No. CIV.A. 12-704-SDD, 2014 WL 199629, at *1 (M.D. La. Jan. 15, 2014) (granting plaintiff's motion for new trial after "commit[ing] manifest error in applying the stricter standard under the ADA rather than the less stringent standard for finding a disability following the 2008 Amendments to the ADA"); *see infra* Part IV.B. (discussing wrongly-decided cases).

rights coverage beyond the traditional subordinated minority. An exhaustive discussion of recent case law is beyond the scope of this Article. What follows, instead, is a sampling of circuit and district court cases involving mental and orthopedic impairments—two of the most heavily litigated[98] and, not surprisingly, controversial bases for ADA claims—which illustrate the continued tension between anti-subordination principles and broad coverage.

A. Correctly-Decided Cases

Before discussing what a minority of courts are doing wrong, it is important to note that a majority of courts are interpreting the ADAAA correctly.[99] Consider, for example, the Fourth Circuit's recent decision in *Jacobs v. N.C. Admin. Office of Courts*. Ms. Jacobs, a courthouse clerk, was diagnosed with social anxiety disorder, a condition that causes people

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[98] According to the EEOC, in fiscal year 2014, out of the 25,369 charges of disability employment discrimination filed with the EEOC, 3,564 alleged discrimination based on anxiety and/or depression, and 4,549 alleged discrimination based on an orthopedic impairment. *ADA Charge Data by Impairments/Bases – Receipts FY 1997 – FY 2014*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, http://eeoc.gov/eeoc/statistics/enforcement/ada-receipts.cfm.

[99] *See, e.g.*, Nicole Buonocore Porter, *The New ADA Backlash*, 82 TENN. L. REV. 1, 19 (2014) ("[C]ourts have taken Congress' mandate to broadly define 'disability' seriously. Many of the courts specifically cite to the Amendments and to the EEOC regulations implementing the Amendments. Some courts seem reluctant to find that an individual has a disability but feel compelled to follow the highly comprehensive language in the Amendments."); *see also* Kevin Barry, Brian East, and Mary Karin, *Pleading Disability After the ADAAA*, 31 HOFSTRA LAB. & EMP. L.J. 1, 62 (2013) ("Although case law under the ADAAA is still in its infancy, the ADAAA appears to be having its intended effect; plaintiffs are prevailing under the definition of disability where before they would have failed."); *see also A Promising Start: Preliminary Analysis of Court Decisions Under the ADA Amendments Act*, NAT'L COUNCIL ON DISABILITY 8 (July 23, 2013), *available at* http://perma.cc/7QZ5-XE4S [hereinafter NAT'L COUNCIL ON DISABILITY] ("The central message from the review of the case law is that, in the decisions rendered so far, the ADAAA has made a significant positive difference for plaintiffs in ADA lawsuits."); *see also* Stephen F. Befort, *An Empirical Analysis of Case Outcomes Under the ADA Amendments Act*, 70 WASH. & LEE L. REV. (forthcoming), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2314628 (stating that the 28.5 percentage point drop in pro-employer summary judgment rulings on issue of disability under ADAAA "provide[s] considerable support for the proposition that the ADAAA is having the intended effect of fostering a broad construction of the revised disability definition."); *see also* C. Reilly Larson, *Conference Speakers Examine ADA Trends, Provide Practical Guidance Under the Law*, BLOOMBERG BNA (Apr. 30, 2013), http://perma.cc/7QZ5-XE4S (""[T]he biggest trend" is "simply" that the ADA Amendments Act is having its "desired effect." Employers and lawyers "are spending a lot less time" on the threshold issue of whether there is coverage, and instead are focusing on "all these other parts" of the law... "[T]hat's exactly I think what Congress had in mind.""") (quoting Paul Buchanan, Attorney, Buchanan Angeli Altschul & Sullivan) (stating that, while "there have not been too many appellate decisions yet arising out of the ADAAA...the "vast majority" of district court cases are surviving summary judgment...The ADAAA is "doing what people intended it to do,"...which was to make the focus in cases less on disability, with a much shorter analysis, and get into all the other issues under the law.") (quoting Sharon Rennert, senior attorney adviser, Equal Employment Opportunity Commission); *see also* Barry, *Exactly What Congress Intended?*, *supra* note 77, at 27 ("While case law under the Amendments is still in its infancy, courts are, for the most part, applying a lower threshold in favor of broad coverage - exactly as Congress intended.").

to avoid social situations or to endure them with "intense anxiety."[100] When her employer assigned her to provide customer service at the courthouse front counter four days per week, Ms. Jacobs began to "experience extreme stress, nervousness, and panic attacks."[101] As a result, Ms. Jacobs "requested an accommodation—to be assigned to a role with less direct interpersonal interaction. Her employer waited three weeks without acting on her request and then terminated her."[102]

Reversing the district court, the Fourth Circuit held that Ms. Jacobs' social anxiety disorder substantially limited her ability to interact with others, thus rendering her disabled under prong one of the ADA.[103] Invoking the ADAAA's reduced threshold for demonstrating disability, the court rejected the employer's assertion that Ms. Jacobs was not disabled because she "interact[ed] with others on a daily basis, routinely answered inquiries from the public at the front counter, socialized with her co-workers outside of work, and engaged in social interaction on Facebook."[104] According to the court:

> [a] person need not live as a hermit in order to be 'substantially limited' in interacting with others. . . . The fact that Jacobs may have *endured* social situations does not per se preclude a finding that she had social anxiety disorder. Rather, Jacobs need only show she endured these situations with intense anxiety.[105]

Furthermore, to the extent that Jacobs' social interaction on Facebook "constituted exposure therapy by which Jacobs attempted to overcome her anxiety through social interaction that was not face-to-face and not in real time," the court stated, "we are not permitted to consider it in determining the existence of a substantial limitation on her ability to interact with others."[106]

Notwithstanding the positive result reached in *Jacobs*, Ms. Jacobs could have also claimed substantial limitation of major bodily functions, namely, brain and neurological functions.[107] She also could have claimed coverage under the regarded-as prong because she was treated adversely (terminated) based on an impairment (social anxiety disorder).[108] These allegations would have likely made the Fourth Circuit's disability analysis even more straightforward.

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[100] *See* Jacobs v. N.C. Admin. Office of the Courts, 780 F.3d 562, 564–65 (4th Cir. 2015).
[101] *Id.* at 566.
[102] *Id.* at 565.
[103] *Id.* at 574.
[104] *Id.* at 573–74.
[105] *Id.*
[106] *Id.* at 574.
[107] *See* 42 U.S.C. § 12102(2)(B).
[108] *See id.* at § 12102(3)

In *Mazzeo v. Color Resolutions Int'l, LLC*, Mr. Mazzeo, a salesperson at a print supply company, was fired two weeks after informing his employer of his upcoming back surgery for a herniated disc and torn ligaments.[109] Ten days later, the employer hired a recent college graduate half Mr. Mazzeo's age to replace him.[110] The Eleventh Circuit did not tarry long on the question of whether Mr. Mazzeo was disabled.[111] Citing the ADAAA and its legislative history for the proposition that disability "should not demand extensive analysis" and "that the establishment of coverage under the ADA should not be overly complex nor difficult," the Eleventh Circuit reversed the district court's grant of summary judgment to the employer.[112] According to the Eleventh Circuit, the district court had erroneously relied on *pre*-ADAAA circuit precedent regarding substantial limitation.[113] Citing post-ADAAA case law and EEOC regulations, the Eleventh Circuit easily concluded that Mr. Mazzeo's orthopedic impairment was a disability under the first prong when looked at in its active state and without regard to the ameliorative effects of mitigating measures.[114] Although not mentioned in the decision, the Eleventh Circuit's holding is also strongly supported by the EEOC's post-ADAAA regulations, which clarify that substantial limitation of "musculoskeletal functions" constitutes a disability under the first prong.[115]

Consider also the district court case of *Kinney v. Century Serv. Corp. II*.[116] In that case, an employee requested leave to get inpatient treatment for depression and suicidal thoughts.[117] Her employer responded that she "thought it was ridiculous," and that she believed Ms. Kinney was "overreacting," and that "people get sad all the time, why do you need to go somewhere for it?"[118] The employer "further indicated to Ms. Kinney that her request made her doubt Ms. Kinney's competence."[119]

Ms. Kinney took four days of leave and was fired one month later.[120] When she brought suit under the ADA in 2011, the U.S. District Court for the Southern District of Indiana denied the employer's motion for

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[109] *See* Mazzeo v. Color Resolutions Int'l, LLC, 746 F.3d 1264, 1266–67 (11th Cir. 2014).

[110] *See id.* at 1267.

[111] *See id.* at 1268–70.

[112] *Id.* at 1268–70.

[113] *See id.* at 1268–70.

[114] *Id.* at 1269. Because the Eleventh Circuit concluded that Mr. Mazzeo "presented sufficient evidence that he was suffering from a disability under the ADA," the court did "not address his alternative argument that [his employer] regarded him as disabled." *Mazzeo*, 746 F.3d at 1270 n.4.

[115] *See* 29 C.F.R. § 1630.2(i)(1)(ii) (2012) ("Major life activities include, but are not limited to . . . musculoskeletal [functions]").

[116] Kinney v. Century Serv. Corp. II, No. 1:10-CV-00787-JMS-DML, 2011 WL 3476569 (S.D. Ind. August 9, 2011).

[117] *Id.* at *5.

[118] *Id.*

[119] *Id.*

[120] *Id.* at *7.

summary judgment on the issue of whether she was disabled.[121] When her impairment was looked at in its active state, the court held, it substantially limited her in major life activities—indeed, it resulted in hospitalization.[122]

In addition to anxiety[123] and depression,[124] circuit and district courts have correctly determined that a variety of other mental impairments are covered disabilities, including ADHD,[125] alcoholism, anxiety disorder, autism,[126] bipolar disorder, eating disorder, obsessive-compulsive disorder,[127] and post-traumatic stress disorder.[128] And in addition to orthopedic impairments,[129] courts have correctly found a range of other physical impairments to be disabilities, including: autoimmune disorder, blindness, brain tumor, cancer, diabetes, eating disorder, fibromyalgia, Friedreich's Ataxia (a degenerative neurological condition), gastrointestinal problems, Grave's Disease, heart disease, HIV infection, hormonal imbalance,[130] insomnia, monocular vision, multiple sclerosis, narcolepsy, obesity, psoriatic arthritis, sleep apnea, stuttering, and transient ischemic attack (mini-strokes).[131]

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[121] *Id.* at *10.

[122] As in *Jacobs*, Ms. Kinney could have also claimed substantial limitation of "major bodily functions," namely, brain and neurological functions, as well as coverage under the regarded-as prong because she was treated adversely (terminated) based on an impairment (depression). *See id; see also supra* notes 107–08 and accompanying text (discussing *Jacobs*).

[123] *Jacobs*, 780 F.3d at 564–65; *see also* Holland v. Shinseki, No. 3:10-CV-0908-B, 2012 WL 162333, at *6 (N.D. Tex. Jan. 18, 2012) (correctly holding that employee presented sufficient evidence that anxiety was disability post-ADAAA).

[124] Kinney v. Century Services Corp. II, No. 1:10-cv-00787-JMS-DML, 2011 WL 3476569 (S.D. Ind. Aug. 9, 2011). For additional cases correctly holding that employees presented sufficient evidence that depression was disability post-ADAAA, *see* Holland v. Shinseki, No., 2012 WL 162333, at *6 (N.D. Tex. Jan. 18, 2012), Estate of Murray v. UHS of Fairmount, Inc., No. 10-2561, 2011 WL 5449364, at *69 (E.D. Pa. Nov. 10, 2011), and Barry et. al., *Pleading Disability, supra* note 99, at 64.

[125] *See* Wolfe v. Postmaster General, 488 F. App'x 465, 468 (11th Cir. 2012) (holding that plaintiff with ADHD was disabled under regarded-as prong).

[126] *See* McElwee v. County of Orange, 700 F.3d 635, 643 (2d Cir. 2012) (implying that district court erred in not considering autism's substantial limitation of brain function, but affirming grant of summary judgment to employer on other grounds).

[127] *See* Becker v. Elmwood Local Sch. Dist., No. 3:10 CV 2487, 2012 WL 13569, at *9–10 (N.D. Ohio Jan. 4, 2012) (holding that obsessive compulsive disorder was disability).

[128] Except as otherwise noted, *see* Barry et al., *Pleading Disability, supra* note 99, at 63–67 for cases discussing ADA's coverage of above-listed impairments.

[129] *See* Mazzeo, 746 F.3d at 1270. For additional cases correctly holding that orthopedic impairments are disabilities post-ADAAA, *see* Barlow v. Walgreen Co., No. 8:11-CV-71-T-30EAJ, 2012 WL 868807 (M.D. Fla. Mar. 14, 2012) (back injury); Cohen v. CHLN, Inc., No. 10-00514, 2011 WL 2713737 (E.D. Pa. July 13, 2011) (back injury), Stark v. Hartt Transp. Sys., Inc., No. 2:12-CV-00195-JDL, 2014 WL 3908128, at *33 (D. Me. Aug. 11, 2014) (neck condition), and Barry et. al., *Pleading Disability, supra* note 99, at 63–66 (listing post-ADAAA cases holding that ankle injury, carpel tunnel syndrome, musculoskeletal disorders, and pain in hands, joints, and hip are disabilities under ADA).

[130] *See* Hubbard v. Day & Zimmermann Hawthorne Corp., No. 3:12-CV-00681-MMD, 2015 WL 1281629, at *5 (D. Nev. Mar. 20, 2015) (holding that hormonal imbalance was disability).

[131] Except as otherwise noted, *see* Barry et al., *Pleading Disability, supra* note 99, at 63–67 for cases discussing ADA's coverage of above-listed impairments.

B. Wrongly-Decided Cases

Despite the majority of decisions correctly applying the ADA, as amended, some courts continue to construe the statute too narrowly in violation of the ADAAA.[132] For example, in *Weaving v. City of Hillsboro*, the Ninth Circuit reversed the district court and took away a substantial jury verdict on grounds that the jury could not have found that Mr. Weaving's ADHD was a disability under the ADA.[133] In that case, the City of Hillsboro placed Weaving, a police officer, on leave because of Weaving's repeated interpersonal problems with staff members, and then subsequently fired him.[134] For four days, the jury heard evidence about how:

> [Weaving's colleagues] would avoid interactions with him; [Weaving] would engage in lengthy lectures in response to simple questions; he would send impulsive emails; he would "beat a dead horse"; he was "socially retarded"; he made [his colleagues] feel intimidated and demeaned; he lacked any awareness of the reactions of others; and . . . he was hard to approach.[135]

The jury also heard evidence from Weaving's doctor, who testified that Weaving was:

> "[u]nable to self-regulate" some of the other symptoms of ADHD without therapy, including impulsiveness, "not seeming to listen when spoken to, interrupting others, difficulty waiting his turn, blurting out comments without having emotional intelligence, [and lack of] awareness of the effect that that communication would have on his other workers at the police department."[136]

Even though the City's own internal investigation described Weaving as "tyrannical, unapproachable, non-communicative, belittling, demeaning, threatening, intimidating, arrogant and vindictive," and lacking "[]acceptable interpersonal communication that suggests he does not possess adequate emotional intelligence to successfully work in a team environment, much less lead a team of police officers," the Ninth Circuit

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[132] For cases misapplying the ADAAA, *see infra* notes 133–223 and accompanying text.

[133] *See* Weaving v. City of Hillsboro, 763 F.3d at 1106 (9th Cir. 2014). Because the jury found the plaintiff disabled under prong one but not under the regarded-as prong, the City's appeal to the Ninth Circuit challenged disability under prong one only. *See id.* at 1112–14.

[134] *Id.* at 1110.

[135] *Id.* at 1115.

[136] *Id.* at 1116.

held that Weaving's ADHD did not substantially limit his ability to interact with others.[137]

While paying lip service to the ADA's newly broadened definition of disability,[138] the court relied on pre-ADAAA case law and pre-ADAAA EEOC guidance to find that the plaintiff was not disabled because he was not "essentially homebound," "barely functional," and "suffer[ing] from a total inability to communicate at times."[139] According to the Ninth Circuit, Weaving was therefore not a person with a disability; he was merely a "cantankerous person" who had "trouble getting along with coworkers."[140] To hold otherwise, the court further stated, "would be to expose to potential ADA liability employers who take adverse employment actions against ill-tempered employees who create a hostile workplace environment for their colleagues."[141]

The court further held that Weaving's ADHD did not substantially limit his ability to work.[142] According to Weaving and his doctor, Weaving "had developed compensatory mechanisms that helped him overcome ADHD's impediments and succeed in his career."[143]

In a stinging dissent, Judge Callahan accused the majority of substituting the jury's findings with its own "diagnosis": "Weaving isn't disabled, he's just a jerk."[144] Because Weaving's relations with others "were undoubtedly characterized on a regular basis by severe problems including 'high levels of hostility,' 'failure to communicate when necessary' due to his perceived unapproachability, and a constant inability to engage in 'meaningful discussion,'" Judge Callahan argued that Weaving was substantially limited in interacting with others.[145]

Judge Callahan was right. While acknowledging the ADAAA's rejection of "prior Supreme Court and lower court cases, as well as [EEOC] regulations" that unduly narrowed the definition of "substantially limits," the Ninth Circuit inexplicably relied on pre-ADAAA case law and pre-ADAAA EEOC guidance to find the plaintiff not substantially limited in interacting with others.[146] Such cases and guidance are no longer good law, and the Ninth Circuit should know this. Had the Ninth Circuit

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[137] *Id.* at 1110, 1113–14.

[138] *Id.* at 1111.

[139] *Id.* at 1113.

[140] *Weaving*, 763 F.3d at 1114.

[141] *Id.*

[142] *Id.* at 1112.

[143] *Id.* at 1113.

[144] *Id.* at 1114, 1116 (Callahan, J., dissenting) ("Dr. Monkarsh elaborated that there is a 'big difference' between someone who is simply 'a jerk' and someone who has ADHD.").

[145] *Id.* at 1118 (stating conclusion by Judge Callahan that, because the plaintiff was substantially limited in interacting with others, "it does not matter whether he failed to establish that he had a work impairment."); *see also* Weaving v. City of Hillsboro, 763 F.3d 1106, 1121 (9th Cir. 2014).

[146] *Id.* at 1111 (citing pre-ADAAA case law and EEOC guidance).

bothered to look closely at post-ADAAA case law[147] and the EEOC's post-ADAAA regulations and guidance,[148] it would have understood that the ADA covered Weaving. Specifically, Weaving's ADHD, a neurobehavioral disorder,[149] substantially limited him in interacting with others and also in neurological functioning.[150]

Although substantial limitation in the major life activity of working has historically been difficult for courts to accept,[151] the Ninth Circuit was wrong to hold that Weaving was not substantially limited in working. When Weaving's ADHD is looked at without regard to the "compensatory mechanisms" that helped him succeed in his career,[152] and in light of the EEOC's lowered threshold for showing substantial limitation in working,[153] Weaving's ADHD certainly seems to substantially limit his ability to work in a class of jobs or broad range of jobs in various classes that involved interacting with others.

This is not to say that Weaving should have won his case. The Ninth Circuit was rightfully concerned about "expos[ing] to potential ADA liability employers who take adverse employment actions against ill-tempered employees who create a hostile workplace environment for their colleagues,"[154] but it was wrong to seize on the definition of disability to address that concern. In a post-ADAAA world, there should have been no question that Weaving was covered. The critical questions—ones not raised by the defendant on appeal—were whether Weaving was qualified to perform the essential functions of the job (with or without a reasonable accommodation), and whether the defendant's reason for terminating Weaving was non-discriminatory. Because these questions were not raised, the Ninth Circuit did not have occasion to address them.

In *Allen v. SouthCrest Hospital*,[155] an unpublished case, the Tenth Circuit affirmed a grant of summary judgment to an employer who failed to accommodate an employee with migraines and then fired her. Ms.

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[147] *See, e.g.*, Rohr v. Salt River Project Agric. Imp. & Power Dist., 555 F.3d 850, 861 (9th Cir. 2009) ("Beginning in January 2009, 'disability' was to be broadly construed and coverage will apply to the 'maximum extent' permitted by the ADA and the ADAAA."); *see generally* Barry et al., *Pleading Disability*, *supra* note 99 (discussing post-ADAAA case law).

[148] *See generally* Barry et al., *Pleading Disability, supra* note 99 (discussing post-ADAAA EEOC regulations and guidance).

[149] *NINDS Attention Deficit-Hyperactivity Disorder Information Page*, NATIONAL INSTITUTE OF NEUROLOGICAL DISORDERS AND STROKE, http://perma.cc/Z8JR-Q59G.

[150] *See generally* Barry et al., *Pleading Disability, supra* note 99, at 23–55 (discussing post-ADAAA statutory and regulatory provisions relating to substantial limitation, major life activities, and major bodily functions).

[151] *Id.* at 50.

[152] *Weaving*, 763 F.3d at 1112.

[153] 29 C.F.R. § 1630.2(j)(5)–(6) (2011); Barry et al., *Pleading Disability, supra* note 99, at 51–52 (discussing major life activity of "working" under EEOC's post-ADAAA regulations).

[154] Weaving v. City of Hillsboro, 763 F.3d 1106, 1114 (9th Cir. 2014).

[155] Allen v. SouthCrest Hospital, 455 F. App'x 827 (10th Cir. 2011).

Allen, a medical assistant at a physicians' office, experienced migraines so severe that, some days, she could not go to work at all and, other days, she had to take medication immediately after coming home from work in order to sleep through the migraine.[156] Approximately one month prior to her termination, Ms. Allen tendered her resignation and then, two weeks later, told her employer that she wished to rescind her resignation.[157] She also asked to continue working for her employer on a temporary basis, which her employer permitted her to do.[158] The day after Ms. Allen became ill at work and was hospitalized due to migraines and chest pain, her employer decided not to allow the rescission, citing performance issues, and "accept[ed] her resignation."[159]

At the outset, it should be noted that Ms. Allen could have claimed coverage under the regarded-as prong because she was treated adversely (not reinstated) based on an impairment (migraines). Because she apparently did not allege regarded-as coverage, the Tenth Circuit did not address the issue.[160] Instead, the court held that Ms. Allen was not disabled under prong one of the ADA because she was not substantially limited in any major life activity, namely, sleeping, self-care, and working.

Even though Ms. Allen testified that she experienced migraines so severe that she had to take medication in order to sleep,[161] the court erroneously held that "[h]er argument concerning the major life activity of sleep was insufficiently developed" and therefore not worthy of consideration.[162] While Ms. Allen did not provide much evidence regarding the impact of migraines on her ability to sleep, she provided enough: when looked at in their active state and without the benefit of medication, Ms. Allen's migraines prevented her from sleeping. Ms. Allen was also substantially limited in major bodily functions—namely, neurological and brain function.[163]

The court's determination that Ms. Allen was not substantially limited in caring for herself was also erroneous. According to the court, the fact that Ms. Allen had to take sleep medication immediately after returning home from work in order to deal with the pain of her migraines did not prove that she was substantially limited in self-care because "the average person also sleeps each evening and cannot care for herself while asleep,

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[156] *Id.* at 829.

[157] *Id.* at 830.

[158] *Id.* at 829.

[159] *Id.* at 830.

[160] Allen v. SouthCrest Hosp., 455 F. App'x 827, 831 n. 3 (10th Cir. 2011) (stating that coverage under regarded-as prong was "not at issue").

[161] *Id.* at 832 (discussing plaintiff's testimony that, when she experienced migraines, she took "medication that's going to make you go to sleep").

[162] *Id.* at 831.

[163] *Id.* at 832.

and sometimes goes to bed early."[164] Because the ADAAA requires courts to look at episodic impairments like migraines in their active—that is, presently symptomatic—state, it is irrelevant that Ms. Allen only "sometimes" experienced migraines. The court should have looked at her migraines, and her need to sleep through those migraines, as an ongoing—not occasional—affair. The average person does not disregard self-care and go to bed early on an ongoing basis. Under the terms of the ADAAA, Ms. Allen did just that, and was substantially limited as a result.

Furthermore, despite the difficulty of demonstrating substantial limitation in working, the Tenth Circuit should have found that Ms. Allen made this showing. When her migraines are looked at in their active state, Ms. Allen is either incapable of going to work (because she cannot get out of bed) or incapable of remaining at work (because she must be hospitalized).[165] This is precisely the sort of person who is substantially limited in working in a class of jobs or broad range of jobs in various classes.

Rather than construing the definition of disability narrowly to deny coverage to Ms. Allen, the Tenth Circuit should have looked at other possible grounds of affirmance, including whether "performance issues" constituted a legitimate, non-discriminatory reason for the employer's refusal to reinstate Ms. Allen.

A far less problematic, but nevertheless incorrect, circuit court decision is *Mann v. Louisiana High School Athletic Association*.[166] In *Mann*, a public high school student athlete who transferred to a new school because of anxiety requested a modification of the high school athletic association's "transfer rule," which would have prohibited him from playing sports at the new school for one year.[167] When the athletic association refused, the student brought suit and the district court granted a preliminary injunction enjoining the association from enforcing the transfer rule against the student.[168] The athletic association appealed the decision to the Fifth Circuit, arguing that the student was not disabled under the ADA.[169] In a per curium, unpublished decision, the Fifth Circuit agreed with the athletic association.[170]

While acknowledging that the ADAAA "lowered the standard that plaintiffs must meet to show that they are disabled," the Fifth Circuit stated that "a plaintiff must still show substantial limitation."[171] According to the

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[164] *Id.* at 833.

[165] *Allen*, 455 F. App'x at 829.

[166] Mann v. Louisiana High School Athletic Association, 535 F. App'x 405 (5th Cir. 2013).

[167] *Id.* at 407–08.

[168] *Id.* at 407.

[169] *Id.* at 408.

[170] *Id.* at 412.

[171] *Id.* at 410.

circuit court, the student's appellate briefs literally made "no argument" regarding the definition of disability under the ADA.[172] And the district court's findings were little better. According to the circuit court, the district court order relied on a report from the athlete's doctor, who diagnosed the athlete with anxiety and noted "some deficiencies in his academic functioning."[173] In a subsequent letter, the doctor "state[d] in a conclusory manner" that the student was disabled under the ADA because his anxiety "substantially limits his life activities, specifically in terms of learning, concentrating, thinking, and working."[174] This evidence, the Fifth Circuit held, was insufficient to demonstrate disability under the ADA.[175]

> [N]either the district court nor [the plaintiff] connect the findings and recommendations that [the doctor] made in her report to the legal test for a disability under the ADA, or otherwise articulate or describe any particular way that [the athlete] is substantially limited in any of these major life activities due to his anxiety disorder. . . . Of course, we do not hold that anxiety disorders can never be a disability under the ADA, and it could still be possible for Mann to prove that A.M. is disabled at trial on a fuller record.[176]

Given the dearth of facts showing how the student's anxiety substantially limited his ability to learn, concentrate, and think (and perhaps also sleep, read, communicate, and interact with others) as well as his neurological and brain functions, it is difficult to say that the Fifth Circuit's ultimate holding in *Mann* was wrong.[177] But some of the court's reasoning in support of its holding was definitely in error. For example, the Fifth Circuit cites *Toyota* for the proposition that "[m]ajor life activities" are "those activities that are of central importance to daily life."[178] This is simply incorrect. The ADAAA explicitly rejected *Toyota's* strict interpretation of major life activities. The EEOC's post-ADAAA regulations could not be clearer on this point: "[T]he term 'major' shall *not* be interpreted strictly to create a demanding standard for disability . . . . Whether an activity is a 'major life activity' is not determined by reference to whether it is of 'central importance to daily life.'"[179] In addition, the court's assertion that "a plaintiff must still show substantial limitation"[180] under the ADA is only partly right. In cases

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[172] Mann v. Louisiana High Sch. Athletic Ass'n, 535 F. App'x 405, 410 (5th Cir. 2013).
[173] *Id.* at 411.
[174] *Id.*
[175] *Id.*
[176] *Id.* at 412.
[177] *Id.* at 410.
[178] Mann, 535 F. App'x at 410.
[179] Barry et al., *Pleading Disability*, *supra* note 99, at 49 (discussing EEOC regulations).
[180] Mann, 535 F. App'x 405 at 410.

involving requests for reasonable accommodations or modifications (like *Mann*), a showing of substantial limitation is still required; in all other cases, no such showing is required under the newly expanded regarded-as prong.

District court decisions reveal similar confusion regarding the ADAAA's application. In *Morse v. Midwest Indep. Transm. System Op.*, the U.S. District Court for the District of Minnesota granted summary judgment to an employer who fired a man with Asperger's Syndrome.[181] According to the Court, "[T]here is no evidence that [Plaintiff] was substantially or materially limited in performing any major life activity on account of his Asperger's syndrome, and Morse himself testified that he did not regard his condition as severe."[182]

The court's analysis was wrong. Under the ADA's first prong, a plaintiff no longer has to prove that he or she is *severely* limited in a major life activity, and Asperger's—by definition—implies some limitation on communication and interacting with others, as well a limitation on neurological functioning.[183] Furthermore, EEOC regulations explicitly state that autism (of which Asperger's Syndrome is a subtype) should, "in virtually all cases," be considered a disability.[184] Finally, the court never mentioned the newly amended regarded-as prong, which covers anyone terminated based on an impairment, regardless of limitation.[185]

In *Koci v. Cent. City Optical Co.*, the U.S. District Court for the Eastern District of Pennsylvania dismissed the claim of an employee who was fired three weeks after she took a leave of absence to care for her son—an employee at the same workplace—who had attempted suicide.[186] During this time, her employer "repeatedly asked about [her] depressed mental state," instructed her "to stay out of work" for an additional eight days, asked whether she was "stable enough to return to work," and "expressly prohibited" her from returning to work.[187]

Despite the fact that Ms. Koci was terminated immediately after her employer raised concerns about depression, the court held that she was not "disabled" under the "regarded as" prong because her (perceived) depression simply did not last long enough; it was "transitory." The court's analysis was wrong.[188] "Transitory and minor" is an affirmative defense—the plaintiff does not have to plead it to survive a motion to

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[181] Morse v. Midwest Indep. Transmission Sys. Operator, Inc., No. 13-CV-0150 PJS/SER, 2013 WL 6502173, at *1 (D. Minn. Dec. 11, 2013).

[182] *Id.*

[183] 29 C.F.R. § 1630.2(j)(1)(ii).

[184] 29 C.F.R. § 1630.2(j)(3) (2012).

[185] *See* 42 U.S.C. § 12102(3).

[186] Koci v. Cent. City Optical Co., No. CIV.A. 14-2983, 2014 WL 6388469, at *5 (E.D. Pa. Nov. 14, 2014)

[187] *Id.* at *1.

[188] *Id.* at *3.

dismiss.[189] Furthermore, according to the EEOC, "transitory" (meaning 6 months or less in duration) is to be looked at objectively.[190] The fact that the Ms. Koci's employer fired her quickly—just a few weeks after the onset of her (perceived) depression—is simply irrelevant. And in any event, there was no evidence that the depression was minor. *Koci* is on appeal to the Third Circuit.

Unfortunately, the list of mental impairments erroneously excluded from coverage under the ADAAA does not end with ADHD,[191] anxiety,[192] autism,[193] and depression.[194] Over the past several years, courts have erroneously held that other mental impairments, including addiction to prescription pain medication, also are not covered disabilities.[195]

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[189] *See* 29 C.F.R. § 1630.15(f). ("It may be a *defense* to a charge of discrimination by an individual claiming coverage under the 'regarded as' prong of the definition of disability that the impairment is (in the case of an actual impairment) or would be (in the case of a perceived impairment) 'transitory and minor.'") (emphasis added).

[190] *Id.*

[191] *See* Weaving v. City of Hillsboro, 763 F.3d 1106, 11143 (9th Cir. 2014).

[192] *See* Mann v. Louisiana High School Athletic Association, 535 F. App'x 405 (5th Cir. 2013); *see also* Sapp v. W. Exp., Inc., No. 3:13-CV-0512, 2014 WL 7357379, at *7 (M.D. Tenn. Dec. 23, 2014) (holding that plaintiff's anxiety disorder was not a disability under first prong, but erroneously failing to consider impairment in its active state (i.e., occasional panic attacks) and without mitigating measures (i.e., the drug clonazepam), as well as its impact on major bodily functions (i.e., brain and neurological functions), and holding that plaintiff's impairment was not a disability under regarded-as prong but erroneously applying pre-ADAAA definition of regarded-as prong).

[193] *See* Morse v. Midwest Indep. Transmission Sys. Operator, Inc., No. 13-CV-0150 PJS/SER, 2013 WL 6502173 (D. Minn. Dec. 11, 2013).

[194] *See* Koci v. Cent. City Optical Co., No. CIV.A. 14-2983, 2014 WL 6388469 (E.D. Pa. Nov. 14, 2014). For other cases erroneously holding that depression is not a disability post-ADAAA, see Latta v. U.S. Steel-Edgar Thompson Plant, No. 2:11-CV-1622, 2013 WL 6252844 at *1, *4 (W.D. Pa. Dec. 4, 2013) (holding that plaintiff's depression was "intermittent and infrequent" and therefore not a disability under first prong, but erroneously failing to consider depression in its active state and its impact on neurological and brain functions), Flynt v. Biogen Idec, Inc., No. 3:11-CV-22-HTW-LRA, 2012 WL 4588570, at *2, *5–6 (S.D. Miss. Sept. 30, 2012) (holding that plaintiff's depression and anxiety were not disabilities, but erroneously failing to consider impairments in their active state (i.e., vomiting, panic attacks) and without regard to mitigating measures (i.e., medication), and impairments' impact on major bodily functions), and Klute v. Shinseki, 840 F. Supp. 2d 209, 213, 216 & n.5 (D.D.C. Jan. 9, 2012) (holding that plaintiff's adjustment disorder, anxiety, and depression were not disabilities under Rehabilitation Act, but erroneously failing to consider impairments in their active state and their impact on major bodily functions, and holding that plaintiff was not disabled under regarded-as prong but erroneously applying pre-ADAAA definition of regarded-as prong).

[195] *See* Maack v. Sch. Bd. of Brevard Cnty., No. 6:12-CV-612-ORL-28, 2013 WL 6050749, at *11 (M.D. Fla. Nov. 15, 2013) (holding that plaintiff's drug addiction was not a disability under first prong, but erroneously failing to consider addiction in its active state and without regard to medication and counseling, and its impact on neurological and brain functions, and erroneously applying pre-ADAAA definition of regarded-as prong and pre-ADAAA EEOC regulations). For cases erroneously holding that unspecified mental impairments are not disabilities, *see* Williams v. Kennedy, No. 12-CV-30176-MAP, 2014 WL 3881224, at *4–6 (D. Mass. Aug. 6, 2014) (holding that plaintiff with undiagnosed learning disability who was terminated after refusing to take certification test was not disabled under first prong, but erroneously failing to consider whether plaintiff was terminated based on *perceived* impairment and therefore disabled under regarded-as prong), and Benitez v. Maxim Healthcare Servs., No. 1:12CV1195, 2013 WL 3441734, at *6 (M.D.N.C. July 9, 2013) (erroneously

The ADA's coverage of orthopedic impairments has also been a significant source of misunderstanding for courts. A case in point is *Dennis v. Airport Chevrolet, Inc.*[196] In that case, the employer, Airport Chevrolet, relocated Mr. Dennis, an automotive technician with painful back, knee, and foot injuries, to a new work station that required him to walk greater distances.[197] Three years later, after the company's merger with another dealership, Airport Chevrolet removed Mr. Dennis's computer from his workstation, which required him to walk greater distances to access a computer.[198] The company terminated him one month later.[199]

In its decision granting summary judgment to the employer, the U.S. District Court for the District of Oregon made three significant missteps.[200] First, the court relied on old law—namely, the EEOC's superseded regulations—in determining whether Mr. Dennis's orthopedic impairments were "substantially limiting" under the first prong.[201] Specifically, the court cited the EEOC's *pre*-ADAAA regulations for the proposition that "substantially limit[s]" means "the inability to perform a major life activity . . . or a significant restriction."[202] This was error; the ADAAA explicitly rejected this definition of disability as "inconsistent with congressional intent, . . . expressing too high a standard" for qualifying as disabled.[203] As a result, the EEOC promulgated new regulations for qualifying as disabled, which say precisely the opposite of the old regulations: "An impairment need *not* prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered substantially limiting."[204] In addition, the court applied the EEOC's old three-factor test for determining "substantial limitation" (i.e., nature and severity; duration; and permanent or long-term impact).[205] This, too, was error; the EEOC's

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applying pre-ADAAA definition of regarded-as prong and holding that plaintiff whose employer told her that "she could no longer work for Defendant . . . because she had a mental problem" was not disabled under regarded-as prong).

[196] Dennis v. Airport Chevrolet, Inc., No. 1: 13-CV-00008-CL, 2014 WL 715458, at *3 (D. Or. Feb. 24, 2014).

[197] *Id.* at *1.

[198] *Id.*

[199] *Id.*

[200] *Id.* at *2–4.

[201] *Id.* at *3.

[202] *Dennis v. Airport Chevrolet, Inc.*, 2014 WL 715458, at *3.

[203] *See* 42 U.S.C. § 12102(4)(B) ("The term 'substantially limits' shall be interpreted consistently with the findings and purposes of the ADA Amendments Act of 2008."); ADA Amendments Act of 2008 § 2(a)(8), P.L. 110-325, Sept. 25, 2008, 122 Stat. 3553 ("Congress finds that the current Equal Employment Opportunity Commission ADA regulations defining the term 'substantially limits' as 'significantly restricted' are inconsistent with congressional intent, by expressing too high a standard.").

[204] 29 C.F.R. § 1630.2 (emphasis added).

[205] *Id.* at *2.

new regulations have removed these three "substantial limitation" factors.[206]

Second, the court failed to properly apply the ADA's new rules of construction.[207] Specifically, the court did not consider whether Mr. Dennis's orthopedic impairments would substantially limit major life activities or "musculoskeletal functions" in their active state, unmitigated by medication (Vicodin) and Mr. Dennis's own modifications (moving slowly and taking rests).[208] Had the court done so, the court's disability holding likely would have been different, given the court's concession that Mr. Dennis's impairments "do limit his physical activities" and "[c]learly . . . cause him pain when he attempts to do certain activities."[209]

Finally, after correctly stating the new definition of the regarded-as prong, the court inexplicably relied on the pre-ADAAA definition of the regarded-as prong and pre-ADAAA case law in holding that Mr. Dennis was not disabled under the regarded-as prong.[210] Citing *Sutton*, the court stated that, in order to be covered under the regarded-as prong, an employer "must entertain misperceptions about the individual—it must believe either that one has a substantially limiting impairment that one does not have or that one has a substantially limiting impairment when, in fact, the impairment is not so limiting."[211] Furthermore, the court stated, "the purpose of the regarded as prong is to cover individuals rejected from a job because of the myths, fears and stereotypes associated with disabilities."[212] Both of these statements are incorrect. The new regarded-as prong requires only adverse treatment based on an impairment; "substantial limitation"[213] and "myths, fears, or stereotypes about disability"[214] are simply irrelevant. Under the regarded-as prong, the question is not whether Airport Chevrolet perceived Mr. Dennis to be substantially limited, but rather whether Airport Chevrolet terminated Mr. Dennis because of his impairments.[215]

In addition to orthopedic impairments,[216] courts have erroneously determined that a variety of other physical impairments are not covered

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[206] *See* 29 C.F.R. pt. 1630, app. § 1630.2(j)(4) (2011). Courts *may* consider "condition, manner, or duration," if "useful in appropriate cases." 29 C.F.R. § 1630.2(j)(4)(ii).

[207] *Compare* 42 U.S.C. § 12102(4), *with Dennis*, 2014 WL 715458, at *3.

[208] *Compare* 42 U.S.C. §§ 12102(4)(D), (E)(i), *with Dennis*, 2014 WL 715458, at *3

[209] *See id.* at *3.

[210] *Id.* at *4.

[211] *Id.*

[212] *Id.*

[213] 42 U.S.C. § 12102(3)(A).

[214] 29 C.F.R. pt. 1630, app. § 1630.2(l).

[215] *Compare* 42 U.S.C. § 12102(3), *with Dennis*, 2014 WL 715458 at *4.

[216] *See Dennis*, 2014 WL 715458 at *2–4. For other cases erroneously holding that orthopedic impairments are not disabilities post-ADAAA, *see* McNeil v. Wells Fargo Bank, N.A., No. 1:12-CV-02064-DME, 2013 WL 6499796, at *6 (D. Colo. Dec. 11, 2013) (erroneously relying on pre-ADAAA case law and regulations in holding that plaintiff was not disabled under first prong because her knee

disabilities, including: cancer,[217] dehydration,[218] head injury,[219] hearing impairment,[220] hyperemesis of pregnancy (severe "morning sickness" that

injury, which "prevented her from standing for more than one hour," did not "completely preclude[]" or "significantly restrict" her ability to stand), Latta v. U.S. Steel-Edgar Thompson Plant, No. 2:11-CV-1622, 2013 WL 6252844, at *2, *4 (W.D. Pa. Dec. 4, 2013) (erroneously holding that plaintiff's torn ankle tendon, which required surgery, was not a disability under first prong because plaintiff "worked despite his ankle injury"), Baldwin v. Duke Energy Corp., No. 3:12–cv–00212–MOC–DSC, 2013 WL 6056578, at *8 (W.D.N.C. Nov. 15, 2013), *aff'd*, 583 F. App'x 251 (4th Cir. 2014) (holding that plaintiff's inability to sit for more than thirty minutes was transitory and minor, but erroneously failing to consider whether impairment was minor, and erroneously relying on employer's subjective "opinion that plaintiff's condition was short term" rather than *objective* determination as required by EEOC regulations, 29 C.F.R. § pt. 1630, app. § 1630.15(f)), Trelenberg v. 21st Century Ins. & Fin. Servs., Inc., No. CIV.A. 12-3603, 2013 WL 3914468, at *8–9, *14 (E.D. Pa. July 30, 2013) (dismissing plaintiff's claim without prejudice and holding that plaintiff's wrist injury was not a disability under first prong or regarded-as prong, but erroneously failing to consider ADAAA and post-ADAAA regulations and case law, and erroneously discussing "transitory and minor" affirmative defense under first prong of disability (as opposed to regarded-as prong) and in support of motion to dismiss (as opposed to summary judgment)), Wilkins v. J.C. Penney Corp., No. 3:11-CV-989 VLB, 2013 WL 3816588, at *6 (D. Conn. July 22, 2013) (erroneously applying pre-ADAAA definition of regarded-as prong and holding that plaintiff's (transitory but not minor) back injury was not a disability under regarded-as prong because employer did not perceive plaintiff to be "substantially limited"), Griffin v. Prince William Health Sys., No. 01:10-CV-359, 2011 WL 1597508, at *3 & n.1 (E.D. Va. April 26, 2011) (holding that plaintiff's back problem was not a disability under first prong of ADA but erroneously relying on pre-ADAAA standard for showing "disability" and pre-ADAAA case law ("unable" or "significantly restricted"), and erroneously failing to consider whether employee was disabled under "regarded as" prong), Noriega-Quijano v. Potter, No. 5:07-CV-204-FL, 2009 WL 6690943, at *5 (E.D.N.C. Mar. 31, 2009) (holding that plaintiff's back and foot conditions were not disabilities under first prong of ADAAA but erroneously failing to consider impairments without mitigating measures (i.e., floor mat), and erroneously failing to consider whether employee was disabled under "regarded as" prong), and Barry, *Exactly What Congress Intended?*, *supra* note 77, at 32 & n.154 (citing Zurenda v. Cardiology Assocs., P.C., No. 3:10-CV-0882, 2012 WL 1801740, at *7–9 (N.D.N.Y. May 16, 2012) (knee injury), Neumann v. Plastipak Packaging, Inc., No. 1:11-CV-522, 2011 WL 5360705, at *9, *11 (N.D. Ohio Oct. 31, 2011) (back injury), Griffin v. Prince William Health Sys., No. 01:10-CV-359, 2011 WL 1597508, at *3 & n.1 (E.D. Va. April 26, 2011) (back condition), George v. TJX Cos., Inc., No. 08-CV-275 (ARR)(LB), 2009 WL 4718840, at *8 (E.D.N.Y. Dec. 9, 2009) (fractured arm)).

[217] *See* Wade v. New York City Dep't of Educ., No. 11 CIV. 05278 LGS, 2014 WL 941754, at *10 (S.D.N.Y. Mar. 10, 2014) (holding that pro se plaintiff's "cancer, without more, does not qualify as a disability under the ADA," but erroneously failing to consider cancer in its active state and without mitigating measures under first prong, as well as its impact on normal cell growth, and erroneously failing to consider post-ADAAA definition of regarded-as prong, which requires no showing of limitation); *see also* Brandon v. O'Mara, No. 10 Civ. 5174(RJH), 2011 WL 4478492, at *7 (S.D.N.Y. Sept. 28, 2011) (erroneously holding that pro se plaintiff's cancer was not a disability).

[218] *See Latta*, 2013 WL 6252844 at *1, *4 (holding that dehydration that resulted in plaintiff's hospitalization was not a disability under first prong, but erroneously failing to consider dehydration in its active state and without regard to mitigating measures, such as "taking fluids and resting in a cool place," as well as its impact on bodily functions).

[219] *See* Young v. United Parcel Serv., Inc., 992 F. Supp. 2d 817, 825, 835–37 (M.D. Tenn. 2014) (erroneously applying pre-ADAAA definition of regarded-as prong and holding that plaintiff's head injury was not a disability under regarded-as prong because employer did not "mistakenly believe" him to be "substantially limited," and holding that plaintiff was not disabled under first prong but erroneously failing to consider plaintiff's impairment in its active state (i.e., headaches) and without mitigating measures (e.g., avoiding high noise levels), as well as its impact on major bodily functions).

results in excessive vomiting, dehydration, and chemical imbalances in the body),[221] Eppstein-Barr virus (which causes fatigue) and fibromyalgia (which causes musculoskeletal pain and fatigue),[222] and severe psoriasis and psoriatic arthritis.[223] As these wrongly-decided cases demonstrate, anti-subordination has a downside: not everyone will be covered under the ADA, including some who should be. Fortunately, these cases are the exception, not the rule.

The next section turns from the ADA's failure to cover certain people with disabilities based on courts' overly narrow interpretation of the definition of "disability," to the ADA's subordination of transgender people through its pernicious exclusion of Gender Identity Disorder.

V. ANTI-SUBORDINATION'S FUTURE: REMOVING THE GID EXCLUSION

"Gender Identity Disorder" or GID (now, "Gender Dysphoria") refers to clinically significant and persistent distress that results from the incongruence between one's gender identity and one's assigned gender at birth.[224] Several months ago, one of my clinic students (a non-transgender woman) testified against a Connecticut bill that would have made it more

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[220] *See* Allen v. St. James Parish Hosp., No. CIV.A. 12-1619, 2013 WL 6017931, at *5 (E.D. La. Nov. 13, 2013) (erroneously failing to consider plaintiff's hearing impairment without regard to the hearing aid she wore in her left ear, and holding that plaintiff's impairment was not a disability under first prong because "she can hear out of her right ear" and she "graduated from school, married, raised children, cared for herself, and . . . maintained long-term employment despite her alleged disability"); Koenig v. Maryland, No. CIV.A. JFM-12-1087, 2013 WL 4026909, at *3 n.4 (D. Md. Aug. 6, 2013), *aff'd*, 567 F. App'x 178 (4th Cir. 2014) (holding that prisoner's hearing impairment was not a disability, but failing to consider ADAAA and whether hearing impairment substantially limited auditory function).

[221] *See* Wonasue v. Univ. of Maryland Alumni Ass'n, 984 F. Supp. 2d 480, 484, 490 (D. Md. 2013) (holding that plaintiff's hyperemesis of pregnancy that resulted in hospitalization was not a disability under first prong, but erroneously relying on pre-ADAAA case law and pre-ADAAA definition of disability and failing to consider impairment in its active state and without regard to mitigating measures, as well as its impact on major bodily functions).

[222] *See* Maack v. Sch. Bd. of Brevard Cnty., No. 6:12-CV-612-ORL-28, 2013 WL 6050749, at *11 (M.D. Fla. Nov. 15, 2013) (holding that Epstein-Barr virus and fibromyalgia were not disabilities under first prong, but erroneously failing to consider plaintiff's impairments in their active state and without regard to pain medication, as well as impairments' impact on major bodily functions, and erroneously applying pre-ADAAA definition of regarded-as prong and pre-ADAAA EEOC regulations).

[223] *See* O'Kane v. Lew, No. 10-CV-5325 PKC, 2013 WL 6096775, at *1, *6 (E.D.N.Y. Nov. 20, 2013) (holding that plaintiff's psoriatic arthritis was not a disability under first prong, but erroneously relying on pre-ADAAA case law (*Toyota*) and failing to consider plaintiff's "painful, uncomfortable" impairment in its active state and without regard to measures taken by plaintiff to avoid pain, as well as impairment's impact on major bodily functions, and erroneously failing to consider whether post-ADAAA definition of regarded-as prong covered plaintiff who was treated adversely based on "severe" and "socially isolating" psoriasis that caused his skin to flake off of his body and bleed).

[224] *See* AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 451 (5th ed. 2013) [hereinafter "DSM-5"]; *see also* Brief for Gay & Lesbian Advocates et al. as Amici Curiae Supporting Petitioner, Blatt v. Cabela's Retail, Inc., 2015 WL 1360212 (E.D. Pa. Feb. 23, 2015) [hereinafter Br. for Amici Curiae].

difficult for people diagnosed with GID to access medically necessary health treatments.[225] After she finished her testimony, a transgender woman in attendance at the hearing approached my student, smiling and said:

> You were awesome. Everything you talked about, I've been living. Suicidal thoughts? I've been there. And when my doctor prescribed hormones, I couldn't get to the pharmacy fast enough. But now my problem is that I can't get a job. Employers look at employment records from my old job, see a different name, and hire someone else because they don't want to deal with me. So now I'm doing things I shouldn't be doing.

The woman did not elaborate on what, exactly, she was doing that she should not have been. Did she mean that she was working at a job for which she was overqualified? Or did she mean that she was working in the underground economy, a place to which too many transgender people are forced to turn?[226] In either case, the woman's experience demonstrates the level of subordination experienced by people with GID and, more broadly, by transgender people.[227]

As the District of Columbia Court of Appeals recently observed, "the hostility and discrimination that transgender individuals face in our society today is well-documented."[228] In a recent study of nearly 6,500 transgender people: 41% of respondents reported attempting suicide (compared to 1.6% of the general population), 55% lost a job due to bias, 51% were harassed/bullied in school, 90% were harassed at work or hid their identities to avoid harassment, 61% were the victim of physical assault, and 64% were the victims of sexual assault.[229] In addition, respondents were unemployed at twice the rate of the general population

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[225] *See* Testimony of Quinnipiac University School of Law Legal Clinic in Opposition to House Bill 5193 (Feb. 24, 2015), http://perma.cc/KD3T-JMVW.

[226] *See* Jamie M. Grant et al., *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey*, NAT'L CTR. FOR TRANSGENDER EQUALITY AND NAT'L GAY AND LESBIAN TASKFORCE 22 (2011) http://perma.cc/C8TJ-X8JE ("It has been well documented that economic circumstances have caused many transgender people to enter the underground economy for survival, as sex workers or by selling drugs. . . . Sixteen percent (16%) of [survey of 6,450] respondents said they had engaged in sex work, drug sales, or other underground activities for income.").

[227] "Transgender" is an umbrella term that describes those whose gender identity does not conform to one's assigned gender at birth. *See* DSM-5, *supra* note 224, at 451. All people with GID are transgender, because their gender identity does not conform to their assigned sex at birth. Conversely, only some transgender people have GD—i.e., clinically significant distress resulting from the incongruence between gender identity and anatomical sex. *See* DSM-5, *supra* note 224, at 451–52; *see also* Br. for Amici Curiae, *supra* note 224, at § I.

[228] Brocksmith v. United States, 99 A.3d 690, 698 n.8 (D.C. 2014).

[229] Grant et al., *supra* note 226, at 2–3.

and nearly four times more likely to have a household income of less than $10,000/year.[230]

Transgender people face severe and pervasive discrimination in nearly every aspect of their lives. Indeed, our society has so devalued transgender lives that many transgender individuals contemplate taking their own. Significantly, the ADA does not protect transgender people. In fact, it explicitly excludes them.[231] According to the ADA,

> the term 'disability' shall not include—
>
> 1) transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders;
>
> 2) compulsive gambling, kleptomania, or pyromania; or
>
> 3) psychoactive substance use disorders resulting from current illegal use of drugs.[232]

The ADA excludes GID (and its subtype, transsexualism) not because GID is not an impairment, but rather because of the moral opprobrium of two senior senators, conveyed in the eleventh hour of a marathon day-long floor debate, who erroneously believed that GID was a "sexual behavior disorder" undeserving of legal protection.[233] Senator William Armstrong (R-CO) stated that he "could not imagine the sponsors would want to provide protected status to somebody who has such [mental] disorders, particularly those [that] might have a moral content to them or which in the opinion of some people have a moral content."[234] Senator Jesse Helms, an outspoken critic of Martin Luther King Day and LGBT rights, among other things, likewise railed against coverage for people with a variety of mental impairments, including people with intellectual disabilities, "manic-depressives," "schizophrenics," "kleptomaniacs," and "transvestites."[235] Invoking the example of Senator Bob Dole, a World War II combat veteran, Helms stated,

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[230] *Id.*

[231] *See* 42 U.S.C. § 12211(b)(1).

[232] *Id.*

[233] *See* Br. for Amici Curiae, *supra* note 224, at 1–3; *see also* Christine Michelle Duffy, *The Americans with Disabilities Act of 1990 and the Rehabilitation Act of 1973*, in GENDER IDENTITY AND SEXUAL ORIENTATION DISCRIMINATION IN THE WORKPLACE: A PRACTICAL GUIDE 16–39 (Christine Michelle Duffy ed. Bloomberg BNA 2014); Barry, *Disabilityqueer*, *supra* note 53, at 12–25; Ruth Colker, *Homophobia, AIDS Hysteria, and the Americans with Disabilities Act*, 8 J. GENDER RACE & JUST. 33, 36–38, 42–44, 50 (2004).

[234] 135 CONG. REC. S10753, 1989 WL 183115 (daily ed. Sept. 7, 1989) (statement of Sen. Armstrong).

[235] 135 CONG. REC. S10765, 1989 WL 183216 (daily ed. Sept. 7, 1989) (statement of Sen. Helms).

> If this were a bill involving people in a wheelchair or those who have been injured in the war, that is one thing. But how in the world did you get to the place that you did not even [ex]clude transvestites? . . .What I get out of all of this is here comes the U.S. Government telling the employer that he cannot set up any moral standards for his business . . . . [H]e cannot say, look I feel very strongly about people who engage in sexually deviant behavior or unlawful sexual practices.[236]

Senator Warren Rudman similarly objected to Congress' protection of "socially unacceptable behavior [that] lacks any physiological basis,"—"behavior that is immoral, improper, or illegal and which individuals are engaging in of their own volition. . . ."[237]

Significantly, when Congress amended the ADA in 2008, it did not remove the GID exclusion.[238] Although GID remains excluded from the ADA, this may be about to change. On August 15, 2014, lawyers for plaintiff Kate Lynn Blatt, a transgender woman, filed a complaint in federal district court against her former employer, Cabela's Retail, Inc., alleging employment discrimination under the ADA and Title VII.[239] According to the complaint, Ms. Blatt was diagnosed with GID in October 2005.[240] As part of her medical transition, Ms. Blatt grew long hair, dressed in feminine attire, underwent hormone therapy, and changed her name from "James" to "Kate Lynn."[241] In September 2006, Ms. Blatt was hired to work as a merchandise stocker at Cabela's Retail, Inc., a sporting goods store.[242] Soon thereafter, her employer discriminated against her by refusing to give her a female uniform; requiring her to wear a nametag bearing the name "James"; initially requiring her to use the male bathroom and eventually allowing her to use the unisex "family" bathroom (after suggesting she use the bathroom at a Dunkin Donuts across the street); refusing to consider her for a promotion; refusing to discipline employees who referred to her as "ladyboy," "he/she," "fag," "sinner," "freak," "cross-dressing gay fruit," and "confused sicko"; and abruptly terminating Ms. Blatt in March 2007.[243]

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[236] *Id.*

[237] 135 CONG. REC. S10796, 1989 WL 183216 (daily ed. Sept. 7, 1989) (statement of Sen. Rudman).

[238] *See* 42 U.S.C. § 12111(b)(1); *see also* Barry, *Disabilityqueer*, *supra* note 53, at 31 ("When given the chance to do away with the GID exclusion in 2008, Congress chose not to act.").

[239] Complaint at 67–74, Blatt v. Cabela's Retail, Inc., 2014 WL 4379556 (E.D. Pa. Aug. 15, 2014) (Counts V-VI); *see* First Amended Complaint at 52–59, Blatt v. Cabela's Retail, Inc., 2014 WL 8276701 (E.D. Pa. Nov. 5, 2014) [hereinafter "Blatt Compl."].

[240] Blatt Compl., *supra* note 239, at 10.

[241] *Id.* at 11.

[242] *Id.* at 12–13.

[243] *Id.* at 16–19, 21–22, 25–26, 28–32.

In response to the complaint, the Defendant filed a motion to dismiss, invoking the GID exclusion.[244] On January 20, 2015, lawyers for Ms. Blatt filed a brief in opposition, raising a first-of-its kind equal protection challenge to the ADA's GID exclusion.[245] In support of heightened scrutiny, Ms. Blatt argues that transgender individuals (including those diagnosed with GID) are subordinated; they are a "historically and politically marginalized class of people."[246] According to the brief, "[t]ransgender individuals find themselves discriminated against in almost all aspects of life, including employment, housing, education, public accommodations, and access to government services."[247] An *amicus* brief authored by six state and national transgender rights organizations likewise argues that the GID exclusion violates public policy because it denies coverage to the very people the ADA seeks to protect: those whose impairment (GID) substantially limits life activities, and those without an impairment who are substantially limited "as a result of others' negative reactions—namely fear, discomfort, lack of understanding, and animus."[248]

Furthermore, according to Ms. Blatt and *amici*, the ADA does not simply fail to protect a subordinated group of people—the ADA, itself, *subordinates* those people by marking them as undeserving of civil rights protection.[249] As *amici* argue:

> The fact that Congress went out of its way to exclude GID, along with a variety of distinctly different conditions that the *DSM* classified as sexual behavior disorders and/or that the law treats as criminal or reckless, sends a strong symbolic message: transgender people have no civil rights worthy of respect. By maintaining this exclusion, the ADA perpetuates the very thing it seeks to dismantle: "the prejudiced attitudes or ignorance of others" and the "inferior status" that people with disabilities occupy in our society.[250]

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[244] *See* Plaintiff's Mem. Law Opp. Def.'s Part'l Mot. Dismiss, Blatt v. Cabela's Retail, Inc., 2015 WL 1360179, at § III (E.D. Pa. Jan. 20, 2015) [hereinafter "Blatt Mem."].

[245] *Id.* at § I. A forthcoming article will analyze Ms. Blatt's novel constitutional challenge in greater detail.

[246] *Id.* at § IV(C).

[247] *Id.* at § IV(C)(1)(a)(i).

[248] Br. for Amici Curiae, *supra* note 224, at § III(B). In addition to arguing in support of Ms. Blatt's equal protection challenge, Amici argue, in the alternative, that the court should avoid the constitutional question by interpreting the ADA to exclude only GID—not the DSM's new diagnosis of GD.

[249] *Id.* at § III(A); *see also* Blatt Mem., *supra* note 244, at §§ IV(C)(1)(a)(ii), (iv) ("[H]istorical discrimination against transgender individuals is epitomized by the very fact that its exclusion from the ADA was retained subsequent to the ADA Amendments Act of 2008. . . . [T]he exclusion of GID from the ADA epitomizes the transgender community's minority and politically fragile status.").

[250] Br. for Amici Curiae, *supra* note 224, at § III(B).

In its reply, the Defendant takes no position on the constitutional question and instead defers to the position of the Department of Justice. On July 21, 2015, the Department filed a Statement of Interest in the case, suggesting that the court should avoid the constitutional question by resolving the case under Title VII.[251] Importantly, the Department also reserved the right to weigh in should the court decide to take on directly the issue of the constitutionality of the GID exclusion.[252]

As one scholar has commented, "[f]ederal law has an important expressive function, especially concerning the messages it sends about disadvantaged groups."[253] *Blatt* teaches that the ADA should be part of the solution to subordination, not part of the problem. Hopefully, the court will not sidestep the issue as the Department has done, and will agree with Ms. Blatt that the GID exclusion has no place under the ADA. No matter what happens in *Blatt*, more equal protection challenges will surely follow, and the ADA's pernicious exclusion will inevitably fall.

VI. CONCLUSION

The ADA, which celebrates its twenty-fifth anniversary this year, is a response to the subordination of people with disabilities. Seven years ago, in response to a series of Supreme Court decisions narrowing the class of people protected by the law, Congress passed the ADAAA, which reinstated the ADA's broad scope of coverage for those who are subordinated. This Article offers three observations on the ADAAA and its anti-subordination aims.

The first observation considers one of the upsides of anti-subordination: the ADA protects only people with "disabilities," not people without disabilities who have experienced "reverse" discrimination. While drastically expanding the definition of disability to those whose impairments are episodic, fully mitigated, non-stigmatized, or non-existent, the ADAAA makes the distinction clear: the lack of disability does not give rise to a claim under the ADA. This is at it should be; people treated adversely for not having a disability (or for having only a transitory and minor impairment) surely are not subordinated, and they are therefore not entitled to the ADA's protections.

The second observation considers one of the obvious downsides of anti-subordination: not everyone who *should* be covered by the ADA *will* be covered because of the tendency of a minority of courts to narrowly construe the ADA's definition of disability. The Ninth Circuit's 2014

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[251] Statement of Interest of U.S. for Blatt v. Cabela's Retail, Inc. (No. 5:14-cv-4822-JFL) at 2 (July 21, 2015).

[252] *Id.* at 3.

[253] Michael Waterstone, *Returning Veterans and Disability Law*, 85 NOTRE DAME L. REV. 1081, 1122 (2010).

decision in *Weaving v. City of Hillsboro*, the first published circuit level case narrowly interpreting the ADA's definition of disability post-ADAAA, is a case in point. While paying lip service to the ADA's newly broadened definition of disability, the court inexplicably relied on pre-ADAAA case law and pre-ADAAA EEOC guidance to find that a person with ADHD was not disabled because he was not "essentially homebound," "barely functional," and "suffer[ing] from a total inability to communicate at times." According to the Ninth Circuit, the plaintiff was merely a "cantankerous person" who had "trouble getting along with coworkers." The Ninth Circuit got it wrong. In a post-ADAAA world, there should have been no question that the plaintiff was disabled: ADHD is a neurobehavioral disorder that substantially limits neurological functioning and interacting with others. Time will tell if erroneously-reasoned cases like this one gain traction.

The third observation turns from anti-subordination under the ADA to the ADA's subordination of transgender people through its pernicious exclusion of GID, a medical impairment associated with the transgender community. The ADA excludes GID not for medical reasons but rather because of the moral opprobrium of two senior senators, conveyed in the eleventh hour of a marathon day-long floor debate, who erroneously believed that GID was a "sexual behavior disorder" undeserving of legal protection. By excluding GID, the ADA does not simply fail to protect a subordinated group of people—the ADA, itself, subordinates transgender people by marking them as undeserving of civil rights protection. This may be about to change. On January 20, 2015, lawyers for Kate Lynn Blatt, a transgender woman, brought a first-of-its kind equal protection challenge to the ADA's GID exclusion. Hopefully, the *Blatt* court (and other courts hearing identical challenges) will strike down the GID exclusion, making good on the ADA's promise to alleviate—not entrench—the subordinate status that people with disabilities occupy in our society.