

An Indirect Challenge to the FDA’s “Gay Blood Ban”

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I. INTRODUCTION

The U.S. Food and Drug Administration (FDA) has banned all men who have had sex with another man (MSM) from donating blood and plasma for life since 1977.¹ This so-called “gay blood ban”² was first

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1. The FDA’s regulations require blood collection establishments to screen blood and plasma donors for certain risk factors related to infectious diseases such as HIV. 21 C.F.R. § 640.3(b)(6) (2010) (blood donation); *id.* § 640.63(c)(9) (plasma donation). According to the FDA’s guidance, “donors who have engaged in certain high-risk activities” must be deferred from donation, including “[m]en who have had sex with another man even one time since 1977.” U.S. DEP’T OF HEALTH & HUMAN SERVS., RECOMMENDATIONS FOR THE PREVENTION OF HUMAN IMMUNODEFICIENCY VIRUS (HIV) TRANSMISSION BY BLOOD AND BLOOD PRODUCTS 2-3 (1992), <http://www.fda.gov/downloads/UCM062834.pdf>, archived at <http://perma.cc/0vCxu8ZMwyn>.

2. Emily Greenhouse, *Breaking the Gay Blood Ban*, NEW YORKER (July 13, 2013), <http://www.newyorker.com/online/blogs/newsdesk/2013/07/gay-blood-donor-ban-protest.html>,

instituted as an attempt to quarantine the blood supply from blood-borne diseases like HIV at a time when blood and plasma were not tested for the presence of HIV,³ and HIV/AIDS was thought to predominantly, if not exclusively, affect gay men.⁴ Today, however, blood- and plasma-testing technology has progressed leaps and bounds,⁵ and society recognizes that HIV/AIDS can affect anyone.

Despite the thorough and ubiquitous testing of blood and plasma for blood-borne diseases and despite the reality that HIV-tainted blood can come from a donor of any sexual orientation, the FDA continues to enforce the ban based on the relatively high incidence of HIV infection in MSM as compared to the rest of the population.⁶ Consequently, the blood ban has been the focus of a significant debate: should the FDA's ban persist in an effort to minimize the possibility of HIV-tainted blood transfusions, or should the ban be lifted in an effort to treat MSM the same as other blood donors?

Many have called on the FDA to rescind the MSM blood ban in its entirety.⁷ Others have argued for the FDA to adopt a more lenient policy

archived at <http://perma.cc/04noacVr7pY>; Andrew Belonsky, *85 Lawmakers Fight Gay Blood Ban*, OUT.COM (Aug. 5, 2013), <http://www.out.com/entertainment/popnography/2013/08/05/senator-tammy-baldwin-leads-lawmakers-against-gay-blood-ban>, archived at <http://perma.cc/0iJze4vBP3f>.

3. On April 23, 1984, the Secretary of the U.S. Department of Health and Human Services announced that, in the wake of researchers determining that the cause of AIDS is the retrovirus HTLV-III, development had begun on the first diagnostic blood test to identify HTLV-III. *A Timeline of AIDS*, AIDS.GOV, <http://aids.gov/hiv-aids-basics/hiv-aids-101/aids-timeline/> (last visited Feb. 11, 2014), archived at <http://perma.cc/0vaX9g37aEk>.

4. See Lawrence K. Altman, *New Homosexual Disorder Worries Health Officials*, N.Y. TIMES (May 11, 1982), <http://www.nytimes.com/1982/05/11/science/new-homosexual-disorder-worries-health-officials.html?pagewanted=all>, archived at <http://perma.cc/0NrLqBxwATQ>.

5. Demetre Daskalakis, *HIV Diagnostic Testing: Evolving Technology and Testing Strategies*, 19 TOPICS ANTIVIRAL MED. 18, 18-19 (2011).

6. *HIV in the United States: At a Glance*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/hiv/statistics/basics/ata glance.html> (last visited Feb. 11, 2014), archived at <http://perma.cc/0ZUZuLkZXZM> ("Although MSM represent about 4% of the male population in the United States, in 2010, MSM accounted for 78% of new HIV infections among males and 63% of all new infections. MSM accounted for 52% of all people living with HIV infection in 2009, the most recent year these data are available." (citations omitted)).

7. See, e.g., Press Release, Am. Med. Ass'n, *AMA Adopts New Policies on Second Day of Voting at Annual Meeting* (June 18, 2013), <http://www.ama-assn.org/ama/pub/news/news/2013/2013-06-18-new-ama-policies-annual-meeting.page>, archived at <http://perma.cc/0xqfcTVKgJe> (explaining the AMA's decision, at its annual meeting in 2013, to oppose the FDA's ban on MSM blood donations); Letter from Senator Elizabeth Warren et al. to Honorable Kathleen Sebelius, Sec'y, U.S. Dep't of Health & Human Servs. (Aug. 1, 2013), <http://www.warren.senate.gov/files/documents/Bicameral%20msm%20Blood%20Ban%202013.pdf>, archived at <http://perma.cc/0QUpiAFoVyH>; Letter from Senator John Kerry et al. to Honorable Margaret Hamburg, Comm'r, U.S. Food & Drug Admin. (Mar. 4, 2010), http://gmhc.org/files/editor/file/a_bb_18_senators_FDA.pdf, archived at <http://perma.cc/08ZmtTRJyo2>; Alisha Ebrahimji, *National Gay Blood Drive Aims to Lift Donation Ban*, CNN HEALTH (July 11, 2013, 1:55 PM),

permitting MSM in monogamous relationships or MSM who use condoms to donate blood and plasma.⁸ Others still have argued that the ban violates the Fifth Amendment's Equal Protection component or the Administrative Procedures Act.⁹ This Article does not seek to convince the reader that the ban should be rescinded; sufficient colloquy of that sort exists elsewhere. Instead, this Article presumes the FDA's gay blood ban is a draconian relic of a regretful era in American history and should be eliminated as soon as possible. To that end, this Article proffers an as-yet unarticulated weapon in the fight against the gay blood ban: an indirect, state-law challenge.

Rather than challenge the blood ban directly, I argue for a challenge to the clinics and hospitals that solicit blood donations from the public. Twenty-two jurisdictions (twenty-one states and the District of Columbia) prohibit discrimination on the basis of sexual orientation in places of public accommodation.¹⁰ As the analysis in Part II will demonstrate, these statutes likely bar clinics and hospitals in some of these jurisdictions from soliciting blood donations from the public so long as the FDA's gay blood ban remains in place. Assuming *arguendo* that this analysis is correct, a successful challenge would outlaw solicitation of blood donations from the public in certain jurisdictions. As a consequence of the threat of such successful challenges, Part III explains how the FDA would likely buckle under the mounting pressure of a sharply decreasing blood supply and voluntarily rescind the gay blood ban.

II. CHALLENGING THE GAY BLOOD BAN

Each of the aforementioned twenty-two public accommodation antidiscrimination statutes is comprised of three discrete elements:

<http://www.cnn.com/2013/07/11/health/gay-blood-drive/index.html>, archived at <http://perma.cc/0Uqzr3HocCj>.

8. *MSM Blood Ban*, GMHC, <http://www.gmhc.org/advocate/msm-blood-ban> (last visited Feb. 11, 2014), archived at <http://perma.cc/0fuvLQDjwoM> ("The ban should be replaced with a policy that defers high-risk gay and bisexual men, while permitting low-risk gay and bisexual men to donate blood. The risk assessment for gay and bisexual men should also include whether the donor engaged in low-risk sexual practices like condom usage or monogamy.")

9. See, e.g., Dwayne J. Bensing, Comment, *Science or Stigma: Potential Challenges to the FDA's Ban on Gay Blood*, 14 U. PA. J. CONST. L. 485 (2011); Michael Christian Belli, *The Constitutionality of the "Men Who Have Sex with Men" Blood Donor Exclusion Policy*, 4 J.L. Soc'y 315 (2002).

10. See *LGBT Inclusive Public Accommodations Laws*, HUMAN RIGHTS CAMPAIGN, <http://www.hrc.org/resources/entry/lgbt-inclusive-public-accommodations-laws1> (last visited Sept. 14, 2013), archived at <http://perma.cc/0QFLRLcxc5F?type=image>.

(1) discrimination, (2) on the basis of sexual orientation, (3) in a place of public accommodation. I isolate and discuss these elements below.

A. *“Discrimination”*

Twenty of the statutes prohibiting sexual orientation discrimination in places of public accommodation follow the same form: they define discrimination as denying individuals any accommodations, advantages, facilities, privileges, services, or goods on the basis of a protected classification.¹¹ For example, in Delaware, it is unlawful to deny any individual the accommodations, advantages, facilities, and privileges of a place of public accommodation on account of sexual orientation;¹² however, Delaware does not explicitly prohibit denying an individual the services or goods of a place of public accommodation because of sexual orientation. These subtle distinctions matter a great deal. For example, a barber shop refusing to give someone a haircut would be a denial of services, but not a denial of goods. A movie theatre denying a couple the 3D glasses to their 3D movie would be a denial of privileges, but not a denial of facilities.

As applied here, denying MSM the opportunity to donate blood unquestionably denies to those individuals the services, advantages, and

11. CAL. CIV. CODE § 51(b) (West 2013) (accommodations, advantages, facilities, privileges, and services); COLO. REV. STAT. ANN. § 24-34-601(2) (West 2013) (accommodations, advantages, facilities, privileges, services, and goods); CONN. GEN. STAT. § 46a-81d(a) (2013) (accommodations); DEL. CODE ANN. tit. 6, § 4504(a) (West 2013) (accommodations, advantages, facilities, and privileges); D.C. CODE § 2-1402.31(a) (2013) (accommodations, advantages, facilities, privileges, services, and goods); HAW. REV. STAT. § 489-3 (2013) (accommodations, advantages, facilities, privileges, services, and goods); 775 ILL. COMP. STAT. 5/5-102 (2013) (facilities, services, and goods); IOWA CODE § 216.7(1)(a) (2013) (accommodations, advantages, facilities, privileges, and services); ME. REV. STAT. ANN. tit. 5, § 4592(1) (2013) (accommodations, advantages, facilities, privileges, services, and goods); MD. CODE ANN. STATE GOV'T § 20-304 (West 2013) (accommodations, advantages, facilities, privileges, services, and goods); MINN. STAT. ANN. § 363A.11(1)(a)(1) (West 2013) (accommodations, advantages, facilities, privileges, services, and goods); NEV. REV. STAT. ANN. § 233.010(2) (West 2013) (accommodations, advantages, facilities, privileges, services, and goods); N.H. REV. STAT. ANN. § 354-A:17 (2013) (accommodations, advantages, facilities, privileges, services, and goods); N.J. STAT. ANN. § 10:5-4 (West 2013) (accommodations, advantages, facilities, and privileges); N.M. STAT. ANN. § 28-1-7(F) (West 2013) (accommodations, facilities, services, and goods); N.Y. EXEC. LAW § 296(2)(a) (McKinney 2013) (accommodations, advantages, facilities, and privileges); OR. REV. STAT. §§ 659A.403(1), (3) (2013) (accommodations, advantages, facilities, and privileges); R.I. GEN. LAWS § 11-24-2 (2013) (accommodations, advantages, facilities, and privileges); VT. STAT. ANN. tit. 9, § 4502(a) (2013) (accommodations, advantages, facilities, and privileges); WIS. STAT. ANN. § 106.52(3)(a)(1), (2) (West 2013) (facilities and services).

12. DEL. CODE ANN. tit. 6, § 4504(a) (West 2013).

privileges of the place collecting the blood for several reasons.¹³ Foremost, public blood donation often includes a free “mini physical,” during which donors have their pulse, blood pressure, body temperature, and hemoglobin checked by a healthcare professional.¹⁴ Many blood donors are offered a free screening for diseases like Chagas disease, Hepatitis B and C, HIV Types I and II, Human T-Lymphotropic virus, Syphilis, and West Nile virus.¹⁵ Most significantly, peer-reviewed studies have shown that donating blood is linked to reductions in heart attacks,¹⁶ heart disease,¹⁷ strokes,¹⁸ cardiovascular disease,¹⁹ Type II Diabetes,²⁰ and several types of cancer.²¹ Because donating blood affords donors these perks, the denial of the opportunity to donate blood constitutes the denial of services, advantages, and privileges. Accordingly, soliciting blood donations from the public amounts to discrimination in California, Colorado, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, Wisconsin, and the District of Columbia.²²

Less likely is that the denial would amount to a denial of the accommodations or facilities of the place of public accommodation. True: there may be certain amenities or areas in the clinic or hospital that

13. See Michael Alvear, *Evidence Suggests that Giving Blood Has Health Benefits*, CNN.COM HEALTH (Apr. 26, 2000, 12:56 PM), <http://edition.cnn.com/2000/HEALTH/04/26/give.blood.wmd>, archived at <http://perma.cc/03c4FzB5heF>.

14. *Why Donate Blood?*, AM. RED CROSS, <http://www.redcrossblood.org/donating-blood/why-donate-blood> (last visited Feb. 11, 2014), archived at <http://perma.cc/0VDC2w7JMbX>; *Interesting Facts about Blood Donation*, MAYO CLINIC, <http://www.mayoclinic.org/donate-blood-rst/know.html> (last visited Feb. 11, 2014), archived at <http://perma.cc/0f1twYWU35E>.

15. *Blood Testing*, AM. RED CROSS, <http://www.redcrossblood.org/learn-about-blood/what-happens-donated-blood/blood-testing> (last visited Feb. 11, 2014), archived at <http://perma.cc/0hdjY9rZuUj>.

16. Jukka T. Salonen et al., *Donation of Blood Is Associated with Reduced Risk of Myocardial Infarction*, 148 AM. J. EPIDEMIOLOGY 445, 447 (1998); Leo R. Zacharski et al., *Reduction of Iron Stores and Cardiovascular Outcomes in Patients With Peripheral Arterial Disease: A Randomized Controlled Trial*, 297 J. AM. MED. ASS'N 603, 604 (2007).

17. *FAQ*, AM. RED CROSS, <http://www.americanredcrossblood.org/faq.html> (last visited Feb. 12, 2014) (“[D]onating blood . . . reduces the chances of ischemic heart diseases (beginning of heart problems) . . .”), archived at <http://perma.cc/08dt1kdM7ah>.

18. Zacharski et al., *supra* note 16, at 603.

19. David G. Meyers et al., *Possible Association of a Reduction in Cardiovascular Events with Blood Donation*, 78 HEART 188 (Aug. 1997).

20. José Manuel Fernández-Real et al., *Iron Stores, Blood Donation, and Insulin Sensitivity and Secretion*, 51 CLINICAL CHEMISTRY 1201, 1202-03 (2005).

21. Karl Merk et al., *The Incidence of Cancer Among Blood Donors*, 19 INT. J. EPIDEMIOLOGY 505 (1990).

22. See sources cited *supra* note 11.

are off limits to anyone deferred from donation, but a denial of this sort is most likely *de minimus* and—as such—beyond the protection of antidiscrimination statutes.²³ Finally, at the far end of the spectrum, denying an MSM the opportunity to donate blood clearly is not denying that individual any goods (setting aside, of course, any snacks or prizes the clinic or hospital may give to donors). Consequently, denying an MSM the opportunity to donate blood would only be discriminatory in Connecticut, where the law only protects access to accommodations, if the MSM could prove that being denied the opportunity to donate blood was a denial of an accommodation.²⁴

The remaining jurisdictions—Massachusetts and Washington State—follow a different form. In Massachusetts, “[w]hoever makes any distinction, discrimination or restriction on account of . . . sexual orientation . . . relative to the admission of any person to, or his treatment in any place of public accommodation” violates the law.²⁵ Denying an MSM the opportunity to donate blood amounts to discrimination under this statute because the MSM is treated discriminatorily and distinctly in a place of public accommodation. Similarly, Washington prohibits “any distinction, restriction, or discrimination . . . or the refusing or withholding from any person the admission, patronage, custom, presence, [or] frequenting . . . in any place of public . . . accommodation . . . applicable to all persons, regardless of . . . sexual orientation.”²⁶ Soliciting blood donations from the public constitutes discrimination in Washington because the denial of MSM from donating blood is—at a minimum—a denial of MSMs’ patronage.

In sum, because of the FDA’s gay blood ban, soliciting blood donations from the public constitutes discrimination in twenty states (i.e., California, Colorado, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, Washington, and Wisconsin) and the District of Columbia, and potentially constitutes discrimination in Connecticut.

B. “On the Basis of Sexual Orientation”

The most interesting legal question posed by this theoretical challenge is whether soliciting public blood donations under the FDA’s ban constitutes discrimination “on the basis of sexual orientation.” The

23. See *infra* Part II.B.2.

24. See sources cited *supra* note 11.

25. MASS. GEN. LAWS ch. 272, § 98 (2013).

26. WASH. REV. CODE § 49.60.215(1) (2013).

difficulty lies with the ban's *fit*, for the ban does not uniquely affect *all* homosexuals; homosexual women are entirely unaffected, as are homosexual men who have not had sex with another man since 1977 (the "Underinclusivity Problem"). On the flip side of that coin, not every MSM since 1977 identifies as a homosexual; a subset of outliers exists (the "Overinclusivity Problem").

Combined, the Underinclusivity Problem and the Overinclusivity Problem show that the gay blood ban does not draw a neat line with homosexuals on one side and everyone else on the other. As such, can the ban legally be deemed to discriminate on the basis of sexual orientation? No federal or state court has addressed the Underinclusivity Problem or the Overinclusivity Problem in the context of public accommodation discrimination on the basis of sexual orientation. Nonetheless, we can glean insight into how courts would approach these problems from somewhat similar cases.

1. Underinclusivity

Most of the jurisdictions prohibiting sexual orientation discrimination in places of public accommodation have never addressed the Underinclusivity Problem in any context. Yet, those jurisdictions that have tackled the problem have uniformly held that underinclusivity alone does not doom the challenge. These cases all follow the same logic: discrimination against a subset of a class is still discrimination against that class.

Take as an example *Currier v. National Board of Medical Examiners*, wherein the Supreme Judicial Court of Massachusetts considered the Underinclusivity Problem in the context of a lactating mother wishing to express breast milk during a medical licensing exam.²⁷ When the National Board of Medical Examiners (NBME) denied her request for forty-five minutes of extra break time during an examination so she could express milk in private, the mother sued, alleging sex discrimination.²⁸ This case highlights the Underinclusivity Problem well because, although the NBME's policy of denying extra time to lactating mothers discriminated only against women, the policy does not discriminate against *all* women. Nevertheless, the court held that the NBME violated the law because "a subclass, comprised only of women, are denied advantages of adequate break time [Therefore, w]e conclude that the protections of the public accommodation statute extend

27. 965 N.E.2d 829 (Mass. 2012).

28. *Id.* at 835-36.

to lactating mothers because we find lactation to be a sex-linked distinction or classification.”²⁹

Similarly, in *Elaine W. v. Joint Diseases North General Hospital, Inc.*, the Court of Appeals of New York considered the Underinclusivity Problem in the context of a hospital detoxification program that refused to admit pregnant women.³⁰ Similar to the NBME’s policy in *Currier*, the hospital’s policy affected a subset of women and no one else. When the hospital denied a pregnant woman admission to the program, she sued, alleging sex discrimination.³¹ The court agreed with the plaintiff, holding that discrimination against pregnant women is discrimination on the basis of sex.³²

The court’s logic in *Elaine W.* is reminiscent of Congress’s logic when it enacted the Pregnancy Discrimination Act of 1978 (the PDA). The PDA was a direct reaction to the United States Supreme Court’s ruling in *General Electric Co. v. Gilbert*, where the Court held that pregnancy discrimination is *not* tantamount to sex discrimination.³³ Congress abrogated *Gilbert* by enacting the PDA, which explicitly stated that discrimination on the basis of “sex,” as that term is used in Title VII of the Civil Rights Act of 1964, includes discrimination on the basis of pregnancy.³⁴

Finally, in the somewhat-comical case of *Braun v. Swiston*, a New York court considered the Underinclusivity Problem in the context of a bar that refused service to men with long hair but served all women, regardless of hair length, and men with short hair.³⁵ The bar’s policy undoubtedly was underinclusive because it discriminated only against men, but not *all* men. A group of long-haired men who were denied service sued, alleging sex discrimination.³⁶ The court found the bar liable for discrimination on the basis of sex.³⁷

Applying the logic of these cases to the issue at hand, it would appear that the Underinclusivity Problem of soliciting public blood donations is overcome. The fact that soliciting blood donations under the

29. *Id.* at 843-44.

30. 613 N.E.2d 523 (N.Y. 1993).

31. *Id.* at 524.

32. *Id.* at 525; *see also* *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 684 (1983) (acknowledging that pregnancy discrimination violates Title VII’s prohibition on sex discrimination because Congress overturned *Gen. Electric Co. v. Gilbert*, 429 U.S. 125 (1976), with the Pregnancy Discrimination Act of 1978).

33. 429 U.S. 125, 133-40 (1976).

34. Pregnancy Discrimination Act, Pub. L. No. 95-555, § 995, 92 Stat. 2076 (1978).

35. 340 N.Y.S.2d 468 (Sup. Ct. 1972).

36. *Id.* at 468-69.

37. *Id.* at 469.

FDA's gay blood ban discriminates against only a subset of homosexuals is no defense to a claim of sexual orientation discrimination—at least in those jurisdictions that have considered the Underinclusivity Problem and in other jurisdictions to the extent that the above-referenced cases are persuasive authority.

2. Overinclusivity

Overinclusivity, on the other hand, generally has been a complete defense to discrimination in the twenty-two jurisdictions at issue. For example, in *Cohn v. Corinthian Colleges, Inc.*, a California state court considered the Overinclusivity Problem in the context of a free giveaway at a baseball game.³⁸ On Mother's Day 2005, Corinthian Colleges, Inc., sponsored a Mother's Day celebration at Angels Stadium of Anaheim during a game between the Angels and the Tigers, wherein Corinthian gave away a tote bag to all mothers at the game.³⁹ In this context, the policy was overinclusive because it discriminated against all men *and* some women (i.e., nonmothers). Subsequently, a group of nonmothers sued Corinthian, claiming they were discriminated against on account of their sex. However, the court dismissed the claim, holding that the law does not "requir[e] the treatment of mothers to be exactly the same as that of non-mothers. A viable gender discrimination case must be *because of* the group's sex, not merely a resultant correlation."⁴⁰

Similarly, in *Monson v. Rochester Athletic Club*, a Minnesota state court considered the Overinclusivity Problem in the context of a discounted gym membership.⁴¹ When a local gym offered a discounted membership to married couples, a homosexual couple—who, at the time, could not marry in Minnesota on account of their sexual orientation—sued the gym, claiming sexual orientation discrimination.⁴² Here, the policy was overinclusive because it discriminated against all homosexuals and some heterosexuals (i.e., nonmarried heterosexuals). The court dismissed the claim, holding that the gym's restricted offering discriminated on the basis of marital status, not sexual orientation.⁴³

38. 86 Cal. Rptr. 3d 401 (Ct. App. 2008).

39. *Id.* at 403 ("Due to the difficult logistics of discerning which women were mothers in the heavy traffic of entry to the game, the Angels decided to generalize 'mothers' as females 18 years old and over.").

40. *Id.* at 405 (citing *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993)).

41. 759 N.W.2d 60 (Minn. Ct. App. 2009).

42. *Id.* at 62.

43. *Id.* at 64-65; *see also* *Levin v. Yeshiva Univ.*, 754 N.E.2d 1099, 1105-06 (N.Y. 2001) (holding that a university did not discriminate on the basis of sexual orientation by giving priority

Given these precedents, can a challenge to public solicitation of blood donations survive the Overinclusivity Problem? At the outset of my research, I posited two hypotheses—one factual and one legal—as to why the Overinclusivity Problem was no defense to discrimination in this case: (1) factually, the number of nonhomosexuals affected by the FDA’s ban is *de minimus*, and (2) legally, a *de minimus* overinclusion is no defense to discrimination. As I will demonstrate, my research revealed weaknesses in my first hypothesis and proved the accuracy of my second hypothesis.

Foremost, scant data exists to test the hypothesis that a *de minimus* number of nonhomosexuals are affected by the FDA’s ban. A recent population-based health survey of men living in New York City is the most reliable data available. According to this survey, nearly 10% of men surveyed who self-identified as straight had at least one sexual encounter with another man during the previous year.⁴⁴ Such same-sex sexual encounters would bar many self-identified straight men from donating blood. If accurate, this survey suggests that the Overinclusivity Problem in public blood donation is much more than *de minimus*. Yet, drawing such a conclusion has three significant shortcomings.

First, the survey is confined to a population sample of New York City whereas the incidence of straight men who have had sex with men is sure to be wildly different depending on where surveyed. Second, the survey does not account for the truism that self-identification is irrelevant to sexual orientation; homosexuality is an attraction to individuals of the same sex, regardless of self-identification.⁴⁵ In other

cohabitational housing to married couples); *Tanner v. Or. Health Sciences Univ.*, 971 P.2d 435, 443-44 (Or. Ct. App. 1998) (holding that a university did not discriminate on the basis of sexual orientation by denying health benefits to domestic partners); *Phillips v. Wis. Pers. Comm’n*, 482 N.W.2d 121, 123 (Wis. Ct. App. 1992) (holding that an employer’s denial of family health benefits to unmarried partners did not discriminate on the basis of sexual orientation because the denial was “keyed to marriage”); *Beaty v. Truck Ins. Exchange*, 8 Cal. Rptr. 2d 593, 596-97 (Ct. App. 1992) (holding that an insurance carrier did not discriminate on the basis of sexual orientation by offering a discounted rate to married couples); *Hinman v. Dep’t of Pers. Admin.*, 213 Cal. Rptr. 410, 416 (Ct. App. 1985) (holding that a state agency’s health policy was not discriminatory on the basis of sexual orientation because it “makes a distinction solely on the basis of married and unmarried employees or annuitants, not between heterosexual and homosexual ones”).

44. Preeti Pathela et al., *Discordance Between Sexual Behavior and Self-Reported Sexual Identity: A Population-Based Survey of New York City Men*, 145 ANNALS INTERNAL MED. 416 (2006); see also Lynda S. Doll et al., *Homosexually and Nonhomosexually Identified Men Who Have Sex with Men: A Behavioral Comparison*, 29 J. SEX RES. 1, 1-14 (1992).

45. AM. PSYCHOLOGICAL ASS’N, ANSWERS TO YOUR QUESTIONS FOR A BETTER UNDERSTANDING OF SEXUAL ORIENTATION & HOMOSEXUALITY 1 (2008), available at <http://www.apa.org/topics/sexuality/orientation.pdf>, archived at <http://perma.cc/0o3zg9aWPJS?type=pdf> (“Sexual orientation refers to an enduring pattern of emotional, romantic, and/or sexual

words, just because an individual self-identifies as straight does not mean that individual is straight. And third, the paucity of surveys or scientific studies on the topic belies any definitive conclusions. Hence, one *cannot* conclude from this survey that 10% of straight men in New York City had sex with a man in the previous year, and one certainly cannot extrapolate such a flawed conclusion to the greater populous.

With respect to my hypothesis that discrimination persists despite a *de minimus* overinclusion, I look to the high court. In *Bray v. Alexandria Women's Health Clinic*, the Supreme Court famously opined that "[a] tax on wearing yarmulkes is a tax on Jews."⁴⁶ With that quote, the Court recognized that a small overinclusion (e.g., non-Jews who wear yarmulkes) is no defense to discrimination.⁴⁷ Granted: this particular case was in the context of constitutional law and not statutory nondiscrimination law; however, the Court has been known to import relevant logic from constitutional law into interpreting statutory law.⁴⁸

I believe the twenty-two jurisdictions at issue here are likely to follow *Bray's* example. After all, nondiscrimination laws would be rendered impotent if, for example, a restaurant could avoid claims of sexual orientation discrimination by placing the following sign in the front window: "No gays, lesbians, or Bob (who's straight)." This sign is technically overinclusive, but if the restaurant tried to argue that this overinclusivity is a defense to sexual orientation discrimination, I hasten to say that such an argument would not pass the laugh test of any judge or juryperson.

De minimus overinclusion is no defense to discrimination. Yet, this conclusion begs the question: how much overinclusion is enough to tip the scales? At what point does an overinclusive policy begin to include too many members of the largely unaffected class such that it becomes a defense to discrimination à la *Cohn* or *Monson*? Such questions cannot be answered without resorting to actual numbers and percentages.

attractions to men, women, or both sexes." (emphasis added)); see also HAW. REV. STAT. § 489-2 (2013) ("Sexual orientation" means having a preference for heterosexuality, homosexuality, or bisexuality, [or] having a history of any one or more of these preferences"); MINN. STAT. ANN. § 363A.03(44) (West 2013) ("Sexual orientation" means having or being perceived as having an emotional, physical, or sexual attachment to another person without regard to the sex of that person or having or being perceived as having an orientation for such attachment").

46. 506 U.S. 263, 270 (1993).

47. Yet the Supreme Court has held that overinclusion of even 2% *is* a defense to discrimination. *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 270 (1979).

48. See, e.g., *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 133 (1976) ("We think . . . that our decision in *Geduldig v. Aiello* . . . dealing with a strikingly similar disability plan [in the context of constitutional law], is quite relevant in determining whether or not the pregnancy exclusion did discriminate on the basis of sex [in Title VII]." (citations omitted)).

Accordingly, whether the Overinclusivity Problem associated with challenging the solicitation of public blood donation serves as a defense to discrimination is a jurisdiction-specific and highly fact-intensive inquiry.

C. *“In a Place of Public Accommodation”*

The issue here is whether clinics and hospitals that solicit public blood donations are “places of public accommodation.” Beginning with a plain-text interpretation, BLACK’S LAW DICTIONARY defines a “public accommodation” as a “business that provides . . . services to the public.”⁴⁹ Applying that definition here, clinics and hospitals that solicit public blood donations provide services⁵⁰ and are open to the public. Potential donors can walk-in or make an appointment; there is no membership required. These facilities are not exclusive. In fact, it is their very public nature that has made public blood donation such a great success: these clinics and hospitals open their doors for anyone willing to donate. Thus, under a plain-text interpretation, clinics and hospitals that solicit public blood donations are places of public accommodation.

This interpretation is sufficiently persuasive in Nevada, Oregon, and Rhode Island because those jurisdictions do not define “public accommodation.” Yet, such an interpretation is insufficient in the remaining jurisdictions because “public accommodation” is a defined term of art; seventeen of the nineteen remaining jurisdictions, either broadly define “public accommodation”⁵¹ or illustrate a nonexclusive list

49. BLACK’S LAW DICTIONARY 17 (9th ed. 2009).

50. *See supra* Part II.A.

51. CONN. GEN. STAT. § 46a-63 (2013) (“Place of public accommodation . . . means any establishment which caters or offers its services or facilities . . . to the general public.”); DEL. CODE ANN. tit. 6, § 4502(14) (West 2013) (“A ‘place of public accommodation’ means any establishment which caters to or offers . . . services or facilities to, or solicits patronage from, the general public.”); IOWA CODE § 216.2(13)(a) (2013) (“‘Public accommodation’ means each and every place, establishment, or facility of whatever kind, nature, or class that caters or offers services [or] facilities . . . for a fee or charge to nonmembers of any organization or association utilizing the place, establishment, or facility, provided that any place, establishment, or facility that caters or offers services [or] facilities . . . to the nonmembers gratuitously shall be deemed a public accommodation if the accommodation receives governmental support or subsidy.”); MINN. STAT. ANN. § 363A.03(34) (West 2013) (“‘Place of public accommodation’ means a business, accommodation, [or] facility of any kind, whether licensed or not, whose . . . services, facilities, privileges, advantages or accommodations are extended, offered . . . , or otherwise made available to the public.”); N.M. STAT. ANN. § 28-1-2(H) (West 2013) (“[P]ublic accommodation’ means any establishment that provides or offers its services, facilities, [or] accommodations . . . to the public”); VT. STAT. ANN. tit. 9, § 4501(1) (2013) (“‘Place of public accommodation’ means any . . . establishment or other facility at which services, facilities . . . , privileges, advantages, benefits or accommodations are offered to the general public.”).

of places of public accommodation.⁵²

As an example of a state attempting a broad definition, New Mexico defines a public accommodation as “any establishment that provides or offers its services, facilities, [or] accommodations . . . to the public.”⁵³ On the other hand, Maine’s antidiscrimination statute provides that a “[p]lace of public accommodation” includes a “professional office of a health care provider, hospital, . . . clinic, . . . or other service establishment; [or a]ny establishment that in fact caters to, or offers its . . . facilities or services to, or solicits or accepts patronage from, the general public.”⁵⁴ In both of these examples, clinics and hospitals that solicit public blood donations would qualify as places of public accommodation.

Moreover, having examined each of these seventeen jurisdictions’ definitions in detail, I have concluded that a facility that solicits blood donation from the public squarely falls within the provided definition of a place of “public accommodation” in every jurisdiction except Iowa. Iowa defines a place of public accommodation as a place that offers

52. COLO. REV. STAT. § 24-34-601(1) (West 2013) (“[P]lace of public accommodation’ means any . . . establishment[s] conducted to serve the health . . . or physical condition of a person, . . . [a] clinic, [or] hospital.”); D.C. CODE § 2-1401.02(24) (2013) (“Place of public accommodation’ means . . . establishments dealing with . . . services of any kind[,] clinics, [and] hospitals.”); HAW. REV. STAT. §§ 489-2(7), (9) (2013) (“Place of public accommodation’ means a business, accommodation, [or] facility of any kind whose . . . services, facilities, privileges, advantages, or accommodations are extended, offered, sold, or otherwise made available to the general public as . . . clients . . . or visitors. By way of example, but not of limitation, place of public accommodation includes . . . [an] establishment conducted to serve the health . . . or physical condition of persons . . . [a] clinic, [and a] hospital.”); 775 ILL. COMP. STAT. 5/5-101(A)(6) (2013) (“Place of public accommodation’ includes [a] professional office of a health care provider, hospital, or other service establishment.”); ME. REV. STAT. ANN. tit. 5, § 4553(8)(F), (N) (2013) (“Place of public accommodation’ [includes a] professional office of a health care provider, hospital . . . clinic, . . . or other service establishment [and a]ny establishment that in fact caters to, or offers its . . . facilities or services to, or solicits or accepts patronage from, the general public.”); MASS. GEN. LAWS ch. 272, § 92A(10) (2013) (“A place of public accommodation . . . shall be deemed to include any place . . . which is open to and accepts or solicits the patronage of the general public and . . . whether or not it be . . . a hospital, dispensary or clinic operating for profit”); N.H. REV. STAT. ANN. § 354-a:2(XIV) (2013) (“Place of public accommodation’ includes any . . . health care provider . . . or other establishment which caters or offers its services or facilities . . . to the general public.”); N.J. STAT. ANN. § 10:5-5(1) (West 2013) (“A place of public accommodation’ shall include . . . any . . . clinic or hospital.”); N.Y. EXEC. LAW § 292(9) (McKinney 2013) (“The term ‘place of public accommodation[.]’ . . . shall include . . . establishments dealing with . . . services of any kind, . . . clinics, [and] hospitals.”); WASH. REV. CODE § 49.60.040(2) (2013) (“Any place of public . . . accommodation[.]’ includes . . . any place . . . where medical service or care is made available”); WIS. STAT. ANN. § 106.52(1)(e)(1) (West 2013) (“Public place of accommodation or amusement’ shall be interpreted broadly to include, but not be limited to, places of business . . . ; clinics; hospitals . . . ; and any place where accommodations . . . or services are available [for] free”).

53. N.M. STAT. ANN. § 28-1-2(H) (West 2013).

54. ME. REV. STAT. ANN. tit. 5, § 4553(8) (2013).

services for a fee, provided that if the place offers services gratuitously, it “shall be deemed a public accommodation if the accommodation receives governmental support or subsidy.”⁵⁵ Thus, a clinic or hospital would fall under this definition only if it received governmental support or subsidies.

Lastly, California and Maryland take unique approaches. California applies its nondiscrimination statute to “all business establishments of every kind whatsoever.”⁵⁶ Clearly, all clinics and hospitals fall within this definition. Yet, Maryland offers an *exclusive* list of public accommodations covered by the statute which does not cover clinics or hospitals that solicit public blood donors.⁵⁷

Hence, in twenty of the jurisdictions at issue, any clinic or hospital that solicits blood donations from the public would be considered a place of public accommodation. Such facilities most likely would not be considered places of public accommodation in Maryland and would be considered as such in Iowa only if they received government support or subsidies.

D. A Brief Note on Liability Exemptions and Preemption

Most of the jurisdictions at issue offer no liability exemptions to places of public accommodation that discriminate on the basis of sexual orientation. However, some do. In Maine, Minnesota, and Vermont, no entity is required to permit an individual to participate in or benefit from the services, facilities, goods, privileges, advantages, and accommodations of a public accommodation when that individual poses a “direct threat” to the health or safety of others, which is defined uniformly as “a significant risk to the health or safety of others that can not be eliminated by a modification of policies, practices, or procedures or by the provision of auxiliary aids or services.”⁵⁸ In a similar vein, Washington’s antidiscrimination statute provides that “behavior or actions constituting a risk to . . . other persons . . . shall not constitute an unfair practice.”⁵⁹

There have been no cases examining whether allowing MSM to donate blood would pose a direct threat to the health or safety of others or would constitute a risk to other persons. However, with the recent

55. IOWA CODE § 216.2(13)(a) (2013).

56. CAL. CIV. CODE § 51(b) (West 2013).

57. MD. CODE ANN. STATE GOV'T § 20-301 (West 2013).

58. ME. REV. STAT. ANN. tit. 5, § 4592 (2013); MINN. STAT. ANN. § 363a.11(4) (West 2013); VT. STAT. ANN. tit. 9, § 4502(h) (West 2013).

59. WASH. REV. CODE § 49.60.215(1) (2013).

advances in blood screening technology,⁶⁰ it is doubtful that allowing MSM blood donations would pose a health threat at all, let alone a *direct* threat. Yet, without a court's guidance to confirm this conclusion, a clinic or hospital conceivably could contend that allowing MSM to donate blood would increase the risk of transmitting blood-borne diseases like HIV, thereby posing a significant health risk to healthy blood recipients.

Some jurisdictions exempt entities from liability for public accommodation discrimination caused by "bona fide business necessity."⁶¹ In fact, one such exemption was cited recently by proponents of a proposed city ordinance that would prohibit sexual orientation discrimination in places of public accommodation as the reason the ordinance would not stymie blood donations in the city.⁶² However, not a single one of the state laws analyzed herein contains an exemption for bona fide business necessity.

Finally, it is worth noting that these state laws are not preempted by federal law. It is well-settled that the Supremacy Clause⁶³ (1) empowers Congress to preempt state laws expressly, through explicit statutory text; (2) allows Congress to preempt state law impliedly, by making federal law so pervasive that it occupies the field in that area of the law; and (3) mandates that federal law preempts state law when the two directly conflict.⁶⁴ Here, Congress has neither expressly preempted state laws prohibiting public accommodations discrimination nor occupied the field of public accommodations discrimination; to the contrary, in enacting Title II of the Civil Rights Act of 1964—the federal public accommodation discrimination statute—Congress expressly preserved states' authority to concurrently regulate public accommodations discrimination.⁶⁵ Moreover, no conflict can exist between federal and state laws because there is no federal law at issue (e.g., a hypothetical federal law affirmatively granting clinics and hospitals the right to solicit public

60. See Daskalakis, *supra* note 5.

61. See, e.g., ANN ARBOR, MICH., CODE OF ORDINANCES 9:159 (2013) ("No person shall adopt, enforce or employ any policy or requirement which has the effect of creating unequal opportunities according to . . . sexual orientation . . . for a person to obtain . . . public accommodation, except for a bona fide business necessity.").

62. Judy Davids, *Will Human Rights Debate Prevent Blood Drives in Royal Oak?*, ROYAL OAK PATCH (Oct. 18, 2013, 2:57 PM), <http://royaloak.patch.com/groups/elections/p/will-human-rights-debate-prevent-blood-drives-in-royal-oak>, archived at <http://perma.cc/3JLZ-NJTC>.

63. U.S. CONST. art. VI, cl. 2.

64. *English v. Gen. Elec. Co.*, 496 U.S. 72, 78-79 (1990).

65. 42 U.S.C. § 2000a-6(b) (2013) ("[N]othing in this subchapter shall preclude any individual or any State or local agency from asserting any right based on any other Federal or State law not inconsistent with this subchapter, including any statute or ordinance requiring nondiscrimination in public establishments or accommodations, or from pursuing any remedy, civil or criminal, which may be available for the vindication or enforcement of such right.").

blood donations). Accordingly, these state laws would survive any preemption challenge.

III. THE PURPOSE OF AN INDIRECT CHALLENGE

The purpose of this Article is to develop a novel means of pressuring the FDA into rescinding the gay blood ban. Yet, it is important to reiterate that the challenges discussed herein would not directly affect the FDA's ban. On the contrary, a successful challenge would affect only the clinics and hospitals that solicit public blood donations in the affected jurisdiction. As such, a successful challenge in a populous jurisdiction may put a sufficient amount of pressure on the FDA to rescind the ban; imagine, for instance, if solicitation of public blood donations were banned in California or New York. However, a successful challenge in a less-populated jurisdiction could do far more harm than good. Arguably, if soliciting blood donations from the public were prohibited in Vermont or the District of Columbia, the FDA might accept the relatively minimal decrease in blood supply and leave the gay blood ban intact. This result is unacceptable; any decrease in the blood supply is an unacceptable consequence of fighting for LGBT equality. Such a possibility is precisely why a single-plaintiff strategy is ill-advised.

This Article is not a guide for an individual MSM to challenge a clinic or hospital that denied him the opportunity to donate blood; instead, my intent is to offer impact litigation law firms a tool to bring about systemic change by pressuring the FDA to revoke the gay blood ban, lest the United States face a devastating blood shortage. If such a firm were to mount a successful challenge in *every* possible jurisdiction, over 43% of the United States' population would live in a jurisdiction where soliciting public blood donation would be illegal.⁶⁶ Hopefully, the mere threat of such an unthinkable, catastrophic blood shortage would force the FDA to rescind the gay blood ban once and for all.

66. See U.S. CENSUS BUREAU, POPULATION DISTRIBUTION AND CHANGE: 2000 TO 2010 (2011), available at <http://www.census.gov/prod/cen2010/briefs/c2010br-01.pdf>, archived at <http://perma.cc/0rJ11jrPUu4> (noting that 134,816,831 of the 312,913,872 persons living in the United States as of the 2010 census live in jurisdictions that prohibit sexual orientation discrimination in places of public accommodation).