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## We All Bleed Red: Dismantling the Discriminatory Gay Blood Ban in the Era of Bostock

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## Comment

# We All Bleed Red: Dismantling the Discriminatory Gay Blood Ban in the Era of *Bostock*

*Rohan Keith Andresen\**

*In the mid-1980s, the FDA responded to uncertainty surrounding the AIDS epidemic with a ban on blood donations from certain groups the FDA deemed to be high-risk. This ultimately included a lifetime ban on men who had sex with other men. Although this lifetime ban has been shortened in recent years, undue restrictions still exist on gay men who wish to donate blood, despite advancements in medicine and technology that should render the ban redundant.*

*As of July 2021, the American Red Cross declared the United States was suffering a severe blood shortage; nevertheless, the ban remains unyielding. Yet jurisprudence since 1995—culminating in the 2020 decision in *Bostock v. Clayton County*—suggests the current ban is unconstitutional and based solely in animus toward the LGBTQ+ community. This Comment sketches out a path to dismantle the blood ban, once and for all, on constitutional grounds.*

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## I. INTRODUCTION

The text “Be A Hero, Give Blood,” emblazoned next to images of the fallen World Trade Centers, is still used to encourage Americans to donate blood twenty years after the 9/11 terrorist attacks.<sup>1</sup> In the days that followed the deadly attack, Americans all over the country lined up at local blood banks to come together and donate over a million units of blood.<sup>2</sup> However, among the patriots being called to the aid of their

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1. See *September 11 Event*, INOVA BLOOD DONOR SERVS. (Sept. 11, 2019), <https://www.inovablood.org/event/sept112019/> [<https://perma.cc/QU4D-875P>] (encouraging donations to a Virginia blood bank in 2019 in honor of victims of the 9/11 terrorist attacks eighteen years prior); see also Cindy Uken, *9/11 Blood Drive Designed to Honor Fallen Heroes*, BILLINGS GAZETTE (Aug. 25, 2014), [https://billingsgazette.com/news/local/9-11-blood-drive-designed-to-honor-fallen-heroes/article\\_9eab4b18-2d0f-5641-9c49-1b1dbe8dec3e.html](https://billingsgazette.com/news/local/9-11-blood-drive-designed-to-honor-fallen-heroes/article_9eab4b18-2d0f-5641-9c49-1b1dbe8dec3e.html) [<https://perma.cc/SFY7-FKV5>] (urging people, in a Billings, Montana, newspaper advertisement in 2011, to give blood to honor those lost in the 9/11 terrorist attacks, nearly ten years prior).

2. Gilbert M. Gaul & Mary Pat Flaherty, *Red Cross Collected Unneeded Blood*, WASH. POST (Nov. 11, 2001), <https://www.washingtonpost.com/archive/politics/2001/11/11/red-cross->

fellow countrymen, a subset of the population was excluded from partaking in this selfless act solely because of their sexual orientation, and they still are today.<sup>3</sup>

Since 1984, the Food and Drug Administration (FDA) has effectively prohibited gay men from donating blood.<sup>4</sup> In light of an abundance of caution triggered by the emergence of the novel human immunodeficiency virus (HIV) that causes acquired immunodeficiency syndrome (AIDS),<sup>5</sup> the FDA reacted in 1984 by ultimately barring men who have had sex with other men (MSM).<sup>6</sup> Though this was a lifetime ban until 2015, it was shortened to a one-year period of abstinence in 2015, and then three months of abstinence in 2020 in response to blood

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collected-unneeded-blood/639b5ba9-bcb0-40f3-87fb-b0f2c166c614/ [https://perma.cc/5MW2-RYW6] (explaining that the Red Cross received so many blood donations that it was forced to waste many of the donations); Gene Curtis, *Donors Overwhelm Blood Banks After 9/11 Attacks*, TULSA WORLD (Feb. 24, 2019), [https://tulsaworld.com/archive/donors-overwhelm-blood-banks-after-9-11-attacks/article\\_d59350a8-ed8c-5a1d-8d39-94dfc1623a7a.html](https://tulsaworld.com/archive/donors-overwhelm-blood-banks-after-9-11-attacks/article_d59350a8-ed8c-5a1d-8d39-94dfc1623a7a.html) [https://perma.cc/B4VD-3C7M] (“During the first two days after the attack, 1.5 million units of blood were donated nationwide . . .”); Rose Hartman & Zuma Press Inc., *Blood Drive at the American Red Cross in the Aftermath of the World Trade Center Twin Tower Bombing in NYC* (photograph), in ALAMY STOCK PHOTOS (Sept. 11, 2001), <https://www.alamy.com/sept-11-2001-31464rh-91101blood-drive-at-the-american-red-cross-in-image64716498.html> [https://perma.cc/K462-BD7Y] (showing crowded waiting room of prospective blood donors following the 9/11 terrorist attacks).

3. See 21 C.F.R. § 630.10(a–e) (2020) (establishing donor eligibility requirements). Congress has empowered the FDA—as a federal agency within the Health and Human Services Department—to create restrictions around blood donations to limit risks. 42 U.S.C. § 262 (a–c) (2020); see *FDA Organization*, U.S. FOOD & DRUG ADMIN., <https://www.fda.gov/about-fda/fda-organization> [https://perma.cc/TF9B-QMYS] (last modified Jan. 17, 2020) (explaining the role of the FDA); see REVISED RECS. *infra* note 6 (recommending the deferral of “[f]or male donors: a history in the past 3 months of sex with another man . . .”).

4. See *id.* (establishing donor eligibility requirements); Ronald Bayer, *Science, Politics, and the End of the Lifelong Gay Blood Donor Ban*, 93 THE MILBANK QUARTERLY 230, 231–32 (2015) (explaining the history of the Blood Ban from 1983 to 2014).

5. David Heitz, *FDA Moves to End Lifetime Ban on Gay Blood Donors*, HEALTHLINE (Jan. 2, 2015), <https://www.healthline.com/health-news/fda-moves-to-end-lifetime-ban-on-gay-blood-donors-122314#One-Year-Deferral-Troubling-to-Lawmakers> [https://perma.cc/RH26-86YF] (“The FDA established the no donations policy for gay men in 1983 after the government first learned that HIV could be transmitted via a blood transfusion. It was a time of fear and uncertainty. HIV tests weren’t very sophisticated.”). See *infra* note 12 (explaining HIV and AIDS).

6. See 21 C.F.R. § 630.10(a–e) (2020) (establishing donor eligibility requirements); U.S. FOOD & DRUG ADMIN., DEP’T HEALTH & HUM. SERVS., REVISED RECOMMENDATIONS FOR REDUCING THE RISK OF HUMAN IMMUNODEFICIENCY VIRUS TRANSMISSION BY BLOOD AND BLOOD PRODUCTS 3 (2020), <https://www.fda.gov/media/92490/download> [https://perma.cc/HNG5-DQKU] [hereinafter REVISED RECS.]; Adam R. Pulver, NLGLA Michael Greenberg Writing Competition, *Gay Blood Revisionism: A Critical Analysis of Advocacy and the “Gay Blood Ban”*, 17 LAW & SEXUALITY: REV. LESBIAN, GAY, BISEXUAL & TRANSGENDER LEGAL ISSUES 107, 107 (2008); Maggie L. Shaw, *FDA’s Revised Blood Donation Guidance for Gay Men Still Courts Controversy*, AJMC (Apr. 4, 2020), <https://www.ajmc.com/view/fdas-revised-blood-donation-guidance-for-gay-men-still-courts-controversy> [https://perma.cc/T43F-73Y4]; see also *MSM Deferral*, STANFORD BLOOD CTR., <https://stanfordbloodcenter.org/msm-12-month-deferral/> [https://perma.cc/WT2W-8E34] (last visited Aug. 28, 2021) (explaining the Blood Ban generally).

shortages caused by the COVID-19 pandemic.<sup>7</sup> Nevertheless, the discriminatory restriction exists to this day as both a written policy and an enforced practice at blood banks.<sup>8</sup>

Amid substantial progress in the elimination of policies and laws that discriminated against people based on sexual orientation and in medical developments in the detection and prevention of HIV transmission, there has been a renewed call to eradicate this discriminatory policy.

In light of the Supreme Court's decisions in *Obergefell v. Hodges* and *Bostock v. Clayton County*, the repeal of "Don't Ask, Don't Tell," and significant medical advancements in the detection and prevention of HIV transmission, this Comment proposes that any challenge to the gay blood donation ban will be successful in striking down the discriminatory restriction.<sup>9</sup>

## II. BACKGROUND

The history of how the policy prohibiting the donation of blood by any man who has sex with another man was developed is extremely important for understanding why the policy has continued to exist.<sup>10</sup> The policy is as discriminatory as it is anachronistic, but its historical ties to the emergence of HIV/AIDS and the societal visibility of the gay community explain the Blood Ban's enactment, as well as its longevity and tenacity. The public learned of HIV and AIDS through a stilted media lens suggesting the virus was inherent in and inseparable from gay men.<sup>11</sup>

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7. See REVISED RECS., *supra* note 6, at 9 ("Defer for 3 months from the most recent sexual contact, a man who has had sex with another man during the past 3 months.").

8. See 21 C.F.R. § 630.10(a-e) (2020); see also REVISED RECS., *supra* note 6, at 9 (prohibiting blood donation from a man who has had sex with a man in the previous three months).

9. See *Romer v. Evans*, 517 U.S. 620, 623-24, 635-36 (1996) (holding unconstitutional a state law prohibiting localities from granting protected class status based on sexual orientation); *Lawrence v. Texas*, 539 U.S. 558, 562, 578-79 (2003) (holding unconstitutional a state law prohibiting consensual, same-sex sexual relations in privacy of home); Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515 (allowing openly gay people to serve in the United States military); *Obergefell v. Hodges*, 576 U.S. 644, 681 (2015) (holding that marriage is a fundamental right and cannot be denied based on sexual orientation); *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1737 (2020) (holding that Title VII's prohibition of sex-based discrimination forbids employment discrimination based on gender identity or sexual orientation); see generally *infra* Part II and accompanying discussion of cases.

10. In this Comment, the Author will refer to the MSM ban as the "Blood Ban" and homosexual as "gay." The usage of either term is not meant to be pejorative but rather reflects how both terms are commonly and colloquially used. Furthermore, as this Comment discusses, the Blood Ban only applies to men who have sex with other men. Thus, "gay" in terms of the Blood Ban is only meant to refer to men who have sex with other men. This term thus excludes lesbians and includes bisexual men, for the purposes of this Comment.

11. Christopher McAdam & Logan Parker, *An Antiquated Perspective: Lifetime Ban for MSM*

This Part thus recounts the history of both HIV/AIDS and gay rights in the United States.

*A. Introduction of AIDS in the United States*

The first known cases of what scientists and medical professionals now believe to have been HIV/AIDS<sup>12</sup> were documented in a June 1981 Morbidity and Mortality Weekly Report from the Centers for Disease Control and Prevention (CDC).<sup>13</sup> The report noted what doctors believed at the time to be a rare case of pneumonia among five young, otherwise healthy, gay men in Los Angeles in 1980–81.<sup>14</sup> By mid-1981, handfuls of gay men—mostly white and from urban areas—began displaying similar immunodeficiency symptoms.<sup>15</sup> Within months of the publication of the CDC article, the novel illness began to be referred to by the public and researchers as “gay cancer” and “GRID” (Gay-Related Immune Deficiency).<sup>16</sup> By the end of 1981, there were 270 reported cases of a

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*Blood Donations No Longer Global Norm*, 16 DEPAUL J. HEALTH CARE L. 21, 23 (2014) (“The fact that homosexual men constituted the initial population in which AIDS occurred in the United States led some to surmise that a homosexual lifestyle was specifically related to the disease.’ The disease was also referred to as ‘gay plague,’ ‘gay cancer,’ ‘gay-related immune disorder,’ and even a bug that could be brought home to infect the family.” (first quoting *The Relationship Between the Human Immunodeficiency Virus and Acquired Immunodeficiency Syndrome*, NAT’L INSTS. OF HEALTH NAT’L INST. OF ALLERGY AND INFECTIOUS DISEASES (Mar. 23, 2010), then citing *History of AIDS Up to 1985*, AVERT, <http://www.avert.org/aids-hiv-epidemic.htm> [<https://perma.cc/7FR3-8LA9>] (last visited Mar. 23, 2013))).

12. Today, we know human immunodeficiency virus (HIV) spreads through contact with certain bodily fluids and is most commonly contracted during unprotected sex (i.e., sex without a condom or medicine to prevent or treat HIV), or through sharing injection (intravenous) drug equipment. HIV attacks cells that help a body fight infection, making people who have HIV more susceptible to other infectious diseases. If left untreated, HIV can lead to acquired immunodeficiency syndrome (AIDS). AIDS is the late stage of HIV infection that occurs when the body’s immune system is very damaged from the HIV infection. Today, most HIV-positive people in the United States do not develop AIDS because taking HIV medicine daily prevents the disease’s progression. There is no known cure for HIV, and the body cannot eliminate it on its own; thus, if contracted, a person will have the virus for life. However, HIV medicine called antiretroviral therapy (ART) allows people to live “long and healthy lives” and prevents HIV transmission to sexual partners. Once diagnosed with AIDS, people typically survive about three years unless infected by a dangerous opportunistic illness, in which case their life expectancy drops to one year. Nevertheless, ART treatment can still help—and, in some cases, save lives—at this late stage. *What Are HIV and AIDS*, HIV.GOV, <https://www.hiv.gov/hiv-basics/overview/about-hiv-and-aids/what-are-hiv-and-aids> [<https://perma.cc/ABC3-K34H>] (last visited Oct. 3, 2020).

13. *A Timeline of HIV and AIDS*, HIV.GOV, <https://www.hiv.gov/hiv-basics/overview/history/hiv-and-aids-timeline> [<https://perma.cc/XSK4-PERG>] (last visited Nov. 5, 2020) (explaining the history of AIDS through an interactive timeline from 1981–2019).

14. *See id.* (noting 1981 report that five otherwise healthy, gay men died of a rare lung infection, which doctors believed was *pneumocystis carinii* pneumonia (PCP)).

15. *Id.*

16. *See id.* (noting that the *New York Times* published an article on July 3, 1981, referring to

severe immune deficiency among gay men, and 121 of them had already died.<sup>17</sup>

In early 1982, the medical community learned that a number of hemophiliacs, intravenous drug abusers, and Haitians—none of whom seemed to have any link to the gay community—were suffering from a similar immune deficiency disorder.<sup>18</sup> Hemophiliac patients require frequent transfusions of a blood clotting factor received from a national donor pool.<sup>19</sup> This prompted initial theories that the mysterious disorder could be communicated through the blood.<sup>20</sup> However, in summer 1982, CDC representatives experienced pushback from a variety of stakeholders<sup>21</sup> after presenting the bloodborne-agent causation theory.<sup>22</sup> Not many decisions emerged following this meeting; however, the CDC did recategorize the immunodeficiency as Acquired Immunodeficiency Syndrome (AIDS), implying that the illness might affect other populations besides gay men.<sup>23</sup> In fall 1982, more hemophilic patients began exhibiting AIDS symptoms, including some who had received transfusions, thus turning the leaders' attention to blood.<sup>24</sup>

### B. *The Development of the Blood Ban*

After the medical community's acknowledgement that AIDS was a

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“gay cancer”); Joe Wright, *Remembering the Early Days of ‘Gay Cancer’*, NPR (May 8, 2006, 4:00 PM), <https://www.npr.org/templates/story/story.php?storyId=5391495> [<https://perma.cc/9SGW-4BQL>] (explaining early stereotypes around the emergence of AIDS and how these misconceptions of AIDS and the gay community have persisted).

17. See *A Timeline of HIV and AIDS*, *supra* note 13 (detailing beginnings of AIDS epidemic in 1981).

18. B. L. Evatt, *The Tragic History of AIDS in the Hemophilia Population, 1982–1984*, 4 J. OF THROMBOSIS AND HAEMOSTASIS 2295, 2296 (2006) (describing 1982 emergence of AIDS cases in populations with no links to the gay community).

19. See *id.* at 2295 (noting blood transfusion treatments for hemophiliacs); see also Harold M. Schmeck Jr., *Infant Who Received Transfusion Dies of Immune Deficiency Illness*, N.Y. TIMES, Dec. 10, 1982, at A22 (“Patients who suffer from hemophilia require frequent transfusions of a blood clotting factor from normal blood to stem their tendency to bleed copiously after the slightest injury.”).

20. See Evatt, *supra* note 18, at 2296 (highlighting earliest researchers' theory of a possible blood-borne pathogen).

21. *Id.* at 2296–97. Stakeholders included leaders from the blood industry, gay-rights activists, representatives from hemophilia groups, and the FDA and the National Institutes of Health (NIH). *Id.*

22. *Id.* at 2296 (“Only the high risk for blood-borne infections could explain a risk common to all four groups. But, rather than expressing alarm at a possible blood-borne infection and suggesting ways to reduce a blood-borne risk, the audience expressed an almost universal reluctance to act.”).

23. *Id.* at 2297 (“The official name of the disease, the AIDS, was established. The new name facilitated an expansion of investigations beyond that of solely a homosexual problem.”).

24. *Id.* (“In the fall of 1982, we identified four additional and one probable case of AIDS in hemophilic patients, two of whom were children. In addition, we investigated and identified AIDS in a number of individuals who had received transfusions.”).

bloodborne pathogen, focus began to shift. In early 1982, medical experts, scientists, blood bank leaders, and gay activists met in Atlanta and debated the proper response to the growing crisis.<sup>25</sup> Blood banks and gay activists resisted proposals to screen or defer gay men who wanted to donate blood because gay white men made up a significant percentage of donors nationwide, and blood banks feared screening questions would offend.<sup>26</sup> However, in March 1983, the Public Health Service published recommended guidelines to restrict gay men from donating blood.<sup>27</sup> The FDA, CDC, and NIH agreed to the guidelines and enacted exclusionary recommendations to deter sexually active men who have had sex with another man from donating blood.<sup>28</sup> The ban underwent multiple revisions until 1992 when the FDA issued mandatory guidelines recommending the indefinite deferral of men who have had sex with other men from donating blood.<sup>29</sup>

Over two decades later, in 2015, the FDA moved to revise the lifetime ban on MSM, prohibiting donations only from men who had had sex with another man in the preceding twelve months.<sup>30</sup> The Department of Health

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25. *See id.* at 2296–98 (detailing response to AIDS crisis in 1982). The various parties struggled to reach consensus because they all had competing self-interests, and the disease was still mysterious. Evatt recounted his personal experience: “Unfortunately, 4 January 1983 became possibly the most discouraging and frustrating day of the epidemic for CDC staff. Rather than a rational discussion of the data, the meeting quickly became a forum to advance individual agendas and ‘turf protection.’” *Id.* at 2298.

26. *Id.* at 2296–97. Gay men were frequent blood donors in large east and west coast cities. Blood industry leaders feared stigmatizing this population through exclusion without sufficient evidence of transmission risk. *Id.* (“The blood industry, threatened by losing a large donor pool, strongly supported the position of the gay groups on this issue; ‘three hemophilia patients with the syndrome did not mean that they should spend millions of dollars’ changing recruitment and screening practices.”); Harvey M. Sapolsky & Stephen L. Boswell, *The History of Transfusion AIDS: Practice and Policy Alternatives*, in *AIDS: THE MAKING OF A CHRONIC DISEASE* 170, 174 (Elizabeth Fee & Daniel M. Fox eds., 1992) (“Sensitive to the concerns of the gay community, some influential blood bankers were reluctant to force the exclusion of gays and doubted the effectiveness of direct questioning of donors to achieve that exclusion.”).

27. *See* Evatt, *supra* note 18, at 2298 (explaining policies prohibiting blood donations from “high-risk donor groups,” effectively screening out men who have sex with men).

28. *See id.* (“[B]ut after appropriate amendments, the FDA, CDC and NIH agreed on a set of guidelines that was published by the PHS on 4 March 1983, although it was clearly short of what we, as individuals, at the CDC wanted.”); *see* Bayer, *supra* note 4 (“In this context of fear, the US Public Health Service issued its first, cautiously worded, exclusionary recommendations on March 4, 1983: ‘Sexually active homosexual and bisexual men with multiple partners’ should refrain from blood donation.”); *see also* McAdam & Parker, *supra* note 11 (explaining that the original ban in 1983 followed the issuance of non-mandatory recommendations from the Office of Biologics recommendation that certain groups, including sexually active gay and bisexual men, refrain from donating blood).

29. *See* McAdam & Parker, *supra* note 11 (giving an overview of the history and evolution of the Ban); *see also* Heitz, *supra* note 5 (noting the 2015 policy change).

30. *See id.* (explaining FDA’s 2015 modification changing the lifetime restriction to a twelve-month deferral).



and Human Services (HHS) made the recommendation based on a multiagency collaboration within the department, as well as new information from recent studies and similar reductions abroad.<sup>31</sup> Though this policy change may seem significant after decades of inaction, critics found the reduction inadequate to eradicating animus.<sup>32</sup>

Most recently, in 2020, the ban was again reduced from one year to three months.<sup>33</sup> Like the 2015 reduction, this change was inspired by the success of shortened deferrals in other developed countries.<sup>34</sup> Notably, the United Kingdom and Canada shortened their respective MSM deferral periods from one year to three months in 2017 and 2019, respectively.<sup>35</sup> Though advocates celebrated the three nations'

31. *Blood Donation Policies Regarding Men Who Have Sex with Men (MSM)*, Blood Products Advisory Committee Meeting (March 20–21, 2019), <https://www.fda.gov/media/120953/download> [<https://perma.cc/4D4U-W69M>]; Press Release, Committee Recommendation on Change to Blood Donation Ban Continues to Stigmatize Gay & Bisexual Men, HUM. RTS. CAMPAIGN (Nov. 13, 2014), <https://www.hrc.org/press-releases/committee-recommendation-on-change-to-blood-donation-ban-continues-to-stigm> [<https://perma.cc/L9GG-AZE6>] (last visited Sep 23, 2020).

32. See Press Release, *supra* note 31 (“This recommendation—although nominally better than the existing policy—falls far short because it continues to stigmatize gay and bisexual men, preventing them from donating life-saving blood based solely on their sexual orientation,” said David Stacy, HRC’s Government Affairs Director. “The current policy, adopted in the earliest days of the HIV/AIDS epidemic, and the new recommendation are both simply wrong and can no longer be justified in light of scientific research and updated blood screening technology. It’s far past time for this stigma to end.”).

33. See REVISED RECS., *supra* note 6, at 9 (outlining new blood donation guidelines, shortening deferral to three months for MSM).

34. Patrick Greenfield, *Gay Men to Be Allowed to Give Blood Three Months after Sex*, THE GUARDIAN (July 23, 2017, 3:37 PM), <https://www.theguardian.com/world/2017/jul/23/gay-men-blood-donation-three-months-after-sex> [<https://perma.cc/4TSS-UCF2>] (explaining how blood donation restrictions for gay men and sex workers were relaxed in England and Scotland); see also May Bulman, *Gay Men to Be Allowed to Donate Blood Three Months after Having Sex under New Government Policy*, THE INDEP. (July 23, 2017, 0:11 AM), <https://www.independent.co.uk/news/uk/home-news/gay-men-donate-blood-rules-three-months-after-having-sex-12-government-policy-freedomtodonate-stonewall-a7854811.html> [<https://perma.cc/GRP5-ZVSU>] (explaining that gay men in the United Kingdom would be allowed to donate blood three months rather than a year after having sex); *Blood Donation Waiting Period for Men Who Have Sex with Men Reduced to Three Months*, CANADIAN BLOOD SERVICES (May 8, 2019), <https://www.blood.ca/en/about-us/media/newsroom/blood-donation-waiting-period-for-men-who-have-sex-with-men-reduced-to-three-months> [<https://perma.cc/KY2F-LUB5>] (explaining Canada’s Blood Services’ request to reduce blood donation waiting period for gay men).

35. See Greenfield, *supra* note 34 (noting relaxed blood donation restrictions in England and Scotland); *Blood Donation Waiting Period for Men Who Have Sex with Men Reduced to Three Months*, *supra* note 34 (explaining Canada’s reduced blood donation waiting period); see also REVISED RECS., *supra* note 6, at 6 (“The totality of the surveillance information and the experience with a 3-month deferral in other countries, combined with the uniform use of nucleic acid testing for HIV, HBV, and HCV, which can detect each of these viruses well within a 3-month period following initial infection, leads the Agency to conclude that at this time a change to a recommended 3-month deferral is scientifically supported.”).

reductions, many doubted such a narrow change could meaningfully combat the enduring stigma and discrimination.<sup>36</sup>

Like the Canadian and United Kingdom governments, the United States also acknowledged the shortage of blood donations during the COVID-19 pandemic as a compelling reason to increase the size of the potential donor pool.<sup>37</sup> Inarguably, the reduction of the deferral in the last five years represents substantial progress. However, the mere existence of any sexual orientation-based deferral—that treats a group as a monolithic risk, rather than assesses individuals—perpetuates discriminatory animus. Before analyzing how courts might review a legal challenge to the Blood Ban as unlawful discrimination based on sexual orientation, it is imperative to understand the gay-rights movement’s history and relevant case law.

*C. Gay Discrimination, Development of Legal Protections, and Evolution of AIDS in the United States*

The Blood Ban sits indomitably as good law; however, four decades of gay-rights cases created protections and furthered equality for gay men, weakening legal arguments for the Blood Ban.

Four Supreme Court cases and the repeal of the federal policy known as “Don’t Ask, Don’t Tell,” set legal precedent and a relevant yardstick for evaluating facially discriminatory laws and policies. Though not the only relevant decisions, they show the progression and development of the Court’s gay-rights jurisprudence. The Supreme Court evolved from merely allowing gay people to freely go about their daily lives without state interference (*Romer v. Evans*; *Lawrence v. Texas*) to affirming equal access to significant life activities (*Obergefell v. Hodges*; *Bostock v.*

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36. See Bulman, *supra* note 34 (“‘Changes to the blood donation rules are welcome. However, while this is an important move, it’s vital that this is a stepping stone to a system that doesn’t automatically exclude most gay and bi men,’ [Ruth Hunt, Chief Executive of Stonewall] said.”); see also *Blood Donation Waiting Period for Men Who Have Sex with Men Reduced to Three Months*, *supra* note 34 (“‘The work to evolve the blood donation eligibility criteria doesn’t end here. The research required to generate further evidence-based changes is ongoing,’ added [Dr. Graham Sher, chief executive officer with Canadian Blood Services].”); see also HRC Staff, *Equality Magazine: FDA Loosens Ban on Blood Donations from Gay and Bi+ Men*, HUM. RTS. CAMPAIGN (June 11, 2020), <https://www.hrc.org/news/equality-magazine-fda-loosens-ban-on-blood-donations-from-gay-and-bi-men> [<https://perma.cc/X38S-DQGZ>] (“While this FDA announcement is a step in the right direction, it’s still not enough. We are not yet there with equality in the rules surrounding blood donations, and won’t be until the policy treats all potential donors based on the actual risk their blood poses to the blood supply rather than who they are.”).

37. See REVISED RECS., *supra* note 6, at 1 (“Furthermore, early implementation of the recommendations in this guidance may help to address significant blood shortages that are occurring as a result of a current and ongoing public health emergency.”).

Clayton County).<sup>38</sup>

Modern courts employ three levels of scrutiny when they assess discriminatory policies' validity: rational basis, intermediate scrutiny, and strict scrutiny. Rational basis is the lowest level of scrutiny and requires only that a law be rationally related to a legitimate state interest.<sup>39</sup> *Craig v. Boren* introduced intermediate scrutiny, distinguishing classifications by sex—which are not subject to strict scrutiny—as subject to “rational basis with a bite” or “heightened scrutiny.”<sup>40</sup> Under intermediate scrutiny, a discriminatory policy must further an important government interest by substantially related means.<sup>41</sup> Finally, a discriminatory law passes constitutional muster under strict scrutiny if it furthers a compelling governmental interest and is narrowly tailored to achieve that interest.<sup>42</sup> Courts apply strict scrutiny to laws or policies that infringe upon a fundamental right (e.g., marriage) or involve a suspect classification (race, national origin, religion, or alienage).<sup>43</sup>

As HIV/AIDS spread throughout the nation, sectors other than healthcare and medicine responded. But recognition was slow and came with animus.<sup>44</sup> President Ronald Reagan first publicly recognized AIDS in 1985—four years after the epidemic began—though, prior to Reagan's recognition, Reagan's press secretary, Larry Speakes, joked about the “gay plague” and discussed the administration's lack of concern

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38. See generally *Romer v. Evans*, 517 U.S. 620 (1996); *Lawrence v. Texas*, 539 U.S. 558 (2003); Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515; *Obergefell v. Hodges*, 576 U.S. 644 (2015); *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020).

39. *Rational Basis Test*, CORNELL L. SCH. LEGAL INFO. INST., [https://www.law.cornell.edu/wex/rational\\_basis\\_test](https://www.law.cornell.edu/wex/rational_basis_test) [<https://perma.cc/EX2L-S9U9>] (last visited Nov. 1, 2020).

40. *Intermediate Scrutiny*, CORNELL L. SCH. LEGAL INFO. INST., [https://www.law.cornell.edu/wex/intermediate\\_scrutiny](https://www.law.cornell.edu/wex/intermediate_scrutiny) [<https://perma.cc/QFN5-DMN5>] (last visited Mar. 16, 2021).

41. *Id.*; see also Natalie Wexler, *Sex Discrimination: The Search for a Standard*, in SUPREME COURT DECISIONS AND WOMEN'S RIGHTS: MILESTONES TO EQUALITY 39, 51–52 (Clare Cushman ed. 2d ed. 2011) (analyzing *Craig v. Boren*'s application of intermediate scrutiny where the law's gender-based distinction must address “important governmental objectives” that are “substantially related to the achievement of those objectives”).

42. *Strict Scrutiny*, CORNELL L. SCH. LEGAL INFO. INST., [https://www.law.cornell.edu/wex/strict\\_scrutiny](https://www.law.cornell.edu/wex/strict_scrutiny) (last visited March 16, 2021).

43. *Id.*; see also *Johnson v. California*, 543 U.S. 499, 505 (2005) (“Under strict scrutiny, the government has the burden of proving that racial classifications ‘are narrowly tailored measures that further compelling governmental interests.’” (quoting *Adarand Constructors, Inc., v. Peña*, 515 U.S. 200, 227 (1995))).

44. See Philip Shenon, *A Move to Evict AIDS Physician Fought by State*, N.Y. TIMES, Oct. 1, 1983 (§ 1), at 31 (detailing the attempt to evict Dr. Joseph Sonnabend, a physician who treated AIDS patients, by his fellow tenants of the building his clinic was located in).

regarding the virus.<sup>45</sup> But this early indifference soon transformed into fear and concern.<sup>46</sup> The growing fear in communities prompted restrictions of gay rights.

### 1. *Romer v. Evans* (1995)

In the early 1990s, Colorado voters adopted a state constitutional amendment that disallowed any judicial, legislative, or executive action protecting people from discrimination based on their sexual orientation.<sup>47</sup> In other words, the voters of Colorado forbade any state or municipal court, government, or jurisdiction from enacting a law protecting gay people from discrimination based on their orientation.

The Supreme Court held the amendment unconstitutional under the Equal Protection Clause of the Fourteenth Amendment.<sup>48</sup> The Court explained equal protection is incompatible with arbitrary inequities imposed by law.<sup>49</sup> The Court applied rational basis review, thus declining to treat homosexuality as a suspect classification.<sup>50</sup> Still, the majority opinion represents one of the Court's earliest efforts to counter animus entrenched in law based on sexual orientation. The Court recognized the

45. See Joseph Bennington-Castro, *How AIDS Remained an Unspoken—But Deadly—Epidemic for Years*, HISTORY (June 1, 2020), <https://www.history.com/news/aids-epidemic-ronald-reagan> [<https://perma.cc/7JFN-LGQ8>] (“Yet, U.S. leaders had remained largely silent and unresponsive to the health emergency. And it wasn’t until September 1985, four years after the crisis began, that President Ronald Reagan first publicly mentioned AIDS. But by then, AIDS was already a full-blown epidemic.”); see also German Lopez, *The Reagan Administration’s Unbelievable Response to the HIV/AIDS Epidemic*, VOX (Dec. 1, 2016, 11:20 AM), <https://www.vox.com/2015/12/1/9828348/ronald-reagan-hiv-aids> [<https://perma.cc/3DYE-VLPU>] (explaining Reagan administration’s slow response to the AIDS crisis); WHEN AIDS WAS FUNNY (Scott Calonico 2015), <http://www.scottcalonico.com/when-aids-was-funny> [<https://perma.cc/E89H-QMA8>] (showing documentary footage of the early response to and sentiments about AIDS in which many joked about the disease that seemed to only be killing gay men).

46. Madonna, among many artists at the time, memorialized the fear and uncertainty surrounding the AIDS crisis and the young, otherwise healthy gay men who perished during the crisis. MADONNA, *In This Life, on EROTICA* (Maverick and Sire Records 1992) (“He was only 23 / Gone before he had his time / It came without a warning / Didn’t want his friends to see him cry . . . People pass by and I wonder who’s next / Who determines, who knows best / Is there a lesson I’m supposed to learn in this case / Ignorance is not bliss . . .”).

47. *Romer v. Evans*, 517 U.S. 620, 624 (1996) (citing statute, which disallowed local laws protecting people based on their “homosexual, lesbian or bisexual orientation, conduct, practices or relationships”); COLO. CONST. art. II, § 30b, *invalidated by Romer*, 517 U.S. at 635–36.

48. *Romer*, 517 U.S. at 635–36 (holding the Colorado constitutional provision unconstitutional).

49. *Id.* at 633 (“Equal protection of the laws is not achieved through indiscriminate imposition of inequalities.” (quoting *Sweatt v. Painter*, 339 U.S. 629, 635 (1950) (quoting *Shelley v. Kraemer*, 334 U.S. 1, 22, (1948)))).

50. *Id.* at 632 (“[T]he amendment seems inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests.”); see *id.* at 635 (“We must conclude that Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else. This Colorado cannot do.”).

Colorado law's discriminatory intent and stated, "[L]aws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected."<sup>51</sup>

When this decision came out, 500,000 cases of AIDS had been reported in the United States, and then-President Bill Clinton had issued an executive order establishing an Advisory Council on HIV/AIDS.<sup>52</sup> Though *Romer* ensured laws could not specifically target homosexuals, Congress safeguarded the coveted right to marriage as restricted to heterosexual couples, and within a year of *Romer*, President Clinton signed the Defense of Marriage Act (DOMA) into law.<sup>53</sup> DOMA defined marriage as the union of one man and one woman, and it allowed states to refuse to recognize same-sex marriages granted under the laws of other states.<sup>54</sup> While *Romer* was a significant first step toward equality, the prospect was still grim for equal social acceptance and legal rights for homosexuals while the AIDS crisis persisted.

## 2. *Lawrence v. Texas* (2003)

At the turn of the millennium, only a few years after *Romer v. Evans*, two men in Texas were arrested and convicted for engaging in consensual sexual acts, a violation of a Texas statute.<sup>55</sup> Texas law provided: "A person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex."<sup>56</sup> Texas law defined "deviate sexual intercourse" as "any contact between any part of the genitals of one person and the mouth or anus of another person."<sup>57</sup> The men

51. *Id.* at 634 ("[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest." (quoting *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973))).

52. See *A Timeline of HIV and AIDS*, *supra* note 13.

53. Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7; 28 U.S.C. § 1738C), *invalidated by* *United States v. Windsor*, 570 U.S. 744 (2013), and *Obergefell v. Hodges*, 576 U.S. 644 (2015). Passed by Congress and signed into law by President Bill Clinton, the Defense of Marriage Act (DOMA) was intended to protect under federal law only traditional marriage between a man and a woman. See *id.* at § 3(a) (defining marriage under federal law).

54. *Id.* at § 3(a) ("In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife.").

55. *Lawrence v. Texas*, 539 U.S. 558, 562 (2003) ("The question before the Court is the validity of a Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct."); see also Petition for Writ of Certiorari at 127a, 139a, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102) (providing original charging documents for alleged criminal conduct of "deviate sexual intercourse, namely anal sex, with member of the same sex (man)").

56. *Lawrence*, 539 U.S. at 563 (citing TEX. PENAL CODE. ANN. § 21.06(a) (2003)).

57. *Id.* (citing TEX. PENAL CODE. ANN. § 21.01(1)(A) (2003)).

appealed the conviction, claiming the Texas statute was unconstitutional because, like the law in *Romer*, it violated the Equal Protection Clause of the Fourteenth Amendment.<sup>58</sup>

The Court held that the Fourteenth Amendment's Due Process Clause and the Equal Protection Clause protected people's right to engage in consensual, private sexual acts.<sup>59</sup> Justice Sandra Day O'Connor explained in her concurrence that "[a] law branding one class of persons as criminal based solely on the State's moral disapproval of that class and the conduct associated with that class runs contrary to the values of the Constitution and the Equal Protection Clause, under any standard of review."<sup>60</sup> *Lawrence*'s holding notably overruled an earlier holding (*Bowers v. Hardwick*)—decided in 1986 during the early years of the AIDS crisis—which had upheld a Georgia law criminalizing sodomy, finding no constitutional protection to engage in consensual sodomy.<sup>61</sup>

In the fifteen years between *Bowers* and *Lawrence*, significant progress had been made inside and outside the courts. Beyond *Romer*'s and *Lawrence*'s holdings that laws cannot simply target people for being gay, research and public opinion around AIDS had started to evolve, as well. Around the time *Bowers* was decided, Princess Diana stunned the world when she touched an AIDS patient without wearing a glove;<sup>62</sup> conversely, by the time *Lawrence* was decided, a rapid HIV diagnostic kit with a 99.6 percent accuracy rate had been developed,<sup>63</sup> and President George W. Bush allocated \$15 billion to combat AIDS in countries with a high burden of infections.<sup>64</sup> Significant progress was being made for

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58. *Id.* ("They challenged the statute as a violation of the Equal Protection Clause of the Fourteenth Amendment and of a like provision of the Texas Constitution.").

59. *Id.* at 562, 578–79.

60. *Id.* at 585 (O'Connor, J., concurring).

61. *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986) ("The law, however, is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed. . . . [The respondent] insists that majority sentiments about the morality of homosexuality should be declared inadequate. We do not agree . . ."), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003); *Lawrence*, 539 U.S. at 578 ("Bowers was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled.").

62. *How Princess Diana Changed Attitudes to AIDS*, BBC (Apr. 5, 2017), <https://www.bbc.com/news/av/magazine-39490507> [<https://perma.cc/FZ4W-KMDW>] ("In front of the world's media, Princess Diana shook the hand of a man suffering with the illness. She did so without gloves, publicly challenging the notion that HIV/Aids was passed from person to person by touch. She showed in a single gesture that this was a condition needing compassion and understanding, not fear and ignorance.").

63. *A Timeline of HIV and AIDS*, *supra* note 13.

64. *Fact Sheet: The President's Emergency Plan for AIDS Relief*, WHITE HOUSE ARCHIVES (Jan. 29, 2003), <https://georgewbush-whitehouse.archives.gov/news/releases/2003/01/20030129-1.html> [<https://perma.cc/FK6K-KW6T>].

gay rights in the courts as well as in the battle against AIDS, but the Blood Ban remained untouched.

### 3. *Obergefell v. Hodges* (2015)

Federal gay rights remained essentially stagnant for the next decade. But the Supreme Court delivered two consecutive wins for gay rights, first in *United States v. Windsor* (2013), and more significantly in *Obergefell v. Hodges* (2015).<sup>65</sup> *Windsor* asked whether gay partnerships could qualify for tax benefits heterosexual couples enjoyed; however, it effectively eliminated DOMA's definition of marriage for federal purposes as exclusively between a man and a woman.<sup>66</sup> Consequently, *Windsor* paved the way for *Obergefell*.<sup>67</sup> Furthermore, as noted earlier, *Obergefell* marked a difference from the Court's treatment of gay rights in *Romer* and *Lawrence*. In the few years between *Windsor* and *Obergefell*, the Court's analysis evolved from asking, "Does the Constitution protect homosexuals from discriminatory laws?" to "Does the Constitution afford homosexuals equal rights?" The *Obergefell* Court said yes.

The Court in *Obergefell* ultimately held that same-sex couples have the same fundamental right to marry afforded to all under the Fourteenth Amendment.<sup>68</sup> The Court reached this conclusion through both a due-process analysis of the fundamental right to marry, as well as an equal-protection analysis.<sup>69</sup> The Court also stressed the many benefits of marriage and the risks of denying gay couples access to benefits afforded

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65. See Sarah Wheeler, *United States v. Windsor, Obergefell v. Hodges and the Future of LGBT Rights in the Workplace*, 33 HOFSTRA LAB. & EMP. L.J. 329, 332 (2016) ("The outcome of *Windsor* was a pivotal moment in the fight to legalize same-sex marriage in the United States."); see *id.* at 334 ("Just four years after the *Windsor* decision, the *Obergefell* decision made it illegal for individual states to refuse to recognize the same-sex marriages of couples based on where their ceremony was."); see generally *United States v. Windsor*, 570 U.S. 744 (2013); see generally *Obergefell v. Hodges*, 576 U.S. 644 (2015).

66. *Windsor*, 570 U.S. at 775 ("The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity."); see Wheeler, *supra* note 65, at 330–31 (providing background on *Windsor* holding).

67. *Id.* at 335 ("The overturn of section 3 of DOMA had broad implications not just for marriage equality up until the decision in *Obergefell* issued . . .").

68. *Obergefell*, 576 U.S. at 672 ("The right of same-sex couples to marry that is part of the liberty promised by the Fourteenth Amendment is derived, too, from that Amendment's guarantee of the equal protection of the laws.")

69. *Id.* at 664 ("[T]he Court has long held the right to marry is protected by the Constitution. In *Loving v. Virginia*, . . . which invalidated bans on interracial unions, a unanimous Court held marriage is 'one of the vital personal rights essential to the orderly pursuit of happiness by free men.'" (quoting 388 U.S. 1, 12 (1967))); see *id.* at 681 ("The Court, in this decision, holds same-sex couples may exercise the fundamental right to marry in all States.")

to other married couples.<sup>70</sup> The Court emphasized that the right to marriage was essential to the fundamental right to build a family.<sup>71</sup> Accordingly, much of the opinion stemmed from the importance of allowing all to exercise this fundamental right, rather than an analysis of equality for gay people.<sup>72</sup> Although the Court acknowledged that the Equal Protection Clause was implicated in this case, the Court refrained from deciding if classifications based on sexual orientation required any form heightened scrutiny and instead rested upon due-process analysis of the fundamental right to marriage along with the implication of the Equal Protection Clause.<sup>73</sup>

*Obergefell* was pivotal for allowing homosexuals to enjoy the fundamental right of marriage, and it paved the way for the second phase of gay-rights cases in the Supreme Court, that affirmatively granted equal rights. Nevertheless, the Court's limitation on extending a higher level of scrutiny based on sexual orientation is significant.

Meanwhile, from the *Lawrence v. Texas* decision in 2003 to the time the Supreme Court heard *Obergefell*, annual HIV diagnoses in the United

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70. See Mark P. Strasser, *Obergefell's Legacy*, 24 DUKE J. GENDER L. & POL'Y 61, 69–72 (2016) (discussing legal benefits and risks afforded married versus unmarried couples).

71. See *Obergefell*, 576 U.S. at 668 (“As all parties agree, many same-sex couples provide loving and nurturing homes to their children . . . . Excluding same-sex couples from marriage thus conflicts with a central premise of the right to marry.”). Including the right to build a family, the Court recognized four principles of why marriage is a fundamental right under the Due Process clause, these included 1) the personal choice of choosing whom to marry as inherent to one’s individual autonomy 2) marriage’s unique support and recognition of a two-person union 3) the safeguarding of children in a family unit 4) the importance of marriage in the nation’s social order. *Id.* at 665–72; see also Rodney M. Perry, *Obergefell v. Hodges: Same-Sex Marriage Legalized*, CONGRESSIONAL RESEARCH SERVICE (Aug. 7, 2015), <https://sgp.fas.org/crs/misc/R44143.pdf> [<https://perma.cc/XE3P-U6YK>].

72. See *id.* at 663–73 (analyzing right to marry as a fundamental right under due-process analysis).

73. See *id.* at 675 (“These considerations lead to the conclusion that the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty. The Court now holds that same-sex couples may exercise the fundamental right to marry.”); Ann L. Schiavone, *Unleashing the Fourteenth Amendment*, 2016 WIS. L. REV. FORWARD 27, 28 (“[C]ases like *Romer*, *Lawrence*, *Windsor*, and *Obergefell* potentially signal a shift away from declaration of new rights and suspect classes, while applying a stronger rational basis test.”); see also Strasser, *supra* note 70, at 88 (“The *Obergefell* Court suggested that equal protection informed its decision, while at the same time not recognizing sexual orientation as a protected class. Perhaps in light of *Romer*, *Lawrence*, *Windsor* and *Obergefell* the Court will soon announce that orientation is suspect or quasi-suspect. Perhaps not.”); Perry, *supra* note 71 at 5 (“The Court held that both equal protection and due process guarantees protect the fundamental right to marry, and that states can no longer deny this right to same-sex couples. Importantly, in doing so, the Court did not hold that classifications based on sexual orientation warrant any form of heightened scrutiny.”).



States had fallen by approximately 20 percent.<sup>74</sup> Additionally, between *Lawrence* and *Obergefell*, the FDA had approved the use of a medication called Truvada, a pre-exposure prophylaxis (PrEP), that reduced the risk of communicating the virus through sexual activity.<sup>75</sup> Furthermore, at the time of *Obergefell*, the World Health Organization announced new treatment recommendations that called for all people living with HIV to begin antiretroviral therapy after diagnosis.<sup>76</sup> The World Health Organization also determined that taking PrEP as an additional prevention measure for those at substantial risk for contracting HIV could help avert more than 21 million deaths and 28 million new infections by 2030.<sup>77</sup> Finally, the same year *Obergefell* was decided, the FDA Blood Ban on gay donors was modified from an indefinite restriction to a twelve-month deferral.<sup>78</sup>

#### 4. *Bostock v. Clayton County* (2020)

Most recently, the Supreme Court decided *Bostock v. Clayton County* in early 2020.<sup>79</sup> *Bostock* was consolidated with two other similar cases: *Altitude Express, Inc. v. Zarda* and *R. G. & G. R. Harris Funeral Homes, Inc. v. Equal Employment Opportunity Commission*.<sup>80</sup> The Supreme Court heard these three cases together because their factual similarities posed the same legal question.<sup>81</sup> Each questioned whether terminating an employee based on their sexual orientation or transgender status violated Title VII of the Civil Rights Act of 1964 (Title VII), which forbids sex-based discrimination.<sup>82</sup> In all three cases, an employer terminated a long-time employee shortly after the employee had divulged that he or she was transgender or gay.<sup>83</sup>

Title VII of the Civil Rights Act of 1964 (Title VII) specifically prohibits the termination of employees based on an individual's race,

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74. See *A Timeline of HIV and AIDS*, *supra* note 13 (showing the decline in new HIV diagnoses during the time between *Lawrence* and *Obergefell*).

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020).

80. *Id.* at 1731.

81. *Id.* at 1737.

82. See *id.* (“[I]n Title VII, Congress outlawed discrimination in the workplace on the basis of race, color, religion, sex, or national origin. Today, we must decide whether an employer can fire someone simply for being homosexual or transgender.”).

83. *Id.* (“Each of the three cases before us started the same way: An employer fired a long-time employee shortly after the employee revealed that he or she is homosexual or transgender—and allegedly for no reason other than the employee’s homosexuality or gender identity.”).

color, religion, sex, or national origin.<sup>84</sup> Title VII had been amended multiple times prior to the *Bostock* ruling.<sup>85</sup> “So long as the plaintiff’s sex was one but-for cause of that decision [to fire], that is enough to trigger the law.”<sup>86</sup> Courts had long assumed that Title VII did not protect against discrimination based on sexual orientation.<sup>87</sup> But the Supreme Court in *Bostock* interpreted Title VII’s text to cover discrimination based on sexual orientation and gender identity as sex-based.

The Court interpreted Title VII to mean that “an employer who intentionally treats a person worse because of sex—such as by firing the person for actions or attributes it would tolerate in an individual of another sex—discriminates against that person in violation of Title VII.”<sup>88</sup> The Court found sexual orientation and gender identity are inextricably tied to sex and, therefore, both included in the protection from discrimination based on “sex” under Title VII.<sup>89</sup> The Court went on to explain that “[f]or an employer to discriminate against employees for being homosexual or transgender, the employer must intentionally discriminate against individual men and women in part because of sex.”<sup>90</sup> The Court emphasized this was not a new interpretation of Title VII but rather an application of an already-prohibited employer action.<sup>91</sup>

*Bostock* involves statutory—not constitutional—interpretation. Unlike the preceding cases, *Bostock* may be viewed in more of a vacuum, in which the Court’s interpretation goes no further than Title VII’s explicitly

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84. (a) Employer practices: It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin; . . . .

42 U.S.C. § 2000e–2(a)(1) (2019).

85. 42 U.S.C. § 2000e–2(a) (2019); see Max C. Farris, *Title VII of the Civil Rights Act of 1964*, 8 GEO. J. GENDER & L. 543, 544 (2007) (providing an overview of Title VII of the Civil Rights Act of 1964 and its amendments).

86. *Bostock*, 140 S. Ct. at 1739; see generally *Burrage v. United States*, 571 U.S. 204, 211 (2014); *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 350 (2013).

87. See 42 U.S.C. § 2000e (2019) (enumerating protected classes of employees); see also *Allen v. Min. Fiber Specialists*, No. Civ. A. 02-7213, 2004 WL 231293, at \*7 (E.D. Pa. Jan. 30, 2004) (finding Title VII does not address discrimination based on sexual orientation); Farris, *supra* note 85, at 580 (“Title VII does not recognize sexual orientation as a classification and discrimination based on sexual orientation is not actionable under Title VII.”).

88. *Bostock*, 140 S. Ct. at 1740.

89. *Id.* at 1742. The Court further elaborated that the connection to sex exists, “[n]ot because homosexuality or transgender status are related to sex in some vague sense or because discrimination on these bases has some disparate impact on one sex or another, but because to discriminate on these grounds requires an employer to intentionally treat individual employees differently because of their sex.” *Id.*

90. *Id.* at 1743.

91. See *id.* (describing the decision as a “straightforward application of legal terms” to an issue that “has always been prohibited” under Title VII).

stated protections.<sup>92</sup> Therefore, some may argue that *Bostock*'s explanation that sexual orientation and identity are inextricably linked to sex need not extend beyond Title VII. The majority in *Bostock*—like in *Romer*, *Lawrence*, and *Obergefell*—declined to hold that sexual orientation classifications should be assessed under any higher standard of review than rational basis.

The Court in *Romer* clearly applied a rational basis review, while the Court in *Lawrence* and *Obergefell* focused its discussions on the denial of a fundamental right (privacy and marriage); in *Bostock*, the Court avoided this discussion altogether by simply answering the statutory interpretation question before it.<sup>93</sup> But as much as *Bostock* operates within a statutory vacuum, its reasoning could apply just as easily to future questions regarding discrimination based on sexual orientation that would trigger an Equal Protection Clause analysis under the Fourteenth Amendment.<sup>94</sup> Justice Alito also referenced this possibility in his dissent in *Bostock*, where he stated:

Finally, despite the important differences between the Fourteenth Amendment and Title VII, the Court's decision may exert a gravitational pull in constitutional cases. Under our precedents, the Equal Protection Clause prohibits sex-based discrimination unless a "heightened" standard of review is met. By equating discrimination because of sexual orientation or gender identity with discrimination because of sex, the Court's decision will be cited as a ground for

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92. See *Hecox v. Little*, 479 F. Supp. 3d 930, 974 (D. Idaho 2020) ("Further, although in the context of Title VII, the Supreme Court has, as mentioned, recently stated, 'it is impossible to discriminate against a person for being . . . transgender without discriminating against that individual based on sex.'" (quoting *Bostock*, 140 S. Ct. at 1741)). Because the Court's decision in *Bostock* revolved around the interpretation of a specific statute, the holding does not necessarily have to define "gender" or "sex" for other statutes as the same way it was defined in *Bostock*. Nevertheless, the court in *Hecox* uses the decision in *Bostock* as persuasive in its decision regarding transgender rights.

93. See generally *Romer v. Evans*, 517 U.S. 620 (1996); *Lawrence v. Texas*, 539 U.S. 558 (2003); Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515; *Obergefell v. Hodges*, 576 U.S. 644 (2015); *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020).

94. See Sharita Gruberg, *Beyond Bostock: The Future of LGBTQ Civil Rights*, CTR. FOR AM. PROGRESS (Aug. 26, 2020, 9:01 AM), <https://www.americanprogress.org/issues/lgbtq-rights/reports/2020/08/26/489772/beyond-bostock-future-lgbtq-civil-rights/> [<https://perma.cc/AWJ9-ANEM>] ("Despite the holding's language and *Bostock*'s focus on firing under Title VII, the potential impact of the decision is much broader: The Supreme Court's opinion states that 'it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.'" (citing *Bostock*, 140 S. Ct. at 1741)); see *id.* ("An extension of the Supreme Court's finding in *Bostock* that sex necessarily includes sexual orientation and gender identity could also mean, then, that laws that target people based on sexual orientation or gender identity could be subject to heightened scrutiny."); see generally *Hecox v. Little*, 479 F. Supp. 3d 930 (D. Idaho 2020).

subjecting all three forms of discrimination to the same exacting standard of review.<sup>95</sup>

Justice Alito recognized that, though *Bostock* ostensibly restricted its holding to the statutory interpretation of Title VII, the majority's reasoning lends itself to deeper inferences and broader applications.<sup>96</sup> Nevertheless, *Bostock* extended newly recognized rights and protections to homosexuals, and it was an important step in gay-rights legislation and jurisprudence.

As gay rights have continued to evolve, HIV/AIDS statistics have also improved in the years between *Obergefell* in 2015 and *Bostock* in 2020. Between 2015 and 2019, new diagnoses decreased by 9 percent.<sup>97</sup> In 2019, male-to-male sexual contact amounted for 65 percent of new cases, while the remainder was attributed to heterosexual contact or injection drug use.<sup>98</sup> Contemporaneously, there has also been a 73 percent annual increase between 2012 and 2016 (an 880 percent total increase) in the number of PrEP users, with over 77,000 people using PrEP in 2016.<sup>99</sup> Furthermore, recall that in early 2020, the one-year ban on MSM donors was further reduced to a three-month deferral,<sup>100</sup> while President Donald Trump outlined a plan aimed to end the HIV epidemic (by 2030) and secured donations from the drug manufacturer Gilead to donate PrEP medication for up to 200,000 individuals for up to eleven years.<sup>101</sup>

### 5. Repeal of Don't Ask Don't Tell

Alongside the aforementioned Supreme Court cases, the government took additional action to reverse discriminatory laws and policies.

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95. *Bostock*, 140 S. Ct. at 1783 (Alito, J., dissenting) (citations omitted). In Justice Alito's dissent, he focuses on the consequences that the majority opinion's definition of sex to include sexual orientation and transgender status could have beyond simply a Title VII statutory reading. Justice Alito foresees the possibility for this definition to influence constitutional and equal-rights analyses, triggering a heightened level of scrutiny that was not afforded to sexual orientation or transgender status prior to *Bostock*.

96. *Id.*

97. See *HIV: Basic Statistics*, CDC, <https://www.cdc.gov/hiv/basics/statistics.html> [<https://perma.cc/M5JW-RQDK>] (last visited Sept. 25, 2020) (outlining basic statistics, changes, and trends for HIV tracking in the United States).

98. *Id.*

99. *Mapping PrEP: First Ever Data on PrEP Users Across the U.S.*, AIDSVU (Mar. 6, 2018), <https://aidsvu.org/prep/> [<https://perma.cc/N7YS-78RU>] (looking at the number of PrEP users throughout the U.S. and over different periods of time).

100. See REVISED RECS., *supra* note 6, at 9 (outlining the purpose and the current status of the FDA MSM policy).

101. *Trump Administration Secures Historic Donation of Billions of Dollars in HIV Prevention Drugs*, HIV.GOV (May 9, 2019), <https://www.hiv.gov/blog/news-release-trump-administration-secures-historic-donation-billions-dollars-hiv-prevention> [<https://perma.cc/9NDS-Y828>]; *What Is Ending the HIV Epidemic in the U.S.?*, HIV.GOV, <https://www.hiv.gov/federal-response/ending-the-hiv-epidemic/overview> [<https://perma.cc/5V2X-S5DM>] (last updated June 2, 2021).

Perhaps the most recognizable anti-gay policy was “Don’t Ask, Don’t Tell,” which President Clinton signed into law in 1993.<sup>102</sup> “Don’t Ask, Don’t Tell” (DADT) was one of the few federal policies—including the Blood Ban—that specifically burdened individuals based on their sexual orientation.<sup>103</sup> DADT barred openly gay, bisexual, and lesbian people from serving in the military based on the assumption that they would disturb the morale, order, discipline, and cohesion of the military.<sup>104</sup> The policy was enforced throughout its time as law; during the approximately fifteen years it existed, DADT was used to discharge more than 13,000 gay, lesbian, and bisexual soldiers from the American military.<sup>105</sup>

In 2010, President Barack Obama certified the repeal of DADT, stating that the policy was discriminatory and that all Americans—no matter their sexual orientation—should be free to serve in the United States military.<sup>106</sup>

DADT’s relevance to the Blood Ban is twofold. First, after DADT’s repeal, the Blood Ban remains the most prominent facially discriminatory federal policy grounded in gay animus.<sup>107</sup> Second, both restrictions barred gay Americans’ access to activities to which Americans are frequently called as a way to selflessly give back to their country. The repeal of DADT reversed a facially discriminatory policy, marking an important milestone in the gay-rights movement.

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102. Policy Concerning Homosexuality in the Armed Forces (“Don’t Ask Don’t Tell Act”), Pub. L. 103-160, § 571, 107 Stat. 1547, 1670–73 (1993), *repealed by* Don’t Ask, Don’t Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515. The regulation prohibited military applicants from disclosing their sexual orientation, and military personnel could be discharged based on their stated sexual orientation.

103. Pulver, *supra* note 6, at 108.

104. Don’t Ask Don’t Tell Act § 571(a), *supra* note 102, (“The presence in the armed forces of persons who demonstrate a propensity or intent to engage in homosexual acts would create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability.”).

105. Sarah Pruitt, *Once Banned, Then Silenced: How Clinton’s ‘Don’t Ask, Don’t Tell’ Policy Affected LGBT Military*, HIST. (July 3, 2019), <https://www.history.com/news/dont-ask-dont-tell-repeal-compromise> [<https://perma.cc/C4U8-XFM8>] (citing Servicemembers Legal Defense Network).

106. See Press Release, Barack Obama, Statement by the President on the Repeal of Don’t Ask, Don’t Tell (Sept. 20, 2011), <https://obamawhitehouse.archives.gov/the-press-office/2011/09/20/statement-president-repeal-dont-ask-dont-tell> [<https://perma.cc/5ZZW-3AYW>] (“[T]he discriminatory law known as ‘Don’t Ask, Don’t Tell’ is finally and formally repealed. As of today, patriotic Americans in uniform will no longer have to lie about who they are in order to serve the country they love.”); see generally Don’t Ask, Don’t Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515.

107. See Pulver, *supra* note 6, at 108 n.2 (explaining that besides the gay Blood Ban, ‘Don’t Ask, Don’t Tell’ was the only other notable federal policy that “specifically *care[d]* about the gender of one’s sexual partner”).

## III. DISCUSSION

Though the Blood Ban has endured nearly forty years, it has not existed without criticism and pushback.<sup>108</sup> Many gay community activists vehemently opposed the Blood Ban in the early days of the AIDS crisis.<sup>109</sup> But attention quickly shifted elsewhere as the epidemic spread, and the Blood Ban was forgotten.<sup>110</sup> The next group to criticize the Ban were mostly college students in the mid-2000s.<sup>111</sup> Thus, some of the policy's early critics did not live through the height of the epidemic; they did not carry the troubling memories of what the crisis was like when it seemed uncontrollable. This Comment categorizes the college-based movements in the mid-2000s as the "first wave" of Blood Ban criticism.

Condemnation has also come from other sources in recent years. Over the past five years or so, lawmakers started to take notice of the Blood Ban, even including it in some of their positions, speeches, and proposed laws.<sup>112</sup> This Comment will consider pushback by lawmakers and elected officials as the "second wave" of criticism. Interestingly, however, the Ban does not seem to be a major point of contention among LGBTQ+ advocacy groups, with not even a mention on the Human Rights Campaign's website among the federal legislation that it opposes and supports.<sup>113</sup> Similarly, the website of the Gay & Lesbian Alliance Against Defamation (GLAAD) contains no mention of it on their

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108. Ben Carlson, Letter to the Editor, *Drop the Foolish Ban on Blood Donations by Healthy Gay Men*, S.F. EXAM'R, Jan. 26, 1994, at 18.

109. See Pulver, *supra* note 6, at 113 ("Gay groups continued to oppose screening vehemently, decrying it as "scapegoating" homosexuals,' 'reminiscent of miscegenation blood laws that divided black blood from white,' and similar to the 'rounding up of Japanese-Americans . . . to minimize the possibility of espionage' in World War II." (citing RANDY SHILTS, AND THE BAND PLAYED ON: POLITICS, PEOPLE, AND THE AIDS EPIDEMIC 199 (1987))).

110. See *id.* at 117 ("The issue of gays and donor deferral was replaced with concerns about the impact of widespread testing, including dealing with the potential diagnosis of thousands of gay men en masse."); see also SHILTS *supra* note 109, at 539–43 (noting that the health crisis became the priority for gay men and activists).

111. See Pulver, *supra* note 6, at 119 ("Most prominently, these arguments have been made by student groups on college campuses across the country, mostly LGBT student clubs or student government associations that sponsor blood drives.").

112. See generally Susan Scutti, *Lawmakers Urge FDA to Lift Blood Ban for Gay Men*, CNN (June 28, 2016, 5:32 PM), <https://www.cnn.com/2016/06/28/health/fda-gay-men-blood-donation/index.html> [<https://perma.cc/CE3A-XF3W>]; Jill Cowan, *Why a California Lawmaker is Pushing to Change Plasma Donation Rules*, N.Y. TIMES (Apr. 7, 2020), <https://www.nytimes.com/2020/04/07/us/coronavirus-blood-plasma-donation.html> [<https://perma.cc/64RV-22C2>].

113. See generally *Federal Legislation*, HUM. RTS. CAMPAIGN, <https://www.hrc.org/resources/federal-legislation> [<https://perma.cc/DNN7-YLLM>] (last visited Sept. 25, 2020) (omitting any mention of the gay Blood Ban or any reference to current legislation aimed at eradicating it).

“Legislation” page.<sup>114</sup> Nevertheless, individual advocates demand the gay Blood Ban’s elimination.<sup>115</sup>

The first wave’s history shows why, despite twenty years of public outcry, the policy still stands. The second wave, as this Comment proposes, is more likely to succeed long-term, though it, too, has its faults. This section will explore the two waves of criticism, their merits, and their shortcomings.

#### A. First Wave of Advocacy—College Students

The first wave of advocacy to address the gay Blood Ban in the United States came, unsurprisingly, from the nation’s college campuses.<sup>116</sup> Statistically, students in the mid-2000s would have been the first generation of adults in the United States who were too young to experience firsthand the first two decades of the AIDS epidemic and, consequently, the fear and uncertainty that surrounded the virus.<sup>117</sup> By the time the early college protests began to gain momentum in 2006, twenty-five years had passed since gay men had started dying from a mysterious sickness in Los Angeles.<sup>118</sup>

Even more noteworthy, when the college movements began, the epicenter of AIDS had shifted from the United States and the developed

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114. See *Legislation*, GLAAD, <https://www.glaad.org/tags/legislation> [<https://perma.cc/34UJ-LGHF>] (last visited Oct. 2, 2021). A mention of the Blood Ban is found only when one digs deeper to a “media reference guide” page, which contains outdated information. See *GLAAD Media Reference Guide - In Focus: HIV, AIDS, & the LGBTQ Community*, GLAAD, <https://www.glaad.org/reference/hiv> [<https://perma.cc/2RBY-D5KJ>] (last visited Sept. 25, 2020) (“[G]ay and bisexual men are still prohibited by federal law from donating blood unless they have been celibate for at least one year. In December 2015, the FDA amended its policy that previously banned all gay and bisexual men from donating blood.”).

115. See, e.g., Michael Christian Belli, *The Constitutionality of the “Men Who Have Sex with Men” Blood Donor Exclusion Policy*, 4 J. L. SOC’Y 315, 373–74 (2003) (explaining that the blood ban policy does not meet rational basis scrutiny, even before *Bostock* and *Obergefell*); see also, Pulver, *supra* note 6, at 129 (explaining that while the Blood Ban ideally should not exist, there may be other more important priorities for the gay-rights agenda); Sam Hemingway, *UVM Blood Drives to Continue*, BURLINGTON FREE PRESS, Jan. 30, 2006, at 7 (discussing discrimination complaints brought relating to blood drives at the University of Vermont); John G. Culhane, *Bad Science, Worse Policy: The Exclusion of Gay Males from Donor Pools*, 24 ST. LOUIS U. PUB. L. REV. 129, 131 (2005) (“This perception is detrimental to gay men in two related ways: First, it erodes self-esteem and contributes to a climate in which other kinds of discrimination are more easily justified. Second, the policy is so plainly absurd that it risks being ignored by gay men who *should* self-defer.”).

116. See Pulver, *supra* note 6, at 119 (“Most prominently, these arguments have been made by student groups on college campuses across the country . . .”).

117. See *id.* at 121 (“Many gay college students in the twenty-first century have also never met anyone with HIV, and certainly do not consider themselves high-risk . . .”).

118. See *A Timeline of HIV and AIDS*, *supra* note 13 (explaining that in 1981, an article was released in which doctors believed that five otherwise healthy gay men died of a rare lung infection, *pneumocystis carinii* pneumonia (PCP)).

world.<sup>119</sup> The virus was now predominantly in Sub-Saharan Africa, which, by the end of 2005, accounted for 64 percent of new infections globally.<sup>120</sup> For instance, in 2005, fewer than 14,000 people died from HIV/AIDS in the United States, whereas nearly 109,000 people died from the disease in Kenya.<sup>121</sup> Therefore, college students likely associated AIDS with the developing world and not with gay men in the United States, as the prior generation had.<sup>122</sup> This lack of a cognitive bias may have allowed college students to consider the gay Blood Ban more rationally. Furthermore, college students tend to be more liberal-leaning and more likely to protest—so the first whispers of dissonance understandably came from the halls of the nation’s colleges.<sup>123</sup>

The issue also enjoyed heightened visibility on college campuses. LGBT campus organizations, coupled with the prevalence of blood drives at colleges, created an environment where discrimination was on display for a progressive and politically vocal population. Advocacy and protests ensued.

In 2006, more than twenty college campuses participated in the “Fight to Give Life” campaign.<sup>124</sup> During this movement, LGBT student groups

119. WORLD HEALTH ORG., AIDS EPIDEMIC UPDATE: SPECIAL REPORT ON HIV PREVENTION 20 (2005) [http://www.who.int/hiv/epi-update2005\\_en.pdf?ua=1](http://www.who.int/hiv/epi-update2005_en.pdf?ua=1) [<https://perma.cc/5KA4-FFBU>] (explaining the updates of the AIDS epidemic globally).

120. See *AIDS Epidemic Update: December 2005*, WORLD HEALTH ORG., <https://www.who.int/hiv/pub/epidemiology/epiupdate2005/en/> [<https://perma.cc/4E7K-93V7>] (last visited Nov. 7, 2020) (“[S]ub-Saharan Africa continues to be the most affected globally— with 64% of new infections occurring here (over three million people).”).

121. Max Roser & Hannah Ritchie, *HIV/AIDS*, OUR WORLD IN DATA, <https://ourworldindata.org/hiv-aids> [<https://perma.cc/H4YR-ZBY2>] (last visited Aug. 29, 2021); see also UNAIDS & WORLD HEALTH ORG., AIDS EPIDEMIC UPDATE: DECEMBER 2006, at 3 (2006) [http://data.unaids.org/pub/epireport/2006/2006\\_epiupdate\\_en.pdf](http://data.unaids.org/pub/epireport/2006/2006_epiupdate_en.pdf) [<https://perma.cc/6V39-ADEW>] (noting that cases in Sub-Saharan Africa continued to increase, especially among women).

122. See Roser & Ritchie, *supra* note 121 (noting that, in an analysis of the statistics, numerically AIDS was affecting far more people in Africa and the developing world rather than in the United States and Europe); see also Pulver, *supra* note 6, at 121.

123. *New Research on College Students Political Views*, Association of American Colleges and Universities (2008), <https://www.aacu.org/publications-research/periodicals/new-research-college-students-political-views> [<https://perma.cc/7PG5-Y253>] (A compilation of 2008 Survey of America’s College Student to illustrate the political beliefs and views of college students, at that time); see also Christopher J. Broadhurst, *Campus Activism in the 21<sup>st</sup> Century: A Historical Framing*, NEW DIRECTIONS FOR HIGHER EDUCATION, 3-4 (Sept. 2014) (“The campus protests of each period, while unique, often represent a continuation from earlier eras. Activists are often unaware of such connections, but strong protest tradition in American higher education exists in the very causes students fight for and the tactics used to achieve their goals.”).

124. Pulver, *supra* note 6, at 119–20. As a Northeastern University student newspaper article explained, “Fight to Give Life is a national organization opposed to the current regulations regarding blood donations from homosexual men. Fight to Give Life was founded November by Shawn Werner, current president of the organization, and comprises college students from around



accompanied gay male students to blood donation centers where they attempted to donate blood, showing their desire to contribute and give back to the community.<sup>125</sup> The following year, a handful of Harvard students created a website complaining of the ban and urging Americans and lawmakers to reconsider what they deemed a nonsensical blood-donation policy in the United States.<sup>126</sup> The now-defunct website, which was active throughout the 2000s, pointed out that the Blood Ban was born of homophobia and had an undeniable discriminatory effect.<sup>127</sup>

Regardless of the good intentions and fervor of the student-led advocacy groups and protests, the movement suffered from critical gaps, preventing long-term and institutional success. The first issue was that students' lives at colleges are inherently temporary.<sup>128</sup> Because students only attend college for a few years, there was a lack of long-term projects and subsequent follow-up on issues, resulting in a short institutional memory. For instance, at Columbia University in 2007, a student article criticized the university for hosting blood drives on campus despite the homophobic policy.<sup>129</sup> But the year before, Columbia had hosted a discussion panel between students and the university's administration to discuss their condemnation of the Blood Ban policy and advocate for its change.<sup>130</sup> Though well-intentioned, the movement's lack of follow-up and continuity of ownership prevented much of this advocacy from making any significant gains.

In addition, student opposition to the Blood Ban has also faced obstacles by attacking sympathetic targets—blood banks. For example, at Tufts University, a student filed a discrimination complaint against a community-service organization after it sponsored a blood drive hosted by the New England Red Cross.<sup>131</sup> But the sponsoring organization had a handful of LGBT students as members and promoted specific AIDS-related projects that focused on raising money for AIDS research as well as providing services to AIDS patients.<sup>132</sup> Though they ultimately compromised and students and Tufts agreed future blood drives would

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the country, including members of Northeastern's NUBILAGA." Katie Cray, *FDA Rules Still Ban Gay Blood Donations*, HUNTINGTON NEWS (Oct. 31, 2006), <https://huntnewsnu.com/5153/campus/fda-rules-still-ban-gay-blood-donations/> [https://perma.cc/3UAW-AYD2]

125. Pulver, *supra* note 6, at 119–20.

126. *Id.* at 120.

127. *Id.* at 123.

128. *Id.* at 122 ("Student groups are also challenged by their tendency to have little or no institutional memory.").

129. *Id.*

130. *Id.*

131. *Id.* at 121–22.

132. *Id.* at 122.

also provide information about the discriminatory policy, the dispute had the potential to create fissures amongst students and risk losing support for the elimination of the Blood Ban.<sup>133</sup> In attacking the “good guy”—community-service groups that provide blood to those in need—advocates risked losing both support and understanding for the cause.

Lastly, college movements have had difficulty advancing any significant change because of the argument that students advanced. The students’ argument relied almost exclusively on the premise that the Blood Ban was unfair, created a stigma that burdened homosexual males, and was discriminatory in nature.<sup>134</sup> The Blood Ban has always been discriminatory.<sup>135</sup> But when it began, the lack of scientific evidence and the potential risks of AIDS-infected blood entering into the blood supply likely outweighed discrimination concerns.<sup>136</sup> The students’ focus on the equality argument, however, failed to address the Ban’s objective of securing a clean blood supply.<sup>137</sup>

Arguments that focus on eliminating discrimination—without acknowledging the risk—developed when HIV/AIDS cases in the United States had decreased significantly. Thus, when the college students made this argument, the risk of contaminating the blood supply through donations from gay men likely felt minimal.<sup>138</sup> Nevertheless, the failure to acknowledge the risk in this discussion made the argument less persuasive in the mid-2000s.

College students have continued to protest the Blood Ban in the decade following these first movements.<sup>139</sup> The messaging and argument have

133. *See id.* (“While the action thus raised consciousness around the policy, it also inspired negative attitudes towards the gay community and damaged potential alliances.”).

134. *Id.* at 121 (“Gay college students are responding out of a sense of indignity, based on an idea that: ‘Homosexuality is placed in the same class as prostitution and intravenous drug use . . . .’” (quoting Derek Link, *Should Gay Men Be Allowed to Donate Blood?*, TREATMENT ISSUES, Nov./Dec. 2000, available at <http://www.thebody.com/gmhc/issues/novdec00/blood.html>)).

135. *See id.* at 124 (“The claim that blood screening is discriminatory and unjust is not new; it is the exact same claim that was made throughout the early 1980s in resistance to various HIV prevention policies . . .”).

136. *See* McAdam & Parker, *supra* note 11, at 23 (“With much of the nation still gripped in fear and ignorance, coupled with lack of scientific knowledge about HIV/AIDS, the government thought it imperative and necessary to take action and place appropriate procedures to control the spread of HIV/AIDS and keep the nation’s blood supply safe.”).

137. *See* Whitney Larkin, Comment, *Discriminatory Policy: Denying Gay Men the Opportunity to Donate Blood*, 11 HOUS. J. HEALTH L. & POL’Y 121, 140–42 (2011) (asserting the policy is both outdated and discriminatory). *But see* Pulver, *supra* note 6, at 127–28 (contending there still are legitimate public health justifications for prohibiting sexually active gay men from donating blood).

138. *See* Pulver, *supra* note 6, at 121 (explaining a shift in younger people’s attitudes as time passes since height of AIDS epidemic).

139. *See* *Berkeley Law Students Peacefully Protest the “Gay Blood Ban”*, LGBTQ+ BAR (April

remained largely the same, and there is no evidence that these movements have directly affected the law. In 2018, for example, law students at the University of California at Berkeley peacefully protested the gay Blood Ban during the law school's first annual blood drive. The students' messaging and presence was primarily educational, explaining to donors that the gay Blood Ban still existed and that it was a form of discrimination.<sup>140</sup> One student protester claimed the policy only existed because of persistent homophobia.<sup>141</sup> This student's argument echoes sentiments expressed by college students over the last decade.

For these reasons—1) a lack of longevity in college-based movements, 2) attacking the “good guy”, and 3) not weighing the risk versus the discrimination—few results came from the first wave of advocacy among college students in the mid- to late-2000s.

### B. *Second Wave of Advocacy—Lawmakers*

Although the college protests and movements have not ceased since their beginning in the mid-2000s, elected officials have also advocated in recent years for the Blood Ban's elimination.<sup>142</sup> This previously niche issue has now gained traction among both gay and straight lawmakers and elected officials. This Comment will explore three arguments that lawmakers tend to adopt when discussing the Blood Ban's elimination. First, some lawmakers rely on the same argument espoused by college students: that the ban should be eliminated because it is unfair,

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11, 2018), <https://lgbtbar.org/bar-news/berkeley-law-students-peacefully-protest-the-gay-blood-ban/> [<https://perma.cc/3LAQ-3B97>] (covering the LGBT student club at University of California at Berkeley protesting the blood drive on campus to raise awareness for the MSM ban).

140. *See id.* (“The Berkeley Law students’ protest aimed to raise awareness of the fact that blood collection agencies could be far more effective at ensuring blood samples are HIV-free, and far less discriminatory, by implementing an individual risk assessment. Under this system, blood collection agencies would defer individuals based on risky behavior rather than sexual orientation.”); *id.* (“[T]he ‘Gay Blood Ban’ is rooted in blatant homophobia. There is no other explanation.” (quoting a student protester)).

141. *Id.* Likely due to a lack of urgency and uncertainty that existed when the Blood Ban began, students protesting the Ban today see only the discriminatory nature of the Ban. *See Pulver, supra* note 6, at 110, 120 (discussing the history behind the MSM ban and the motivation behind the student protests).

142. *See Sam Levin, Activists Urge US to End Ban on Gay Men Donating Blood After Orlando Massacre, GUARDIAN* (June 14, 2016, 9:14 PM), <https://www.theguardian.com/us-news/2016/jun/14/orlando-pulse-shooting-gay-blood-ban-lgbt-rights> [<https://perma.cc/92Y2-STWH>] (discussing the call from Democratic lawmakers to end the blood donation restrictions after the Orlando massacre); *see also* H.R. Res. 989, 116th Cong. (as introduced in House, June 1, 2020) (“Expressing the sense of the House of Representatives that blood donation policies in the United States should be equitable and based on science.”); *see generally* Pat Schneider, *Tammy Baldwin Says Proposed 12-Month Ban on Gay Blood Donors Discriminates*, *CAP TIMES* (Dec. 30, 2014), [https://madison.com/ct/news/local/govt-and-politics/tammy-baldwin-says-proposed-12-month-ban-on-gay-blood-donors-discriminates/article\\_2b0c9f33-142a-5973-8d77-282e2890d7e6.html](https://madison.com/ct/news/local/govt-and-politics/tammy-baldwin-says-proposed-12-month-ban-on-gay-blood-donors-discriminates/article_2b0c9f33-142a-5973-8d77-282e2890d7e6.html) [<https://perma.cc/5WMMR-QR49>].

discriminatory, and stigmatizes gay men.<sup>143</sup> Second, lawmakers acknowledge that donating blood is both a patriotic and altruistic activity that should not be restricted based on sexual orientation.<sup>144</sup> Lastly, a handful of lawmakers employ a more utilitarian argument, highlighting the United States' low blood supply and urgent need to increase it, which maximizing the eligible donor pool would address.<sup>145</sup>

Perhaps the most outspoken opponent of the Blood Ban on the political stage is Senator Tammy Baldwin of Wisconsin. Since 2014 (prior to the 2015 reduction from an indefinite ban to a one-year ban), Baldwin has advocated for the elimination of the Blood Ban.<sup>146</sup> At this time, Baldwin and her colleagues' main argument was based on the policy's discriminatory and unfair nature.<sup>147</sup> Baldwin authored a letter to the FDA in 2014—joined by eighty congressional Democrats—urging the FDA to end the Blood Ban.<sup>148</sup> When the FDA proposed changing the lifetime ban to a one-year deferral, the letter criticized the move as insufficient and based not on individualized risk but rather an exclusionary, categorical approach.<sup>149</sup> Additionally, Baldwin and her fellow legislators adopted an increasingly popular comparison to criticize the Ban. Lawmakers explained that the current policy is even more unfair because it restricts a sexually-active gay man from donating, regardless of whether he has had safe sex, has only one sexual partner, or is regularly taking PrEP. In contrast, the current policy allows a straight man or any woman to donate blood regardless of how many sexual partners they have recently had or

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143. See Schneider, *supra* note 142 (highlighting that Senator Baldwin contests the Ban because of its discriminatory nature).

144. See Scutti, *supra* note 112 (explaining that two Congressmen—Jared Polis (CO) and Alan Grayson (FL)—urged the FDA to reevaluate the Blood Ban in the wake of the Pulse nightclub massacre).

145. Mychael Schnell & Tony Morrison, *Senators, Activists Urge FDA to Revise Blood Donation Policy for Gay, Bisexual Men Amid Coronavirus Pandemic*, ABC NEWS (Apr. 2, 2020, 10:52 AM), <https://abcnews.go.com/Politics/senators-activists-urge-fda-revise-blood-donation-policy/story?id=69879028> [<https://perma.cc/HT5V-JJR8>] (discussing lawmakers advocating for the revision of the Blood Ban based on the urgent need for blood donations during the coronavirus pandemic); see also H.R. Res. 989, 116th Cong. (as introduced in House, June 1, 2020) (advocating for eliminating the ban given the present need for blood donations).

146. Schneider, *supra* note 142 (explaining Baldwin's longstanding opposition to the Blood Ban).

147. *Id.*

148. *Id.*

149. *Id.* (“A one-year deferral policy, like a lifetime ban, is a categorical exclusion based solely on the sex of an individual’s sexual partner—not his actual risk of carrying a transfusion-transmittable infection. . . . Both policies are discriminatory and both approaches are unacceptable. Low-risk individuals who wish to donate blood and help to save lives should not be categorically excluded because of outdated stereotypes.” (quoting letter from Tammy Baldwin, United States Senator, to Sylvia Burwell, Sec’y of the Dep’t of Health and Hum. Servs. (Dec. 15, 2014))).

the risk level of the sexual behaviors they engage in.<sup>150</sup>

The gay community's desire to donate blood as a selfless act to help those in need rose to national prominence in 2016, after a mass shooting at a gay nightclub in Orlando, Florida.<sup>151</sup> In June 2016, a shooter opened fire at Pulse nightclub in Orlando, killing forty-nine victims.<sup>152</sup> In the aftermath of this tragedy, members of the LGBT community looked for ways to honor their friends and help the injured.<sup>153</sup> Local blood banks in Orlando issued urgent calls for members of the community to come donate blood to assist the dozens of people injured in the shooting.<sup>154</sup> But the Blood Ban prevented many gay men from helping their friends and community members, making many feel the discriminatory policy's sting in a more personal way than perhaps ever before.<sup>155</sup> This sense of injustice and helplessness motivated lawmakers across the country to speak out against the policy with a new, more empathetic fervor.<sup>156</sup>

Following the tragedy in Orlando, Senator Baldwin joined twenty-three other senators in another letter to the FDA that urged the agency to eliminate the twelve-month ban on gay blood donations.<sup>157</sup> Baldwin

150. *See id.* ("Rights groups say that current policy is unfair because it blocks a sexually active gay man from donating even if he has had only one sexual partner, has protected sex, and has not been exposed to HIV, but allows sexually active heterosexual men and women who may have been exposed to HIV to donate. They also argue that the lifetime ban stigmatizes homosexuality, making it seem like being gay is a risk in and of itself.")

151. Camila Domonoske, *Blood Banks See Massive Response After Orlando Attack*, NPR (June 12, 2016, 7:44 PM), <https://www.npr.org/sections/thetwo-way/2016/06/12/481795633/blood-banks-see-massive-response-after-orlando-attack> [<https://perma.cc/D8BJ-U7XD>]; *see generally* Alyson Hurt & Ariel Zambelich, *3 Hours in Orlando: Piecing Together an Attack and Its Aftermath*, NPR (June 26, 2016, 5:09 PM), <https://www.npr.org/2016/06/16/482322488/orlando-shooting-what-happened-update> [<https://perma.cc/Z5QS-3BR9>] (detailing the mass shooting in Orlando).

152. Hurt & Zambelich, *supra* note 151.

153. *Id.*

154. *See* Levin, *supra* note 142 ("In the wake of the deadliest US mass shooting in modern history, which also left more than 50 people injured on Sunday, local blood banks in Florida issued urgent calls for donations. But gay men who wanted to donate blood to people recovering from the attack at Pulse nightclub were unable to offer their support.")

155. *See id.* ("To be denied [a tangible way to support members of the gay community] by an outdated rule that's really based more on prejudice than science at this point is hurtful . . . It reminds us that in many ways, our civil rights are still not fully recognized throughout the country." (quoting an HIV advocate)); *see also id.* ("It adds insult to injury. Here we have someone who murders 50 of our brothers and sisters, and then our own government turns around and says we're not allowed to help them simply because we're gay. . . . There is no basis in science for this ban, and that is pure and simple discrimination." (quoting a member of the gay community in San Francisco)).

156. *Id.* ("On . . . World Blood Donor Day, a group of Democratic lawmakers sent a letter to the FDA noting that there is a dire need for blood in Orlando and urging federal officials to eliminate the 12-month regulation.")

157. Amanda Magnus, *Senator Tammy Baldwin on Blood Donation Restrictions for Gay Men and Senate Gun Votes*, WIS. PUB. RADIO, at 01:47 (June 22, 2016, 6:05 PM), <https://www.wpr.org/listen/949756> [<https://perma.cc/3JHC-5SPH>] ("I certainly was moved to speak out again on this after the horrific shooting in Orlando.")

called on the FDA to approach blood donations scientifically instead of categorically excluding donors.<sup>158</sup> Baldwin explained that a more individualized screening process would achieve this objective.<sup>159</sup> In an interview with Wisconsin Public Radio, Baldwin stressed these points and also explained that there are safeguards and redundancies in the blood-screening process to ensure blood is not infected with HIV.<sup>160</sup> In addition to Baldwin and her colleagues in the Senate, two members of the House of Representatives—Jared Polis (CO) and Alan Grayson (FL)—also urged the FDA to reevaluate its policies.<sup>161</sup> After the shooting in Orlando, Grayson made a statement highlighting the Blood Ban’s unfairness in the wake of a tragedy where the gay community was denied the opportunity help their fallen friends and family.<sup>162</sup> Despite Congress’s calls for the FDA to end the ban and create a less discriminatory system, the agency refused to change.<sup>163</sup> Instead, the FDA stressed that the deferment practice relied on scientific data and that its policies would be reevaluated based on any newly available data.<sup>164</sup> The Ban remained intact.

Most recently, lawmakers have made an argument that gained significant traction in 2020 and has been regarded as the primary motivator behind the Blood Ban’s most recent modification—shortening the year-long deferment period to three months.<sup>165</sup> When the COVID-19 global pandemic began, the United States witnessed a drop-off in blood donations as thousands of blood drives were canceled because of social-distancing rules and worries about the spread of the novel coronavirus.<sup>166</sup> To combat this issue, the FDA announced in early April 2020 that the Blood Ban’s deferral period would be relaxed from one year to three

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158. *Id.* at 03:25.

159. *Id.* at 03:10.

160. *Id.* at 04:01.

161. *See* Scutti, *supra* note 112 (explaining Polis and Grayson’s attempts to challenge the Blood Ban).

162. *See id.* (“Florida Rep. Alan Grayson . . . suggested using this month’s Pulse nightclub shootings to show renewed respect for people’s rights. He said blood donation screening should be based on science and a donor’s safe and monogamous sexual behavior, no matter their orientation.”).

163. *See* Levin, *supra* note 142 (explaining the FDA’s stance on deferral policies).

164. *See id.* (“[T]he FDA would reevaluate its policies ‘as new scientific data becomes available.’”).

165. *See* REVISED RECS., *supra* note 6, at 6, 8–9 (outlining the purpose and current status of the FDA MSM policy).

166. *See* Shaw, *supra* note 6 (“The FDA has announced a relaxing of its restrictions on gay men being allowed to donate blood, in light of the coronavirus disease 2019 (COVID-19) pandemic. Red Cross figures in March showed a drop-off of 86,000 fewer blood donations across the United States, due to almost 2700 blood drives that had to be cancelled.”).

months to increase the size of the potential donor pool.<sup>167</sup> The motivation to increase the size of the blood pool by including gay men is not unfounded. The Williams Institute on Sexual Orientation and Gender Identity Law at the University of California, Los Angeles, estimated that the ban's elimination would result in more than 600,000 additional pints of donated blood, resulting in aid to more than one million individuals.<sup>168</sup>

The change to a three-month deferral occurred after significant outcry from elected officials.<sup>169</sup> Interestingly, the argument has gained traction based on a premise that directly opposes the one the Ban's creation was based on: blood from gay men will *help* the United States, instead of the forty-year-old justification that blood from gay men will *hurt* the United States. Accordingly, groups of lawmakers have proposed bills using this exact justification for why the Blood Ban should be eliminated.<sup>170</sup> Career-long advocate Senator Baldwin, joined by various prominent United States senators (including Elizabeth Warren (MA), Corey Booker (NJ), and Bernie Sanders (VT)), wrote a letter to FDA Commissioner Dr. Stephen Hahn urging him to reevaluate "discriminatory blood donation policies" in light of the blood shortage to save American lives.<sup>171</sup>

Following the waiting period's reduction from one year to three months, lawmakers continued to urge the FDA to eliminate the ban altogether, using the same argument.<sup>172</sup> On June 1, 2020, Congressman Adam Schiff—along with other prominent Representatives—introduced a resolution that called on the FDA to eliminate the Ban, as it was discriminatory and not based in science.<sup>173</sup>

The resolution employed a familiar argument: there was a tangible need for more blood donations during the pandemic, with 130,000 fewer

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167. *Id.* (explaining the FDA's decision to reduce the deferment period to three months in an effort to increase the donor pool in light of blood shortages caused by the COVID-19 pandemic).

168. Schnell & Morrison, *supra* note 145.

169. *See* Shaw, *supra* note 6 (highlighting the pressure that lawmakers put on the FDA to reassess the policy amid the coronavirus pandemic).

170. Letter from Tammy Baldwin, U.S. Senator for Wisconsin, to Stephen M. Hahn, Comm'r, U.S. Food & Drug Admin. (Mar. 26, 2020), [https://www.baldwin.senate.gov/imo/media/doc/FDA%20MSM%20Blood%20Donor%20Deferral%20Policy%20Letter%203262020\\_final.pdf](https://www.baldwin.senate.gov/imo/media/doc/FDA%20MSM%20Blood%20Donor%20Deferral%20Policy%20Letter%203262020_final.pdf) [<https://perma.cc/HB5F-XSJH>] [hereinafter Letter to Hahn]; Donald Padgett, *New U.S. Resolution Renews Calls to End 'Gay Blood Ban'*, OUT (June 3, 2020, 11:39 AM), <https://www.out.com/health/2020/6/03/new-us-resolution-renews-calls-end-gay-blood-ban> [<https://perma.cc/GBA7-7EMJ>].

171. Letter to Hahn, *supra* note 170.

172. *See* Padgett, *supra* note 170 ("Noting the need for policies grounded in science rather than fear and bias, a coalition of Democratic House representatives have introduced a resolution that calls for the elimination of deferral periods for queer men wanting to donate blood by the U.S. Food and Drug Administration (FDA).").

173. *See* H.R. Res. 989, 116th Cong. (as introduced in House, June 1, 2020) (demanding that the FDA create a new policy that is "grounded in science" and does not "unfairly single out any group of individuals").

blood donations after more than 4,000 blood drives were canceled.<sup>174</sup> The resolution criticized the three-month deferral by saying it was still overly stringent and not scientifically grounded.<sup>175</sup> Furthermore, the resolution's authors reiterated the contention that the policy is unfair and discriminatory because it treats straight men and bisexual or gay men differently based solely on their sexual orientation.<sup>176</sup> But the majority of the resolution concentrated on the urgent need for blood and the scientific evidence for safe screening procedures.<sup>177</sup>

Though the utilitarian argument that the United States needs more blood is attractive to many and helps justify the elimination of the Ban—along with safety assurances from scientific advances to screen blood—this argument does suffer one key criticism, akin to the reaction when people called for the repeal of “Don’t Ask, Don’t Tell” because there was a troop shortage.<sup>178</sup> This criticism, in short, points out that gay soldiers and gay blood are only acceptable when the United States is in desperate need of them.<sup>179</sup> In other words, under normal circumstances, gay blood is not good enough and discrimination against gays is acceptable; however, in the nation’s hour of need, gay blood will suffice just fine—regardless of any justice-based argument to ameliorate discriminatory policies.

Regardless of the argument used, there are a handful of avenues to challenge the Blood Ban. At least one of these will likely succeed in finally dismantling the Blood Ban.

#### IV. ANALYSIS

##### *A. Judicial Challenge*

In order for the Blood Ban to come onto the docket of the Supreme

174. *See id.* (“[M]ore than 4,000 blood drives across the United States have been canceled due to the COVID-19 pandemic, resulting in approximately 130,000 fewer donations . . .”).

175. *See id.* (“[A] 3-month deferral policy for gay and bisexual men to donate blood remains overly stringent given the scientific evidence, advanced testing methods, and the safety and quality control measures in place within the different FDA-qualified blood donating centers . . .”).

176. *See id.* (“[A] double standard remained as the revised policy continued to treat gay and bisexual men differently from others.”).

177. *Id.*

178. *See* Pulver, *supra* note 6, at 124 (“Like calls to repeal ‘Don’t Ask, Don’t Tell’ in a time of troop shortage . . .”). *But see* JODY FEDER, CONG. RSCH. SERV., R40795, “DON’T ASK, DON’T TELL”: A LEGAL ANALYSIS 3–4 (2013) (focusing on the need to reconcile the deference the Court has given Congress and the Executive Branch in establishing military rules with the safe harbor for homosexual conduct between consenting adults established in *Lawrence v. Texas*).

179. *See* Pulver, *supra* note 6, at 124 (“[T]his argument has a dangerous undertone that gay blood (or soldiers) is ‘good enough’ only when other options have been exhausted.”); *see also* FEDER, *supra* note 178, at 13 (noting troop shortage as one factor Congress considered when deciding to repeal DADT as a matter of public policy).



Court of the United States, there would have to be a plaintiff who has been injured by the Blood Ban—in other words, a gay man unable to give blood due to the Ban.<sup>180</sup> There have been two tangential challenges to the Blood Ban in courts over the last few years; however, the complaints failed to directly challenge the constitutionality of the Blood Ban. Instead, they disputed the Ban's application in specific instances.<sup>181</sup> In these cases, two transgender women brought actions against a plasma collection center for denying their ability to donate plasma under the MSM Ban.<sup>182</sup> Both cases challenged the Ban's applicability to transgender women who had never had sexual contact with males, as opposed to validity of the Ban itself.<sup>183</sup> In *Kaiser v. CSL Plasma*, the court focused on the fact that the FDA has provided no specific instructions or guidance restricting transgender women from donating blood or plasma under the MSM Ban and, therefore, it was inapplicable.<sup>184</sup> In *Kaiser*, the court did not opine on the soundness of the Ban itself but found Ms. Kaiser had stated a claim, which was ultimately settled outside the court.<sup>185</sup> In *Scott v. CSL Plasma*, Ms. Scott also brought an action against CSL Plasma for denying her ability to donate

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180. *Standing*, CORNELL L. SCH. LEGAL INFO. INST., <https://www.law.cornell.edu/wex/standing> [<https://perma.cc/7JRJ-QTPR>] (last visited Oct. 20, 2020) (explaining the requisite standing to sue in federal courts).

181. *See Kaiser v. CSL Plasma Inc.*, 240 F. Supp. 3d 1129, 1132 (W.D. Wash. 2017) (addressing a transgender woman's claim that the Ban was wrongly applied to her); *see also Scott v. CSL Plasma, Inc.*, 151 F. Supp. 3d 961, 963 (D. Minn. 2015) (addressing a transgender woman's claim that she was discriminated against when she was not allowed to donate "due to sex change operation and hormone replacement medication").

182. *Kaiser*, 240 F. Supp. 3d at 1132; *Scott*, 151 F. Supp. 3d at 963.

183. *See Kaiser*, 240 F. Supp. 3d at 1137 (explaining that Ms. Kaiser had been denied based on her transgender status and that she was "simply ask[ing] Defendant to stop 'deferring' donations based only on gender identity"); *see also Scott*, 151 F. Supp. 3d at 963 (describing the basis for Scott's cause of action).

184. *See Kaiser*, 240 F. Supp. 3d at 1139 ("The FDA has never issued direct guidance on the eligibility of transgender donors and, most recently, has proposed leaving the question within the discretion of medical directors, suggesting that one typical rationale for invoking the primary jurisdiction doctrine—promoting uniformity and consistency—is not compelling in this case."); *see also Gabe Verdugo & Isaac Ruiz, Lawsuit Challenging For-Profit Plasma Company's Refusal of Transgender Donor Is Resolved*, KELLER ROHRBACK L. OFFS. (Apr. 12, 2017), <https://www.kellerrohrback.com/news/lawsuit-challenging-for-profit-plasma-companys-refusal-of-transgender-do> [<https://perma.cc/4ZJW-9EUR>] ("Judge Martinez agreed with Ms. Kaiser that federal law does not shield CSL Plasma from her claims brought under Washington state law. Judge Martinez noted in his ruling that CSL Plasma had failed to provide any guideline, regulation, or law that requires the wholesale rejection of donations from transgender people by plasma collection centers.").

185. *See Kaiser*, 240 F. Supp. 3d at 1134 (granting Plaintiff's Motion for Partial Summary Judgment); *see Verdugo & Ruiz, supra* note 184 (highlighting that the parties settled soon after Judge Martinez's ruling, and two months prior to the case's scheduled trial date).

plasma based on her transgender status.<sup>186</sup> Similarly, the judge in *Scott* denied CSL's motion for summary judgment based on the specific facts of Ms. Scott's case, without considering the soundness of the Blood Ban policy.<sup>187</sup> Unlike *Kaiser*, however, a federal jury decided Ms. Scott's case and found in favor of CSL because CSL had a legitimate business purpose under Minnesota law to refuse Ms. Scott's donation.<sup>188</sup>

If the Supreme Court were to grant certiorari to review a Blood Ban challenge, it is still unclear what standard of review its analysis would apply. The majority in *Bostock* was careful not to exercise heightened scrutiny.<sup>189</sup> But the dissent, legal pundits, and a subsequent case addressing transgender rights have interpreted *Bostock* as an application of heightened scrutiny.<sup>190</sup> This points to ambiguity regarding the applicable standard of review when analyzing sexual orientation discrimination.

On one hand, some case law suggests rational basis review would apply.<sup>191</sup> On the other hand, liberally extending the language of *Bostock*,

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186. See *Scott*, 151 F. Supp. 3d at 962 (“Lisa Scott is a transgender woman who attempted to give plasma at a collection center run by defendant CSL Plasma . . . but was rejected because she is transgender. She has asserted a single cause of action against CSL for unlawful discrimination . . . .”); see MINN. STAT. § 363A.17(3) (2020) (prohibiting businesses from discriminating based on sex or sexual orientation unless the discrimination is rooted in a “legitimate business purpose”).

187. See *Scott*, 151 F. Supp. 3d at 963 (“Although the parties’ arguments at times invoke broader concerns regarding the fairness and propriety of federal guidance on plasma donor eligibility, such policy concerns are not properly before the Court, and the Court does not address them.”).

188. See Special Verdict Form at 1, *Scott v. CSL Plasma, Inc.*, No. 13-2616 (D. Minn. Mar. 9, 2016), ECF No. 136 (expressing the findings of the federal jury in favor of CSL); see also Dominic Holden, *Transgender Woman Loses Anti-Discrimination Case Against Blood Bank*, BUZZFEED (March 18, 2016, 5:28 PM), <https://www.buzzfeednews.com/article/dominicholden/transgender-woman-loses-anti-discrimination-case-against-blo> [<https://perma.cc/T8EB-B7WQ>] (explaining the verdict in *Scott*); see MINN. STAT. § 363A.17 (“It is an unfair discriminatory practice for a person engaged in a trade or business or in the provision of a service: . . . (3) . . . to discriminate . . . [based on] sex, sexual orientation . . . unless the alleged refusal or discrimination is because of a legitimate business purpose.”).

189. *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1738–39 (2020) (analyzing Title VII according to the ordinary public meaning of the statute’s language); see Gruberg, *supra* note 94 (“Despite the holding’s language and *Bostock*’s focus on firing under Title VII, the potential impact of the decision is much broader: The Supreme Court’s opinion states that ‘it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.’”).

190. *Bostock*, 140 S. Ct. at 1783 (Alito, J., dissenting) (discussing the “gravitational pull” the Court’s opinion may exert in other constitutional cases); *Hecox v. Little*, 479 F. Supp. 3d 930, 973–74 (D. Idaho 2020) (noting that sex-based discrimination cases require heightened scrutiny and suggesting *Bostock* lends support to this approach); see Gruberg, *supra* note 94 (explaining that the definition of the majority in *Bostock* could be applied to Equal Protection discussions in the future).

191. See Ian Bartrum, *The Ninth Circuit’s Treatment of Sexual Orientation: Defining “Rational Basis Review with Bite”*, 112 MICH. L. REV. FIRST IMPRESSIONS 142, 145–46 (2014) (noting that although sexual orientation is historically assessed under rational basis review, courts have used

which interprets Title VII to include sexual orientation in “sex,” would lead one to assume that the Court would apply intermediate scrutiny as it had in other sex-based discrimination cases.<sup>192</sup> This Comment will explore how a challenge to the Blood Ban may be assessed under either of the applicable standards of review. Moreover, this Comment asserts the Blood Ban is illegitimate under both standards.

### 1. Defeating the Blood Ban at Rational Basis

Rational basis is the lowest level of scrutiny.<sup>193</sup> It holds that a law that restricts an activity is constitutional if it addresses a legitimate state interest and is rationally related to said interest.<sup>194</sup> Courts apply rational basis review to legislation that distinguishes between people based on age, mental disability, or other attributes considered non-suspect.<sup>195</sup> If the restriction is not arbitrary or capricious, it will often pass constitutional muster under rational basis review.<sup>196</sup> In gay-rights cases, the Supreme Court has been careful not to establish sexual orientation as a suspect classification.<sup>197</sup> Notably, the Court used rational basis review

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more of a “rational basis review with bite” established in *Lawrence v. Texas*) (quoting Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a New Equal Protection*, 86 HARV. L. REV. 1, 20–22 (1972)); see generally *Romer v. Evans*, 517 U.S. 620, 632 (1996).

192. See *Bostock*, 140 S. Ct. at 1783 (Alito, J., dissenting). In his dissent, Justice Alito focused on the consequences of the majority opinion’s decision to expand the definition of sex to include sexual orientation and transgender status. He foresaw the possibility for this definition to influence constitutional and equal rights analyses, triggering a heightened level of scrutiny that was not afforded to sexual orientation or transgender status prior to *Bostock*. *Id.* This foresight proved accurate, as lower court judges have already applied *Bostock*’s rationale to other contexts. See Gruberg, *supra* note 94 (“In his reasoning for applying heightened scrutiny to the Idaho law, [an Idaho federal district judge] cited the Supreme Court’s statement in *Bostock* affirming that one cannot discriminate against an individual for being transgender without also discriminating against that individual based on sex.”); see generally *Hecox*, 479 F. Supp. 3d at 973–74 (applying *Bostock* to validate a higher level of scrutiny).

193. See *Rational Basis Test*, *supra* note 39 (“To pass the rational basis test, the statute or ordinance must have a legitimate state interest, and there must be a rational connection between the statute’s/ordinance’s means and goals.”); see also Erwin Chemerinsky, *The Rational Basis Test Is Constitutional (and Desirable)*, 14 GEO. J. L. & PUB. POL’Y 401, 401 (2016) (“Under the *Carolene Products* framework, the rational basis test is the minimum level of review. Under equal protection, all classifications must at least meet this level of review . . .”).

194. *Rational Basis Test*, *supra* note 39.

195. See *Rational Basis Test*, *supra* note 39 (“The rational basis test is generally used when in cases where no fundamental rights or suspect classifications are at issue.”).

196. Louis J. Virelli III, *Deconstructing Arbitrary and Capricious Review*, 92 N.C. L. REV. 721, 727 (2014) (explaining the origin of the “arbitrary and capricious” test in rational basis review).

197. See Strasser, *supra* note 70, at 88 (“The *Obergefell* Court suggested that equal protection informed its decision, while at the same time not recognizing sexual orientation as a protected class. Perhaps in light of *Romer*, *Lawrence*, *Windsor* and *Obergefell* the Court will soon announce that orientation is suspect or quasi-suspect. Perhaps not.”); see Courtney A. Powers, *Finding LGBTs a*

in one of the early landmark sex-discrimination cases, which suggests the Blood Ban may be reviewed under the same level of scrutiny.<sup>198</sup> Therefore, though a higher level of scrutiny might apply, it is appropriate to first assess a challenge to the Blood Ban under rational basis review.

In 1971, the Supreme Court decided *Reed v. Reed*, declaring that an Idaho statute was unconstitutional because it discriminated on the basis of sex and did not further any rational state objective.<sup>199</sup> In *Reed*, the Court overturned an Idaho law that automatically selected a deceased child's father—instead of the child's mother—as administrator of the child's will.<sup>200</sup> *Reed* is an important case for women's rights, but it also has influential consequences for general Fourteenth Amendment jurisprudence.<sup>201</sup> The Court held that discriminatory laws are not prima facie illegal, and the Fourteenth Amendment does not deny states the power to treat different classes of people in different ways.<sup>202</sup> Nevertheless, the Court applied a rational basis test in analyzing the Idaho statute and determined that a non-suspect classification of people must be reasonable, cannot be arbitrary, and must have substantial relation to the legislation's objective.<sup>203</sup> When *Reed* was decided, the Court only had two tests for analyzing equal-protection claims under the Fourteenth Amendment: rational basis and strict scrutiny.<sup>204</sup> Again, courts routinely upheld laws assessed under a rational basis test.<sup>205</sup>

Thus, *Reed*'s analysis and holding under rational basis review is notable for two reasons. First, rational basis review in *Reed* did not designate sex as a suspect classification, which would afford it strict

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*Suspect Class: Assessing the Political Power of LGBTs as a Basis for the Court's Application of Heightened Scrutiny*, 17 DUKE J. GENDER L. & POL'Y 385, 387 (2010) (“But neither the Supreme Court, nor the majority of state courts, have considered sexual orientation a suspect classification or applied heightened scrutiny to statutes distinguishing on that basis.”).

198. See Wexler, *supra* note 41, at 44 (“But the Court’s opinion simply applied the rationality standard without mentioning the possibility of adopting anything more stringent.”).

199. *Id.* at 43–44; *Reed v. Reed*, 404 U.S. 71, 72–73, 76 (1971).

200. *Reed*, 404 U.S. at 76–77; see Wexler, *supra* note 41, at 41 (“[T]he Court struck down a state law on the ground that it discriminated against women in violation of the equal protection clause.”).

201. See Wexler, *supra* note 41, at 44 (“[B]ecause the reasonableness test was so malleable, challenges to discriminatory legislation [under the Fourteenth Amendment] would now have to be resolved on a case-by-case basis.”).

202. *Reed*, 404 U.S. at 75.

203. *Id.* at 76 (“The question presented . . . is whether a difference in the sex of competing applicants for letters of administration bears a rational relationship to a state objective that is sought to be advanced by the operation [of the statute].”).

204. Emily Martin, *Reed v. Reed at 40: A Landmark Decision*, NAT’L WOMEN’S L. CTR. (Nov. 16, 2011), <https://nwlc.org/blog/reed-v-reed-40-landmark-decision/> [<https://perma.cc/MDC2-4VRD>] (explaining the relevance of *Reed* to the women’s rights movement).

205. *Id.* (“Laws, including those that relied on gender-based classifications, were virtually always upheld under this test.”).

scrutiny.<sup>206</sup> Second, *Reed*'s holding diverged from the common practice of upholding laws under rational review. The Court found that the Idaho statute's arbitrary preference in favor of males was incompatible with the Fourteenth Amendment's guarantee of equal protection under the law.<sup>207</sup> The Court found that if a law that distinguished between the sexes was arbitrary, then even most generous standard of review would deem it unconstitutional and a violation of the Equal Protection Clause.<sup>208</sup> The Court explained:

To give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment; and whatever may be said as to the positive values of avoiding intrafamily controversy, the choice in this context may not lawfully be mandated solely on the basis of sex.<sup>209</sup>

Like the classification of sex in *Reed v. Reed*, the Court in *Romer v. Evans* held that laws making distinctions based on sexual orientation would also be assessed under rational basis review.<sup>210</sup> Notwithstanding subsequent gender and gay-rights cases, under *Reed* and *Romer*, it is appropriate to apply rational basis review to a potential challenge against the gay Blood Ban.

For a law to be held constitutional under the Equal Protection Clause using rational basis review, it must be rationally related to a legitimate government interest.<sup>211</sup> The government's interest in mitigating the

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206. See *Reed*, 404 U.S. at 76 ("The question presented . . . is whether a difference in the sex of competing applicants for letters of administration bears a rational relationship . . ."); see also Catherine G. Noonan, Note, *Reed v. Reed*, 2 TEX. S. U. L. REV. 329, 331–32 (1973) ("In studying the *Reed* case it appears to be of very limited use in either expanding the concept of the Equal Protection Clause or in changing women's class status in the eyes of the Supreme Court. . . . It employed only the 'reasonable classification' test.").

207. *Reed*, 404 U.S. at 74 ("[T]hat the arbitrary preference established in favor of males by § 15-314 of the Idaho Code cannot stand in the face of the Fourteenth Amendment's command that no State deny the equal protection of the laws to any person within its jurisdiction.").

208. *Id.*

209. *Id.* at 76–77.

210. *Romer v. Evans*, 517 U.S. 620, 632 (1996) ("Second, its sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests.").

211. See *City of New Orleans v. Dukes*, 427 U.S. 297, 303–05 (1976) (per curiam) (upholding a local ordinance prohibiting pushcart vendors in the French Quarter unless they had operated there for at least eight years permissible under the Equal Protection Clause because it was rationally related to the government's goal in regulating commerce and promoting tourism); Raphael Holoszyk-Pimentel, *Reconciling Rational Basis Review: When Does Rational Basis Bite?*, 90 N.Y.U. L. REV. 2070, 2074 (2015) ("Traditionally, rational-basis review is extremely deferential to legislatures' enactments. A statutory classification comports with the Equal Protection Clause if it is 'rationally related to a legitimate state interest.'" (quoting *Dukes*, 427 U.S. at 303)).

spread of disease and having a healthy populace is certainly legitimate.<sup>212</sup> The relationship between a healthy populace through the Blood Ban ostensibly to limit AIDS' spread, however, is not rational today.

## 2. Legitimate Government Interest

Admittedly, when the AIDS crisis broke out, the government's interest in preserving public health could have been rationally related to the Blood Ban. During a time of confusion and inadequate information, the Blood Ban rationally connected a community that seemed highly susceptible and an activity that seemed to be linked to infections.<sup>213</sup> However, the relationship is no longer rational because of the discriminatory nature of the Blood Ban and the lack of scientific evidence linking categorically unsafe blood to the gay community.<sup>214</sup>

Even under rational basis review, the Court is clear that laws established with discriminatory animus are not constitutional.<sup>215</sup> The Court has held that a bare desire to harm an unpopular group is not enough to constitute a legitimate governmental interest.<sup>216</sup> Therefore, the Blood Ban may be unconstitutional based solely on the fact that it is

212. State and local governments have enacted legislation limiting the liberties of some for the general health of others in a handful of instances, especially those relating to smoking and tobacco laws. Jessica Niezgoda, Note, *Kicking Ash(Trays): Smoking Bans in Public Workplaces, Bars, and Restaurants - Current Laws, Constitutional Challenges, and Proposed Federal Regulation*, 33 J. LEGIS. 99, 99 (2006); see also *Lexington Fayette Cnty. Food & Beverage Ass'n v. Lexington-Fayette Urb. Cnty. Gov't*, 131 S.W.3d 745, 752 (Ky. 2004) ("The fact that an exercise of police power impinges upon private interest does not restrict reasonable regulation.").

213. See Evatt, *supra* note 18, at 2295–96 (discussing the emergence of AIDS as a disease originally thought of as specific to gay men, but that could infect others, such as hemophiliacs, through blood donations).

214. Matthew L. Morrison, Note, *Bad Blood: An Examination of the Constitutional Deficiencies of the FDA's Gay Blood Ban*, 99 MINN. L. REV. 2363, 2364 (2015) ("Though the FDA currently cites statistics to justify its policies, many argue that the guidelines are now outdated and no longer based on 'sound science.' Others contend that the ban is discriminatory and, as such, unconstitutional under U.S. law."); see Gillian Mohny, *FDA Ban on Gay Men as Blood Donors Opposed by American Medical Association*, ABC NEWS (June 19, 2013, 9:41 AM), <https://abcnews.go.com/Health/american-medical-association-opposes-fda-ban-gay-men/story?id=19436366> [<https://perma.cc/SC2V-RR9R>] (explaining the lack of scientific support for the Blood Ban).

215. See Holoszyc-Pimentel, *supra* note 211, at 2093 ("Animus can be understood as the impermissible purpose of 'harnessing the public laws to reflect and enforce private bias,' as opposed to a legitimate public purpose. The Court has established the presence of animus in two ways: through 'direct evidence of private bias in the legislative record,' and through 'an inference of animus based on the structure of a law.'" (quoting Susannah W. Pollvogt, *Unconstitutional Animus*, 81 FORDHAM L. REV. 887, 926 (2012))); see generally *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973); *Romer v. Evans*, 517 U.S. 620 (1996).

216. See *Moreno*, 413 U.S. at 534. The Supreme Court in *Moreno* found that a provision of the Food Stamp Act denying food stamps to households of "unrelated persons" was a violation of equal protection because denying food stamps to households of unrelated persons was not rationally connected to the government's goal to prevent fraud, but instead, was found to be simply targeted at an unpopular group. *Id.* at 534–36.

grounded in discrimination and a harmful stereotype that conflates the entire gay community with the AIDS virus.<sup>217</sup> Additionally, medical and scientific progress further supports the proposition that the Blood Ban is irrational and now based only on outdated prejudice.<sup>218</sup>

### B. Scientific Progress Reduces Rational Relation

Preventive medicine and education, along with the CDC policy for testing all donated blood for HIV, have rendered the Blood Ban irrational. To assess the rationality of the Ban, it is necessary to determine whether the prevalence of HIV/AIDS in the gay community is significant enough to justify excluding the entire class of gay men.

First, HIV transmission has decreased, and education and preventative medication and measures have increased, among gay men.<sup>219</sup> Accordingly, Americans have recognized that AIDS is not simply a gay disease, as believed in the 1980s and at the inception of the Blood Ban.<sup>220</sup> Since Ban's inception in the mid-1980s, annual infections in the United States have decreased by more than two-thirds.<sup>221</sup> Though the reduction has slowed, HIV diagnoses in the United States decreased by 9 percent between 2015 and 2019.<sup>222</sup> Furthermore, HIV diagnoses among men who have sex with men also decreased by 9 percent in the same timeframe, whereas HIV diagnoses have remained stable among people who inject

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217. See Pulver, *supra* note 6, at 110 (“But the story of the restriction on blood donations by men who have sex with men is essentially the story of the early days of AIDS itself, and because of this history and the political and rhetorical power of AIDS today, any attempt to isolate the MSM policy will fail.”); see *Romer*, 517 U.S. at 634 (“[I]f the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.” (quoting *Moreno*, 413 U.S. at 534)).

218. See Shaw, *supra* note 6 (“The FDA’s decision to ease restrictions on blood donations from men who have sex with men proves what medical experts have been saying for decades: that this ban is not based in science but rather discriminatory politics.”).

219. Liz Highleyman, *PrEP Scales Up, HIV Incidence Declines*, S.F. AIDS FOUND. (Aug. 8, 2018), <https://www.sfaf.org/collections/beta/prep-scales-up-hiv-incidence-declines/> [https://perma.cc/9ZSE-GWUE] (explaining recent statistics related to the decline in AIDS prevalence among gay men and the rise in PrEP and education).

220. See Wright, *supra* note 16 (highlighting early stereotypes around the emergence of AIDS—notably, the early name of AIDS as “gay cancer”—and how these misconceptions and stereotypes persist); see Pulver, *supra* note 6, at 121 (“[T]he fear of HIV amongst gay males caused by the MSM policy is nowhere near the levels experienced throughout the 1980s.”).

221. U.S. Statistics, HIV.GOV, <https://www.hiv.gov/hiv-basics/overview/data-and-trends/statistics> [https://perma.cc/M5JW-RQDK] (last visited Sept. 27, 2021) (comparing statistics on HIV/AIDS in the U.S. based on time, demographics, or geographic focus from the start of the AIDS epidemic until 2019).

222. See *id.* (“[I]n 2019, 36,801 people received an HIV diagnosis in the U.S. and 6 dependent areas—an overall 9% decrease compared with 2015.”).

drugs.<sup>223</sup> Though men who have sex with men still constitute the majority of new HIV cases in the United States, approximately one-third of new diagnoses are among those not involved in MSM activities.<sup>224</sup> Even more notably, nearly 23 percent of new diagnoses in 2019 were in heterosexuals and were not linked to drug use—individuals who would likely elude current screening questions for blood donation exclusion.<sup>225</sup>

In addition to HIV diagnoses' downward trend among gay men, innovations in health care have also played an important role in the reduction of HIV/AIDS prevalence among gay men and constitute a further challenge to the rationality of the Blood Ban. Specifically, the introduction of the publicly available PrEP drug has aided in the battle against HIV/AIDS in gay men.<sup>226</sup> Studies have shown the increase in PrEP usage correlates with the decline in new HIV infections.<sup>227</sup> In addition to the annual increase of PrEP usage, recall that former President Trump contracted with drug manufacturer Gilead to donate PrEP medication to up to 200,000 individuals for up to eleven years in an effort to end the HIV epidemic by 2030.<sup>228</sup>

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223. *HIV in the United States and Dependent Areas*, CTRS. FOR DISEASE CONTROL & PREVENTION | HIV, <https://www.cdc.gov/hiv/statistics/overview/ata glance.html> [<https://perma.cc/5WC4-HBB6>] (last visited Oct. 3, 2021) (noting that while the percentage of HIV diagnoses attributable to people who inject drugs (“PWID”) remained stable from 2015 to 2019, HIV diagnoses among men who have sex with men fell by 9 percent).

224. *See id.* (noting heterosexuals accounted for 23 percent of new HIV diagnoses, while PWID accounted for about 7 percent; roughly 69 percent of new HIV diagnoses were among men who have sex with men).

225. *Id.*; *see also Full Length Donor History Questionnaire (DHQ)*, AMERICAN ASS'N OF BLOOD BANKS (Apr. 2020) <https://www.aabb.org/tm/questionnaires/Documents/dhq/v2/DHQ%20v2.0.pdf> [<https://perma.cc/PQ3S-V3ZP>] (listing the questions asked of prospective blood donors).

226. *See PrEP Effectiveness*, CTRS. FOR DISEASE CONTROL & PREVENTION | HIV, <https://www.cdc.gov/hiv/basics/prep/prep-effectiveness.html> [<https://perma.cc/6L4U-24M7>] (last visited Nov. 7, 2020) (“PrEP reduces the risk of getting HIV from sex by about 99 percent when taken as prescribed.”); *see also About PrEP*, CTRS. FOR DISEASE CONTROL & PREVENTION | HIV, <https://www.cdc.gov/hiv/basics/prep/about-prep.html> [<https://perma.cc/XH4N-LMEB>] (last visited Nov 7, 2020) (“PrEP (pre-exposure prophylaxis) is medicine people at risk for HIV take to prevent getting HIV from sex or injection drug use.”).

227. *See Liz Highleyman, PrEP Use Linked to Few New HIV Infections in US States*, AIDSMAP (July 26, 2018), <https://www.aidsmap.com/news/jul-2018/prep-use-linked-fewer-new-hiv-infections-us-states> [<https://perma.cc/3PNQ-8X2N>] (“As pre-exposure prophylaxis (PrEP) use continues to grow, epidemiological evidence is starting to show an association between increases in PrEP uptake and declines in new infections.”); *see also Jules Levin, The Impact of Pre-exposure Prophylaxis with TDF/FTC on HIV Diagnoses, 2012–2016, United States*, 22<sup>ND</sup> INT’L AIDS CONF. (July 2018), [https://www.natap.org/2018/IAC/IAC\\_17.htm](https://www.natap.org/2018/IAC/IAC_17.htm) [<https://perma.cc/6E5W-8VG6>] (reporting on the 22nd International AIDS Conference and its discussion of Patrick Sullivan’s and his colleagues’ research showing a simultaneous decrease in HIV diagnoses while PrEP usage increased).

228. *See Trump Administration Secures*, *supra* note 101 (discussing how the Trump Administration secured PrEP donations from Gilead for up to 200,000 individuals for up to eleven years).



If the decrease of HIV among gay men were the only factor at play, the Ban might still meet the rational basis test.<sup>229</sup> But the disentanglement of gay men and AIDS, as well as the testing of all blood donations, further weakens the link between the Blood Ban and the government's means to safeguard public health.

All blood is now tested for a series of infectious disease pathogens following donation.<sup>230</sup> CDC policy mandates that all donated blood used for transfusion be tested for certain types of infectious disease pathogens, such as hepatitis B and C viruses and human immunodeficiency virus (HIV).<sup>231</sup> Blood is tested for HIV-1 and HIV-2 using nucleic acid amplification to detect the virus's existence as well as to the presence of antibodies; the former is nearly 100 percent accurate.<sup>232</sup> The testing of donated blood began to detect antibodies for HIV-1 in 1985 and has continuously improved throughout the last almost four decades—now including the detection of HIV-2 antibodies and the virus itself for both HIV-1 and HIV-2.<sup>233</sup> With these scientific tools available, researchers have been able to test and explore potential impacts of lifting the Blood Ban.<sup>234</sup> After the Blood Ban's modification from a lifelong ban to a twelve-month deferral in 2015, researchers were able to monitor any changes to HIV occurrence in the donated blood pool.<sup>235</sup>

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229. *Miller v. Albright*, 523 U.S. 420, 452 (1998) (O'Connor, J., concurring) ("It is unlikely . . . that any gender classifications based on stereotypes can survive heightened scrutiny, but under rational scrutiny, a statute may be defended based on generalized classifications unsupported by empirical evidence.").

230. *Blood Safety Basics*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/bloodsafety/basics.html> [<https://perma.cc/PL6A-KDXT>] (last visited Nov. 7, 2020) ("All blood for transfusion is tested for evidence of certain infectious disease pathogens, such as hepatitis B and C viruses and human immunodeficiency virus (HIV).").

231. *Id.*

232. *Id.* (describing the different tests used to detect each specific disease that must be screened under CDC mandates); see also Susan Bernstein & Jonathan E. Kaplan, *Which HIV Tests Are Most Accurate?*, WEBMD (June 6, 2020), <https://www.webmd.com/hiv-aids/hiv-tests-accurate> [<https://perma.cc/PKC7-HDRP>] (explaining the statistical accuracy of different types of HIV tests).

233. Eve M. Lackritz et al., U.S. Public Health Service Guidelines for Testing and Counseling Blood and Plasma Donors for Human Immunodeficiency Virus Type 1 Antigen, CTRS. FOR DISEASE CONTROL & PREVENTION (Mar. 1, 1996), <https://www.cdc.gov/mmwr/preview/mmwrhtml/00040546.htm> [<https://perma.cc/RG57-QC5L>] (explaining the evolution of early HIV blood testing).

234. Donald G. McNeil Jr., *F.D.A. Ends Ban, Allowing Some Blood Donations by Gay Men*, N.Y. TIMES (Dec. 21, 2015), <https://www.nytimes.com/2015/12/22/health/fda-ends-ban-allowing-some-blood-donations-by-gay-men.html> [<https://perma.cc/T3L3-SC7Q>] (noting that a few different organizations have called for the repeal of the Blood Ban based on relevant scientific data and statistics).

235. See Eduard Grebe et al., *HIV Incidence in US First-Time Blood Donors and Transfusion Risk with a 12-Month Deferral for Men Who Have Had Sex with Men*, 136 BLOOD 1359, 1359

When comparing the incidences of HIV in the blood supply before the modification of the Blood Ban and after, researchers from the American Society of Hematology found no increase in HIV incidence or HIV-transmission risk through transfusions.<sup>236</sup> In addition to independently conducted research, the FDA has also investigated its current policies through the Blood Products Advisory Committee (BPAC), which published its meeting notes and discussions beginning in 2006.<sup>237</sup> Upon the publication of these studies, the American Association of Blood Banks, the American Red Cross, and the Advisory Committee on Blood Safety and Availability issued a joint statement to the FDA urging more rational and scientifically grounded deferral periods applied more fairly across all possible blood donors.<sup>238</sup> Thus, the availability of scientific and medical approaches to mitigate the risk of HIV entering the donated blood supply supports a finding that the Blood Ban is irrational, and thus unconstitutional, under an equal-protection claim.

Lastly, other countries' success in eliminating their own versions of the Blood Ban further establishes the irrationality of the Ban in the United States. Italy and Spain—along with a handful of other countries—have eliminated their MSM bans altogether and instead opted for risk-based deferral questions.<sup>239</sup> Notably, these countries do not include any

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(2020), <https://ashpublications.org/blood/article-abstract/136/11/1359/461434/HIV-incidence-in-US-first-time-blood-donors-and?redirectedFrom=fulltext> [https://perma.cc/5VKC-DSFK] (explaining the potential impact and minimal risk of reducing or eliminating deferral period for gay men).

236. See *id.* at 1363 (“We did not observe any evidence that a cohort of new higher-risk male donors entered the donor pool after the [12-month] deferral policy implementation. The failure to identify a significant association between period of donation and incident infection . . . lends further weight to the conclusion that there is no evidence that HIV incidence in first-time donors or first-time male donors increased after implementation of the revised MSM eligibility criteria.”).

237. *Joint Statement Before ACBSA on Donor Deferral for Men Who Have Had Sex with Another Man (MSM) – 6/15/10*, AM. ASS’N BLOOD BANKS (June 15, 2010), <http://www.aabb.org/advocacy/statements/Pages/statement061510.aspx> [https://perma.cc/HEJ6-PTEE] (noting that the data and publications available since a 2006 BPAC meeting have also encouraged organizations to be critical of the BPAC and FDA because of their reluctance to change the MSM for so long); see generally *BPAC Meeting Summary – 03/20–03/21/19*, AM. ASS’N BLOOD BANKS, <http://www.aabb.org/advocacy/government/bpac/Pages/bpacmeeting190320.aspx> [https://perma.cc/FR2Z-S5ET] (last visited Nov. 7, 2020) (showing most recent BPAC meeting notes available).

238. See *Joint Statement Before ACBSA*, *supra* note 237 (explaining that the AABB, America’s Blood Center, and American Red Cross were opposed to the Blood Ban had urged the FDA since 2006 to reevaluate the deferral criteria for male blood donors who have had sexual contact with another male).

239. See Ashwin N. Skelly et al., *Science over Stigma: The Need for Evidence-Based Blood Donation Policies for Men Who Have Sex with Men in the USA*, 7 *LANCET HAEMATOLOGY* 779, 781 (2020) (highlighting the need for the U.S. to follow the example of other countries); see also McAdam & Parker, *supra* note 11, at 21 (explaining the different policy cases in various countries).

questions regarding sexual orientation to establish a donor's risk.<sup>240</sup> In Italy, for example, questions focus on the number of sexual partners that a donor has had and whether the donor has used protection, such as a condom.<sup>241</sup> Furthermore, a 2013 study published in *Blood Transfus* found no significant increase after the MSM Ban's eradication in the proportion of HIV-antibody-positive blood donors who were men who had sex with men compared to heterosexual donors.<sup>242</sup> Additionally, in spring 2020, the Supreme Court of Brazil struck down the country's MSM blood donor deferral and declared it unconstitutional.<sup>243</sup> Brazil had previously exercised a twelve-month deferral period for MSM blood donations, but the highest court eliminated the waiting period altogether, explaining that the deferral, based on discrimination and prejudice, disproportionately restricted sexually active gay men from helping their communities.<sup>244</sup>

The scientific evidence from peer countries such as Italy, which has collected over two decades of data since eliminating the Ban, reveals that existing controls and safeguards are effective in reducing the risk of HIV-positive blood from entering the blood supply and infecting blood transfusion recipients.<sup>245</sup> This revelation indicates that, like the policies

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240. See McAdam & Parker, *supra* note 11, at 33 (“[T]he study considered Spain and Italy’s risk-based approach, in which donors were considered for deferral based on behavior (having sex with HIV carriers, having more than one sexual partner at a time, or having sex with an occasional partner) over the previous twelve months.”).

241. Barbara Suligoi et al., *Changing Blood Donor Screening Criteria from Permanent Deferral for Men Who Have Sex with Men to Individual Sexual Risk Assessment: No Evidence of a Significant Impact on the Human Immunodeficiency Virus Epidemic in Italy*, 11 *BLOOD TRANSFUS* 441, 442 (2013); see also McAdam & Parker, *supra* note 11, at 40 (“In 2001, Italy removed the question about male homosexual intercourse and replaced it with questions regarding risky sexual behaviors such as having multiple partners and unprotected sex.”).

242. See Suligoi, *supra* note 241, at 446 (“[N]o significant increase in the proportion of MSM compared to heterosexuals was observed among HIV antibody-positive blood donors, suggesting that the change in donor deferral policy has not led to a disproportionate increase of HIV-seropositive MSM.”).

243. Michael K. Lavers, *Brazil Supreme Court Strikes Down MSM Blood Donor Ban*, WASH. BLADE (May 11, 2020), <https://www.washingtonblade.com/2020/05/11/brazil-supreme-court-strikes-down-msm-blood-donor-ban/> [<https://perma.cc/96XZ-6HVH>]; Fabio Teixeira, *Brazil’s Supreme Court Throws Out Rules That Limit Gay Men Donating Blood*, REUTERS (May 10, 2020, 1:44 AM), <https://www.reuters.com/article/us-brazil-lgbt-blood-idUSKBN22M05N> [<https://perma.cc/ZFV9-LUEE>] (discussing Brazil’s Supreme Court decision to overturn law limiting gay and bisexual men from donating blood).

244. See Teixeira, *supra* note 243 (“Instead of the state enabling [gay men] to promote good by donating blood, it unduly restricts solidarity based on prejudice and discrimination.” (quoting Brazil Supreme Court Minister Edson Fachin)).

245. See Beattie RH Sturrock & Stuart Mucklow, *What Is the Evidence for the Change in the Blood Donation Deferral Period for High-Risk Groups and Does It Go Far Enough?*, 18 *ROYAL COLL. PHYSICIANS | CLINICAL MED.* 304, 306 (2018) (“A comparison of the blood donor

in question in both *Romer v. Evans* and *Reed v. Reed*, the Blood Ban exists now as nothing but animus toward gay men because it, too, lacks a rational relationship to legitimate state interests.<sup>246</sup>

Furthermore, when considering the totality of circumstances, the policy seemingly exists as a bare desire to harm a disfavored group.<sup>247</sup> Thus, as the Court decided in *Romer v. Evans*, this policy cannot be said to further a legitimate government interest and thus would likely be found to be unconstitutional under the rational basis review.<sup>248</sup>

#### V. PROPOSAL

The Blood Ban can be eliminated in a number of ways. It can be revoked by the FDA, repealed through legislation in Congress, or struck down in the courts. The FDA made the two modifications to the Ban (decreasing it to a one-year deferral in 2015 and to a three-month deferral in 2020).<sup>249</sup> Although President Trump stated that he did not directly instruct the FDA to modify the Blood Ban from a one-year to a three-month deferral, the reduction came after he ordered the FDA to eliminate outdated rules and bureaucracy during the coronavirus pandemic.<sup>250</sup> If history is any indication, the dismantling of the policy will probably be handled independently and unilaterally by the FDA, due to both public pressure and pressure from outspoken lawmakers, like Senator Tammy

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epidemiology between 1999 and 2009/10 showed no significant change in HIV prevalence in either first time or repeat donors.”); see Alice Klein, *New Rules for Gay and Bisexual Male Blood Donors Found to Be Safe*, *NEW SCIENTIST* (Nov. 29, 2019), <https://www.newscientist.com/article/2225154-new-rules-for-gay-and-bisexual-male-blood-donors-found-to-be-safe/#ixzz6pF2CZJvX> [<https://perma.cc/5WBC-R3WV>] (“In Italy, for example, the risk of getting HIV from a blood transfusion is estimated to be 1 in 13 million.”).

246. *Romer v. Evans*, 517 U.S. 620, 632 (1996) (“[T]he amendment seems inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests.”).

247. *Romer*, 517 U.S. at 634 (“[I]f the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.” (quoting *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534 (1973))).

248. *Id.* at 635–36.

249. See Heitz, *supra* note 5 (explaining how the FDA altered the ban in 2015 from a lifetime ban to a twelve-month deferral); see also REVISED RECS., *supra* note 6, at 9 (outlining the recommendations published by the FDA in 2020 to shorten the twelve-month deferral to a three-month deferral for MSM).

250. David Greene, *Food and Drug Administration Seeks to Expand Treatment for Coronavirus*, *NPR* (Mar. 20, 2020, 9:09 AM), <https://www.npr.org/2020/03/20/818835878/food-and-drug-administration-seeks-to-expand-treatment-for-coronavirus> [<https://perma.cc/PY2K-KX9A>] (statement of President Donald Trump) (“What the FDA is doing is incredible. They’ve done things in times that were not even thinkable. And I’ve directed the FDA to eliminate outdated rules and bureaucracy so this work can proceed rapidly, quickly and, I mean, fast.”).

Baldwin, in Congress.<sup>251</sup> Nevertheless, this Comment proposes that in the wake of *Bostock*, a heightened scrutiny, resembling the modern application of intermediate scrutiny for sex-based discrimination, should be used.

#### A. *The Potential Challenge to the Blood Ban in Courts*

*Bostock*'s impact was limited to the definition of "sex" within the confines of Title VII.<sup>252</sup> The majority deliberately emphasized the limitation of its holding to the text of Title VII and its protections against sex-based discrimination.<sup>253</sup> Nevertheless, if the courts extended *Bostock*'s reasoning to include sexual orientation as inherent in sex, the Blood Ban might be held unconstitutional under the Fourteenth Amendment.<sup>254</sup>

Extending *Bostock*'s reasoning means the Blood Ban's sexual-orientation-based discrimination is analogous to sex- or gender-based discrimination.<sup>255</sup> This extension would then cement sexual orientation as a quasi-suspect class that triggers the heightened scrutiny afforded to sex-based discrimination—intermediate scrutiny.<sup>256</sup> A federal court in Idaho has already extended *Bostock*'s definition of gender in other cases involving discrimination.<sup>257</sup> In *Hecox v. Little*, a federal judge applied heightened scrutiny to assess an Idaho law that prohibited transgender

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251. See Letter to Hahn, *supra* note 170 (urging FDA to reconsider and eliminate the Blood Ban); see Padgett, *supra* note 170 (describing different lawmakers' lobbying for changes to the restriction in summer 2020).

252. *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1742 (2020) ("Not because homosexuality or transgender status are related to sex in some vague sense or because discrimination on these bases has some disparate impact on one sex or another, but because to discriminate on these grounds requires an employer to intentionally treat individual employees differently because of their sex.").

253. *Id.* at 1753 (discussing the limitations of the decision in *Bostock*).

254. *Id.* at 1783 (Alito, J., dissenting) ("Under this logic, today's decision may have effects that extend well beyond the domain of federal antidiscrimination statutes. . . . Although the Court does not want to think about the consequences of its decision, we will not be able to avoid those issues for long."); see also Gruberg, *supra* note 94 ("An extension of the Supreme Court's finding in *Bostock* that sex necessarily includes sexual orientation and gender identity could also mean, then, that laws that target people based on sexual orientation or gender identity could be subject to heightened scrutiny.").

255. *Bostock*, 140 S. Ct. at 1783 (Alito, J., dissenting) ("By equating discrimination because of sexual orientation or gender identity with discrimination because of sex, the Court's decision will be cited as a ground for subjecting all three forms of discrimination to the same exacting standard of review.").

256. *Id.* (highlighting Justice Alito's hypothesis that *Bostock* opens the door to extend intermediate scrutiny to sexual orientation cases).

257. See Gruberg, *supra* note 94 ("In his reasoning for applying heightened scrutiny to the Idaho law, [a federal district court judge] cited the Supreme Court's statement in *Bostock* affirming that one cannot discriminate against an individual for being transgender without also discriminating against that individual based on sex."); see also *Hecox v. Little*, 479 F. Supp. 3d 930, 962, 974, 984 (D. Idaho 2020) (citing *Bostock*).

women and girls from playing on sports teams and cited *Bostock* as the relevant jurisprudence.<sup>258</sup> If the ruling in *Hecox* is affirmed, intermediate scrutiny will likely become the standard of review in any subsequent case assessing the Blood Ban. Therefore, if that were the case, the impact that applying intermediate scrutiny in assessing the Blood Ban would have on the Constitution is negligible, as it would have already been established in at least one prior case.

### 1. Beyond Rational Basis; Discrediting the Blood Ban Under Heightened Scrutiny

Though the Supreme Court has not explicitly extended heightened scrutiny to cases involving discrimination based on sexual orientation, some judges point to *Bostock* as demonstrating a higher level of scrutiny than mere rational basis.<sup>259</sup> In *Obergefell* and *Lawrence*, the fundamental rights at issue—marriage and privacy, respectively—triggered heightened scrutiny.<sup>260</sup> But *Bostock* represents a turning point because no fundamental right was at issue, but the Court nevertheless applied a seemingly higher level of scrutiny when including sexual orientation as a part of sex.<sup>261</sup> Sex discrimination sits between rational basis and strict scrutiny review—a standard referred to as intermediate scrutiny.<sup>262</sup> Strict scrutiny demands the government prove a restriction is narrowly tailored and serves a compelling government interest.<sup>263</sup> Intermediate scrutiny

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258. *Hecox*, 479 F. Supp. 3d at 973–74 (citing *Bostock* as support for principle that “transgender individuals qualify as a quasi-suspect class” (citing 140 S. Ct. at 1731)).

259. *Hecox*, 479 F. Supp. 3d at 974; *Bostock*, 140 S. Ct. at 1783 (Alito, J., dissenting).

260. Laurence H. Tribe, *Lawrence v. Texas: The “Fundamental Right” That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1898 (2004) (highlighting that the right to private intimacy between consensual adults is fundamental); see Gruberg, *supra* note 94 (explaining that the focus in *Obergefell* was based on the fundamental right of marriage).

261. See Gruberg, *supra* note 94 (“An extension of the Supreme Court’s finding in *Bostock* that sex necessarily includes sexual orientation and gender identity could also mean, then, that laws that target people based on sexual orientation or gender identity could be subject to heightened scrutiny.”); see also *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982) (“[T]he party seeking to uphold a statute that classifies individuals on the basis of their gender must carry the burden of showing an ‘exceedingly persuasive justification’ for the classification.” (quoting *Kirchberg v. Feenstra*, 450 U.S. 455, 461 (1981))).

262. “[C]ourts will sometimes refer to intermediate scrutiny by other names, such as ‘heightened scrutiny,’ or as ‘rational basis with bite.’” *Intermediate Scrutiny*, *supra* note 40.

263. See *Johnson v. California*, 543 U.S. 499, 505 (2004) (“Under strict scrutiny, the government has the burden of proving that racial classifications ‘are narrowly tailored measures that further compelling governmental interests.’” (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995))); see also *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (explaining strict scrutiny as applied to racial classifications); see also Ozan O. Varol, *Strict in Theory, but Accommodating in Fact?*, 75 MO. L. REV. 1243, 1245–46 (2010) (“As to its ends, the government must show a compelling interest in drawing a suspect classification or infringing on a fundamental right. As to its means, the government must prove that it adopted narrowly tailored means to achieve that compelling interest.”).

requires that the challenged law furthers an *important* government interest and that the means of the law must be *substantially* related to the interest.<sup>264</sup> Accordingly, applying *Bostock*'s holding that sex includes sexual orientation, the Court would analyze the Blood Ban's validity according to intermediate scrutiny. Though it is worth reiterating that the Court in *Bostock* defined sex as inclusive of sexual orientation only within the parameters of Title VII, this definition could be extended to include sexual orientation as part of gender in an equal-protection analysis.<sup>265</sup> As Justice Alito noted in his dissent:

Finally, despite the important differences between the Fourteenth Amendment and Title VII, the Court's decision may exert a gravitational pull in constitutional cases. Under our precedents, the Equal Protection Clause prohibits sex-based discrimination unless a "heightened" standard of review is met. By equating discrimination because of sexual orientation or gender identity with discrimination because of sex, the Court's decision will be cited as a ground for subjecting all three forms of discrimination to the same exacting standard of review.<sup>266</sup>

Thus, if what Justice Alito cautions proves true, the Blood Ban would be assessed under an intermediate scrutiny analysis.<sup>267</sup>

As such, intermediate scrutiny first asks whether the Blood Ban furthers an important government interest.<sup>268</sup> In *Craig v. Boren*, the Court stated that the protection of public health and safety is an important function of the government.<sup>269</sup> Similarly, the Court could logically find limiting the spread of the AIDS virus is an important government

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264. See *Intermediate Scrutiny*, *supra* note 40 (explaining intermediate scrutiny); see also *Craig v. Boren*, 429 U.S. 190, 197 (1976) (affirming that state law discriminating based on sex must serve "important governmental objectives and must be substantially related to achievement of those objectives" (citing *Reed v. Reed*, 404 U.S. 71, 75 (1971))); see also *Wexler*, *supra* note 41, at 56 ("The cat was out of the bag: a new equal protection standard had been born. The intermediate, or middle-tier, test was a compromise . . .").

265. See *Gruberg*, *supra* note 94 ("An extension of the Supreme Court's finding in *Bostock* that sex necessarily includes sexual orientation and gender identity could also mean, then, that laws that target people based on sexual orientation or gender identity could be subject to heightened scrutiny."); *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1783 (2020) (Alito, J., dissenting) (explaining that the *Bostock* majority's definition of gender to include sexual orientation under Title VII could be extended to equal-protection analyses and heightened scrutiny).

266. *Bostock*, 140 S. Ct. at 1783 (Alito, J., dissenting) (citing *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1689 (2017)).

267. *Id.*

268. See *Intermediate Scrutiny*, *supra* note 40 (explaining intermediate scrutiny); see also *Boren*, 429 U.S. at 197 (affirming that state law discriminating based on sex must serve "important governmental objectives and must be substantially related to achievement of those objectives" (citing *Reed v. Reed*, 404 U.S. 71, 75 (1971))).

269. *Boren*, 429 U.S. at 199–200.

objective.<sup>270</sup> But in light of *Boren* and prior rational-relationship justifications based on safety, it is unlikely that data would support a court's conclusion that sexual orientation-based discrimination is substantially related to achieving that objective.<sup>271</sup> The analysis of the relationship would rely on the science-based arguments, likely rendering the Ban unconstitutional under rational basis review, but a higher level of scrutiny could examine the validity of the policy even more closely.<sup>272</sup> The FDA justifies the Ban with the high statistical prevalence of HIV/AIDS among men who have sex with men.<sup>273</sup> Thus, using *Bostock's* inclusion of sexual orientation within sex, and extending it from Title VII to an equal-protection analysis under the Fourteenth Amendment, the statistical evidence must be substantially related to the objective.<sup>274</sup> The Court has repeatedly found that the use of statistics to justify burdening individuals of a certain gender insufficient to uphold discriminatory policies.<sup>275</sup>

For instance, in *Craig v. Boren*, the Court found that even though

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270. See Niezgoda, *supra* note 212, at 99 (discussing government's history of intervening to protect public health, especially regarding secondhand tobacco smoke).

271. See *Boren*, 429 U.S. at 200–04 (finding statistics that young men were more likely to be involved in a DUI-related crash than young women were insufficient to prohibit young men—but allow young women—to consume certain alcoholic drinks); *City of Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 709–10 (1978) (finding that using statistical evidence that women live longer than men was insufficient to require female employees to pay more into pension funds than male employees).

272. See Brian Soucek, *The Case of the Religious Gay Blood Donor*, 60 WM. & MARY L. REV. 1893, 1904 (2019) (noting some circuits apply heightened scrutiny to sexual orientation discrimination in equal-protection claims); see *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 474 (9th Cir. 2014) (holding heightened scrutiny applies to sexual orientation discrimination claims in the Ninth Circuit, prior to both the *Obergefell* (2015) and *Bostock* (2020) decisions).

273. See CTRS. FOR DISEASE CONTROL & PREVENTION, HIV AND GAY AND BISEXUAL MEN 1 (2020), <https://www.cdc.gov/hiv/pdf/group/msm/cdc-hiv-msm.pdf> [<https://perma.cc/GR4W-CLEE>] (noting that 69 percent of new HIV diagnoses in the United States and dependent areas were among gay men in 2018); see also Dwayne J. Bensing, Comment, *Science or Stigma: Potential Challenges to the FDA's Ban on Gay Blood*, 14 U. PA. J. CONST. L. 485, 500 (2011) (“The FDA defends the policy by stating the high HIV prevalence . . . in MSM men.”); see Mike Darling, *Banned for Life: Why Gay Men Still Can't Donate Blood*, NBC NEWS (July 14, 2013, 9:42 AM), <https://www.nbcnews.com/healthmain/banned-life-why-gay-men-still-cant-donate-blood-6c10622947> [<https://perma.cc/3WKM-B7JR>] (“The FDA classifies all gay men in the highest-risk blood-donor category—the same category as IV drug users and people who've spent more than five years since 1980 in a country that has mad cow disease.”).

274. Definitions or explanations under one statute can sometimes influence interpretation of other areas of law outside of the original statute. See *Emeldi v. Univ. of Oreg.*, 698 F.3d 715, 724 (9th Cir. 2012) (explaining that stating a sex-based retaliation claim under Title IX is analogous to the same claim under Title VII); see also *Boren*, 429 U.S. at 204 (discussing that the requirement for gender-based policies must be “substantially related to the achievement of the statutory objective”).

275. See *Boren*, 429 U.S. at 200–05; *Manhart*, 435 U.S. at 709 (explaining illegitimacy of using statistics to broadly discriminate against groups).



young men were more likely to be involved in drunk-driving traffic accidents than similarly aged women, Oklahoma could not prohibit these men from purchasing alcoholic beverages while allowing similarly aged women to purchase the same beverage.<sup>276</sup> The Court reasoned that although the statistics used by Oklahoma inarguably showed men (ages eighteen to twenty) were more likely to be arrested for alcohol-related driving offenses than women of the same age, this statistical probability alone could not justify sex-based discrimination.<sup>277</sup> The Court in *Boren* explained that the use of sex-based statistics to prove extensive sociological schemes was unequivocally opposed to the Equal Protection Clause's foundational principles.<sup>278</sup> In other words, the Court has found using statistics as the sole basis for discriminatory policies in direct tension with constitutional equal protection guarantees.<sup>279</sup> The FDA's use of HIV/AIDS statistics to defend the Blood Ban as the sole justification is analogous to Oklahoma's explanation in *Boren*.<sup>280</sup>

As noted in the rational basis discussion, the advanced and highly accurate testing of all donated blood to detect HIV would likely defeat any argument that the Blood Ban is still rational; however, under heightened scrutiny, an examination of the ineffectiveness of the current policy's implementation is germane as well.<sup>281</sup>

As it stands, the Blood Ban policy requires donors to answer screening questions.<sup>282</sup> Whomever is administering the blood donation must ask any male blood donor if he has had sexual contact with a male within the past three months.<sup>283</sup> There are three issues that most affect the rationality of this question, beyond its discriminatory nature and overall lack of

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276. *Boren*, 429 U.S. at 204 (finding the Oklahoma statute unconstitutional and a violation of the Equal Protection Clause of the Fourteenth Amendment); see Wexler, *supra* note 41, at 51–52 (explaining the holding of *Boren*).

277. *Boren*, 429 U.S. at 201 (explaining the statistics were not trivial but could not be employed for a sex-based policy).

278. “[P]roving broad sociological propositions by statistics is a dubious business, and one that inevitably is in tension with the normative philosophy that underlies the Equal Protection Clause.” *Id.* at 204.

279. The Court explained that the use of statistics to define an entire class, and thus, restrict its liberty is exactly what the Equal Protection Clause exists to protect against. *Id.*

280. See *id.* at 201 (“Even were this statistical evidence accepted as accurate, it nevertheless offers only a weak answer to the equal protection question presented here.”); see Bensing, *supra* note 273, at 500 (“The FDA defends the policy by stating the high HIV prevalence . . . in MSM men.”).

281. Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1328 (2007) (explaining that under higher scrutiny, statute's effectiveness must also be considered if it discriminates and an equally effective, but less discriminatory means could achieve the same goal).

282. See *Full Length Donor History Questionnaire (DHQ)*, *supra* note 225 (listing all the questions asked of prospective blood donors); REVISED RECS., *supra* note 6, at 7 (noting DHQ).

283. See *id.* (asking the donor specifically if he has “[h]ad sexual contact with another male”).

scientific support: 1) its redundancy,<sup>284</sup> 2) its over-inclusiveness,<sup>285</sup> and 3) its inefficacy.<sup>286</sup>

a. Redundancy of the Question's Goal

First and foremost, the question does not need to be asked because it is redundant in its goal.<sup>287</sup> The goal of this question, as the expression of the Blood Ban policy, is to prevent the spread of AIDS through the exclusion of high-risk individuals from donating blood and, thus, infecting the blood supply with HIV.<sup>288</sup> But among the other screening questions, the administrator must ask if the potential donor has had sexual contact with anyone who has HIV/AIDS or has tested positive for HIV/AIDS in the past three months.<sup>289</sup> Though the two questions are clearly different, the purpose is the same—identifying donors who should be ineligible to donate blood.<sup>290</sup> Though a gay man who has had sex with another man may have been unknowingly exposed to HIV, the same can be said of a heterosexual donor.<sup>291</sup> Therefore, the MSM question is redundant in its purpose and falls short of effectively contributing to the overall goal of mitigating the spread of HIV/AIDS.

b. Distinguishing “Gay Men” as a Class

Secondly, the question is not one about risky activity but instead about status and thus aimed at excluding an entire class of people.<sup>292</sup> Donors answer other questions like whether they have had sex with a prostitute, had a tattoo, had a body piercing, or had an organ transplant—all within

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284. See discussion *supra* Section V.A.1.a.

285. See discussion *supra* Section V.A.1.b.

286. See discussion *supra* Section V.A.1.c.

287. See REVISED RECS., *supra* note 6, at 2–7 (outlining the purpose and the current status of the FDA MSM policy); see Fallon, *supra* note 281, at 1328 (explaining that under heightened scrutiny, alternative options that are equally effective and less discriminatory must be considered).

288. See REVISED RECS., *supra* note 6, at 7 (“The following sections summarize the revised recommendations related to blood donor deferral and requalification related to reducing the risk of HIV transmission by blood and blood products.”).

289. See *Full Length Donor History Questionnaire (DHQ)*, *supra* note 225 (listing questions asked of prospective blood donors, including whether the donor has “[h]ad sexual contact with anyone who has HIV/AIDS or has had a positive test for the HIV/AIDS virus?”).

290. See REVISED RECS., *supra* note 6, at 7 (“The following sections summarize the revised recommendations related to blood donor deferral and requalification related to reducing the risk of HIV transmission by blood and blood products.”).

291. See McAdam & Parker, *supra* note 11, at 59 (explaining Blood Ban’s overinclusivity by admitting risky heterosexual donors).

292. See *id.* at 59 (“By categorically excluding gay men, the MSM policy is facially discriminatory. The ban does not apply to other high-risk groups, thus is not rationally related to its stated goal of protecting the nation’s blood supply. A ban that discriminates against a suspect class without commendable rationalization violates the Equal Protection Clause and should be deemed unconstitutional.”).

in the past three months.<sup>293</sup> The MSM question is distinct from the others because of its permanence.<sup>294</sup> All the other questions in this section of the screening address temporary activities that can reasonably be ceased, allowing the donor to become eligible after a certain period at any point in the potential donor's life. However, the MSM question singles out a class of people—gay men—and excludes them simply based on that status.<sup>295</sup> It is unreasonable to assume that a gay individual would abstain from sex for a period of time in the same way that an individual may abstain from getting a body piercing, receiving an organ transplant, or having sex with a prostitute for the same amount of time, thus permitting them to donate blood. Furthermore, the question does not consider the risk level of the gay man's sexual conduct and, instead, treats all gay sex as inherently risky. In other words, the question (and the policy) treats a gay man who has been tested for HIV and is in a monogamous, long-term relationship the same as it would treat a gay man who has unprotected sex with many sexual partners and who has not been tested for HIV.<sup>296</sup>

Even more significantly, the policy is hypocritical in that it treats the aforementioned gay man (HIV-negative and in a long-term, monogamous relationship) as a riskier donor than a heterosexual donor who engages in unprotected sex with many sexual partners and who also has not been tested for HIV.<sup>297</sup> Additionally, this MSM question remains unique on the blood donation screening for singling out a certain class of people.<sup>298</sup> There are no other questions that differentiate between groups based on race, sex, sexual orientation, sexual identity, nationality, or ethnicity who are disproportionately affected by HIV/AIDS.<sup>299</sup> Statistics show that certain racial and ethnic communities have a higher prevalence of

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293. See *Full Length Donor History Questionnaire (DHQ)*, *supra* note 225 (listing all questions asked of prospective blood donors); see generally REVISED RECS., *supra* note 6.

294. The Court has recognized the liberty of consensual sexual intimacy as integral to the fundamental rights of privacy and in relationships with other people. It is clear that the right to engage in consensual sexual activities has been found to be more integral and important to humans' fundamental rights and life than the ability to get a tattoo or piercing. See *Lawrence v. Texas*, 539 U.S. 558, 574 (2003) ("In explaining the respect the Constitution demands for the autonomy of the person in making these choices, we stated as follows: 'These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment.'" (quoting *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 851 (1992))).

295. See *McAdam & Parker*, *supra* note 11, at 58 ("The MSM ban targets all gay men, even those who practice safe sex, get tested regularly, and do not have an HIV infection.").

296. *Id.* ("[A] person does not get HIV/AIDS because he is gay, nor does a person only get HIV by having sex with a man. A person contracts HIV by participating in risky behavior. It does not matter if that person is gay or straight.").

297. *Id.* at 58–59.

298. See *Full Length Donor History Questionnaire (DHQ)*, *supra* note 225 (listing all questions asked of prospective blood donors).

299. *Id.*

HIV/AIDS when compared to the national average in the United States.<sup>300</sup> Though certain racial groups make up a disproportionate share of those infected with HIV/AIDS, the screening questions only differentiate between gay men and everyone else.<sup>301</sup> Overall, the question does not truly consider the riskiness of the sexual behaviors or conduct beyond donors' sexual orientation, thus revealing an overtly homophobic policy.

c. The Insubstantiality of the Question's Efficacy

Lastly, and perhaps most obviously, the screening question is irrational because its efficacy is uncertain.<sup>302</sup> The screening question assumes potential donors to be truthful with neither incentive nor threat of punishment.<sup>303</sup> Donating blood is an uncompensated act of good faith, so there is no incentive for donors to lie or to tell the truth, nor the ability for the blood bank or FDA to punish those who are not truthful in their screening questions.<sup>304</sup> Blood drives often take place at high schools, universities, and churches as a way for schools and organizations to help their communities.<sup>305</sup> Therefore, a gay man may feel uncomfortable

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300. See *HIV and AIDS in the United States of America (USA)*, AVERT (Oct. 10, 2019), <https://www.avert.org/professionals/hiv-around-world/western-central-europe-north-america/usa> [<https://perma.cc/N2ZQ-C4RF>] ("Stigma and discrimination continue to hamper people's access to HIV prevention as well as testing and treatment services, which fuels a cycle of new infections."); see also *id.* ("The HIV epidemic in the USA has impacted some groups more than others. These groups . . . can be grouped by transmission category (for example, men who have sex with men) but also by race and ethnicity, with people of colour having significantly higher rates of HIV infection over white Americans.").

301. See *Full Length Donor History Questionnaire (DHQ)*, *supra* note 225 (listing all questions asked of prospective blood donors).

302. A British study found that over 10 percent of men surveyed in a United Kingdom who had sex with other men had been noncompliant with the Ban. The study highlights that the reasons men violated the Ban and still donated blood while ineligible included the self-categorization of oneself as low risk, or discounting sexual experience that barred donation. Other reasons included the belief that screening safeguarded blood, a misunderstanding of the rule, the need for secrecy around sexual history, and rarely, resentment over inequity of the deferral. P. Grenfell et al., *Views and Experiences of Men Who Have Sex with Men on the Ban on Blood Donation: A Cross Sectional Survey with Qualitative Interviews*, U.S. NAT'L LIBR. OF MED. NAT'L INSTS. OF HEALTH (Sept. 8, 2011), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3168936/>; see Pulver, *supra* note 6, at 119 (explaining that people lie to donate blood or to avoid explaining to others why they cannot donate blood).

303. John Riley, *Blood Lies: Gay Men Who Lie to Donate Blood*, METRO WEEKLY (July 13, 2016), <https://www.metroweekly.com/2016/07/blood-lies-gay-men-lie-donate-blood/> [<https://perma.cc/T9ZL-HWN2>] (explaining the commonplace practice of gay, sexually-active men lying to donate blood for a variety of reasons).

304. *Id.*; see Shaw, *supra* note 6 (highlighting testimony that blood bank nurses do not know if blood donor is gay or is being honest).

305. Alexander Indrikovs, *The Pandemic Is Pushing Blood Supplies to the Brink*, U.S. NEWS &

answering this question truthfully if he fears that he is within earshot of his classmates, colleagues, or fellow parishioners.<sup>306</sup> Because stigma around homosexuality still exists, coupled with the typical location of blood drives and the lack of any authority by the blood banks, respondents may not answer truthfully.<sup>307</sup> As in *Craig v. Boren*, a policy's enforcement is also worth questioning.<sup>308</sup> In *Boren*, the Court noted that the challenged law did nothing to prevent a younger man from consuming the beverage he could not legally purchase as long as a female companion or an older male bought it for him.<sup>309</sup> The Blood Ban is a similar policy, in that its enforcement and posited effectiveness depend entirely upon the truthfulness of the donor; one gives blood on the honor system, so to speak.<sup>310</sup> Thus, the relationship between preventing the spread of AIDS and disclosing sexual orientation becomes increasingly tenuous under scrutiny, just as in *Boren*, the relationship between public safety and treating men and women differently was insufficiently close.

Though the ineffectiveness and problematic nature of the MSM question may not independently demonstrate that the Blood Ban policy is irrational, when considered with the overall discriminatory nature of the policy, as well as medical innovations in testing donated blood, the policy is not substantially related to the goal of mitigating the spread of HIV/AIDS.

### B. Health & Societal Impacts

One of the greatest quantifiable impacts that the abolition of the Blood Ban will have is to increase the available blood supply. The Williams Institute on Sexual Orientation and Gender Identity Law at the University

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WORLD REPORT (Nov. 11, 2020, 11:08 AM), <https://www.usnews.com/news/healthiest-communities/articles/2020-11-11/covid-19-is-pushing-us-blood-supplies-to-the-brink> [<https://perma.cc/7N87-6BYE>] (touching on the fact that blood supply dwindled as pandemic caused cancellations of blood drives at closed schools and churches).

306. See Riley, *supra* note 303 (highlighting why some Americans choose to donate blood despite being ineligible under the Blood Ban); see Grenfell, *supra* note 302 (listing the reasons why men had violated the Blood Ban in the United Kingdom and still donated blood, despite being prohibited from doing so).

307. See Riley, *supra* note 303 (explaining how stereotypes impact blood drive respondents).

308. See *Craig v. Boren*, 429 U.S. 190, 204 (1976) (highlighting the difficulty at enforcing the restriction to have any impact to the desire goals of the statute).

309. *Id.* (“In fact, when it is further recognized that Oklahoma’s statute prohibits only the selling of 3.2% beer to young males and not their drinking the beverage once acquired (even after purchase by their 18–20-year-old female companions), the relationship between gender and traffic safety becomes far too tenuous to satisfy *Reed*’s requirement that the gender-based difference be substantially related to achievement of the statutory objective.”).

310. See Riley, *supra* note 303 (highlighting why some Americans choose to donate blood despite being ineligible under the Blood Ban); see Grenfell, *supra* note 302 (listing the reasons why men had violated the Blood Ban in the United Kingdom and still donated blood, despite being prohibited from doing so).

of California Los Angeles estimated that if the ban were lifted, more than 600,000 additional pints of blood would be donated, resulting in aid to more than one million individuals.<sup>311</sup> This impact, especially during the blood shortage caused by the COVID-19 crisis, would be palpable.

The second greatest impact is that dismantling the Blood Ban would help decrease the stigma of being gay. Researchers have found that when there is less of a stigma around homosexuality and HIV, more people are likely to get tested for HIV.<sup>312</sup> Interestingly, an elimination of the policy may actually lead to a healthier populace because of the increase in donated blood as well as an increase in people knowing their HIV status and being able to take proactive measures to reduce its transmission and seek treatment. Ultimately, this policy is homophobic and has negatively impacted the morale and feelings of inclusion of individuals in the gay community. To want to help others by giving the gift of life, only to be denied based on your sexual orientation, is stigmatizing. The eradication of the policy would undoubtedly advance equality.

## VI. CONCLUSION

Since the ruling in *Romer v. Evans*, nearly forty years ago, the Court has continued to dismantle discriminatory laws and policies that have burdened homosexuals. Although it began with more basic protections and rights, such as prohibiting government discrimination against gays, barring the criminalization of consensual sex between gay adults, and the right to marry, the Court has since progressed to extending equal protection and fundamental rights in more nuanced rulings. The successes that the gay-rights movement has celebrated since the days of *Romer* and the original five young gay men mysteriously dying in Los Angeles cannot be understated. Nevertheless, the focus should now shift to eradicating the still-lingering archaic Gay Blood Ban.

This Comment argues the Gay Blood Ban has become untenable under either a rational basis or a heightened scrutiny standard of review. If rational basis is applied, the Blood Ban will fall short because of the progress made in science and technology—notably the advanced screening of donated blood to detect HIV and the growing adoption of PrEP to prevent the spread of HIV among gay men through sexual contact. More so, this Comment contends that under a higher standard of review—such as intermediate scrutiny—the Blood Ban will also fail.

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311. See Schnell & Morrison, *supra* note 145 (discussing lawmakers' advocacy for Blood Ban's repeal based on urgent need for blood donations during the coronavirus pandemic).

312. See *HIV and AIDS in the United States of America (USA)*, *supra* note 300 (explaining that HIV-related stigma, socially conservative communities, and low HIV-risk perception all serve as barriers to testing).

Using language from *Bostock*, if sexual orientation is to be defined as inextricably linked to “sex,” this would trigger heightened scrutiny analysis of the Blood Ban, and the discriminatory principles woven into the policy will be exposed and held unconstitutional.

It is time for the Blood Ban to be challenged or repealed as we continue to progress to a more equitable and fair society.