

**CONTINUING STIGMA: WHY THE FDA’S POLICY  
DEFERRING MEN WHO HAVE SEX WITH MEN  
FROM DONATING BLOOD IS UNCONSTITUTIONAL  
& A POOR POLICY CHOICE**

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## INTRODUCTION

Around 2 a.m. on June 12, 2016, a gunman entered the Pulse nightclub in Orlando, Florida, shooting and killing fifty people while wounding another fifty-three.<sup>1</sup> The shooting was, at the time, the worst mass shooting ever committed in the United States, and remains the deadliest attack on an LGBT-related group or target.<sup>2</sup> The massacre shook not only the LGBT community in Orlando, but the LGBT community around the globe as homophobia that many people hoped had been left behind in the 1980s and 1990s was brought back into the spotlight.<sup>3</sup> Because of the horrific nature of the shooting and the political climate, the response focused largely on homophobia, hate crimes, terrorism, fundamentalism, the right to bear arms, and gun control.<sup>4</sup> However, the Food & Drug Administration's (FDA) enforcement of a discriminatory regulation deferring men who have sex with men<sup>5</sup> from donating blood for one year after their most recent sexual encounter with another man was also brought back into the spotlight in the aftermath of the Pulse shooting.<sup>6</sup> As a result of this policy, a portion of the LGBT

1. Lizette Alvarez & Richard Pérez-Peña, *Orlando Gunman Attacks Gay Nightclub, Leaving 50 Dead*, N.Y. TIMES (June 12, 2016), <https://www.nytimes.com/2016/06/13/us/orlando-nightclub-shooting.html>.

2. *Id.*

3. See Keri Blakinger, *LGBTQ Activists, Advocates Express Outpouring of Grief on Social Media in Aftermath of Orlando Nightclub Shooting*, N.Y. DAILY NEWS (June 12, 2016, 6:29 PM), <http://www.nydailynews.com/news/national/lgbtq-activists-advocates-react-orlando-shooting-article-1.2670994>; Garance Franke-Ruta, *How America Got Past the Anti-Gay Politics of the '90s*, ATLANTIC (Apr. 8, 2013), <https://www.theatlantic.com/politics/archive/2013/04/how-america-got-past-the-anti-gay-politics-of-the-90s/266976/>.

4. See Blakinger, *supra* note 3; Eric Bradner, *Orlando Shooting Sparks Gun Control, Language Debates*, CNN, <https://www.cnn.com/2016/06/12/politics/orlando-shooting-gun-control-islamic-terrorism/index.html> (last updated June 12, 2016, 8:02 PM).

5. The FDA allows for self-identification and self-reporting of gender. *LGBTQ+ Donors*, AM. RED CROSS, <https://www.redcrossblood.org/donating-blood/lgbtq-donors> (last visited Apr. 6, 2019). This means that there is no distinction in the policy between cisgender men who have sex with men and transgender men who have sex with men. *See id.* There is no deferral period required based strictly on gender identity or for women (cisgender or transgender) who have sex with women. *Id.* There is also no deferral in place for transgender men, nor women who have sex with members of the opposite gender. *Id.* There is, however, also a deferral of one year in place for women who have had a sexual encounter with a man who has sex with men, which ultimately still discriminates men and incidentally impacts women. *Id.*; *Revised Recommendations for Reducing the Risk of Human Immunodeficiency Virus Transmission by Blood & Blood Product*, U.S. FOOD & DRUG ADMIN. (Jan. 9, 2018), <https://www.fda.gov/BiologicsBloodVaccines/BloodBloodProducts/QuestionsaboutBlood/ucm108186.htm>.

6. *Gay Men Still Unable to Donate Blood One Year After Pulse*, HEALTH NEWS FLA.

community was unable to give blood, preventing them from giving back and trying to help heal their community, though many men waited in line to donate anyway, hoping they would be able to help.<sup>7</sup> Activists described this feeling as horrible, ironic, and cruel, arguing that the deferral essentially means that men who have sex with men cannot have active sex lives if they plan to donate.<sup>8</sup> The deferral was again brought into the public discourse after the Route 91 shooting in Las Vegas, with some activists renewing calls for repeal so that men who have sex with men could help communities across the country in need of blood, whether it follows a tragedy or not.<sup>9</sup>

The one-year deferral period was a change from a lifetime ban that was in place from 1992 until late 2015 as a way, the FDA claimed, to protect the blood supply from HIV and other blood borne pathogens.<sup>10</sup> The deferral period, while admittedly not as severe as a lifetime ban, is still based on continuing stigma against the LGBT community at large.<sup>11</sup> Additionally, this one-year deferral amounts to what is essentially a lifetime ban for young, healthy men who have sex with men who would like to donate, but also generally have higher levels of testosterone and healthy libidos beyond their teens and twenties.<sup>12</sup> While these policies are technically different in terms of their actual wording, they are

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(June 22, 2017, 9:37 AM), <http://health.wusf.usf.edu/post/gay-men-still-unable-donate-blood-one-year-after-pulse#stream/0>.

7. Maggie Fox, *Are Gay Men Really Banned From Giving Blood?*, NBC NEWS, <https://www.nbcnews.com/storyline/orlando-nightclub-massacre/are-gay-men-really-banned-giving-blood-n591301> (last updated June 13, 2016, 2:40 PM); Alex Storer, *After Pulse Shooting, Gay Men Hope FDA Will Reevaluate Ban*, CENT. FLA. FUTURE (June 30, 2016), <http://www.centralfloridafuture.com/story/news/2016/06/30/after-pulse-shooting-gay-men-hope-fda-reevaluate-ban/86481080/>.

8. *'Horrible Irony': Gay Men Turned Away from Donating Blood After Orlando Shooting*, RT NEWS, <https://www.rt.com/usa/346422-gay-men-blood-orlando/> (last edited June 13, 2016, 12:08 PM); Nathan Kohrman, *Gay Men Wanted to Donate Blood in Orlando. They're Still Not Allowed To.*, MOTHER JONES (June 19, 2016, 10:00 AM), <https://www.motherjones.com/politics/2016/06/why-gay-men-couldnt-donate-blood-orlando/>.

9. Shira Karsen, *A 34-Year-Old FDA Ban on Gay Men Donating Blood Exists: Lance Bass Wants It Gone*, BILLBOARD (Oct. 11, 2017), <https://www.billboard.com/articles/news/lifestyle/7997566/lance-bass-gay-men-blood-donation-ban-exclusive>.

10. U.S. DEP'T OF HEALTH & HUM. SERVS., REVISED RECOMMENDATIONS FOR REDUCING THE RISK OF HUMAN IMMUNODEFICIENCY VIRUS TRANSMISSION BY BLOOD AND BLOOD PRODUCTS 2, 11 (2015), <https://www.fda.gov/downloads/BiologicsBloodVaccines/GuidanceComplianceRegulatoryInformation/Guidances/Blood/UCM446580.pdf>; see also Karsen, *supra* note 9.

11. HEALTH NEWS FLA., *supra* note 6; Karsen, *supra* note 9.

12. See Laurie L. Dove, *Do Men Hit Their Sexual Peak in Their 20s?*, HOWSTUFFWORKS (May 12, 2015), <https://health.howstuffworks.com/sexual-health/male-reproductive-system/do-men-hit-sexual-peak-in-20s.htm>.

constructively the same due to their impact on men who have sex with men.

Laws, like the FDA's one-year deferral policy, which discriminate based on sexual orientation, should be subject to heightened scrutiny under the Equal Protection Clause of the U.S. Constitution.<sup>13</sup> This is because the LGBT community, including men who have sex with men, have been historically discriminated against by both private citizens and the government.<sup>14</sup> The discrimination faced by the LGBT community throughout history, combined with the persistent stigma today and the current equal protection doctrine developed by the U.S. Supreme Court, lends itself to the assertion that laws discriminating on the basis of sexual orientation should receive a form of heightened scrutiny similar to laws that discriminate on the basis of gender.<sup>15</sup> Once analyzed using heightened scrutiny, it is clear that the one-year deferral period violates the Equal Protection Clause. This policy would not satisfy the requirements of heightened scrutiny as it is not substantially tailored to serve an important government interest when it categorically bans, for an entire year, all men who have sex with men without regard to whether they are actually engaging in risky sexual behavior from donating blood, and simultaneously allowing heterosexual people to donate regardless of any risky sexual behavior.<sup>16</sup>

The goal of this Note is to demonstrate that the FDA's deferral policy would fail heightened scrutiny, and so the FDA should be forced to demonstrate a compelling interest in order to create rules and regulations which discriminate based on sexual orientation. Previous scholarship has argued that the prior FDA policy of banning any man who had sexual contact with another man from donating blood violated the Equal Protection Clause.<sup>17</sup> No scholarship has looked at the idea that the FDA's change in policy, particularly in this age of scientific and

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13. See U.S. CONST. amend. XIV, § 1; *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015); *United States v. Windsor*, 570 U.S. 744, 754 (2013); *Lawrence v. Texas*, 539 U.S. 558, 567 (2003).

14. See, e.g., Rose Saxe, *It's Always Been About Discrimination for LGBT People*, ACLU (Dec. 1, 2017, 12:30 PM), <https://www.aclu.org/blog/lgbt-rights/lgbt-nondiscrimination-protections/its-always-been-about-discrimination-lgbt-people>.

15. See, e.g., *United States v. Virginia*, 518 U.S. 515, 534 (1996) (first quoting *Califano v. Webster*, 430 U.S. 313, 320 (1977); and then quoting *Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 289 (1987)); *Loving v. Virginia*, 388 U.S. 1, 8 (1967).

16. See *LGBTQ+ Donors*, *supra* note 5. As stated above, this policy also tangentially impacts women who have sex with men (if those men have sex with men as well), but not women who have sex with women nor men who have sex with women. *Id.*

17. E.g., Dwayne J. Bensing, Comment, *Science or Stigma: Potential Challenges to the FDA's Ban on Gay Blood*, 14 U. PA. J. CONST. L. 485, 495 (2011).

technological advancement, continues to violate the Equal Protection Clause despite being more lenient than the prior policy.

Part I provides an overview of historical discrimination against the LGBT community at large with particular focus on the stigma related to HIV/AIDS, while also providing context for how HIV is spread and the current HIV/AIDS research efforts. Part II looks to Supreme Court jurisprudence, arguing that despite some inconsistencies, the Court has utilized a heightened standard of review rather than rational basis review, like it claims, for equal protection and due process claims brought by members of the LGBT community. This is critical as rational basis is a highly deferential standard while heightened scrutiny, which requires a law to be substantially tailored to an important government interest, does not allow for as much deference to the legislature or in this case, the administrative agency. Part II perhaps most critically provides summary and analysis of previous equal protection and due process claims brought by members of the LGBT community against laws infringing on their rights.

Part III argues that under a heightened scrutiny standard, the FDA's one-year deferral fails because by deferring all men who have sex with men for a year, the regulation is not significantly tailored to meet the standard. Part III examines why animosity towards a particular group cannot be an important government interest, as determined by analogous case law, and thus concludes denying men who have sex with men the ability to donate blood is unconstitutional. Finally, Part IV argues that the one-year deferral policy does not adequately protect the blood supply from all people who could be infected with a blood borne pathogen and spread that pathogen via a blood transfusion. Part IV recommends that the FDA replace the deferral with a risk-based assessment that does not discriminate based upon sexual orientation, but instead discriminates based upon risky sexual and other behavior. This replacement policy would better protect the blood supply because risky sexual behavior knows no single sexual orientation or gender identity.<sup>18</sup>

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18. There is ample evidence, admittedly anecdotal, to support this proposition. *See, e.g.,* Michael Segalov, *For Gay Men Donating Blood, the Discrimination Isn't Over—Yet*, GUARDIAN (Jul. 24, 2017, 10:39 AM), <https://www.theguardian.com/commentis-free/2017/jul/24/gay-men-donating-blood-discrimination-sex-lgbt-equality> (discussing the author's heterosexual friends having sexual awakenings, sleeping around, and not being barred from donating blood, despite the potential for sexually transmitted infections).

## I. HISTORY

The original ban on donations from men who have sex with men originated during a time of great uncertainty surrounding HIV and AIDS (or gay-related immune deficiency as it was originally called).<sup>19</sup> Discrimination against gay men was rampant particularly during the late twentieth century, even as awareness about the disease increased.<sup>20</sup> Stigma surrounding HIV-positive people due to a lack of understanding about the disease, particularly how it could be spread and who could be infected, continued.<sup>21</sup> Doctors and nurses refused to treat patients, out of fear they would catch the disease.<sup>22</sup> While the uncertainty surrounding the disease in the early days was likely a constitutionally valid reason to implement such a ban, the uncertainty around treatment, testing, and how the disease is spread since that time has been significantly reduced,<sup>23</sup> rendering the ban unnecessary and an Equal Protection Clause violation.

*A. Testing and Research Have Changed Significantly Since the Original Ban Was Put into Place*

When the epidemic first began, no test existed to diagnose the disease and there was no way to treat the disease, manage symptoms, or prevent the disease.<sup>24</sup> The transmission methods were not understood—the only thing that researchers knew with certainty was that men who have sex with men made up most of those afflicted.<sup>25</sup> It took time, along with some infected newborns, women, and intravenous drug users, for doctors to understand that this was not only a gay disease, but a disease that could impact anyone who came in contact with bodily fluids (such as blood, semen, vaginal secretions, and breast milk) of an HIV-positive person.<sup>26</sup> The link between HIV and gay men had already been firmly engrained by the time it was discovered people other than men who have

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19. *History of HIV and AIDS Overview*, AVERT, [https://www.avert.org/professionals/history-hiv-aids/overview#footnote28\\_i1obry0](https://www.avert.org/professionals/history-hiv-aids/overview#footnote28_i1obry0) (last updated Mar. 9, 2018).

20. *See id.*

21. *See HIV Stigma and Discrimination*, AVERT, <https://www.avert.org/professionals/hiv-social-issues/stigma-discrimination> (last updated Apr. 9, 2018).

22. *See id.*; *see also* Olga Khazan, *When the Religious Doctor Refuses to Treat You*, ATLANTIC (Jan. 23, 2018), <https://www.theatlantic.com/health/archive/2018/01/when-the-religious-doctor-refuses-to-treat-you/551231/> (indicating a new Department of Health & Human Services rule could make it easier for doctors to refuse treatment on religious grounds, including based on their views related to LGBT people).

23. *See HIV Stigma and Discrimination*, *supra* note 21.

24. *See History of HIV and AIDS Overview*, *supra* note 19.

25. *Id.*

26. *See id.*; UCFS Ctr. for HIV Info., *How Do You Get (and Avoid Getting) HIV?*, HIV INSITE (Aug. 3, 2011), <http://hivinsite.ucsf.edu/hiv?page=basics-00-05>.

sex with men could become infected.<sup>27</sup>

HIV research has changed from the early days when the U.S. government spent less than two billion dollars annually on HIV research.<sup>28</sup> The U.S. government now, by contrast, spends over twenty-eight billion dollars per year on HIV-related research via multiple different federal departments and agencies, including Health and Human Services, the Center for Disease Control and Prevention, and the National Institutes of Health.<sup>29</sup> Additionally, billions of dollars are donated globally to advance research and advocacy through private charities such as the Henry J. Kaiser Family Foundation and the International AIDS Society.<sup>30</sup>

The first HIV tests were approved by the FDA in 1985 and could not detect a positive result until approximately six to twelve weeks post-infection, and sometimes would take even longer.<sup>31</sup> Now, people can use rapid at-home tests that can detect the HIV virus about two weeks after infection, sometimes even less, and with a much-reduced rate of false positives.<sup>32</sup> This means that it could have previously taken over three months, maybe even more, to obtain an accurate result, and now people can confirm their HIV status within days following a possible infection.<sup>33</sup> The reduced time to diagnose HIV means that the chances of a latent HIV-positive person donating before a positive result can be obtained is highly reduced.<sup>34</sup> These technological advancements have led many in the scientific and political communities to call for the repeal of the FDA's deferral of men who have sex with men from blood donation, and to be replaced by a risk-based assessment that does not focus on sexual orientation, but rather, risky behavior performed by a member of any

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27. GAY MEN'S HEALTH CRISIS, A DRIVE FOR CHANGE: REFORMING U.S. BLOOD DONATION POLICIES 6 (Sean Cahill, Nathan Schaefer, & John A. Guidry eds., 2010), [http://www.gmhc.org/files/editor/file/a\\_blood\\_ban\\_report2010.pdf](http://www.gmhc.org/files/editor/file/a_blood_ban_report2010.pdf).

28. TODD SUMMERS & JENNIFER KATES, TRENDS IN U.S. GOVERNMENT FUNDING FOR HIV/AIDS: FISCAL YEARS 1981 TO 2004, at 2 (Mar. 2004), <https://kaiserfamilyfoundation.files.wordpress.com/2013/01/issue-brief-trends-in-u-s-government-funding-for-hiv-aids-fiscal-years-1981-to-2004.pdf>.

29. *Federal Domestic HIV/AIDS Programs & Research Spending*, HIV.GOV, <https://www.hiv.gov/federal-response/funding/budget> (last updated Mar. 11, 2019).

30. *Global HIV/AIDS Organizations*, HIV.GOV, <https://www.hiv.gov/federal-response/pepfar-global-aids/global-hiv-aids-organizations> (last updated July 2, 2018).

31. Thomas S. Alexander, *Human Immunodeficiency Virus Diagnostic Testing: 30 Years of Evolution*, 23 CLINICAL & VACCINE IMMUNOLOGY 249, 249 (2016).

32. *Id.* at 251–52.

33. *See id.* at 249.

34. *See id.*

group.<sup>35</sup>

*B. LGBT People Have Been Subject to Discrimination for Reasons Other Than Their Association with HIV/AIDS*

HIV and AIDS have not been the only focus of discrimination and stigma related to men who have sex with men and the LGBT community at large. Laws banning marriage between members of the same sex, sodomy performed by members of the same sex, and laws preventing anti-discrimination measures are just some of the ways that this community has felt the sting of discrimination.<sup>36</sup> Many states, although rendered unenforceable by Supreme Court decisions,<sup>37</sup> still have laws on the books banning sodomy and same-sex marriage.<sup>38</sup> Additionally, LGBT people are continually harassed in public and, in extreme cases, are associated with pedophilia and bestiality in public discourse.<sup>39</sup> LGBT students are disproportionately harassed when compared to their non-LGBT peers, and the LGBT community at large faces an ever-present danger of hate crimes.<sup>40</sup>

Until “Don’t Ask, Don’t Tell” was repealed in 2011, gay, lesbian, and bisexual members of the armed forces were not allowed to serve openly in the armed forces.<sup>41</sup> Some would argue, perhaps convincingly, that transgender members of the military are still not truly allowed to serve openly in the military, as a result of President Donald Trump’s

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35. Letter from Tammy Baldwin et al., U.S. Senators, to Hon. Robert M. Califf, MD, Comm’r, U.S. Food & Drug Admin. (June 20, 2016), <https://www.baldwin.senate.gov/imo/media/doc/6.20.16%20Letter%20to%20FDA%20on%20MSM%20Blood%20Ban.pdf>.

36. See Minh T. Nguyen, *Civil Rights—The History of Gay Rights*, MINH T. NGUYEN (1999), <http://www.enderminh.com/minh/civilrights.aspx#.Wm41hjdG1PY>.

37. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607–08 (2015); *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

38. *12 States Still Ban Sodomy a Decade After Court Ruling*, USA TODAY (Apr. 21, 2014, 6:42 PM), <https://www.usatoday.com/story/news/nation/2014/04/21/12-states-ban-sodomy-a-decade-after-court-ruling/7981025/>; Faith Karimi & Michael Pearson, *The 13 States that Still Ban Same-Sex Marriage*, CNN, <https://www.cnn.com/2015/02/13/us/states-same-sex-marriage-ban/index.html> (last updated Feb. 13, 2015, 1:13 PM).

39. Paul Crossley et al., *Pride, Prejudice, and Punishment: Gay Rights Around the World*, ABC NEWS (Nov. 14, 2017), <https://www.abc.net.au/news/2017-03-04/gay-lesbian-mardi-gras-rights-around-the-world/8126828>; Nguyen, *supra* note 36.

40. Jordan Dashow, *New FBI Data Shows Increased Reported Incidents of Anti-LGBTQ Hate Crimes in 2016*, HUM. RTS. CAMPAIGN (Nov. 13, 2017), <https://www.hrc.org/blog/new-fbi-data-shows-increased-reported-incidents-of-anti-lgbtq-hate-crimes-i>; Marissa Higgins, *LGBT Students Are Not Safe at School*, ATLANTIC (Oct. 18, 2016), <https://www.theatlantic.com/education/archive/2016/10/school-is-still-not-safe-for-lgbt-students/504368/>.

41. Elisabeth Bumiller, *Obama Ends ‘Don’t Ask, Don’t Tell’ Policy*, N.Y. TIMES (July 22, 2011), <https://www.nytimes.com/2011/07/23/us/23military.html>.



tweets in regard to their service.<sup>42</sup> These are just some of the many ways that LGBT people remain vulnerable members of our society, which is one of the ways judges and justices determine if a particular group warrants heightened scrutiny under the Equal Protection Clause.

## II. HEIGHTENED SCRUTINY SHOULD APPLY TO LAWS DISCRIMINATING ON THE BASIS OF SEXUAL ORIENTATION

In its recent jurisprudence, the Supreme Court has not specifically articulated the scrutiny level<sup>43</sup> to be utilized when analyzing an equal protection claim brought by a member of the LGBT community.<sup>44</sup> While the Supreme Court has not delineated a higher scrutiny level for LGBT equal protection claims, lower federal courts have used heightened scrutiny for these and other claims related to LGBT discrimination.<sup>45</sup> However, in recent history, laws discriminating against LGBT people consistently have been struck down by the Supreme Court under an increasingly heightened—if not always clear—scrutiny standard. Most recently, Justice Anthony Kennedy, writing for the majority, struck down a ban on gay marriage in *Obergefell v. Hodges*.<sup>46</sup> Cases have also struck down laws banning LGBT protections in housing and other areas,<sup>47</sup> outlawing same-sex sodomy,<sup>48</sup> and charging widows of same-sex spouses an estate tax not charged of those in opposite-sex marriages.<sup>49</sup> Additionally, the LGBT community is viewed as a viable candidate for

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42. See Abby Phillip et al., *Trump Announces that He Will Ban Transgender People from Serving in the Military*, WASH. POST (July 26, 2017), [https://www.washingtonpost.com/world/national-security/trump-announces-that-he-will-ban-transgender-people-from-serving-in-the-military/2017/07/26/6415371e-723a-11e7-803f-a6c989606ac7\\_story.html?noredirect=on&utm\\_term=.00d64a013072](https://www.washingtonpost.com/world/national-security/trump-announces-that-he-will-ban-transgender-people-from-serving-in-the-military/2017/07/26/6415371e-723a-11e7-803f-a6c989606ac7_story.html?noredirect=on&utm_term=.00d64a013072).

43. The Equal Protection Clause of the Fourteenth Amendment has been consistently interpreted to require different levels of judicial scrutiny depending on the law at issue, any vulnerable population that is targeted with the law, and any rights that are infringed upon by the law. James W. Ellis, *On the Usefulness of Suspect Classifications*, 3 CONST. COMMENT. 375, 382 (1986). Laws that discriminate on the basis of gender have received a heightened scrutiny review, requiring an important governmental interest and that the law is substantially tailored to that interest. *Id.* at 383; Maxwell L. Stearns, *Obergefell, Fisher, and the Inversion of Tiers*, 19 U. PA. J. CONST. L. 1043, 1063–64 (2017). Race and fundamental rights receive strict scrutiny, which require a compelling governmental interest and a law that is narrowly tailored to that interest. Stearns, *supra* at 1049–50. The Court has not been clear about where LGBT related laws fall in this scheme. See Stearns, *supra* at 1101.

44. Bensing, *supra* note 17, at 497.

45. See, e.g., *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 484 (9th Cir. 2014).

46. 135 S. Ct. 2584, 2608 (2015).

47. *Romer v. Evans*, 517 U.S. 620, 635–36 (1996).

48. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

49. *United States v. Windsor*, 570 U.S. 744, 749–52 (2013).

heightened scrutiny under the factors outlined in the *City of Cleburne v. Cleburne Living Center* dissent, which include the class involved, rights impacted, and a history of discrimination.<sup>50</sup>

While the Supreme Court has acknowledged that this is not a guarantee that a group will receive heightened scrutiny, the Justices have been developing powerful precedent that these factors can be used to determine which groups warrant this level of constitutional protection.<sup>51</sup> The LGBT community satisfies all three factors, and when taken along with some critical cases, it is clear that the Supreme Court has been utilizing a form of scrutiny more exacting than rational basis—i.e., heightened (or intermediate) scrutiny—when analyzing equal protection claims brought by members of the LGBT community.<sup>52</sup> It is useful to first look to cases decided relating to women’s rights and discrimination against women in order to determine the standard used in cases that require heightened scrutiny due to the similarities in discrimination faced by women and LGBT people.<sup>53</sup>

#### *A. Gender Discrimination Cases Provide Framework for Heightened Scrutiny*

It has been established in cases involving discrimination based on gender that courts must use heightened scrutiny, rather than rational basis review, meaning that laws discriminating on the basis of gender must “serve important governmental objectives and must be substantially related to achievement of those objectives.”<sup>54</sup> The law at issue in *Craig v. Boren* allowed females to buy non-intoxicating<sup>55</sup> beer at the age of eighteen, while males could not buy any beer until they turned twenty-one.<sup>56</sup> The Court began its analysis by stating that “archaic and overbroad” generalizations would not suffice to satisfy this heightened scrutiny test.<sup>57</sup> The Court did not look kindly upon statistics alone cited

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50. See 473 U.S. 432, 464 (1985) (Marshall, J., dissenting).

51. See *Obergefell*, 135 S. Ct. at 2593, 2595–96; *Windsor*, 570 U.S. at 770; *Lawrence*, 539 U.S. at 578; *Romer*, 517 U.S. at 633 (quoting *Louisville Gas & Electric Co. v. Coleman*, 277 U.S. 32, 37–38 (1928)) (citing *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 181 (1980)).

52. See *Obergefell*, 135 S. Ct. at 2593, 2595–96; *Windsor*, 570 U.S. at 770; *Lawrence*, 539 U.S. at 578; *Romer*, 517 U.S. at 633 (quoting *Louisville Gas & Electric*, 277 U.S. at 37–38) (citing *Fritz*, 449 U.S. at 181).

53. See *Craig v. Boren*, 429 U.S. 190, 197 (1976) (quoting *Reed v. Reed*, 404 U.S. 71, 75 (1971)).

54. *Id.* (quoting *Reed*, 404 U.S. at 75).

55. This amounts to approximately 3.2% alcohol by volume according to the Oklahoma statute. *Id.* (first citing OKLA. STAT. tit. 15, § 13 (1972); and then citing OKLA. STAT. tit. 37, 241, 245 (1972)).

56. *Id.* at 192.

57. *Id.* at 198–99 (quoting *Schlesinger v. Ballard*, 419 U.S. 498, 508 (1975)).

by Oklahoma in support of their law that men were more likely than women to drink and drive, and thereby endanger other drivers and themselves.<sup>58</sup> Oklahoma's law discriminating based on gender was therefore struck down as invidious discrimination after the Court once again stated that "loose-fitting generalities" would not suffice under this more exacting, heightened scrutiny standard.<sup>59</sup> "Loose-fitting generalities" and invidious discrimination allow for parallels to be drawn between the gender discrimination lineage and the still-developing line of cases dealing with LGBT rights, as both groups have dealt with similar historical discrimination.<sup>60</sup>

More recently, the Court has dealt with the question of gender discrimination in educational opportunities provided only to men and not to women at the Virginia Military Institute (VMI).<sup>61</sup> Virginia operated VMI to train "citizen-soldiers" to be leaders in both civilian and military life.<sup>62</sup> VMI, at the time of the suit, had a very powerful alumni base including generals, politicians, and business people.<sup>63</sup> VMI also maintained the highest per-student endowment of any public college in America.<sup>64</sup> The Court decided that the Equal Protection Clause prevented Virginia from continuing to only offer these educational opportunities to men and not to women.<sup>65</sup> The Court noted that in order to pass heightened scrutiny, any gender classification must "demonstrate an 'exceedingly persuasive justification.'"<sup>66</sup> Justice Ruth Bader Ginsburg stated that government action was not compatible with the Equal Protection Clause if it denied women the right to "contribute to society" simply because of their gender.<sup>67</sup> Ginsburg further noted that qualified women could not be denied a high quality education like that offered at VMI due to Virginia's obligation to provide them with equal protection under its laws.<sup>68</sup> Parallels can be drawn between Virginia denying specific education to women based on their gender and states outlawing same-sex marriage,

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58. *Craig*, 429 U.S. at 200–01.

59. *Id.* at 208–10.

60. *See id.*; *see also* *Obergefell v. Hodges*, 135 S. Ct. 2584, 2597 (2015) (citing *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 864–68 (8th Cir. 2006)); *United States v. Windsor*, 570 U.S. 744, 770 (2013); *Lawrence v. Texas* 539 U.S. 558, 564 (2003).

61. *United States v. Virginia*, 518 U.S. 515, 519–20 (1996).

62. *Id.* at 520.

63. *Id.*

64. *Id.*

65. *Id.* at 519.

66. *Virginia*, 518 U.S. at 531 (quoting *J.E.B. v. Ala. ex rel. T.B.* 511 U.S. 127, 136 (1994)).

67. *Id.* at 532 (citing *Kirchberg v. Feenstra*, 450 U.S. 455, 462–63 (1981)).

68. *See id.* at 557.

same-sex sodomy, and denying tax benefits based on type of marriage, which allow the developed law in gender discrimination equal protection to be useful as a framework for LGBT discrimination cases.<sup>69</sup>

*B. Previous Cases Dealing with LGBT Discrimination Use More Exacting Scrutiny than Rational Basis*

Although the Supreme Court has been less than clear about what scrutiny should apply to laws discriminating against the LGBT community, the Justices have dropped hints through a line of cases dealing with LGBT discrimination in various forms. The first case in that line, *Romer v. Evans*, dealt with an amendment to the Colorado State Constitution, which prevented any protection from discrimination on the basis of sexual orientation.<sup>70</sup> The amendment stated that no political entity within Colorado could enact a statute, which protected “homosexual, lesbian or bisexual orientation, conduct, practices or relationships.”<sup>71</sup> The Supreme Court relied on the “sweeping and comprehensive” nature of the law in striking it down.<sup>72</sup> Further, the Court looked to the broad language utilized and the possible consequences of the law.<sup>73</sup>

Justice Kennedy claimed to be applying rational basis review, merely looking for a rational relation between the means utilized in the law and the ends.<sup>74</sup> Typically, under this form of review, the legislature is afforded the most deference; however, this does not seem to be the case here as Justice Kennedy did not find any rational basis for the law,<sup>75</sup> despite multiple rational bases being brought up by the dissent.<sup>76</sup> Instead of accepting any of the reasons provided for the law, Justice Kennedy went on to state that “[a] state cannot so deem a class of persons a stranger to its laws” and proceeded to determine that a law that singles out one particular group of people cannot stand under the Fourteenth Amendment.<sup>77</sup> Despite claiming he applied rational basis, commentators have looked at this decision as using a seemingly heightened level of scrutiny, as Justice Kennedy ignored multiple “rational bas[es]” for the

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69. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2597 (2015) (citing *Citizens for Equal Prof. v. Bruning*, 455 F.3d 859, 871 (8th Cir. 2006)); *United States v. Windsor*, 570 U.S. 744, 770 (2013); *Lawrence v. Texas*, 539 U.S. 558, 564 (2003).

70. 517 U.S. 620, 624 (1996) (citing COLO. CONST. art. II, § 30b).

71. *Id.* (citing COLO. CONST. art. II, § 30b).

72. *Id.* at 627.

73. *Id.* at 630 (citing COLO. REV. STAT. § 24-4-106(7) (1988)).

74. *Id.* at 631 (citing *Heller v. Doe*, 509 U.S. 312, 319–20 (1993)).

75. See *Romer*, 517 U.S. at 635.

76. See *id.* at 640 (Scalia, J., dissenting).

77. See *id.* at 635.

law provided by Justice Antonin Scalia.<sup>78</sup>

More recently, the Court struck down a Texas statute, which criminalized same-sex sodomy which some have seen as a true shift in doctrine.<sup>79</sup> *Lawrence v. Texas*, another Justice Kennedy-penned majority opinion, is viewed as the seminal LGBT rights case, shifting how LGBT rights are seen in courts throughout America.<sup>80</sup> Justice Kennedy revisited his holding from *Romer*, reminding us that laws “born [out] of animosity toward the class of persons affected” cannot stand under the Fourteenth Amendment.<sup>81</sup> Justice Kennedy further noted that laws criminalizing homosexual behavior “demeans the lives of homosexual persons.”<sup>82</sup> As in his *Romer* decision, Justice Kennedy required more than a rational basis as Justice Scalia pointed out in his dissent.<sup>83</sup> Justice Sandra Day O’Connor noted in her concurrence that a law labeling one group of people based on “moral disapproval” was unacceptable in light of constitutional norms and the Equal Protection Clause.<sup>84</sup>

While criminal laws, like the law at issue in *Lawrence*, are significantly more serious in terms of consequences than a deferral for blood donations, there are related issues at play. For example, both are arguably a governmental judgment on a person’s private sexual choices.<sup>85</sup> The two laws are also comparable in that they advance a dangerous stigma about LGBT people; Justice Kennedy took this possibility seriously in his *Lawrence* opinion, looking disapprovingly on laws that demean a particular group of people.<sup>86</sup> Additionally, the Texas statute at issue in *Lawrence* did not ban sodomy performed by heterosexual couples,<sup>87</sup> similar to the FDA’s deferral applying only to men who have sex with men and not the vast majority of heterosexual people. The Texas statute did nothing to prevent sodomy amongst heterosexual people, as the deferral does nothing to protect the blood supply from risky sexual

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78. *See id.* at 640 (Scalia, J., dissenting).

79. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003); Bensing, *supra* note 17, at 496.

80. *See* Bensing, *supra* note 17, at 496.

81. *Lawrence*, 539 U.S. at 574 (quoting *Romer*, 517 U.S. at 634).

82. *Id.* at 575.

83. *Id.* at 599 (Scalia, J., dissenting) (quoting *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986)) (arguing that rational bases do exist for the Texas anti-sodomy statute—such as the state furthering the belief that the sexual behavior was immoral and unacceptable—and noting that the “majoritarian sexual morality” is in fact a rational state interest).

84. *Id.* at 583 (O’Connor, J., concurring) (quoting *Romer*, 517 U.S. at 633).

85. *See id.* at 567.

86. *See* 539 U.S. at 567.

87. *See* TEX. CODE. ANN. § 21.06(a) (2017), *invalidated by Lawrence v. Texas*, 539 U.S. 588 (2003).

behavior performed by heterosexual people.<sup>88</sup>

Further, a federal law defining marriage as between a man and a woman for tax and other purposes was struck down.<sup>89</sup> The Defense of Marriage Act, although challenged in the context of an estate,<sup>90</sup> defined marriage as “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 wife” in over 1,000 federal laws,<sup>91</sup> so it had a very expansive reach. Here, in another opinion written by Justice Kennedy, the Court reminds us that the equal protection and due process jurisprudence is applicable to the federal government via the Fifth Amendment, which is important for a case involving federal marriage benefits as well as a regulation promulgated by a federal agency like the one-year deferral.<sup>92</sup> The Court clarified that “‘a bare congressional desire to harm a politically unpopular group cannot’ justify disparate treatment of that group.”<sup>93</sup> Here again, Justice Kennedy purports to use a rational basis review by looking for a legitimate purpose and utilizing the bare desire to harm standard, which originated in other rational basis cases.<sup>94</sup> However, he once again declined to acknowledge the rational bases put forth by Justice Scalia and other justices in the dissents.<sup>95</sup>

The Supreme Court has also struck down state same-sex marriage bans, without making the legal basis entirely clear.<sup>96</sup> In *Obergefell*, Justice Kennedy began his analysis by quoting the Fourteenth Amendment and further observed that in order for laws to be upheld under the Fourteenth Amendment, they cannot infringe upon liberties “central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs.”<sup>97</sup> He further stated that same-sex couples and opposite-sex couples enjoyed the same rights of intimate association.<sup>98</sup> While Justice Kennedy focused his *Obergefell* analysis on fundamental rights and due process, he did indicate that there is overlap

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88. See *Lawrence*, 539 U.S. at 582 (O’Connor, J., concurring); GAY MEN’S HEALTH CRISIS, *supra* note 27, at 12.

89. *United States v. Windsor*, 570 U.S. 744, 752 (2013) (quoting 1 U.S.C. § 7 (2012)).

90. *Id.* at 750–51.

91. 1 U.S.C. § 7, *invalidated by* *United States v. Windsor*, 570 U.S. 744 (2013).

92. *Windsor*, 570 U.S. at 774.

93. *Id.* at 770 (quoting *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534–35 (1973)).

94. See *id.* (quoting *Moreno*, 413 U.S. at 534–35).

95. See *id.* at 795 (Scalia, J., dissenting).

96. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607–08 (2015).

97. *Id.* at 2597–98 (quoting U.S. Const. amend. XIV, § 1) (first citing *Duncan v. Louisiana*, 391 U.S. 145, 147–49 (1968); and then citing *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972)).

98. *Id.* at 2600 (citing *Lawrence v. Texas*, 539 U.S. 558, 568 (2003)).

between the jurisprudence in equal protection and due process doctrines and that a gay person's right to marry someone of the same sex also stems from the Equal Protection Clause in the Fourteenth Amendment.<sup>99</sup> Justice Kennedy continually utilized the word "immutable," which is frequently part of the analysis when determining if a classification is suspect.<sup>100</sup>

While donating blood is not a fundamental right like the right to marriage,<sup>101</sup> in the case of the one-year deferral of men who have sex with men it implicates the same intimate association that is at issue in a marriage case.<sup>102</sup> The ability to make "intimate choices that define personal identity and beliefs" without governmental interference is again at issue in both marriage and the deferral, which makes the deferral suspect just like a ban on same-sex marriage.<sup>103</sup>

### III. THE DEFERRAL VIOLATES THE EQUAL PROTECTION CLAUSE

The deferral policy categorically prevents all men who have sex with men from donating blood for a year following their most recent sexual encounter, without regard to the risky sexual behaviors actually performed.<sup>104</sup> The deferral does not meet the heightened scrutiny standard of an important governmental interest that is substantially tailored to that interest.<sup>105</sup> Celibacy for a year is a harsh condition to place on men who have sex with men, and is something that would likely never be imposed on heterosexual men or women, even though everyone who engages in risky sexual activity—which is engaged in by people of all genders and sexual orientations—is at risk for HIV.<sup>106</sup>

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99. *See id.* at 2602–03.

100. Ian Millhiser, *Here Is the Single Most Important Word In Today's Historic Marriage Equality Opinion*, THINK PROGRESS (June 26, 2015, 4:02 PM), <https://thinkprogress.org/here-is-the-single-most-important-word-in-todays-historic-marriage-equality-opinion-6154e564a834/>.

101. *Obergefell*, 135 S. Ct. at 2604.

102. *See* Kohrman, *supra* note 8.

103. *See Obergefell*, 135 S. Ct. at 2597 (citing *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972)).

104. U.S. FOOD & DRUG ADMIN., REVISED RECOMMENDATIONS FOR REDUCING THE RISK OF HUMAN IMMUNODEFICIENCY VIRUS TRANSMISSION BY BLOOD AND BLOOD PRODUCTS 14 (2015), <https://www.fda.gov/downloads/biologicsbloodvaccines/guidancecomplianceregulatoryinformation/guidances/blood/ucm446580.pdf>.

105. *See id.*; Berkman, Note, *Fulfilling the Full Promise of Liberty Made in Lawrence v. Texas: Using the Fundamental Right to Sexual Intimacy to Challenge the FDA's Policy Against Blood Donations from Men Who Have Sex with Men*, 20 N.Y.U. J. LEGIS. & PUB. POL'Y 827, 872 (2018); *cf. Obergefell*, 135 S. Ct. at 2602.

106. *Sexual Risk Behaviors: HIV, STD, & Teen Pregnancy Prevention*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/healthyouth/sexualbehaviors/> (last updated June 14, 2018). Statistics do show that LGBT youth, particularly men who have sex with men, are at higher risk than their heterosexual counterparts of serious health outcomes

*A. Deferral Is Unnecessary Based Upon Other FDA Regulations and Current Scientific Knowledge*

The FDA has other policies in place to prevent blood contaminated with blood borne pathogens from reaching patients, which renders this policy unnecessary and further supports the claim that animus is the reason for the deferral. All blood donated in the United States has to be tested for blood borne pathogens, such as HIV, without regard to any characteristic of the donor.<sup>107</sup> This is important because it means that cost is not a reason to support the policy as even donations from people other than men who have sex with men must be tested, supporting the idea that animus motivates the policy.<sup>108</sup>

Additionally, science does not support a twelve-month deferral period, which is evidence that the policy remains in place due to animus and stigma left over from the AIDS epidemic and an unending association between men who have sex with men with HIV. There are three main tests used to detect HIV.<sup>109</sup> Antibody tests are designed to test for HIV antibodies in blood or saliva and can take anywhere from three to twelve weeks to detect HIV because these tests require a person to have produced a threshold number of antibodies, which vary person to person.<sup>110</sup> Antibody tests, at least those utilizing saliva, are widely accessible and relatively inexpensive at local pharmacies for in-home use.<sup>111</sup>

Another test used is the combination antibody/antigen test, which looks for both HIV antibodies and antigens so it can detect HIV sooner—within approximately two to six weeks—however, these must be performed in a lab.<sup>112</sup>

The third commonly used test is the nucleic acid test, which tests for nucleic acids produced by an HIV infection and can detect HIV in as little

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like HIV diagnosis. *Id.* However, this does not mean that all men who have sex with men are at higher risk nor that there is no risk for heterosexual people as young people, of all sexual orientations, accounted for twenty-one percent of new HIV diagnoses in the United States in 2016. *Id.*

107. 21 C.F.R. § 610.40(a)(1) (2018).

108. See *Blood FAQ*, AABB, <http://www.aabb.org/tm/Pages/bloodfaq.aspx> (last visited Apr. 6, 2019).

109. *HIV Overview*, AIDSINFO, <https://aidsinfo.nih.gov/understanding-hiv-aids/factsheets/19/47/hiv-testing> (last updated Oct. 31, 2018).

110. *Id.*; *HIV Test Window Periods*, S.F. AIDS FOUND., <http://www.sfaf.org/hiv-info/testing/hiv-test-window-periods.html> (last visited Apr. 6, 2019).

111. See *HIV Overview*, *supra* note 109; *Testing*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/hiv/basics/testing.html> (last updated Oct. 31, 2018).

112. *HIV Overview*, *supra* note 109; *HIV Test Window Periods*, *supra* note 110.



as seven to twenty-eight days after exposure.<sup>113</sup> The nucleic acid tests are admittedly the most expensive HIV test and therefore not utilized as frequently as the other two tests, although research is advancing daily so these tests may be cheaper and more accessible in the future, making them a more viable option.<sup>114</sup>

Although the science may not support a deferral as low as seven days, it is clear that HIV testing has advanced enough that a twelve-month deferral is unnecessary to protect the blood supply, and arbitrary due to the vast disparity between the latent infection period and the actual deferral put into place.<sup>115</sup> The advancements in testing, treatment, and prevention have allowed for a reduction in risk of HIV transmission via a blood transfusion from one in 2500 to one in 1.5 million.<sup>116</sup>

*B. The Deferral Singularly Denies Blood Donation Benefits to Men Who Have Sex with Men*

The deferral prevents men who have sex with men from reaping the benefits of blood donation, both physical and emotional. There is research that indicates that the risk of heart attacks and strokes are reduced by blood donation, as well as a general improvement in cardiac health and allowing for maintenance of a healthy iron level.<sup>117</sup> Blood donation has also been linked to a reduction in cancer risk due to the removal of extra iron in the blood, which may decrease free-radical damage throughout the body, a factor which has been linked to cancer.<sup>118</sup> Although not recommended as a weight loss plan, blood donation can burn up to 650 calories per donation.<sup>119</sup> The sense of significance felt following a blood donation has also been documented, and is an additional benefit denied to men who have sex with men.<sup>120</sup> The American Red Cross even solicits blood donations by appealing to the need to contribute to society and

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113. *HIV Testing Overview*, HIV.GOV, <https://www.hiv.gov/hiv-basics/hiv-testing/learn-about-hiv-testing/hiv-testing-overview> (last updated May 14, 2018).

114. *Id.*

115. *See id.*; Alexander, *supra* note 31, at 252.

116. Rachel Laufer, *Opening up Blood Donations to Sexually Active Gay Men Could Save Millions*, BALT. SUN (Oct. 26, 2017, 9:20 AM), <http://www.baltimoresun.com/news/opinion/oped/bs-ed-op-1027-lgbtq-blood-donors-20171025-story.html> (suggesting that blood donated by a man who has sex with men could be shelved for days in order to prevent a latent infection from being missed).

117. Lizette Borrelli, *Why Donating Blood Is Good for Your Health*, MED. DAILY (May 30, 2013, 6:37 PM), <http://www.medicaldaily.com/why-donating-blood-good-your-health-246379>.

118. *Id.*

119. *Id.*

120. *See, e.g., Video: Why Give Blood?*, AM. RED CROSS (Aug. 14, 2017), <https://www.redcross.org/about-us/news-and-events/news/Video-Why-Give-Blood.html>.

“feel[ing] good knowing you’ve helped change a life.”<sup>121</sup> These are all benefits that are categorically denied to men who have sex with men because of animus and stigma towards the gay community, similar to the benefits of marriage,<sup>122</sup> sexual intimacy without fear of being arrested,<sup>123</sup> and the protection of the laws that were denied to LGBT people.<sup>124</sup>

*C. Proponents of the Deferral Cannot Offer Reasoning Sufficient to Uphold It Under Heightened Scrutiny*

Proponents of the ban, including the FDA, maintain that the policy is still necessary because of the significantly higher rates of HIV in men who have sex with men, that people lie on questionnaires about sexual behavior, and that condoms are not 100% effective at preventing HIV transmission.<sup>125</sup> The Supreme Court, though, has shown that statistics themselves are not enough to uphold a discriminatory statute.<sup>126</sup> There are other demographics that have alarmingly high rates of HIV as well, including African Americans, lower-income populations, and persons living in the Southern region of the United States, but none of these populations are prevented from donating blood.<sup>127</sup> The rate of HIV in the black population is particularly interesting because it is unlikely that a blanket ban on the black population donating blood would pass equal protection scrutiny.<sup>128</sup> Although a regulation of this type would be analyzed under strict scrutiny, it is still helpful to compare different demographics that courts would likely deem unconstitutional to categorically ban.

Additionally, while the rate of HIV is higher in men who have sex with men than in the general population, the men who have sex with men

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121. *The American Red Cross in the Greater New York Region*, AM. RED CROSS, <https://www.redcross.org/local/new-york/greater-new-york.html> (last visited Apr. 6, 2019).

122. *See* *United States v. Windsor*, 570 U.S. 744, 775 (2013).

123. *See* *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

124. *See* *Romer v. Evans*, 517 U.S. 620, 624 (1996).

125. Kahrman, *supra* note 8.

126. *See, e.g.*, *Craig v. Boren*, 429 U.S. 190, 208–09 (1976).

127. *See* DIV. OF HIV/AIDS PREVENTION, CTRS. FOR DISEASE CONTROL & PREVENTION, HIV IN THE SOUTHERN UNITED STATES 1 (2016), <https://www.cdc.gov/hiv/pdf/policies/cdc-hiv-in-the-south-issue-brief.pdf>; *Communities in Crisis: Is There a Generalized HIV Epidemic in Impoverished Urban Areas of the United States?* CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/hiv/group/poverty.html> (last updated Aug. 28, 2017); *HIV Among African Americans*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/hiv/group/raciaethnic/africanamericans/index.html> (last updated Mar. 19, 2019).

128. *See, e.g.*, *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003) (noting that race-based classifications receive strict scrutiny under the Equal Protection Clause).

are also more likely to be taking PrEP.<sup>129</sup> PrEP reduces the chances of HIV transmission by ninety-two percent if taken consistently,<sup>130</sup> which is a substantial reduction in transmission rate. This is a fact that may ultimately make blood donated by some men who have sex with men safer than other populations, and safer than the assumption made by just looking at the rate of HIV in the population of men who have sex with men.

#### IV. THE DEFERRAL IS A POOR POLICY CHOICE

Repealing the deferral would benefit LGBT people by helping to break down the stereotype that HIV is a gay disease and the associated stigma. Repeal would also allow more members of the LGBT community to participate in helping communities, whether following a tragedy or more generally.<sup>131</sup> However, this is not the only group of people that repeal would help. Repeal would also increase the security of America's blood supply and, perhaps most importantly, would increase America's blood supply, helping those in need of transfusions.

##### *A. Deferral Repeal Would Increase Blood Supply in the United States*

In the United States, there are about four million men who had a sexual encounter with another man in the last year.<sup>132</sup> The AABB, formerly known as the American Association of Blood Banks, maintains that around 6.8 million people donate blood each year, which in 2013 meant that about 13.6 million units of blood were donated across the United States.<sup>133</sup> The AABB also recognizes that the need for blood is significant with hospitals requiring around 36,000 units of blood each to

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129. See *Basic Statistics*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/hiv/basics/statistics.html> (last updated Nov. 19, 2018); *Pre-Exposure Prophylaxis (PrEP)*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/hiv/risk/prep/index.html> (last updated Nov. 1, 2018); Benjamin Ryan, *Enough People are Taking the HIV-Prevention Drug to Finally Lower Infection Rates Around the World*, QUARTZ, (June 1, 2018), <https://qz.com/1288341/has-prep-use-finally-reached-critical-mass/> (noting that the largest demographic taking PrEP is white, gay, and bisexual men over the age of twenty-five).

130. *Pre-Exposure Prophylaxis (PrEP)*, *supra* note 129.

131. See NAOMI GOLDBERG & GARY GATES, THE WILLIAMS INST., *EFFECTS OF LIFTING BLOOD DONATION BANS ON MEN WHO HAVE SEX WITH MEN 1* (2010), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-Goldberg-MSM-Blood-Ban-Jun-2010.pdf>; Ryan Carey-Mahoney, *The Government's Ban on Gay Blood Donors Isn't Science, It's Bias*, WASH. POST (June 24, 2016), [https://www.washingtonpost.com/news/science/wp/2016/06/24/the-governments-ban-on-gay-blood-donors-isnt-science-its-bias/?hpid=hp-science%3A-gay-blood-donors%3Ahomepage%2Ft-top&utm\\_term=.f26f050aa8b7](https://www.washingtonpost.com/news/science/wp/2016/06/24/the-governments-ban-on-gay-blood-donors-isnt-science-its-bias/?hpid=hp-science%3A-gay-blood-donors%3Ahomepage%2Ft-top&utm_term=.f26f050aa8b7).

132. GOLDBERG & GATES, *supra* note 131.

133. *Blood FAQ*, *supra* note 108.

appropriately treat their patients.<sup>134</sup> The amount of blood donated in the United States amounts to only approximately sixty percent of treatment facilities having three days of blood on hand, which is the standard to meet operational demands.<sup>135</sup> Every two seconds in the United States a person requires a blood transfusion, which means that the United States essentially faces a constant blood shortage.<sup>136</sup> It has been estimated that repealing the deferral would increase units of blood by 219,200 units, not a small number considering the number of treatment facilities that operate at less than the standard to meet operational demands.<sup>137</sup> A more recent estimate given by the Williams Institute indicates that the number would increase to about 615,300 pints, which amounts to 1.8 million people whose lives could be saved with this increase in blood donations.<sup>138</sup>

*B. U.S. Peer Countries Have Eliminated Their (Or Never Had) Bans and Deferrals*

U.S. peer countries around the world have removed their bans or lengthy deferrals in favor of shorter deferrals or a risk-based assessment that does not discriminate on the basis of sexual orientation.<sup>139</sup> These countries include, but are not limited to, Russia, Italy, Spain, France, South Africa, and the United Kingdom.<sup>140</sup> In January 2018, Israel began a pilot program to allow men who have sex with men to donate blood without any deferral period.<sup>141</sup> Israel's pilot program will allow for "double testing," once upon donation, and a second time after a four-month period, during which time the blood will be frozen.<sup>142</sup> Worldwide,

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134. *Id.*

135. *Stoplight Report*, AM. BLOOD CTRS., <http://www.americasblood.org/stoplight.aspx> (last visited Apr. 6, 2019). These numbers—from January 29, 2018—tend to fluctuate based on illness rates, travel, holidays, etc. *Id.*; *Blood FAQ*, *supra* note 108.

136. Laufer, *supra* note 116.

137. See R.T. Winston Berkman & Li Zhou, *Ban the Ban: A Scientific and Cultural Analysis of the FDA's Ban on Blood Donations from Men Who Have Sex with Men*, 1 COLUM. MED. REV. 2, 3 (2015).

138. AYAKO MITASHITA & GARY J. GATES, THE WILLIAMS INST., UPDATE: EFFECTS OF LIFTING BLOOD DONATION BANS ON MEN WHO HAVE SEX WITH MEN 1 (2014), <https://escholarship.org/uc/item/3kf9z338>; Press Release, Laura Rodriguez & Brenda Arrendondo, The Williams Inst., Report Finds Lifting U.S. Ban on MSM Blood Donations Would Increase Annual Blood Supply by 2%–4% (Sept. 19, 2014), <https://williamsinstitute.law.ucla.edu/press/press-releases/18-sep-2014/>.

139. GAY MEN'S HEALTH CRISIS, *supra* note 27, at 13–14.

140. *Id.*

141. Grace Guarnieri, *Gay and Bisexual Men in Israel Can Now Donate Blood Without Delay*, *But Not in the U.S.*, NEWSWEEK (Jan. 10, 2018, 12:17 PM), <http://www.newsweek.com/gay-bisexual-blood-donors-israel-delay-776679>.

142. *Id.*

in high-income countries, like those listed above, approximately 0.003% of donated blood was infected with HIV, perhaps indicating a high amount of self-selection out of the blood donor pool by HIV-positive people, at least in the countries without a deferral or ban.<sup>143</sup> Additionally, 99.6% of blood donations in high-income countries were tested using basic quality procedures, making it extremely unlikely for any HIV-positive blood sample to make it into a transfusion because basic quality procedures include testing for HIV and other blood borne pathogens.<sup>144</sup> Medical researchers from the National Center for Biotechnology Information found that the risk of HIV-contaminated blood reaching the blood supply is about one per every eight to twelve million donations.<sup>145</sup>

To provide further context, in Russia, between the 1980s (during the peak of the HIV epidemic) through 2013, there were eighty cases of HIV transmission via blood donation—only eight of those occurred between the years of 2010 and 2013.<sup>146</sup> Similarly, Italy performed a study on its risk assessment, which does not discriminate based on sexual orientation, and found that it was equally as effective at preventing HIV-positive blood donations.<sup>147</sup> Looking towards other countries in cases like this is not totally uncommon; for example, Justice Kennedy, in his opinion in *Lawrence*, looked to other countries to determine how they handled gay rights and the FDA looked at Australia when analyzing their blood donation policies.<sup>148</sup>

*C. A Risk-Based Assessment Would Make the Blood Supply Safer While Not Discriminating Against a Particular Group*

A risk-based assessment, like that implemented in many of the United States' peer countries, likely makes the blood supply more secure than the deferral as it protects against high-risk sexual behaviors not currently covered by the deferral, such as unprotected sex between a man and a woman.<sup>149</sup> This would allow the blood donation centers more latitude to accept donations from low-risk men who have sex with men, but deny them from, for example, men who engage in risky sexual

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143. See *Blood Safety & Availability*, WORLD HEALTH ORG. (June 22, 2017), <http://www.who.int/en/news-room/fact-sheets/detail/blood-safety-and-availability>.

144. See *id.*

145. Guarnieri, *supra* note 141.

146. E.B. Zhiburt & S.R. Madzaev, *HIV Infection Among Potential Blood Donors*, 5 J. MED. MICROBIOLOGY & DIAGNOSIS, no. 1, 2016, at 1 (indicating that two cases annually have been registered between the years 2010 and 2013).

147. Kohrman, *supra* note 8.

148. See *Lawrence v. Texas*, 539 U.S. 558, 577 (2003); Kohrman, *supra* note 8.

149. See GAY MEN'S HEALTH CRISIS, *supra* note 27, at 14.

behaviors with only women.<sup>150</sup> The risk-based assessment would take into account these behaviors without regard to sexual orientation, as well as consider things like the relationship the donor is in and any medication they are on, such as PrEP.<sup>151</sup>

The number of people on PrEP has drastically increased since 2012, with the vast majority of those prescribed being men, presumably men who have sex with men as the marketing for PrEP has largely focused on that group.<sup>152</sup> Still, more of these deferred men are engaged in monogamous sexual relationships or do not engage in risky sexual behavior, two traits which drastically decrease the risk of becoming infected.<sup>153</sup> Under the deferral, a man could have unprotected sex with multiple women for years leading up to his blood donation and donate without issue, while a man on PrEP would be deferred after one sexual encounter with another man irrespective of the safety of that encounter.<sup>154</sup> The risk-based assessment would fix this disparity and better protect the blood supply from blood borne pathogens, which are contracted by people of all genders and sexual orientations who engage in risky behaviors.

#### CONCLUSION

After the LGBT community experienced one of the worst mass shootings in history at the Pulse nightclub in Orlando, many people attempted to donate blood but were turned away.<sup>155</sup> Continuing to stigmatize the LGBT community, particularly men who have sex with men, by associating them with HIV and other blood borne pathogens while deferring them for one year is the wrong policy choice. The deferral also violates the equal protection rights of men who have sex with men. When utilizing the heightened scrutiny used by courts in famous LGBT and gender discrimination cases, it is clear that those rights are violated

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150. *See id.* at 15.

151. *See id.* at 38.

152. *Mapping PrEP: First Ever Data on PrEP Users Across the U.S.*, AIDSVU, <https://aidsvu.org/prep/> (last visited Apr. 6, 2019); Benjamin Ryan, *As PrEP Turns Five, the HIV Prevention Pill is a Major Success*, POZ MAG. (July 13, 2017), <https://www.poz.com/article/prep-turns-five-hiv-prevention-pill-major-success> (indicating the increase in PrEP prescriptions was correlated with marketing targeted at men who have sex with men).

153. GAY MEN'S HEALTH CRISIS, *supra* note 27, at 12, 22.

154. *See id.* at 12.

155. *See* Alvarez & Pérez-Peña, *supra* note 1; Mark Joseph Stern, *There's an Urgent Need for Blood Donors in Orlando. Most Gay Men Still Can't Donate*, SLATE (June 12, 2016, 10:52 AM), <https://slate.com/human-interest/2016/06/orlando-pulse-gay-nightclub-shooting-gay-men-cant-donate-blood.html>.

by this deferral policy.<sup>156</sup> The deferral is based on animosity towards the LGBT community and generalities that do not pass muster under the more exacting heightened scrutiny.<sup>157</sup>

Healthy, willing donors are being turned away daily in the United States strictly because of their sexual orientation, while people in desperate need of blood transfusions face an ever decreasing blood donor pool.<sup>158</sup> Repealing the one-year deferral period and allowing low-risk men who have sex with men would allow for a significant infusion of blood into the increasingly lacking transfusion pool in the United States. U.S. peer countries are implementing policies that better secure their blood supplies while not discriminating against a particular group of people.<sup>159</sup>

This Note demonstrates that because of historic discrimination, animosity, and stigma related to being LGBT, laws that discriminate on the basis of sexual orientation should receive heightened scrutiny when analyzing an equal protection claim.<sup>160</sup> Further, this Note highlights that in addition to being bad policy, the FDA's deferral would not pass constitutional muster under heightened scrutiny. The FDA must stop arbitrarily decreasing the amount of blood donated across the United States and allow the United States to join its peers around the globe in their more secure blood donation policies. The only way this can happen is to stop enforcing the unconstitutional, outdated, and discriminatory deferral policy that discriminates against men who have sex with men under the guise of protection.

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156. *Cf.* *Lawrence v. Texas*, 539 U.S. 558, 582 (2003).

157. *See* GAY MEN'S HEALTH CRISIS, *supra* note 27, at 12.

158. *See* GOLDBERG & GATES, *supra* note 131, at 1–2.

159. *See* GAY MEN'S HEALTH CRISIS, *supra* note 27, at 13.

160. *See* Nguyen, *supra* note 36.