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UNITED STATES DISTRICT COURT
DISTRICT OF UTAH

UNITED STATES OF AMERICA

Plaintiff,

v.

THE STATE OF UTAH, THE UTAH
DEPARTMENT OF CORRECTIONS,
AND THE UTAH DEPARTMENT OF
HEALTH AND HUMAN SERVICES

Defendants,

**UNITED STATES' OPPOSITION TO
DEFENDANTS' MOTION TO DISMISS**

Case No. 2:24-cv-00241

Judge Jill N. Parrish
Magistrate Judge Jared C. Bennett

INTRODUCTION

The United States brings this suit to enforce Title II of the Americans with Disabilities Act (ADA) and to enjoin Defendants from denying incarcerated individuals with gender dysphoria equal access to health care and other services, programs, or activities. Gender dysphoria is the clinically significant distress or impairment in social, occupational, or other important areas of

function resulting from the incongruence between gender identity and assigned sex. Defendants' discrimination against the Complainant, including its failure to provide timely medical treatment for her disability and necessary reasonable modifications, caused Complainant significant harm.

Defendants now move to dismiss the United States' complaint based on an incorrect interpretation of [42 U.S.C. § 12211\(b\)\(1\)](#), which excludes from the ADA's definition of "disability" "transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders" (hereafter "the Statutory Exclusions"). Defendants incorrectly assert that gender dysphoria is a "gender identity disorder" or a "sexual behavior disorder." But it is not. At the time of the ADA's passage, the term "gender identity disorder" referred to the fact of identifying as a different gender from one's sex assigned at birth. The United States is not alleging that merely identifying as a different gender from one's sex assigned at birth qualifies as a disability. Instead, the United States asserts ADA protection for aggrieved individuals who have gender dysphoria—a serious medical condition characterized by clinically significant distress or impairment in social, occupational, or other important areas of functioning resulting from the incongruence between gender identity and assigned sex. That medical condition is distinct from and falls outside the Statutory Exclusions. The United States's position is consistent with the only court of appeals to have decided this issue, [Williams v. Kincaid](#), 45 F.4th 759, 767 (4th Cir. 2022), and many district courts. Additionally, this interpretation of the Statutory Exclusions is supported by Congress's express directive to interpret the ADA's definition of "disability" broadly and permits this Court to avoid the constitutional issues implicated by an alternative reading of the Statutory Exclusions, consistent with the doctrine of constitutional avoidance. For these reasons, this Court should deny Defendants' Motion to Dismiss the Complaint.

BACKGROUND

A. Overview of Gender Dysphoria

Sometimes, an individual’s gender identity—the gender with which they identify—does not match their sex assigned at birth, typically based on sex chromosomes and visible sex characteristics, like genitalia. Am. Psychiatric Ass’n, *Diagnostic and Statistical Manual of Mental Disorders* 511 (5th ed. text rev. 2022) (DSM-5-TR).¹ “Transgender” is a term referring to individuals whose gender identity differs from their assigned sex. *Id.*

Gender dysphoria is different from being transgender; it is a serious medical condition experienced by *some* transgender individuals and appears as a diagnostic category in the DSM-5-TR 512-13. Left untreated, individuals with gender dysphoria can experience significant adverse health outcomes, including risks for suicidality and surgical self-mutilation. World Pro. Ass’n for Transgender Health, *Standards of Care for the Health of Transgender and Gender Diverse People, Version 8*, at S106 (Sept 15, 2022) (WPATH Standards).²

Importantly, not all transgender people experience gender dysphoria. *See id.* at S252. Some are able to transition to their gender identity without significant distress. This can include adopting pronouns, names, and various aspects of gender expression that match their gender identity. *See* Am. Psychiatric Ass’n, *What is Gender Dysphoria?* (Aug. 2022), <https://www.psychiatry.org/patients-families/gender-dysphoria/what-is-gender-dysphoria> (APA Q&A).

¹ The DSM-5-TR is available online at https://psychiatryonline.org/doi/full/10.1176/appi.books.9780890425787.x14_Gender_Dysphoria.

² The WPATH Standards are available online at <https://www.tandfonline.com/doi/pdf/10.1080/26895269.2022.2100644>.

ARGUMENT³

I. Gender Dysphoria is Not Excluded from ADA Coverage

A. Gender Dysphoria is Not Excluded as a Gender Identity Disorder.

Defendants misinterpret [42 U.S.C. § 12211\(b\)\(1\)](#), the Statutory Exclusions. The ADA protects from discrimination individuals who have a disability, which the statute defines as a “physical or mental impairment that substantially limits one or more major life activities.” [42 U.S.C. § 12102\(1\)\(A\)](#). Gender dysphoria—clinically significant distress or impairment resulting from an incongruence between gender identity and assigned sex—plainly falls within this definition, as Utah acknowledges. See [Defendants’ Motion to Dismiss \(Def. MTD\) at 5](#). But the ADA excludes certain conditions from coverage under the statute, including “gender identity disorders not resulting from physical impairments.” [42 U.S.C. § 12211\(b\)\(1\)](#). Gender dysphoria falls outside the exclusion of “gender identity disorders not resulting from physical impairments” because it is not merely a gender identity disorder.

The ADA does not define “gender identity disorders” or any of the other Statutory Exclusions. Phrases must be given their ordinary public meaning at the time of the statute’s enactment. See [Wis. Cent. Ltd. v. United States](#), 138 S. Ct. 2067, 2070 (2018). That said, where the context shows that Congress has employed a term of art, any specialized meaning will prevail over the common and ordinary meaning. See [New Mexico Farm & Livestock Bureau v. United States Dep’t of Interior](#), 952 F.3d 1216, 1224 (10th Cir. 2020) (“When Congress has used technical words or terms of art, the term must be given its technical or scientific meaning.”); [United States](#)

³ The parties agree that the interpretation of the term “disability” under the ADA is a question of law—not a question of fact. See [MTD at 8](#) citing [Scanlon White, Inc., v C.I.R.](#), 472 F.3d 1173, 1175 (10th Cir. 2006).

[v. Thomas, 939 F.3d 1121, 1125 \(10th Cir. 2019\)](#) ([W]hen dealing with a technical or specialized subject, we should understand terms in their technical or specialized meaning.”).

Congress largely used terms of art taken from the contemporaneous edition of the DSM, the DSM-III-R. Am. Psychiatric Ass’n, *Diagnostic and Statistical Manual of Mental Disorders* 71 (3rd ed. rev. 1987) (DSM-III-R).⁴ As Defendants acknowledge, reference to the DSM-III-R in construing “gender identity disorders” at the time of the ADA is therefore informative. See [Hall v. Florida, 572 U.S. 701, 704 \(2014\)](#) (recognizing DSM as a text used by psychiatrists and experts); [Williams v. Kincaid, 45 F.4th 759, 767 \(4th Cir. 2022\)](#) (relying on the version of the DSM in use when the ADA was passed to construe “gender identity disorders”), *cert. denied*, 143 S. Ct. 2414 (2023), [Defs. MTD at 7](#).⁵

When Congress enacted the ADA, “gender identity disorders” referred to the mere fact of identifying as a different gender from one’s sex assigned at birth. Under the DSM-III-R, the essential feature of all gender identity disorders was “an incongruence between assigned sex (i.e., the sex that is recorded on the birth certificate) and gender identity,” DSM-III-R at 71. An individual experiencing gender incongruence alone could be diagnosed with a gender identity disorder, without the presence of any clinically significant distress or impairment. While the DSM-III-R acknowledged that “[s]ome forms of gender identity disturbance are on a continuum,” DSM-III-R at 71, none of the gender identity-related diagnoses for adults required clinically

⁴ The DSM-III-R is available online at <https://psychiatryonline.org/doi/epdf/10.1176/appi.books.9780890420188.dsm-iii-r>.

⁵ Legislators—including the author of the proposed Statutory Exclusions—explicitly cited the DSM-III-R when discussing the proposed legislation’s coverage. See, e.g., 135 Cong. Rec. S11174-78 (daily ed. Sept. 14, 1989) (statement of Sen. William Armstrong) (referencing the DSM-III-R); 135 Cong. Rec. S10772 (daily ed. Sept. 7, 1989) (statement of Sen. Edward Kennedy) (explaining that Senator Armstrong’s “long list of various kinds of conduct . . . has been extracted from the DSM III”).

significant distress or impairment.⁶ Instead, gender identity disorders in the DSM-III-R focused on the medicalization of gender identity and nonconformity. As observed by the Court of Appeals for the Fourth Circuit in *Williams v. Kincaid*: “[I]n 1990, the gender identity disorder diagnosis marked being transgender as a mental illness.” [45 F.4th at 767](#). By excluding “gender identity disorders” from the definition of disability in the ADA, Congress thus excluded the mere fact of being transgender—*i.e.*, of simply identifying as a different gender from one’s sex assigned at birth—as a covered disability.

The United States does not assert that merely identifying as a different gender from one’s sex assigned at birth qualifies as a disability. Instead, the United States’ complaint relates only to gender dysphoria, added as a diagnosis in the DSM-5, which “focuses on dysphoria as the clinical problem” and requires clinically significant distress or impairment in social, occupational, or other important areas of functioning. DSM-5-TR at 512. Defendants ignore this distinction. For example, Defendants cite the American Psychiatric Association’s 2013 statement accompanying the release of the DSM’s fifth edition to argue that “gender dysphoria” just replaced “gender identity disorder.” [Def’s. MTD at 9](#). But this 2013 statement also explained that the new diagnosis of gender dysphoria includes “important clarifications in the criteria. It is important to note that gender nonconformity is not in itself a mental disorder. The critical element of gender dysphoria is the presence of clinically significant distress associated with the condition.” Am. Psychiatric Ass’n: DSM-5 Development, Gender Dysphoria (2013), *available at*

⁶ See *e.g.*, DSM-III-R at 76 (identifying that “persistent discomfort,” a “sense of inappropriateness” and a “[p]ersistent preoccupation” about one’s primary and secondary sex characteristics as criteria for a transsexualism diagnosis); *id.* at 77 (identifying “persistent or recurrent discomfort” and cross-dressing as criteria for a Gender Identity Disorder of Adolescence of Adulthood, Nontranssexual Type (GIDAANT) diagnosis); *cf. id.* at 73 (identifying “[p]ersistent and intense distress” about assigned sex as criterion for gender identity disorder of childhood).

https://www.psychiatry.org/File%20Library/Psychiatrists/Practice/DSM/APA_DSM-5-Gender-Dysphoria.pdf (last visited June 18, 2024). Accordingly, gender dysphoria is not a mere “gender identity disorder.” Indeed, as noted above, not all transgender individuals experience gender dysphoria. Because gender dysphoria is not simply identifying with a different gender—but is instead characterized by clinically significant distress or impairment in social, occupational, or other important areas of functioning—gender dysphoria falls outside the exclusion of gender identity disorders.

That gender dysphoria is linked to the status of being transgender does not preclude coverage under the ADA for gender dysphoria. It is not unusual for the ADA to exclude a certain status or condition, but still encompass related conditions that meet the statute’s definition of “disability.” Pregnancy provides a useful example. The Court of Appeals for the Tenth Circuit has explained that a pregnancy without medical complications “does not constitute a disability under 42 U.S.C. § 12102(2)(A).” [*Richards v. City of Topeka*, 173 F.3d 1247, 1250 \(10th Cir. 1999\)](#). Yet a physical or mental impairment that substantially limits one or more major life activities of such individual is a disability under the ADA even if the impairment is caused by pregnancy. *See* [*LaCount v. S. Lewis, LLC*, No. 16-CV-0545-CVE-TLW, 2017 WL 1826696, at *3 \(N.D. Okla. May 5, 2017\)](#) (“physical or mental impairments caused by an abnormal or unusual pregnancy may be considered a disability.”); *cf.* [*Owens v. Governor’s Off. of Student Achievement*, 52 F.4th 1327, 1336 \(11th Cir. 2022\)](#) (“a pregnancy- or childbirth-related impairment may qualify as a disability, but only if that impairment substantially limits a major life activity.”); [*U.S. Equal Emp. Opportunity Comm’n, Enforcement Guidance on Pregnancy Discrimination and Related Issues \(2015\)*](#) (identifying anemia, sciatica, carpal tunnel syndrome, and gestational diabetes as pregnancy-related impairments under the ADA). The same is true here. The Statutory Exclusions

remove the status of merely being transgender from the statute's coverage, but do not exclude impairments related to being transgender, such as the clinically significant impairments associated with gender dysphoria, which otherwise satisfy the ADA's definition of disability.

Finding that gender dysphoria is a disability covered under the ADA is consistent with the Fourth Circuit's decision in [Williams v. Kincaid, 45 F.4th 759, 767 \(4th Cir. 2022\)](#), and many district courts around the country. In fact, after the Fourth Circuit's decision in *Williams*, all district courts reaching the issue have found ADA claims based on gender dysphoria to be viable, with many conclusively affirming that the ADA protects individuals with gender dysphoria. See, e.g., [Helen Doe v. Thomas C Horne, No. CV-23-00185-TUC-JGZ, 2024 WL 3091984, at *3 \(D. Ariz. June 21, 2024\)](#) (concluding that gender dysphoria does not fall under the category of "gender identity disorders" as conceived at the time of the ADA's enactment, and that gender dysphoria does not belong to the category of "other sexual behavioral disorders."); [Doe v. Georgia Dep't of Corr., No. 1:23-cv-5578-MLB, 2024 WL 1962021, at *13 \(N.D. Ga. Apr. 17, 2024\)](#) (determining that gender dysphoria is distinct from gender identity disorder and is covered by the ADA), appeal filed; [Kozak v. CSX Transp., Inc., No. 20-CV-184S, 2023 WL 4906148, at *4 \(W.D.N.Y Aug. 1, 2023\)](#) (holding that gender dysphoria does not fall within the Statutory Exclusions as "gender dysphoria is distinct from 'gender identity disorders' as understood in 1990"); [Griffith v. El Paso County, CO, No. 21-cv-00387-CMA-NRN, 2023 WL 3099625, at *6 \(D. Col. Mar. 27, 2023\)](#) (finding persuasive the "recent thorough and closely reasoned decision" issued by the Fourth Circuit in *Williams* and finding that gender dysphoria is covered by the ADA), appeal filed on other grounds. And, before *Williams*, several district courts had already reached that conclusion. See e.g., [Doe v. Hosp. of Univ. of Pennsylvania, 546 F. Supp. 3d 336, 350 \(E.D. Pa. 2021\)](#) (denying motion to dismiss ADA claim where plaintiff alleged her gender dysphoria substantially limited

her occupational functioning); [Doe v. Triangle Doughnuts, LLC, 472 F. Supp. 3d 115, 135 \(E.D. Pa. 2020\)](#) (finding employee’s allegations were sufficient to state ADA hostile work environment claim based on gender dysphoria). While Utah cites to five district court cases that have found that the ADA precludes claims on the basis of gender dysphoria, *see* [Def. MTD at 10](#), all were decided before *Williams*, and the United States is unaware of any post-*Williams* decision that has found gender dysphoria is excluded from ADA coverage.

Finally, Defendants argue that Congress’ use of the plural term “gender identity disorders” in the Statutory Exclusions supports its argument that gender dysphoria comes under its scope. *Defs. MTD at 10*. Not so. The term “gender identity disorders” is the heading of a section of the DSM-III-R, which classifies gender identity disorders into four diagnoses. DSM-III-R at 71-78. Thus, Congress’ use of the plural term—a term of art in the DSM-III-R—means no more than the grouping of four related diagnoses of gender identity disorders. [New Mexico Farm & Livestock Bureau v. United States Dep’t of Interior, 952 F.3d 1216, 1224 \(10th Cir. 2020\)](#) (“When Congress has used technical words or terms of art, the term must be given its technical or scientific meaning.”)

B. Gender Dysphoria is Not Excluded as A Sexual Behavior Disorder.

Defendants argue in the alternative, without any analysis, that gender dysphoria falls within the term “other sexual behavior disorders.” [Defs. MTD at 11](#) (citing *Kincaid*, 143 S. Ct. 2414, 2417 (2023) (Alito, J., dissenting)).⁷ It does not. Congress does not define “other sexual behavior

⁷ Even Justice Alito acknowledged this issue was not briefed, and that there is room to distinguish gender dysphoria from the phrase “sexual behavior disorders,” noting in his dissent that “the Fourth Circuit should have explained why the catch-all provision was insufficient to encompass gender dysphoria.” *Kincaid*, 143 S. Ct. at 2417.

disorders” nor is this phrase defined in the DSM-III-R.⁸ Therefore, we must rely on the ordinary meaning of these terms. A *behavior* is “the way in which someone conducts oneself or behaves.” <https://www.merriam-webster.com/dictionary/behavior> (last visited June 21, 2024). Gender dysphoria is not a sexual *behavior* disorder because the diagnosis has no criteria that depend on behavior. See [*Helen Doe v. Thomas C Horne*, No. CV-23-00185-TUC-JGZ, 2024 WL 3091984, at *3 \(D. Ariz. June 21, 2024\)](#) (“[t]he phrase ‘other sexual behavior’ serves as a qualifier that emphasizes the *behavioral* component of the explicitly excluded ‘sexual disorders.’”); [*Kozak v CSX Transp.*, No. 20-cv-184S, 23 WL 4906148 \(W.D.N.Y. Aug. 1, 2023\)](#) (a gender dysphoria diagnosis lacks a behavioral component). Rather, gender dysphoria is based on a finding of “clinically significant distress or impairment in social, occupational, or other important areas of functioning.” DSM-5-TR at 512-13. The plain meaning of “other sexual behavior disorders” therefore does not include gender dysphoria.

C. The Definition of Disability Must be Construed Broadly.

Additionally, reading the Statutory Exclusions to foreclose ADA protections for gender dysphoria would contravene Congress’s express directive to interpret the ADA’s definition of “disability” broadly. In [42 U.S.C. § 12102\(4\)\(A\)](#), Congress instructs that “the definition of disability in this chapter shall be construed in favor of broad coverage of individuals under this chapter, to the maximum extent permitted by the terms of this chapter.” Exceptions to a statute’s “general statement of policy,” like the Statutory Exclusions, are sensibly read “narrowly in order

⁸ The DSM-III-R identifies two groups of “Sexual Disorders,” which it categorizes as relating to sexual arousal (“Paraphilias”) or sexual dysfunction. It also notes a residual class of Other Sexual Disorders, for disorders in “sexual functioning that are not classifiable in any of the specific categories.” DSM-III-R at 279-296. The DSM-III-R references “other sexual behavior problems (e.g. Pedophilia, Voyeurism, and Exhibitionism)” in its discussion of Paraphilias (the essential features of which are “recurrent intense sexual urges and sexually arousing fantasies....”) DSM-III-R at 280.

to preserve the primary operation of the [policy].” [City of Edmonds v. Oxford House, Inc.](#), 514 U.S. 725, 731 (1995) (quoting [Comm’r v. Clark](#), 489 U.S. 726, 739 (1989)); see also [Williams](#), 45 F.4th at 766 (“courts must construe the ADA’s exclusions narrowly” because of Congress’s directive to ensure broad coverage for people with disabilities). Excluding gender dysphoria from coverage where the plain text covers it “would be for a court to take it upon itself to rewrite the statute in two impermissible ways: by penciling a new condition into the list of exclusions, and by erasing Congress’ command to construe the ADA as broadly as the text permits.” [Williams](#), 45 F.4th at 770. As recognized by the *Williams* court, “nothing in the ADA, then or now, compels the conclusion” that gender dysphoria falls within the Statutory Exclusions. *Id.* at 769. This reading of the Statutory Exclusions undermines the ADA’s broad remedial purpose.

D. Finding that Gender Dysphoria is Covered under the ADA Avoids Constitutional Concerns.

Should the Court determine that the Statutory Exclusions are subject to more than one possible construction, the Court should nevertheless adopt the United States’ interpretation to avoid constitutional concerns. Where a statute has two possible constructions, the doctrine of constitutional avoidance applies. [United States v. Hansen](#), 599 U.S. 762, 781 (2023) (a statutory interpretation that is “at least ‘fairly possible’” and avoids constitutional issues should be adopted). The doctrine of constitutional avoidance offers “a tool for choosing between competing plausible interpretations of a statutory text” and is based on the “reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts.” [Clark v. Martinez](#), 543 U.S. 371, 381 (2005); see also [id.](#) at 380-81 (“If one [interpretation] would raise a multitude of constitutional problems, the other should prevail . . .”). The construction of the statute urged by the United States, and as recognized by the Fourth Circuit, would avoid these constitutional issues.

Interpreting gender identity disorders to encompass gender dysphoria implicates

constitutional concerns. The gender identity disorders exclusion is inherently based on a sex-classification as it targets only transgender people. As observed by the Supreme Court, it is “impossible to discriminate against a person for being . . . transgender without discriminating against that individual based on sex.” [*Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1741 \(2020\)](#). Such discrimination rests on a person identifying with a different sex or gender “than their sex identified at birth.” [*Id.* at 1746](#). The Court of Appeals for the Tenth Circuit has held that *Bostock’s* reasoning applies equally to equal protection claims. [*Fowler v. Stitt*, ___ F.4th ___, No. 23-5080, 2024 WL 3035712 at *18 \(10th Cir., June 18, 2024\)](#) (“because the Policy intends to discriminate based on transgender status, it necessarily intends to discriminate based in part on sex.”). Classifications based on sex call for a heightened standard of review under the equal protection clause. *See* [*United States v. Virginia*, 518 U.S. 515, 532 \(1996\)](#), [*Fowler* ___ F.4th ___, 2024 WL 3035712 at *18](#) (applying intermediate scrutiny to policy that prohibited amending sex designations on birth certificates). Accordingly, as a sex-based distinction, the gender identity disorder exclusion is subject to heightened scrutiny. Adoption of Defendants’ interpretation would raise significant constitutional issues as to whether excluding medical conditions that, by definition, are experienced only by persons who are transgender, could survive intermediate scrutiny. *See* [*Williams*, 45 F.4th at 773](#) (suggesting that there is “no legitimate reason why Congress would intend to exclude from the ADA’s protections transgender people who suffer from gender dysphoria”).

The exclusion of gender identity disorders is thus properly interpreted as encompassing only gender identity disorders not resulting from a physical impairment as understood at the time of the ADA’s passage and not as a bar to coverage for individuals with gender dysphoria.

CONCLUSION

Gender dysphoria falls outside the ADA’s Statutory Exclusions. For all of the above reasons, the United States respectfully requests that the Court deny Defendants’ motion to dismiss the United States’ Complaint.

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