No. 22-633

IN THE
Supreme Court of the United States

STACEY A. KINCAID,
Petitioner,
v.
KESHA T. WILLIAMS,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The Americans with Disabilities Act provides that "the term 'disability' shall not include … gender identity disorders not resulting from physical impairments." 42 U.S.C. § 12211(b). The questions presented are:

1. Did respondent's complaint allege well-pleaded facts giving rise to a plausible inference that she suffers from a disability that is not a "gender identity disorder"?

2. Assuming that respondent's disability is a "gender identity disorder," did respondent's complaint allege well-pleaded facts giving rise to a plausible inference that her disability resulted from "physical impairments"?

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INTRODUCTION

The Court should deny certiorari because petitioner does not challenge one of the two independent grounds supporting the Fourth Circuit's decision, and this case is a poor vehicle to consider the ground that petitioner does challenge.

The Americans with Disabilities Act ("ADA") provides that "the term 'disability' shall not include … gender identity disorders not resulting from physical impairments." 42 U.S.C. § 12211(b). The Fourth Circuit concluded, on two independent grounds, that respondent adequately pleaded a "disability" that was not subject to that exemption. First, the court held that she adequately pleaded that she suffered from gender dysphoria, a distinct condition from "gender identity disorders." Second, the court held that even if she suffered from a "gender identity disorder," she adequately pleaded that it "result[ed] from physical impairments."

Petitioner challenges only the first ground and makes no mention of the second. This is a fatal vehicle problem because it is impossible for this Court to reverse the Fourth Circuit's judgment when petitioner does not challenge an independent ground supporting that judgment. Moreover, even if petitioner had challenged the Fourth Circuit's "physical impairments" holding, that holding would not be worthy of certiorari as it rested on the Fourth Circuit's interpretation of the case-specific allegations in respondent's complaint concerning respondent's medical history.

As to the Fourth Circuit's first ground, petitioner argues that gender dysphoria falls within the statutory

category of "gender identity disorders." This case would be an exceedingly poor vehicle for addressing the proper interpretation of "gender identity disorders." There are no facts in the record regarding respondent's disability. The Fourth Circuit emphasized that this case was at the motion to dismiss stage and that it was merely deciding that respondent pleaded sufficient facts to state a claim. Also, the provision of the ADA on which petitioner relies is an affirmative defense, not an element of the claim. As such, petitioner cannot prevail on this issue on a motion to dismiss unless respondent has effectively pleaded herself out of court, which she has not done.

At a minimum, more percolation is needed. The Fourth Circuit is the first appellate court to address this issue, and petitioner has not shown why certiorari is immediately warranted, especially in a case at an interlocutory and undeveloped posture.

On the merits, the Fourth Circuit correctly concluded that respondent adequately pleaded allegations of gender dysphoria that do not fall within the statutory category of "gender identity disorders."

STATEMENT

Respondent Kesha Williams is a transgender woman. She has legally changed her name, and her home state of Maryland has issued her a driver's license recognizing her gender as female. Pet. App. 3a. For fifteen years prior to her incarceration, she received hormone therapy in the form of a daily pill and biweekly injections. Pet. App. 4a.

In 2018, respondent was incarcerated. Jail officials housed her in the men's side of the facility and

confiscated her prescribed hormone medication. Pet. App. 4a-5a. After two weeks without her medication, respondent began experiencing significant mental and emotional distress arising from gender dysphoria. Pet. App. 5a. Although respondent's request for hormone treatment was ultimately approved, the jail nurse failed to provide her with her approved and scheduled hormone treatment on two separate occasions. Pet. App. 5a. In addition, respondent was subject to harassment by prison deputies, and in one case was aggressively searched, resulting in bruising and significant pain. Pet. App. 6a.

After her release, respondent sued jail officials, including petitioner Stacey Kincaid, the Sheriff of Fairfax County, Virginia. Respondent alleged, among other things, that her mistreatment by jail officials violated the ADA, 42 U.S.C. §§ 12101 *et seq.* Respondent alleged her gender dysphoria qualified as a "disability" under the ADA. *See id.* § 12102(1)(A) (defining a "disability" to include "a physical or mental impairment that substantially limits one or more major life activities of such individual"). She further alleged that jail officials violated the ADA because they deprived her of hormone treatment, causing her "emotional, psychological, and physical distress." Pet. App. 19a.

The district court dismissed respondent's complaint. It found that respondent's gender dysphoria was not a "disability" under the ADA because it fell under the statutory exception for "transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or

other sexual behavior disorders." 42 U.S.C. § 12211(b)(1); *see* Pet. App. 64a-72a.

The Fourth Circuit reversed the dismissal of respondent's complaint and remanded for further proceedings. The Fourth Circuit first held that respondent adequately pleaded a disability that was cognizable under the ADA. Based on a close examination of respondent's complaint, the court concluded that there were sufficient well-pleaded factual allegations "to 'nudge [her] claims' that gender dysphoria falls entirely outside of § 12211(b)'s exclusion for 'gender identity disorders' 'across the line from conceivable to plausible.'" Pet. App. 16a (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Next, the Fourth Circuit held that even if Williams' gender dysphoria was a "gender identity disorder" within the meaning of the ADA, Williams had sufficiently pleaded that her gender dysphoria was a "gender identity disorder[] … resulting from physical impairments," such that it did not fall within the exclusion. Pet. App. 17a.

Petitioner sought rehearing en banc. The Fourth Circuit denied the petition, with six judges dissenting. Pet. App. 74a.

REASONS FOR DENYING THE WRIT

I. PETITIONER FAILS TO CHALLENGE ONE OF THE TWO INDEPENDENT GROUNDS SUPPORTING THE FOURTH CIRCUIT'S DECISION.

The ADA provides that "the term 'disability' shall not include … gender identity disorders not resulting from physical impairments." 42 U.S.C. § 12211(b). The

Fourth Circuit reversed the district court's dismissal of respondent's complaint on two grounds: *first*, respondent adequately alleged a disability that was not a "gender identity disorder," and *second*, even if respondent did suffer from a "gender identity disorder," her complaint still stated an ADA claim because she adequately pleaded that her gender dysphoria "result[ed] from physical impairments." Pet. App. 16a-20a.

Petitioner addresses only the first holding. She makes no mention of the second. Every single one of petitioner's arguments is targeted to the Fourth Circuit's holding that respondent's gender dysphoria did not qualify as a "gender identity disorder." Although petitioner repeatedly quotes the statutory language in full, including the "physical impairments" language, *e.g.*, Pet. i, she nowhere acknowledges, much less refutes, the Fourth Circuit's separate holding that respondent adequately pleaded a disability resulting from physical impairments.

Petitioner's failure to challenge the Fourth Circuit's alternative holding is a fatal vehicle problem because, as a result of that waiver, it would be impossible for this Court to reverse the Fourth Circuit's judgment. The district court dismissed respondent's complaint with prejudice. The Fourth Circuit issued a judgment reversing that dismissal and reinstating the complaint. No matter how this Court resolves the statutory-interpretation question that petitioner raises, the Fourth Circuit's judgment reinstating the complaint would have to remain intact on account of its alternative holding.

At a minimum, petitioner's failure to challenge the "physical impairments" holding renders this case a poor vehicle to resolve the proper meaning of 42 U.S.C. § 12211(b). The Court would be in the difficult position of interpreting one-half of a statute—it would be interpreting the phrase "gender identity disorders" in isolation while ignoring the accompanying "physical impairments" provision. This unusual posture will artificially constrain the Court's analysis. If the Court seeks to resolve the meaning of § 12211(b), it should await a case in which the full statute is properly before the Court.

Even if petitioner did challenge the Fourth Circuit's "physical impairments" holding, that holding would not warrant Supreme Court review. As both parties acknowledged below, this is a purely fact-bound issue, turning on the Fourth Circuit's interpretation of particular allegations in respondent's complaint concerning respondent's medical history.

In the Fourth Circuit, petitioner expressly conceded that gender dysphoria *could* sometimes result from a physical impairment, Pet. App. 17a, but nonetheless argued that respondent "failed to explicitly *plead* that her gender dysphoria was the result of a physical impairment." Pet. App. 18a. Petitioner's argument "boil[ed] down to the assert[ion]" that respondent "should have inserted the words 'from a physical basis' into her complaint." Pet. App. 21a. The Fourth Circuit rejected this argument, finding that "a plaintiff need not plead any 'specific words' to defeat a motion to dismiss." Pet. App. 21a. The Fourth Circuit pointed to respondent's allegation that she had received hormone

treatment, and held that "the need for hormone therapy may well indicate that her gender dysphoria has some physical basis." Pet. App. 19a. It further held that respondent pointed to "medical and scientific research identifying possible physical bases of gender dysphoria," and concluded that her allegations "render[ed] the inference that gender dysphoria has a physical basis sufficiently plausible to survive a motion to dismiss." Pet. App. 19a-20a.

These holdings do not warrant Supreme Court review. They merely assess the plausibility of respondent's allegations and reach no factual or legal conclusions. Moreover, because this case arises at the motion to dismiss stage, there is no evidentiary record on the etiology of respondent's disability. For example, there is no record on which hormones respondent was taking, why she was taking the hormones, the effects of the hormones, the effects of taking the hormones away, and other basic information needed to assess whether respondent's gender dysphoria was attributable to "physical impairments." Indeed, beyond nitpicking about the wording of the complaint, petitioner has *never*—neither in the Fourth Circuit, nor in this Court—offered any theory for how those allegations can be adjudicated at the motion to dismiss stage.

Because petitioner does not challenge an independent ground for the Fourth Circuit's judgment, and because that ground would not warrant Supreme Court review even if petitioner did challenge it, certiorari should be denied.

II. THIS CASE IS AN UNSUITABLE VEHICLE TO CONSIDER THE FOURTH CIRCUIT'S INTERPRETATION OF "GENDER IDENTITY DISORDERS."

Petitioner challenges the Fourth Circuit's holding that that petitioner's allegations of gender dysphoria fall outside of the statutory exclusion for "gender identity disorders." 42 U.S.C. § 12211(b). Even setting aside petitioner's failure to challenge the "physical impairments" holding, this case would be a poor vehicle to challenge the Fourth Circuit's "gender identity disorders" holding.

First, the Court should deny certiorari because this case arises in an interlocutory posture. As multiple members of this Court have recently emphasized, the Court's ordinary practice is to deny certiorari in interlocutory cases. *See, e.g.*, *City of Ocala v. Rojas*, 143 S. Ct. 764, 765 (2023) (Gorsuch, J., respecting the denial of certiorari) ("I see no need for the Court's intervention at this juncture. This case remains in an interlocutory posture … I would allow that process to unfold."); *NFL v. Ninth Inning, Inc.*, 141 S. Ct. 56, 56-57 (2020) (Kavanaugh, J., respecting the denial of certiorari) ("[T]he case comes to us at the motion-to-dismiss stage, and the interlocutory posture is a factor counseling against this Court's review at this time."); *Abbott v. Veasey*, 137 S. Ct. 612, 613 (2017) (Roberts, C.J., respecting the denial of certiorari) (noting that case was "in an interlocutory posture" and "issues will be better suited for certiorari review" after final judgment).

Following that practice is particularly warranted here. The interlocutory posture of the case would

significantly complicate this Court's review. Petitioner frames this case as presenting a pure question of statutory interpretation, but that is not so. The Fourth Circuit explained that "a dismissal of Williams' ADA claims would misunderstand the generosity with which complaints are to be reviewed." Pet. App. 16a. The court held that "[t]he difference between 'gender identity disorders' and gender dysphoria, as revealed by the DSM and the WPATH Standards, would be more than enough support to nudge Williams' claims that gender dysphoria falls entirely outside of § 12211(b)'s exclusion for 'gender identity disorders' across the line from conceivable to plausible." Pet. App. 16a (internal quotation marks and alteration omitted). That application of the pleading standards in the Federal Rules does not warrant review.

Moreover, on the current record, the Court could not reach an informed conclusion as to whether "gender dysphoria" always, sometimes, or never falls within the statutory exclusion for "gender identity disorders." There is no fact or expert testimony concerning respondent's gender dysphoria. There are merely allegations in a complaint. Yet, petitioner asks the Court to hold that respondent's complaint should be dismissed with prejudice because—as a matter of law—respondent's disability categorically qualifies as a "gender identity disorder." With no facts in the record regarding the nature or cause of respondent's disability, the Court will be hard-pressed to analyze that issue intelligently.

Making matters even more difficult for the Court, petitioner is invoking an affirmative defense, on which

petitioner bears the burden of proof. This Court has long recognized the "familiar principle that '[w]hen a proviso … carves an exception out of the body of a statute or contract[,] those who set up such exception must prove it.'" *Meacham v. Knolls Atomic Power Lab'y*, 554 U.S. 84, 91 (2008) (quoting *Javierre v. Cent. Altagracia, Inc.*, 217 U.S. 502, 508 (1910)). "[T]he burden of proving justification or exemption under a special exception to the prohibitions of a statute generally rests on one who claims its benefits." *Id.* (quoting *FTC v. Morton Salt Co.*, 334 U.S. 37, 44-45 (1948)). "That longstanding convention is part of the backdrop against which the Congress writes laws," and courts "respect it unless [they] have compelling reasons to think that Congress meant to put the burden of persuasion on the other side." *Id.* at 91-92. Here, petitioner invokes an exception to the ADA's definition of disability for "gender identity disorders not resulting from physical impairments"; she therefore bears the burden of proving that the exception is satisfied. 42 U.S.C. § 12211(b).

Affirmative defenses may be resolved at the motion to dismiss stage only in the "relatively rare circumstances" where "all facts necessary to the affirmative defense clearly appear on the face of the complaint." *Goodman v. Praxair, Inc.*, 494 F.3d 458, 464 (4th Cir. 2007) (en banc) (alterations and internal quotation marks omitted). Here, to invoke this affirmative defense that respondent's condition is excluded from the ADA, petitioner would have to demonstrate that the facts alleged clearly show respondent's condition is, in fact, a gender identity disorder, and the disorder does not result from a physical

impairment. That standard is not satisfied where, as here, the complaint provides little detail on the nature of respondent's disability. At a minimum, whether this complaint satisfies that standard is a fact-bound question not worthy of Supreme Court review.

In addition to there being no facts in the record, there are virtually no arguments in the record. At the panel stage, petitioner barely offered any response to respondent's argument that gender dysphoria differed from "gender identity disorders." The panel observed that "[a]rguably," petitioner's "'passing shot' amounts to waiver." Pet. App. 14a n.4. Petitioner certainly did not advocate for the theories presented in the petition, such as the argument concerning the plural nature of "gender identity disorders." This Court is a "court of review, not of first view," *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005), and the Court should not entertain novel legal theories that did not appear in petitioner's brief below.

There is no pressing need to review the question presented, particularly on this undeveloped record. As petitioner acknowledges, there is no circuit split on the question presented. To the contrary, the Fourth Circuit is the first appellate court ever to opine on the proper interpretation of 42 U.S.C. § 12211(b). Neither the Fourth Circuit, nor any other appellate court, has ever interpreted that statute with the benefit of a complete evidentiary record. This is the paradigmatic scenario in which additional percolation is warranted.

III. THE FOURTH CIRCUIT'S DECISION IS CORRECT.

As noted above, petitioner makes no arguments challenging the Fourth Circuit's conclusion that respondent adequately pleaded that her gender dysphoria "result[s] from physical impairments." Instead, petitioner argues exclusively that, as a matter of law, petitioner's gender dysphoria falls within the statutory category of "gender identity disorders." Pet. App. 17a.

Even on that issue, petitioner's arguments fail. The Fourth Circuit correctly concluded that the ADA does not categorically exclude gender dysphoria. As is customary for statutory interpretation questions, the Fourth Circuit looked to the meaning of "gender identity disorders" at the "time of [the ADA's] enactment." *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1738 (2020). The court concluded that in 1990, at the time of the ADA's adoption, "gender identity disorders" did not include gender dysphoria. "Gender identity disorders" all have the same "essential feature"—namely, "an incongruence between assigned sex (*i.e.*, the sex that is recorded on the birth certificate) and gender identity." Am. Psych. Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* 71 (3d ed., rev. 1987) (DSM-III-R).[1]

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[1] Akin to a dictionary, the latest edition of the Diagnostic and Statistical Manual of Mental Disorders is a useful source as to the meaning of a statutory term. Indeed, this Court has previously relied on the DSM as "one of the basic texts used by psychiatrists and other experts," to aid its analysis of statutory language involving psychological disorders. *Hall v. Florida*, 572 U.S. 701, 704

As the Fourth Circuit explained in *Grimm v. Gloucester County School Board*, "being transgender was pathologized for many years," such that in the DSM-III "one could receive a diagnosis of … 'gender identity disorder,' 'indicat[ing] that the clinical problem was the discordant gender identity.'" 972 F.3d 586, 611 (4th Cir. 2020) (citation omitted) (alteration in original), *cert. denied*, 141 S. Ct. 2878 (2021).

By contrast, the modern diagnosis of gender dysphoria, in name and diagnostic criteria, is concerned primarily with the "*clinically significant distress*" felt by some of those who experience "an incongruence between their gender identity and their assigned sex." Pet. App. 12a (quoting DSM-5); *see also* World Pro. Ass'n for Transgender Health, *Standards of Care* 2 (7th Version 2012) (defining gender dysphoria as "discomfort or distress that is caused by a discrepancy between a person's gender identity and that person's sex assigned at birth"). The DSM-5 expressly addresses the revision, noting that gender dysphoria is focused on "dysphoria as the clinical problem, not identity per se." *See* Pet. App. 15a (quoting DSM-5).

Given the clinically significant distinction between gender dysphoria and "gender identity disorders," and in light of Congress's mandate that "courts . . . construe the amended [ADA] as broadly as possible," and the "generosity with which complaints are to be reviewed,"

(2014). Below, petitioner argued that the Fourth Circuit could not consider the DSM-5 because Williams did not refer to it in her complaint. The Fourth Circuit rightly rejected that argument and Petitioner does not revisit it here. *See* Pet. App. 11a n.2.

the Fourth Circuit correctly held that the "difference between 'gender identity disorders' and gender dysphoria" was sufficient support to "nudge Williams' claims . . . across the line from conceivable to plausible." Pet. App. 9a, 16a (quoting *Twombly*, 550 U.S. at 570 (alteration omitted)).

Petitioner contends that the panel's holding "ignores the plurality of the word disorders." Pet. 9. Petitioner emphasizes that in the DSM-III-R, "'gender identity disorders' is characterized as a 'subclass' of disorders including the specific diagnoses: 'Gender Identity Disorder of Childhood,' 'Transsexualism,' 'Gender Identity Disorder of Adolescence or Adulthood, Nontranssexual type,' and 'Gender Identity Disorder Not Otherwise Specified.'" Pet. 9. This argument is meritless. As used in the DSM-III-R, the term "gender identity disorders" referred to four specific subtypes of "gender identity disorders," and gender dysphoria does not fall into *any* of them.

Petitioner characterizes the Fourth Circuit's decision as holding that gender dysphoria is "dramatically different" and "an entirely separate unrelated condition" from gender identity disorder. Pet. 11, 12. Petitioner attacks a straw man. The question is not whether gender dysphoria is "dramatically different," "entirely separate," or "unrelated" to gender identity disorders. The question is whether gender dysphoria *is* a "gender identity disorder." It is not, so the statutory exclusion in § 12211(b) does not apply. Indeed, as the Fourth Circuit noted, equating the two conditions is akin to "equating the now-obsolete diagnosis of hysteria with the modern diagnosis of

general anxiety disorder simply because they share a common diagnostic criterium." Pet. App. 16a n.5. Petitioner's contention that § 12211(b) covers disabilities unless they are "unrelated" or "dramatically different" from the enumerated terms reflects an improper effort to rewrite the statutory text.

Moreover, petitioner's position that the ADA excludes any disability "associated with" gender identity disorders (Pet. 13) would yield absurd consequences. Some people with gender dysphoria also suffer from "intense anxiety" and "depression." Pet. App. 12a. Under petitioner's position, anxiety and depression would be deemed a disability under the ADA *unless* a court deemed that anxiety and depression to be "associated with" a person's "gender identity disorder." The Court should not adopt a reading of the ADA that would yield such arbitrary discrimination against transgender persons.

Contrary to petitioner's contention (Pet. 12), petitioner does not advocate writing "nine out of the eleven terms that were excluded" out of the ADA. If a term does not appear in the DSM, then the DSM cannot be relevant to the proper interpretation of that term. "Gender identity disorders" do appear in the DSM, and so the DSM is relevant to the proper interpretation of that term.

Petitioner relies heavily on a page-and-a-half press release issued by the American Psychological Association in 2013 when it added gender dysphoria to the DSM. *See* Pet. at 13–14. To the extent this press release is authoritative and relevant to this case, it supports respondent's position. The press release stated

that gender dysphoria "is a revision of DSM-IV's criteria for gender identity disorder," Pet. at 14 (quotation marks omitted), demonstrating that gender dysphoria is not the same thing as gender identity disorder. As the panel correctly held, in 1990 "gender identity disorders" carried a meaning that differed from "gender dysphoria" alleged in the complaint.

The Fourth Circuit's decision reflects the straightforward application of well-settled principles of statutory construction. No further review is warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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