

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

KESHA WILLIAMS,)
)
Plaintiff-Appellant,) No. 21-2030

v.)

) Brief of *Amici Curiae* The disAbility Law
) Center of Virginia, and Disability Rights
) Vermont in Support of Plaintiff-Appellant

STACY A. KINCAID, et al.,)
)
Defendant-Appellees,)

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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- In civil, agency, bankruptcy, and mandamus cases, a disclosure statement must be filed by **all** parties, with the following exceptions: (1) the United States is not required to file a disclosure statement; (2) an indigent party is not required to file a disclosure statement; and (3) a state or local government is not required to file a disclosure statement in pro se cases. (All parties to the action in the district court are considered parties to a mandamus case.)
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No. 21-2030Caption: Kesha Williams v. Cynthia A. Kincaid et al.

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If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: John Cimino

Date: 12/8/21

Counsel for: disAbility Law Center of Virginia

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No. 21-2030Caption: Kesha Williams v. Stacy Kincaid, et al

Pursuant to FRAP 26.1 and Local Rule 26.1,

Disability Rights Vermont

(name of party/amicus)

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Signature: /s/ John Paul Cimino

Date: 12/7/2021

Counsel for: amici

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I. IDENTIFICATION OF AMICI CURIAE

The disAbility Law Center of Virginia (“dLCV”) and Disability Rights Vermont (DRVT) respectfully submit this brief amici curiae¹ as part of our mission to advocate for the legal interests of people with disabilities.

dLCV is the designated protection and advocacy (“P&A”) system for the Commonwealth of Virginia. Va. Code § 51.5-39.13. As the designated protection and advocacy system, dLCV has the authority to “pursue legal, administrative, and other remedies or approaches to ensure the protection of, and advocacy for, the rights of such individuals.” 29 U.S.C. § 794e(f)(3). The United States Supreme Court affirmed this authority in *Virginia Office for Protection and Advocacy v. Stewart*, 563 U.S. 247 (2011) (involving two other protection and advocacy laws). As the P&A system for Virginia, dLCV has a strong interest in enforcement of the Americans with Disabilities Act (“ADA”) to assure full inclusion of people with disabilities in all aspects of society.

DRVT is the federally authorized Protection & Advocacy System for people with disabilities in Vermont. DRVT has an interest in pursuing legal remedies for individuals with disabilities who face discrimination. DRVT provides free legal services to advance and protect the rights of people with disabilities throughout

¹ Counsel for amici curiae authored this brief in whole and no other party other than amici curiae contributed financially to this brief. Neither party involved in this litigation authored this brief or contributed to its funding.

Vermont, including impact litigation to achieve systemic reform. DRVT provides these services to hundreds of individuals per year under federally-funded mandates established by Congress to protect and advocate for the rights, safety, and autonomy of people with disabilities. DRVT's work in the area of disability discrimination includes successful systemic litigation aimed at addressing areas impacting the intersectionality of other identities in addition to a person's disability.

II. SUMMARY

When Congress enacted the Americans with Disabilities Act (ADA) in 1990, it excluded from the definition of "disability" "transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders." 42 U.S.C. § 12211(b). In 1992, Congress incorporated an identical exclusion into the Rehabilitation Act of 1973. P.L. 102-569 (Oct. 29, 1992).² Congress did not define "Gender Identity Disorders" (hereinafter GIDs) in the Act itself, nor does the language in the Act provide a rationale for their exclusion from the definition of "disability." Among the questions before this court, and the only question addressed in this brief, is whether

² While both the ADA and the Rehabilitation Act are implicated in this case, the Gender Identity Disorder (GID) exclusion is identical in both. For the sake of simplicity, this brief will discuss the ADA throughout, but the same arguments and reasoning are applicable to the Rehabilitation Act's identical GID exclusions.

Gender Dysphoria, as defined in the DSM-5 in 2013, is a GID as defined in 1990 when the ADA was enacted. We urge the court to find that it is not.

Gender Dysphoria is a serious medical condition characterized by a marked incongruence between the individual's experienced gender and the individual's assigned sex, and clinically significant distress or impairment in social, occupational, or other important areas of functioning. DSM-5 at 452. Gender Dysphoria was first included in the American Psychiatric Association's (APA's) Diagnostic and Statistical Manual (DMS) with the publication of its Fifth Edition (DSM-5) in 2013. DSM-5, at 814 (noting that "[g]ender dysphoria is a new diagnostic class in DSM-5 and reflects a change in conceptualization of the disorder's defining feature by emphasizing the phenomenon of "gender incongruence" rather than cross-gender identification per se."). When Gender Dysphoria was added by the APA as a diagnosis, an older class of diagnoses called "Gender Identity Disorders" (GIDs) was removed from the DSM. *Id.* The removal of GID from the DSM and adoption of Gender Dysphoria as an alternative diagnosis reflected an updated understanding of gender identity, and of transgender people and their lived experiences. This updated understanding no longer depicted transgender identity as a "disorder," but instead "focuses on dysphoria as the clinical problem, not identity per se." DSM-5 at 451.

The court below described the ADA’s GID exclusion as “unambiguous,” and concluded with little analysis that Gender Dysphoria is a GID, thus framing the central question in the case as “whether gender dysphoria is the result of a physical impairment and thus excluded from the scope of the ADAA [ADA Amendments Acts] and RA.” *Williams v. Kincaid*, No. 1:20-CV-1397, 2021 WL 2324162, at *2 (E.D. Va. June 7, 2021). It then dismissed the appellant’s ADA claim, after concluding that the “amended complaint fails to demonstrate that gender dysphoria is the result of a physical impairment.” *Id.* Deeper analysis, however, reveals that Gender Dysphoria, by definition, is not a GID as that diagnosis was understood in 1990 when the ADA was enacted. Because Congress has instructed courts to construe the terms of the ADA in a manner that extends its protections “to the *maximum* extent permitted by the terms of the Act,” ADAAA Section 12102(4)(A). Pub.L. No. 110–325, § 2(b)(5) (2008) (emphasis added), and because Gender Dysphoria is not a GID, Amici urge the court to find that Gender Dysphoria is not categorically excluded from the ADA’s protections.

III. ARGUMENT

A. Exclusions from the Americans with Disabilities Act must be construed narrowly

We begin our analysis of the meaning of the ADA’s GID exclusion with the premise that any exclusions from the ADA’s protections must be construed

narrowly. When Congress enacted the ADA Amendments Act (ADAAA), it declared that the definition of disability in the ADA “shall be construed in favor of broad coverage of individuals under this Act, *to the maximum extent permitted by the terms of this Act.*” *Id.* (emphasis added). As this court previously explained:

The ADA Amendments Act (ADAAA) was intended to make it easier for people with disabilities to obtain protection under the ADA. The regulation clarifies that the primary object of attention in cases brought under the ADA should be whether covered entities have complied with their obligations and whether discrimination has occurred, not whether the individual meets the definition of disability. *Jacobs v. N.C. Admin. Off. of the Cts.*, 780 F.3d 562, 572 (4th Cir. 2015) (internal quotations and citations removed).

By requiring the ADA’s terms to be construed liberally in favor of broad coverage under the Act, the ADAAA effectively codified the previously “well-accepted principle that remedial legislation... is to be given a liberal construction consistent with the Act’s overriding purpose.” *United States v. Article of Drug . . . Bacto-Unidisk . . .*, 394 U.S. 784, 798 (1969). To liberally construe remedial legislation, exceptions contained in such legislation must be construed narrowly. *See, e.g., Loc. Union 7107 v. Clinchfield Coal Co.*, 124 F.3d 639, 640 (4th Cir. 1997) (“Because the WARN Act is remedial legislation, its exceptions are construed

narrowly.”); *see also Messer v. Bristol Compressors Int'l, LLC*, W.D. Va. No. 1:18CV00040, 2020 WL 1472217, at *16 (W.D. Va. Mar. 26, 2020); *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 65 S. Ct. 807, 89 L. Ed. 1095 (1945) (“Any exemption from humanitarian and remedial legislation such as the Fair Labor Standards Act must be narrowly construed....”). Likewise, exclusions from the definition of “disability” in the ADA must be construed narrowly to effectuate Congress’s express intent to achieve broad coverage under the Act.

The legislative history of the ADA’s exclusions also support a narrow construction of its exclusions. 135 Cong. Rec. S10765-01, S10786 (daily ed. Sept. 7, 1989), 1989 WL 183216. When speaking to the amendment that incorporated the exclusions into the ADA, Senator Harkin described the amendment as “narrowly focused,” and clarified that the exclusions “cannot be used as a pretext for discrimination based on other disabilities.” *Id.*

B. When the ADA was enacted in 1990, the “Gender Identity Disorder” diagnosis contemplated transgender status as a clinical problem in itself that warranted psychiatric diagnosis

To interpret the ADA’s GID exclusion, we must look to the meaning of GID as it was understood at the time of the ADA’s enactment. *Bostock v. Clayton Cty., Georgia*, 140 S. Ct. 1731, 1738, 207 L. Ed. 2d 218 (2020) (“This Court normally interprets a statute in accord with the ordinary public meaning of its terms at the time

of its enactment.”). The history of GID as a diagnosis is not unknown to this court. See *Grimm v. Gloucester Cty. Sch. Bd.*, 972 F.3d 586, 611 (4th Cir. 2020), as amended (Aug. 28, 2020), *cert. denied*, 141 S. Ct. 2878 (2021). As this court recently explained in *Grimm*, the GID diagnosis pathologized transgender people:

Being transgender was pathologized for many years. As recently as the DSM-3 and DSM-4, one could receive a diagnosis of “transsexualism” or “gender identity disorder,” indicating that the clinical problem was the discordant gender identity. Whereas “homosexuality” was removed from the DSM in 1973, “gender identity disorder” was not removed until the DSM-5 was published in 2013. What is more, even though being transgender was marked as a mental illness, coverage for transgender persons was excluded from the Americans with Disabilities Act of 1990 (ADA) after a floor debate in which two senators referred to these diagnoses as “sexual behavior disorders.” *Id.* (internal quotes and citations removed). *Id.* 611.

In each of the diagnoses included under the Gender Identity Disorder class of diagnoses transgender status itself was perceived as the clinical problem warranting psychiatric diagnosis. When GID was first adopted by the APA as a diagnostic class with the publication of the DSM-III in 1980, it was characterized as “feelings of discomfort and inappropriateness about his or her anatomic sex and by persistent behaviors generally associated with the other sex.” American Psychiatric Association, *Diagnostic and Statistical Manual, Third Edition (DSM III)* at 261. The GID subclass included “transsexualism,” “Gender Identity Disorder of Childhood,” and “Atypical Gender Identity Disorder.” *Id.* 261-266.

In 1987, a revised version of the DSM-III was published (DSM-III-R). American Psychiatric Association, Diagnostic and Statistical Manual, Third Edition (DSM III-R), 1987. In the DSM-III-R, the diagnosis of “Gender Identity Disorder of Adolescence or Adulthood” was added as a diagnosis within the GID subclass; and “Atypical Gender Identity Disorder” was replaced with “Gender Identity Disorder Not Otherwise Specified.” *Id.* 71-78. “GID Not Otherwise Specified” was defined as “disorders in gender identity that are not classifiable as a specific Gender Identity Disorder.” *Id.* 77. Examples of such not otherwise classifiable GIDs were enumerated in the text of the DSM-III-R, including “children with persistent cross-dressing,” and “adults with transient, stress-related cross-dressing behavior.” *Id.* 78. Gender Dysphoria was not included as a diagnosis in either the DSM-III or the DSM-III-R. It was not until the publication of the DSM-5 in 2013 that Gender Dysphoria was defined as a diagnosis in the DSM, and Gender Identity Disorders were simultaneously removed from the DSM.

C. Gender Dysphoria is distinguishable from GID as understood in 1990, because the clinical problem is not gender identity, but clinically significant distress

Our understanding of gender identity has evolved significantly in the past three decades, and so too have the medical and psychological constructs that relate to transgender people and gender nonconformity broadly. GIDs are no longer

recognized as valid diagnoses by the APA. The APA removed the GID class of diagnoses in 2013 with the publication of the DSM-5 and replaced it with the new and distinct diagnosis of Gender Dysphoria, a single diagnosis that is in a class of its own within the DSM-5. *Id.* Unlike GID, Gender Dysphoria is not subsumed under any broader diagnostic class and is not associated with any of the other diagnoses classified as “sexual behavior disorders” in § 12211(b). The removal of GID diagnostic subclass from the DSM reflects the contemporary consensus that transgender status and gender nonconformity are not themselves physical or mental impairments. *See Grimm v. Gloucester Cty. Sch. Bd.*, 972 F.3d 586, 594 (4th Cir. 2020), as amended (Aug. 28, 2020), *cert. denied*, 141 S. Ct. 2878 (2021) (“Being transgender is also not a psychiatric condition, and implies no impairment in judgment, stability, reliability, or general social or vocational capabilities.”) (Internal quotations and citations removed).

When a transgender person experiences clinically significant distress that accompanies an incongruence between their gender identity and their assigned sex, that person may be diagnosed with Gender Dysphoria. DSM-5, pg. 451 (“Gender dysphoria refers to the distress that may accompany the incongruence between one’s experienced or expressed gender and one’s assigned gender.”). The clinical problem associated with this diagnosis is not the discordant identity, but the dysphoria that may accompany it. *Id.* (“The current term [Gender Dysphoria] is more descriptive

than the previous DSM-IV term gender identity disorder and focuses on dysphoria as the clinical problem, not identity per se.”); *see also* American Psychiatric Association, *Highlights of Changes from DSM-IV-TR to DSM 5*, at 14-15 (“Gender dysphoria is a new diagnostic class in DSM-5 and reflects a change in conceptualization of the disorder’s defining features by emphasizing the phenomenon of ‘gender incongruence’ rather than cross-gender identification per se, as was the case in DSM-IV gender identity disorder.”) (*available at* https://www.psychiatry.org/File%20Library/Psychiatrists/Practice/DSM/APA_DS_M_Changes_from_DSM-IV-TR_to_DSM-5.pdf). Dysphoria is defined in the DSM-5 as “a condition in which a person experiences intense feeling of depression, discontent, and in some cases indifference to the world around them.” DSM-5 at 821.

D. Gender Dysphoria falls outside of the GID exclusion’s grasp, because it is a new and distinct diagnosis

The definition of “disability” in the ADA is intentionally broad, consistent with Congress’s express purpose of providing a “clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.” 42 U.S.C. § 12101(b)(1); *Blatt v. Cabela’s Retail, Inc.*, No. 5:14-CV-04822, 2017 WL 2178123, at *2 (E.D. Pa. May 18, 2017) (noting that “Congress opted to define the scope of the [ADA’s] coverage by means of a flexible and broad definition of

“disability”). Disability under the Act means "(a) A physical or mental impairment that substantially limits one or more of the major life activities of [an] individual; (b) a record of such an impairment; or (c) being regarded as having such an impairment." 42 U.S.C. § 12102(2) (1994); 29 C.F.R. § 1630.2(g) (1996). Although the definition is broad, Congress categorically excluded from the definition a list of diagnoses, including:

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). (emphasis added)

At issue in this case is whether Gender Dysphoria is a “gender identity disorder” as that term was understood in 1990. If it is, then it is excluded from the definition of “disability” under the Act unless it is caused by a physical impairment. The court below held that it is. Other courts have decided differently.

No appeals court has yet to rule on whether Gender Dysphoria falls within the ADA’s GID exclusion. While district courts have come to different conclusions, a growing chorus of district courts have recognized the distinctions between the now rejected GID diagnostic class of diagnoses on the one hand, and the current diagnosis of Gender Dysphoria on the other. *See, e.g., Doe v. Mass. Dep’t of Correction*, 2018 WL 2994403, at *7 (D. Mass. 2018) (noting that a “distinction can be made between the definition given in DSM-IV of ‘gender identity disorders,’ and that now given in

DSM-V of ‘gender dysphoria.’ In contrast to DSM-IV, which had defined ‘gender identity disorder’ as characterized by a ‘strong and persistent cross gender-identification’ and a ‘persistent discomfort’ with one’s sex or ‘sense of inappropriateness’ in a given gender role, the diagnosis of GD in DSM-V requires attendant disabling physical symptoms, in addition to manifestations of clinically significant emotional distress.”); *see also Venson v. Gregson*, 2021 WL 673371, at *2-3 & n.2 (S.D. Ill. 2021) (allowing incarcerated transgender woman’s claim that defendants discriminated against her and failed to accommodate her gender dysphoria in violation of ADA to go forward); *Tay v. Dennison*, No. 19-cv-00501-NJR, 2020 WL 2100761, at *3 (S.D. Ill. May 1, 2020) (“[T]he Court cannot categorically say that gender dysphoria falls within the ADA’s exclusionary language and will allow th[e plaintiff’s ADA] claim to proceed.”); *Iglesias v. True*, 403 F. Supp. 3d 680, 688 (S.D. Ill. 2019) (concluding, on preliminary review pursuant to 28 U.S.C. § 1915A, that “the Court cannot categorically say that gender dysphoria falls within the [Rehabilitation Act’s] exclusionary language and will err on the side of caution to allow Plaintiff’s claim to proceed.”); *Edmo v. Idaho Dep’t of Corr.*, No. 1:17-cv-00151-BLW, 2018 WL 2745898, at *8 (D. Idaho June 7, 2018) (“[T]he issue of whether Edmo’s diagnosis falls under a specific exclusion of the ADA presents a genuine dispute of material fact in this case.”). *Blatt v. Cabela’s Retail, Inc.* 2017 WL 2178123, at 4 (E.D. Pa., May 18, 2017) (reading the GID

exclusion narrowly “to refer to only the condition of identifying with a different gender, not to encompass (and therefore exclude from ADA protection) a condition like Blatt’s gender dysphoria, which goes beyond merely identifying with a different gender and is characterized by clinically significant stress and other impairments that may be disabling.”). Cf. *Parker v. Strawser Contr. Inc.*, 307 F.Supp. 3d 744, (S.D. Ohio) (dismissing case because Plaintiff failed to allege that gender dysphoria results from physical impairment).

There are important distinctions between Gender Dysphoria as understood today and GID as it was understood in 1990. Gender Dysphoria was not a recognized diagnosis in 1990 when the ADA was enacted; and Gender Dysphoria is not synonymous with GID; it is a distinct diagnosis. A comparison of the GID diagnoses as they were understood in 1990, with Gender Dysphoria as understood today reveals significant differences in their conceptualizations. The GID diagnosis as it existed in 1990 pathologized transgender people and contemplated transgender identity as “disordered.” *Grimm* at 611. The perceived clinical problem in the GID diagnosis was the individual’s discordant gender identity itself. *Id.* By contrast, the Gender Dysphoria diagnosis recognizes clinically significant distress as the clinical problem, not the identity itself. *Highlights of Changes from DSM-IV-TR to DSM 5*, at 14-15

In *Blatt*, the court analyzed the text of the ADA's exceptions and noted that they "can be read as falling into two distinct categories: first, non-disabling conditions that concern sexual orientation or identity, and second, disabling conditions that are associated with harmful or illegal conduct." *Blatt v. Cabela's Retail, Inc.*, No. 5:14-CV-04822, 2017 WL 2178123, at *3 (E.D. Pa. May 18, 2017). Noting that GID would hold an "anomalous place in the statute" if it were interpreted as excluding a disabling condition that does not involve harmful or illegal conduct, such as disabling Gender Dysphoria, the court reasoned that the term GID as used in the ADA should be interpreted as referring "only to the condition of identifying with a different gender, [and] not to encompass... a condition like Blatt's gender dysphoria, which goes beyond merely identifying with a different gender and is characterized by clinically significant stress and other impairments that may be disabling." *Id.* 2.

A purely textualist reading of the ADA exclusions arrives at the same result as the court in *Blatt*. If we interpret the terms of the ADA exclusion in accordance with their meaning as understood in 1990, as we must, *see Bostock* at 1738, the GID exclusion does not capture Gender Dysphoria within its net. Gender Dysphoria was neither a diagnosis in 1990, nor is it synonymous with any of the then existing GID diagnoses. Instead, Gender Dysphoria is a new diagnosis, which recognizes a

different underlying clinical problem than the then existing GIDs: dysphoria, not gender identity per se.

The broad construction of the GID exclusion employed by the court below would deny the ADA's protections to a group of people with otherwise qualifying disabilities solely based on their transgender identity. *Doe*, 2018 WL 2994403, at 8 (“The court is of the view that, to the extent that the statute may be read as excluding an entire category of people from its protections because of their gender status, such a reading is best avoided.”). Such an interpretation of the GID exclusion would ascribe to Congress a discriminatory intent that is inconsistent with the very remedial purpose for which the ADA was enacted. As one court explained:

It is virtually impossible to square the exclusion of otherwise bona fide disabilities with the remedial purpose of the ADA, which is to redress discrimination against individuals with disabilities based on antiquated or prejudicial conceptions of how they came to their station in life. *Id.*, *7-8.

A narrow construction, as described above, which interprets the GID exclusion in a way that does not capture Gender Dysphoria in its net avoids this paradoxical outcome. It also avoids judicial expansion of the terms of the statute in a way that would incorporate a diagnosis that did not exist when Congress enacted the ADA into its specifically enumerated exclusions. Congress excluded a list of specific diagnoses when in enacted the ADA in 1990. Gender Dysphoria was not among them. If Congress wishes to expand the list of excluded conditions, it is

within its purview to do so. Unless or until that happens, the Court should not expand Congress's expressly enumerated exclusions to include a diagnosis that did not exist in 1990 when the ADA was enacted.

IV. CONCLUSION

Gender Dysphoria is distinct from the now discarded diagnosis of Gender Identity Disorders, because the clinical problem in Gender Dysphoria is not the discordant gender identity, but “the distress that may accompany the incongruence between one’s experienced or expressed gender and one’s assigned gender.” DSM-5 at 451. The exclusion of a historically-marginalized class of Americans, transgender people, from the protections of the ADA even when those people experience a diagnosis that significantly limits one or more major life activities is inconsistent with the remedial purpose of the ADA. Because of this, a statutory construction that results in this paradoxical result should be rejected if there is an at least equally reasonable construction that achieves a different result. In this case, there is such a construction of the ADA’s GID exclusion that does not deny the protections promised by the ADA to transgender people who have Gender Dysphoria. The GID exclusion can be interpreted narrowly, consistent with the plain language of the statute, such that it does not catch the new diagnosis of Gender Dysphoria in its net. This interpretation is consistent with the remedial purposes of the ADA; with the ADA’s express instructions that the ADA should be

interpreted in a manner that extends the ADA’s protections “to the maximum extent permitted by the terms of the Act;” and with the intent of Congress as depicted in the ADA’s own legislative history. For these and all of the reasons explained in this brief, *amici* urge this court to hold that Gender Dysphoria is not precluded from the ADA’s protections by the GID exclusion, because it is a separate and distinguishable diagnosis from the now rejected GID diagnosis.

Respectfully submitted,

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