

Rapid Research Report

When is gender dysphoria considered a disability under the Americans with Disabilities Act?

Compiled by Maeve Moynihan, JD Candidate 2024, University of Denver Sturm College of Law
Jill L. Bezyak, PhD, Professor, University of Northern Colorado

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EXECUTIVE SUMMARY AND DEFINITIONS

This report will explore when gender dysphoria is a protected disability under the Americans with Disabilities Act (ADA).ⁱ According to relevant federal case law, gender dysphoria can be considered a disability under the ADA if the gender dysphoria is either: (1) not considered a gender identity disorder; or (2) is a gender identity disorder but is a result of “physical impairments” instead of mental or emotional factors.ⁱⁱ Advocates of transgender rights have turned to the statutory language of “physical impairments” because “gender identity disorders” are largely excluded from protection under the ADA.ⁱⁱⁱ

For the purposes of this report, a transgender person will be defined as “a person whose gender identity differs from the sex the person had or was identified as having at birth.”^{iv} Gender dysphoria will be defined as the fifth edition of the American Psychiatric Association Diagnostic and Statistical Manual of Mental Disorders (DSM-V) defines it, namely: “a difference between one’s experienced/expressed gender and assigned gender” that causes “significant distress or problems functioning.”^v Importantly, not all transgender people experience gender dysphoria.^{vi}

Throughout the report, quoted language from court documents and statutes will be used. Such language may be outdated or offensive to the LGBTQIA community. The author will only use such terminology when quoting material in an original document and will provide an explanatory endnote with preferred modern terminology. This report will focus on cases that are relevant to the six states that the Rocky Mountain ADA Center serves, namely: Colorado, Utah, Wyoming, Montana, North Dakota, and South Dakota.^{vii} These states fall within the Eighth, Ninth, and Tenth federal circuits, so cases from those jurisdictions will be discussed.

INTRODUCTION

Across the United States, politicians, civilians, and community groups have fought over the legality and scope of transgender rights for decades.^{viii} In pursuing protection for transgender people, many legal practitioners have focused on sex discrimination laws.^{ix} However, disability rights laws, like the ADA, can also offer meaningful protection.^x Uniquely, disability rights laws can provide the right to reasonable accommodations or modifications for people with disabilities in public and private spaces.^{xi} If gender dysphoria is considered a disability under the ADA, people who experience gender dysphoria can access accommodations related to the distress they feel as a result of their gender dysphoria.^{xii} For example, a transgender man with gender

dysphoria might seek a gender transition surgery to remove excess skin and tissue on his chest.^{xiii} If his gender dysphoria is protected under the ADA, he could request a reasonable accommodation to work from home during his surgical recovery or to have more frequent breaks to change bandages. Similarly, a transgender woman with gender dysphoria might ask for a reasonable accommodation to use a specific restroom or wear a women's uniform that conforms with her identity.^{xiv} Gender-affirming care for transgender people with gender dysphoria can include hormone therapy, surgical treatments, and mental health counseling, among other services.^{xv} Without ADA protection, reasonable accommodations or modifications for gender dysphoria can be challenging to access.^{xvi}

Despite advocacy for the protection of transgender rights, from April 2021 to June 2023, Montana, Utah, South Dakota, and North Dakota enacted state laws that limited or completely prohibited gender-affirming healthcare for transgender people, particularly transgender youth.^{xvii} These restrictive laws make the question of federal ADA protection increasingly important in those states. Although Wyoming attempted to outlaw gender-affirming care twice, the bills failed, and the care remains legal there at this time.^{xviii} Colorado is the only Rocky Mountain state that has enacted a law to protect a transgender person's right to gender-affirming care.^{xix}

This report will examine when gender dysphoria is considered a disability under the ADA. First, this report will briefly examine the ADA and the protections it provides. Second, the report will outline two federal cases that serve as the foundation for current law regarding gender dysphoria and the ADA. Third, the report will discuss relevant cases in three federal circuits: the Eighth Circuit (which includes North and South Dakota), the Ninth Circuit (which includes Montana), and the Tenth Circuit (which includes Colorado and Utah).^{xx} The U.S. Courts of Appeals in each of these circuits, the highest regional court in each circuit, have not addressed this issue directly. As a result, there is no concrete rule of law on the issue that federal district courts in the Rocky Mountain states must follow. Therefore, federal courts within these states turn to other federal decisions for analysis. This report is not an exhaustive analysis of every case that has addressed this issue; instead, it aims to provide a short update on the current state of the law as is relevant to the Rocky Mountain region.

THE AMERICANS WITH DISABILITIES ACT

Passed in 1990, the ADA broadly prohibits discrimination based on disability in employment, public services, transportation, public accommodations, and telecommunication services.^{xxi} The ADA defines disability as “a physical or mental impairment that substantially limits one or more major life activities...; a record of such an impairment; or being regarded as having such an impairment.”^{xxii} Importantly, being transgender is not protected under the ADA because being transgender alone is not a disability.^{xxiii}

Despite the protection for disabilities, two sections of the ADA limit the definition. First, section 12111 specifically excludes the following from the term disability: “transvestism, transsexualism, . . . gender identity disorders not resulting from physical impairments, or other sexual disorders.”^{xxiv} Second, section 12208 explicitly states that “the term ‘disabled’, or ‘disability’ shall not apply to an individual solely because that individual is a transvestite.”^{xxv} The ADA does not mention or define gender dysphoria.^{xxvi} Therefore, at first glance, gender dysphoria appears to fit the definition of a disability because it can substantially limit daily life activities. However, if gender dysphoria *is* a gender identity disorder that does *not* result from physical impairments, the ADA excludes it from protection.^{xxvii}

Legislative history behind the ADA demonstrates that Congress intended for the section 12111 exclusions to be understood narrowly.^{xxviii} Congress specifically excluded sexual orientation and gender identities from protection but did not exclude conditions related to sexual orientation or gender identities that might disable a person, such as gender dysphoria.^{xxix} Therefore, if gender dysphoria is interpreted to be a mental condition alone, it is excluded from ADA protection because it would be considered a “gender identity disorder . . . not resulting from physical impairments.”^{xxx} On the other hand, if gender dysphoria is *not* a gender identity disorder or if it *does* result from “physical impairments,” it can be protected as a disability under the statute’s language, which is why the terminology of “physical impairment” is used frequently in court documents and statutes.^{xxxi}

Importantly, Congress amended the ADA in 2008 and directed courts to construe the definition of disability “in favor of broad coverage of individuals under this chapter, to the maximum extent permitted by the ADA’s terms.”^{xxxii} With these amendments, Congress intended to make it easier for people with disabilities to receive protection; therefore, the

amendments lend support to the protection of gender dysphoria as a disability under the ADA.^{xxxiii}

RELEVANT FEDERAL CASE LAW

The federal case law in this area is unsettled; but, recent holdings from federal courts have recognized protection for gender dysphoria under the ADA.^{xxxiv} However, that protection is often contingent upon a plaintiff alleging sufficient facts to show that their gender dysphoria is a result of “physical impairments.”^{xxxv} As discussed, if a condition related to gender identity is purely mental or emotional, the ADA excludes it from protection under section 12111.^{xxxvi} For example, being transgender is excluded because it solely relates to identity. However, because of the “physical impairments” exception, gender dysphoria can be protected if it is rooted in physical factors.^{xxxvii} In fact, transgender rights advocates have turned to scientific research that suggests that gender dysphoria is rooted in physical factors.^{xxxviii} Moreso, advocates have distinguished being transgender, an identity, from having gender dysphoria, which involves clinically significant distress.^{xxxix} In 2015 the Department of Justice also concluded that modern scientific research suggests that gender dysphoria has biological roots and is a covered disability under the ADA under the “physical impairments” exception.^{xl} Furthermore, throughout the Obama, Trump, and Biden Administrations, the Department of Justice has held the position that gender dysphoria is a disability that is protected under the ADA.^{xli}

On June 30, 2023, the U.S. Supreme Court directly addressed this issue when it declined to grant certiorari in *Williams v. Kincaid*.^{xliii} Declining certiorari means that the Justices decided not to review the case, thereby implicitly accepting the lower court’s decision.^{xliii} In *Williams*, discussed subsequently, the U.S. Court of Appeals for the Fourth Circuit held that gender dysphoria is not a gender identity disorder.^{xliv} Furthermore, the court concluded that even if gender dysphoria is a gender identity disorder, it is protected if it results from “physical impairments,” which increasing scientific evidence shows that it does.^{xlv} The Supreme Court’s denial of review of the *Williams* decision signifies that the Justices did not overturn the Fourth Circuit’s decision at this time. However, Justices Alito and Thomas dissented from the decision not to review the case, implying that they disagree with the Fourth Circuit’s analysis in *Williams*.^{xlvi} In their dissent, Justices Alito and Thomas wrote that “the Fourth Circuit has effectively invalidated a major provision of the Americans with Disabilities Act . . . and that

decision is certain to have far-reaching and highly controversial effects.”^{xlvi} In writing on the “major provision,” Justices Alito and Thomas were referring to the section 12111 gender identity exclusions. They argued that the Fourth Circuit’s decision in *Williams* invalidated those exclusions and intimated that doing so was improper.^{xlviii} Their dissenting opinion argued that the Supreme Court should weigh in on the issue because there is a “reasonable argument” that the Fourth Circuit’s decision in *Williams* was incorrect.^{xliv} With these divergent perspectives of Supreme Court justices in mind, future federal case law will weigh significantly on ADA protection of gender dysphoria.

A. The Foundation for Protection: *Blatt v. Cabela’s Retail, Inc.*

Blatt v. Cabela’s Retail, Inc. (2017) provides a foundation for the legal relationship between gender dysphoria and the ADA.¹ In *Blatt*, a federal district court in Pennsylvania held that the ADA does not categorically exclude gender dysphoria from protection.^{li} The court reasoned that gender dysphoria was not a gender identity disorder.^{lii} Instead, gender dysphoria was a disabling condition related to gender because it can substantially limit daily activities, including “interacting with others, reproducing, and social and occupational functioning.”^{liii} Therefore, section 12111 does not exclude gender dysphoria from protection.^{liv} Because courts had not explicitly stated as such before, *Blatt* effectively opened the door for transgender people with gender dysphoria to challenge civil rights violations under the ADA.^{lv} However, like many other cases this report explores, *Blatt* is not binding legal precedent for the Rocky Mountain states because it is a Third Circuit case. Nevertheless, *Blatt* provides persuasive analysis of the issue that courts within the Rocky Mountain region can follow if they choose.

B. The “Physical Impairments” Contingency: *Williams v. Kincaid*

In *Williams v. Kincaid* (2022), discussed above, the Fourth Circuit Court of Appeals held that if an individual can allege sufficient facts to show that their gender dysphoria results from “physical impairments,” then that individual’s gender dysphoria can be protected as a disability under the ADA.^{lvi} While *Williams* is not binding on the Rocky Mountain states because it is a Fourth Circuit case, it provides a framework and an in-depth analysis of the issue that has been used persuasively within the Eighth, Ninth, and Tenth Circuits.

Kesha Williams, the plaintiff in *Williams*, is a transgender woman with gender dysphoria who was incarcerated in Virginia.^{lvii} Ms. Williams’s home state of Maryland recognized her as a female and stated as such on her driver’s license.^{lviii} Nevertheless, when staff at the detention center learned that Ms. Williams was transgender, they transferred her from a female facility to a male facility.^{lix} While housed at the male facility, detention center staff caused delays in Ms. Williams’s hormone therapy treatment for her gender dysphoria.^{lx} Furthermore, both prison deputies and other inmates harassed Ms. Williams based on her transgender identity and frequently intentionally misgendered her, referring to her as “mister” and using he/him pronouns.^{lxi} As a result, Ms. Williams experienced increased physical and emotional distress, did not receive her hormone treatment for several days, and feared for her safety.^{lxii}

When released, Ms. Williams brought suit against the Sheriff of Fairfax County and individual staff members at the prison for violating the ADA, Section 504 of the Rehabilitation Act, the U.S. Constitution, and state law.^{lxiii} The Defendants contested the action and argued that gender dysphoria is not a disability under the ADA because it is a gender identity disorder and thus the section 12111 exceptions exclude it from protection.^{lxiv} Ms. Williams argued that gender dysphoria was not a gender identity disorder, and even if it was, it was rooted in “physical impairments.”^{lxv} The court agreed and reasoned that the category “gender identity disorders” did not include gender dysphoria when Congress enacted the ADA in 1990.^{lxvi} Therefore, nothing in the ADA excludes gender dysphoria from protection.^{lxvii} Since Ms. Williams successfully argued that her gender dysphoria arose out of “physical impairments,” she was entitled to protection under the ADA.^{lxviii}

C. Eighth, Ninth, and Tenth Circuit Cases Following *Williams*

Within the Rocky Mountain states, *Griffith v. El Paso County* (2023) and *Duncan v. Jack Henry and Associates* (2022) are the most pertinent and recent cases on this issue.^{lxix} In *Griffith*, a case within the Tenth Circuit, the District Court of Colorado specifically addressed the interplay of gender dysphoria and the ADA.^{lxx} The court concluded that the ADA does not categorically exclude gender dysphoria from protection.^{lxxi} In this case the plaintiff, Darlene Griffith, is a transgender woman who had been diagnosed with gender dysphoria and incarcerated in a detention facility in Colorado.^{lxxii} While incarcerated, Defendants sexually assaulted Ms. Griffith, misgendered her, and placed her in a male facility, despite her

presentation and identification as a female and her explicit request to be placed in a female facility due to her gender dysphoria.^{lxxiii} Ms. Griffith later brought suit against staff at the detention facility, alleging that they had violated the ADA by failing to protect her gender dysphoria as a disability.^{lxxiv}

Because the Tenth Circuit had not addressed the issue directly, the court in *Griffith* followed the Fourth Circuit’s reasoning in *Williams*.^{lxxv} In doing so, the court concluded that gender dysphoria is not categorically excluded from the ADA under the language of the statute.^{lxxvi} However, the court did not confirm protection for gender dysphoria for Ms. Griffith, because the court found that she had not alleged sufficient facts to prove the discrimination.^{lxxvii}

While this case did not result in a favorable conclusion for Ms. Griffith, the language of the case alludes to the District of Colorado’s orientation in favor of the protection for gender dysphoria under the ADA.^{lxxviii} For example, Ms. Griffith argued that the case directly addressed, “governmental validation of the existence and experiences of transgender people, as well as the simple recognition of their humanity.”^{lxxix} The court acknowledged the importance of the topic and stated that the court was, “sympathetic to Plaintiff and cognizant of the harms that she has suffered during her detention.”^{lxxx} Moreso, at the preceding level of the case, the judge specifically stated that “the [c]ourt believes that discrimination based on gender dysphoria violates the ADA” but acknowledged that this is not “settled law.”^{lxxxii} This language indicates a favorable orientation toward ADA protection of gender dysphoria in the Tenth Circuit, which could impact future cases in Colorado, Utah, and Wyoming. Furthermore, the court’s conclusion that the ADA does not categorically exclude gender dysphoria from disability protection leaves the opportunity for litigation on the issue open.

Within the Eighth Circuit, *Duncan v. Jack Henry and Associates* (2022) is the most pertinent case, because a federal district court in Missouri concluded that gender dysphoria *is* a gender identity disorder and thus is excluded from ADA protection.^{lxxxii} While Missouri is not a Rocky Mountain state, it falls within the same circuit as North and South Dakota, meaning that courts in those two states could follow *Duncan* if they choose to.^{lxxxiii} The court undertook a statutory interpretation analysis to determine whether gender dysphoria is considered a disability under the ADA.^{lxxxiv} Unlike the court in *Williams*, however, the court concluded that gender dysphoria is a gender identity disorder.^{lxxxv} The court reasoned that Congress intended the phrase “gender identity disorders” to serve as a general category.^{lxxxvi} Furthermore, unlike *Blatt* in

which the plaintiff brought constitutional claims, the plaintiff in *Duncan* did not bring any constitutional claims, so the court was not required to interpret the phrase “gender identity disorder” broadly.^{lxxxvii} Because of the court’s reasoning in *Duncan*, ADA protection for gender dysphoria is weaker in the Eighth Circuit than it is in the Tenth Circuit.

Within the Ninth Circuit, several plaintiffs have attempted to garner ADA protection for gender dysphoria; however, none of them have done so successfully as of July 2023.^{lxxxviii} Most courts have concluded that the individual plaintiffs have been unable to allege enough facts to show that their gender dysphoria is a protected disability.^{lxxxix} Therefore, transgender people experiencing gender dysphoria and seeking ADA protection in Montana could still argue for protection under the ADA.

CONCLUSION

As many courts across the United States have acknowledged, this area of law is far from settled. Within the Rocky Mountain region, most federal district courts have not categorically denied protection for gender dysphoria under the ADA. In fact, several federal district courts have recognized that gender dysphoria is not categorically excluded from ADA protection. However, because the U.S. Courts of Appeals in the Eighth, Ninth, and Tenth Circuits have not addressed the issue directly, there is no binding rule for this issue in the Rocky Mountain states.

The U.S. Supreme Court’s June 2023 denial of review of *Williams v. Kincaid* serves as an important moment in the evolution of the law surrounding gender dysphoria and the ADA. Because the Supreme Court denied review and declined to provide a binding rule on the issue, the future of the law surrounding this issue lies with federal courts across the country. If the U.S. Court of Appeals in the Eighth, Ninth, or Tenth Circuit addresses the issue, that rule will be binding on the Rocky Mountain states in that respective circuit. Currently, however, without a Supreme Court opinion that explicitly provides a ruling related to the protection of gender dysphoria under ADA protection as a disability, transgender rights advocates can argue that it merits protection. Such advocates can continue to argue that gender dysphoria is not a gender identity disorder or that it is a gender identity disorder that results from physical impairments.

WORKS CITED

ⁱ Throughout this report, “ADA” refers to both the original statute, passed in 1990, and the amendments, passed in 2008. The amendments are often referred to as the ADA Amendments Act (ADAAA), but the Amendments and original statute will be referred to as ADA throughout the report for continuity. *See* Americans with Disabilities Act, 42 U.S.C. §12101 (1990), As Amended.

ⁱⁱ *Williams v. Kincaid*, 45 F.4th 759, 770 (4th Cir. 2022) (explaining that gender dysphoria is not a gender identity disorder, but even if it was considered a gender identity disorder, it has distinct physical roots and is therefore a result of physical impairments).

ⁱⁱⁱ The author uses the phrase “physical impairments” throughout the paper because this phrase is specifically written in the ADA. Americans with Disabilities Act § 12111. Furthermore, both lawyers and courts use the same statutory language when discussing gender dysphoria and the ADA. *See Williams*, 45 F.4th at 765-66. The author has placed quotes around this phrase throughout the paper for those who find the use of the phrase offensive in relation to gender dysphoria.

^{iv} *Transgender*, Merriam Webster Dictionary, <https://www.merriam-webster.com/dictionary/transgender> (last visited Jul. 16, 2023).

^v American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders, 451-53 (5th ed. 2013) (DSM-V); *see also Gender Dysphoria*, Merriam Webster Dictionary, <https://www.merriam-webster.com/dictionary/gender%20dysphoria> (last visited Jul. 16, 2023); Standards of Care 7, World Professional Association for Transgender Health 1, 5 (7th Ed. 2012), https://www.wpath.org/media/cms/Documents/SOC%20v7/SOC%20V7_English.pdf (last visited Jul. 20, 2023). Historically, the scientific and medical communities referred to gender dysphoria under many other names including “transsexualism” and “gender identity disorder.” However, in 2013 the DSM-V included gender dysphoria to describe the symptoms that that people who feel a mismatch between their identities and bodies experience. *See* American Psychiatric Association, Gender Dysphoria Diagnosis (2017), <https://www.psychiatry.org/psychiatrists/diversity/education/transgender-and-gender-nonconforming-patients/gender-dysphoria-diagnosis> (last visited Jul. 16, 2023); *see also Williams*, 45 F.4th at 769 (explaining that the DSM-V removed the term “gender identity disorder” and added “gender dysphoria” because gender identity disorder did not adequately capture the clinically significant distress that people with gender dysphoria often feel).

^{vi} Expert Q&A: Gender Dysphoria, The American Psychiatric Association, <https://www.psychiatry.org/patients-families/gender-dysphoria/expert-q-and-a> (last visited Jul. 20, 2023); *see Blatt v. Cabela's Retail, Inc.*, No. 5:14-CV-04822, 2017 WL 2178123 at *1, *2 (E.D. Pa. May 18, 2017) (explaining that gender dysphoria goes beyond merely identifying with a different gender and instead involves significant distress).

^{vii} Rocky Mountain ADA Center, About Us, <https://rockymountainada.org/about-us> (last visited Jul. 16, 2023).

^{viii} See Kevin Barry & Jennifer L. Levi, *Blatt v. Cabela's Retail, Inc. and a New Path for Transgender Rights*, 127 Yale L. J. F. 373, 373-74 (Nov. 2017) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3183409 (last visited Jul. 27, 2023).

^{ix} *Id.* at 375.

^x *Id.*

^{xi} *Id.*

^{xii} See *id.* at 390.

^{xiii} Female-to-Male (FTM) Top Surgery, Cleveland Clinic, <https://my.clevelandclinic.org/health/treatments/21861-female-to-male-ftm-top-surgery> (last visited Jul. 20, 2023).

^{xiv} *Blatt*, 2017 WL 2178123 at *4; see Barry and Levi (2017) at 376.

^{xv} Barry and Levi (2017) at 389.

^{xvi} See *id.* at 390 (explaining that Title VII of the Civil Rights Act of 1964, which prohibits discrimination based on gender, is not as comprehensive as the ADA); Ali Szemanski, Student Note: When Trans Rights Are Disability Rights: The Promises and Perils of Seeking Gender Dysphoria Coverage Under the Americans with Disabilities Act, 43 Harv. J.L. & Gender 137, 148, https://harvardjlg.com/wp-content/uploads/sites/19/2020/04/HLG104_crop.pdf (last visited Jul. 20, 2023) (explaining that transgender people have struggled to find protection in the past because of the ADA's gender identity disorder exceptions).

^{xvii} See National Public Radio, Utah's New Law Bans Gender Affirming Care for Transgender Youth (Feb. 11, 2023), <https://www.npr.org/2023/02/11/1156306026/utahs-new-law-bans-gender-affirming-care-for-transgender-youth> (last visited Jul. 16, 2023); National Public Radio, Montana is the Latest State to Ban Gender-Affirming Care for Trans Minors (Apr. 28, 2023), <https://www.npr.org/2023/04/28/1172881782/montana-ban-gender-affirming-care-trans-minors-signed>; American Civil Liberties Union, South Dakota Bans Gender-Affirming Medical Care for Transgender Youth (Feb. 13, 2023), <https://www.aclu.org/press-releases/south-dakota-bans-gender-affirming-medical-care-for-transgender-youth> (last visited Jul. 16, 2023); Public Broadcasting Service, North Dakota Governor Signs Law Criminalizing Trans Healthcare for Minors (Apr. 20, 2023), <https://www.pbs.org/newshour/politics/north-dakota-governor-signs-law-criminalizing-trans-health-care-for-minors> (last visited Jul. 16, 2023).

^{xviii} Wyoming Public Media, Despite Two Attempts to Outlaw it, Gender-Affirming Care Will Remain Legal in Wyoming (Mar. 3, 2023), <https://www.wyomingpublicmedia.org/news/2023-03-03/despite-two-attempts-to-outlaw-it-gender-affirming-care-will-remain-legal-in-wyoming> (last visited Jul. 16, 2023).

^{xix} See, e.g., The Commonwealth Fund, Unpacking Colorado’s New Guidance on Transgender Health (Nov. 10, 2021) <https://www.commonwealthfund.org/blog/2021/unpacking-colorados-new-guidance-transgender-health> (last visited Jul. 16, 2023).

^{xx} Court Role and Structure, United States Courts, <https://www.uscourts.gov/about-federal-courts/court-role-and-structure> (last visited Jul. 20, 2023).

^{xxi} An Overview of the Americans with Disabilities Act, The ADA National Network, <https://adata.org/factsheet/ADA-overview> (last visited Jul. 20, 2023).

^{xxii} Americans with Disabilities Act, §12101.

^{xxiii} *Williams*, 45 F.4th at 769 (discussing the DSM-V and differences between transgender identity and gender dysphoria).

^{xxiv} “Americans with Disabilities Act § 12211. The LGBTQIA community disfavors the term “transsexual” and prefers the terms “transgender,” “trans woman,” and “trans man.” “Transsexual” is only used in this report when directly quoting the ADA. See *Transsexual*, GLAAD Media Reference Guide, (11th Ed.), <https://glaad.org/reference/trans-terms/> (last visited Jul. 20, 2023).

^{xxv} Americans with Disabilities Act § 12208. Because the LGBTQIA community is largely opposed to the use of the term “transvestite,” the term will only be used here when explicitly quoting the ADA. Instead of “transvestite,” the LGBTQIA community typically advocates for the use of the term “cross-dresser” when referring to a man who sometimes wears clothing that is typically associated with women but does not wish to transition from male to female. See *Cross-Dresser*, GLAAD Media Reference Guide, 11th Ed., <https://glaad.org/reference/trans-terms/> (last visited Jul. 20, 2023).

^{xxvi} See generally, Americans with Disabilities Act; *Williams*, 45 F.4th at 767 (explaining that gender dysphoria did not exist as a diagnosis when Congress enacted the ADA in 1990). The section 12111 exclusions are couched among several other conditions, specifically: “transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from “physical impairments,” or other sexual behavior disorders; compulsive gambling, kleptomania, or pyromania; or psychoactive substance use disorders resulting from current illegal use of drugs.” Americans with Disabilities Act § 12211. Scholars have argued that two senators who drafted these exclusions believed that “gender identity disorders” and related conditions did not deserve protection because they were morally wrong, and the senators provided no legal basis for their exclusion. Barry and Levi (2017) at 379-80 (citing Kevin M. Barry, Disabilityqueer: Federal Disability Rights Protection for Transgender People, 16 Yale H U.M. RTS . & D EV. L.J. 1, 13-25 (2013)); see also The ADA Project, Gender Dysphoria Discrimination (2019), <https://www.adalawproject.org/gender-dysphoria-discrimination> (last visited Jul. 16, 2023).

Furthermore, Republican Senator William Armstrong, one of the drafting Senators, discussed “sexual deviance” and “unlawful sexual practices” in his discussion surrounding protection for transgender people in the workplace, further elucidating the moral, rather than legal, reasoning behind the exclusions. *See* Barry and Levi (2017) at 379-80.

^{xxvii} *See* Szemanski, 43 Harv. J.L. & Gender at 152; *see Williams*, 45 F.4th at 767; *see also Blatt*, 2017 WL 2178123 at *4.

^{xxviii} *Blatt*, 2017 WL 2178123 at *3.

^{xxix} *Id.*

^{xxx} *See* Szemanski, 43 Harv. J.L. & Gender at 148-49.

^{xxxi} *See id.* at 151.

^{xxxii} Americans with Disabilities Act, 42 U.S.C. § 12102(4)(A) (2012); *see also Blatt*, 2017 WL 2178123 at *2 (explaining that Congress amended the ADA to highlight its broad coverage and Congress’s intent for the ADA to remedy disability discrimination in several facets of society); *Blatt*, 2017 WL 2178123 at *3 (quoting *Disabled in Action of Pa. v. Se. Pa. Transp. Auth.*, 539 F.3d 199, 208-09 (3d Cir. 2008)).

^{xxxiii} *Williams*, 45 F.4th at 765 (citing *Summers v. Altarum Inst., Corp.*, 740 F.3d 325, 332 (4th Cir. 2014)); *Williams*, 45 F.4th at 765 (citing *Jacobs v. N.C. Admin. Off. of the Cts.*, 780 F.3d 562, 572 (4th Cir. 2015)).

^{xxxiv} *See e.g. Williams*, 45 F.4th at 770.

^{xxxv} *See id.*

^{xxxvi} *See generally* Americans with Disabilities Act § 12111.

^{xxxvii} *Id.*

^{xxxviii} *See Williams*, 45 F.4th at 770; *see also* Barry and Levi (2017) at 375, 382 (citing scientific research the Department of Justice referenced in briefs related to *Blatt v. Cabela’s Retail*).

^{xxxix} *See Williams*, 45 F.4th at 769 (explaining that the DSM-V removed the term “gender identity disorder” and added “gender dysphoria” because gender identity disorder did not adequately capture the clinically significant distress that people with gender dysphoria often feel).

^{xl} *See* Statement of Interest Re: *Blatt v. Cabela’s Retail*, U.S. Department of Justice (filed Nov. 15, 2015) <https://www.glad.org/wp-content/uploads/2015/02/blatt-v-cabelas-doj-soi-11-16-15.pdf> (last visited Jul. 20, 2023).

^{xli} *See* Barry and Levi (2017) at 375; Letter to State Attorneys General, U.S. Department of Justice (March 31, 2022), <https://www.justice.gov/media/1215916/dl?inline> (last visited Jul. 20, 2023).

^{xlii} *Kincaid v. Williams*, 143 S. Ct. 2414, 2414 (2023).

^{xliii} See Supreme Court Procedures, United States Courts, <https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/supreme-1> (last visited July 27, 2023) (explaining that parties can petition the U.S. Supreme Court to hear their case if the party is unhappy with a lower court’s decision. The Supreme Court can decline the petition for certiorari, meaning they have denied review of the lower case).

^{xliv} *Williams*, 45 F.4th at 770.

^{xlv} *Id.*

^{xlvi} *Kincaid*, 143 S. Ct. at 2414-15 (Alito, J., Thomas, J., dissenting).

^{xlvii} *Id.* at 2415.

^{xlviii} *Id.* at 2414-15.

^{xlix} *Id.*

^l See Barry and Levi (2017) at 375.

^{li} *Blatt*, 2017 WL 2178123 at *4.

^{lii} *Id.*

^{liii} *Id.*

^{liv} *Id.*

^{lv} Gender Dysphoria Discrimination, The ADA Project (2019), <https://www.adalawproject.org/gender-dysphoria-discrimination> (last visited Jul. 20, 2023).

^{lvi} *Williams*, 45 F.4th at 770.

^{lvii} *Id.* at 763.

^{lviii} *Id.* at 764.

^{lix} *Id.* at 763-64.

^{lx} *Id.* at 763.

^{lxi} *Id.* at 763-64.

lxii *Id.* at 764.

lxiii *Id.* at 765.

lxiv *Id.*

lxv *Id.* at 766.

lxvi *Id.* at 767.

lxvii *See id.*

lxviii *Id.* at 771-72.

lxix *See Griffith v. El Paso County*, 21-CV-00387-CMA-NRN, 2023 WL 3099625 at *1, *6 (D. Colo. Mar. 27, 2023); *Duncan v. Jack Henry & Associates, Inc.*, 617 F. Supp. 3d 1011, 1051 (W.D. Mo. 2022).

lxx *Griffith*, 2023 WL 3099625, at *6.

lxxi *Id.*

lxxii *Id.* at *1.

lxxiii *Id.* at *1-2.

lxxiv *Id.* at *3.

lxxv *Id.* at *6.

lxxvi *Id.*

lxxvii *Id.* at *6 (concluding that “because the law is unsettled as to whether discrimination based on gender dysphoria violates the ADA and Rehabilitation Act, the Complaint could not plausibly allege that Defendants were ‘deliberately indifferent’ in that they *knew* that a harm to a federally protected right was substantially likely.”).

lxxviii *Id.* at *4

lxxix *Id.* (quoting *G.G. v. Gloucester Cnty. Sch. Bd.*, 853 F.3d 729, 730 (4th Cir. 2017) (Davis, J., concurring)).

lxxx *Id.*

lxxxi *Griffith v. El Paso County, Colorado*, 21-CV-00387-CMA-NRN, 2023 WL 2242503 at *1, *18 (D. Colo. Feb. 27, 2023).

lxxxii *Duncan*, 617 F. Supp. 3d at 1054-57.

^{lxxxiii} See Court Role and Structure, United States Courts, <https://www.uscourts.gov/about-federal-courts/court-role-and-structure> (last visited Jul. 20, 2023).

^{lxxxiv} *Duncan*, 617 F. Supp. 3d at 1054.

^{lxxxv} *Id.*

^{lxxxvi} *Id.* at 1056.

^{lxxxvii} *Id.* at 1056, n.34 (discussing the doctrine of constitutional avoidance).

^{lxxxviii} See, e.g. *Dana v. Tewalt*, 1:18-CV-00298-DCN, 2020 WL 1545786 at *1, *16 (D. Idaho Apr. 1, 2020) (concluding that plaintiff's claims under the ADA were too vague to state a claim for relief); *Gibson v. Cmty. Dev. Partners*, No. 3:22-cv-454-SI, 2022 U.S. Dist. LEXIS 189828 at *1, *20 (D. Or. Oct. 18, 2022) (reasoning that the court did not need to determine whether gender dysphoria is a disability under the ADA to address defendant's immediate motion, because Plaintiff did not allege a failure to provide a reasonable accommodation); *Scutt v. Carbonaro CPAs n Mgmt. Grp.*, No. 20-00362 JMS-RT, 2020 U.S. Dist. LEXIS 182849 at *1, *12 (D. Haw. Oct. 2, 2020) (concluding that Plaintiff failed to state a claim under the ADA because Plaintiff did not allege that she suffered from gender dysphoria).

^{lxxxix} See *id.*