# THE DEATH OF THE GID EXCLUSION: *WILLIAMS V. KINCAID* REVITALIZES THE ADA FOR TRANS LITIGANTS

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## INTRODUCTION

Kesha Williams is a transgender woman with gender dysphoria who spent six months incarcerated in the Fairfax County Adult Detention Center in Virginia.[1] When Williams first entered the facility, she was assigned to women's housing and given the uniforms typically provided to female inmates.[2] However, upon learning that Williams had not undergone transfeminine bottom surgery, prison deputies stripped Williams of her female undergarments and transferred her to the men's side of the facility.[3] There, Williams was harassed by other inmates, misgendered by prison deputies, and delayed in receiving medical treatment for her gender dysphoria.[4] Following her release, Williams asserted several claims, among them a violation of the Americans with Disabilities Act (ADA).[5]

Although the ADA has been recognized as one of the most pivotal pieces of civil rights legislation in this country, it has been largely unsuccessful in protecting against discrimination towards transgender people.[6] While the ADA purports to guarantee protection for those with disabilities, § 12211 of the Act contains an exclusionary clause commonly referred to as the gender identity disorder (GID) exclusion.[7] This section prevents "gender identity disorders not resulting from physical impairments" from being recognized as a protected "disability" under the Act.[8] Thus, until recently, many transgender litigants have left the GID exclusion virtually unchallenged.[9]

However, in *Williams v. Kincaid*, the Fourth Circuit became the first circuit court to rule that gender dysphoria was not within the GID exclusion, such that gender dysphoria constitutes a disability warranting

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1 Williams v. Kincaid, 45 F.4th 759, 763 (4th Cir. 2022), *reh'g denied en banc*, 50 F.4th 429 (Oct. 7, 2022), *cert. denied*, 143 S. Ct. 2414 (2023).

2 *Id.* at 764.

3 *Id.*

4 *Id.* at 763.

5 *Id.* at 765.

6 *See generally Introduction to the Americans with Disabilities Act*, ADA, https://www.ada.gov/topics/intro-to-ada [https://perma.cc/74DQ-E6QD]; *see also* Kevin M. Barry & Jennifer L. Levi, *The Future of Disability Rights Protections for Transgender People*, 35 TOURO L. REV. 25, 42 (2019).

7 Taylor Payne, *A Narrow Escape: Transcending the GID Exclusion in the Americans with Disabilities Act*, 83 MO. L. REV. 799, 799 (2018); *see also* 42 U.S.C. § 12211.

8 Payne, *supra* note 7, at 799 (quoting 42 U.S.C. § 12211(b)(1)).

9 *Id.* at 800.

protection under the ADA.[10] Critically, the *Williams* majority recognized that there has been a shift in medical understanding as psychiatric authorities have replaced the term "gender identity disorder" with "gender dysphoria," which suggests that the courts should pay deference to such distinction when interpreting technical words in a statute.[11]

This Note discusses the groundbreaking ruling of *Williams v. Kincaid* and its important impact on transgender civil rights. Part I provides context by defining gender-related terms, detailing a brief history of the ADA, and explaining how courts interpret the ADA. Part I also examines the GID exclusion in the face of medical advances and ends by detailing the current legal landscape for gender dysphoria claims brought under the ADA. Part II outlines the facts and procedural history of *Williams*, and Part III describes its holding, reasoning, and dissent. Part IV offers support for the Fourth Circuit's reasoning and argues that the *Williams* majority was correct in taking an approach to statutory interpretation that goes slightly beyond traditional textualism in resolving this matter. Part IV further suggests that moving forward, trans litigants bringing claims under the ADA should follow *Williams*' lead in presenting a three-pronged approach grounded, in part, in textualism. This Note concludes by highlighting *Williams*' potential implications and the questions that it leaves unanswered, while also recognizing *Williams* as a victory for transgender advocates.

## I. BACKGROUND AND PRIOR LAW

To understand this Note and the conversation surrounding the ADA and its exclusions, it is important to understand the following terms, definitions, and history.

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10 *Williams*, 45 F.4th at 779–80. The Fourth Circuit noted that while it is the first circuit court to answer the question presented, its conclusion accords with other district courts that have addressed this question. *Id.* at 769 n.6 (citing Venson v. Gregson, No. 18-CV-2185, 2021 WL 673371, at *3 (S.D. Ill. Feb. 22, 2021); Iglesias v. True, 403 F. Supp. 3d 680, 687–88 (S.D. Ill. 2019); Doe v. Mass. Dep't of Corr., No. 17-12255, 2018 WL 2994403, at *6–7 (D. Mass. June 14, 2018); Edmo v. Idaho Dep't of Corr., No. 17-CV-00151, 2018 WL 2745898, at *8 (D. Idaho June 7, 2018); Blatt v. Cabela's Retail, Inc., No. 14-CV-04822, 2017 WL 2178123, at *4–5 (E.D. Pa. May 18, 2017)).

11 *Id.* at 769.

### A. *Gender-Related Terms and Definitions*

The word "transgender" is an "umbrella term describing individuals whose gender identity does not align in a traditional sense with the gender they were assigned at birth."[12] At birth, doctors determine whether individuals are male or female based on the appearance of their genitalia—a designation referred to as "sex assigned at birth."[13] As people grow up, those labeled male at birth tend to identify as male, and those labeled female at birth tend to identify as female.[14] However, "some people's gender identity—their innate knowledge of who they are—is different from" their sex assigned at birth.[15] Those who experience an incongruence between their gender identity and sex assigned at birth often describe themselves as transgender or trans.[16]

For some transgender people, the difference between their gender identity and sex assigned at birth can lead to severe distress that affects their health and everyday lives.[17] As stated in the fifth edition of the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (DSM-V), gender dysphoria is diagnosed when an individual: (1) displays a marked incongruence between their gender identity and sex assigned at birth; (2) has a strong desire to be of another gender or to be treated as another gender (which often includes being rid of primary and/or secondary characteristics); and (3) experiences clinically significant distress or impairment in social, occupational, or

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12 *What Is Gender Dysphoria?*, AM. PSYCHIATRIC ASS'N, https://www.psychiatry.org/patients-families/gender-dysphoria/what-is-gender-dysphoria [https://perma.cc/H2KC-N8VL].

13 *Frequently Asked Questions About Transgender People*, NAT'L CTR. FOR TRANSGENDER EQUAL. (July 9, 2016), https://transequality.org/issues/resources/frequently-asked-questions-about-transgender-people [https://perma.cc/4LVX-FC9C]; *see also Terms for Understanding Gender and Sexuality*, PITTSBURGH PA. GOV., https://apps.pittsburghpa.gov/redtail/images/10135_Terms_-_Sexuality_and_Gender_Definitions.pdf [https://perma.cc/5DRY-NHUX] (defining sex assigned at birth as the "sex assigned to a person at birth based on perceived biological traits").

14 *Frequently Asked Questions About Transgender People*, *supra* note 13.

15 *Id.*

16 *Id.*

17 *Id.*; *see also* E. Coleman et al., *Standards of Care for the Health of Transgender and Gender Diverse People, Version 8*, 23 INT'L J. TRANSGENDER HEALTH S1, S252 (2022) (defining gender dysphoria as "a state of distress or discomfort that may be experienced because a person's gender identity differs from that which is physically and/or socially attributed to their sex assigned at birth"). For a powerful example of individuals with gender dysphoria, see Laura Beltrán Villamizar, *Nonbinary Photographer Documents Gender Dysphoria Through a Queer Lens*, NPR (June 30, 2020, 7:42 AM), https://www.npr.org/sections/pictureshow/2020/06/30/883930251/documenting-gender-dysphoria [https://perma.cc/2RSL-E8MP].

other important areas of functioning.[18] It is important to note that not all transgender people experience gender dysphoria.[19]

People suffering from gender dysphoria often seek treatment in the form of various types of affirmations: social, legal, and medical.[20] Social affirmation includes adopting pronouns and aspects of gender expression that align with an individual's gender identity.[21] Legal affirmation includes changing one's name and gender on government identification documents.[22] Medical affirmation includes gender-affirming hormone treatments.[23] Hormone treatments have been stated as an effective way to combat gender dysphoria by both the American Psychiatric Association (APA)[24] and the World Professional Association for Transgender Health (WPATH) in the seventh version of the Standards of Care.[25] If medical treatment is not sought, gender dysphoria can cause "debilitating depression, anxiety, suicidality, and death,"[26] which can be further exacerbated by the discrimination that many people with gender dysphoria face.[27] Widespread medical recognition of gender dysphoria, coupled with discrimination, has led many litigants to file claims under the ADA, but few have been successful for the reasons detailed below.

### B. *History of the ADA*

In 1990, President Bush signed into law "one of America's most comprehensive pieces of civil rights legislation"—the Americans with Disabilities Act—which was modeled on the Civil Rights Act of 1964 and

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18 *See* AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 452 (5th ed. 2013) [hereinafter DSM-V].

19 *What Is Gender Dysphoria?*, *supra* note 12.

20 *Id.*

21 *Id.*

22 *Id.*

23 *Id.*; *see also Removing Financial Barriers to Care for Transgender Patients*, AM. MED. ASS'N 1, 1, http://www.tgender.net/taw/ama_resolutions.pdf [https://perma.cc/NLG7-T5U8] ("An established body of medical research demonstrates the effectiveness and medical necessity of mental health care, hormone therapy and sex reassignment surgery as forms of therapeutic treatment . . . .").

24 *What Is Gender Dysphoria?*, *supra* note 12.

25 E. Coleman et al., *supra* note 17, at S110.

26 Kevin M. Barry, *Challenging Transition-Related Care Exclusions Through Disability Rights Law*, 23 UDC/DCSL L. REV. 97, 101 (2020).

27 *Id.* at 101–02; *see also Removing Financial Barriers to Care for Transgender Patients*, *supra* note 23, at 2 (explaining that delaying treatment can also aggravate these health problems).

§ 504 of the Rehabilitation Act of 1973.[28] The purpose of the ADA is to prohibit discrimination and guarantee that people with disabilities have the same opportunities as everyone else.[29] The ADA is divided into five titles that relate to various areas of public life.[30] Notably, Title I refers to employment, Title II refers to state and local government (which includes prisons), and Title III refers to public accommodations.[31] To assert a claim for disability discrimination, a plaintiff must allege that they: (1) have a disability within the meaning of the law; (2) are otherwise qualified for the program or benefit; and (3) are excluded or denied access to the program or benefit because of the disability.[32]

While drafting the ADA, conservative U.S. senators sought to narrow the definition of "disability" by excluding medical conditions closely associated with transgender people.[33] In advocating for such an exclusion, Senator William Armstrong stated that he doubted that the ADA's sponsors would want to protect people whose condition might have a moral content to it.[34] Additionally, Senator Jesse Helms argued that the ADA's exclusions were necessary to allow employers to disfavor certain medical conditions based on moral concerns.[35] Although moral animus was present, Congress passed the following exclusion: "the term 'disability' shall not include (1) transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, *gender identity disorders not resulting from physical impairments*, or other sexual behavior disorders; (2) compulsive

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28 *Introduction to the ADA*, *supra* note 6.

29 *Id.*

30 *What Is the Americans with Disabilities Act (ADA)?*, ADA NAT'L NETWORK, https://adata.org/learn-about-ada [https://perma.cc/L8CW-BUMC].

31 *Id.* For purposes of this Note, it is important to recognize that in *Pennsylvania Department of Corrections v. Yeskey*, 524 U.S. 206, 209–10 (1998), the Supreme Court ruled that Title II covers inmates in state prisons and local jails. *Legal Memorandum LG05: The Americans with Disabilities Act Applies to Local Jails and Prisoners*, N.Y. DEP'T OF STATE (2006), https://dos.ny.gov/legal-memorandum-lg05-americans-disabilities-act-applies-local-jails-and-prisoners [https://perma.cc/9RT9-B3ZF].

32 *The Americans with Disabilities Act in Jail & Prison*, EQUIP FOR EQUAL. 1, 1–2 (2016), https://www.equipforequality.org/wp-content/uploads/2016/04/Prisoner-Rights-Under-the-ADA.pdf [https://perma.cc/YFP2-5V5S] (defining disability as a "physical or mental impairment that substantially limits one or more major life activities" (quoting 42 U.S.C. § 12102(1)(A))).

33 Barry & Levi, *supra* note 6, at 36.

34 *Id.* at 41. Armstrong "'could not imagine the [ADA's] sponsors would want to provide a protected legal status' to people with mental health conditions that 'might have a moral content to them.'" *Id.* (quoting 135 CONG. REC. S10734-02 (daily ed. Sept. 7, 1989) (statement of Sen. William Armstrong)).

35 *Id.* (citing 135 CONG. REC. S10765-01 (daily ed. Sept. 7, 1989) (statement of Sen. Jesse Helms)).

gambling, kleptomania, or pyromania; or (3) psychoactive substance use disorders resulting from current illegal use of drugs."[36] In practice, the GID exclusion makes it difficult for transgender litigants to bring disability discrimination claims under the ADA.[37]

### C. *Interpreting the ADA*

When faced with questions requiring interpretation of the ADA, the Supreme Court has issued several decisions, which narrowed the scope of protection available to litigants by creating a more demanding standard for proving "disability" under the ADA.[38] The holdings of these decisions led Congress to enact the ADA Amendments Act of 2008 (ADAAA), in which Congress stated that the definition of disability is to be construed broadly.[39] The ADAAA further clarified that the ADA requires accommodations for an individual with an impairment that is limiting or that would be limiting, absent treatment.[40] Moreover, in 29 C.F.R. § 1630.1(c)(4), Congress stated that "[t]he primary purpose of the ADAAA is to make it easier for people with disabilities to obtain protection under the ADA."[41] Following the passage of the ADAAA, courts started to construe "disability" broadly so as to offer greater protection to plaintiffs.[42]

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36 42 U.S.C. § 12211(b) (emphasis added).

37 Barry & Levi, *supra* note 6, at 42. "For almost two decades following the passage of the ADA, the GID Exclusion was left virtually unchallenged . . . . [T]ransgender plaintiffs who tried to invoke the ADA's protections were unsuccessful . . . until 2014." Payne, *supra* note 7, at 800.

38 Barry, *supra* note 26, at 107. In determining whether an individual has a disability, the Court in both *Sutton v. United Air Lines* and *Murphy v. United States Parcel Service, Inc.* held that the Court should reach its decision by referencing "measures that mitigate the individual's impairment." NANCY LEE JONES, CONG. RSCH. SERV., RL31401, THE AMERICANS WITH DISABILITIES ACT: SUPREME COURT DECISIONS 3–4 (2008) (quoting Sutton v. United Air Lines, Inc., 527 U.S. 471, 475 (1999)). In *Albertsons Inc. v. Kirkingburg* the Court held that "the ADA requires proof that the limitation on a major life activity by the impairment is substantial." *Id.* at 4.

39 *Id.*; *see* Barry, *supra* note 26, at 107; *see also* 42 U.S.C. § 12102(4)(A) ("The definition of disability . . . shall be construed in favor of broad coverage of individuals . . . to the maximum extent permitted by the terms of this chapter.").

40 42 U.S.C. § 12102(4)(C)–(D); *see also* 42 U.S.C. § 12102(4)(E)(i) ("The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures . . . .").

41 29 C.F.R. § 1630.1(c)(4).

42 *See* Summers v. Altarum Inst., Corp., 740 F.3d 325, 332 (4th Cir. 2014) ("Congress expressly directed courts to construe the amended [ADA] as broadly as possible."); *see also* Jacobs v. N.C.

### D. *Viewing the GID Exclusion Under the DSM-V*

While the ADAAA makes it easier for litigants to claim discrimination in violation of the ADA, it does not address the GID exclusion since the Supreme Court has yet to interpret the exclusion.[43] Thus, the exclusion still exists today. However, medical advances indicate that the GID exclusion is outdated. In 2013, the APA published the DSM-V, in which the term "gender identity disorder" was removed and replaced by "gender dysphoria."[44] The APA explained that this change in terminology was not merely linguistic as the new term places a greater focus on dysphoria as the clinical problem, rather than identity itself.[45]

Additionally, the DSM-V focuses on distress as a diagnostic feature of gender dysphoria, whereas older versions of the DSM, such as the DSM-III, state that the hallmark of a gender identity disorder is an incongruence between sex assigned at birth and gender identity.[46] Moreover, the DSM-V adds a post-transition specifier, which signifies that an individual can still be diagnosed with gender dysphoria even if they have undergone gender transition.[47] Under prior versions of the DSM, individuals who had undergone gender transition would not meet the criteria for gender identity disorder because their distress would have been considered alleviated by transitioning.[48] Importantly, recent medical research reveals evidence that the development of gender identity occurs in the mother's womb (before birth), indicating that gender dysphoria may have physical or biological roots.[49]

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Admin. Off. of the Cts., 780 F.3d 562, 572 (4th Cir. 2015) (explaining that the 2008 amendments to the ADA were "intended to make it 'easier for people with disabilities to obtain protection under the ADA.'" (quoting 29 C.F.R. § 1630.1(c)(A))).

43 Barry & Levi, *supra* note 6, at 44.

44 DSM-V, *supra* note 18, at 451.

45 *Id.* at 453. Dysphoria is hallmarked by "clinically significant distress or impairment in social, occupational or other important areas of functioning." *Id.*

46 *Id.*; AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 261, 263 (3d ed. 1980) [hereinafter DSM-III].

47 Barry & Levi, *supra* note 6, at 44–45.

48 *Id.*

49 Ananya Mandal, *Causes of Gender Dysphoria*, NEWS-MEDICAL.NET (May 31, 2019), https://www.news-medical.net/health/Causes-of-Gender-Dysphoria.aspx [https://perma.cc/D2A5-T6GR]; *see also* Ferdinand J.O. Boucher & Tudor I. Chinnah, *Gender Dysphoria: A Review Investigating the Relationship Between Genetic Influences and Brain Development*, 11 ADOLESCENT HEALTH, MED. & THERAPEUTICS 89, 89 (2020) ("Evidence suggests that abnormal biological processes, including mutations in certain genes, can lead to abnormal gonadal

### E. *Progress for Transgender Plaintiffs Seeking Recourse Under the ADA*

The cases that follow demonstrate that courts have started to rely on the updated DSM-V in interpreting the ADA's GID exclusion. However, courts have taken different approaches to interpreting the GID exclusion, such that the law remains unsettled, and it remains unanswered as to which strategy and/or interpretation will prove most successful for trans litigants.[50]

#### 1. *Blatt v. Cabela's Retail*

The first successful challenge to the GID exclusion occurred in the Eastern District of Pennsylvania in 2017 when plaintiff Kate Lynn Blatt received the groundbreaking ruling that she had stated a claim for relief under the ADA sufficient to overcome a motion to dismiss.[51] Blatt is a transgender woman who alleged sex discrimination by her employer, Cabela's Retail, on the basis of her sex and disability.[52] Before working at Cabela's, Blatt was diagnosed with gender dysphoria and changed her name, dressed in female clothing, and used hormone therapy to affirm her gender identity as female.[53] Blatt's complaint alleged that following orientation, where she did not endure any problems, the Human Resources ("HR") Director at Cabela's denied Blatt's request for a nametag that read "Kate Lynn" and instead forced her to wear a nametag that read "James."[54] Moreover, Blatt asserted that the HR Director commanded other employees to refer to Blatt as "James" or else they

development, causing some fetuses to present with indifferent gonads and to be reassigned at birth to the default female sex. This disparity in genetic influences relates to an increased likelihood of a diagnosis of GD.").

50 Ali Szemanski, *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, 154 (2020).

51 Blatt v. Cabela's Retail, Inc., No. 14-CV-04822, 2017 WL 2178123, at *4–5 (E.D. Pa. May 18, 2017); *see* Szemanski, *supra* note 50, at 153; *see also* Payne, *supra* note 7, at 800 ("Blatt's suit marks one of the few times the GID [e]xclusion has been challenged and the only time in which a court has held the ADA does not categorically bar transgender plaintiffs from protection.").

52 *Blatt*, 2017 WL 2178123, at *2.

53 First Amended Complaint & Jury Demand ¶ 11, Blatt v. Cabela's Retail Inc., No. 14-CV-04822 (E.D. Pa. Nov. 5, 2014).

54 *Id.* ¶ 16–18.

would be fired.[55] Additionally, Blatt alleged that the HR Director would not let Blatt use the female restroom until she presented documentation that her gender marker had been legally changed.[56] Blatt received the proper documentation and presented it to the HR Director, but was still denied bathroom access.[57]

In deciding Cabela's motion to dismiss Blatt's ADA claim, Judge Leeson of the U.S. District Court for the Eastern District of Pennsylvania used the constitutional-avoidance canon to assert that there was a fairly plausible interpretation of the GID exclusion that would allow the court to avoid answering the question of whether the GID exclusion violated Blatt's equal protection rights.[58] Judge Leeson proposed that the term "gender identity disorder" be read narrowly, so as to refer only to identifying with a gender other than the one assigned at birth, and thus not encompassing gender dysphoria.[59] By drawing this line, Judge Leeson arrived at the conclusion that gender dysphoria is a medical condition and covered disability, whereas identifying as transgender is not a covered disability.[60] Judge Leeson's distinction and focus on clinical distress aligns with the DSM-V's use of gender dysphoria instead of gender identity disorder.[61]

Aside from Judge Leeson's construction aligning with the DSM-V, this case is also uniquely important because the Department of Justice (DOJ) filed two statements of interest.[62] In the second statement, the DOJ urged the court to avoid answering the constitutional question.[63] To avoid the question, the DOJ provided a reasonable interpretation of § 12211:

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55 *Id.* ¶ 18.

56 *Id.* ¶ 19, 27–29.

57 *Id.* ¶ 28–29.

58 Blatt v. Cabela's Retail, Inc., No. 14-CV-04822, 2017 WL 2178123, at *2 (E.D. Pa. May 18, 2017).

59 *Id.* Judge Leeson explained that "the exceptions listed in § 12211 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." If gender identity disorders were understood to include gender dysphoria, then the term would not fit within the statute since "it would exclude from the ADA conditions that are actually disabling but that are not associated with harmful or illegal conduct. But under the alternative, narrower interpretation of the term, this anomaly would be resolved, as the term gender identity disorders would belong to the first category described above." *Id.* at *3.

60 Payne, *supra* note 7, at 824.

61 *Id.* at 825.

62 Szemanski, *supra* note 50, at 152. The DOJ intervened at the request of Judge Leeson. Court Order, Blatt v. Cabela's Retail, Inc., No. 14-CV-04822 (E.D. Pa. Sept. 21, 2015), ECF No. 62.

63 Payne, *supra* note 7 at 828.

gender dysphoria falls outside the GID exclusion because gender dysphoria has roots in biology and physiology such that it may result from a physical impairment.[64] To further support its "physical impairment" argument, the DOJ noted that "[a]lthough the ADA does not define the phrase, . . . federal regulations that apply to the ADA . . . define[] a physical impairment as 'any physiological disorder or condition' that affects one or more body systems, such as 'neurological,' 'reproductive,' 'genitourinary,' or 'endocrine.'"[65] Moreover, the DOJ stated that emerging scientific evidence should be considered in light of the remedial nature of the ADA and emphasized Congress' guidance to construe the ADA's protections broadly and exceptions, or exclusions, narrowly.[66]

Although Judge Leeson and the DOJ reached different interpretations of § 12211, both exemplify that there is room for a successful argument that gender dysphoria falls outside the GID exclusion.[67] However, following Judge Leeson's denial of Cabela's motion to dismiss, the parties ultimately settled, leaving open the question as to how future litigants will fare beyond the motion to dismiss stage.[68]

### 2. *Doe v. Massachusetts Department of Corrections*

Following *Blatt*, trans litigants leveraged the *Blatt* court's expansive interpretation of the ADA to reach gender dysphoria-based claims in other settings, such as prisons.[69] In *Doe v. Massachusetts Department of Corrections*, plaintiff Jane Doe, a transgender woman with gender dysphoria, challenged her incarceration in a men's prison by asserting a violation of the ADA.[70] Doe alleged that her strip searches were

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64 *Id.* ("[T]he Second Statement of Interest reads: '[U]nder a reasonable interpretation of the statute, Plaintiff's [G]ender [D]ysphoria falls outside of the scope of the GID Exclusion because a growing body of scientific evidence suggests that it may result[] from [a] physical impairment[].'" (quoting Second Statement of Interest at 1–2, Blatt v. Cabela's Retail, Inc., No. 14-CV-04822 (E.D. Pa. Nov. 16, 2015), ECF No. 67)).

65 Julia Reilly, Bostock*'s Effect on the Future of the ADA's Gender Identity Disorder Exclusion: Transgender Civil Rights and Beyond*, 59 SAN DIEGO L. REV. 181, 223–24 (2022) (quoting Second Statement of Interest, *supra* note 64, at 2–3).

66 Second Statement of Interest, *supra* note 64, at 4–5.

67 Payne, *supra* note 7, at 829.

68 Szemanski, *supra* note 50, at 154.

69 *Id.* at 155.

70 Doe v. Mass. Dep't of Corr., No. 17-12255, 2018 WL 2994403, at *1 (D. Mass. June 14, 2018); *see also id.* at *3 (explaining Doe's gender dysphoria as defined by the DSM-V).

conducted by male guards and that she experienced groping; she was forced to strip naked in front of male staff and in view of the other prisoners; she endured sexually suggestive comments about her body; correctional officers refused to call her by her female name; and she was subjected to overall harassment.[71] Despite these allegations, the Massachusetts Department of Corrections (Massachusetts DOC) maintained that it was merely following its prison policy, which segregated inmates based on sex assigned at birth and did not accommodate individuals with gender dysphoria.[72]

In an attempt to defeat Doe's claim, the Massachusetts DOC contended that gender dysphoria is essentially equivalent to gender identity disorder, such that gender dysphoria falls within the GID exclusion.[73] However, the *Doe* court rejected the Massachusetts DOC's arguments and found that Doe raised a dispute of fact that her gender dysphoria may have resulted from physical causes.[74] In accepting Doe's argument, the court acknowledged that recent studies demonstrate that gender dysphoria has a physical etiology and was particularly persuaded by the fact that hormonal and genetic factors contribute to the in utero development of dysphoria.[75] However, the court refrained from taking a position on whether gender dysphoria may definitively be found to have a physical etiology as it felt expert testimony would be needed to resolve this.[76] Regardless, the court found the abundance of evolving medical studies surrounding gender dysphoria enough to raise a dispute of fact as to whether gender dysphoria falls outside of the GID exclusion.[77]

While the *Doe* court was ultimately compelled by the argument that gender dysphoria is a gender identity disorder resulting from a physical impairment, it also acknowledged the distinction between "gender identity disorder" as used in the fourth edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV) and the use of "gender dysphoria" in the DSM-V.[78] Moreover, the *Doe* court recognized that it needed to find a reasonable interpretation of the GID exclusion so as to

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71 *Id.* at *4.

72 *Id.* at *11.

73 *Id.* at *6.

74 *Id.*

75 *Id.*

76 *Id.* at *7.

77 *Id.* at *6.

78 *Id.* (noting that the DSM-IV defines "gender identity disorder" in terms of cross-gender identification and persistent discomfort with one's sex, whereas the DSM-V defines "gender dysphoria" as requiring disabling physical symptoms and clinically significant emotional distress).

not reach the constitutional question and to avoid a reading where the statute excluded an entire category of people based on gender status.[79]

Since Doe's transfer request to a women's prison was granted, her case was eventually dismissed as moot.[80] However, *Doe* is significant as it lays out a potentially successful path for incarcerated trans individuals with gender dysphoria to seek relief.

### 3. *Parker v. Strawser Construction, Inc.* Rejects *Blatt*

While some district courts have followed *Blatt* in holding that gender dysphoria is outside the scope of the GID exclusion, others have rejected *Blatt*'s analysis.[81] In fact, in *Parker v. Strawser Construction, Inc.*, the U.S. District Court for the Southern District of Ohio rejected plaintiff Tracy Parker's claim that gender dysphoria fell outside of the GID exclusion and further rejected Parker's use of *Blatt* to support her point.[82]

Parker is a transgender woman with gender dysphoria who began transitioning and was diagnosed with gender dysphoria after three years of employment at Strawser Construction.[83] After disclosing her diagnosis and intent to transition to her supervisor, Parker alleged that she started being written up for minor and unsubstantiated errors, whereas other non-transgender employees were not experiencing similar treatment.[84] Parker's therapist contacted Strawser's HR Manager to request that accommodations be provided for Parker by allowing her to use female restrooms and be referred to by female gender terminology, but these requests were allegedly denied due to a lack of "legal" documentation.[85] Parker further asserted that she was sexually assaulted at work and that the assaulting co-worker was fired, but that her desk was still moved to an area that symbolized punishment.[86] Parker approached the company superintendent about the continuing harassment and was allegedly told

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79 *Id.* at *7–8. Importantly, the court noted that 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.* at *8 (citing Tennessee v. Lane, 541 U.S. 509, 536 (2004) (Ginsburg, J., concurring)).

80 Szemanski, *supra* note 50, at 157.

81 *See id.*

82 Parker v. Strawser Constr., Inc., 307 F. Supp. 3d 744, 754 (S.D. Ohio 2018).

83 *Id.* at 748.

84 *Id.*

85 *Id.* at 748–49.

86 *Id.* at 749.

that there was nothing that the company could do and that Parker was to text the superintendent her resignation.[87] After complaining about the persisting discrimination, Parker was suspended without pay and ordered to see a company-approved therapist.[88] Parker complied, but, shortly after returning to work, she was terminated for insubordination.[89]

In response to Parker's assertions, the court found no textual support for the *Blatt* court's interpretation of the GID exclusion and held that the exclusion applies to all gender identity disorders not resulting from physical impairments, regardless of whether the disorder is disabling.[90] In rejecting the *Blatt* court's rationale, the majority emphasized that, under *Blatt*, a condition is only considered "disabling" if it substantially limits one or more major life activities.[91] However, whether something substantially limits one or more major life activities is a requirement for all conditions seeking disability classification.[92] Thus, the *Parker* majority found that anything that does not substantially limit one or more major life activities is already excluded from the ADA's protection and any further protection of non-disabling conditions would be superfluous.[93] The court did not reach the physical impairment question since it found that Parker's amended complaint did not allege that Parker's gender dysphoria was caused by a physical impairment.[94]

The *Parker* court demonstrated great deference to the legislature and an unwillingness to view the ADA in light of evolving medical standards, which further proves that while *Blatt* served as a sign of hope for trans litigants, there is still instability and a lack of assurance for litigants who bring gender dysphoria claims under the ADA.

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87 *Id.*

88 *Id.* at 750.

89 *Id.*

90 *Id.* at 754. "[T]his Court can find no support, textual or otherwise, for the *Blatt* court's interpretation. The exclusion plainly applies to all 'gender identity disorders not resulting from physical impairments,' without any regard to whether the gender identity disorder is disabling." *Id.*

91 *Id.*

92 *Id.* (citing 42 U.S.C. § 12101(1)).

93 *Id.* (citing Daniel v. Cantrell, 375 F.3d 377, 383 (6th Cir. 2004)).

94 *Id.* at 755. By not reaching the physical impairment question, the court dismissed Parker's proffered evidence of emerging medical studies, which proves the physical etiology of gender dysphoria. *Id.* Interestingly, however, the court still noted that it was "not convinced that a mere difference in brain structure or physiology, by itself, is necessarily a 'physical impairment'—it may have physical underpinnings in the brain, but not every physical difference between two groups implies that one of the groups is impaired in some way." *Id.*

### F. *The Potential Effect of* Bostock v. Clayton County *on ADA Claims*

Following the above decisions, the Supreme Court has since weighed in on an adjacent area of the law—sex discrimination under Title VII—in *Bostock v. Clayton County*.[95] *Bostock* held that Title VII of the Civil Rights Act of 1964 protects against discrimination on the bases of sexual orientation and gender identity.[96] This decision has been praised for its use of textualism, such that the opinion has been regarded as a "textualist triumph."[97] Justice Gorsuch, writing for the majority, used the plain meaning approach to textualism to determine what the phrase "because of . . . sex" meant at the time of Title VII's enactment.[98] The *Bostock* majority's decision reflects the notion that textualists can reach conclusions that the drafters of an act may not have contemplated.[99] Given that *Bostock* involved the rights of sexual minorities, commentators have postulated the ways in which its textualist approach can be applied to other contexts, such as gender dysphoria claims brought under the ADA.[100]

#### 1. Ordinary Meaning

Gorsuch's rationale in *Bostock* set forth a demanding textualist standard for interpreting federal discrimination statutes.[101] Thus, in order to have the same success as the plaintiffs in *Bostock*, commentators suggest that ADA litigants emphasize Gorsuch's statement that "[o]nly the written word is the law."[102] In doing so, litigants can argue that since

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95 Bostock v. Clayton County, 590 U.S. 644 (2020).

96 *Id.* at 651–52; *see* Reilly, *supra* note 65, at 182.

97 *See* Reilly, *supra* note 65, at 194.

98 *See Bostock*, 590 U.S. at 654–55; Reilly, *supra* note 65, at 194 (quoting 42 U.S.C. § 2000e-2(a)).

99 "Even assuming the premise that the drafters of the Civil Rights Act did not intend to capture issues of gender identity or sexual orientation explicitly in the language of the provision, the Court was, through its singular focus on the text, nonetheless able to reach the conclusion that the provision protects transgender individuals." Michael Milov-Cordoba & Ali Stack, *Transgender and Gender-Nonconforming Voting Rights After* Bostock, 24 U. PA. J.L. & SOC. CHANGE 323, 328 (2021).

100 Reilly, *supra* note 65, at 211.

101 *Id.* at 217.

102 *Id.* (quoting *Bostock*, 590 U.S. at 653).

§ 12211 "does not mention gender dysphoria, gender dysphoria must be covered under the ADA."[103]

Gorsuch also explained that a statute is interpreted based on the "ordinary public meaning of its terms at the time of its enactment."[104] In 1990, gender identity disorders were hallmarked by cross-gender identification, although persistent discomfort about one's sex assigned at birth also factored into the diagnosis.[105] However, in 2013, the DSM-V removed gender identity disorders and added gender dysphoria, which signified that the diagnosis is now focused on the clinical distress element.[106] Given the different diagnostic criteria of the two conditions, it is evident that gender dysphoria is a separate condition from gender identity disorder.[107] Thus, litigants should argue that gender dysphoria is plainly not within the GID exclusion, as it was understood in 1990, such that it is covered by the ADA.[108]

### 2. Legislative Intent

Commentators also acknowledge that following *Bostock*, plaintiffs can now successfully rebut defendants' arguments that the drafters of the ADA intended to exclude gender dysphoria because *Bostock* made clear that "legislative intent is only relevant when interpreting ambiguous statutory language."[109] In *Bostock*, the Court found that the term "sex" was unambiguous, and, similarly, the term "gender identity disorder" was unambiguous since its definition can be gathered from the DSM-III.[110] While defendants may argue that Congress could not have anticipated that the ADA would apply to gender dysphoria, Justice Gorsuch stated that "'the fact that [a statute] has been applied in situations not expressly

103 *Id.*

104 *Bostock*, 590 U.S. at 654; *see* Reilly, *supra* note 65, at 217.

105 Reilly, *supra* note 65, at 218.

106 *Id.*

107 *Id.* at 218–19. Commentators further suggest that courts should interpret the plain meaning of gender identity disorders in 1990 in the same manner that Gorsuch in *Bostock* relied on the dictionary definition of "sex" in the 1960s. *Id.* at 219.

108 *Id.*

109 *Id.*

110 *Id.*

anticipated by Congress' does not demonstrate ambiguity; instead, it simply 'demonstrates [the] breadth' of a legislative command."[111]

## II. FACTS AND PROCEDURAL HISTORY

Plaintiff Kesha Williams identifies as a transgender woman and, prior to her incarceration, she took several gender-affirming steps: she lived her life as a woman, changed her legal name, and received a driver's license with a female designation from her home state of Maryland.[112] Additionally, for the fifteen years prior to her incarceration, Williams had suffered from gender dysphoria.[113]

When Williams first entered the detention center, she underwent a preliminary evaluation in which she informed the prison nurse, Nurse Wang, that she was transgender, suffered from gender dysphoria, and had been receiving hormone medical treatment, including daily pills and biweekly injections, to treat her gender dysphoria.[114] In fact, Williams brought the hormone medication with her to prison.[115] When Williams asked Nurse Wang to bring her the medication, Nurse Wang returned empty-handed, instructed Williams to fill out a medical release form, and

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111 Bostock v. Clayton County, 590 U.S. 644, 673 (2020) (quoting Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 499 (1985)); *see* Reilly, *supra* note 65, at 219–20. "[I]n *Bostock*, the Court explained their reasoning for rejecting unexpected applications by comparing the application of the ADA. The ADA states that 'no public entity' can discriminate against an individual with a disability." *Id.* at 220. The *Bostock* Court noted that no one argued when the ADA was found to apply to a post office, but there were arguments when the statute was applied to prisons in *Pennsylvania Department of Corrections v. Yeskey*. *Bostock*, 590 U.S. at 676–77 (citing Pa. Dept. of Corrs. v. Yeskey, 524 U.S. 206, 211–12 (1998)); *see* Reilly, *supra* note 65, at 220. In *Yeskey*, the Supreme Court held that legislative intent is irrelevant where the statute is unambiguous, despite the fact that Congress may not have envisioned the ADA to apply to state prisoners. *Yeskey*, 524 U.S. at 212; *see* Reilly, *supra* note 65, at 219–20.

112 Williams v. Kincaid, 45 F.4th 759, 763–64 (4th Cir. 2022). Kesha Williams identifies as transgender since her gender identity (female) differs from the sex she was assigned at birth (male). *Id.*

113 *Williams*, 45 F.4th at 764. Again, gender dysphoria is "a 'discomfort or distress that is caused by a discrepancy between a person's gender identity and that person's sex assigned at birth,'" for which those suffering "often benefit from medical treatment." *Id.* (quoting Amended Complaint, Williams v. Kincaid, 45 F.4th 759 (4th Cir. 2022) (No. 20-CV-01397)); *see also* DSM-V, *supra* note 18, at 451–53 (defining gender dysphoria and explaining that distress persists if hormones are not made available).

114 *Williams*, 45 F.4th at 764.

115 *Id.*

suggested that "healthcare staff would follow up with her soon."[116] Williams filled out the form the same day.[117]

Additionally, in the course of the preliminary evaluation, Nurse Wang learned that Williams "had not undergone transfeminine bottom surgery."[118] In response, Nurse Wang marked Williams as "male" due to the prison's policy "which provide[d] that '[m]ale inmates shall be classified as such if they have male genitals' and '[f]emale inmates shall be classified as such if they have female genitals.'"[119] Thus, pursuant to this policy, prison deputies required Williams to switch to the men's side of the facility, depriving her of the women's clothing she had previously received.[120]

After two weeks, Williams still did not receive her prescribed medication, and, as a result, she "began experiencing significant mental and emotional distress."[121] Nurse Wang finally received Williams' medical records but did not approve the medication or re-initiate the hormone treatment for about six more days.[122] Moreover, on two separate occasions, Nurse Wang again failed to provide Williams with her approved and scheduled hormone treatment.[123]

While on the men's side of the prison, prison deputies repeatedly harassed Williams regarding her sex and gender identity—deliberately ignoring her requests to be referred to as a woman and instead referring to her as "mister," "sir," "he," and "gentleman."[124] Williams also requested to shower privately and for her body searches to be conducted by a female deputy, but both requests were denied and, on one occasion, a "deputy threatened to place her in solitary confinement if she resisted a search by a male deputy."[125] In fact, during a shakedown search, Williams' requests for a female deputy were further denied, despite the availability of female deputies, and she endured a "highly aggressive" search by a male deputy, which left her with bruising and "pain for several days."[126]

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116 *Id.*
117 *Id.*
118 *Id.*
119 *Id.*
120 *Id.*
121 *Id.*
122 *Id.*
123 *Id.*
124 *Id.*
125 *Id.*
126 *Id.* at 765.

Following her release in May 2019, Williams brought this § 1983 action, asserting violations by prison officials of the ADA,[127] the Rehabilitation Act,[128] the United States Constitution, and state law.[129] Williams filed her original complaint on November 16, 2020, naming Sheriff Kincaid and twenty-four "Does" as defendants.[130] However, after limited discovery, she filed an amended complaint two months later against only Sheriff Kincaid, Nurse Wang, and Deputy Garcia (Defendants).[131] The Defendants moved to dismiss the amended complaint.[132]

The district court dismissed the ADA and Rehabilitation Act claims against Sheriff Kincaid, finding that Williams had no cause for relief since gender dysphoria is not a "disability" under the ADA due to the ADA's exclusions.[133] Subsequently, the district court found that the GID exclusion barred Williams' ADA claim.[134]

The district court also dismissed the claims against Nurse Wang and Deputy Garcia, finding that although the statute of limitations prohibited most claims, the alleged acts did not even amount to viable claims against those defendants.[135] The district court further held that the claims against Sheriff Kincaid and Deputy Garcia for gross negligence (state claims) failed because they had demonstrated some degree of care for Williams.[136] Williams appealed.[137]

Following the instant decision detailed below, the Defendants petitioned for rehearing en banc.[138] The petition was ultimately denied.[139]

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127 *See* 42 U.S.C. § 12101.

128 *See* 29 U.S.C. § 701.

129 *Williams*, 45 F.4th at 765.

130 *Id.*

131 *Id.*

132 *Id.*

133 *Id.*; *see supra* note 36 and accompanying text. "[T]he ADA prohibits public entities from discriminating against, or excluding from participation in the benefits of services, programs, and activities, any qualified individual with a disability." *Williams*, 45 F.4th at 766 (citing 42 U.S.C. § 12132). The ADA defines "'disability' broadly to include 'a physical or mental impairment that substantially limits one or more major life activities of such individual.'" *Williams*, 45 F.4th at 766 (quoting 42 U.S.C. § 12102(1)(A)).

134 *Williams*, 45 F.4th at 765.

135 *Id.* Discussion of the statute of limitations issue is beyond the scope of this Note.

136 *Id.* Discussion of the state claims issue is beyond the scope of this Note.

137 *Id.*

138 Williams v. Kincaid, 45 F.4th 759 (4th Cir. 2022), *reh'g denied en banc*, 50 F.4th 429 (Oct. 7, 2022).

139 *Williams*, 50 F.4th 429.

The concurring opinion issued alongside the denial emphasized that the majority did not judicially update the ADA, rather, it followed the ADA's mandate to construe the ADA broadly and its exclusions narrowly.[140] Moreover, the concurrence underscored that the majority opinion upheld the ADA's purpose to treat others with "dignity, respect, and kindness."[141]

## III. HOLDING AND REASONING

This Part explores the instant decision and how the majority reached its conclusion to reverse the district court's dismissal of Williams' ADA claims under two lines of rationale: (1) gender dysphoria is a separate condition from gender identity disorder and (2) gender dysphoria is a gender identity disorder resulting from a physical impairment. This Part concludes by explaining how and why the majority avoided answering the posited constitutional question.

### A. *Gender Dysphoria Is Categorically Different from Gender Identity Disorder*

In reversing the lower court's opinion, the Fourth Circuit held that as a matter of statutory interpretation, gender dysphoria is not a gender identity disorder.[142] Thus, gender dysphoria is not excluded from the ADA's definition of disability, such that those with gender dysphoria are entitled to the ADA's protection.[143] In deciding whether "gender identity disorder" includes "gender dysphoria," the majority relied on *Bostock* and grounded its rationale, in part, in textualism.[144] In doing so, the majority emphasized that statutes are interpreted based on the meaning of their terms at the time of their enactment, and, at the time of the ADA's enactment, gender identity disorders did not include gender dysphoria.[145] To support this conclusion, the majority noted that gender identity disorder, as understood in 1990, marked being transgender as a mental

140 *Id.* at 431 (Wynn, J., concurring).

141 *Id.* (first quoting *Williams*, 50 F.4th at 432 (Quattlebaum, J., dissenting); then citing 42 U.S.C. § 12101).

142 *Williams*, 45 F.4th at 769.

143 *Id.*

144 *Id.* at 766–67 (citing Bostock v. Clayton County, 590 U.S. 644, 654 (2020)).

145 *Id.*

illness, whereas the later-defined gender dysphoria differs dramatically by focusing on clinically significant distress.[146]

Moreover, the Fourth Circuit acknowledged that it had previously emphasized the distress and disabling symptoms associated with gender dysphoria, which differ from merely being transgender, in *Grimm v. Gloucester County School Board*.[147] Not only was the majority persuaded by the differences in diagnostic criteria that determine whether gender dysphoria is a separate condition, but it also found compelling Williams' argument that gender dysphoria is not suffered by all transgender people.[148] Thus, the majority determined that the revision of "gender identity disorder" in the DSM-III to "gender dysphoria" in the DSM-V was not merely semantics and instead reflected a crucial shift in medical understanding worthy of the Court's attention.[149] Given the medical landscape and *Bostock*'s textualist guidance,[150] the Court ultimately found that "nothing in the ADA, then or now, compels the conclusion that gender dysphoria constitutes a 'gender identity disorder' excluded from ADA protection."[151]

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146 *Id.* at 767–68. The majority also found support for the focus on the distress associated with gender dysphoria by relying on the WPATH standards. *Id.* at 767 n.3. "In short, 'being trans alone cannot sustain a diagnosis of gender dysphoria under the DSM-[V], as it could for a diagnosis of gender identity disorder under [earlier versions of the DSM].'" *Id.* at 768 (quoting Szemanski, *supra* note 50, at 147).

147 *Id.* at 768. For further support, the majority highlighted *Edmo v. Corizon, Inc.*, 935 F.3d 757, 771 (9th Cir. 2019), in which the Ninth Circuit acknowledged the risk of psychological and physical harm if there is a failure to treat gender dysphoria. *Id.*

148 *Id.*

149 *Id.* at 767. The majority refuted Defendant Kincaid's argument that the court should not consider the DSM-V because Williams did not refer to it in her complaint on the grounds that the Supreme Court has recognized the DSM and that it is often referred to as an authoritative source by courts. *Id.* The majority further analogized the DSM-V to a dictionary and stated that it was useful for gathering the meaning of a statutory term. *Id.* at 767 n.2 (citing Hall v. Florida, 572 U.S. 701, 704 (2014) and Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 595 (4th Cir. 2020)).

150 "[T]he ADA excludes from its protection anything falling within the plain meaning of 'gender identity disorders' as that term was understood 'at the time of its enactment.'" *Id.* at 769 (quoting Bostock v. Clayton County, 590 U.S. 644, 654 (2020)).

151 *Id.*

### B. *If Gender Dysphoria Is Not Categorically Distinct from Gender Identity Disorder, It Is a Gender Identity Disorder Resulting from a Physical Impairment*

Additionally, the Fourth Circuit held that even if gender dysphoria is considered a gender identity disorder, "Williams' complaint . . . permits a plausible inference that her condition 'result[s] from a physical impairment,'"[152] placing it outside the ADA's exclusions, as gender dysphoria has known physical roots.[153] In reaching its decision, the court again took a partly textualist approach as it deferred to Congress' mandate that the definition of "disability" be construed broadly.[154] Since the ADA does not define the phrase "physical impairments," the majority turned to the Equal Employment Opportunity Commission (EEOC) as it must "defer to the EEOC's reasonable interpretations of ambiguous terms in the ADA."[155] The EEOC has promulgated regulations that define "physical impairment[]" as "any physiological disorder or condition . . . affecting one or more body systems, such as neurological . . . and endocrine."[156]

In determining that Williams' allegations satisfy the EEOC's definition of physical impairment, the majority noted that Williams stated her need for hormone therapy to alleviate her gender dysphoria at least ten times in her complaint, which proves that her gender dysphoria requires hormone therapy and that she will experience physical distress without it.[157] Given the EEOC's expansive definition of physical impairment and the broad scope of the ADA, the majority found that Williams' allegations were sufficient to raise a reasonable inference that her gender dysphoria results from a physical impairment.[158] In support of

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152 *Id.* at 772 (quoting 42 U.S.C. § 12211(b)).

153 *Id.* at 770. Sheriff Kincaid conceded that gender dysphoria may result from a physical impairment, but her disagreement focused on Williams' failure to explicitly plead that her gender dysphoria was a result of a physical impairment. *Id.*

154 *Id.* (citing 42 U.S.C. § 12102(4)(A)).

155 *Id.* (citing Summers v. Altarum Institute, Corp., 740 F.3d 325, 331–32 (4th Cir. 2014)).

156 *Id.* (quoting 28 C.F.R. § 35.108(b)(1)(i)).

157 *Id.* at 770–71. By contrast, the dissent argued that hormone therapy was not enough since an individual with gender dysphoria may require hormone therapy, which does not imply the pre-existence of a physical impairment. *Id.* at 787–88.

158 *Id.* at 771 (citing Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)). "That Williams did not 'specifically allege that her gender dysphoria is rooted in some physical component' by using those particular words does not render implausible the inference that her gender dysphoria has a physical basis." *Id.* (citing Doe v. Pa. Dep't of Corr., No. 20-CV-00023, 2021 WL 1583556, at *11–12 (W.D. Pa. Feb. 19, 2021)).

its conclusion, the majority also gave credence to Williams' proffered medical evidence which demonstrated that gender dysphoria may have physiological roots.[159] Moreover, the majority acknowledged that courts lack sufficient expertise in the medical arena to determine the cause or causes of gender dysphoria, but found that it would be speculative to dismiss a case at this early stage based on unknowns.[160]

### C. *The Canon of Constitutional Avoidance Is Triggered*

Lastly, the court recognized that even if Williams' statutory arguments were insufficient to overcome a motion to dismiss, the court would interpret § 12211 to allow the claim to proceed in order to avoid triggering the Equal Protection Clause of the Fourteenth Amendment.[161] If a reasonable construction of § 12211 was not found, the court would be forced to decide an equal protection claim under the Fourteenth Amendment since a law excluding both gender identity disorders and gender dysphoria from the ADA's protection would discriminate against transgender people as a class, implicating the Equal Protection Clause.[162]

The majority went a step further and stated that even if the constitutional question was reached, the Defendants would need to overcome intermediate scrutiny[163] and prove that the law is "substantially related to a sufficiently important governmental interest."[164] Due to the listed evidence of discriminatory animus towards transgender people in the enactment of the GID exclusion, the majority demonstrated skepticism as to the Defendants' ability to overcome intermediate scrutiny: (1) the GID exclusion exists alongside "pedophilia,

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159 *Id.* "The Department of Justice has agreed that this emerging research renders the inference that gender dysphoria has a physical basis sufficiently plausible to survive a motion to dismiss." *Id.*; *see, e.g.*, Second Statement of Interest, *supra* note 64, at 1–2. For more examples of studies linking gender dysphoria to physical etiology, see *Williams*, 45 F.4th at 771 n.7.

160 *Williams*, 45 F.4th at 772 (citing Doe v. Pa. Dep't of Corr., No. 20-CV-00023, 2021 WL 1583556, at *9 (W.D. Pa. Feb. 19, 2021); Bd. of Trs. v. Four-C-Aire, Inc., 929 F.3d 135, 152 (4th Cir. 2019)).

161 *Id.*

162 *Id.* at 772–73. "When a statute 'raises "a serious doubt" as to its constitutionality,' we must 'first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.'" *Id.* (quoting Zadvydas v. Davis, 533 U.S. 678, 689 (2001)).

163 *Id.* at 772 (quoting Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 610 (4th Cir. 2020)). The Fourth Circuit previously held in *Grimm* that "transgender people constitute at least a quasi-suspect class" warranting intermediate scrutiny. *Id.*

164 *Id.* (quoting *Grimm*, 972 F.3d at 608).

exhibitionism, and voyeurism" which has the effect of branding transgender people as criminals;[165] (2) legislative history reveals that morality was implicit in forming the GID exclusion;[166] and (3) the law withdraws specific legal protection caused by discrimination from one group but not another.[167]

Thus, in recognizing that a purpose of the ADA is to promote equality, the majority found no reason as to why Congress would intend to exclude those with gender dysphoria from the ADA's protection and further stated that the only reason apparent from the text is "a bare . . . desire to harm a politically unpopular group."[168] While the majority discussed how the constitutional question may be answered, it did not in fact provide an answer as it resolved this matter by finding two reasonable constructions of § 12211(b): (1) gender dysphoria is not a gender identity disorder and (2) gender dysphoria results from a physical impairment.[169]

### D. *The Dissent*

While the dissent agreed that the proper starting point for interpreting "gender identity disorder" was to determine what the phrase meant at the time of the ADA's enactment, it disagreed as to which

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165 *Id.* at 772–73 (quoting Lawrence v. Texas, 539 U.S. 558, 581 (2003) (O'Connor, J., concurring)). "This grouping implicitly 'brands all [transgender people] as [equivalent to] criminals, thereby making it more difficult for [them] to be treated in the same manner as everyone else." *Id.* (alteration in original) (quoting *Lawrence*, 539 U.S. at 581 (O'Connor, J., concurring)).

166 *See id.* at 773 for a discussion of senators advocating for the GID exclusion and their morality concerns.

167 *Id.* (quoting Romer v. Evans, 517 U.S. 620, 624 (1996)). The majority found that the GID exclusion "bears a striking resemblance to the Colorado law at issue in *Romer*, which repealed municipal antidiscrimination ordinances 'to the extent they prohibit discrimination on the basis of "homosexual, lesbian or bisexual orientation, conduct practices or relationships." *Id.* Moreover, the majority noted that in *Romer*, the Supreme Court held that laws of this kind "raise the inevitable inference that the disadvantage imposed is born on animosity towards the class of persons affected." *Id.* (quoting *Romer*, 517 U.S. at 634). Lastly, the majority further emphasized that it had recognized in *Grimm* that the GID exclusion *itself* is evidence of discriminatory animus. *Id.* (citing *Grimm*, 972 F.3d at 611). Taken together, the majority advanced the argument that the GID exclusion resembles discriminatory animus of the kind prohibited in *Romer*, such that if the Fourth Circuit were to reach the constitutional question, the Defendants would likely fail to overcome its established standard of intermediate scrutiny. *Id.*

168 *Id.* (quoting *Romer*, 517 U.S. at 634). "[A] bare . . . desire to harm a politically unpopular group . . . cannot constitute a legitimate governmental interest." *Id.*

169 *Id.* at 773–74.

version of the DSM should ground the court's analysis.[170] Given that the ADA was enacted in 1990, the dissent argued that the court should rely on the most current version of the DSM available in 1990—the DSM-III.[171] In turning to the DSM-III, the dissent asserted that the first diagnostic feature of gender identity disorder is discomfort about one's sex assigned at birth and that "discomfort" is analogous to the DSM-V's diagnostic feature of "distress."[172] In support of the dissent's comparison, it emphasized that, until now, gender identity disorder has been thought to include both discomfort and distress.[173] Thus, the dissent concluded that gender dysphoria falls within the DSM-III's definition of gender identity disorder, such that gender dysphoria is excluded from the ADA's protection.[174] Moreover, the dissent argued that the focus needs to be on what gender identity disorder meant in 1990, not on what the APA did in 2013 when it published the DSM-V.[175] In support of this argument, the dissent claimed that giving such power to the APA would, in effect, allow them to modify statutes passed by Congress.[176]

As to the physical impairment issue, the dissent asserted that Williams essentially alleged that her physical impairment was the accompanying physical characteristics from the sex she was assigned at birth, which differed from her gender identity.[177] The dissent found fault with this physical impairment as it believed this impairment would capture anyone with a gender identity disorder and render the phrase "not resulting from physical impairments" superfluous.[178]

Lastly, in rejecting the constitutional question, the dissent stated that a statute must be ambiguous to use the canon of constitutional avoidance and that here, "gender identity disorder" includes "gender dysphoria," such that the statute is not ambiguous.[179]

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170 *Id.* at 781–82.

171 *Id.*

172 *Id.* at 782.

173 *Id.* at 783.

174 *Id.* at 782. To bolster its argument, the dissent added that the DSM-III listed categories of gender identity disorders, one of which was "Gender Identity Disorder Not Otherwise Specified," meaning that whether gender dysphoria is a new diagnosis or a replacement is irrelevant since it falls within the listed excluded category. *Id.* at 784.

175 *Id.* at 785.

176 *Id.*

177 *Id.* at 787–88.

178 *Id.* at 788.

179 *Id.* at 786.

## IV. ANALYSIS OF THE *WILLIAMS* DECISION

The *Williams* majority reached the correct conclusion in reversing the district court's dismissal of Williams' ADA claims as the court undertook an approach to statutory interpretation that goes slightly beyond traditional textualism in resolving this matter. Moving forward, trans litigants bringing claims under the ADA should follow Williams' lead in presenting a three-pronged approach grounded, in part, in textualism.

### A. *Future Litigants*

When reading the *Williams* majority's opinion, it is unclear as to which theory of statutory interpretation fits the majority's rationale. At the very least, it is evident that the majority began its analysis with the text itself.[180] As previously mentioned, the majority defined "gender identity disorder" based on its meaning at the time of the ADA's enactment by looking to the 1990 DSM-III—a traditional textualist approach.[181] Upon doing so, the majority determined that the term "gender identity disorder" had been deemed outdated by the medical community.[182] Thus, the majority was seemingly left with a predicament: interpret the statute with the outdated term intact, or consider a source that the legislature would have considered if it had had the resources available today.[183]

By turning to the DSM-V and emerging medical evidence, it is apparent that the majority recognized that traditional textualism alone could not resolve Williams' gender dysphoria claims.[184] Thus, the majority's analysis evidently embraced something more than traditional

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180 *Id.* at 765–67.

181 *See supra* Section III.A; *see also* Tara Leigh Grove, *Which Textualism?*, 134 HARV. L. REV. 265, 281–82 (2020).

182 *Williams*, 45 F.4th at 769 n.5.

183 *Id.* at 766–67 ("The text of the ADA does not define the term 'gender identity disorders' and does not mention gender dysphoria at all. Thus, although the ADA specifically lists a number of exclusions from the definition of 'disability,' that list does not include gender dysphoria. . . . [I]n 1990, [at] 'the time of the statute's adoption,' 'gender identity disorders' did not include gender dysphoria."). Since the dissent relied solely on the 1990 DSM-III, it interpreted the statute based on an outdated term, which this Note argues is a flawed approach. *See supra* Section III.D.

184 *Williams*, 45 F.4th at 767 ("Crucially, advances in medical understanding led the [APA] in 2013 to remove 'gender identity disorders' from the most recent DSM . . . . At the same time as the APA removed 'gender identity disorder' from the DSM-[V], the APA added the diagnosis of 'gender dysphoria,' which did not exist as a diagnosis in 1990.").

textualism.[185] It is important to postulate which theory of statutory interpretation aligns with the majority's rationale so that future trans litigants can better shape their arguments and hopefully prevail as well.[186] Today, everyone seems to be a textualist; however, some may be more open-minded.[187] Hence, litigants should consider the potential interpretive theories embraced by the *Williams* majority and decide whether those theories may also benefit their case.

### B. *Statutory Interpretation*

A future litigant who presents three potential lines of argument similar to Williams is bound to prevail on at least one of them, if not all three: (1) gender dysphoria is distinct from gender identity disorder (under a flexible textualism or dynamism approach);[188] (2) gender dysphoria is a gender identity disorder resulting from a physical impairment (purposivism);[189] and (3) the canon of constitutional avoidance (traditional textualism).[190]

#### 1. Flexible Textualism

One theory the majority may have used is flexible textualism,[191] in which the court may have considered "policy and social context[s] as well as practical consequences."[192] As emphasized by the majority, in 1990,

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185 *See id.*

186 It would not be advantageous for future litigants to outright proclaim which specific theory they are using to advance their argument because judges rarely announce the theory they embrace, nor do they place their interpretations into a certain box. However, it is still beneficial to understand the theories to help litigants better shape their arguments.

187 Cary Franklin, *Living Textualism*, 2020 SUP. CT. REV. 119, 123 (2020) ("However, what is generally true of the cases that reach the Court is that they are strongly contested. They are the site of significant, often sustained, legal conflict, and—especially now that we're all textualists—they are the subject of multiple, competing textual interpretations.").

188 *See infra* Sections IV.B.1–2.

189 *See infra* Section IV.B.3.

190 *See infra* Section IV.B.4.

191 Flexible textualism is "an approach that attends to text but permits interpreters to make sense of that text by considering policy and social context as well as practical consequences." Grove, *supra* note 181, at 267.

192 *Id.*; *see also id.* at 290 ("[U]nder this approach, an interpreter may make sense of the statutory language by considering social and policy context (perhaps through the views of 'ordinary people'), norms external to the text, and practical consequences.").

ordinary people did not know about gender dysphoria since the term did not exist.[193] Moreover, by comparing the diagnostic criteria for gender identity disorder in the DSM-III to the diagnostic criteria for gender dysphoria in the DSM-V, there is further evidence of the significant differences between the two terms.[194] While the dissent argued that an overlap of diagnostic criteria indicates that gender identity disorder and gender dysphoria are analogous, the dissent ignored the fact that the APA stated the change in terminology was specifically focused on gender dysphoria's diagnostic element of distress.[195] Thus, taken together, the majority could have reasonably concluded that the social context in the 1990s reveals that gender identity disorder is distinct from gender dysphoria.

Additionally, when Senator Helms advocated for the GID exclusion, he relied on the DSM-III, which indicates that the policy context of the time was that the legislature, and subsequently the courts, should rely on the DSM when interpreting terms of art in the ADA.[196] So, if Senator Helms relied on the most current version of the DSM at the time (the DSM-III), the court now should also rely on the most current version available (the DSM-V) in making its determinations.[197] Thus, flexible textualism emerges as a possible rationale for the majority's reasoning.

### 2. The Dynamic Approach to Statutory Interpretation

The majority may have also leaned on elements of dynamism in reaching its conclusion.[198] In accordance with the dynamic approach's contemplation of society's current conditions, the majority relied on the most current DSM, the DSM-V, and emerging medical evidence in

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193 *Williams*, 45 F.4th at 767.

194 *Id.* at 767–68; *see supra* Sections I.D, III.A.

195 *Williams*, 45 F.4th at 767–68; *Gender Dysphoria Diagnosis*, AM. PSYCHIATRIC ASS'N, https://www.psychiatry.org/psychiatrists/diversity/education/transgender-and-gender-nonconforming-patients/gender-dysphoria-diagnosis [https://perma.cc/D9DW-25YJ].

196 *See* Amber Trotter, *Federal Law Fails Transgender Community: Americans with Disabilities Act and the Gender Identity Exclusion*, 53 NEW ENG. L. REV. F. 78, 87 n.63, 90 (2018).

197 *See id.*

198 The dynamic theory of statutory interpretation involves a "[r]esponsiveness to the needs and values of society . . . [such] that statutory meaning can change and develop. [Moreover,] courts should not blindly enforce the legislative deals of the past but should adapt the legislation to contemporary needs and conditions." EVA H. HANKS, MICHAEL E. HERZ & STEVEN S. NEMERSON, ELEMENTS OF LAW 271 (2d ed. 2010) ("The idea [of dynamic statutory interpretation] is that even 'clear' statutory meaning can change with time (and absent legislative amendment).").

reaching its decision.[199] Importantly, there is support from both the Eighth and Ninth Circuits for applying the dynamic approach when interpreting the ADA.[200] Moreover, *Bostock* even stated that, while a law's ordinary meaning at the time of its enactment tends to govern, the court must still be cognizant of the potential for a statutory term to mean one thing today, yet another at the time of its adoption, which lends some support to dynamism.[201]

Although the dissent was concerned that the majority allowed the APA to serve as a substitute to the legislature,[202] dynamism supports the notion that courts do not need to wait eternally for Congress to update statutes.[203] In fact, there is a consensus that judges update statutes and commentators even agree that such updates are inevitable.[204] Moreover, in the event that a court rules in such a way as to defy Congress' intent,

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199 *See id.*; *see also Williams*, 45 F.4th at 767.

200 Jonathan D. Andrews, *Reconciling the Split: Affording Reasonable Accommodation to Employees "Regarded As" Disabled Under the ADA—An Exercise in Statutory Interpretation*, 110 PA. STATE L. REV. 977, 996 (2006) (citing the use of a dynamic approach to statutory interpretation in both *Kaplan v. City of N. Las Vegas*, 323 F.3d 1226, 1232 (9th Cir. 2003) and *Weber v. Strippit, Inc.*, 186 F.3d 907, 916 (8th Cir. 1999)); *Kaplan*, 323 F.3d at 1232 ("[B]ecause a formalistic reading of the ADA in this context has been considered by some courts to lead to bizarre results, we must look beyond the literal language of the ADA." (citing *Weber*, F.3d at 916)). *See generally* Jennifer M. Jackson, *The Americans with Disabilities Act, Mental Illness, and Medication: A Historical Perspective and Hope for the Future*, 12 MARQ. ELDER'S ADVISOR 219, 245 (2010) ("The ADA was the beginning of equal treatment for people with disabilities, but attitudes and beliefs . . . must be adjusted so that statutory interpretation will lead to the realization of the ADA's goals."); *supra* Sections I.E.1–2 (providing examples of other courts that used the DSM-V to help define the ADA's terms).

201 Bostock v. Clayton County, 590 U.S. 644, 674–75 (2020) ("Because the law's ordinary meaning at the time of enactment usually governs, we must be sensitive to the possibility a statutory term that means one thing today or in one context might have meant something else at the time of its adoption or might mean something different in another context."). For support that the majority in *Bostock* did not use a rigid, traditional form of textualism, see generally William N. Eskridge Jr., Brian G. Slocum & Stefan Th. Gries, *The Meaning of* Sex*: Dynamic Words, Novel Applications, and Original Public Meaning*, 119 MICH. L. REV. 1503, 1507, 1510–11 (2021); Bill Watson, *Textualism, Dynamism, and the Meaning of "Sex,"* CARDOZO L. REV. DE • NOVO 41, 41–42 (2022); Asher Honickman, *A Textualist Critique of Bostock*, ADVOCS. FOR RULE L. (June 27, 2020), http://www.ruleoflaw.ca/a-textualist-critique-of-bostock [https://perma.cc/7E73-RW6F].

202 *Williams*, 45 F.4th at 785.

203 Is the *Williams* majority really re-writing the statute or are they emphasizing that the plain language of the statute excludes gender dysphoria? *See* Reilly, *supra* note 65 at 218–19.

204 HANKS, *supra* note 198 at 271; *see also* Trotter, *supra* note 196, at 90–91 (citing Hively v. Ivy Tech Cmty. Coll. of Indiana, 853 F.3d 339, 352–53 (7th Cir. 2017) (Posner, J., concurring)) ("[C]ourts have the ability to interpret and construct statutes to fit with contemporary norms. Judge Posner coined the term 'judicial interpretive updating' in reference to his suggested method of statutory interpretation that gives fresh meaning to a statement found in statutory text—'a meaning that infuses the statement with vitality and significance today.'").

Congress can respond in the same manner as it did in 2008 by drafting another amendment.[205] Ultimately, while there are no explicit mentions of dynamism in *Williams*, there is precedent for using this approach in the ADA context.

### 3. Purposivism

Lastly, the majority may have also used purposivism[206] in holding that even if gender dysphoria is not distinct from a gender identity disorder, it is a gender identity disorder resulting from a physical impairment.[207] In furthering the ADA's purpose, the majority construed "disability" broadly, turned to the EEOC to define "physical impairments," and considered burgeoning medical research to reach its conclusion, all of which aligns with purposivism.[208] By contrast, if the majority were to have taken the dissent's stance that Williams needed to have pled an explicit mention of a physical impairment to be protected, the majority would have been "at odds with the . . . [ADAAA's] objective to simplify the ADA's gatekeeping process . . . [and the] goal to shift attention from scrutiny of the plaintiff's diagnosis to the question of whether the plaintiff experienced discrimination."[209] Thus, purposivism is a viable theory for grounding the majority's analysis.

### 4. The Canon of Constitutional Avoidance

In terms of the constitutional question raised by Williams, the majority openly acknowledged its use of the canon of constitutional

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205 *See generally supra* Section I.C. When the Supreme Court issued several opinions pre-2008 narrowing the scope of the ADA, was the Court then, in effect, rewriting the ADA? If Congress drafted the ADAAA in response to the Supreme Court's decisions, the same can be done here if Congress is unhappy with the courts' interpretations.

206 Purposivism is "an interpretive approach that directs courts to '[i]nterpret the words of the statute . . . so as to carry out the purpose as best [they] can.'" Anita S. Krishnakumar, *Backdoor Purposivism*, 69 DUKE L.J. 1275, 1282 (2020) (quoting HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1374 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994)).

207 *Williams*, 45 F.4th at 770–71.

208 *Id.*

209 *Id.* at 787–88 (Quattlebaum, J., concurring in part and dissenting in part); *see also* Jeannette Cox, *Disability Law and Gender Identity Discrimination*, 81 U. PITT. L. REV. 315, 335 (2019).

avoidance[210] as it stated that even if § 12211(b) does not resolve this issue, the court should interpret the statute in such a way as to avoid answering the constitutional question.[211] In fact, the use of the canon of constitutional avoidance has garnered support from both the DOJ and other commentators, illuminating the correctness of this approach.[212] Moreover, given that both the *Blatt* court and the *Doe* court used the canon, the *Williams* court's use of the canon was not an anomaly.[213]

## CONCLUSION

While the ADA has traditionally been a dead-end for trans litigants with gender dysphoria to seek recourse, the Fourth Circuit's decision in *Williams* revitalizes the ADA as a potential vehicle for relief. Moving forward, plaintiffs should continue to build on *Williams*' rationale by honing in on arguments grounded in something more than textualism and presenting a strong, three-pronged approach. Similarly, neighboring courts should look to *Williams* as persuasive authority and recognize that by taking an approach to statutory interpretation that embraces more than traditional textualism, they are interpreting the ADA in the manner that best aligns with current medical standards and the ADA's purposes, while also working to eliminate discrimination against transgender individuals.[214]

*Williams* is certainly a victory for trans advocates.[215] However, it does leave several practical questions unanswered: (1) to what lengths will

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210 "[T]he avoidance canon is understood as a method for resolving interpretive ambiguities: if there are two equally plausible readings of a statute, and one of them raises constitutional concerns, judges are instructed to choose the other one." Eric S. Fish, *Constitutional Avoidance as Interpretation and as Remedy*, 114 MICH. L. REV. 1275, 1275 (2016).

211 *Williams*, 45 F.4th. at 772.

212 "The DOJ, even after a change in administration, has maintained its position that the ADA exclusions can and should be read narrowly to avoid the constitutional problem while also providing coverage for trans people with gender dysphoria." Szemanski, *supra* note 50, at 168. For an argument that courts should use the canon of constitutional avoidance where the legislature remains silent, see Trotter, *supra* note 196, at 79, 89–92.

213 Blatt v. Cabela's Retail, Inc., No. 14-CV-04822, 2017 WL 2178123, at *2 (E.D. Pa. May 18, 2017); Doe v. Mass. Dep't of Corr., No. 17-12255, 2018 WL 2994403, at *7–8 (D. Mass. June 14, 2018).

214 Trotter, *supra* note 196, at 92.

215 There is an argument that offering protection to individuals with gender dysphoria further separates transgender people as a class. Szemanski, *supra* note 50, at 161–62. However, this argument is more idealistic, whereas the realities of society demonstrate that the trans community needs immediate legal protection against discrimination. *Id.*

a plaintiff have to go to prove that they have gender dysphoria (i.e., is a doctor's note sufficient); (2) to what extent, if at all, is a plaintiff's case impacted if they do not elect to use hormone therapy, although doctors recommend such therapy (i.e., does the physical impairment argument fail); and (3) in a prison setting, does a plaintiff need to be diagnosed with gender dysphoria prior to incarceration? Despite the questions that the Fourth Circuit left unanswered, litigants should continue to follow *Williams*' lead until the legislature or the Supreme Court weigh in on this matter and advocates should celebrate this win.