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9 **IN THE UNITED STATES DISTRICT COURT**
10 **FOR THE DISTRICT OF ARIZONA**
11 **TUCSON DIVISION**

12 Jane Doe, *et al.*,

13 Plaintiffs,

14 v.

15
16
17 Thomas C. Horne, in his official capacity
18 as State Superintendent of Public
19 Instruction, *et al.*,

20 Defendants.
21

Case No. 4:23-cv-00185-JGZ

**Intervenor-Defendants' Reply in
Support of Motion to Dismiss**

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INTRODUCTION

1
2 Congress excluded certain conditions like “gender identity disorders not resulting
3 from physical impairments” from coverage under the Americans with Disabilities Act
4 (ADA) and the Rehabilitation Act. Plaintiffs have failed to avoid the exclusion or even
5 establish the elements necessary for their claim.

6 Plaintiffs’ argument against the statutory exclusion hinges on a private organization
7 replacing a diagnosis name and adding a distress component to the diagnosis. Changing
8 the name does not change the statutory meaning when Congress passed it. Using DSM-
9 III-R, the DSM version in effect at the time of the statute’s passage, Congress intended to
10 exclude disorders with an incongruence between assigned sex and gender identity.
11 Plaintiffs’ condition is also based on this incongruence. That Plaintiffs also have clinically
12 significant distress still means they would have been diagnosed with a gender identity
13 disorder under DSM-III-R.

14 Plaintiffs also have not avoided the statutory exclusion by alleging a physical
15 impairment or a constitutional defect. Plaintiffs have not pointed to any physical
16 abnormality or other physical impairment that caused their gender identity disorder. And
17 in addition to not arguing statutory ambiguity necessary to apply constitutional avoidance,
18 Plaintiffs have not raised a constitutional challenge to the ADA and Rehabilitation Act
19 exclusion, proved the necessary classification, or disproved legitimate government
20 interests.

21 Finally, Plaintiffs have not alleged the elements necessary for their claim. Plaintiffs
22 have abandoned their argument that sports is a major life activity. They now point to major
23 life activities they did not plead resulting from possible effects in the general population
24 they have not claimed to have. They also have not presented any individualized evidence
25 that they have been substantially limited in any of these major life activities. These fatal
26 flaws doom their claim.

27 For these reasons, Plaintiffs’ Count III should be dismissed. Plaintiffs’ other claims
28 should be dismissed for the reasons stated in Intervenors’ previous briefing.

ARGUMENT

I. Plaintiffs' gender dysphoria falls within the Exclusion to the ADA and the Rehabilitation Act.

The ADA and the Rehabilitation Act exclude certain conditions like “gender identity disorders not resulting from physical impairments” from the disability definition (the “Exclusion”). 42 U.S.C. § 12211(b)(1); 29 U.S.C. § 705(20)(F)(i). Plaintiffs’ opposition depends on a divided panel opinion in a different circuit that narrowly avoided en banc rehearing. *See Williams v. Kincaid*, 45 F.4th 759 (4th Cir. 2022); *Williams v. Kincaid*, 50 F.4th 429 (4th Cir. 2022). This Court should instead follow the “majority of federal cases” that have rejected ADA claims based on gender dysphoria because “Congress intended to exclude from the ADA’s protection both disabling and non-disabling gender identity disorders that do not result from a physical impairment.” *Parker v. Strawser Constr., Inc.*, 307 F. Supp. 3d 744, 754 (S.D. Ohio 2018).

A. Gender dysphoria is a gender identity disorder.

Plaintiffs’ primary argument against the Exclusion is that because the term “gender dysphoria” did not exist in 1990, Plaintiffs’ condition must be outside the Exclusion. But statutory interpretation demonstrates that Congress intended to exclude the condition that is now called gender dysphoria.

Plaintiffs do not avoid the Exclusion just because a private organization replaced the diagnostic name. More than two decades after Congress passed the Exclusion, the American Psychiatric Association (“APA”) declared that gender dysphoria *replaced* gender identity disorder rather than created a new, unrelated diagnosis. According to the APA, DSM-5 “replaces the diagnostic name ‘gender identity disorder’ with ‘gender dysphoria.’” American Psychiatric Association, *Gender Dysphoria* (2013), 1, at https://www.psychiatry.org/File%20Library/Psychiatrists/Practice/DSM/APA_DSM-5-Gender-Dysphoria.pdf.¹ The name replacement was for linguistic, not medical reasons.

¹ In an appeal of a granted motion to dismiss, the *Williams* dissent repeatedly cited this document. *Williams*, 45 F.4th at 784-85 (Quattlebaum, J., dissenting).

1 As the APA explained, “[r]eplacing ‘disorder’ with ‘dysphoria’ in the diagnostic label is
2 not only more appropriate and consistent with familiar clinical sexology terminology, it
3 also removes the connotation that the patient is ‘disordered.’” *Id.* at 2. DSM-5 lauded the
4 name change because “[gender dysphoria] is more descriptive than the previous DSM-IV
5 term *gender identity disorder* and focuses on dysphoria as the clinical problem, not identity
6 per se.” APA, *Diagnostic and Statistical Manual of Mental Disorders – Fifth Edition* 451
7 (2013) [hereinafter DSM-5].

8 DSM-5’s replacement of “gender identity disorder” with “gender dysphoria” does
9 not change the original statutory meaning of “gender identity disorder.” *Williams*, 45 F.4th
10 at 782-85 (Quattlebaum, J., dissenting). Plaintiffs do not directly contest constitutional
11 principles holding that Congress cannot delegate power to private individuals to modify
12 statutes passed by Congress. Doc. 146 at 5 (citing *Mistretta v. United States*, 488 U.S. 361,
13 373 n.7 (1989); *Williams*, 45 F.4th at 785 (Quattlebaum, J., dissenting)). But Plaintiffs
14 argue essentially that by emphasizing the new diagnostic label gender dysphoria did not
15 exist in 1990. Doc. 150 at 4-5. Statutory interpretation demands more.

16 Plaintiffs do not dispute that DSM-III-R is the relevant interpretive aid to determine
17 what the Exclusion meant when it became law. Under the DSM-III-R section on Gender
18 Identity Disorders, which is the same terminology used by Congress in the Exclusion,
19 “[t]he essential feature of the disorders included in this subclass is an incongruence
20 between assigned sex (i.e., the sex that is recorded on the birth certificate) and gender
21 identity.” Doc. 146-1 at 73. DSM-5 changed the name but not the meaning or the
22 emphasis: “Individuals with gender dysphoria have a marked incongruence between the
23 gender they have been assigned to (usually at birth, referred to as *natal gender*) and their
24 experienced/expressed gender. This discrepancy is the core component of the diagnosis.”
25 DSM-5 at 453 (emphasis original). Similar to DSM-III-R, Plaintiffs claim their diagnosed
26 condition is “the distress caused by incongruence between a person’s gender identity and
27 their designated sex at birth.” Doc. 150 at 2. Plaintiffs’ own allegations—that they
28 experience incongruence between their gender identity and their designated sex at birth—

1 match the “essential feature” of gender identity disorders in DSM-III-R. This excludes
2 their claims under the ADA and Rehabilitation Act.

3 Contrary to Plaintiffs’ claims, *id.* at 4-5, the Exclusion is not affected in this case by
4 gender dysphoria’s addition of “clinically significant distress” to DSM-III-R’s gender
5 identity disorder diagnosis. Under DSM-III-R, an individual experiencing “persistent
6 discomfort and sense of inappropriateness about one’s assigned sex”—like Plaintiffs
7 here—could be diagnosed with a gender identity disorder whether the individual
8 experienced clinically significant distress or not. Doc. 146-1 at 76, 77. Gender dysphoria’s
9 clinically significant distress requirement narrows the diagnosis by excluding individuals
10 who previously would have been diagnosed with gender identity disorder but who do not
11 experience clinically significant distress. That does not impact Plaintiffs. Plaintiffs’
12 gender dysphoria diagnosis means they also would have been diagnosed with a gender
13 identity disorder under DSM-III-R because they experience persistent discomfort and sense
14 of inappropriateness about their assigned sex.

15 Plaintiffs employ a red herring and contend that “Gender Identity Disorder of
16 Childhood”—which would have been the DSM-III-R diagnosis when they were diagnosed
17 with gender dysphoria (Doc. 1, ¶¶ 45, 57) and when Plaintiff Doe filed this lawsuit (*id.* at
18 ¶ 46)—does not apply because they have “already reached puberty.” Even if this were
19 true, the Exclusion still applies. “Persistent or recurrent discomfort and sense of
20 inappropriateness about one’s assigned sex” in those who have reached puberty is either
21 Gender Identity Disorder of Adolescence or Adulthood (when there is not “persistent
22 preoccupation (for at least two years) with getting rid of one’s primary and secondary sex
23 characteristics and acquiring the sex characteristics of the other sex”) or Transsexualism
24 (when there is such a persistent preoccupation). Doc. 146-1 at 74-77; *see also* 42 U.S.C.
25 § 12211(b)(1). Either way, Plaintiffs have a gender identity disorder under DSM-III-R that
26 subjects them to the Exclusion.

27 **B. Plaintiffs have not alleged a physical impairment.**

28 Plaintiffs next try to avoid the Exclusion by claiming that their gender identity

1 disorder results from a physical impairment. This is unsupported by their allegations and
2 DSM-III-R.

3 Plaintiffs do not dispute that DSM-III-R provided examples of gender identity
4 disorders resulting from physical impairments. Under the standard set forth in DSM-III-
5 R, Plaintiffs have not pleaded or argued any “[p]hysical abnormalities of the sex organs.”
6 Doc. 146-1 at 73; *see also* 74 (“physical intersexuality or a genetic abnormality”). Without
7 these allegations, Plaintiffs’ ADA claim is subject to the Exclusion.

8 In fact, Plaintiffs do not point to any language in DSM-III-R or DSM-5 that
9 demonstrates their diagnosis results from a physical impairment. Instead, Plaintiffs broadly
10 allege an “innate biological condition.” Doc. 150 at 6. But by definition, innate means
11 “originating in or derived *from the mind* or the constitution of the intellect rather than from
12 experience.” *Innate*, <https://www.merriam-webster.com/dictionary/innate> (emphasis
13 added). Even Plaintiffs’ own argument does not support the view that Plaintiffs’ condition
14 is a “physical impairment.”

15 Finally, Plaintiffs argue that their treatment with puberty blocking medication and
16 hormone therapy “indicate[s] that [their] gender dysphoria has some physical basis.” Doc.
17 150 at 6. Yet taking medication does not automatically mean the condition results from a
18 physical impairment. Quite the contrary. For example, DSM-III-R’s section on Mood
19 Disorders begins by stating, “The essential feature of this group of disorders is a
20 disturbance of mood, accompanied by a full or partial Manic or Depressive Syndrome, that
21 *is not due to any other physical or mental disorder.*” DSM-III-R, at 213 (emphasis added).
22 Thus, taking anti-depressants does not mean depression resulted from a physical
23 impairment. Plaintiffs cannot survive a motion to dismiss simply by alleging they have
24 taken puberty blocking medication or hormone therapy.

25 **C. Granting Intervenor-Defendants’ motion would not raise constitutional**
26 **issues.**

27 Plaintiffs’ final attempt to evade the Exclusion is to claim it is unconstitutional if it
28 excludes their claims and therefore must be avoided. This argument fails, too.

1 Constitutional avoidance is not applicable here. “The canon of constitutional
2 avoidance comes into play only when, after the application of ordinary textual analysis, the
3 statute is found to be susceptible of more than one construction.” *Jennings v. Rodriguez*,
4 138 S. Ct. 830, 842 (2018) (internal quotations omitted). “In the absence of more than one
5 plausible construction, the canon simply has no application.” *Id.* (internal quotations
6 omitted). “Spotting a constitutional issue does not give a court the authority to rewrite a
7 statute as it pleases.” *Id.* at 843.

8 Plaintiffs have not claimed the Exclusion is ambiguous or presented alternative
9 statutory constructions of “gender identity disorders not resulting from physical
10 impairments.” Plaintiffs instead have made factual arguments relating to when gender
11 dysphoria was added to DSM-5 and whether Plaintiffs have alleged a physical impairment.
12 Since Plaintiffs do not dispute that DSM-III-R is the relevant interpretive aid and have not
13 presented a competing statutory construction, the constitutional avoidance canon “simply
14 has no application.” For the same reason, the statutory construction in favor of maximum
15 protection is inapplicable as well. *Williams v. Kincaid*, 45 F.4th 759, 785 (4th Cir. 2022)
16 (Quattlebaum, J., dissenting) (quoting *Clifford F. MacEvoy Co. v. United States*, 322 U.S.
17 102, 107 (1944)) (“Even in cases in which a statute is ‘entitled liberal construction and
18 application in order properly to effectuate the Congressional intent,’ that ‘salutary policy
19 does not justify ignoring plain words of limitation.’”).

20 Plaintiffs also have not pleaded a constitutional challenge to the Exclusion. Nor is
21 the Exclusion constitutionally defective. While Plaintiffs conflate gender dysphoria with
22 transgender status, Doc. 150 at 7, DSM-5 treats them differently. “*Gender dysphoria* refers
23 to the distress that may accompany the incongruence between one’s experienced or
24 expressed gender and one’s assigned gender.” DSM-5 at 451 (emphasis original). On the
25 other hand, “[*t*]ransgender refers to the broad spectrum of individuals who transiently or
26 persistently identify with a gender different from their natal gender.” *Id.* (emphasis
27 original). Because gender dysphoria and transgender are not identical terms, Plaintiffs’
28 Equal Protection Clause argument fails because the exclusion of “gender identity

1 disorders” does not classify on the basis of transgender status.²

2 Even if Plaintiffs had pleaded a constitutional challenge and the Exclusion did raise
3 equal protection issues, Plaintiffs did not challenge any of the legitimate government
4 interests identified by Intervenor-Defendants that could support the Exclusion. Doc. 146
5 at 8. Plaintiffs also did not provide any evidence that satisfies the standard for animus. *Id.*
6 at 7-8. Plaintiffs’ claim thus fails.

7 **II. Plaintiffs have not properly alleged they have a disability under the ADA**
8 **and Rehabilitation Act.**

9 Before the Exclusion even becomes relevant, Plaintiffs must establish they satisfy
10 the definition for disability. 42 U.S.C. § 12102(1)(A). To establish a disability, each
11 Plaintiff must plead and prove (1) a physical or mental impairment (2) that substantially
12 limits (3) one or more major life activities of that individual. *Id.*; *see also Weaving v. City*
13 *of Hillsboro*, 763 F.3d 1106, 1111 (9th Cir. 2014). Plaintiffs have failed to do so.

14 **A. *Williams* evaluated the disability exclusion, not whether Plaintiff was**
15 **disabled.**

16 Plaintiffs argue that “[t]his Court should follow the well-reasoned decision of the
17 Fourth Circuit in *Williams v. Kincaid*, 45 F.4th 759 (4th Cir. 2022) concluding that gender
18 dysphoria is a cognizable disability under the ADA; . . .” Doc. 150 at 1. But the Fourth
19 Circuit did not reach such a conclusion.

20 On arguments relevant to this case, the Fourth Circuit only considered whether the
21 Exclusion applied. The Fourth Circuit did not consider the elements for disability,
22 including substantial limitation and major life activity, because the parties did not raise
23

24 ² Under this same reasoning, the Save Women’s Sports Act does not discriminate
25 against gender dysphoria as required to state a claim under the ADA or Rehabilitation Act.
26 42 U.S.C. § 12132 (“by reason of such disability, be excluded from participation in or . . .
27 be subjected to discrimination”); 29 U.S.C. § 794(a) (“solely by reason of her or his
28 disability, be excluded from the participation in, . . . or be subjected to
discrimination”). The Act does not exclude Plaintiffs from girls’ sports because of
their gender dysphoria. Until their opposition to this motion, Plaintiffs have repeatedly
argued that the Act excludes them based on transgender status. *See, e.g.*, Doc. 3 at 10, 11;
Doc. 65 at 1. Transgender status is not the same as gender dysphoria.

1 those issues. *Williams*, 45 F.4th at 766. *Williams* is thus inapplicable to the severe
2 deficiencies Intervenor-Defendants have identified in Plaintiffs’ pleadings relating to
3 substantial limitation and major life activity.

4 **B. Plaintiffs have failed to plead major life activity.**

5 Plaintiffs have dramatically reversed course on the major life activities they believe
6 are impacted. In their complaint and their initial opposition to Intervenor-Defendant’s
7 proposed motion to dismiss, Plaintiffs identified only one affected major life activity that
8 they blamed on the Save Women’s Sports Act: the ability to play sports. Doc. 1 at ¶ 85;
9 Doc. 64 at 11-12. Intervenor-Defendants cited numerous cases holding that sports was not
10 a major life activity. Doc. 146 at 8-10.

11 Perhaps recognizing these legal headwinds, Plaintiffs have completely abandoned
12 their position that sports is a major life activity. *See* Doc. 150 at 7-8. Now Plaintiffs argue
13 that “gender dysphoria substantially impairs major life activities, including caring for
14 oneself, eating, sleeping, learning, reading, concentrating, thinking, and communicating,
15 as well as major bodily functions, such as neurological and brain functioning.” *Id.* at 8.

16 There is just one problem: Plaintiffs did not plead any of these activities in their
17 complaint. *See* Doc. 1. Plaintiffs know this. For support, they cite to a single paragraph
18 in the complaint that listed some possible effects in the general population if gender
19 dysphoria is untreated. Doc. 150 at 8 (citing Doc. 1, ¶ 32). Plaintiffs then speculate—
20 without any evidence—about how these possible effects could generally impair major life
21 activities. As an example, Plaintiffs allege that “[i]f untreated, gender dysphoria may cause
22 anxiety, depression, eating disorders, substance abuse, self-harm, and suicide.” Doc. 1,
23 ¶ 32. Based on that allegation, Plaintiffs claim that gender dysphoria substantially impairs
24 things like caring for oneself, sleeping, learning, reading, and communicating. Doc. 150
25 at 8. But there is no evidence or allegation connecting Plaintiffs’ condition with effects on
26 these major life activities.

27 Plaintiffs have failed to sufficiently plead the major life activity element required
28 for an ADA claim.

1 **C. Plaintiffs have failed to plead substantial limitation.**

2 Plaintiffs also have not made any allegations that a major life activity has been
3 substantially limited. The words “substantially limited” are not in Plaintiffs’ complaint.
4 *See* Doc. 1. Nor are there allegations from which one could infer substantial limitation.

5 Plaintiffs try to mask this deficiency through a single conclusory statement:
6 “Because Plaintiffs have been diagnosed with gender dysphoria, they have a record of a
7 substantially limiting impairment.” Doc. 150 at 8. Plaintiffs do not cite to their complaint
8 or any part of the record in this case.³ Plaintiffs thus have alleged no evidence of any
9 substantial limitation.

10 The lack of individualized evidence is fatal to Plaintiffs’ claim. The ADA contains
11 a “statutory obligation to determine the existence of disabilities on a case-by-case basis.”
12 *Albertson’s, Inc. v. Kirkingburg*, 527 U.S. 555, 566 (1999). In *Albertson’s*, the Supreme
13 Court reversed the Ninth Circuit because an impairment “may embrace a group whose
14 members vary” by a number of variables, and “[t]hese variables are not the stuff of a *per*
15 *se* rule.” *Id.*

16 Like *Albertson’s*, just because Plaintiffs have been diagnosed with gender dysphoria
17 does not automatically mean they are substantially limited in “caring for oneself, eating,
18 sleeping, learning, reading, concentrating, thinking, and communicating, as well as major
19 bodily functions, such as neurological and brain functioning.” Doc. 150 at 8. To the
20 contrary, even if they could be considered at this stage, Plaintiffs’ affidavits do not allege
21 any substantial limitation of any major life activity. Their affidavits contain reports of
22 teasing before transition (Doc. 7, ¶ 5) and worries about the Plaintiffs being “very upset”
23 (*id.* at ¶ 16) or “distraught” (Doc. 9, ¶ 11) if they cannot play sports with girls. But these
24 do not allege a substantial limitation of one or more of their major life activities.

25
26 ³ Plaintiffs’ only supporting citation is to a district court case in a different circuit in
27 which a court screening a prisoner complaint under 28 U.S.C. § 1915A(a) did not dismiss
28 the entire ADA claim as non-meritorious, although it did dismiss several defendants and
invite a motion to dismiss. Doc. 150 at 8 (citing *Iglesias v. True*, 403 F. Supp. 3d 680,
687-88 (S.D. Ill. 2019)). This inapposite decision does not provide evidence that Plaintiffs
have been substantially limited in one or more of their major life activities.

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CONCLUSION

The Court should dismiss Plaintiffs' Complaint.

Dated: October 3, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on October 3, 2023, I caused a true and correct copy of the foregoing to be filed by the Court’s electronic filing system, to be served by operation of the Court’s electronic filing system on counsel for all parties who have entered in the case.

/s/ Justin D. Smith