DISTRICT COURT, CITY AND COUNTY OF DENVER DENVER CITY & COUNTY BUILDING 1437 BANNOCK STREET DENVER, CO 80202	
CADEN KENT, Plaintiff, v. CHILDREN'S HOSPITAL COLORADO, Defendant.	▲COURT USE ONLY▲
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RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS	

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INTRODUCTION

Colorado's Anti-Discrimination Act (CADA), a law duly enacted by the General Assembly, expressly prohibits hospitals from refusing, denying, or withholding services from any individual or group based on protected characteristics, including sex, gender identity, gender expression, and disability. C.R.S. § 24-34-601(1) & (2)(a). Plaintiff Caden Kent's complaint squarely alleges that Children's Hospital Colorado ("CHCO") policy violates these legislative prohibitions and that the hospital applied its unlawful policy to deny him care.

CHCO is plainly bound by CADA. But in its motion to dismiss ("Motion"), the hospital contrives to avoid any accountability for failing to comply with the law's nondiscrimination command. It suggests this Court is without power to assess whether CHCO complied with its obligations under CADA and that Kent cannot seek relief the statute expressly authorizes. Defendant is wrong on both counts. Contrary to the thrust of its Motion, the hospital is not above the law. Because Defendant has not identified any valid reason why this Court cannot exercise the quintessential judicial function of applying a state statute, it is this Court's responsibility to consider Kent's discrimination claim.

Taking the complaint's well-pled factual allegations as true, as this Court must, CHCO categorically withholds surgeries that it otherwise provides when those procedures are sought by transgender patients as treatment for gender dysphoria. It does so where CHCO's own doctors have determined the procedures to be medically necessary and appropriate. Indeed, CHCO overrode its own doctors' medical judgment when it cancelled Kent's surgery pursuant to the categorical ban. On these facts, Kent has stated claims for discrimination, and Defendant's motion should be denied in its entirety.

ARGUMENT

I. This Court has jurisdiction over Plaintiff's discrimination complaint.

The hospital devotes the bulk of its Motion attempting to piece together a doctrinal reason its conduct in this case should be immune from scrutiny under CADA. But because no such basis exists in law, Defendant's efforts are unavailing. This case presents a justiciable question and Plaintiff has standing to bring it.

A. This case does not present a nonjusticiable political question.

Defendant first asks this Court to dismiss Plaintiff's complaint on the basis that it presents a nonjusticiable political question. But the political question doctrine is inapplicable here.

The political question doctrine seeks to guard the constitutional separation of powers. *Colo. Common Cause v. Bledsoe*, 810 P.2d 201, 205-06 (Colo. 1991). It therefore "excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of [the legislature] or the confines of the Executive Branch." *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986); *see also United States v. Munoz–Flores*, 495 U.S. 385, 394 (1990) (stating that the political question doctrine "is designed to restrain the Judiciary from inappropriate interference in the business of the other branches of Government"). Unlike cases implicating political question doctrine (including every such case cited in Defendant's Motion), the present dispute involves *no* specter of judicial interference with a judgment made by a coordinate branch of government. Defendant has not pointed to a single case suggesting the doctrine prevents judicial examination of a private hospital's conduct, and Plaintiff is aware of none.

Contrary to CHCO's suggestion, the General Assembly's governance over the practice of medicine in Colorado does not defeat Kent's claim, it *supplies* it. Reaching for a connection to an arm of government, CHCO apparently suggests the Court cannot hear this case because the practice of medicine is regulated by the legislature. Motion at 8–9. Of course, this dubious logic would subsume all manner of legitimate cases and controversies into political questions. The political question doctrine is a "narrow exception" to the judiciary's responsibility to resolve disputes properly before it, *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 195 (2012), and this argument is particularly inapt here. The General Assembly wrote, debated, voted on, and enacted CADA. It expressly defined a "place of public accommodation" to include "a hospital." C.R.S. 24-34-601. The legislature has thus already made the "policy determination" and set the "manageable standard" that hospitals practicing medicine in Colorado must do so without discriminating in their provision of services. Motion at 8. It is the legislature that empowered individuals excluded from hospital services on the basis of their disability, sex, gender identity, or gender expression to sue in court. It cannot show "lack of the respect due" to the legislative branch, *id* at 8, for this Court to hear precisely the cause of action the General Assembly created. On the contrary, it is the judiciary's "solemn duty" to apply and interpret Colorado statutes, and "[h]owever delicate that duty may be, [this Court is] not at liberty to surrender, or to ignore, or to waive it." *Markwell v. Cooke*, 2021 CO 17, ¶ 31 (quoting *In re Legis. Reapportionment*, 374 P.2d 66, 68 (Colo. 1962)). This Court has and must exercise its jurisdiction over Plaintiff's claims.[1]

[1] As discussed further in Part III below, Defendant attaches an affidavit to its Motion, which it claims is for the purpose of challenging jurisdictional facts. In reality, the affidavit does not

B. Plaintiff has standing to seek an order requiring compliance with CADA.

Next, Defendant asks this Court to dismiss Plaintiff's "complaint for injunctive relief" on the purported basis that he lacks standing to bring it. Motion at 12–14. As an initial matter, CHCO misstates Plaintiff's burden in seeking an order requiring compliance with CADA. But in any event, CHCO conflates the issue of standing with whether Kent will ultimately be able to prove entitlement to a permanent injunction. Because Defendant applies the wrong test, it gets to the wrong outcome. Kent plainly meets Colorado's "broad definition of standing," which is "relatively easy to satisfy." *Ainscough v. Owens*, 90 P.3d 851, 855-56 (Colo. 2004).

Under Colorado law, a plaintiff has standing if he has suffered "an injury in fact" to a "legally protected interest." *Wimberly v. Ettenberg*, 570 P.2d 535, 539 (Colo. 1977). When determining whether an injury in fact exists, the court must accept all the allegations set forth in the complaint as true. *Ainscough*, 90 P.3d at 857. "The injury may be tangible, such as physical damage or economic harm; however, it may also be intangible, such as aesthetic issues or the deprivation of civil liberties" or "other legally created rights." *Ainscough,* 90 P.3d at 856. Here, per the well-pled facts of the complaint, Kent was denied care under CHCO's newly adopted categorical ban on gender-affirming surgeries. Compl. ¶ 64. That denial of care is an injury in fact, whether or not Kent could ultimately be treated somewhere else. *E.g.*, *Minton v. Dignity Health*, 39 Cal. App. 5th 1155, 1165 (Cal. App. Ct. 2019) (concluding transgender plaintiff suffered cognizable injury under state nondiscrimination law "[w]hen his surgery was

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challenge any jurisdictional facts and does not bear on jurisdiction at all. Instead, the affidavit improperly tries to contradict central factual assertions that go directly to the merits of the claim (not jurisdiction). Accordingly, the Court should disregard it. *See* Part III *infra*.

cancelled," even though he was able to reschedule the procedure at a different institution). Concluding otherwise, as CHCO urges, would defeat the purpose of antidiscrimination laws. CADA exists to ensure that Coloradans have equal access to each and every public accommodation; it would be nonsensical if, so long as the person facing discrimination could ultimately access services *somewhere*, his right to sue the discriminating entity were extinguished.

It is similarly clear that the injury Kent suffered was to a legally protected interest. CADA creates a legally protected interest in "full and equal" access, free from discrimination based on disability, gender identity, sex, and gender expression, to places of public accommodation, explicitly including "hospital[s]." C.R.S. § 24-34-601(1)–(2). Kent's claim is squarely within the "zone of interests to be protected" by CADA. *Rocky Mountain Animal Defense v. Colo. Div. of Wildlife*, 100 P.3d 508, 513 (Colo. App. 2004). He has adequately pled that (1) CHCO, a hospital, (2) denied him a surgical procedure it offered to others, (3) based on his diagnosis and his transgender status. Compl. ¶¶ 8, 63, 64. As discussed further in Part III below, Defendant may try to contest the truth of these well-pled factual allegations, but doing so cannot sustain a motion to dismiss for lack of standing.

The sole basis Defendant asserts to support its contention that Plaintiff lacks standing is that he cannot show "irreparable harm." Motion at 12–14. But, as shown above, irreparable harm is not a prerequisite to standing. Moreover, there is no requirement to show irreparable harm in CADA's statutory language. On the contrary, CADA explicitly provides that a person who proves that he has been denied services by a hospital on the basis of disability in violation of C.R.S. § 24-34-601 "is entitled to . . . [a] court order requiring compliance with" the statute.

C.R.S. § 24-34-802(2)(a). Thus, under the plain language of the statute, so long as Kent can prove the hospital denied him surgery on the basis of his disability in violation of CADA, he is *entitled* to "an order requiring [the hospital's] compliance" with the statute.

CADA was "designed . . . to eliminate discriminatory practices." *Elder v. Williams*, 477 P.3d 694, 699 (Colo. 2020). The statute's broader public purpose explains why it authorizes, for example, statutory fines, *see* C.R.S. §§ 24-24-602(1)(a) & 802(2)(a)(III), and reasonable attorney fees for prevailing plaintiffs, C.R.S. § 24-34-802(3). *See Elder*, 477 P.3d at 699 (distinguishing between capped damages structure and availability of attorney's fees and CADA's focus on ending discriminatory practices). Indeed, "any benefits to an individual claimant resulting from a claim under CADA . . . are 'merely incidental' to [the] statute['s] greater purpose[] of eliminating . . . discrimination." 477 P.3d at 699. Particularly if Kent proves he was discriminated against pursuant to CHCO's categorical policy, it would make little sense for this Court *not* to order the hospital's compliance with CADA.[2] Such an outcome would simply invite the hospital to run its discrimination again against the next patient.

In any event, it would be premature to conclude at this point in the litigation the ultimate relief to which Kent may be entitled. What matters for present purposes is that Plaintiff easily satisfies the requirements of *standing* to bring his claims under CADA, and Defendant's Motion on that basis should be denied.

[2] Notably, an order requiring compliance with CADA would not be a disfavored mandatory injunction, as Defendant suggests. Contrary to Defendant's framing throughout its Motion, this case is not about whether any hospital must offer particular surgeries that it has never previously done. Instead, this case is about whether a hospital that does offer certain procedures can withhold them from one group of patients based on their disability, gender identity, sex, or gender expression. Under CADA, the answer is that it cannot.

II. Plaintiff has adequately stated claims under CADA.

"Motions to dismiss for failure to state a claim are disfavored and should not be granted if relief is available under any theory of law." *Colorado Ethics Watch v. Senate Majority Fund, LLC*, 269 P.3d 1248, 1253 (Colo. 2012) (en banc); *Woodall v. Godfrey*, 2024 COA 42, ¶ 9, __ P.3d __. Such motions serve only to "test the formal sufficiency of the complaint," *Dorman v. Petrol Aspen, Inc.*, 914 P.2d 909, 911 (Colo. 1996), which need only give a "short and plain" notice of the claim for relief that is "plausible on its face." C.R.C.P. 8(a)(2); *Warne v. Hall*, 373 P.3d 588, 589 (Colo. 2016).

Defendant asks this Court to dismiss Plaintiff's CADA claims on the basis of (1) CHCO's version of the facts, which are contrary to those alleged in the complaint; and (2) its suggestion that the statute should be read narrowly to exclude Plaintiff's disability from coverage. But CADA "was enacted for a beneficent purpose and should be liberally construed in favor of the legal remedies it provides." *Colo. Civil Rights Comm'n v. ConAgra Flour Mill. Co.*, 736 P.2d 842, 846 (Colo. App. 1987); *Moeller v. Colorado Real Estate Com.*, 759 P.2d 697, 701 (Colo. 1988) ("Statutes having remedial purposes are to be liberally construed to advance the remedial objectives of the General Assembly."). And fatally for Defendant, in evaluating a motion to dismiss for failure to state a claim, the Court must accept the complaint's factual allegations as true and view them in the light most favorable to Plaintiff. *Nieto v. Clark's Mkt., Inc.*, 2021 CO 48, ¶ 11, 488 P.3d 1140, 1143. Plaintiff is confident that he will be able to prove the factual allegations in the complaint, and the hospital is free to challenge them at trial, if they can. But not on a motion to dismiss. Accordingly, the hospital's C.R.C.P. 12(b)(5) arguments fail.

A. Plaintiff adequately states a claim for discrimination based on sex, gender identity, and gender expression.

CADA makes it a "discriminatory practice and unlawful" for a hospital, as a place of public accommodation, "directly or indirectly, to refuse, withhold from, or deny to an individual or a group, because of . . . sex, . . . gender identity, [or] gender expression . . . the full and equal enjoyment of [its] goods, services, facilities, privileges, advantages, or accommodations." C.R.S. § 24-34-601(1)-(2). Here, CHCO refused, withheld from, and denied Kent surgery not based on any kind of individualized medical judgment, but pursuant to a categorical ban on care adopted by the hospital administration (not its doctors) that would not have applied but for his sex, gender identity, and gender expression. Compl. ¶ ¶ 63, 64. On these facts, Kent easily states claims for sex, gender identity, and gender expression discrimination under CADA, and this Court should reject Defendant's one-page, superficial argument to the contrary.

CADA defines "gender identity" to mean "an individual's innate sense of the individual's own gender, which may or may not correspond with the individual's sex assigned at birth." C.R.S. § 24-34-301(10). Kent was assigned female at birth, but he has a male gender identity. Compl. ¶ 14. The term transgender is used to describe individuals, like Kent, whose gender identity, or internal sense of gender, differs from the sex they were assigned at birth. Compl. ¶ 13.[3] CADA's sex, gender identity, and gender expression protections prohibit discrimination based on transgender status. *Scardina v. Masterpiece Cakeshop, Inc.*, 2023 COA 8, ¶ 58, 528 P.3d 926, 937 & n.4; *Bostock v. Clayton Cty*, 590 U.S. 644, 660 (2020) ("[I]t is impossible to

[3] The term cisgender is used to describe individuals whose gender identity aligns with their sex assigned at birth. Compl. ¶ 13.

discriminate against someone for being . . . transgender without discriminating against that individual based on sex.").[4]

Kent has gender dysphoria, a condition unique to transgender people, "characterized by the clinically significant distress associated with incongruence between a person's gender identity and assigned sex at birth." Compl. ¶¶ 24, 15. Kent's gender dysphoria is exacerbated by being unable to live, and express his gender, consistently with his gender identity. Compl. ¶¶ 18, 42. CADA defines "gender expression" to mean "an individual's way of reflecting and expressing the individual's gender to the outside world, typically demonstrated through appearance, dress, and behavior." C.R.S. § 24-34-301(9). Although hormone therapy improved his symptoms, Kent's gender dysphoria persisted with the misalignment of his secondary sex characteristics with his gender identity. Compl. ¶ 42. CHCO's own doctors determined that chest masculinization surgery was medically necessary to treat Kent's gender dysphoria and that he was a good candidate for the procedure. *Id.* ¶¶ 6, 51, 52. CHCO indicated it would perform such surgery on patients over the age of 18 if they had begun their course of treatment and surgery planning with CHCO before turning 18. Compl. ¶ 45. Kent and his family chose a surgeon in CHCO's pediatric plastic surgery practice, whom CHCO recommended. Compl. ¶ 46. In consultation with that surgeon's physician's assistant, Kent completed all the necessary paperwork to be scheduled for surgery at CHCO. Compl. ¶¶ 47–55.

[4] *See also e.g.*, *Poe by & through Poe v. Labrador*, No. 1:23-CV-00269-BLW, 2023 WL 8935065 (D. Idaho Dec. 26, 2023); *Dekker v. Weida*, 679 F.Supp.3d 1271 (N.D. Fla. 2023); *Norsworthy v. Beard*, 87 F.Supp.3d 1104, 1119 (N.D. Cal. 2015); *Fain v. Crouch*, 618 F. Supp. 3d 313, 324 (S.D. W. Va. 2022).

But when he submitted the last document he needed, CHCO's own physician's assistant informed Plaintiff and his family that there had been an "executive decision," effective immediately, that CHCO surgeons were now prohibited from providing medically necessary surgeries to treat gender dysphoria. Compl. ¶¶ 64–66. Because of the new categorical policy, Kent's surgery would not be scheduled. Compl. ¶ 65.

Contrary to Defendant's suggestion, and as discussed further below, Kent need not show that CHCO harbors animus against transgender or gender-diverse people generally in order to state a claim under CADA. *Craig v. Masterpiece Cakeshop, Inc.*, 2015 COA 115, ¶ 37, *rev'd on other grounds,* ____ ("CADA requires no . . . showing of 'animus'"). It is enough for Kent to show that "'but for' [his] status as a trans [man]," CHCO's executive, categorical ban would not have applied to bar his care. *Scardina v. Masterpiece Cakeshop, Inc.*, 2023 COA 8, ¶ 58, 528 P.3d 926, 937; *see also Bostock v. Clayton Cty*, 590 U.S. 644, 656 (2020) (explaining that "but for" causation analysis is the "simple" and "traditional" standard in assessing violations of anti-discrimination laws).[5] The well-pled allegations of the complaint show just that.

Defendant's argument to the contrary impermissibly relies on assertions directly at odds with the facts Plaintiff has alleged. Defendant suggests its denial of care was not because of Kent's sex, gender identity, or gender expression, but because Kent is over the age of eighteen.

[5] Discrimination may also be cognizable where a Plaintiff can show their protected characteristic was a substantial factor in the differential treatment. *See, e.g.*, *Washington State Commc'n Access Project v. Regal Cinemas, Inc.*, 293 P.3d 413, 421 (Wash. Ct. App. 2013) ("Under the [Washington Law Against Discrimination] a plaintiff must demonstrate . . . that the disability was a substantial factor causing the discrimination"); *Brown v. Denver Symphony Ass'n*, 794 P.2d 1011, 1014 (Colo. App. 1989) ("A plaintiff can also prevail in [an Age Discrimination in Employment case] if the reasons offered by the employer [for discharging the employee] are legitimate but age discrimination was also a substantial factor.")

Motion at 15, 19, 25. But accepting that assertion would require entirely disregarding the well-pled allegations in the complaint that CHCO's categorical ban *does not apply* to young adult cisgender patients who seek equivalent procedures. Compl. ¶¶ 62, 63, 86–88. Defendant admits as much. Motion at 21 n.5. Defendant suggests the Court should reject the facts in the complaint and rule—on a Motion to Dismiss—that chest reconstruction surgery for gender dysphoria is materially different from other surgeries CHCO continues to provide, even with no true factual basis for doing so. *Id.* Of course, doing so would be incompatible with the applicable standard of review on a motion to dismiss. *Woodall*, ¶¶ 32–41 (reversing district court for failing to accept fact allegations as true and draw supported inferences in Plaintiff's favor). Plaintiff has alleged and will be able to prove at trial that the procedure Kent was denied remained available to treat conditions other than gender dysphoria in CHCO's non-pediatric patients.

Such facts state a claim for discrimination based on transgender status. In *Minton v. Dignity Health*, a case similar to this one, a transgender man filed a complaint alleging violation of California's antidiscrimination law after a medical center cancelled his hysterectomy because he was transgender. 252 Cal. Rptr. 3d 616, 619-621 (Cal. Ct. App. 2019), *cert. denied*, 142 S.Ct. 455. The California Court of Appeals determined that the plaintiff properly stated a claim for discrimination because "[t]he pleading alleges that [the hospital] allows doctors to perform hysterectomies as treatment for other conditions but refused to allow [the doctor] to perform the same procedure as treatment for [plaintiff]'s gender dysphoria, a condition that is unique to transgender individuals." *Id.* at 622. The *Minton* court found that "[d]enying a procedure as treatment for a condition that affects only transgender persons supports an inference that [the medical center] discriminated against [plaintiff] based on his gender identity." *Id*.

Across the country, courts have similarly held that allegations the defendant provided or covered certain surgical procedures, but denied or failed to cover the same or similar surgical care for treatment of gender dysphoria, are sufficient to sustain a discrimination claim. *M.H. v. Jeppesen*, 677 F.Supp.3d 1175, 1194 (D. Idaho 2023) (holding that transgender plaintiffs' allegations that the state's Medicaid program excluded surgical care for gender dysphoria but covered the same or similar procedures for other diagnoses were sufficient to sustain an equal protection claim for discrimination based on transgender status); *Norsworthy v. Beard*, 87 F.Supp.3d 1104, 1120-21 (N.D. Cal. 2015) (holding that transgender plaintiff's allegation that the California prison system categorically considered some surgeries unnecessary when provided for gender dysphoria, but necessary when provided for other conditions, was sufficient to state an equal protection claim for discrimination based on transgender status); *Kadel v. Folwell*, No. 22-1721, 2024 WL 1846802, at *1 (4th Cir. Apr. 29, 2024) (holding that the state's medical plan, which covered gender affirming surgeries for cisgender people, such as breast reduction to treat gynecomastia, but did not cover similar surgeries for transgender people to treat gender dysphoria, discriminated based on sex and gender identity). These cases sound in equal protection, the same principle that animates CADA. *Elder,* 477 P.3d at 698 (describing CADA as "intended to address constitutionally based concerns of equality").

Here, if Kent's sex assigned at birth was male and he sought chest reconstruction surgery, CHCO's exclusionary policy would not have applied. If Kent had a female gender identity and sought breast reduction surgery, CHCO's exclusionary policy would not have applied. If Kent sought chest reconstruction to align his gender expression with his sex assigned at birth, rather than his gender identity, CHCO's exclusionary policy would not have applied. Based on the facts

as alleged in the complaint, he was categorically barred from "full and equal" access to CHCO's "goods, services, facilities, privileges, advantages, or accommodations" based on his sex, gender identity, and gender expression.

B. Plaintiff adequately states a claim for discrimination based on disability.

CHCO contends that Kent cannot state a claim for disability discrimination because gender dysphoria is a "gender identity disorder" excluded from coverage under CADA. But as other courts have recognized, and as the well-pled allegations in Kent's complaint demonstrate, gender dysphoria is not a "gender identity disorder." In addition, because Kent has adequately pled that his gender dysphoria stems from a physical impairment, Defendant's Motion fails.

1. Gender dysphoria is distinct from gender identity disorder and encompassed by CADA.

CADA prohibits a hospital, as a place of public accommodation, from excluding a person with a disability from its services, if the exclusion is because of the disability. C.R.S. § 24-34-801(b). "Disability," under CADA, "has the same meaning" as set forth in section 42 U.S.C. 12102 of the Americans with Disabilities Act (ADA). Under the ADA (and thus CADA), "gender identity disorders not resulting from physical impairments" are excluded from the definition of "disability." 42 U.S.C. § 12211(b)(1). While CHCO contends that gender dysphoria is subject to this exclusion, the facts and law demonstrate otherwise. To determine whether gender dysphoria is a gender identity disorder within the meaning of the ADA, 42 U.S.C. § 12211(b)(1), courts must examine the meaning its "terms at the time of its enactment." *Bostock*, 590 U.S. at 654. Courts must construe the definition of disability "in favor of broad coverage of individuals . . . to the maximum extent permitted" by its terms, and construe exclusions from

CADA and the ADA narrowly. § 12102(4)(A); *Williams v. Kinkaid*, 45 F.4th 759, 766 (4th Cir. 2022); *Moeller*, 759 P.2d at 701.

Kent has pled that gender dysphoria is recognized by the Diagnostic and Statistical Manual of Mental Disorders Fifth Edition (DSM-V), that it is recognized as its own diagnostic class, and that it is distinct from the outdated diagnosis of gender identity disorder. Compl. ¶ 15. Merely being transgender would have sustained a diagnosis of gender identity disorder but cannot not sustain a diagnosis of gender dysphoria, which requires clinically significant distress associated with incongruence between a person's gender identity and assigned sex at birth. Compl. ¶ ¶ 15, 16. Taking as true the well-pled facts that gender dysphoria has different diagnostic characteristics than gender identity disorder and constitutes its own diagnostic class, and drawing all inferences in favor of the Plaintiff, this Court should deny the Motion and allow Plaintiff to prove that gender dysphoria is a new, distinct diagnosis from the now-defunct diagnosis of gender identity disorder.

As Defendant concedes, other courts have reached the same conclusion. Motion at 17. *See, e.g.*, *Griffith v. El Paso County*, No. 21-CV-00387-CMA-NRN, 2023 WL 2242503 (D. Colo. February 27, 2023) ("[T]he Court is . . . convinced that gender dysphoria is a disability included in the ADA's protections."). Yet CHCO argues that because the law is not unanimous, this Court should dismiss Kent's disability claim. Quite the opposite. Particularly in light of the directive to interpret CADA broadly, the current legal landscape weighs in favor of allowing Kent's claim to proceed and receive the benefit of full adjudication on the merits. *See Guthrie v. Noel*, No. 1:20-CV-02351, 2023 WL 8115828 (M.D. Pa. Sept. 11, 2023) (determining that because of the dynamic nature of the legal and medical precedent surrounding a disability claim

for gender dysphoria, it should survive a motion to dismiss); *Doe v. Triangle Doughnuts, LLC,* 472 F. Supp. 3d 115 (E.D. Pa. 2020) (concluding that the unsettled state of the legal and medical evidence surrounding a disability claim for gender dysphoria favored denying a motion to dismiss); *Doe v. Mass. Dep't of Correction*, No. CV 17-1225-RGS, 2018 WL 2994403 at *7 ("the continuing re-evaluation of [gender dysphoria] underway in the relevant sectors of the medical community is sufficient, for [the purposes of a motion to dismiss] to raise a dispute of fact as to whether Doe's [gender dysphoria] falls outside the ADA's exclusion of gender identity-based disorders as they were understood by Congress twenty-eight years ago.")

Kent has demonstrated that, at minimum, it is plausible that gender dysphoria is not a gender identity disorder. *See Williams*, 45 F.4th at 766 ("The difference between 'gender identity disorders' and gender dysphoria . . . would be more than enough support to 'nudge . . . claims' that gender dysphoria falls entirely outside of § 12211(b)'s exclusion for 'gender identity disorders across the line from conceivable to plausible.'" (citations omitted)). On this basis alone, the Court should deny the request to dismiss Plaintiff's disability claim under CADA.

2. Kent has adequately pled that his gender dysphoria stems from a physical impairment.

As discussed above, while gender dysphoria is not a gender identity disorder (and therefore not excluded from CADA), even if was, Kent also has adequately pled that his gender dysphoria stems from a physical impairment and therefore falls within the disability protections of CADA and the ADA. 42 U.S.C. § 12211(b)(1) (only excluding gender identity disorders "not resulting from physical impairments" from the definition of "disability"). The ADA itself does not define "physical impairment," but the Equal Employment Opportunity Commission has issued regulations, defining physical impairment as "any physiological disorder or condition . . .

affecting one or more body systems . . . such as neurological . . . and endocrine." 28 C.F.R. § 35.108(b)(1)(i). "[Courts] must defer to the EEOC's reasonable interpretations of ambiguous terms in the ADA." *Williams*, 45 F.4th at 770.

Courts should not prematurely determine complex issues of "physiology, etiology, psychiatry, and other potentially relevant disciplines" that relate to the causes of gender dysphoria at the pleading stage. *Williams*, 45 F.4th at 772 (4th Cir. 2022) (quoting *Doe v. Pa. Dep't of Corr.*, No. 120CV00023SPBRAL, 2021 WL 1583556 at *9 (W.D. Pa. Feb. 19, 2021)). Kent is not required to include "a scientific analysis explaining the precise biomechanical processes by which" his condition arose, to make out the plausible inference that his condition resulted from a physical impairment. *Williams*, 45 F.4th at 772.

Kent pleaded in his complaint that he "was assigned female at birth, but he has a male gender identity," Compl. ¶ 14, that "he was diagnosed with gender dysphoria," Compl. ¶ 6, that his "gender dysphoria . . . is exacerbated by being unable to live consistently with his gender identity," Compl. ¶ 18, and that "[t]here is growing scientific evidence that gender identity has biological origins." Compl. ¶ 13. Kent has further pled that that he was prescribed hormone therapy as treatment for his gender dysphoria. Compl. ¶ 25. On these facts, Kent has plausibly alleged that his gender dysphoria stems from a physical impairment. *See* Statement of Interest of the United States of America at 1–2, *Blatt v. Cabela's Retail, Inc.*, No. 5:14-cv-4822 Dkt. No. 67, at 5 (E.D. Pa. Nov. 16, 2015) ("In light of the evolving scientific evidence suggesting that gender dysphoria may have a physical basis, along with the remedial nature of the ADA and the relevant statutory and regulatory provisions directing that the terms 'disability' and 'physical impairment' be read broadly, the [Gender Identity Disorder] Exclusion should be construed narrowly such

that gender dysphoria falls outside its scope."); *Williams*, 45 F.4th at 771 (concluding that plaintiff's "need for hormone therapy" was sufficient to allege that her gender dysphoria had a physical basis).

Given the mandate to interpret CADA's coverage broadly, and the disfavored posture of motions to dismiss for failure to state a claim, Kent has pled sufficient facts to draw the inference that his gender dysphoria results from a physical basis. § 12102(4)(A); *Woodall v. Godfrey*, ¶ 8; *Moeller*, 759 P.2d at 701.

3. Kent has adequately pled that he was denied surgery because of his diagnosis of gender dysphoria.

CHCO contends that it cannot have discriminated against Kent because CHCO provides some type of care to adolescents with gender dysphoria. Kent, however, need not show that CHCO refuses all types of care to every person with gender dysphoria in every context or even that CHCO harbors animus against people with gender dysphoria. He need only show that the care he sought was denied *because of* his disability. CHCO also suggests, somewhat weakly, that CHCO denied Kent surgical care and referred him to another provider because he no longer fell within their pediatric specialty. Notably, CHCO did not – even in its improper affidavit, discussed further in Part III, – deny that it adopted a categorical ban on providing particular surgeries to treat gender dysphoria and that this ban was the cause of it denying surgery to Plaintiff, just as CHCO's own staff reported. In any event, Kent has sufficiently pled that he was denied surgical care because of his diagnosis; CHCO wanting to dispute the facts as to the cause of the denial of care is not appropriate on a motion to dismiss.

CHCO also argues that the decision to discontinue offering chest masculinization surgery could not have been discriminatory because of other treatments it offers related to gender

dysphoria. Mot. at 19. The fact that CHCO engages in some practices that are non-discriminatory says nothing about whether it discriminated against Plaintiff here. CADA is applicable regardless of whether a broad discriminatory intent applies to all of an entity's actions. As noted above, it is sufficient for a plaintiff to show that "'but for' the disability, he or she would not have been denied the full privileges of a place of public accommodation." *Tesmer v. Colo. High Sch. Activities Ass'n*, 140 P.3d 249, 253 (Colo. App. 2006). That CHCO still offers some gender affirming care does not answer the question of whether its decision to deny Kent's surgery was discriminatory. Similarly, to the extent CHCO wishes to prove it had a nondiscriminatory reason for its actions, a motion to dismiss is not that opportunity.

CHCO further argues that because it is a pediatric hospital, it is entitled to maintain its pediatric specialty. Here, because CHCO did in fact offer surgical procedures to young adults, it was required by law (and failed) to do so in a nondiscriminatory manner. Kent has sufficiently pled that CHCO specializes in this care, as it was offering chest masculinization surgeries previously, Compl. ¶ 30, and still has staff capable of this care. Compl. ¶ 61. Kent has also sufficiently pled that CHCO offers the procedure he was denied to young adults to treat conditions other than gender dysphoria. Compl. ¶ 62. These facts are sufficient to establish that Kent was denied surgery because of his disability, not because he was over eighteen.

CHCO argues that because it is permitted under the ADA to "refer patients, disabled or otherwise, to another provider if the patient is seeking services outside of [CHCO's] area of specialization," Motion at 22 (citing 28 CFR 36.302(b)(2)), and it specializes in pediatrics, it was permitted to refer Kent to an adult facility. CHCO, however, omitted the second half of the sentence it cites. 28 CFR 36.302(b)(2) reads: "A health care provider may refer an individual

with a disability to another provider, if that individual is seeking, or requires, treatment or services outside of the referring provider's area of specialization, *and if the referring provider would make a similar referral for an individual without a disability who seeks or requires the same treatment or services."* (emphasis added). Here, Kent pleads and will prove that CHCO applied its categorical exclusion only to the treatment of gender dysphoria. Compl. ¶ 62. CHCO can try to prove otherwise as a factual matter, but disputing the fact cannot sustain a motion to dismiss.

4. **Kent was not required to seek a futile reasonable accommodation.**

While CHCO suggests that Kent's disability claim is barred because he did not seek a reasonable accommodation before filing suit, it does not explain what possible accommodation would have been available when CHCO continues to reaffirm its decision to refuse to provide the surgery and care Plaintiff needed. Moreover, although Plaintiff was not required to ask CHCO multiple times to reverse its discriminatory actions, the ACLU and other community organizations did, in fact, ask CHCO to reverse its discriminatory policy and CHCO has repeatedly refused to do so. And, in any event, CHCO knew about Plaintiff's disability, it formed the basis for the discrimination against him, and any request for some theoretical "accommodation" would have been futile.

The case that Defendant cites in support, *Castillo v. Hudson Theatre, LLC,* 412 F. Supp. 3d 447 (S.D.N.Y. 2019), shows why no request for an accommodation would have made sense here. There, a plaintiff who had diabetes sued two Broadway theaters because the websites of the theaters stated that patrons could not bring outside food into the theater. *Id.* at 448. The plaintiff did not purchase tickets, did not contact the theater, and did not request a modification to the

policy to accommodate her disability (which required her to have food). *Id at 451.* The court held there was no way for the theater to know what accommodation the plaintiff sought and it would be impossible to know if the theater actually was unwilling to accommodate her because she never asked them to make an exception to their policy. *Id*.

Here, unlike in *Castillo,* Kent was a patient at CHCO for the condition in question and had been communicating with staff to request and prepare for chest masculinization surgery. Compl. ¶ 49-55. CHCO knew Kent had gender dysphoria, knew chest masculinization surgery was medically necessary, and knew that Kent was seeking that treatment. In fact, when it passed its discriminatory policy, a CHCO staff member called Kent's family and explicitly informed them that Kent would not have access to the surgery. Compl. ¶ 64. CHCO was well-aware of what Kent was seeking and was openly unwilling to accommodate him.

Moreover, in *Castillo* itself*,* the court explained a "futile gesture" exception to a requirement that a plaintiff request an accommodation: the ADA does not require "a person with a disability to engage in a futile gesture [such as attempting to gain access to an inaccessible location] if such person has actual notice that a person or organization does not intend to comply [with the ADA]." *Castillo*, 412 F. Supp. 3d at 452 (citing 42 U.S.C. § 12188(a)(2) (emphasis added); *Davoll v. Webb*, 194 F.3d 1116, 1133 (10th Cir. 1999) (disabled employee not required to engage in "futile gesture" of requesting reasonable accommodation when employer had established policy against such accommodation)). In Title II ADA cases, the Tenth Circuit as well as courts around the country have similarly held that a plaintiff does not need to request an accommodation if the need for an accommodation is obvious. *Robertson v. Las Animas Cnty. Sheriff's Dep't*, 500 F.3d 1185, 1197 (10th Cir. 2007) ("When a disabled individual's need for an

accommodation is obvious, the individual's failure to expressly 'request' one is not fatal to the ADA claim"); *Bax v. Drs. Med. Ctr. of Modesto, Inc.,* 52 F.4th 858, 869 (9th Cir. 2022) ("It is axiomatic that an 'entity's duty to look into and provide a reasonable accommodation may be triggered when "the need for accommodation is obvious,"' even if no request has been made") (citing *Pierce v. District of Columbia*, 128 F. Supp. 3d 250, 269 (D.D.C. 2015) (Jackson, J.) ("rejecting the 'suggestion that a prison facility need not act to accommodate an obviously disabled inmate if the inmate does not ask for accommodations" as "truly baffling as a matter of law and logic'").

Here, it would have been futile for Kent to request a surgery again after he was put on actual notice of CHCO's policy categorically excluding him from receiving it. Indeed, CHCO admits that even if he had requested the chest masculinization surgery, it would have denied it to him as an "unreasonable" accommodation. Motion at 23-24. CHCO cannot credibly claim both that there is no way to determine whether an accommodation could have been made and that no accommodation would have been made.

III. Reliance on the Brumbaugh Affidavit is improper.

Under the guise of its baseless C.R.C.P. 12(b)(1) justiciability argument, Defendant attaches an affidavit to its Motion that it actually relies on under C.R.C.P. 12(b)(5) to try to deny fact allegations central to the merits of this dispute. Reliance on the affidavit as providing any basis to dismiss Plaintiff's complaint would be wholly improper.

First, as discussed in Part I, this case plainly, and as a matter of law, does not present a political question. Thus, Defendant's sole asserted justification for attaching the affidavit—to set forth jurisdictional facts for purposes of its argument under C.R.C.P. 12(b)(1) —has no merit.

And while Defendant acknowledges facially that the affidavit cannot be considered for purposes of its argument under C.R.C.P. 12(b)(5), it nonetheless repeatedly cites that document in support of its C.R.C.P. 12(b)(1) arguments and asks this Court to draw conclusions on the merits that substitute the well-pled allegations of the complaint with Defendant's version of the facts. Indeed, Defendant relies on the affidavit to suggest that the surgeries CHCO continues to provide are materially distinct from the surgery Kent was denied and that Defendant had non-discriminatory reasons for adopting its categorical ban. Motion at 20, 20 n.4. In other words, Defendant relies on the affidavit to dispute that it discriminated against Kent and that it did so because of his protected characteristics. CHCO's use of the affidavit for these purposes would, if considered, convert its Motion to one for summary judgement. But because the affidavit at best only highlights the disputed issues of material fact in this matter, it is unavailing under either C.R.C.P. 12(b)(5) or C.R.C.P. 56, and this Court should disregard it.

Should the Court nonetheless decide to consider the improper external evidence, Plaintiff requests limited discovery, including depositions and document discovery, an opportunity to present his own expert affidavit, and a limited evidentiary hearing under C.R.C.P. 56(f) and *Trinity Broadcasting Inc. v. City of Westminster*, 848 P.2d 916, 924-25 (Colo. 1993). Indeed, on its face, the affidavit invites further scrutiny and fact-finding. First, the affiant, Dr. Brumbaugh, is not even a surgeon. He is the hospital's chief medical officer. The weight due his self-serving statements is open to question. Moreover, to the extent this affidavit represents the hospital's best articulation of supposed differences between the surgeries it continues to provide and the surgery it refused Kent, those differences largely confirm Plaintiff's position. For example, the affidavit posits that the first important distinction is that the "indications" for the surgeries are different.

But that is precisely the point of Plaintiff's complaint for discrimination—that CHCO withholds a procedure it otherwise provides only when the "indication" is gender dysphoria in transgender patients. Nor do minor asserted differences in post-operative care seem to legitimately explain CHCO's categorically differential treatment of transgender and cisgender patients who seek gender-affirming care. Also notably absent from the affidavit is any denial of the central fact in this case: that its categorical ban on chest reconstruction surgery for patients over 18 applies only to the treatment of gender dysphoria. To the extent this affidavit informs the Court's thinking in this case, Plaintiff is entitled to the opportunity to contest its truth.

CONCLUSION

Defendant mischaracterizes this case as an effort to override a hospital's medical judgment. Not so. Plaintiff only asks that CHCO not categorically exclude transgender patients from its otherwise available services. Because this Court has jurisdiction over the claim, Plaintiff has standing, and he has stated claims for discrimination under CADA, Plaintiffs respectfully request that this Court DENY Defendants' Motion to Dismiss in its entirety.

Respectfully submitted this 10th day of May 2024.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on May 10, 2024, a copy of the foregoing **RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS** was electronically filed with the Court and served on the following via the Colorado Courts E-Filing System.

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