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Disparately Disabled: Advocating for All Federal Courts of Appeals to Make Disparate Impact Claims Cognizable Under Federal Disability Rights Law

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DISPARATELY DISABLED: ADVOCATING FOR ALL FEDERAL COURTS OF APPEALS TO MAKE DISPARATE IMPACT CLAIMS COGNIZABLE UNDER FEDERAL DISABILITY RIGHTS LAW

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Abstract: People with disabilities have the same rights and deserve to enjoy the same privileges as everyone else. However, people with disabilities face societal inequities that hinder their full participation in society. As a result of persistent advocacy and civil protest, federal laws have been enacted to prohibit discrimination based on a person's disability. Yet, policies that discriminate against people with disabilities have continued. One cause of this troubling situation is that federal circuit courts still disagree on whether federal disability rights laws, including Section 504 of the Rehabilitation Act of 1973 and the Americans with Disabilities Act (ADA), allow plaintiffs to challenge facially neutral policies that disproportionately discriminate against people with disabilities. The Third and Ninth Circuits say that disparate impact claims should be cognizable under federal disability rights laws, while the Sixth Circuit says that disparate impact claims should not be cognizable, specifically under Section 504.

This Comment argues that the Sixth Circuit overlooked the possibility for seemingly neutral policies that could still disproportionately impact people with disabilities in practice. Policies that make face coverings optional in public schools during the coronavirus (COVID-19) pandemic are good examples. Societal exclusion faced by people with disabilities was a systemic issue when Congress passed Section 504 and the ADA. Yet, societal exclusion based on disability still exists, in part because entities still implement policies and practices that unfairly impact people with disabilities. This Comment advocates for all federal circuit courts to follow the Third and Ninth Circuits in declaring that disparate impact claims are cognizable under both Section 504 and the ADA.

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Finally, a huge thank you to everyone at the DO-IT Scholars Program at the University of Washington, who accepted me into their program in 2013 and helped sparked my interest in disability rights and advocacy. As someone who is neurodivergent (diagnosed with autism spectrum disorder) with friends and acquaintances with disabilities, I dedicate this Comment to the disability community, which has contributed so much to my educational and career endeavors over the years.

INTRODUCTION

Anyone can acquire a disability at any time.[1] People with disabilities are a historically marginalized population and are a protected class.[2] People with disabilities deserve to live and participate fully in society.[3] However, many obstacles still prevent them from doing so, such as inaccessible environments, negative attitudes toward people with disabilities, and systems that hinder the participation of people with various health conditions.[4] Real-life examples abound,[5] such as missing curb cuts on sidewalks,[6] common usage of terms like "inspirational"[7] to

1. *See* Michelle Duprey, *Many Hands Make Light Work*, CT LAW., Mar.–Apr. 2022, at 32, 32, https://www.ctbar.org/docs/default-source/publications/connecticut-lawyer/ctl-vol-32/4-marchapril-2022/ctl-march-april-22---dei.pdf?sfvrsn=33442b66_4 [https://perma.cc/79XN-T6JH] ("Disability is a protected class that anyone can enter at any time by accident, illness, or age.").

2. *Id.*; *see, e.g.*, Maayan Agmon, Amalia Sa'ar & Tal Araten-Bergman, *The Person in the Disabled Body: A Perspective on Culture and Personhood from the Margins*, 15 INT'L J. FOR EQUITY & HEALTH 1, 2 (2016) (noting that "[p]erson[s] with disabilities (PWD) are one of the most marginalized groups in Western societies"); *see also infra* Part I (discussing the history of the marginalization of people with disabilities prior to the passage of Section 504 of the Rehabilitation Act of 1973).

3. *See Life in the Community Summary*, THE ARC, https://thearc.org/position-statements/life-community-summary/ [https://perma.cc/6HX5-YLZL] (opining that people with disabilities "deserve the opportunity for a full life in their community where they can live, learn, work, and play alongside each other through all stages of life").

4. *Common Barriers to Participation Experienced by People with Disabilities*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/ncbddd/disabilityandhealth/disability-barriers.html [https://perma.cc/SS3Q-FRD3].

5. The following examples may be instances of ableism, defined as "discrimination of and social prejudice against people with disabilities," rooted from a notion that those without disabilities "are superior." Ashley Eisenmenger, *Ableism 101*, ACCESS LIVING (Dec. 12, 2019), https://www.accessliving.org/newsroom/blog/ableism-101/ [https://perma.cc/7EQQ-9967]. Ableism also includes discrimination against people who are neurodivergent, such as, but not limited to, people with attention deficit hyperactivity disorder (ADHD) or on the autism spectrum. *See, e.g.*, JESSICA MCCABE, HOW TO ADHD: AN INSIDER'S GUIDE TO WORKING WITH YOUR BRAIN (NOT AGAINST IT) 300 (2024) (defining "ableism" as "discrimination and social prejudice against people with disabilities, including [people with] ADHD, based on the belief that (neuro)typical abilities or those with (neuro)typical abilities are inherently better or more valuable"); Kristen Bottema-Beutel, Steven K. Kapp, Jessica Nina Lester, Noah J. Sasson & Brittany N. Hand, *Avoiding Ableist Language: Suggestions for Autism Researchers*, 3 AUTISM ADULTHOOD 18, 20 (2021) (listing terms that are "potentially ableist" in research involving autism and autism spectrum disorder).

6. *See* Complaint at 11–12, Reynoldson v. City of Seattle, 2015 WL 13633915 (W.D. Wash. 2015) (No. 2:15-cv-01608) (asserting that "curb ramps" in Seattle neighborhoods such as the University District, Fremont, Capitol Hill, and Ballard, among others, failed to meet either the 1991 or 2010 ADA Standards for Accessible Design).

7. *See, e.g.*, TED, *I'm Not Your Inspiration, Thank You Very Much | Stella Young*, YOUTUBE, at 03:53–04:43, https://youtu.be/8K9Gg164Bsw?si=3fOuQ5IATTRNf52h (last visited Apr. 6, 2024) (contending that people with disabilities have been objectified as "inspiration porn").

describe people with disabilities, job discrimination,[8] degrading labels like "crazy,"[9] "lazy,"[10] and "weird,"[11] and higher ticket prices for wheelchair-accessible seats.[12]

More recently, with the rise of the coronavirus (COVID-19) pandemic, some with other underlying conditions have been especially affected as well. These conditions, including asthma and heart disease, may count as "disabilities" under the Americans with Disabilities Act (ADA).[13] While the ADA lacks a list of conditions that count as "disabilities,"[14] the qualification is based in part on whether the person's conditions "substantially limit[] one or more major life activities,"[15] including

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8. *See, e.g.*, Complaint at 4, Equal Emp. Opportunity Comm'n v. All. Ground Int'l, LLC, *filed* (E.D. Ill. 2023) (No. 1:23-cv-14302) (alleging that an applicant was denied a warehouse position, because the applicant was deaf and the employer would have had to provide reasonable accommodations). The plaintiff also alleged that the employer did not hire a person who was deaf or had a hearing-related disability from "at least September 19, 2019, to September 30, 2022." *Id.*

9. *See, e.g.*, Mike Hedrick, *The Pain of Being Labeled Crazy*, OC87 RECOVERY DIARIES, https://oc87recoverydiaries.org/being-labeled-crazy/ [https://perma.cc/6H2U-QBDX] (describing the label of "crazy" as "a series of small little jabs" amid the ongoing "stigma surrounding mental illness"). "Crazy" and similar words "are now considered offensive" but "were once commonly used to describe people with mental illness." *Disability Language Style Guide*, NAT'L CTR. ON DISABILITY & JOURNALISM, https://ncdj.org/style-guide/ [https://perma.cc/94TW-TT3T] (last updated Aug. 2021).

10. *See, e.g.*, MCCABE, *supra* note 5, at 320 (noting that "[t]eachers, peers, and family all apply labels . . . such as lazy, messy, spacey, and irresponsible" to children with ADHD (emphasis omitted)). These labels "are more stigmatizing, more shame inducing, less accurate, and much, much less helpful than any diagnostic term will be." *Id.*

11. *See, e.g.*, Monique Botha, Bridget Dibb & David M. Frost, *"Autism Is Me": An Investigation of How Autistic Individuals Make Sense of Autism and Stigma*, 37 DISABILITY & SOC'Y 427, 438–39 (2022) (quoting Allen, who stated that others think of Allen as "weird," regardless of whether others have known Allen to be autistic).

12. *See, e.g.*, Complaint at 8, Reynoldson v. Univ. of Wash., 2015 WL 13633915 (W.D. Wash. 2015) (No. 2:15-cv-02042) (detailing the plaintiff's interaction with a supervisor after the plaintiff, a University of Washington Huskies fan who used a motorized wheelchair, was required to pay fifty-five dollars for tickets to a men's basketball game at the University of Washington, even when the general-seating admission cost only twenty dollars at the time). The plaintiff was eventually given a "one-time exception" of paying thirty dollars, which was still ten dollars more than the general admission seating price. *Id.* On top of this, the supervisor "did not appear to be familiar" with what the ADA required to make seats at sporting venues accessible for people who use wheelchairs. *Id.* at 9.

13. *Asthma and Social Security Disability*, DISABILITY BENEFITS HELP, https://www.disability-benefits-help.org/disabling-conditions/asthma-and-social-security-disability# [https://perma.cc/F4CQ-D4B8]; *see Accommodation and Compliance: Heart Condition,* JOB ACCOMMODATION NETWORK, https://askjan.org/disabilities/Heart-Condition.cfm [https://perma.cc/56DH-5U2D]; Americans with Disabilities Act, 42 U.S.C. §§ 12101–12212. The ADA defines "disability" under three prongs, only one of which is needed to qualify as having a "disability." *See id.* § 12102(1) (noting that one has a disability if one has an "impairment that substantially limits one or more major life activities," or has "a record of such an impairment," or is "regarded as having such an impairment").

14. *Accommodation and Compliance: Heart Condition*, *supra* note 13.

15. 42 U.S.C. § 12102(1)(A).

"breathing, learning, . . . thinking, [and] communicating."[16] Long-term illnesses and conditions caused by COVID-19 may have impacted the ability for some to perform these necessary "activities."[17] Disability rights laws did not account for a global pandemic or the immense impact on global health it would have.[18] Nevertheless, people with disabilities have been especially affected by the pandemic, particularly through pandemic-related policies that may disproportionately exclude people with disabilities in schools.[19]

This Comment proceeds as follows. Part I describes the history and context that prefaced Section 504 of the Rehabilitation Act of 1973[20] (Section 504). Part II provides a similar discussion with regard to the Americans with Disabilities Act of 1990 (ADA). Part III addresses the COVID-19 pandemic, including its impact on individuals with disabilities. Part IV introduces "disparate impact" claims in disability rights law and the circuit split on whether such claims can be heard in federal courts. Part V argues for all federal courts to make disparate impact claims cognizable.

I. SECTION 504 OF THE REHABILITATION ACT OF 1973

Section 504 of the Rehabilitation Act of 1973 (Section 504) is an important piece of disability rights legislation today and preceded the Americans with Disabilities Act of 1990 ("ADA").[21] First, this Part

16. *Id.* § 12102(2)(A).

17. *See Guidance on "Long COVID" as a Disability Under the ADA, Section 504, and Section 1557*, U.S. DEP'T OF HEALTH & HUM. SERVS. (July 26, 2021), https://www.hhs.gov/civil-rights/for-providers/civil-rights-covid19/guidance-long-covid-disability/index.html [https://perma.cc/MF5C-V758]; *Accommodation and Compliance: Heart Condition*, *supra* note 13; *Long COVID or Post-COVID Conditions*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/coronavirus/2019-ncov/long-term-effects/index.html# [https://perma.cc/U8LX-3R4N] (last updated Mar. 14, 2024) (noting that some with "severe" cases of COVID-19 may have "multiorgan effects or autoimmune conditions" that can last months or even years).

18. *Cf.* Dorota Anna Gozdecka, *Human Rights During the Pandemic: COVID-19 and Securitisation of Health*, 39 NORDIC J. HUM. RTS. 205, 215 (2021) (noting how regulations from the World Health Organization foresaw treatment and evacuation of passengers who become sick in large cruise ships and disinfection, but not in the specific case of COV-Sars-2).

19. *See* Complaint at 5, Doe 1 v. Perkiomen Valley Sch. Dist., 585 F. Supp. 3d 668 (E.D. Pa. 2022) (No. 2:22-cv-00287-WB) (noting how the defendant school district's policy of making masks optional would force parents of children with disabilities to risk their safety by attending class, or keep them away from in-person instruction).

20. 29 U.S.C. §§ 701–796l. Section 504 is codified at 29 U.S.C. § 794.

21. *See* Karen M. Tani, *After 504: Training the Citizen-Enforcers of Disability Rights*, 42 DISABILITY STUD. Q. (2023), https://dsq-sds.org/index.php/dsq/article/view/7558/7861 [https://perma.cc/N9RG-G59Q] (noting that Section 504 was "the first real civil rights law that people

examines the history of disability rights and the context leading up to passage of Section 504. Next, this Part describes the events that unfolded during a sit-in tied to Section 504. Finally, this Part discusses Section 504's text and its interpretation by courts.

A. Disability Rights History and Context Pre-504

Before Section 504, the United States lacked a federal civil rights law that prohibited discrimination based on disability.[22] Efforts to improve the living conditions of people with disabilities date back to the mid-nineteenth century.[23] Yet, some still lived in horrid conditions.[24] Some of these individuals languished in appalling conditions similar to "cages" and "pens" while "[c]hained, naked, beaten with rods, and lashed into obedience,"[25] looking like "wild animals."[26]

[with disabilities] could use" when advocating for change (alteration in original)); Julia Carmel, *Before the A.D.A., There Was Section 504*, N.Y. TIMES (July 22, 2020) [hereinafter Carmel, *Before the A.D.A.*], https://www.nytimes.com/2020/07/22/us/504-sit-in-disability-rights.html (last visited Apr. 28, 2024) (explaining that Section 504 provisions "laid the groundwork" for the ADA, which was enacted thirteen years after Section 504 was implemented). Even with the ADA, Section 504 has been relevant with the mission of ensuring that students with disabilities have access to education, particularly with "504 Plans" in public schools. *See 504 Plans and Students with Disabilities*, WASH. OFF. OF SUPERINTENDENT OF PUB. INSTRUCTION, https://ospi.k12.wa.us/policy-funding/equity-and-civil-rights/resources-school-districts-civil-rights-washington-schools/504-plans-and-students-disabilities [https://perma.cc/AE2G-GV7A]. 504 Plans have been used nationwide in recent years. *See* MARIA M. LEWIS & RAQUEL MUÑIZ, NAT'L EDUC. POL'Y CTR., SECTION 504 PLANS: EXAMINING INEQUITABLE ACCESS AND MISUSE 7 (2023) (noting that almost 1.4 million students had been "served under Section 504" during the 2017–2018 school year).

22. *See* Robert L. Burgdorf, Jr., *"Substantially Limited" Protection from Disability Discrimination: The Special Treatment Model and Misconstructions of the Definition of Disability*, 42 VILL. L. REV. 409, 421 (1997) (opining that it is "hard" to overstate the "import" of Section 504 as "the first broad civil rights law" that bans "discrimination based on disability").

23. *See* DORIS ZAMES FLEISCHER & FRIEDA ZAMES, THE DISABILITY RIGHTS MOVEMENT: FROM CHARITY TO CONFRONTATION, at xxv (updated ed. 2011) (noting that Dorothea Dix began to help people with disabilities in prisons in 1841); *March 28, 1841: Dorothea Dix Begins Her Crusade*, MASS MOMENTS [hereinafter *Dorothea Dix Begins Her Crusade*], https://www.massmoments.org/moment-details/dorothea-dix-begins-her-crusade.html [https://perma.cc/P43P-9XU2].

24. Romel W. Mackelprang & Richard O. Salsgiver, *People with Disabilities and Social Work: Historical and Contemporary Issues*, 41 SOC. WORK 7, 9 (1996).

25. Eric Andrew Nelson, *Dorothea Dix's Liberation Movement and Why It Matters Today*, 17 AM. J. PSYCHIATRY RESIDENTS' J. 8, 8 (2021).

26. *Dorothea Dix Begins Her Crusade*, *supra* note 23.

Institutionalization, in facilities[27] such as state hospitals,[28] state schools,[29] and segregated residential settings,[30] proliferated into the nineteenth and twentieth centuries.[31] Some people living with developmental disabilities in such institutions were assaulted and physically abused, including being spanked and slapped.[32] At the notorious Willowbrook State School in Staten Island,[33] it was revealed in 1972[34] that people with developmental disabilities suffered in a "disgrace[ful]" environment[35] where unattended children "wail[ed] under the sinks,"[36] ate "slop,"[37] and were "smeared with their own feces."[38]

Viewed as "objects of shame and disgrace," many people with disabilities continued to be warehoused in such institutions.[39] Others were hidden at home by their families, who felt "embarrass[ed] . . . about their

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27. At the same time, the term "institution" has no shared universal definition and people may differ on whether a facility is, in fact, an "institution." *See* Kevin M. Cremin, *Challenges to Institutionalization: The Definition of "Institution" and the Future of* Olmstead *Litigation*, 17 TEX. J. ON C.L. & C.R. 143, 144 (2012) (noting the lack of a "universally agreed-upon answer" to the question of what an "institution" is).

28. *See id.* (observing that the "targets of litigation" in a period of deinstitutionalization included state hospitals).

29. *See* Gabrielle Stangis, "Places of Such Towering Misery": The History of the Institutionalization of Disabled People and Deinstitutionalization (Apr. 2, 2021) (unpublished manuscript) (on file with author) (noting that "institutions" commonly "use[d] physical abuse to punish patients for perceived misbehavior," including a patient in the Empire State School who was made to "kneel on logs for two hours").

30. Cremin, *supra* note 27, at 145.

31. Mackelprang & Salsgiver, *supra* note 24, at 9.

32. *See, e.g.*, Stangis, *supra* note 29, at 17 (noting the experience of Terry Schwartz, an institutionalized patient at the Fairview Training Center in Salem, Oregon, who recalled that if staff "wanted to slap us down, spank us, why, it doesn't matter" in light of the staff who "could do what they wanted and abuse people").

33. *See* New York State Council on Developmental Disabilities, *The Path Forward: Remembering Willowbrook - Full Documentary*, YOUTUBE (Mar. 27, 2023), at 00:15, https://www.youtube.com/watch?v=ev80qEtp2u4 (last visited Apr. 8, 2024) (calling the Willowbrook State School "an infamous state-run institution"). Willowbrook was declared "closed" on September 17, 1987. *Willowbrook: Commemorating the Willowbrook Mile*, N.Y. STATE OFF. FOR PEOPLE WITH DEVELOPMENTAL DISABILITIES, https://opwdd.ny.gov/willowbrook [https://perma.cc/3ZQW-MTH5].

34. *See* New York State Council on Developmental Disabilities, *supra* note 33, at 00:27 (introducing the documentary by noting, "[i]n 1972," reporter "Geraldo Rivera's shocking exposé revealed deplorable conditions and abuses").

35. *See id.* at 01:20 (quoting Bernard Carabello, a former resident of the Willowbrook State School, who described the condition of Bernard's ward to a reporter). Carabello lived at Willowbrook for at least eighteen years. *See id.* at 01:15.

36. *Id.* at 15:35.

37. *Id.* at 15:43.

38. *Id.* at 15:36.

39. *See* Mackelprang & Salsgiver, *supra* note 24, at 9.

presence."[40] Even Franklin Delano Roosevelt, the thirty-second President of the United States,[41] hid his disability while in public.[42]

Furthermore, the pervasive eugenics movement fueled additional disparaging beliefs about people with disabilities.[43] These widely held negative beliefs prevented people with disabilities "from marrying or [producing] children."[44] Assumptions about parenting capability extended to those who were deaf, blind, or had intellectual, physical, or psychiatric disabilities.[45]

Amid these assumptions, legislation began to shift in favor of supporting people with disabilities. Part of these earliest laws aimed at aiding people with disabilities focused on vocational rehabilitation of civil employees.[46] The Smith-Hughes Act,[47] passed in 1917, provided federal funding for vocational education in "agriculture, trade, industry, and home

40. Paul K. Longmore, *Uncovering the Hidden History of People with Disabilities*, 15 REVS. AM. HIST. 355, 359 (1987) (reviewing HUGH GREGORY GALLAGHER, FDR'S SPLENDID DECEPTION (1990)).

41. *Franklin D. Roosevelt's Presidency*, FRANKLIN D. ROOSEVELT PRESIDENTIAL LIBR. & MUSEUM, https://www.fdrlibrary.org/fdr-presidency [https://perma.cc/UG3Z-6EPS].

42. Mackelprang & Salsgiver, *supra* note 24, at 9. For some, hiding a disability may also include "masking," a practice by people who are neurodivergent, such as, but not limited to, people with ADHD or people on the autism spectrum, to conceal certain behaviors associated with their disability. *See, e.g.*, MCCABE, *supra* note 5, at 310 (quoting Ying D., who shared that Ying was "overly on top of paperwork" because it was "necessary masking for [Ying's] Asian first-generation immigrant ADHD brain"); Danielle Miller, Jon Rees & Amy Pearson, *"Masking Is Life": Experiences of Masking in Autistic and Nonautistic Adults*, 3 AUTISM ADULTHOOD 330, 333 (2021) (restating the experience of an autistic woman who "cop[ies] people's phrases, and dress sense too").

43. *See* Robyn M. Powell, *Confronting Eugenics Means Finally Confronting Its Ableist Roots*, 27 WM. & MARY J. RACE GENDER & SOC. JUST. 607, 613 (2021) (contending that the United States Supreme Court's decision in *Buck v. Bell* helped pave the way for more than thirty states to enact statutes to "condition release upon sterilization"). By 1970, many of the 65,000 people who were sterilized had disabilities. *Id.*; Mackelprang and Salsgiver, *supra* note 24, at 9.

44. Mackelprang & Salsgiver, *supra* note 24, at 8–9.

45. *See, e.g.*, Powell, *supra* note 43, at 619 (discussing how "[d]eaf parents" had to deal with "speculation that their children's language development w[ould] be delayed"); *id.* (discussing how "blind parents" had to "face assumptions that they [could not] safely care for their children"); *id.* (discussing how people with physical disabilities also "face[d] assumptions that they [could not] safely care for their children"); *id.* (discussing how people with intellectual disabilities were "presumed to be unable to care for children and incapable of learning parenting tasks"); *id.* at 620 (discussing how people with psychiatric disabilities were assumed to be "a danger to their children").

46. *See infra* notes 50–54 and accompanying text (discussing three laws that aimed to provide resources for vocational rehabilitation and employment).

47. Pub. L. No. 64-347, 39 Stat. 929 (1917) (codified at 20 U.S.C. §§ 11–14, 18–27 (repealed 1997); *id.* §§ 15a–ggg (repealed 1968); *id.* § 17 (repealed 1966)).

economics."[48] A year later, the Smith-Sears Act[49] was signed into law and provided free vocational rehabilitation courses for soldiers with disabilities while receiving compensation and reentering society after participating in the war.[50] Two years later, the Smith-Fess Act[51] "provided training, counseling, and job placement for" those with disabilities, including civilians who acquired a disability from "industrial accidents during civil employment."[52]

While the Smith-Fess Act applied only to people with physical disabilities,[53] subsequent laws began to address individuals with other disabilities. In 1936, the Randolph-Sheppard Act,[54] intended to enable employment for those who are blind, allowed licensed blind persons to operate "vending facilities on any Federal property."[55] In 1946, the National Mental Health Act[56] addressed diagnosis and treatment of

48. DAVID CARLETON, LANDMARK CONGRESSIONAL LAWS ON EDUCATION 63–64 (2002); *see* Smith-Hughes Act, Pub. L. No. 64-347 § 3, 39 Stat. 929, 930 (1917) (allocating $500,000 "for the purpose of . . . preparing teachers, supervisors, and directors of agricultural subjects and teachers of trade and industrial and home economics subjects" for the fiscal year ending on June 30, 1918, with another $700,000 to be apportioned for the fiscal year ending on June 30, 1919). However, subsequent legislation allowed for the allocation of resources aimed at helping for individuals who acquired disabilities because of their service in World War I. *Id.*

49. Pub. L. No. 65-178, 40 Stat. 617 (1918).

50. *See* James Phinney Munroe, *The Advantages of National Auspices of Re-Education*, 80 ANNALS AM. ACAD. POL. & SOC. SCI. 123, 127 (1918) (noting that the Smith-Sears Act tasked the Federal Board for Vocational Education with "placing back in economic life and, if need be, for the training of every soldier and sailor so far disabled in military service"); Smith-Sears Act, Pub. L. No. 65-178, § 3, 40 Stat. 617, 618 (1918) (providing that the "courses of vocational rehabilitation" by the Federal Board of Vocational Rehabilitation are to be "available without cost for instruction" for people with disabilities "after discharge from the military or naval forces of the United States"); *id.* § 2, 40 Stat. at 617 (providing that everyone following a "course[] of vocational rehabilitation" with the Federal Board of Vocational Rehabilitation shall "receive monthly compensation equal to the amount of [the person's] monthly pay for the last month of [their] active service").

51. Pub. L. No. 66-236, 41 Stat. 735 (1920) (repealed 1973).

52. Erin M. Conroy, Case Comment, *Labor and Employment Law – Discrimination: An EEOC Regulation Allowing Employers to Assert that an Employee May Not Pose a Danger to Himself Falls Within the Purview of the Americans with Disabilities Act*, 79 N.D. L. REV. 147, 152 (2003); John D. Bies, *Service Students with Special Needs*, 3 J. EPSILON PI TAU, 39, 39 (1977).

53. *Celebrating the 100 Year History of Vocational Rehabilitation (1920–2020)*, WASH. STATE REHAB. COUNCIL, https://www.wsrcwa.org/our-history [https://perma.cc/N8TH-5VBP]. "Physical disability" refers to "physical limitations or disabilities that inhibit the physical function of one or more limbs of a certain person." *Physical Disabilities*, RUTGERS CTR. FOR DISABILITY SPORTS, HEALTH & WELLNESS, https://kines.rutgers.edu/dshw/disabilities/physical/1060-physical-disabilities [https://perma.cc/L5NH-M5VW].

54. 20 U.S.C. §§ 107, 107a–107f.

55. *Id.* § 107a.

56. Pub. L. No. 79-487 §§ 2–3, 60 Stat. 421, 421 (1946).

conditions affecting mental health.[57] However, it was not until the early 1970s that legislation began to address systemic inequities faced by people with disabilities.[58]

At this point, disability rights legislation demonstrated a growing awareness of the social model of disability,[59] i.e., that "disability" is caused by societal oppression.[60] By contrast, the medical model of disability, which viewed disability as a personal problem, emphasized "solutions to adjust the individual to fit society."[61]

The Wagner-O'Day Act[62]—another disability-related law enacted before Section 504—helped to promote independence for some with disabilities.[63] Under this Act, the federal government shall purchase from nonprofit agencies where at least seventy-five percent of the direct labor comes from individuals who are blind.[64] Moreover, the Act established

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57. In its session law form, the National Mental Health Act states a goal related to improving the mental health for many in the United States. *See id.* (intending to improve "the mental health of people in the United States" by, among other things, "developing, and assisting the States in the use of, the most effective methods of prevention, diagnosis, and treatment of psychiatric disorders," defined as "diseases of the nervous system which affect mental health").

58. *See A Brief History of Legislation*, COLO. STATE UNIV., https://disabilitycenter.colostate.edu/disability-awareness/disability-history [https://perma.cc/Z3ML-QHRK] ("The Rehabilitation Act [of 1973] was the first act to address the notion of equal access of people with disabilities through the removal of architectural, employment and transportation barriers.").

59. The term "social model," when referring to "disability," is used here in contrast with the "medical model," a framework of disability that was predominant for decades. Paritosh Joshi & Julia Pappageorge, *Reimagining Disability: A Call to Action*, 3 DEVELOPMENTAL DISABILITIES NETWORK J. 88, 89–90 (2023).

60. Sara Goering, *Revisiting the Relevance of the Social Model of Disability*, 10 AM. J. BIOETHICS 54, 54 (2010).

61. Bradley A. Areheart, *When Disability Isn't "Just Right": The Entrenchment of the Medical Model of Disability and the* Goldilocks *Dilemma*, 83 IND. L.J. 181, 185–89 (2008); *see* MARY JOHNSON, MAKE THEM GO AWAY: CLINT EASTWOOD, CHRISTOPHER REEVE & THE CASE AGAINST DISABILITY RIGHTS 27 (2003) (positing that disability rights advocates define the medical model as "a personal, medical problem, requiring . . . an individualized medical solution" with "no 'group' problem caused by society or that social policy should be used to ameliorate" the problems facing people with disabilities).

62. 41 U.S.C. §§ 8501–8506.

63. *National Industries for the Blind Commemorates the 50th Anniversary of the Javits-Wagner-O'Day Act*, NAT'L INDUS. FOR THE BLIND (June 23, 2021), https://nib.org/press/national-industries-for-the-blind-commemorates-the-50th-anniversary-of-the-javits-wagner-oday-act/ [https://perma.cc/PBR4-KLNF].

64. 41 U.S.C. § 8504(a) ("An entity of the Federal Government intending to procure a product or service on the procurement list referred to in section 8503 of this title shall procure the product or service from a qualified nonprofit agency for the blind or a qualified nonprofit agency for other severely disabled."). A "qualified nonprofit agency for other severely disabled" is a nonprofit agency that "employs blind or other severely disabled individuals for at least 75 percent of the hours of direct labor required for the production or provision of the products or services." *Id.* § 8501(6)(C). At the

the "Committee for Purchase From People Who Are Blind or Severely Disabled"[65] to help effectuate the goal of buying from individuals who are blind.[66] The Wagner-O'Day Act was later amended in 1971,[67] renamed the Javits-Wagner-O'Day Act,[68] and included the provision of services performed by the blind and individuals with other disabilities.[69]

Although employment opportunities for individuals with disabilities help promote economic security,[70] the Javits-Wagner-O'Day Act failed to address social exclusion of people with disabilities, an issue that persisted before Section 504.[71] After two vetoes over initial concerns surrounding the costs and resources needed to enact this law, including the need to retrofit federally-funded public facilities for accessibility, President Richard Nixon signed the Rehabilitation Act of 1973.[72] The U.S. Department of Health, Education, and Welfare (HEW) was the lead agency delegated by Congress for effectuating Section 504 regulations.[73]

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same time, a "qualified nonprofit agency for the blind" is a nonprofit agency that "employs blind individuals for at least 75 percent of the hours of direct labor required for the production or provision of the products or services." *Id.* § 8501(7)(C). Under 41 U.S.C. § 8503(a)(1)(A), a fifteen-member committee shall publish a "procurement list" of products in the Federal Register. *Id.* § 8503(a)(1)(A). At least some of the products under this procurement list included products used by the military. *See History,* U.S. ABILITYONE COMM'N, https://www.abilityone.gov/abilityone_program/history.html [https://perma.cc/YL35-8BA8] (noting that during World War II, "workers who [we]re blind help[ed] meet the growing demand for various products needed by the military").

65. 41 U.S.C. § 8502.

66. MARY JANE SURRAGO, EMPOWERING PEOPLE: THE STORY OF NATIONAL INDUSTRIES FOR THE BLIND AND ITS ASSOCIATED AGENCIES 12 (2013), https://www.nib.org/sites/default/files/FINAL_Empowering%20People_sliced%20cover_508v2.pdf [https://perma.cc/4KYW-BFAD].

67. *National Industries for the Blind Commemorates the 50th Anniversary of the Javits-Wagner-O'Day Act*, *supra* note 63.

68. 41 U.S.C. §§ 46–48, 48a–48c.

69. *National Industries for the Blind Commemorates the 50th Anniversary of the Javits-Wagner-O'Day Act*, *supra* note 63.

70. Rebecca Vallas, Kimberly Knackstedt, Hayley Brown, Julie Cai, Shawn Fremstad & Andrew Stettner, *Economic Justice Is Disability Justice*, THE CENTURY FOUND. (Apr. 21, 2022) https://tcf.org/content/report/economic-justice-disability-justice/ [https://perma.cc/9G5H-HGSH] (stating that "[a]ccess to employment and training supports is another important pathway to economic security for workers with disabilities").

71. *See* Kitty Cone, *Short History of the 504 Sit-in*, DISABILITY RTS. EDUC. & DEF. FUND, https://dredf.org/504-sit-in-20th-anniversary/short-history-of-the-504-sit-in/ [https://perma.cc/R4RC-SRSV] (alluding to Senator Hubert Humphrey's earlier efforts to pass civil rights laws to including people with disabilities before Section 504, when, "At that time, discrimination existed in education, employment, . . . access to equal medical care[,] and in many other areas").

72. Carmel, *Before the A.D.A.*, *supra* note 21.

73. Cone, *supra* note 71.

Unfortunately, subsequent inaction by HEW contributed to growing unrest among people with disabilities.[74] HEW set up a task force supposedly to "study" the proposed regulations.[75] However, on top of the lack of action to implement the regulations, HEW failed to include anybody from the disability community in its Section 504 task force.[76] This inaction contributed to resentment,[77] manifested through protests in major cities across the country.[78] No protest was as profound as the "504 sit-in" in April 1977 in San Francisco.

B. Section 504 Sit-in in San Francisco

The 504 sit-in began on April 5, 1977, when 200 people with disabilities rallied in front of the San Francisco Federal Building.[79] One of them was the late Judith Heumann,[80] known as "the mother" of the Disability Rights Movement.[81] The 504 sit-in lasted nearly a month[82] and was the longest sit-in at a federal building as of 2021.[83] The 504 sit-in united people with disabilities across economic backgrounds and included children and their parents.[84] The 504 sit-in pressured HEW

74. *Id.*

75. *Id.*

76. *Id.*

77. *See id.* (noting that a national disability advocacy group "realiz[ed] [that their] civil rights protections were being gutted" and thus, "demanded HEW [to] issue the regulations" by April 4, 1977, or that "action would occur").

78. Some of these cities include New York and Washington, D.C., and in other cities like Atlanta, Chicago, and Seattle, among others, protesters occupied federal buildings "for hours or days." Carmel, *Before the A.D.A.*, *supra* note 21.

79. Cone, *supra* note 71; Emily Holmes, *From Side Eddies to Main Stream: The Rehabilitation Act of 1973 Section 504 Sit-Ins* (June 16, 2006) (senior seminar paper, Western Oregon University).

80. Judith Heumann passed away at the age of seventy-five on March 4, 2023. Press Release, The Heumann Perspective, The World Mourns the Passing of Judy Heumann, Disability Rights Activist (Mar. 4, 2023), https://judithheumann.com/the-world-mourns-the-passing-of-judy-heumann-disability-rights-activist/ [https://perma.cc/Z2B2-GKPD].

81. *Judy Heumann (1947–2023)*, THE HEUMANN PERSPECTIVE, https://judithheumann.com/project/about/ [https://perma.cc/DN96-UV4T].

82. Sources differ as to the exact duration of the 504 sit-in. *Compare* Cone, *supra* note 73 ("The San Francisco federal building sit in, the only one that endured, lasted 26 days and was critical in forcing the signing of the regulations almost unchanged."), *with* Michael Ervin, *The 25 Day Siege that Brought Us 504*, INDEP. LIVING INST. (1986) https://www.independentliving.org/docs4/ervin1986.html [https://perma.cc/Z3A8-ZTKQ] (referring to the 504 sit-in as a "25 day siege").

83. Ruth Osorio, *Disabling Citizenship: Rhetorical Practices of Disabled World-Making at the 1977 504 Sit-In*, 84 COLL. ENG. 243, 243 (2022).

84. Cone, *supra* note 71.

Secretary Joseph Califano to enact the Section 504 regulations.[85] As long as Califano failed to sign these regulations, Heumann and others remained inside the Federal Building to combat, among other things, exclusion "from a building that [they] pa[id] taxes to keep open."[86]

Throughout the 504 sit-in, participants received support from various allies that helped enable them to remain in the Federal Building for weeks.[87] The Black Panther Party delivered hot meals[88] and helped settle disagreements between those who remained inside the Federal Building.[89] Even San Francisco Mayor George Moscone "brought more than just sympathy"[90] by providing towels,[91] medicine,[92] and mattresses to those inside the Federal Building.[93] The support, especially from the Black Panther Party, lasted throughout the 504 sit-in.[94] According to Judith

85. *See* Claire Raj, *The Lost Promise of Disability Rights*, 119 MICH. L. REV. 933, 941 (2021) (opining that Section 504 regulations were enacted "only after impressive and sustained pressure from disability rights activists" (citing Cone, *supra* note 71)).

86. Disability Rts. Educ. & Def. Fund, *The Power of 504*, YOUTUBE (Aug. 24, 2015), at 13:44, https://www.youtube.com/watch?v=52XqupjXHIM (last visited Apr. 7, 2024); *see* Cone, *supra* note 71.

87. *See* JUDITH HEUMANN WITH KRISTEN JOINER, BEING HEUMANN: AN UNREPENTANT MEMOIR OF A DISABILITY RIGHTS ACTIVIST 90 (2021) (detailing a list of other activists who called for action in signing Section 504, including Reverend Cecil Williams, who cofounded the Glide Memorial Church, Tom Hayden, who was a "civil rights leader" and served in Congress, and Sylvia Bernstein, a feminist who represented the Black Panther Party); *id.* at 113 (recalling a moment during the 504 sit-in when members of the Black Panther Party "forc[ed] their way into the [San Francisco Federal Building]" and provided meals to all 125 people in the Federal Building).

88. Eileen AJ Connelly, *Overlooked No More: Brad Lomax, a Bridge Between Civil Rights Movements*, N.Y. TIMES (July 20, 2020), https://www.nytimes.com/2020/07/08/obituaries/brad-lomax-overlooked.html (last visited Dec. 20, 2023). Some of these meals included ribs and fried chicken. *Id.* These meals also included potato salad and corn with "paper supplies." Susan Schweik, *Lomax's Matrix: Disability, Solidarity, and the Black Power of 504*, 31 DISABILITY STUDS. Q. (2011), https://dsq-sds.org/index.php/dsq/article/view/1371/1539 [https://perma.cc/RXK4-A8CK].

89. *See* Paul K. Longmore Inst. on Disability, *Patient No More: Feeding a Movement*, YOUTUBE (July 16, 2015), at 00:40, https://www.youtube.com/watch?v=RztQtieDxcE (last visited Apr. 20, 2024) ("[T]he Black Panther Party was there every day . . . settling disagreements amongst the people that were getting frazzled and worn out and stuff.").

90. *"We Shall Not Be Moved" the 504 Sit-In for Disability Civil Rights*, DISABILITY RTS. EDUC. & DEF. FUND, at 29:56 (June 1, 1997) [hereinafter *"We Shall Not Be Moved"*], https://dredf.org/we-shall-not-be-moved/ [https://perma.cc/KY4W-LDZ3]. A transcript of this audio-only documentary may be found in the permalink provided in this footnote.

91. *Id.* at 30:00.

92. *Id.* at 30:01.

93. Carmel, *Before the A.D.A.*, *supra* note 21. Mayor George Moscone also attempted to deliver portable showerheads so that people during the 504 sit-in could take showers using the sinks inside the Federal Building, a measure that was unsuccessful, because the Regional Director of HEW told Moscone that the Regional Director was "not running a hotel." *"We Shall Not Be Moved," supra* note 90, at 30:34.

94. *See* HEUMANN, *supra* note 87, at 114 (remembering the Black Panthers who "brought [the 504-sit protesters] food every night for the rest of the [504] protest").

Heumann, the Black Panther Party's support "was like an enormous gust of wind [that] just filled our sail and pushed us forward."[95]

Finally, after nearly a month, Califano signed the Section 504 regulations into law on April 28, 1977.[96] These regulations barred "program[s] or activit[ies] receiving financial assistance" from excluding people with disabilities, giving Section 504 practical effect.[97]

C. Description of Goals of Section 504

Section 504 is the first civil rights law banning discrimination based on disability.[98] It mandates that no qualified individual[99] "shall, solely by reason of . . . disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving [f]ederal financial assistance."[100] Schools, which this Comment will specifically address in subsequent Parts,[101] are "program[s] or activit[ies]" under Section 504 protections.[102]

Section 504 protections are designed to apply broadly and eliminate disability-based discrimination in programs receiving federal funding.[103] However, federal courts have differed in how to interpret Section 504.[104] Some courts have interpreted Section 504 to suggest that its protections

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95. *Id.*

96. Nancy Hicks, *Califano Signs Regulations to Ban Discrimination Against Disabled*, N.Y. TIMES, Apr. 29, 1977, at 1.

97. 29 U.S.C. § 794(a); Hicks, *supra* note 96.

98. Cone, *supra* note 71.

99. "Qualified individual[s]" are defined in 29 U.S.C. § 705(20) as: individuals who "(i) ha[ve] a physical or mental impairment which for such individual constitutes or results in a substantial impediment to employment; and (ii) can benefit in terms of an employment outcome from vocational rehabilitation services provided pursuant to subchapter I, III, or VI." 29 U.S.C. §§ 705(20)(A)(i)–(ii); *id.* § 794(a).

100. *Id.* § 794(a).

101. *See infra* section IV.D (discussing a 2022 district court case involving a public school district's policy to make masks optional, a policy that allegedly impacted children with disabilities disparately).

102. *See* 29 U.S.C. § 794(b)(2)(B) (accounting for "a local educational agency (as defined in section 7801 of title 20), system of career and technical education, or other school system").

103. *Section 504 of the Rehabilitation Act of 1973*, DISABILITY RTS. EDUC. & DEF. FUND, https://dredf.org/legal-advocacy/laws/section-504-of-the-rehabilitation-act-of-1973/ [https://perma.cc/BP3S-RFEM]; *see* Mark H. v. Lemahieu, 513 F.3d 922, 930 (9th Cir. 2008) (noting that "Section 504 contains a broadly-worded prohibition on discrimination against, exclusion of and denial of benefits for disabled individuals").

104. *See infra* section IV.C.1 (discussing the Sixth Circuit case *Doe v. BlueCross BlueShield of Tennessee* that struck down disparate impact claims under Section 504 and contrasting it with Ninth Circuit precedent in *Payan v. Los Angeles Community College District* that allowed for disparate impact claims under Section 504 and the ADA).

apply to intentional discrimination based on disability only.[105] However, other courts have interpreted Section 504 to apply to unintentional discrimination, i.e., discrimination against individuals with disabilities, without the intent to discriminate.[106] One such court found that ending discrimination would be "difficult if not impossible to reach" if Section 504 was interpreted to cover conduct with discriminatory intentions only.[107] In fact, conduct with discriminatory effects on people with disabilities is often a result of indifference or neglect, rather than ill will.[108]

Unfortunately, Section 504 has not eliminated oppression against people with disabilities. Section 504's shortcomings, along with the Americans with Disabilities Act (ADA), are discussed in the next section.

II. AMERICANS WITH DISABILITIES ACT (ADA)

Like Section 504, the ADA is another prominent federal disability rights law.[109] This Part addresses the historical context leading up to the ADA, describes the ADA's relevant text and its definition of "disability," and discusses the applications of the ADA.

A. ADA History and Context

While Section 504 helped to prevent disability-based discrimination, it is limited to public facilities receiving federal funds.[110] Section 504 did not apply to privately owned businesses or other places that did not receive public funds.[111] Thus, even after Section 504, privately owned

105. *See* Doe v. BlueCross BlueShield of Tenn., Inc., 926 F.3d 235, 242 (6th Cir. 2019) (interpreting the Rehabilitation Act of 1973's language barring discrimination "solely by reason of . . . disability" to suggest that its "language does not encompass actions taken for nondiscriminatory reasons"); *id.* ("The language, as well, applies only to individuals who are 'otherwise qualified' for the program at issue, meaning that the Act allows the disabled to be 'disparately affected by legitimate job criteria.'" (quoting Crocker v. Runyon, 207 F.3d 314, 321 (6th Cir. 2000))).

106. *See* Alexander v. Choate, 469 U.S. 287, 296–97 (1985) (opining that ending discrimination based on disability "would be difficult if not impossible" if it targeted intentional discrimination only).

107. *Id.*

108. Derek Warden, *Ending the Charade: The Fifth Circuit Should Expressly Adopt the Deliberate Indifference Standard for ADA Title II and RA Section 504 Damages Claims*, 9 TEX. A&M L. REV. 437, 440 (2022) [hereinafter Warden, *Ending the Charade*].

109. *See Laws*, EVERYBODY: AN ARTIFACT HISTORY OF DISABILITY IN AMERICA, https://everybody.si.edu/citizens/laws [https://perma.cc/D9VY-E9MY] (noting that the ADA "is one of the most significant civil rights documents of the 20th century").

110. Derek Warden, *The Americans with Disabilities Act at Thirty*, 11 CALIF. L. REV. ONLINE 308, 310 (2020) [hereinafter Warden, *The ADA at Thirty*].

111. *Id.*

places of accommodation could still discriminate against people with disabilities.[112]

Meanwhile, Congress continued to pass legislation that provided rights for people with disabilities rather than prohibiting discrimination. For example, the Individuals with Disabilities Education Act (IDEA)[113] intended to provide an appropriate education for millions of children with disabilities,[114] including an education in the "least restrictive environment" for students between the ages of three and twenty-one.[115] However, these laws failed to truly attain equal rights and protections.[116] While individual states passed anti-discrimination statutes, federal courts could not enforce state-level anti-discrimination laws.[117]

Dissatisfied with Congress's legislative actions, advocates occupied another federal building.[118] On March 12, 1990, dozens of people with disabilities rallied in front of the U.S. Capitol Building to compel Congress to pass more effective laws addressing the lack of accommodation to access public places.[119] People who used wheelchairs got up from their seats and dragged themselves up at least seventy-eight steps[120] to the entrance of the U.S. Capitol Building to protest the

112. *Id.*

113. 20 U.S.C. §§ 1400–1482.

114. *See id.* § 1400(c)(2) (finding that "the educational needs of millions of children with disabilities were not being fully met").

115. *Id.* § 1411(e)(3)(F)(1); *id.* § 1411(a)(2)(A)(i)(I)–(II); *see id.* § 1400(c)(2).

116. *See* CG v. Pa. Dep't of Educ., 734 F.3d 229, 235 (3d. Cir. 2013) (noting that a school that complies with the IDEA does not "automatically immunize [itself] from liability under the ADA or [Rehabilitation Act of 1973]").

117. *See* Warden, *The ADA at Thirty*, *supra* note 110, at 310 (noting how some "state laws" intended to eradicate disability-based discrimination were "all but useless"); Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 106 (1984) (holding that "[a] federal court's grant of relief against state officials on the basis of state law, whether prospective or retroactive, does not vindicate the supreme authority of federal law").

118. Jasmine E. Harris, *The Aesthetics of Disability*, 119 COLUM. L. REV. 895, 947 (2019).

119. Julia Carmel, *'Nothing About Us Without Us': 16 Moments in the Fight for Disability Rights*, N.Y. TIMES (July 29, 2020) [hereinafter Carmel, *'Nothing About Us Without Us'*], https://www.nytimes.com/2020/07/22/us/ada-disabilities-act-history.html (last visited Dec. 21, 2023); *see* JOSEPH P. SHAPIRO, NO PITY: PEOPLE WITH DISABILITIES FORGING A NEW CIVIL RIGHTS MOVEMENT 133 (1994) (recalling the "three dozen . . . demonstrators [from the disability rights advocacy group ADAPT] . . . [who] threw themselves out of their wheelchairs[] [and] began a 'crawl-up' of the eighty-three marble steps to the Capitol").

120. Sources differ on the exact number of steps that Capitol Crawl participants climbed to the entrance of the Capitol Building. *Compare, e.g.*, *Moments in Disability History 27*, MINN. GOVERNOR'S COUNCIL ON DEVELOPMENTAL DISABILITIES, https://mn.gov/mnddc/ada-legacy/ada-legacy-moment27.html (last visited May 3, 2024) (reporting that people who used "wheelchairs, crutches and walkers . . . crawl[ed] and drag[ged] . . . up the 78 marble steps of the Capitol's West Front"), *with* SHAPIRO, *supra* note 119, at 133 (accounting for the "three dozen ADAPT

continuing issues of inaccessible public facilities.[121] Known as the "Capitol Crawl,"[122] this profound event included adults and children with disabilities.[123]

More than four months after the Capitol Crawl, on July 29, 1990, President George H.W. Bush signed the ADA into law, at a time when forty-three million people in the United States had a disability.[124] Yet, the struggle for disability rights and justice continued after the ADA's enactment.[125]

This struggle may partly be attributed to how the United States Supreme Court defined the word "disability." *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*[126] involved a plaintiff

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demonstrators" who "began a 'crawl-up' of the eighty-three steps to the Capitol"). ADAPT is the acronym name for a national grassroots disability rights advocacy organization, Americans Disabled for Attendant Programs Today. ADAPT, https://adapt.org/ [https://perma.cc/87H5-4G4C].

121. Harris, *supra* note 118, at, 947; Becky Little, *When the 'Capitol Crawl' Dramatized the Need for Americans with Disabilities Act*, HISTORY (Mar. 13, 2024), https://www.history.com/news/americans-with-disabilities-act-1990-capitol-crawl [https://perma.cc/4BNG-J8UF].

122. Carmel, *'Nothing About Us Without Us,' supra* note 119.

123. *Id.*; *see The Little Girl Who Crawled up the Capitol Steps 25 Years Later: Jennifer Keelan and the ADA*, CEREBRAL PALSY RSCH. NETWORK (July 24, 2015), https://cprn.org/the-little-girl-who-crawled-up-the-capitol-steps-25-years-later-jennifer-keelan-and-the-ada/ [https://perma.cc/E3SV-YJ62] (discussing how eight-year-old Jennifer Keelan, "along with many other adult advocates and historic figures in the disability rights movement, demonstrated to politicians, citizens, and the world that people with disabilities deserve the same human rights and access to society as everyone else"). Jennifer Keelan may aptly be referred to as Jennifer Keelan-Chaffins. *Compare* JENNIFER KEELAN-CHAFFINS, https://jkclegacy.com/ [https://perma.cc/758J-5ZLH] (prefacing the provided short description of Jennifer with "Jennifer Keelan was born with cerebral palsy and started her life of activism for disability rights at the age of six"), *with Meet Jennifer Keelan*, JENNIFER KEELAN-CHAFFINS, https://jkclegacy.com/about [https://perma.cc/4ZN3-6JXP] (prefacing Jennifer's biography with "Jennifer Keelan-Chaffins has spent her life fighting for her right to live a normal life; in school, on the public transit system, and on the steps of the United States Capit[o]l building [referencing the 'Capitol Crawl']"). Jennifer Keelan-Chaffins was eight years old on the day of the "Capitol Crawl"; as a child activist since the age of six, Jennifer stated, "I had a very important responsibility . . . . I was also representing my generation and future generations of children with disabilities who felt left out as they struggled for the same rights as everyone else." Jennifer Keelan-Chaffins, *Foreword* to ANNETTE BAY PIMENTEL, ALL THE WAY TO THE TOP: HOW ONE GIRL'S FIGHT FOR AMERICANS WITH DISABILITIES CHANGED EVERYTHING (2021). That responsibility motivated Jennifer to crawl toward another crucial piece of landmark disability rights legislation. *See id.*

124. Derek Warden, *The ADA at Thirty*, *supra* note 110, at 310–11; Americans with Disabilities Act, Pub. L. No. 101-336, § 2(a)(1), 104 Stat. 327, 328 (1990) (stating that "some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older").

125. *See* Stacy A. Hickox, *The Underwhelming Impact of the Americans with Disabilities Act Amendments Act*, 40 U. BALT. L. REV. 419, 424–25 (reporting that 7.9% of plaintiffs in litigated ADA cases succeeded in 1990, a miniscule percentage that dropped to three percent in 2004).

126. 534 U.S. 184 (2002), *superseded by statute*, ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(b)(4), 122 Stat. 3553, 3554.

employee with carpal tunnel syndrome and bilateral tendinitis, who was allegedly denied reasonable accommodation at work.[127] The Court interpreted the "substantially limits" language of the ADA by opining that "substantially" entails "considerable" or "to a large degree."[128] The Court also interpreted "major" in "major life activities" to mean "important,"[129] because "major" meant "greater in dignity, rank, importance, or interest."[130] These interpretations enabled the Supreme Court to disqualify from the "disability" classification any "impairments that interfere[d] in only a minor way with the performance of manual tasks" or other tasks that did not amount to "a major life activity," as defined by the ADA.[131] Because the Court also defined "major" narrowly, many plaintiffs were left unprotected by the ADA.[132] Ultimately, the Supreme Court's interpretations of the word "disability" were nullified.[133] Congress passed the ADA Amendments Act[134] in 2008, restoring congressional intention to interpret "disability" broadly.[135]

B. Description of the ADA and Its Definition of "Disability"

The ADA echoes the rationales behind Section 504's protection against discrimination in federally funded programs.[136] Title II of the ADA requires that "no qualified individual with a disability shall, by reasons of

127. *Williams*, 534 U.S. at 196.

128. *Id.*

129. *Id.* at 197.

130. *Id.*

131. *Id.* Activities that are "major life activities" under the ADA must be "central to daily life." *Id.*

132. For example, the Sixth Circuit held in a 2002 case that the plaintiff with a knee injury did not have a disability under the ADA because the plaintiff was not "substantially limited in the major life activity of working." *See* Black v. Roadway Express, Inc., 297 F.3d 445, 454 (6th Cir. 2002), *superseded by statute*, ADA Amendments Act of 2008, Pub. L. No 110-325, § 2(a)(4), 122 Stat. 3553, 3553 (stating that the United States Supreme Court case *Sutton v. United Air Lines, Inc.* "and its companion cases [including *Williams*] have narrowed the broad scope of protection intended . . . by the ADA . . . [and] eliminat[ed] protection for many individuals whom Congress intended to protect"), *as recognized in* Harrison v. Soave Enters., 826 Fed. App'x 517, 525 (6th Cir. 2020). *Sutton*, decided before *Williams*, held that myopic plaintiffs did not have a "disability" because their myopia did not "substantially limit[] . . . the major life activity of working." Sutton v. United Air Lines, Inc., 527 U.S. 471, 492–93 (1999), *superseded by statute*, ADA Amendments Act of 2008, § 2(b)(3), 122 Stat. at 3554 (rejecting Sutton's proposition that the presence of "mitigating measures" determine whether one has a disability under the ADA).

133. *See* ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(b)(5), 122 Stat. 3553, 3554.

134. 42 U.S.C. §§ 12103, 12205a.

135. Peter Blanck, *On the Importance of the Americans with Disabilities Act at 30*, J. DISABILITY POL'Y STUDS. 1, 5 (2021).

136. *State and Local Governments*, C.R. DIV., U.S. DEP'T OF JUST., https://www.ada.gov/ada_title_II.htm [https://perma.cc/RC8G-ZW2J]; 42 U.S.C. § 12132.

such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity,"[137] including public schools.[138] But unlike Section 504, the ADA imposes accessibility requirements on not only programs or facilities that receive federal funds but also those that do not.[139]

The ADA defines "disability" to include individuals with "impairment[s] that substantially limit[] one or more major life activities,"[140] having "a record of" impairment,[141] or otherwise "regarded as having" an impairment.[142] This definition is intended to apply "disability" broadly, an objective that was restated in 2008.[143]

Seven decades before the ADA, "disability" meant a physical disability.[144] However, in the 1940s, disability rights legislation accounted for people with mental health conditions.[145] Today, being "regarded as having a disability" may satisfy the requirements of being a "qualified individual" under the ADA,[146] in light of Congress's intention to apply "disability" broadly[147] and ensure "basic human dignity."[148]

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137. 42 U.S.C. § 12132.

138. *Disability Discrimination: Frequently Asked Questions*, U.S. DEP'T OF EDUC., https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/disability.html [https://perma.cc/KNC8-RPAW].

139. *See* 42 U.S.C. § 12132 (declaring that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a *public* entity, or be subjected to discrimination by any such entity" (emphasis added)); *id.* § 12182(a) (declaring that "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of *any* place of public accommodation by *any* person who owns, leases (or leases to), or operates a place of public accommodation" (emphasis added)).

140. 42 U.S.C. § 12102(1)(A).

141. *Id.* § 12102(1)(B).

142. *Id.* § 12102(1)(C).

143. *See* ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(a)(1), 122 Stat. 3553, 3553 (intending a "broad coverage" as part of a "clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities").

144. *See Celebrating the 100 Year History of Vocational Rehabilitation*, *supra* note 53 (noting how the Smith-Fess Act applied only to people with physical disabilities).

145. *See* National Mental Health Act, Pub. L. No. 79-487, § 2, 60 Stat. 421, 421 (1946) (helping to provide for the "treatment of psychiatric disorders"); *id.* at § 3, 60 Stat. at 421 (defining psychiatric disorders as "diseases of the nervous system which affect mental health").

146. *See* Widomski v. State Univ. N.Y. (SUNY) at Orange, 933 F. Supp. 2d 534, 540 (S.D.N.Y. 2013); *id.* at 541 (opining that the language of 42 U.S.C. § 12102(2)(C) "clearly stated" that "being regarded as having a disability" meets the definition of "disability" under the ADA).

147. *See* ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(a)(1), 122 Stat. 3553, 3553 (intending "broad coverage" as part of a "clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities").

148. Helen L. v. DiDario, 46 F.3d 325, 335 (3d Cir. 1995).

Despite Congress's efforts to apply "disability" broadly under the ADA, no legislator could have anticipated a global pandemic in 2020.[149] The next Part of this Comment focuses on how the COVID-19 pandemic has affected people with disabilities.

III. COVID-19'S IMPACT ON PEOPLE WITH DISABILITIES

COVID-19 is an infectious disease that has affected a large portion of the United States population.[150] More than one million people in the United States have died due to COVID-19,[151] while others have been isolated after experiencing symptoms.[152] These symptoms have included fatigue, loss of smell or taste, and more severe symptoms like persistent chest pain.[153] Symptoms have lasted for days or even months.[154]

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149. *Cf.* Gozdecka, *supra* note 18, at 215 (noting how regulations from the World Health Organization foresaw treatment and evacuation of passengers who become sick in large cruise ships and disinfection, but not in the specific case of COV-Sars-2).

150. *See WHO COVID-19 Dashboard,* WORLD HEALTH ORG., https://data.who.int/dashboards/covid19/deaths?m49=840&n=c [https://perma.cc/QS2B-L8AR] (last visited Apr. 29, 2024) (reporting that the United States has 103,436,829 total cases of COVID-19 as of December 24, 2023).

151. *Id.* (reporting that 1,144,877 people have died from COVID-19 in the United States).

152. *See Isolation and Precautions for People with COVID-19*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/coronavirus/2019-ncov/your-health/isolation.html [https://perma.cc/9B85-TAFP] (instructing readers who have tested positive for COVID-19 to "stay home for at least [five] days and isolate from others in your home"). While many individuals have experienced some symptoms of COVID-19, it is possible to experience no symptoms, yet test positive for COVID-19. *See* Daniel Yetman, *What to Know About Asymptomatic COVID-19*, HEALTHLINE (Mar. 30, 2022), https://www.healthline.com/health/what-is-asymptomatic-covid [https://perma.cc/HMT9-MK42] (defining "[a]symptomatic COVID-19" to mean "contract[ing] the coronavirus, SARS-CoV-2, but don't develop any signs or symptoms that are commonly associated with the COVID-19 infection").

153. *Coronavirus Disease 2019 (COVID-19)*, MAYO CLINIC, https://www.mayoclinic.org/diseases-conditions/coronavirus/symptoms-causes/syc-20479963 [https://perma.cc/8QUM-XLB9]; *Coronavirus Disease (COVID-19)*, WORLD HEALTH ORG. (Aug. 9, 2023), https://www.who.int/news-room/fact-sheets/detail/coronavirus-disease-(covid-19) [https://perma.cc/J6MW-6T8J]; *see also* Jennifer K. Logue, Nicholas M. Franko, Denise J. McCulloch, Dylan McDonald, Ariana Magedson, Caitlin R. Wolf & Helen Y. Chu, *Sequelae in Adults at 6 Months After COVID-19 Infection*, 4 J. AM. MED. ASS'N NETWORK OPEN 1, 3 (2021) (finding that 24 of 177 patients who tested positive for COVID-19 and completed a COVID-19 testing survey had "fatigue . . . and [another 24 with] loss of sense of smell or taste" as some of "[t]he most common persistent symptoms").

154. *See, e.g.*, *Long COVID or Post-COVID Conditions*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/coronavirus/2019-ncov/long-term-effects/index.html# [https://perma.cc/FQM7-DZB9] (last updated Mar. 14, 2024) (stating that "[m]ost people with COVID-19 get better within a few days to a few weeks after infection"); Li Jiang, Xuan Li, Jia Nie, Kun Tang & Zulfiqar A. Bhutta, *A Systematic Review of Persistent Clinical Features After SARS-CoV-2 in the Pediatric Population*, 152 PEDIATRICS 1, 21 (2023) (finding that 16.2% of a study sample consisting of children who tested positive for COVID-19 had at least one symptom that lasted more than three months).

The first case of COVID-19 in the United States was confirmed on January 20, 2020.[155] Within two weeks, the Secretary of Health and Human Services (HHS) declared a public health emergency due to COVID-19.[156] On March 11, 2020, the World Health Organization declared COVID-19 a pandemic.[157] More than three years later, on May 11, 2023, the Secretary of HHS ended the emergency.[158] COVID-19 may not be as prevalent today as it once was in early 2021,[159] but the virus continues to infect and affect people's lives.[160] This Part addresses the effects of COVID-19 on children with disabilities, followed by the effectiveness of mask mandates in public schools.

Many children with disabilities have underlying conditions that place them at greater risk of catching COVID-19 and its subsequent illnesses.[161] These conditions include lung, heart, or kidney disease, weakened immune systems, cancer, genetic illnesses, and other conditions that may

155. *CDC Museum COVID-19 Timeline*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/museum/timeline/covid19.html [https://perma.cc/VKK5-4M7U] (last visited Apr. 28, 2024).

156. *Determination that a Public Health Emergency Exists*, ADMIN. FOR STRATEGIC PREPAREDNESS & RESPONSE (Jan. 31, 2020), https://aspr.hhs.gov/legal/PHE/Pages/2019-nCoV.aspx [https://perma.cc/N4PS-NWNH] (declaring that "a public health emergency exists" on January 31, 2020, while acknowledging that it "has existed since January 27, 2020, nationwide").

157. Domenico Cucinotta & Maurizio Vanelli, *WHO Declares COVID-19 a Pandemic*, 91 ACTA BIOMEDICA 157, 157 (2020).

158. Press Release, U.S. Dep't of Health and Hum. Servs., HHS Secretary Xavier Becerra Statement on End of COVID-19 Public Health Emergency (May 11, 2023), https://www.hhs.gov/about/news/2023/05/11/hhs-secretary-xavier-becerra-statement-on-end-of-the-covid-19-public-health-emergency.html [https://perma.cc/T7D2-XV8R].

159. *Compare National Data: Deaths*, THE COVID TRACKING PROJECT, https://covidtracking.com/data/national/deaths [https://perma.cc/AG9S-UVSZ] (reporting that 5,427 people in the United States died of COVID-19 on February 12, 2021, alone), *with Coronavirus in the U.S.: Latest Map and Case Count*, N.Y. TIMES (Mar. 23, 2023), https://www.nytimes.com/interactive/2021/us/covid-cases.html (last visited Apr. 20, 2024) (scroll to the chart labeled "New Reported Deaths by Day" under "U.S. Trends," and then move the mouse cursor on the chart to an area to the right of "Jan. 2023" on the horizontal axis until a box appears that says "Feb. 12, 2023," with the number of new deaths and the daily average number of deaths) (reporting only thirteen new deaths on February 12, 2023, but also an average of 442 daily deaths at the time).

160. *See COVID Data Tracker*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://covid.cdc.gov/covid-data-tracker/#maps_positivity-2-week [https://perma.cc/8Q4S-URAN] (last visited Apr. 28, 2024) (noting that in the week leading up to December 23, 2023, 12.7 percent of people who tested for COVID-19 tested positive).

161. *COVID-19 Vaccination for Children and Teens with Disabilities*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/vaccines/covid-19/planning/children/disabilities.html [https://perma.cc/DH8L-XWGS] (last visited Apr. 28, 2024).

affect the nervous system or metabolism.[162] These conditions may leave children with disabilities at greater risk of the debilitating effects of COVID-19, including myocarditis,[163] multisystem inflammatory syndrome,[164] and death.[165] Children with intellectual or developmental disabilities are also at higher risk of contracting COVID-19,[166] its severe symptoms,[167] and its disruptive effects like declining mental health.[168]

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162. *Id.*; *COVID-19 in Babies and Children,* MAYO CLINIC, https://www.mayoclinic.org/diseases-conditions/coronavirus/in-depth/coronavirus-in-babies-and-children/art-20484405 [https://perma.cc/EW3D-F3MS].

163. *See* Bshara Sleem, Rana Zareef, Fadi Bitar & Mariam Arabi, *Myocarditis in COVID-19: A Focus on the Pediatric Population*, 13 AM. J. CARDIOVASCULAR DISEASE 138, 143 (2023) (noting how children with COVID-19 are forty times more likely to contract myocarditis compared to children without COVID-19). Myocarditis is a cardiac condition with symptoms ranging from chest pain to heart failure to cardiac arrest. *Post-COVID-19 Conditions in Children and Adolescents*, AM. ACAD. OF PEDIATRICS (Sept. 2, 2022), https://www.aap.org/en/pages/2019-novel-coronavirus-covid-19-infections/clinical-guidance/post-covid-19-conditions-in-children-and-adolescents/ [https://perma.cc/V5HJ-BZ32].

164. *When Kids Get Sick After COVID-19 Goes Away*, NAT'L INSTS. OF HEALTH: COVID-19 RSCH. (July 27, 2021), https://covid19.nih.gov/news-and-stories/when-kids-get-sick-after-covid-19-goes-away [https://perma.cc/H5A9-2CK4].

165. *Cf.* Scott D. Landes, Julia M. Finan & Margaret A. Turk, *COVID-19 Mortality Burden and Comorbidity Patterns Among Decedents With and Without Intellectual and Developmental Disability in the US*, 15 DISABILITY & HEALTH J. 1, 5 (2022) (concluding that "COVID-19 was the leading cause of death for people with intellectual disabilit[ies], cerebral palsy, and Down syndrome during the first year of the pandemic"). Decedents who had an intellectual or developmental disability reported on their death certificates had "a greater COVID-19 mortality burden in 2020 than people without [intellectual or developmental disabilities], and at much younger ages." *Id.*

166. *Cf.* Jonathan Gleason, Wendy Ross, Alexander Fossi, Heather Blonsky, Jane Tobias & Mary Stephens, *The Devastating Impact of Covid-19 on Individuals with Intellectual Disabilities in the United States*, NEW ENGLAND J. MED. CATALYST 1, 9 (Mar. 5, 2021), https://catalyst.nejm.org/doi/full/10.1056/CAT.21.0051 (last visited May 28, 2024) (finding that "those with intellectual disabilities [we]re more likely to contract Covid-19").

167. Michael R. Sherby, Luther G. Kalb, Ryan J. Coller, Gregory P. DeMuri, Sabrina Butteris, John J. Foxe, Martin S. Zand, Edward G. Freedman, Stephen Dewhurst, Jason G. Newland & Christina A. Gurnett, *Supporting COVID-19 School Safety for Children with Disabilities and Medical Complexity*, 149 PEDIATRICS S1, S2 (2022); *see* David B. Nicholas, Rosslynn T. Zulla, Olivia Conlon, Gina Dimitropoulos, Simon Urschel, Adam Rapoport, Sherri Lynne Katz, Aisha Bruce, Lori J. West, Mark Belletrutti, Emma Cullen & Lonnie Zwaigenbaum, *Mental Health Impacts of the COVID-19 Pandemic on Children with Underlying Health and Disability Issues, and Their Families and Health Care Providers*, 27 PAEDIATRICS & CHILD HEALTH S33, S35 (2022) (reporting that isolation, rooted in changes to daily life such as switching to online school and "diminished recreational activities and social functions," "negatively impacted mental health" because of increased loneliness).

168. *See* Nicholas et al., *supra* note 167, at S35 (reporting that isolation, rooted in changes to daily life such as switching to online school and "diminished recreational activities and social functions," "negatively impacted mental health" because of increased loneliness). For some, this isolation "exacerbated pre-existing mental health concerns," a finding that was especially prevalent among children diagnosed with autism or had other mental health conditions. *Id.*

Those children missed opportunities to develop in-person social skills[169] and lost established everyday routines.[170]

COVID-19's contagiousness demanded quick and functional responses from the U.S. government. COVID-19 is mainly spread by inhaling "infectious particles" within "short range" of a person infected already, by being crowded with others indoors, or by touching one's eyes, nose, or mouth after contact with an object contaminated with COVID-19.[171] To reduce new infections, the Centers for Disease Control and Prevention recommended wearing cloth face masks, which ultimately proved an effective measure in reducing COVID-19 cases and severity of symptoms.[172] Schools that mandated masks reduced COVID-19 cases by

169. *See* Molly Chiu, *Knock the Rust Off Your Social Skills After Pandemic Setbacks*, BAYLOR COLL. OF MED. (Nov. 13, 2023), https://www.bcm.edu/news/knock-the-rust-off-your-social-skills-after-pandemic-setbacks [https://perma.cc/XL7M-G58J] (quoting Dr. Eric Storch, who stated "[f]ace-to-face interaction is key for developing social skills" and noted that "people missed out" on in-person opportunities "to develop social skills" because events and interactions in person "were limited during the [COVID-19] pandemic"); *see also* Nicholas et al., *supra* note 167, at S37 (quoting an anonymous child, from a study, who said, "If I'm gonna be doing online school, I am gonna need some social activities").

170. *See* Mohammed Al-Beltagi, Nermin Kamal Saeed, Adel Salah Bediwy, Rawan Alhawamdeh & Samara Qaraghuli, *Effects of COVID-19 on Children with Autism*, 11 WORLD J. VIROLOGY 411, 416 (2022) (noting that autistic children "usually resist changes in their routines"); *id.* ("Consequently, most of them suffered during the lockdown with the closure of their kindergartens, schools, and other services they usually attend daily."); Hannah Furfaro, *Washington State Children with Disabilities Are Left Behind by Remote Learning*, SEATTLE TIMES (Oct. 11, 2020, 11:30 AM), https://www.seattletimes.com/education-lab/children-with-disabilities-are-left-behind-by-remote-learning/ (last visited Dec. 29, 2023) (detailing the experience of an autistic seventeen-year-old student who found "peace in routine" and "became increasingly erratic" after the student's routine was disrupted when schools closed in response to the COVID-19 pandemic).

171. *Coronavirus Disease (COVID-19): How Is It Transmitted?*, WORLD HEALTH ORG. (Dec. 23, 2021), https://www.who.int/news-room/questions-and-answers/item/coronavirus-disease-covid-19-how-is-it-transmitted [https://perma.cc/XQF4-2DKY].

172. Kiva A. Fisher, John P. Barile, Rebecca J. Guerin, Kayla L. Vanden Esschert, Alexiss Jeffers, Lin H. Tian, Amanda Garcia-Williams, Brian Gurbaxani, William W. Thompson & Christine E. Prue, *Factors Associated with Cloth Face Covering Use Among Adults During the COVID-19 Pandemic — United States, April and May 2020*, 69 MORBIDITY & MORTALITY WKLY. REP. 933, 933 (2020); *see* Angus K. Wong & Laura B. Balzer, *State-Level Masking Mandates and COVID-19 Outcomes in the United States*, 33 EPIDEMIOLOGY 228, 231 (2022) (concluding that mask mandates on a state level in the United States were tied to a "relative reduction" of the "relative growth" of COVID-19 cases by nine percent two months after implementing the mask mandate); *cf.* Heesoo Joo, Gabrielle F. Miller, Gregory Sunshine, Maxim Gakh, Jamison Pike, Fiona P. Havers, Lindsay Kim, Regen Weber, Sebnem Dugmeoglu, Christina Watson & Fátima Coronado, *Decline in COVID-19 Hospitalization Growth Rates Associated with Statewide Mask Mandates — 10 States, March–October 2020*, 70 MORBIDITY & MORTALITY WKLY. REP. 212, 214 (2021) (finding that states that mandated masks experienced "significant declines in weekly COVID-19 hospitalization growth rates" less than three weeks after implementing the mask mandate for people aged forty to sixty-four years, and three weeks or later for people aged eighteen to sixty-four).

seventy-two percent compared to schools that made masks optional.[173] Furthermore, from July 2021 to early September 2021, counties without mask mandates in public schools had more pediatric COVID-19 cases after school started.[174] In counties that mandated masks in schools, COVID-19 cases among students decreased by nearly half.[175] These findings show that mask mandates considerably reduced COVID-19 cases in schools.[176] Thus, children with disabilities were at higher risk of contracting COVID-19 in regions that failed to require masks.[177] Because those children also have other dire health conditions that make them more susceptible to the virus, optional masking policies impacted children with disabilities disproportionately.[178] The following Part of this Comment discusses a specific type of legal claim brought by people with disabilities based on disproportionate impact against a class of people, known as "disparate impact" claims.

IV. CLAIMS COGNIZING DISPARATE IMPACT

This Part discusses disparate impact claims brought by people with disabilities. It first defines "disparate impact" by looking into a case decided by the United States Court of Appeals for the Ninth Circuit. This Part then compares the Ninth Circuit case *Payan v. Los Angeles Community College District*,[179] which held that disparate impact claims could be brought under Section 504, with a Sixth Circuit case, *Doe v.*

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173. *See* Harrison Wein, *Mandatory Masking in Schools Reduced COVID-19 Cases*, NAT'L INSTS. OF HEALTH (Mar. 22, 2022), https://www.nih.gov/news-events/nih-research-matters/mandatory-masking-schools-reduced-covid-19-cases [https://perma.cc/EXL6-S6NC] (finding that, in a sample of sixty-one school districts, the six districts that made masks optional had 26.4 cases of COVID-19 per 100 cases in the community, compared to 7.3 cases in districts that made masks mandatory).

174. Samantha E. Budzyn, Mark K. Panaggio, Sharyn E. Parks, Marc Papazian, Jake Magid & Lisa C. Barrios, *Pediatric COVID-19 Cases in Counties With and Without School Mask Requirements — United States, July 1–September 4, 2021*, 70 MORBIDITY & MORTALITY WKLY. REP. 1377, 1378 (2021), https://www.cdc.gov/mmwr/volumes/70/wr/pdfs/mm7039e3-H.pdf [https://perma.cc/6GLU-AWBY].

175. *See id.* at 1377 (stating that in counties with schools with mask mandates, there were 16.32 cases of COVID-19 per 100,000 students per day, while in counties with schools without mask mandates, there were 34.85 cases per 100,000 students per day).

176. *Cf. id.* at 1378 (concluding that COVID-19 case rates were smaller in counties with mask mandates in schools than in counties without mask mandates in schools).

177. *See id.*

178. *See* Doe 1 v. Perkiomen Valley Sch. Dist., 585 F. Supp. 3d 668, 702 (E.D. Pa. 2022) (concluding that the plaintiffs, students with disabilities at a public school in Pennsylvania, demonstrated a "likelihood of irreparable harm" and "a heightened risk of serious illness and death" from attending a school with an optional masking policy in early 2022). This Comment further discusses *Doe 1* in section IV.D.

179. 11 F.4th 729 (9th Cir. 2021).

BlueCross BlueShield of Tennessee, Inc.,[180] which held that they could not. Next, this Part discusses a district court case, *Doe 1 v. Perkiomen Valley School District*,[181] that upheld Third Circuit precedent, holding that disparate impact claims are cognizable.[182] Finally, this Part points out the circuit split on whether disparate impact claims are cognizable under Section 504 and the ADA.

A. Disparate Impact Claims in Disability Rights Law

"[D]isparate impact" refers to the "adverse effect of a facially neutral practice . . . that nonetheless discriminates against persons because of their race, sex, national origin, age, or disability" and cannot be "justified by business necessity."[183] Generally, plaintiffs bringing disparate impact claims challenge facially neutral practices with disproportionately adverse effects on marginalized groups, allegedly without a legitimate rationale for the policy or practice.[184]

To successfully claim that a public entity discriminated based on disability, plaintiffs must prove that a facially neutral policy or practice "den[ied] [them] meaningful access to public services."[185] "[M]eaningful access" may entail reasonable accommodations to ensure that people with disabilities can access the benefit in question.[186] "Reasonable accommodations" include reasonable adjustments surrounding the benefit that the individual is trying to access.[187] A "benefit" can include entering accessible buildings and "readily accessible" programs inside physical facilities.[188] If a facially neutral policy or practice has denied certain individuals meaningful access, the entity enacting this policy may be obligated to make reasonable modifications to ensure "meaningful access" for people with disabilities to obtain the "benefit" in question.[189]

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180. 926 F.3d 235 (6th Cir. 2019).

181. 585 F. Supp. 3d 668 (E.D. Pa. 2022).

182. Claims that are "cognizable" are those that are "within the court's jurisdiction" and "[c]apable of being judicially tried or examined" before a court or "[c]apable of being known or recognized." *Cognizable*, BLACK'S LAW DICTIONARY (11th ed. 2019).

183. *Disparate Impact*, BLACK'S LAW DICTIONARY, *supra* note 182.

184. Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 524–25 (2015).

185. Payan v. L.A. Cmty. Coll. Dist., 11 F.4th 729, 738 (9th Cir. 2021) (quoting K.M. *ex rel.* Bright v. Tustin Unified Sch. Dist., 725 F.3d 1088, 1102 (9th Cir. 2013)).

186. Alexander v. Choate, 469 U.S. 287, 301 (1985).

187. *Id.* at 301 n.21.

188. *Id.*

189. *Id.*

Plaintiffs need to show that the policy disproportionately affected people with disabilities, regardless of the policy's intent.[190]

Not all federal courts of appeals recognize the legality of disparate impact claims under federal disability rights laws. Just a few circuits have clearly spoken on this issue. The Sixth Circuit rejects disparate impact claims under Section 504,[191] while the Third Circuit and Ninth Circuit recognize them[192] not only under Section 504, but also the ADA.[193]

B. Payan v. Los Angeles Community College District*: A Ninth Circuit Example of Disparate Impact*

Payan v. Los Angeles Community College District demonstrates how certain conditions give rise to a disparate impact claim. Plaintiffs Roy Payan and Portia Mason, both blind, had been students at Los Angeles City College, a school within the Los Angeles Community College District.[194] Payan and Mason received "C"[195] and "D"[196] grades, respectively, allegedly because the school failed to provide accessible

190. *See* Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 524–25 (2015) ("[A] plaintiff bringing a disparate-impact claim challenges practices that have a 'disproportionately adverse effect on minorities' and are otherwise unjustified by a legitimate rationale." (quoting Ricci v. DeStefano, 557 U.S. 557, 577 (2009))); Raytheon Co. v. Hernandez, 540 U.S. 44, 52–53 (2003) (quoting Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 645–46 (1989)) ("Under a disparate-impact theory of discrimination, 'a facially neutral employment practice may be deemed [illegally discriminatory] without evidence of the employer's subjective intent to discriminate.'" (alteration in original)).

191. Doe v. BlueCross BlueShield of Tenn., Inc., 926 F.3d 235, 241 (6th Cir. 2019) (concluding that Section 504 "does not prohibit disparate-impact discrimination").

192. In other words, whether such claims are "cognizable," defined as being "within the court's jurisdiction." *Cognizable*, BLACK'S LAW DICTIONARY, *supra* note 182.

193. *See* Helen L. v. DiDario, 46 F.3d 325, 335 (3d. Cir. 1995) (suggesting that Section 504 and the ADA "make clear that the unnecessary segregation of individuals with disabilities in the provision of public services is itself a form of discrimination within the meaning of those statutes" and that the ADA should not be limited "to circumstances involving deliberate discrimination"); Payan v. L.A. Cmty. Coll. Dist., 11 F.4th 729, 735 (9th Cir. 2021) (interpreting Title II of the ADA and relying on previous interpretations of Section 504 "to recognize that disparate impact claims are cognizable as authorized by Title II's implementing regulations"). Title II of the ADA is codified at 42 U.S.C. §§ 12131–12165.

194. *Payan*, 11 F.4th at 731.

195. Complaint for Declaratory Relief, Injunctive Relief, and Damages for Disability Discrimination in Violation of Title II of the ADA, and Section 504 of the Rehabilitation Act at 16–17, Payan v. L.A. Cmty. Coll. Dist., 11 F.4th 729 (9th Cir. 2021) (No. 2:17-cv-01697-MRW) (noting that plaintiff Roy Payan "received a 'C' in Math 124A" and a "C" in Math 124B).

196. *Id.* at 19 (noting that plaintiff Portia Mason "received a 'D'" when Mason took Introduction to Psychology in fall 2015). Mason was also given a "D" in a class called Abnormal Psychology. *Id.* at 21.

versions of required class materials.[197] Those materials included the textbook and software to turn in assignments for Payan's math classes and the graphics used routinely in PowerPoint slides for Mason's psychology class.[198]

Along with frustrating endeavors to obtain these accommodations,[199] students like Payan and Mason were subjected to using a web portal that was also inaccessible because it was not compatible with screen readers.[200] Facially, this practice made no references to people with disabilities.[201] Yet, the online portal was inaccessible for students who were blind.[202] Thus, this practice allegedly disparately impacted students with vision-related disabilities,[203] who were denied the equal opportunity to "manage their education independently" by signing up for classes and reviewing grades for their assignments like everyone else.[204] These circumstances, which the plaintiffs argued amounted to "unfair

197. *See id.* at 3 (asserting that the Los Angeles Community College District "consistently failed to provide [the plaintiffs] with digital and physical course materials in accessible formats").

198. *See id.* at 12 (alleging that Payan could not "read the required textbook assignments nor read or answer any questions on the MyMathLab website without the assistance of a sighted person every time"); *id.* at 19 (noting how plaintiff Mason faced slides that contained "graphic material" that was "routinely used" in class, including materials without descriptions or labels and material that Mason could not make accessible themself).

199. As students who were blind, Payan's and Mason's failed pursuits of getting accommodations for class may aptly be deemed to be frustrating, at least when compared to the goals of a disability rights organization in California. *Cf. id.* at 9 ("Discrimination against blind individuals frustrates the mission [to improve independence of the blind] of the [National Federation of the Blind] of California.").

200. Payan v. L.A. Cmty. Coll. Dist., 11 F.4th 729, 739 (9th Cir. 2021) ("To consider an example in the Title II framework [of the ADA], Plaintiffs identified LACCD's facially neutral practice of operating its student web portal through the PeopleSoft program as having a disparate impact on blind students because the program was not compatible with screen reading software."). Screen readers are assistive technology devices that convert text, pictures, or other elements on a computer screen into speech or braille, elements that make the content on computer screens accessible to people who are blind or have low vision. *What Is a Screen Reader?*, FREEDOM SCI., https://www.freedomscientific.com/screen-reader/ [https://perma.cc/23JV-MHGZ].

201. *See Payan*, 11 F.4th at 739 (validating the plaintiffs' use of the "disparate impact framework" when the "[p]laintiffs identified [the Los Angeles Community College District's] facially neutral practice of operating its student web portal through the PeopleSoft program as having a disparate impact on blind students because the program was not compatible with screen reading software").

202. *Id.*

203. *See id.* (opining that the plaintiffs' discrimination claims, when the school failed to ensure that they could access the school's web portal, "w[ere] appropriately considered under the disparate impact framework").

204. *Id.*

disadvantage[s] and an unequal educational experience,"[205] were found by the Ninth Circuit to be grounds for disparate impact claims.[206]

C. Doe v. BlueCross BlueShield of Tennessee, Inc.*: The Sixth Circuit's Refusal to Cognize Disparate Impact Claims*

The Sixth Circuit held in *Doe v. BlueCross BlueShield of Tennessee, Inc.* that Section 504 does not provide legal grounds to bring disparate impact claims.[207] In other words, those claims are not cognizable under Section 504.[208] This section first discusses the facts and explains the holding of *Doe*. It then provides statistics on caseloads and judgeships in response to the court's concern over increased caseloads.

1. Facts of Doe v. BlueCross BlueShield of Tennessee, Inc.

Doe involved a health insurance policy that required patients to pay full price for medication obtained outside their health insurance network.[209] The plaintiff, John Doe, was a retiree,[210] had tested positive for human immunodeficiency virus (HIV),[211] and was a qualified individual with a disability.[212] Doe obtained employer-sponsored health insurance,[213] supplied by defendant BlueCross BlueShield of Tennessee,[214] who agreed to cover Doe's prescription medication costs, subject to a copay, under certain conditions.[215] One of Doe's prescribed medications was

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205. Complaint for Declaratory Relief, Injunctive Relief, and Damages for Disability Discrimination in Violation of Title II of the ADA, and Section 504 of the Rehabilitation Act at 5, Payan v. L.A. Cmty. Coll. Dist., 11 F.4th 729 (9th Cir. 2021) (No. 2:17-cv-01697-MRW).

206. *Payan*, 11 F.4th at 739.

207. Doe v. BlueCross BlueShield of Tenn., Inc., 926 F.3d 235, 243 (6th Cir. 2019).

208. *Id.*

209. *Id.* at 237–38.

210. First Amended Complaint at 59, Doe v. BlueCross BlueShield of Tenn., Inc., 926 F.3d 235 (6th Cir. 2019) (No. 2:17-cv-02793-JTF-cgc).

211. *Doe*, 926 F.3d at 237.

212. *Id.* at 241 (assuming that "Doe's HIV-positive status counts as a disability under [Section 504]").

213. *See* First Amended Complaint at 59, Doe v. BlueCross BlueShield of Tenn., Inc., 926 F.3d 235 (6th Cir. 2019) (No. 2:17-cv-02793-JTF-cgc) (stating that Doe was "enrolled in a BCBST [(BlueCross BlueShield of Tennessee)] health plan through [Doe's] former employer").

214. *Doe*, 926 F.3d at 237.

215. *See* First Amended Complaint at 59, Doe v. BlueCross BlueShield of Tenn., Inc., 926 F.3d 235 (6th Cir. 2019) (No. 2:17-cv-02793-JTF-cgc) ("BCBST agreed to cover Plaintiff's prescription drugs, subject to a copay, so long as those drugs were (a) filled on or after Plaintiff's coverage began; (b) approved for use by the Food and Drug Administration (FDA); (c) dispensed by a licensed pharmacist or network physician; and (d) listed on the Preferred Formulary.").

Genvoya.[216] Doe had been picking up Genvoya by visiting their local pharmacy.[217] When Doe tried to obtain Genvoya in March 2017, the local pharmacist rejected their request.[218] Instead, Doe was told that BlueCross BlueShield of Tennessee, at the time, required Doe to obtain their medication via mail or at a "specialty pharmacy."[219] While Doe's health insurance policies appeared facially neutral,[220] Doe alleged that the policies impacted them and others with HIV disproportionately.[221]

Doe provided at least two reasons why they believed BlueCross BlueShield discriminated against them. First, although BlueCross BlueShield of Tennessee offered to deliver prescriptions through mail, Doe would risk their privacy by switching to mail deliveries.[222] In particular, Doe was concerned that someone could suspect that Doe had HIV, "an improper disclosure" that could "collateral[ly]" cause unfavorable treatment in certain settings.[223] At the time of the lawsuit, many people with HIV experienced first-hand stigma, manifested, for example, by being called "dirty,"[224] being in awkward situations where a roommate wanted to switch rooms,[225] being said to "transmit[] the virus" while "sleeping around,"[226] and being told that if those with HIV "would stop transmitting the virus, everyone would be less depressed."[227]

Second, Doe had already "expended significant effort[s]" to order prescriptions for mail delivery, such as by navigating the automated phone prompts for about twenty to thirty minutes, verifying "voluminous amounts" of sensitive information including date of birth, social security

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216. *Doe*, 926 F.3d at 237–38.

217. First Amended Complaint at 59, Doe v. BlueCross BlueShield of Tenn., Inc., 926 F.3d 235 (6th Cir. 2019) (No. 2:17-cv-02793-JTF-cgc).

218. *Id.*

219. *Id.* at 59–61.

220. *Cf. Doe*, 926 F.3d at 241–42 (describing the list of medication that Doe could pick up through the defendant's plan as "neutral on its face").

221. First Amended Complaint at 69, Doe v. BlueCross BlueShield of Tenn., Inc., 926 F.3d 235 (6th Cir. 2019) (No. 2:17-cv-02793-JTF-cgc).

222. *See id.* at 5 (arguing that Doe's privacy would be "threatened").

223. *Cf. id.* (asserting that "[a]n improper disclosure of a person's HIV or AIDS status can often result in the denial of proper health care, poor treatment in educational and work settings, and many other collateral consequences" for "Class Members").

224. *Real Stories: Emelinda*, VIIV HEALTHCARE, at 00:23, https://viivhealthcare.com/en-us/ending-hiv/against-stigma/real-stories/emelinda/ (last visited Feb. 11, 2024).

225. *See Real Stories: Ja'Mel*, VIIV HEALTHCARE, at 00:16, https://viivhealthcare.com/en-us/ending-hiv/against-stigma/real-stories/jamel/ (last visited Feb. 11, 2024) (stating that Ja'Mel's roommate "wanted a different room because of [Ja'Mel's] HIV status").

226. *Real Stories: "Tboy."* VIIV HEALTHCARE, at 00:45, https://viivhealthcare.com/en-us/ending-hiv/against-stigma/real-stories/tboy/ (last visited Feb. 11, 2024).

227. *Id.* at 00:51.

number, and address, and having to speak to multiple staff members.[228] In April 2017, Doe requested to opt out of BlueCross BlueShield's insurance program, but their request was denied.[229] Doe had to use the health insurance's mailing service to obtain their prescriptions.[230] Doe requested to opt out again in July 2017.[231] Doe was denied again and could no longer appeal using the company's internal procedures.[232] Doe's insurance then listed some "specialty pharmacies" within Doe's network where they must obtain their prescriptions.[233] However, the list was inaccurate, and those pharmacies only provided mail or drop-off services without one-on-one consultations with staff familiar with Doe's medical history.[234] Furthermore, those "specialty pharmacies" were located at least an hour away and could not fulfill Doe's prescriptions entirely.[235] Thus, Doe

228. *See* First Amended Complaint at 60, Doe v. BlueCross BlueShield of Tenn., Inc., 926 F.3d 235 (6th Cir. 2019) (No. 2:17-cv-02793-JTF-cgc) (stating that after Doe provided their sensitive private information, Doe would "then be told the call center representative needed to transfer [them] to another person who then asked for similar voluminous amounts of information and then transferred [them] to yet another customer service representative").

229. *See id.* (alleging that BCBST's legal department told Doe that they "could not opt out of the mail-order requirement" to obtain their prescriptions).

230. *See id.* ("Because [Doe] was running out of medication and was given no choice by BCBST, [Doe] was forced to use the Program to fill [their] prescriptions.").

231. *Id.*

232. *Id.* at 61 (stating that Doe "has exhausted any appeal requirements . . . [and BCBST] has stated [that] no further appeal [wa]s either required or permitted").

233. *See id.* at 8 (alleging that BCBST sent Doe "a list of [brick and mortar] specialty pharmacies supposedly available," which included the names and addresses of two of those pharmacies and the names of seventeen more "specialty pharmac[ies]").

234. *See id.* at 61 (alleging that BCBST's list of "specialty pharmacies" "was inaccurate and that most of the listed pharmacies [in a letter addressed to Doe in September 2017] only provided mail-order or drop shipment deliveries, rather than any specialized pharmacy consulting services"); Doe v. BlueCross BlueShield of Tenn., Inc., 926 F.3d 235, 238 (6th Cir. 2019) (stating that Doe enjoyed "interacting with [Doe's] regular pharmacists, who knew [Doe's] medical history and who could spot the effects of harmful drug interactions").

235. *See* First Amended Complaint at 61, Doe v. BlueCross BlueShield of Tenn., Inc., 926 F.3d 235 (6th Cir. 2019) (No. 2:17-cv-02793-JTF-cgc) (alleging that the "specialty pharmacies" could "only fill a portion of the patient's medications, requiring Class Members [like Doe] to go to multiple locations to fill their prescriptions"). These barriers faced by Doe are not limited to people with HIV. *See* How to ADHD, *How ADHD Treatment Is Not ADHD Friendly*, YOUTUBE, https://www.youtube.com/watch?v=aKUdadCsuRE&t=1s (last visited Mar. 3, 2024) (detailing Jessica McCabe's personal experiences of obtaining medication for ADHD). As someone with ADHD, McCabe faced challenges—similar to the kinds of challenges faced by Doe—when trying to obtain medication for ADHD. *See id.* at 01:34 ("I've been unable to get my medication because the pharmacy I went to was out, and I've had to drive around to pharmacy after pharmacy looking for some place that had my medication, because you can't call, because it's a controlled substance."). Additionally, without insurance authorization of the medication, McCabe would have to pay "out of pocket, which is hundreds of dollars," even if a doctor prescribed the medication. *See id.* at 04:42. Most forms of stimulant medication for people with ADHD are "controlled substances," of which a

would need to drive to multiple locations just to get their full prescription of necessary medications.[236]

Understandably, Doe sought to continue accessing their HIV medication through their network.[237] Before BlueCross BlueShield's policy change, Doe's copay for their monthly prescription of Genvoya was $120.[238] Without insurance coverage, Doe's medication would cost "thousands of dollars per batch" at their usual pharmacy, staffed by people who were familiar with Doe's medical history.[239] This incredible difference in cost was a significant factor in this lawsuit.[240] So, too, were the policy changes that were "extremely stressful"[241] for Doe, whose health was in jeopardy during this lawsuit.[242]

Unfortunately for Doe, the Sixth Circuit ruled that BlueCross BlueShield did not intentionally discriminate against people with disabilities,[243] and that a disparate impact was not prohibited by Section 504 of the Rehabilitation Act of 1973.[244] Section 504 prohibits discrimination "*solely* by reason of . . . disability."[245] Based on the statute's language, the Sixth Circuit held that Section 504 did not reach actions taken for other nondiscriminatory purposes.[246] The Sixth Circuit

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person can obtain only up to a thirty-day supply before having to go to the pharmacy again. *See* Nathaly Pesantez, *Can You Stock Up on ADHD Medications During a Crisis?*, ADDITUDE (Mar. 16, 2020), https://www.additudemag.com/adhd-meds-stock-up-crisis/ (last visited Feb. 13, 2024).

236. *See* First Amended Complaint at 61, Doe v. BlueCross BlueShield of Tenn., Inc., 926 F.3d 235 (6th Cir. 2019) (No. 2:17-cv-02793-JTF-cgc) (alleging that because the BCBST's "specialty pharmacies" could fulfill only part of Doe's medications, and Doe and Class Members similarly situated would need "to go to multiple locations to fill their prescriptions").

237. *See Doe*, 926 F.3d at 238 (noting that BCBST's new policy of obtaining HIV medication "bothered" Doe, who sought permission from BCBST "to opt out of the specialty medications program").

238. *Id.*

239. *Id.*

240. *See* First Amended Complaint at 3, Doe v. BlueCross BlueShield of Tenn., Inc., 926 F.3d 235 (6th Cir. 2019) (No. 2:17-cv-02793-JTF-cgc) (opining that for patients outside of the wealthy, it would be "untenable" to experience "dramatic cost increases and/or reductions in or elimination of benefits").

241. *Id.* at 62.

242. *Cf. id.* at 21 (asserting that the steps that Doe had to go through to obtain their medication "increase[d] stress and fatigue for patients who are sometimes literally fighting to stay alive, which can exacerbate their stress and condition"). Despite medical advice "to do everything possible to reduce stress," given its potential to "undermin[e] the human immune system," Doe's struggles with trying to obtain Genvoya since BCBST's policy change were "extremely stressful." *Id.* at 62.

243. *See Doe*, 926 F.3d at 241 (suggesting that BCBST did not discriminate based on disability because the "specialty medications program" that included Doe's medication for HIV was based on the "cost, not the disabled status of their users").

244. *Id.*

245. *Id.* at 242 (emphasis added); Rehabilitation Act of 1973 § 504, 29 U.S.C. § 794(a).

246. *Doe*, 926 F.3d at 242.

also reasoned that laws prohibiting disparate impact discrimination would have contained language like "otherwise adversely affect" or "otherwise make unavailable."[247] Section 504 does not contain such language.[248] Thus, the court ruled against Doe, and disparate impact claims are currently not cognizable under Section 504 in the Sixth Circuit.[249]

The Sixth Circuit analyzed the "plain language" of what was included and not included in the text of Section 504.[250] "Plain language" analysis accounts for word choice, structure, and design of the statute.[251] However, "plain language" has limits, as discussed later in this Comment.[252] Nevertheless, the Sixth Circuit employed this mode of analysis to conclude that the words of Section 504 did not allow disparate impact claims to be cognizable.[253] Thus, people with disabilities could still be "disparately affected by legitimate job criteria."[254]

Furthermore, the Sixth Circuit expressed fear of a "wholly unwieldy administrative and adjudicative burden" if disparate impact claims became cognizable under Section 504.[255] Even just "the idea of disparate-impact liability" would, according to the court, "invite[] fruitless challenges to legitimate, and utterly nondiscriminatory, distinctions."[256] The court used its concerns over increased workload to justify turning away disparate impact cases under Section 504.[257] The following section discusses federal caseload and judgeship statistics since 1950.

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247. *Id.*

248. *Id.*

249. *Id.* at 242–43.

250. *See id.* at 242 (opining that the language of Section 504 "does not encompass actions taken for nondiscriminatory reasons" because Section 504 "bars discrimination 'solely by reason of her or his disability'" (quoting Rehabilitation Act of 1973 § 504, 29 U.S.C. § 794(a))); *id.* at 243.

251. VALERIE C. BRANNON, CONG. RSCH. SERV., R45153, STATUTORY INTERPRETATION: THEORIES, TOOLS, AND TRENDS 27– 31 (2023).

252. *See infra* sections V.A.1–V.A.3 (discussing three limitations of the "plain language" method of statutory analysis).

253. *Doe*, 926 F.3d at 241–43.

254. *Id.* at 242 (quoting Crocker v. Runyon, 207 F.3d 314, 321 (6th Cir. 2000)).

255. *See id.* ("Because many neutral (and well-intentioned) policies disparately affect the disabled—the point of such laws most often is to ease the burden of having a disability—the proposed use of the theory under [Section] 504 'could lead to a wholly unwieldy administrative and adjudicative burden.'" (quoting Alexander v. Choate, 469 U.S. 287, 298 (1985))).

256. *Id.*

257. *See id.* (pointing to "the oddity of applying disparate-impact discrimination" to Section 504 in a manner that "invites fruitless challenges" and causes "a wholly unwieldy administrative and adjudicative burden" as justification for rejecting disparate impact claims under Section 504 (quoting *Choate*, 469 U.S. at 298)).

2. Federal Caseload and Judgeship Statistics

The Sixth Circuit's stated concerns about increased case filings did not reflect actual filing statistics from recent years. From 1950 to 1978, federal courts experienced a steep increase in filings.[258] In 1950, litigants filed 94,342 cases in federal courts and 5,443 in the United States courts of appeals.[259] In 1978, these numbers increased to 174,753 and 19,657, respectively.[260]

More recently, case filings in the federal courts have actually declined. In the twelve months leading up to March 31, 2021, litigants filed 526,477 civil and criminal cases combined in federal district court while courts of appeals faced 47,805 filings.[261] In the following twelve months through March 31, 2022, these numbers dropped to 380,213 in the district courts and 44,290 in the courts of appeals.[262] And in the next twelve months, filings dropped even more—353,170 in the district courts and 42,163 in the courts of appeals.[263] These numbers show that federal courts may be seeing more cases filed than they did decades ago. However, while there have been "floods" of litigation during certain periods, the increase in caseloads has not been consistent throughout the past seventy-four years, and during some recent periods, there were actually drops in caseloads. By contrast, the number of judgeships on the district court and courts of

258. Marin K. Levy, *Judging the Flood of Litigation*, 80 U. CHI. L. REV. 1007, 1036 (2013).

259. BYRON R. WHITE, COMMISSION ON STRUCTURAL ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS 14 (1998).

260. *Id.*

261. *Federal Judicial Caseload Statistics 2021*, U.S. CTS., https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2021 [https://perma.cc/6F2T-4ZXW] (reporting that 46,165 filings occurred in the twelve geographical courts of appeals with another 1,640 in the court of appeals for the federal circuit).

262. *Federal Judicial Caseload Statistics 2022*, U.S. CTS., https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2022 [https://perma.cc/5SEF-4YMC] (reporting that 42,900 filings occurred in the twelve geographical courts of appeals with another 1,390 in the court of appeal for the federal circuit).

263. *Federal Judicial Caseload Statistics 2023*, U.S. CTS., https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2023 [https://perma.cc/F6TJ-3QEY] (finding a total of 40,681 filings in the twelve geographical courts of appeals with another 1,482 in the federal circuit court of appeals).

appeals has remained the same from March 31, 2012, to March 31, 2022—677[264] and 167,[265] respectively.

These numbers demonstrate that caseloads in both the federal district courts and courts of appeals have been dropping. Thus, the Sixth Circuit's concern about increasing caseloads may not reflect caseload statistics.[266] While these statistics do not consider changes in law, or how recognition of disparate impact claims specifically might impact filing numbers, they do show a recent general decline in filings alongside consistency in the number of sitting judges.[267]

Furthermore, the Sixth Circuit's approach in interpreting Section 504 is not universally accepted by other circuits. In 2022, a district court in the Third Circuit explicitly recognized that disparate impact claims are cognizable under not just Section 504 but the ADA as well.[268]

D. Doe 1 v. Perkiomen Valley School District*: A Case Inside the Third Circuit That Cognizes Disparate Impact Claims*

In 2022, a federal district court in the Third Circuit disagreed with the Sixth Circuit and held that disparate impact claims were cognizable under federal disability rights law.[269] *Doe 1 v. Perkiomen Valley School District* involves a Pennsylvania school district that made masks optional during the COVID-19 pandemic.[270] The events at issue in the case took place when the Omicron variant of COVID-19 was "extremely infectious" and

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264. U.S. CTS., UNITED STATES DISTRICT COURTS — NATIONAL JUDICIAL CASELOAD PROFILE, https://www.uscourts.gov/sites/default/files/data_tables/fcms_na_distprofile0331.2017.pdf [https://perma.cc/S9Q4-AWA7]; U.S. CTS., UNITED STATES DISTRICT COURTS — NATIONAL JUDICIAL CASELOAD PROFILE, https://www.uscourts.gov/sites/default/files/fcms_na_distprofile0331.2022.pdf [https://perma.cc/6N23-NBVA].

265. U.S. CTS., U.S. COURT OF APPEALS — JUDICIAL CASELOAD PROFILE, https://www.uscourts.gov/sites/default/files/fcms_na_appprofile0331.2017.pdf [https://perma.cc/W4V8-LQZ3]; U.S. CTS., U.S. COURT OF APPEALS – JUDICIAL CASELOAD PROFILE, https://www.uscourts.gov/sites/default/files/fcms_na_appprofile0331.2022.pdf [https://perma.cc/678Z-KFG6].

266. *See* Doe v. BlueCross BlueShield of Tenn., Inc., 926 F.3d 235, 242 (6th Cir. 2019) (predicting "a wholly unwieldy administrative and adjudicative burden" if disparate impact claims are cognizable under Section 504 of the Rehabilitation Act of 1973 (quoting Alexander v. Choate, 469 U.S. 287, 298 (1985))).

267. *See supra* notes 261–265 and accompanying text.

268. Doe 1 v. Perkiomen Valley Sch. Dist., 585 F. Supp. 3d 668, 687–88 (E.D. Pa. 2022).

269. *See id.* ("[T]he reasoning in *Helen L.* leads inexorably to the conclusion that disparate impact claims are cognizable under Title II of the ADA and, hence, under Section 504.").

270. *Id.* at 678–79.

the most prevalent.[271] On August 9, 2021, the Board of Directors of the school district (Board) approved a plan for the 2021–2022 school year to require students to wear masks indoors during classes.[272] On November 2, four new members were voted into the nine-person Board.[273] Later that month, the school district allowed unvaccinated or partially vaccinated students exposed to COVID-19 in school to attend class as long as they showed no symptoms and produced negative test results from an "antigen testing cadence."[274]

On December 13, following "robust discussion," the Board voted five to four to make masks optional on January 3, 2022.[275] Just four days after this vote, the first case of the Omicron variant of COVID-19 was confirmed in Montgomery County, Pennsylvania, where the school district was located.[276] Soon after, more people in that county tested positive.[277] In response, the Board met again on January 2, and reinstated the mask mandate through Friday, January 21.[278] Starting Monday, January 24, masks would again become optional during class.[279]

This shift in policy led the parents of three students[280] to sue the school district on January 21, 2022, the same day that the mask mandate ended.[281] These parents had children who were students within the school district

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271. Class Action Complaint for Declaratory and Injunctive Relief for Violations of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act at 3, Doe 1 v. Perkiomen Valley Sch. Dist., 585 F. Supp. 3d 668 (E.D. Pa. 2022) (No. 22-cv-00287-WB).

272. *Perkiomen Valley Sch. Dist.*, 585 F. Supp. 3d at 676. The Board also granted exceptions for students who proved that they had a medical or mental health condition, after an evaluation by a professional that said that wearing a mask could be harmful. *See id.*

273. *Id.* at 674, 677.

274. *Id.* at 677.

275. *Id.* at 678.

276. *Id.* at 674, 678.

277. *See id.* at 678 (noting how after the first confirmed case of the Omicron variant of COVID-19, "transmission and positivity rates in the [c]ounty began to surge"). From December 16 to December 22, 2021, 3,192 tested positive for COVID-19; from December 29, 2021, to January 5, 2022, that number rose sharply to 10,790 people. *Track Covid-19 in Montgomery County, Pa.*, N.Y. TIMES (Mar. 26, 2024), https://www.nytimes.com/interactive/2023/us/montgomery-pennsylvania-covid-cases.html (last visited Apr. 20, 2024).

278. *Perkiomen Valley Sch. Dist.*, 585 F. Supp. 3d at 676, 678. Students were "strongly recommended" to wear masks during extracurricular activities after school. *Id.* at 676. Masks remained optional for outdoor activities and for "athletics practice or competition." *Id.*

279. *Id.* at 678–79.

280. *See* Class Action Complaint for Declaratory and Injunctive Relief for Violations of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act at 13, Doe 1 v. Perkiomen Valley Sch. Dist., 585 F. Supp. 3d 668 (E.D. Pa. 2022) (No. 22-cv-00287-WB) (detailing the plaintiffs as John Doe 1 and Jane Doe 1 as parents of Child Doe 1, John Doe 2 and Jane Doe 2 as parents of Child Doe 2, and Jane Doe 3 as the parent of Child Doe 3).

281. *Perkiomen Valley Sch. Dist.*, 585 F. Supp. 3d at 679.

and vaccinated against COVID-19.[282] The parents sued to keep masks mandatory, because their children also had asthma and other conditions that placed them at greater risk of catching COVID-19.[283] This "brutal"[284] switch to making face covers optional would force these parents to either keep their children at home and "suffer continued learning loss" or take them to school and have them "serious[ly] risk . . . their health and safety."[285] Based on this impact against students with disabilities, the parents alleged that the school district violated Title II of the ADA and Section 504 of the Rehabilitation Act of 1973.[286]

The court in *Doe 1* acknowledged how the school district's optional masking policy was facially neutral.[287] The court ultimately adopted Third Circuit precedent[288] by ruling that disparate impact claims are cognizable under Section 504 and Title II of the ADA.[289] The section below discusses the Third Circuit's position in more detail.

E. Third and Ninth Circuits: Disparate Impact Claims Are Cognizable Based on Section 504's and the ADA's Intent

While disparate impact claims are well-established in cases related to employment,[290] only the Third and Ninth Circuits have applied disparate impact cases to other areas of disability rights law. While Title I of the ADA pertains to employment specifically,[291] the Third Circuit held that the ADA's protections were not limited to cases of "deliberate,"

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282. Class Action Complaint for Declaratory and Injunctive Relief for Violations of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act at 13, 30–33, Doe 1 v. Perkiomen Valley Sch. Dist., 585 F. Supp. 3d 668 (E.D. Pa. 2022) (No. 22-cv-00287-WB). All three of the students were not eligible to receive the COVID-19 booster when the parents sued. *Id.* at 30–33.

283. *Perkiomen Valley Sch. Dist.*, 585 F. Supp. 3d at 679, 691.

284. Class Action Complaint for Declaratory and Injunctive Relief for Violations of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act at 9, Doe 1 v. Perkiomen Valley Sch. Dist., 585 F. Supp. 3d 668 (E.D. Pa. 2022) (No. 22-cv-00287-WB).

285. *Id.*

286. *Id.* (alleging that the three children were "force[d] . . . into a situation that violate[d] Section 504 and the ADA").

287. *See Perkiomen Valley Sch. Dist.*, 585 F. Supp. 3d at 688 (noting that defendant Perkiomen Valley School District did not contest whether the "Phase Two Transition Plan" that dropped the mask mandate was "facially neutral").

288. Helen L. v. DiDario, 46 F.3d 325, 335 (3d. Cir. 1995).

289. *Perkiomen Valley Sch. Dist.*, 585 F. Supp. 3d at 687.

290. *Id.* at 688.

291. Title I of the Americans with Disabilities Act is codified at 42 U.S.C. §§ 12111–12117. *See Americans with Disabilities Act of 1990, as Amended*, C.R. DIV., U.S. DEP'T OF JUST., https://www.ada.gov/law-and-regs/ada/ [https://perma.cc/6D52-VM49] (noting how Subchapter I of the ADA is also referred to as Title I).

"intentional," or "overt" discrimination.[292] According to Third Circuit precedent, if courts interpret the ADA to provide causes of action for intentional discrimination only, it would be difficult to eliminate discriminatory conduct stemming from "benign neglect," "apathy," and "indifference," undermining congressional intent that the ADA eliminate discrimination.[293]

In *Doe 1*, the court acknowledged the ADA's and Section 504's goal to eradicate "unnecessary segregation" in providing public services, segregation which "illegal[ly] discriminat[es]" against people with disabilities, according to Third Circuit precedent.[294] Ninth Circuit precedent is consistent: the discrimination that Section 504 sought to prohibit "would be difficult if not impossible to reach" if Section 504 were to apply only to intentional discrimination.[295] However, as discussed above, not all federal courts of appeals agree with the Third and Ninth Circuits.[296]

V. DISPARATE IMPACT CLAIMS SHOULD BE COGNIZABLE UNDER SECTION 504 AND THE ADA

The final Part of this Comment explains why all federal courts of appeals should allow plaintiffs with disabilities to challenge discriminatory practices or policies, even if the policies appear facially neutral. First, this Comment objects to "plain language" interpretation by opining that "plain language" ignores the historical struggle of people with disabilities, allows for neutral policies with adverse effects, and applies inconsistently. Second, this Comment asserts that potential future litigation should not justify turning away cases. Third, this Comment argues that making disparate impact claims cognizable would promote the social model of disability, a paradigm accepted among people with disabilities.

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292. *Perkiomen Valley Sch. Dist.*, 585 F. Supp. 3d at 687 (citing *Helen L.*, 46 F.3d at 335).

293. *Helen L.*, 46 F.3d at 335.

294. *Perkiomen Valley Sch. Dist.*, 585 F. Supp. 3d at 696.

295. Payan v. L.A. Cmty. Coll. Dist., 11 F.4th 729, 734 (9th Cir. 2021) (citing Alexander v. Choate, 469 U.S. 287, 295 (1985)).

296. *See supra* section IV.C.1 (discussing a Sixth Circuit case that held that disparate impact claims are not cognizable under Section 504 of the Rehabilitation Act of 1973).

A. Courts Should Avoid Interpreting Statutes Based on Their "Plain Language" When These Statutes Implicate the Rights of People with Disabilities

Federal courts of appeals should refrain from interpreting disability-rights statutes on just their "plain language" for three reasons. First, analysis focusing on "plain language" disregards the context of disability rights law, which includes civil disobedience. Second, "plain language" analysis ignores statutory intentions, which can lead to absurd results. Third, "plain language" analysis likely does not serve the ideals of consistency and predictability, which are its supposed benefits.

1. "Plain Language" May Ignore History

Courts that use the "plain language" approach may ignore the events that triggered Congress to pass the statute in question. "Plain language," in the context of "drafting documents" to convey the drafter's intended message, emphasizes the facial features of a statute's text, including the "language, structure, and design."[297] "Language" includes word choice and the information included.[298] "Structure" includes sequencing the information to be "reader-friendly."[299] "Design" includes fonts, color, or "white space" to "enhance readability."[300] Put differently, "plain language" does not account for *why* the statute was passed.[301]

The Sixth Circuit focused on the "language, structure, and design" of Section 504,[302] including language forbidding discrimination "*solely* by reason of . . . disability."[303] The court justified its holding that Section 504 prohibits *intentional* discrimination only, because Section 504 used the

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297. Michael A. Blasie, *The Rise of Plain Language Laws*, 76 U. MIAMI L. REV. 447, 463 (2022).

298. *See* Annetta Cheek, *Defining Plain Language*, CLARITY, May 2010, at 5, 6 (denoting that "vocabulary," such as the act of "choosing words which accurately reflect the writer's intention and which the intended audience will understand," is one of the "elements-focused" means of defining "plain language").

299. *Id.*

300. *See id.* (accounting for elements such as "typeface, typesize, white space, colour, and other methods to enhance readability").

301. *Cf.* Mohamad v. Palestinian Auth., 566 U.S. 449, 458 (2012) (rejecting the plaintiff's use of legislative history on grounds that "reliance on legislative history is unnecessary," considering the "unambiguous language" of the Torture Victim Protection Act); William Baude & Ryan D. Doerfler, *The (Not So) Plain Meaning Rule*, 84 U. CHI. L. REV. 539, 543 (2017) (stating that in some cases, the United States Supreme Court held that "legislative history can be considered only if the text is ambiguous or unclear").

302. *See supra* section IV.C.1 (discussing how the United States Court of Appeals for the Sixth Circuit interpreted Section 504 in *Doe v. BlueCross BlueShield of Tennessee*).

303. Rehabilitation Act of 1973 § 504, 29 U.S.C. § 794(a) (emphasis added).

language "*solely by reason of* . . . disability"[304] and failed to explicitly prohibit discriminatory conduct that "otherwise adversely affect[ed]" people with disabilities, regardless of intent.[305]

However, focusing on "plain language," when interpreting Section 504, overlooks the years of hardship faced by the disability community. Nothing in the language of Section 504 acknowledges the history of discrimination based on disability.[306] The names of the people discriminated against, or descriptions of discriminatory events, are absent from the text.[307] These hardships and events directly contributed to the drafting and passage of Section 504.[308] Without taking into account the history of discrimination against people with disabilities, a court may misread Section 504 and forget that the law was brought to life in part because of civil disobedience.[309] By failing to appreciate this context, courts may apply Section 504 only when entities *intend* to discriminate, a wrong approach when discrimination is more often due to "benign neglect."[310]

2. "Plain Language" May Produce Unintended Consequences

A "plain language" interpretation not only ignores history but also leads to unnecessarily restrictive results. The restrictive effects are evidenced by previous court rulings defining the meaning of "disability" narrowly—rulings which were later rejected by the ADA Amendments Act.[311] As aforementioned,[312] a person meets the legal definition of "disability" when that person has a "physical or mental

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304. *Id.* (emphasis added); *see Reason,* MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/reason [https://perma.cc/3QU6-DSBC] (defining "reason" as "a rational ground or motive").

305. Doe v. BlueCross BlueShield of Tenn., Inc., 926 F.3d 235, 242 (6th. Cir. 2019) (citing Texas Dep't of Hous. and Cmty. Affs. v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 532 (2015)).

306. *See* Rehabilitation Act of 1973 § 504, 29 U.S.C. § 794.

307. *See id.*

308. *See supra* sections I.A–I.B (providing a history of disability rights before Section 504, including the 504 sit-in).

309. *See supra* section I.B (discussing the 504 sit-in at the San Francisco Federal Building).

310. Alexander v. Choate, 469 U.S. 287, 295 (1985).

311. Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 196 (2002), *superseded by statute*, ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(b)(5), 122 Stat. 3553, 3554; ADA Amendments Act of 2008, § 2(b)(2), 122 Stat. at 3554 (intending the ADAAA to "reject the standards enunciated by the Supreme Court in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams* that the terms 'substantially' and 'major' in the definition of disability . . . 'need to be interpreted strictly to create a demanding standard for qualifying as disabled'" (citation omitted) (quoting *Toyota Motor Mfg., Ky., Inc.*, 534 U.S. at 197)).

312. *See supra* section II.A (discussing the Supreme Court's interpretation of "disability" in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*).

impairment that substantially limits one or more major life activities."[313] In *Williams*, the Supreme Court defined "major" to mean "important."[314] The Court also interpreted "major" (from "major life activities") as "greater in dignity, rank, importance, or interest."[315] As a result of the Court's "plain language" approach to interpreting the statutory definition of "disability," a person would need to satisfy a "demanding standard" to legally qualify as having a "disability."[316]

This "demanding standard" created a higher bar for proving that a plaintiff had a "disability," let alone protection under the ADA from discrimination. After *Williams*, multiple courts held that a plaintiff did not have a "disability," because the plaintiff failed to meet this "demanding standard."[317] According to one commentator, *Black v. Roadway Express, Inc.*,[318] a Sixth Circuit case decided after *Williams*, showed that without the ADA Amendments Act reestablishing the intention of defining "disability" broadly,[319] a hypothetical person whose disability affected their ability to breathe likely would have to prove that they could not breathe "under almost any circumstance."[320] Otherwise, a person would likely fail to prove that they have a disability and thus, would likely fail to show that the ADA protects them from discrimination.[321]

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313. 42 U.S.C. § 12102(1)(A).

314. *Williams*, 534 U.S. at 196, *superseded by statute*, ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(b)(5), 122 Stat. 3553, 3554.

315. *Id.* at 197 (citing *Major*, WEBSTER'S THIRD NEW INT'L DICTIONARY 1363 (1976)).

316. *Williams*, 534 U.S. at 197, *superseded by statute*, ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(b)(5), 122 Stat. 3553, 3554.

317. *See, e.g.*, Black v. Roadway Express, Inc., 297 F.3d 445, 451 (6th Cir. 2002) (applying "disability" from *Williams* to hold that a plaintiff with a knee injury did not have a "disability" because the plaintiff's injury was not "*substantially* limited from any major life activit[ies]"); *see also* Nuzum v. Ozark Automotive Distribs., Inc., 432 F.3d 839, 847 (8th Cir. 2005) (holding that a plaintiff with elbow tendonitis failed to prove that they had a "disability" under the ADA because the plaintiff could still "help[] around the house" and the activities that limited the plaintiff's ability to mow the lawn or lift heavy objects were "not central to most people's daily lives"); Wong v. Regents of Univ. of Cal., 410 F.3d 1052, 1064–65 (9th Cir. 2005) (applying *Williams* to hold that a medical school student with learning disabilities did not have a "disability" under the ADA, because the student still "achieve[d] academic success" in school).

318. 297 F.3d 445 (6th Cir. 2002).

319. *See* ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(a)(1), 122 Stat. 3553, 3553 (intending "broad coverage" as part of a "clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities").

320. *Cf.* Jeffrey W. Larroca, Essay, Toyota Manufacturing, Kentucky, Inc. v. Williams*: Disabling the Americans with Disabilities Act*, 19 J. CONTEMP. HEALTH L. & POL'Y 363, 368 (2002) (interpreting the Sixth Circuit's holding in *Williams* to mean that "if [one is] going to allege a disability with regard to the major life activity of, for example, 'walking,' then [one] had better not be able to walk under almost any circumstance").

321. *See id.*

This is an absurd result that is inconsistent with what Congress intended with the ADA.

If *Doe 1* were decided before the ADA Amendments Act superseded *Williams*, the court could have held that each of the students did not have enough of a disability to be protected under the ADA.[322] In *Doe 1*, the three student plaintiffs each had asthma, a condition that limited, but did not fully prevent, their ability to breathe.[323] Under the Court's definition of "disability" in *Williams*, the plaintiffs in *Doe 1* may likely fall short of meeting the requirement of having a "disability" under the ADA.[324] As a result, the plaintiffs may not have been afforded the ADA's protection from discrimination, and thus, the court likely would have upheld the school's optional masking policy, which disparately impacted students with disabilities. Thankfully, however, the court in *Doe 1* avoided the "plain language" analysis, determined that all three plaintiffs had disabilities under the ADA, and opted to strike down an optional masking policy because it disproportionately impacted children with disabilities.[325]

3. Judges Apply "Plain Language" Differently, Defeating Its Purpose

In addition to concerns over potential consequences, "plain language" may not fulfill its perceived purposes. "Plain language" was once viewed by the United States Supreme Court as "the best indication of what the legislature intended."[326] Judges resorted to "plain language" because they believed it would produce consistent rulings.[327] But that belief does not always hold water. There are hundreds of federal judges across the United

322. *See id.*

323. Doe 1 v. Perkiomen Valley Sch. Dist., 585 F. Supp. 3d 668, 691 (E.D. Pa. 2022); *see Asthma*, MAYO CLINIC (Mar. 5, 2022), https://www.mayoclinic.org/diseases-conditions/asthma/symptoms-causes/syc-20369653 [https://perma.cc/U7L9-SNGC] (noting that having asthma may be "minor" for some while for others it may be a "major problem").

324. *See* Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 197 (2002) (necessitating a "demanding standard" to meet the ADA's definition of "disab[ility]"). In contrast, the ADA intends the definition of "disability" to apply "broad[ly]." *See* ADA Amendments Act, Pub. L. No. 110-325, § 2(b)(4), 122 Stat. 3553, 3555 (favoring "broad coverage" of people with disabilities under the ADA). To establish a "disability," one needs to have an impairment that "substantially limits one or more major life activities," "have [some] record" that the person has an "impairment," or be "regarded as having . . . an impairment." 42 U.S.C. § 12102(1).

325. *Perkiomen Valley Sch. Dist.*, 585 F. Supp. 3d at 706 (opining that students who were more vulnerable to catching COVID-19 "would suffer a disparate impact by reason of their disabilities").

326. David A. Strauss, *Why Plain Meaning*, 72 NOTRE DAME L. REV. 1565, 1569–70 (1997).

327. *See* Baude & Doerfler, *supra* note 301, at 558 (noting that "a judge might think it best to stop if the text is 'clear' because [they may feel] confident that [their] colleagues would read the statute in the same way" and that a court may experience "resulting gains in consistency" with "only minimal losses in accuracy").

States,[328] and if each judge has different meanings of "plain language," courts may decide cases inconsistently.[329] In fact, judges have often failed to describe how their own interpretation of "plain language" was "plain."[330] In light of these potential inconsistencies, "plain language" may be less consistent or predictable than the Supreme Court would hope.

B. The Risk of Greater Caseloads Should Not Justify Turning Away New Cases

In addition to analyzing the "plain language" of Section 504, the Sixth Circuit feared that disparate impact claims under Section 504 would cause a "wholly unwieldy administrative and adjudicative burden."[331] However, even if courts continue experiencing increasing caseloads, courts should not invoke the "floodgates of litigation" excuse to justify turning down cases that implicate disability rights. Turning away these cases may eliminate one method of attaining justice: the courts. Court opinions may effectuate rules that other authorities cannot.[332] Budget concerns, in the words of one judge, "should not be permitted to stand in the way of the recognition of otherwise sound constitutional principles."[333]

Lawsuits are expensive,[334] both financially and in time consumed by the parties and judges.[335] However, courts that turn away cases because of

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328. *See* U.S. CTS., AUTHORIZED JUDGESHIPS, https://www.uscourts.gov/sites/default/files/allauth.pdf [https://perma.cc/US4J-K7CF] (reporting that the federal court system in the United States had 860 judgeships in 2022).

329. *Cf.* Baude & Doerfler, *supra* note 301, at 559 (pointing out that one's "perception of the plainness of the statute's meaning would itself need to be widely shared" and if judges fail to agree on what is part of the "threshold" of "plainness," the "plain meaning" mode of interpretation could "actually *exacerbate* unpredictability" (emphasis in original)).

330. *See* Jeffrey W. Stempel, *What Is the Meaning of "Plain Meaning"?*, 56 TORT TRIAL & INS. PRAC. L.J. 551, 595 (2021) (contending that courts "almost never explain how it was they discerned that [their] meaning was plain – at least in the cases in which the court made this type of finding of sufficiently clear, unambiguous policy language").

331. Doe v. BlueCross BlueShield of Tenn., Inc., 926 F.3d 235, 242 (2019) (quoting Alexander v. Choate, 469 U.S. 287, 298 (1985)).

332. *See* GEORGETOWN UNIV. L. CTR., A GUIDE TO READING, INTERPRETING, AND APPLYING STATUTES 7 (2004), https://www.law.georgetown.edu/wp-content/uploads/2018/12/A-Guide-to-Reading-Interpreting-and-Applying-Statutes-1.pdf [https://perma.cc/Q5ZQ-49PS] (tabling the kinds of issues in state or federal courts and which kinds of court opinions are binding authority or persuasive authority).

333. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 411 (1971) (Harlan, J., concurring).

334. This is a view shared by at least some practitioners. *See* Emery G. Lee III & Thomas E. Willging, *Defining the Problem of Cost in Federal Civil Litigation*, 60 DUKE L.J. 765, 769 (2010).

335. *See id.* at 770 (finding that the median cost of litigation that involved discovery was around $15,000 for plaintiffs and $20,000 for defendants); *cf.* JOANNA R. LAMPE, CONG. RSCH. SERV.,

caseload concerns risk taking away a method to create social justice through the law.

Moreover, even if case filings rise, there are other ways to curtail excessive litigation. Congress has passed statutes to alleviate caseloads,[336] including the Supreme Court Case Selections Act of 1988.[337] Congress not only can enact statutes to reduce caseload but may increase the number of judgeships.[338] If federal courts add judges, a single judge may have fewer cases. It is true that there are more cases filed in federal district courts and courts of appeals today than there were fifty years ago.[339] And allowing for disparate impact claims may further increase caseloads. However, case filing numbers have dropped in recent years,[340] and Congress and the federal government have methods available to increase their capacity and maintain access to justice. Courts should not avoid hearing cases just because they are concerned about their caseloads.

This Comment addressed above[341] how the risk of a "wholly unwieldy . . . burden" factored into the Sixth Circuit's holding that disparate impact claims are not cognizable.[342] If a case like *Doe 1* was heard in the Sixth Circuit, instead of the Third, the court may have upheld the optional mask policy.[343] The students and their parents would have been forced to make an impossible decision, simply because of a court's fear of a future burden. Courts instead have the opportunity to recognize

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IF11349, LAWSUITS AGAINST THE FEDERAL GOVERNMENT: BASIC FEDERAL COURT PROCEDURE AND TIMELINES (2020) (claiming that "[l]itigation is not known for its alacrity," citing a finding from the Administrative Office of the United States Courts that civil cases in the United States district courts lasted a median of twenty-seven months from the date of filing to the trial, with ten percent of cases pending over three years).

336. *See* Levy, *supra* note 258, at 1069–70 (pointing to the history of statutes passed by Congress to "reduce frivolous filings").

337. Pub. L. No. 100-352, 102 Stat. 662, 662 (amending 28 U.S.C. § 1257 "[t]o improve the administration of justice by providing greater discretion to the Supreme Court in selecting the cases it will review, and for other purposes"); *see* Ryan J. Owens & David A. Simon, *Explaining the Supreme Court's Shrinking Docket*, 53 WM. & MARY L. REV. 1219, 1268 (2012) (hypothesizing that the Supreme Court Case Selections Act of 1988 "led to a decrease in the Court's docket").

338. *See supra* section IV.C.2 (discussing how the number of judgeships has remained consistent in the federal courts).

339. *See supra* notes 259–265 and accompanying text (providing statistical information surrounding caseloads and judgeships in the federal courts).

340. *See supra* section IV.C.2 (discussing caseload statistics in federal courts).

341. *See supra* section IV.C.1 (discussing the reasons for disallowing disparate impact claims in the Sixth Circuit).

342. *See* Doe v. BlueCross BlueShield of Tenn., Inc., 926 F.3d 235, 242 (2019) (holding that disparate impact claims are not cognizable under Section 504 of the Rehabilitation Act of 1973).

343. *See supra* section V.A (discussing how the Sixth Circuit and other courts may use "plain language" interpretation to hypothetically uphold an optional masking policy because the policy is facially neutral).

disparate impact claims, as the Third Circuit did, allowing others facing discrimination to access justice.[344] The final section of this Comment will elaborate on the kind of message that striking down discriminatory policies may send to the disability community.

C. Enabling Disparate Impact Cases Promotes the Social Model of Disability

Disparate impact claims can tangibly advance the social model of disability, a model embraced by people with disabilities.[345] People with disabilities made up over forty-two million people in the United States as of 2021.[346] As aforementioned, people with disabilities should enjoy the same freedoms as everyone else.[347] Under the social model of disability, disability is not the biological or medical differences that contribute to human diversity.[348] Instead, disability is the societal or structural actions that exclude individuals with these differences.[349] Generally speaking, disability is not medical. It is societal.

Part of society includes schools, including in-person classes where children develop important social skills.[350] Yet, the children with underlying conditions in *Doe 1* were dispossessed of their opportunity to attend class like everyone else without risking their health and safety.[351]

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344. *See* Doe 1 v. Perkiomen Valley Sch. Dist., 585 F. Supp. 3d 668, 706 (E.D. Pa. 2022) (finding "disparate impact by reason of . . . disabilit[y]" when a school district made masks optional during the COVID-19 pandemic).

345. BILL ALBERT, BRIEFING NOTE: THE SOCIAL MODEL OF DISABILITY, HUMAN RIGHTS AND DEVELOPMENT, DISABILITY KNOWLEDGE & RSCH. 1, 7 (2004).

346. Katrina Crankshaw, *The South Had Highest Disability Rate Among Regions in 2021*, U.S. CENSUS BUREAU (June 26, 2023), https://www.census.gov/library/stories/2023/06/disability-rates-higher-in-rural-areas-than-urban-areas.html [https://perma.cc/U962-VDBZ].

347. *See Civil Rights*, THE ARC, https://thearc.org/policy-advocacy/civil-rights/ [https://perma.cc/U2JA-6X8X] (stating the principle that "[d]isability rights are human rights" and that "[e]veryone deserves to be included and live a full life in their community — accessing the same public spaces, housing opportunities, education, and work as anyone else").

348. *See* Angélica Guevara, *The Need to Reimagine Disability Rights Law Because the Medical Model of Disability Fails Us All*, 2021 WIS. L. REV 269, 280 (opining that "there is nothing deficient or wrong with an individual with a disability").

349. *See id.* (defining "disability" as the loss of participating in society when "contemporary social organism[s]" fail to fully account for "people with physical [or mental] impairments and thus excludes them from the mainstream of social activities" (second alteration in original) (citing MICHAEL OLIVER, THE POLITICS OF DISABLEMENT: A SOCIOLOGICAL APPROACH 11 (1990))).

350. *See* Chiu, *supra* note 169.

351. *See* Class Action Complaint for Declaratory and Injunctive Relief for Violations of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act at 8–9, Doe 1 v. Perkiomen Valley Sch. Dist., 585 F. Supp. 3d 668 (E.D. Pa. 2022) (No. 22-cv-00287-WB) (arguing that students would jeopardize "their health and safety" by attending classes in-person where students shall wear masks optionally).

By applying the social model of disability to *Doe 1*, these children were disabled not because of their health conditions; rather, they were disabled because the school district made masking optional,[352] leaving these children at greater risk of catching COVID-19 and its potentially debilitating effects. These children were disabled by their inability to attend class. They were disabled by being prevented from learning about their favorite subjects. They were disabled by being kept away from their friends and teachers and thus face-to-face socialization and social growth.[353] From the lens of the social model of disability, the court in *Doe 1* rightfully applied disparate impact to strike down the school district's policy, because it disproportionately affected children with disabilities.[354]

Abolishing policies like the one in *Doe 1* sends a message that schools and other public entities cannot discriminate against people with disabilities, even with facially neutral policies. Policies like optional masking can be reasonably viewed as policies that fail to consider people with disabilities, a form of "benign neglect" that Section 504 accounted for.[355] Through taking this view, courts can convey to the disability community that facially neutral practices that disparately discriminate against people with disabilities can be challenged under Section 504 and the ADA.

CONCLUSION

The United States has a checkered history of undervaluing people with disabilities. Advocates have successfully fought against and torn down some of the barriers faced by people with disabilities. Yet, other injustices continue, in part because of facially neutral policies that disproportionately impact people with disabilities. Courts are currently split on whether disparate impact claims are cognizable under federal

352. By contrast, under the medical model of disability, the children with disabilities would be disabled because of their asthma and reduced ability to breathe, not because of the policy to make masks or face covering optional. *See* Guevara, *supra* note 348, at 277 (associating disability benefits in the "medical model . . . in the medical field" with "an impairment or loss of function").

353. The benefits of in-person instruction include the ability to connect with teachers. *See* Panos Photopoulos, Christos Tsonos, Ilias Stavrakas & Dimos Triantis, *Remote and In-Person Learning: Utility Versus Social Experience*, SN COMPUT. SCI., Dec. 2022, at 1, 5 (noting how "in-person courses enhance [students'] abilit[ies] to connect and interact with their teachers").

354. *See* Doe 1 v. Perkiomen Valley Sch. Dist., 585 F. Supp. 3d 668, 693 (E.D. Pa. 2022) (concluding that the three student plaintiffs with underlying disabilities would "face a significant risk of serious illness and/or death if they attend school in-person"). This was a risk that others without disabilities would not endure amid the prevalence of the Omicron variant of COVID-19. *Id.* at 693–94.

355. Alexander v. Choate, 469 U.S. 287, 295 (1985).

disability rights law. The "plain language" approach is not the answer to resolve this circuit split. Nor is turning away cases because of increasing caseloads. Instead, all courts of appeals should follow the Third and Ninth Circuit's stance in allowing disparate impact claims to be cognizable under federal disability rights law. Until all courts of appeals do so, facially neutral policies may continue to have a disproportionate impact on people with disabilities, thus impeding the ability of people with disabilities to live fully with the same privileges as everyone else. The longer the courts take to allow disparate impact claims, the longer the goals and ideals of the disability community remain unrecognized. By making disparate impact claims cognizable under federal disability rights law, courts will bring the law closer to fully protecting individuals from discrimination based on disability.