
ARTICLE

THE AMERICANS WITH DISABILITIES ACT'S UNREASONABLE FOCUS ON THE INDIVIDUAL

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In this Article, I argue that the requirement to claim status as an “individual with a disability” to seek reasonable accommodations under the Americans with Disabilities Act undermines the advancement of structural reform that could promote broad conceptions of disability justice. I urge the reader to consider how the ADA could better advance disability justice if we focused on its ex ante requirements rather than the post hoc rules made possible by the statute’s reasonable accommodation requirement. It makes more sense to build a society under the expectation that people with a range of disabilities will be part of our community than make one-at-a-time retrofits after someone identifies themselves as disabled. One should not need to publicly claim disability to be treated with compassion and respect.

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INTRODUCTION

The term “individual” appears throughout the Americans with Disabilities Act (“ADA”).¹ The term “disability” is defined “with respect to an individual.”² In the employment section of the statute, the nondiscrimination rule forbids a covered entity from discriminating against a qualified “individual” based on disability.³ The strong emphasis on the individual under the ADA makes it notoriously difficult to bring class action lawsuits, because courts are unlikely to conclude that the numerosity and commonality requirements can be met for class certification.⁴

This emphasis on the individual is particularly problematic under the reasonable accommodation or modification rules under the ADA.⁵ Ironically, these rules are often heralded as the statute’s most distinctive and progressive innovation, as compared to other civil rights statutes.⁶ Because the concept of reasonable accommodation or modification provides an opportunity to provide a benefit to a person that an entity otherwise would not make

1 Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (amended 2008).

2 42 U.S.C. § 12102(1).

3 42 U.S.C. § 12112(a).

4 See FED. R. CIV. P. 23. To the extent the class certification is considered, the cases tend to be brought under Title III of the ADA to seek access to a private accommodation that is open to the public. Many of those claims for class certification fail. See, e.g., *Mielo v. Steak ‘N Shake Operations, Inc.*, 897 F.3d 467, 491 (3d Cir. 2018) (overturning the lower court’s grant of class certification because of a failure to satisfy numerosity and commonality requirements); *Shields v. Walt Disney Parks & Resorts US, Inc.*, 279 F.R.D. 529, 546 (C.D. Cal. 2011) (rejecting class certification for certain claims against the resort due to failure to meet the numerosity requirement); *Civ. Rts. Educ. & Enf’t Ctr. v. Hosp. Props. Tr.*, 867 F.3d 1093, 1106 (9th Cir. 2017) (upholding the district court’s denial of class certification for failing to satisfy the commonality requirement). Class action lawsuits are notoriously difficult to maintain under the ADA’s employment provisions. See Nathaniel Garrett, Note, *Hendricks-Robinson as Crowbar: Removing the Certification Bar to Disability-Based Employment Discrimination Class Actions*, 58 STAN. L. REV. 859, 862 (2005) (noting that federal courts typically hold that class certification is not appropriate for disability discrimination claims); see also Michael Ashley Stein & Michael E. Waterstone, *Disability, Disparate Impact, and Class Actions*, 56 DUKE L.J. 861, 864 (2006) (advocating a “pandisability theory” of commonality to make class actions a viable solution for disability discrimination claims).

5 The ADA uses the term “reasonable accommodations” in the employment section, and the phrase “reasonable modifications” in the public services and public accommodation sections. Compare 42 U.S.C. § 12112(b)(5)(A) (requiring reasonable accommodations by employers), with 42 U.S.C. § 12131(2) (requiring reasonable modifications by public entities), and 42 U.S.C. § 12182(2)(A)(ii) (requiring reasonable modifications by public accommodations).

6 See Pamela S. Karlan & George Rutherglen, *Disabilities, Discrimination, and Reasonable Accommodation*, 46 DUKE L.J. 1, 3 (1996) (describing a disabled plaintiff’s ability to “insist upon discrimination in their favor” as a novel, plaintiff-friendly feature of the ADA). Craig Konnoth notes the trend among civil rights advocates seeking to use “medical frames as a vehicle for civil rights claims,” including the ADA, rather than other civil rights laws. See Craig Konnoth, *Medicalization and the New Civil Rights*, 72 STAN. L. REV. 1165, 1168-70 (2020).

available to an employee, student, or client, Craig Konnoth argues that this concept should be used in other civil rights statutes or frameworks.⁷

But I will argue that the concept of reasonable accommodation or modification is often not progressive. After a problematic policy or structural feature has been put in place, it requires a disabled person to identify themselves as disabled to ask for the problematic feature to be modified or eliminated.⁸ Defendants, who put the policy or structure in place, get to avoid that request by arguing it is too expensive.⁹ If the plaintiff prevails, it often means that exactly one person has benefitted from a post hoc modification of the environment. While the installation of a permanent ramp or a curb cut is an important structural improvement,¹⁰ those are not the kinds of requests that are typically made by plaintiffs under the ADA at the workplace or in the university setting.¹¹ Instead, plaintiffs often want modifications to the environment which, if installed universally, would benefit everyone. For example, an ergonomic assessment of workplace conditions in jobs that involve repetitive motions can be sought on an individualized basis as a reasonable accommodation, but if instituted generally, would likely benefit a broad swath of the workplace.¹²

⁷ See Konnoth, *supra* note 6, at 1168 (“With the promise of racial justice tempered, if not broken, those seeking rights have looked elsewhere to frame their claims and, in so doing, themselves.” (footnote omitted)).

⁸ See 42 U.S.C. § 12112(b)(5)(A) (“[R]easonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability [are required].”).

⁹ See *id.* (requiring reasonable accommodation unless it “would impose an undue hardship” on the covered entity).

¹⁰ The ADA was enacted in 1990. Most of the reported cases involving curb cuts and ramps are often older cases because it is generally understood that paths of travel must be accessible under Titles II and III of the ADA. This would be an example of the ADA being effective in creating structural change that benefits a broad swath of society. People with shortness of breath or arthritic knees may benefit from ramps but might not consider bringing an ADA case for lack of access. Plaintiffs in cases involving ramps or curb cuts tend to use wheelchairs and are likely to self-identify as someone covered by the ADA. See, e.g., *Kinney v. Yerusolim*, 812 F. Supp. 547, 548 (E.D. Pa. 1993) (curb ramp litigation), *aff’d*, 9 F.3d 1067 (3d Cir. 1993); *Deck v. City of Toledo*, 76 F. Supp. 2d 816, 818 (N.D. Ohio 1999) (curb ramp litigation); *Schonfeld v. City of Carlsbad*, 978 F. Supp. 1329, 1337 (S.D. Cal. 1997) (curb cuts and ramps litigation); *Ability Ctr. of Greater Toledo v. City of Sandusky*, 385 F.3d 901, 902 (6th Cir. 2004) (curb cut litigation); *Wilson v. Pier 1 Imps. (U.S.) Inc.*, 439 F. Supp. 2d 1054, 1070 (E.D. Cal. 2006) (ramp and curb cut litigation); *Snyder v. Lady Slings the Booze, LLC*, 73 F. Supp. 3d 871, 876 (W.D. Ky. 2014) (ramp litigation).

¹¹ Accessible entrances are required under Title III of the ADA for all private accommodations that are open to the public. See 42 U.S.C. § 12183 (requiring new construction and alterations to be “readily accessible and usable by individuals with disabilities”). Thus, an employee or student is not likely to work at or attend an entity that has not already met the accessible entrance requirement. Their complaints are likely to focus on accommodation problems that are not already required by Title III of the ADA. See 28 C.F.R. § 36.403 (requiring attention to paths of travel to a facility when any major alteration occurs).

¹² See, e.g., *Amador v. SBE Ent. Grp., LLC*, No. 19-CV-06414-WHO, 2021 WL 2936735, at *1 (N.D. Cal. July 13, 2021) (finding there were triable issues of fact on an employee’s request for an

The reasonable accommodation remedy is only available to someone who meets the statutory definition of an individual with a disability.¹³ And, even if people meet the statutory definition of being disabled, they can only seek relief for those barriers that they have personally experienced.¹⁴ Thus, people who are deaf but not mobility impaired cannot challenge the lack of a wheelchair-accessible entrance at a restaurant even if that problem means the individual could not invite various friends to join them at the restaurant. In fact, a person who uses a wheelchair cannot even challenge a restaurant's interior inaccessibility if that person did not, in fact, make the futile gesture of seeking to enter the restaurant.¹⁵

ergonomic assessment in a cashier position where repetitive motion injuries were possible); *Savage v. Azar*, 301 F. Supp. 3d 114, 132 (D.D.C. 2018) (finding that the employer did not act in bad faith in addressing an employee's accommodation requests, including addressing the employee's request for an ergonomic evaluation). Because of the high injury rate for jobs that use scanners, the Occupational Safety and Health Administration ("OSHA") developed ergonomic standards in 2004, but they were not put into law by Congress. See David Tuller, *Grocery Store Clerks*, HEALTHDAY (Dec. 31, 2020), <https://consumer.healthday.com/encyclopedia/work-and-health-41/occupational-health-news-507/grocery-store-clerks-646461.html> [<https://perma.cc/WCE4-4DKD>] (listing OSHA's ergonomic recommendations for grocery store clerks).

¹³ One cannot make a claim for accommodation unless one first meets the definition of a qualified individual with a "disability." 42 U.S.C. § 12112 (a), (b)(5)(A).

¹⁴ See *Chapman v. Pier 1 Imps. (U.S.) Inc.*, 631 F.3d 939, 944 (9th Cir. 2011) (holding that plaintiffs may not obtain relief unless they allege or prove that they personally suffered discrimination as defined by the ADA); see also *Twede v. Univ. of Wash.*, 309 F. Supp. 3d 886, 898-99 (W.D. Wash. 2018) (holding that plaintiffs who used wheelchairs lacked standing with respect to claims concerning parking lots that they did not visit or desire to visit in the future); *Clark v. Burger King Corp.*, 255 F. Supp. 2d 334, 338, 343 (D.N.J. 2003) (holding that plaintiffs who used wheelchairs lacked standing to challenge access at restaurants they had not visited); *Steger v. Franco, Inc.*, 228 F.3d 889, 893 (8th Cir. 2000) (holding that disabled plaintiffs did not have standing to sue if they had not been in the building that was allegedly not ADA-compliant nor intended to enter the building in the future).

¹⁵ See, e.g., *Dalton v. NPC Int'l, Inc.*, 932 F.3d 693, 696 (8th Cir. 2019) (holding that plaintiff who used a wheelchair lacked standing to challenge accessibility of a restaurant's entrance and exits, signage, and service counter height because plaintiff never entered the building and thus did not suffer an injury in fact).

The concept of reasonable accommodation or modification assumes that being disabled is rare,¹⁶ so we can solve it one person at a time.¹⁷ But disability is neither an on-off switch nor rare.¹⁸ We are each at some place on the disability spectrum.¹⁹ Vision²⁰ and hearing²¹ impairments are common and become more likely as individuals age. High blood pressure or hypertension²² are common features of aging. Our processing speed slows over time.²³ Our

16 When the ADA was enacted in 1990, its first finding stated that there were approximately 43 million Americans who are disabled. 42 U.S.C. § 12101 (a)(1) (1990). With a 1990 population of 250 million, that meant that about seventeen percent of the population was considered disabled. See MARC J. PERRY AND PAUL J. MACKUN, POPULATION CHANGE AND DISTRIBUTION: CENSUS 2000 BRIEF (2001), <https://www2.census.gov/library/publications/decennial/2000/briefs/c2kbr01-02.pdf> [<https://perma.cc/U8T8-CDNU>]. The 1990 Act also included a finding that individuals with disabilities are a “discrete and insular minority.” 42 U.S.C. § 12101(a)(7) (1990). In *Sutton v. United Air Lines, Inc.*, Justice O’Connor’s majority opinion relied on the 43 million number to argue for a narrow construction of the term disability because “nonfunctional approaches to defining disability produce significantly larger numbers.” 527 U.S. 471, 487 (1999). Justice Ginsburg’s concurrence focused on the “discrete and insular minority” language and the 43 million figure to argue that “in no sensible way can one rank the large numbers of diverse individuals with corrected disabilities as a ‘discrete and insular minority.’” *Id.* at 494 (Ginsburg, J., concurring).

17 When the ADA was amended in 2008, it specifically provided that people who only met the definition of disability under the ADA by being “regarded as” disabled would not be entitled to reasonable accommodations. See 42 U.S.C. § 12102(1) (“The term ‘disability’ means . . . being regarded as having such an impairment”); see also 42 U.S.C. § 12201(h) (“A covered entity . . . need not provide a reasonable accommodation or a reasonable modification to policies, practices, or procedures to an individual who meets the definition of disability in section 12102(1) solely under subparagraph (C) of such section.”).

18 See Steve Barnett & Nicola du Toit, *Disability Is a Spectrum, Not a Binary*, 24 ACCESSIBILITY (Dec. 8, 2018), <https://www.24a11y.com/2018/disability-is-a-spectrum-not-a-binary> [<https://perma.cc/9M3N-ELVG>] (describing disability as a spectrum rather than a binary).

19 *Id.*

20 See *Fast Facts about Common Eye Disorders*, CTRS. FOR DISEASE CONTROL & PREVENTION (June 9, 2020), <https://www.cdc.gov/visionhealth/basics/ced/fastfacts.htm> [<https://perma.cc/53LT-X27J>] (“Approximately 12 million people 40 years and over in the United States have vision impairment.”); *Vision Loss and Age*, CTRS. FOR DISEASE CONTROL & PREVENTION (June 12, 2020), <https://www.cdc.gov/visionhealth/risk/age.htm> [<https://perma.cc/CT4N-7SGK>] (“The prevalence of blindness and vision impairment increases rapidly with age among all racial and ethnic groups, particularly after age 75.”).

21 See *Quick Statistics about Hearing*, NAT’L INST. OF HEALTH, NAT’L INST. ON DEAFNESS & OTHER COMMUNIC’N DISORDERS (Mar. 25, 2021), <https://www.nidcd.nih.gov/health/statistics/quick-statistics-hearing> [<https://perma.cc/8D3M-NYMP>] (“About 2 percent of adults aged 45 to 54 have disabling hearing loss. The rate increases to 8.5 percent for adults aged 55 to 64. Nearly 25 percent of those aged 65 to 74 and 50 percent of those who are 75 and older have disabling hearing loss.”)

22 There are approximately 116 million Americans with hypertension. *Facts about Hypertension*, CTRS. FOR DISEASE CONTROL & PREVENTION (July 12, 2022), <https://www.cdc.gov/bloodpressure/facts.htm> [<https://perma.cc/76GD-ZL8B>].

23 See Heather Walker, *What Causes the Brain to Have Slow Processing Speed, and How Can the Rate Be Improved?*, SCI. AM. (Mar. 1, 2014), <https://www.scientificamerican.com/article/what-causes-the-brain-to-have-slow-processing-speed-and-how-can-the-rate-be-improved> [<https://perma.cc/PK7N-88SP>] (“More important, slowed information processing affects almost every aging adult to some degree, and the line between normal and abnormal is fuzzy.”).

memory deteriorates over time.²⁴ We become more prone to falling as we age.²⁵ Our joints are likely to experience osteoarthritis.²⁶ Mental health disorders are common among older adults.²⁷ Of course, many people are born with some of these characteristics that the ADA calls an “impairment.”²⁸ For some people, these impairments are visible; for others, they are invisible.²⁹ Some people are not even aware of an impairment that they have, or may be reluctant to embrace that impairment as a “disability.”³⁰ That awareness, in turn, may be affected by other characteristics such as race, economic status, or gender.³¹ By making people claim disability status to receive an accommodation, we must assume they are aware of the disability itself, are willing to disclose that disability to others, and have the cultural, political, and economic capital to take advantage of this legal recourse.

If your goal is one of disability justice³²—hoping to proactively make society a better place for all historically disadvantaged members of society

²⁴ See also *Memory, Forgetfulness, and Aging: What's Normal and What's Not?*, NAT'L INST. OF AGING (Oct. 21, 2020), <https://www.nia.nih.gov/health/memory-forgetfulness-and-aging-whats-normal-and-whats-not> [<https://perma.cc/U9TE-BU54>] (explaining various types of memory loss associated with aging).

²⁵ See *Keep on Your Feet—Preventing Older Adult Falls*, CTRS. FOR DISEASE CONTROL & PREVENTION (Dec. 16, 2020), <https://www.cdc.gov/injury/features/older-adult-falls/index.html> [<https://perma.cc/4LQD-M833>] (“Falls are common and costly, especially among Americans age 65 and older.”).

²⁶ See generally A. Shane Anderson & Richard F. Loeser, *Why Is Osteoarthritis an Age-Related Disease?*, 24 BEST PRACS. & RSCH. CLINICAL RHEUMATOLOGY 15 (2010) (examining the relationship between osteoarthritis and aging).

²⁷ See Michael B. Friedman, *Meeting the Mental Health Challenges of the Elder Boom*, GERIATRIC MENTAL HEALTH ALL. OF N.Y., <https://networkofcare.org/library/Issues%20brief.pdf> [<https://perma.cc/X63M-VGBU>] (“The most common mental disorders of old age are anxiety and depression . . . Overall adults 65 and older are 50% more likely to commit suicide; this rises to 600% in white men 85 and older.”).

²⁸ 42 U.S.C. § 12102(1).

²⁹ The aesthetics of disability also trigger particular aesthetic and affective judgments about marked individuals. See Jasmine Harris, *The Aesthetics of Disability*, 119 COLUM. L. REV. 895, 933 (2019) (referring to “invisible” disabilities as those belonging to disabled people who can “assimilate or ‘cover’ more easily”).

³⁰ See, e.g., Jerome McCristal Culp, Jr., *Seventh Aspect of Self-Hatred: Race, Latcrit, and Fighting the Status Quo*, 55 FLA. L. REV. 425, 430-31 (2003) (discussing the author’s initial fear and apprehension obtaining a handicapped parking tag because of the assumptions that others might make about his disabilities).

³¹ *Id.* at 430 (explaining the author’s process of identifying with the community of people who used kidney dialysis or had diabetes, recognizing that both communities are significantly made up of Black, poor, and old people).

³² For a definition of “disability justice,” see Jasmine Harris, *Reckoning with Race and Disability*, 130 YALE L.J.F. 916, 934 (2021) (“[T]he emergence of Disability Justice as a movement and critical frame is a contemporary example of intersectionality. Organically grown from the experiences of people with multiple marginalized identities, disability justice is a powerful antisubordination lens that ‘marks a point of departure rather than a destination.’ That is, Disability Justice is a movement away from disability-rights frames; it is about the process of reframing more than any one end product.” (footnotes omitted)).

while recognizing that people have intersectional identities and often have limited access to legal resources—then the concept of reasonable accommodation is not progressive. A reactive framework that only goes into effect after one makes an individualized claim of being disabled is not likely to achieve structural reform. In fact, this framework may exacerbate existing structural inequities by allowing the comparatively privileged to become more privileged without attaining structural reform. If we think of disability as a social construct—the construction of steps rather than a ramp renders certain people disabled—then the only way to attain disability justice is to attain structural benefits. It makes no sense to have the ramp only come down from the front door when a person who has somehow registered as disabled seeks to make entry. The ramp should be universally present to make entry possible for all.

The consequences of the reasonable accommodation or modification framework are that legal remedies are rarely structural, and people must endure the adverse consequences of being “out” as a disabled person to avail themselves of these limited benefits. A review of the reasonable accommodation or modification case law³³ reveals how it is a neoliberal policy that is unlikely to achieve disability justice. Instead, as Marta Russell argues, we need government to subsidize disability access.³⁴ Moreover, we should insist that universal design³⁵ principles govern all policy decisions³⁶ so that

³³ See *infra* Part I.

³⁴ See MARTA RUSSELL, CAPITALISM & DISABILITY 51 (Keith Rosenthal ed. 2019) (“[S]ubsidies provide a government offset to business costs based on the notion that it is in the government’s (and society’s) interest to see that disabled people are employed.”).

³⁵ “Universal design” is a concept first developed in architecture to describe constructing buildings in a way that anticipates a building’s use by a wide range of disabled people. The term has been expanded to include a large variety of policies that can help provide access as part of the built-in structure rather than on an as-requested basis. See generally *What Is Universal Design?*, UNIVERSALDESIGN.COM, <http://universaldesign.com/what-is-ud/> [<https://perma.cc/H4NK-TDGB>] (explaining the concept of universal design); *About Universal Design for Learning*, CAST, <https://www.cast.org/impact/universal-design-for-learning-udl> [<https://perma.cc/74KM-TAC7>] (“University Design for Learning (UDL) is a framework to improve and optimize teaching and learning for all people . . .”). I have previously applied the concept to standardized testing. See Ruth Colker, *Test Validity: Faster is Not Necessarily Better*, 49 SETON HALL L. REV. 679, 689 (2019) [hereinafter Colker, *Test Validity*] (arguing that standardized testing should be changed to implement a universal design under which all test-takers are allowed to take the test in non-speeded conditions); see also Ruth Colker, *Towards Universal Design in the Classroom*, J. LEGAL EDUC. (forthcoming 2022) (manuscript at 18-21), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3889507 [<https://perma.cc/T84W-6EZF>] (discussing how the law school classroom can be made more accessible through the use of universal design features).

³⁶ We should also critically examine the concept of “universal design” to make sure it is reaching the broadest class of people possible. As with any concept, it may have race, class, gender, ableist or other biases. We should ask: Who is included within the concept of “universal”? How can it become more inclusive?

the concept of reasonable accommodation can become relatively obsolete.³⁷ Similarly, as Katie Eyer argues, a disability justice perspective requires “transforming social structures, building the environment to be accessible, and securing supportive resources required for full meaningful participation of all people with disabilities.”³⁸ A reactive framework that shifts all the costs onto the private sector, one person at a time, is unlikely to help us move towards disability justice in a capitalistic society in which the judiciary is likely to be sympathetic to the private sector’s cost arguments.³⁹ Reasonable accommodation, as a framework, offers little hope of disability justice.

Part I of this article will survey the statutory language and case law on the reasonable accommodation requirement. Part II will offer a critique of the reasonable accommodation framework, focusing on how that framework could do a better job of creating ex ante solutions. Part III will apply this revised model to COVID-19 policy changes for the benefit of the disability community. Part IV concludes by contrasting the reasonable accommodation approach under Title I of the ADA with Title III’s more structural approach for buildings and argues that we do not need to resign ourselves to the highly individualized framework of reasonable accommodation. The ADA could become a better tool for structural change.

I. THE REASONABLE ACCOMMODATION CONCEPT

A. *The Statute*

Before engaging in a critique of the reasonable accommodation or modification requirements,⁴⁰ it is important to understand what they entail in each of the ADA’s three titles. As with all facets of the ADA, one can only take advantage of these rules if one meets the definition of an “individual with a disability.”⁴¹ Although there are three ways that plaintiffs can establish

³⁷ I recognize that some accommodations may still be needed, but a review of the typical reasonable accommodation cases in Part I suggests that those kinds of requests are rare under the current legal regime. Most of the contested accommodations could have been already put into place under a proactive universal design approach in which we develop policies on the assumption that we live in a disability diverse society.

³⁸ Katie Eyer, *Claiming Disability*, 101 B.U. L. REV. 547, 556 (2021).

³⁹ See *infra* notes 80–82 and accompanying text.

⁴⁰ The legislative history of these requirements is beyond the scope of this paper, but the concepts were borrowed from regulations drafted to implement Section 504 of the Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355, 390-94 (1973). For an excellent discussion of this legislative history, see Jeffrey O. Cooper, *Overcoming Barriers to Employment: The Meaning of Reasonable Accommodation and Undue Hardship in the Americans with Disabilities Act*, 139 U. PA. L. REV. 1423, 1425-26 (1991).

⁴¹ See, e.g., 42 U.S.C. § 12112(a) (“No covered entity shall discriminate against a qualified individual on the basis of disability”); see also 42 U.S.C. § 12201(g) (“Nothing in this chapter

that they have a “disability,” the reasonable accommodation rule under Title I and the parallel reasonable modification rule under Titles II and III are only available to plaintiffs who meet the “is disabled”⁴² or has a “record of disability”⁴³ standards. Those rules are not available to individuals who meet the “regarded as” definition of disability.⁴⁴

If one has an impairment that meets the statutory definition of a disability, then one can file a claim of employment discrimination under Title I. The statute lists seven ways that individuals might claim that they have experienced “discrimination . . . on the basis of disability” under Title I.⁴⁵ Only one of the seven forms of discrimination implicates the concept of reasonable accommodation.⁴⁶ It is unlawful for an employer not to make “reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability . . . unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity.”⁴⁷ “Undue hardship” is defined as “an action requiring significant difficulty or expense.”⁴⁸

Title I crafts the reasonable accommodation rule as a post hoc modification that plaintiffs can seek only after disclosing their physical or mental impairments. The physical or mental impairments must be “known,” and the employee must make the request for an accommodation.

Title II provides the rules regarding nondiscrimination for public entities. Its general nondiscrimination rule incorporates the term “qualified individual with a disability.”⁴⁹ The term “qualified individual with a disability” is then defined to mean:

[A]n individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or

shall provide the basis for a claim by an individual without a disability that the individual was subject to discrimination because of the individual's lack of disability.”).

⁴² See 42 U.S.C. § 12102(1)(A) (defining “disability” as “a physical or mental impairment that substantially limits one or more major life activities of such individual”).

⁴³ See 42 U.S.C. § 12102(1)(B) (defining “disability” as having “a record of such an impairment”).

⁴⁴ See 42 U.S.C. § 12201(h) (“A covered entity . . . need not provide a reasonable accommodation or a reasonable modification to policies, practices, or procedures to an individual who meets the definition of disability in section 12101(1) of this title solely under subparagraph (C) of such section.”).

⁴⁵ 42 U.S.C. § 12112(b)(1)-(7).

⁴⁶ See 42 U.S.C. § 12112(b)(5) (stating that discrimination occurs where a reasonable accommodation is not made for an individual with a disability).

⁴⁷ 42 U.S.C. § 12112(b)(5)(A).

⁴⁸ 42 U.S.C. § 12111(10)(A); see 42 U.S.C. § 12111(10)(B) (listing factors to be considered in determining whether there is an undue hardship).

⁴⁹ 42 U.S.C. § 12132 (“Subject to the provisions of this subchapter, 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.”).

transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.⁵⁰

Title II is arguably more expansive than Title I in envisioning ways that disabled people might seek modifications to an environment to fully participate. Three types of requests are anticipated: (1) reasonable modification of rules, policies, or practices, (2) removal of barriers, or (3) the provision of auxiliary aids and services.⁵¹

As with Title I, one would expect these three kinds of requests to be made in a post hoc fashion, primarily benefiting the individual complainant. Barrier removal is the example that is most likely to have consequences beyond the individual plaintiff. If an entity were asked to remove the barrier of a step with a ramp, then one would expect the ramp to become a permanent feature of the structure.

And, as with Title I, the complainant can only seek improved access for themselves “by reason of such disability.”⁵² Thus, people who are deaf and request a sign language interpreter do not have standing to request improved wheelchair access or even an interpreter for events that they are not personally planning to attend.⁵³ Like Title I, there is also a cost defense to the nondiscrimination requirements. That defense is called an “undue financial burden” rather than an “undue hardship” but has an equivalent meaning.⁵⁴ Post hoc requests for removal of barriers that the covered entity created are subject to that defense,⁵⁵ even though it is usually inexpensive to design a building with accessible features.⁵⁶

Finally, Title III provides for the rules regarding nondiscrimination for public accommodation and services operated by private entities. Like Title I, it lists examples of what constitutes “discrimination.”⁵⁷ Unlike Title II, it separates out refusals to provide “reasonable modifications” from failure to provide “auxiliary aids” and failure to remove “architectural barriers” as

⁵⁰ 42 U.S.C. § 12131(2).

⁵¹ *Id.*

⁵² 42 U.S.C. § 12132.

⁵³ *See supra* note 14.

⁵⁴ *See* 42 U.S.C. § 12143(c)(4) (showing the use of the term “undue financial burden” for paratransit rules).

⁵⁵ For an excellent example of how the undue hardship defense arises after an entity ignores ex ante requests from an employee, see *Reyazuddin v. Montgomery County*, 789 F.3d 407, 409 (4th Cir. 2015).

⁵⁶ *See* RONALD L. MACE, GRAEME J. HARDIE & JAINE P. PLACE, ACCESSIBLE ENVIRONMENTS: TOWARD UNIVERSAL DESIGN 2 (1991), https://projects.ncsu.edu/ncsu/design/cud/pubs_p/docs/ACC%20Environments.pdf [<https://perma.cc/KL92-4TP5>] (“Universal and adaptable feature are generally no more expensive than traditional features if incorporated by the designer at the programming and conceptual stages.”).

⁵⁷ 42 U.S.C. § 12182(b)(2)(A).

separate kinds of discrimination.⁵⁸ With respect to the reasonable modification requirement, the available statutory defense is that making the requested modifications would “fundamentally alter the nature of” the good or service.⁵⁹ There is no cost defense mentioned in that provision because requests for modifications that are associated with a cost are handled under the auxiliary aid or removal of architectural barrier rules.⁶⁰ Those latter two rules provide an “undue burden” and “readily achievable” defense.⁶¹ “Readily achievable” is defined in terms of costs.⁶² Again, the rules are complaint driven—requiring the removal of architectural barriers on the assumption that the barriers were once put in place.

Outside the reasonable modification context, Title III, however, does provide the strongest structural requirements found in the ADA. It requires all new construction and substantial alterations to be accessible.⁶³ This is *not* an individually based rule; this is also *not* a reasonable modification requirement. This *is* a broad, structural mandate. While the success of this rule cannot be measured in terms of increased employment or higher earnings for disabled people, it can be measured in the success of a more accessible society. Is it perfect? No. I have argued elsewhere that its enforcement teeth are too limited.⁶⁴ But it is an available model of *ex ante* requirements. New construction and substantial alterations are expected to meet these requirements before the first disabled customer arrives to use a facility.⁶⁵ In this article, I will suggest ways that the reasonable accommodation rules could be harnessed to provide more effective structural remedies, building on this *ex ante* rule.

B. *The Case Law*

There is not adequate space to do a survey of all the reasonable accommodation case law to show how it has been generally ineffective in promoting disability justice. This section will advance two arguments: (1) that the reasonable accommodation case law has tended to favor more privileged employees and (2) that it has been typically ineffective at promoting structural change. Nonetheless, I do not suggest that these limitations are inevitable. More structural, *ex ante* solutions are available under the ADA.

⁵⁸ *Id.*

⁵⁹ 42 U.S.C. § 12182(b)(2)(A)(ii).

⁶⁰ 42 U.S.C. § 12182(b)(2)(A)(iii)–(iv).

⁶¹ *Id.*

⁶² 42 U.S.C. § 12181(9).

⁶³ 42 U.S.C. § 12183.

⁶⁴ See Ruth Colker, *ADA Title III: A Fragile Compromise*, 21 BERKELEY J. EMP. & LAB. L. 377, 379 (2000) (arguing that Title III of the ADA has been “less successful than was originally hoped”).

⁶⁵ 42 U.S.C. § 12183.

Three of the leading accommodation cases can help further that argument—*Vande Zande v. State of Wisconsin Department of Administration*,⁶⁶ *US Airways, Inc. v. Barnett*,⁶⁷ and *PGA Tour, Inc. v. Martin*.⁶⁸ The *Vande Zande* case was about a 35-year-old woman who was paralyzed from the waist down due to a spinal cord tumor.⁶⁹ She used a wheelchair and experienced pressure sores that were exacerbated if she had to sit for long periods of time.⁷⁰ The court described her work for the housing division of the Wisconsin Department of Administration as one “of a clerical, secretarial, and administrative-assistant character.”⁷¹ Before she brought the lawsuit, the employer had modified the bathrooms, had a step ramped, purchased adjustable furniture for her, paid for half of the cost of a cot so she could lie down to avoid the pressure ulcers, adjusted her schedule so she could attend medical appointments, and modified plans for a locker room so she could use it.⁷² Despite these accommodations, Vande Zande requested two further accommodations. She requested permission to work full-time (rather than part-time) from home when she had a bout of pressure ulcers that required her to stay home.⁷³ The employer denied this request and made her take medical leave for less-than-full-time hours during this time period.⁷⁴ She also wanted the kitchenette modified so that she could reach the sink and counter.⁷⁵ The employer denied this request and said she could use the bathroom facility for a sink and counter.⁷⁶

The Seventh Circuit affirmed the district court’s summary judgment decision in favor of the defendant on both reasonable accommodation issues.⁷⁷ With respect to working full-time at home for an eight week period, the court said: “Most jobs in organizations public or private involve team work under supervision rather than solitary unsupervised work, and team work under supervision generally cannot be performed at home without a substantial reduction in the quality of the employee’s performance.”⁷⁸ The decision in this

⁶⁶ 44 F.3d 538 (7th Cir. 1995).

⁶⁷ 535 U.S. 391 (2002).

⁶⁸ 532 U.S. 661 (2001).

⁶⁹ *Vande Zande*, 44 F.3d at 543.

⁷⁰ *Id.*

⁷¹ *Id.* at 544.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* at 545.

⁷⁶ *Id.* at 546.

⁷⁷ *Id.* at 545-46.

⁷⁸ *Id.* at 544.

case has been cited extensively over the years for courts to reach the conclusion that working from home is presumptively an unreasonable request.⁷⁹

With respect to the kitchenette, the Seventh Circuit said that “access to a particular sink, when access to an equivalent sink, conveniently located, is provided, is not a legal duty of an employer,”⁸⁰ even though the estimated cost of altering the relevant sink was only \$150.⁸¹ Other courts have cited *Vande Zande* to justify a refusal to put in place rather inexpensive accommodations.⁸²

The underlying message is that *Vande Zande* is too greedy an employee—she should be satisfied that the employer met the basic accessibility rules for all structures (a ramped entrance, accessible bathrooms, and an accessible locker room). She should be satisfied with the offer to work part-time at home and use her medical leave to cover the missing hours. In addition, the employer offered some no- or low-cost flexibility—schedule changes to accommodate doctor’s appointments and *half* the cost of a cot. But *Vande Zande*, we are reminded, is a mere clerk or secretary. She can’t expect to work from home on a regular basis and she can’t expect to use a sink and counter in a kitchenette rather than in a bathroom that we are told is “conveniently located.”⁸³ Despite the bacteria-laden nature of bathrooms, and the challenges of traveling with liquids while using a wheelchair, the court impliedly expected her to fill a cup in a bathroom and take it to a kitchenette to make coffee or tea (assuming she could even reach the appliances).

But the more important point is the way the Seventh Circuit conceptualized the reasonable accommodation requirement:

And if the employer, because it is a government agency and therefore is not under intense competitive pressure to minimize its labor costs or maximize the value of its output, or for some other reason, bends over backwards to accommodate a disabled worker—goes further than the law requires—by allowing the worker to work at home, it must not be punished for its

⁷⁹ See, e.g., *Mason v. Avaya Commc’ns, Inc.*, 357 F.3d 1114, 1120 (10th Cir. 2004) (quoting Judge Posner’s conclusion that teamwork performed at home tends to lead to a reduction of quality); *EEOC v. Ford Motor Co.*, 782 F.3d 753, 765 (6th Cir. 2015) (finding that there was no evidence in the record to support the plaintiff’s assertion that a highly interactive job could be performed at home); *Rauen v. U.S. Tobacco Mfg. Ltd. P’ship*, 319 F.3d 891, 896 (7th Cir. 2003) (relying on *Vande Zande* for the proposition that “a home office is rarely a reasonable accommodation”).

⁸⁰ *Vande Zande*, 44 F.3d at 546.

⁸¹ *Id.*

⁸² See, e.g., *Swain v. Wormuth*, No. 4:20-CV-04143-SLD-JEH, 2021 WL 4497138, at *7-8 (C.D. Ill. Sept. 30, 2021) (describing the employer’s refusal to put door openers on the door closest to the restroom that plaintiff preferred to use). The *Vande Zande* rule is arguably supported by the Supreme Court’s decision in *US Airways, Inc. v. Barnett*, 535 U.S. 391, 401 (2002), in which the Court interpreted the “reasonable accommodation” rule to not “demand action beyond the realm of the reasonable” and dismissed the argument that the accommodation needs to be “effective.”

⁸³ *Vande Zande*, 44 F.3d at 546.

generosity by being deemed to have conceded the reasonableness of so far-reaching an accommodation.⁸⁴

Notice the insulting way that the Court promotes an ableist perspective. We are told that requests for accommodation make an employer less competitive so we should only expect government employers to grant those kinds of requests because they do not need to worry about competition. We are also told that an employer who has complied with clear legal requirements about access—ramping, bathrooms, and locker rooms—has “ben[t] over backwards” to accommodate “a” disabled worker. She is the rare person who is disabled so that the ramp and bathroom are only for her personal benefit. There is no sense of the structural benefits to having accessible workplaces so that the next employee who uses a wheelchair can easily enter the workplace. In other words, it is a so-called cost–benefit analysis in which the conception of “benefits” is narrowly defined.

Ironically, Vande Zande wants to be accommodated so she can work *more*, not less. She wants a computer at home to allow her to complete her work even when she is experiencing pressure ulcers.⁸⁵ She wants to use the kitchenette for her beverages and meals rather than travel down to the bathroom for a sink or counter.⁸⁶

Let’s also think about the reasonable accommodation process from the perspective of the plaintiff, Vande Zande, and the “claiming disability” aspect of the reasonable accommodation rules.⁸⁷ Vande Zande used a wheelchair. Her disability was therefore public. But not everyone might have been aware that she experienced pressure ulcers as a result of spending extended periods of time sitting in a wheelchair. Although traveling to work may have been difficult for her in an environment in which curb cuts are often faulty or nonexistent, handicapped parking spaces may be rare, the price of a handicapped-equipped vehicle might be beyond her means, and public transportation may not be particularly accessible or convenient,⁸⁸ those challenges were not what led her to request telecommuting. Her request was a result of her pressure ulcers and consequent need to lie down rather than sit. Did she really want everyone at work to know about her medical challenges? Or, if they knew that her request for an accommodation was what caused the change in the workplace rules, would they necessarily understand

⁸⁴ *Id.* at 545.

⁸⁵ *Id.*

⁸⁶ *Id.* at 546.

⁸⁷ See *supra* notes 29–31 and accompanying text.

⁸⁸ For a general discussion of the accessibility challenges that are commonplace, see Abigail Abrams, *30 Years After a Landmark Disability Law, the Fight for Access and Equality Continues*, TIME (July 23, 2020, 9:03 AM), <https://time.com/5870468/americans-with-disabilities-act-coronavirus> [https://perma.cc/HA84-UJSG].

why she made the request? Might they have stereotypically just thought she was too lazy to deal with the challenges of commuting? Will there actually be any “inclusionary” benefits from a mandatory outing of one’s medical condition to others? Yet the ADA always requires employees to disclose their disability to an employer to receive a reasonable accommodation. Existing disability law does not give employees any choice about that disclosure. Stronger ex ante rules and expectations could give employees more options in whether to disclose to anyone at all. The kitchenette should have been built in an accessible fashion and all employees should have had an opportunity to work from home, so that Van Zande never would have had to make those requests at all.

The *US Airways, Inc. v. Barnett*⁸⁹ case reinforces the message that low-level employees will rarely win in reasonable accommodation cases. This case was about Robert Barnett, an employee who injured his back while working in a cargo handling position at US Airways.⁹⁰ He wanted to take advantage of the ADA’s reasonable accommodation rule that allows an employee to be reassigned to a vacant position by being permanently reassigned to the mailroom.⁹¹ The Court found it was lawful to deny that request because “it would not be reasonable in the run of cases that the assignment in question trump the rules of a seniority system.”⁹² By contrast, Justices Souter and Ginsburg argue in dissent that Barnett, who had already held the mailroom position for two years, showed his request was reasonable and the burden should have shifted to US Airways to claim that a modification of the noncontractual seniority system to keep him in the mailroom would have posed an undue hardship.⁹³ As with *Vande Zande*, a cost-free solution (staying in his current position on a permanent basis) could not rise to the level of a reasonable accommodation for a low-level employee. The reasonable accommodation rule did not create structural, positive rights. It allowed a low-level employee to become unemployed after sustaining a back injury at the employer’s workplace.

The sharp contrast to these cases is the one brought by Casey Martin against the PGA Tour.⁹⁴ The Supreme Court describes him as a “talented golfer.”⁹⁵ A google search suggests that he may have earned about \$200,000 in

⁸⁹ 535 U.S. 391 (2002).

⁹⁰ *Id.* at 394.

⁹¹ *Id.*

⁹² *Id.* at 403.

⁹³ *Id.* at 423 (Souter, J., dissenting).

⁹⁴ *PGA Tour, Inc. v. Martin*, 532 U.S. 661 (2001).

⁹⁵ *Id.* at 667.

2018 as a professional golfer.⁹⁶ Because of a degenerative circulatory disorder that made it difficult for him to walk for extended periods of time, Martin sought a modification to the PGA Tour rules so that he could ride a golf cart.⁹⁷ The district court had found that Martin “easily endures greater fatigue even with a cart than his able-bodied competitors do by walking,”⁹⁸ and the Supreme Court affirmed the lower court decisions in his favor.⁹⁹ In dissent, Justices Scalia and Thomas described the Court’s analysis as providing an “individualized analysis that is the Court’s last step on a long and misguided journey.”¹⁰⁰ While the dissent thought that such a highly individualized analysis was inappropriate under the ADA, the majority clearly thought otherwise. They envisioned the analysis as appropriately being a one-person-at-a-time analysis under which a highly compensated plaintiff could attain a modification that would not necessarily be made available to others.¹⁰¹ Not surprisingly, other golfers have not benefitted from Martin’s victory.¹⁰²

Could these cases have been conceptualized in ways that would have created more effective structural changes? The *Vande Zande* case is the easiest. From our post-COVID lens, we can see that workplaces should be expected to have more flexible work arrangements so that all employees can be given the opportunity to work from home.¹⁰³ Vande Zande’s request was denied as a post hoc modification to the work environment. Theoretically, she could have made her telework reasonable accommodation request when she was first hired, anticipating that she might need to work from home when her ulcers flared up. If the employer denied her request, she could have brought a case

⁹⁶ See *Casey Martin*, PGA TOUR <https://www.pgatour.com/players/player.20445.casey-martin.html> [<https://perma.cc/YH66-3NA4>] (scroll down to “performance,” select “career,” and see that Martin earned \$206,874 in the four seasons that he competed).

⁹⁷ *PGA Tour, Inc. v. Martin*, 532 U.S. at 669.

⁹⁸ *Martin v. PGA Tour, Inc.*, 994 F. Supp. 1242, 1252 (D. Or. 1998).

⁹⁹ *PGA Tour, Inc. v. Martin*, 532 U.S. at 690.

¹⁰⁰ *Id.* at 703 (Scalia, J., dissenting).

¹⁰¹ *Id.* at 688 (“Congress intended that an entity like the PGA not only give individualized attention to the handful of requests that it might receive from talented but disabled athletes . . . but also carefully weigh the purpose, as well as the letter, of the rule before determining that no accommodation would be tolerable.”).

¹⁰² The only other golfer who appears to have benefitted from the *Martin* ruling was Ford Olinger, who had also made a request to use a golf cart to compete in the qualifying rounds of the 1998 United States Open. He lost in the Seventh Circuit, but the Supreme Court vacated that decision in light of the *Martin* decision. See *Olinger v. U.S. Golf Ass’n*, 532 U.S. 1064, 1064 (2001) (granting certiorari and vacating the Seventh Circuit’s decision).

¹⁰³ See, e.g., Michelle Singletary, *Remote Work Should Be a Permanent Employee Benefit*, WASH. POST (Aug. 17, 2021, 5:54 PM), <https://www.washingtonpost.com/business/2021/08/17/work-from-home-permanently> [<https://perma.cc/DG3E-XJFT>] (arguing that allowing employees to work from home should be a permanent workplace policy).

based on a denial of a reasonable accommodation request to a job applicant.¹⁰⁴ Ideally, her request would be granted through a change in general workplace policies rather than as merely an accommodation for her, individually.

To devise a broader structural solution in Barnett's case would require more factual development. For example, one would want to know how Barnett came to be injured in the first place. Could the workplace have had auxiliary aids to assist with lifting activities so that injuries were less likely?¹⁰⁵ Could employees with lifting restrictions seek the availability of such auxiliary aids for all employees before such injuries occur? If the ADA is not a tool to require the use of such tools, maybe agencies, such as the Occupational Safety and Health Administration, could be approached to impose such a requirement.¹⁰⁶ Just as it is more expensive to remove steps to install a ramp, than to install a ramp at the beginning of a construction project, it is more expensive to accommodate injured employees than to avoid the injuries through auxiliary aids at the outset. But, as we have seen with the COVID-19 crisis in the United States, it is often harder to suggest protective measures than to implement remedial measures after illness has occurred.¹⁰⁷ The American neoliberal mindset, which focuses on individuals as the primary unit of analysis, tends to shun structural precautionary measures over post hoc remedies.¹⁰⁸

¹⁰⁴ 42 U.S.C. § 12112(b)(5)(A) (defining discrimination as failing to make a reasonable accommodation to the known physical or mental limitations of an otherwise qualified applicant or employee).

¹⁰⁵ Josh Smith, *Here to Assist*, AVIATION PROS (Dec. 19, 2019), <https://www.aviationpros.com/gse/baggage-cargo/baggage-handling-equipment-accessories/article/21114922/here-to-assist> [<https://perma.cc/NMU2-ML2M>] (“Work performed on airport ramps around the world can be difficult and physically taxing. In order to keep ground handlers from suffering injuries, the GSE industry is constantly evolving and creating new equipment to keep users safe.”).

¹⁰⁶ See generally *About OSHA*, OCCUPATIONAL SAFETY & HEALTH ADMIN., U.S. DEP'T OF LAB., <https://www.osha.gov/aboutosha> [<https://perma.cc/982W-JYN6>] (“With the Occupational Safety and Health Act of 1970, Congress created the Occupational Safety and Health Administration (OSHA) to ensure safe and healthful working conditions for workers by setting and enforcing standards and by providing training, outreach, education and assistance.”).

¹⁰⁷ See Benjamin Mueller, *They Shunned Covid Vaccines but Embraced Antibody Treatment*, N.Y. TIMES (Sept. 18, 2021), <https://www.nytimes.com/2021/09/18/health/covid-antibody-regeneron.html> [<https://perma.cc/76SJ-YLNA>] (describing how individuals who are skeptical of the COVID-19 vaccine are opting into an experimental therapeutic treatment).

¹⁰⁸ Development of this point is beyond the scope of this paper, but it can help explain the difficulty in the U.S. of attaining a political consensus on proactive structural steps to avoid environmental calamity while there tends to be consensus about sending money to areas immediately harmed by environmental tragedies. The Flint water crisis is an example of a problem that did not get systemically addressed until a water crisis tragedy occurred. See T.R. Witcher, *How the Flint Water Crisis Has Impacted US Lead-Pipe Removal Efforts*, AM. SOC'Y OF CIV. ENG'RS (Aug. 4, 2021), <https://www.asce.org/publications-and-news/civil-engineering-source/civil-engineering-magazine/article/2021/08/how-the-flint-water-crisis-has-impacted-us-lead-pipe-removal-efforts> [<https://perma.cc/4N47-CAQ4>].

C. *The Costs*

In this section, I will examine reasonable accommodation at the workplace from one more vantage point—its purported cost. There are some disagreements in the literature about the costs of reasonable accommodations. Supporters of the requirement sometimes acknowledge it may be expensive,¹⁰⁹ but more typically, downplay its costs.¹¹⁰ Opponents of the requirement emphasize that the reasonable accommodation concept conflicts with principles of formal equality¹¹¹ and is an unfunded redistributive scheme.¹¹² Thus, ADA advocates often find themselves in the position of wanting to downplay the typical costs of reasonable accommodation because ADA opponents often highlight those costs as a reason to criticize the statute.¹¹³

While I do not dispute the available evidence that reasonable accommodations are typically inexpensive,¹¹⁴ I believe that evidence also

¹⁰⁹ For example, Stewart Schwab and Steven Willborn argue that the concept of reasonable accommodation is distinctive and powerful and should be imported into other civil rights laws. Stewart J. Schwab & Steven L. Willborn, *Reasonable Accommodation of Workplace Disabilities*, 44 WM. & MARY L. REV. 1197, 1201 (2003). While they recognize that “many and perhaps most accommodations are cheap,” Schwab and Willborn do not rely on that fact as a necessary predicate to defending the concept of reasonable accommodation. *Id.* at 1253. They acknowledge that some accommodations are expensive and that “the better approach is to accept the hard preferences of the ADA and to admit frankly that they are similar to, and perhaps even stronger than, ‘affirmative action,’ and then to articulate clearly and forcefully the justifications for the ADA’s preferences.” *Id.*

¹¹⁰ See, e.g., Eyer, *supra* note 38, at 556-57 (reviewing the costs of claiming disability but nevertheless arguing that “there are reasons to think that even the partial benefits that greater claiming of disability identify may afford are important”); Peter David Blanck, *The Economics of the Employment Provisions of the Americans with Disabilities Act: Part I—Workplace Accommodations*, 46 DEPAUL L. REV. 877, 901-03 (1997) (emphasizing the “low direct costs of accommodations for employees with disabilities”).

¹¹¹ See, e.g., Stephen F. Befort & Holly Lindquist Thomas, *The ADA in Turmoil: Judicial Dissonance, the Supreme Court’s Response, and the Future of Disability Discrimination Law*, 78 OR. L. REV. 27, 75 (1999) (conceptualizing reasonable accommodation as a form of affirmative action); John J. Donahue III, *Employment Discrimination Law in Perspective: Three Concepts of Equality*, 92 MICH. L. REV. 2583, 2586 (1994) (criticizing the reasonable accommodations requirement as “constructed equality”).

¹¹² See, e.g., Samuel Issacharoff & Justin Nelson, *Discrimination with a Difference: Can Employment Discrimination Law Accommodate the Americans with Disabilities Act?*, 79 N.C. L. REV. 307, 314-18 (2001) (“The use of the formal discrimination model allowed Congress to disclaim the clear cost consequences of the burden of accommodation it shifted onto employers. The ‘unfunded mandate’ quality of the obligation was magnified by the undefined scope of the ensuing responsibility to accommodate.” (footnotes omitted)).

¹¹³ See, e.g., Passman & Kaplan, P.C., *Employers Exaggerate the Cost of Disability Accommodations*, GILBERT EMP. L., P.C. (Mar. 5, 2019), <https://www.passmanandkaplan.com/blog/2019/03/employers-exaggerate-the-cost-of-disability-accommodations> [<https://perma.cc/83SB-VWES>] (claiming that employers deny accommodation requests based upon preconceptions of prohibitively high costs).

¹¹⁴ See Eyer, *supra* note 38, at 603 (“One of the most stubborn forms of disability bias is the presumption that a claim of disability identity is inherently a claim on resources: that all disabled people are ‘takers’ and perhaps, as legal scholar Doron Dorfman puts it, ‘fakers’ as well. Even among well-meaning progressives, there is often an assumption that disability must be inherently bound

shows the problems with the post hoc reasonable accommodation model. A close examination of the low-cost evidence suggests that it reflects the ineffective and class-biased limitations of the reasonable accommodation framework. It shows how the framework has been an ineffective mechanism to achieve structural disability justice.

The most common support for the low cost premise is data collected by the Job Accommodation Network (“JAN”),¹¹⁵ which is a service funded by the United States Department of Labor.¹¹⁶ JAN found that fifty-six percent of the accommodations that employers reported providing to employees cost nothing; the median one-time expenditure as reported by the employer was \$500.¹¹⁷ Thus, the JAN data arguably supports the proposition that most disabled employees need accommodations that impose little or no cost.

The JAN report is an odd place to look to determine how many employees receive accommodations because JAN’s focus (as its name suggests) is how to assist employers in providing accommodations for disabled employees. It describes itself as “the leading source of free, expert, and confidential guidance on job accommodations and disability employment issues.”¹¹⁸ Employers reach out to JAN when they have already decided to consider granting an accommodation request.¹¹⁹ More importantly, as we will see below, the JAN report does not actually provide much evidence on the typical cost of reasonable accommodation requests.

First, let’s examine what the JAN report does *not* tell us. It does not tell us what percentage of employees request accommodations or what percentage of those requests are approved. It only describes the cost of the accommodations that were requested and provided, when the employer also consulted JAN. It is not a comprehensive report at all. It is based on surveys of a mere 3,369 employers with only 625 surveys completed since October 21,

up with claims of access to resources or accommodations.” (footnotes omitted)); Blanck, *supra* note 110, at 902 (finding that the average direct cost of an accommodation from 1993 to 1996 was \$45); Helen A. Scharz, D.J. Hendricks & Peter Blanck, *Workplace Accommodations: Evidence Based Outcomes*, 27 *WORK* 345, 348, 352 (2006) (relying on JAN data to conclude that the median cost of accommodations was \$600 while also cautioning that employers may “substantial[ly] overestimate the disability-related accommodation costs by between \$300 and \$400”).

¹¹⁵ The frequent citation to JAN is not surprising because the EEOC itself cites to JAN to support its claim that reasonable accommodations tend to be inexpensive. *See, e.g.*, Regulations To Implement the Equal Employment Provisions of the Americans With Disabilities Act, as Amended, 74 *Fed. Reg.* 48431, 48434 (Sept. 23, 2009) (codified at 29 C.F.R. pt. 1630) (“An examination of Job Accommodation Network data from 1992 to 1999 showed a median cost of \$250 . . .”).

¹¹⁶ *Benefits and Costs of Accommodation*, JOB ACCOMMODATION NETWORK (Oct. 21, 2020), <https://askjan.org/topics/costs.cfm> [<https://perma.cc/RQD8-E5DH>].

¹¹⁷ *Id.*

¹¹⁸ *About JAN*, JOB ACCOMMODATION NETWORK, <https://askjan.org/about-us/index.cfm> [<https://perma.cc/HD32-YSUX>].

¹¹⁹ *Id.*

2019.¹²⁰ This small snapshot of approved requests tells us nothing about whether accommodation requests are common or not. No data is collected for requests that were rejected. No information is provided about whether the employee had to use legal recourse to attain these accommodations. We only know that the requested and *accepted* accommodations for this subgroup of employees was associated with zero or little cost.

Second, the survey is biased in favor of employers who accessed JAN's services. Remarkably, "[n]inety-eight percent of the 3,201 employers surveyed who responded reported that JAN understood their needs. In addition, 94% stated the information JAN sent them met their needs. And 100 % of employers stated they would use JAN again!"¹²¹ While it is nice to know that so many employers found JAN helpful, the reported satisfaction rate suggests that the employers responding to the JAN survey are not random. Employers who seek out JAN's resources may be employers who are predisposed to providing accommodations that will assist their employees. Of those employers, we simply know that they often provided quite inexpensive accommodations. Their satisfaction may reflect their lack of commitment to broad structural change; they are pleased to learn that they can offer very modest accommodations and still comply with the law.

Third, the information provided by JAN regarding the employees who have benefitted clearly demonstrates that this sample is skewed towards high-income employees. Whereas JAN reported average salaries around \$61,000 for the accommodated employees,¹²² the annual median income of households that include any working-age people with disabilities is \$43,300 as compared to \$68,700 for households without any disabled members.¹²³ That household income figure, of course, does not mean that the disabled member of the household earned \$43,300—only that the household earned that much money.¹²⁴ The U.S. Census reports that the 2019 median earnings for men in 2019 was \$57,456 and for women was \$47,299.¹²⁵ Whereas JAN reported bachelor's degree rates of 58% for the accommodated group,¹²⁶ the overall percentage of disabled people with a bachelor's degree or higher is 14.4%

¹²⁰ JOB ACCOMMODATION NETWORK, WORKPLACE ACCOMMODATIONS: LOW COST, HIGH IMPACT 2 (2020), <https://askjan.org/publications/Topic-Downloads.cfm?pubid=962628> [<https://perma.cc/HXD4-5EBF>].

¹²¹ *Id.* at 4 (emphasis in original removed).

¹²² *Id.* at 3.

¹²³ RUSSELL, *supra* note 34, at 173.

¹²⁴ *Id.*

¹²⁵ Jessica Semega, Melissa Kollar, Emily A. Shrider & John Creamer, *Income and Poverty in the United States: 2019*, U.S. CENSUS BUREAU (Sept. 15, 2020), <https://www2.census.gov/library/publications/decennial/2000/briefs/c2kbr01-02.pdf> [<https://perma.cc/92ZQ-UM56>].

¹²⁶ JOB ACCOMMODATION NETWORK, *supra* note 120, at 3.

(compared to 33.8% for those without a disability).¹²⁷ Thus, if the JAN data is generalizable to the entire workplace, higher earning employees are more likely to request and receive accommodations.

Fourth, the JAN report suggests that employers are unlikely to choose accommodations that make structural changes at the workplace. JAN provides six examples of beneficial low-cost accommodations in their report:

- Purchase of a foot mouse, speech to text software, and a foot mat for workers with hand impairments;
- Turning off one AC vent and diffusing another vent away from an individual's cubicle who was sensitive to cold;
- Providing a private office space for employee having difficulty concentrating in shared office space;
- Allowing an employee to work from home who needed frequent breaks due to a kidney disorder;
- Allowing an employee who had anxiety to bring a service animal to work; and
- Requesting that employees look at an employee with a hearing impairment before speaking and follow up verbal communication with an email to employee.¹²⁸

These accommodations, which apparently went to relatively privileged members of the workforce, would have provided positive benefits to only the covered employee. They are not the equivalent of a ramp or curb cut that can benefit many people.

In the first example, the employer would not be required to install speech to text software in every employee's computer or offer a foot mouse to each employee. Further, other employees would not receive any kind of ergonomic assessment to determine if the mouse configuration was causing them a repetitive injury.

In the second example, the ventilation is modified to benefit one employee. No survey is conducted of the comfort of employees working in cubicles. One can easily imagine that the temperature and ventilation is uncomfortable for other employees. In the era of COVID-19, we have learned that ventilation systems are often poor and cause viruses to easily spread in a

¹²⁷ RUSSELL, *supra* note 34, at 173; *see also* Rabia Belt & Doron Dorfman, *Reweighing Medical Civil Rights*, 72 STAN. L. REV. ONLINE 176, 182 (2020) ("It needs to be emphasized that despite the fact that the ADA was put in place three decades ago, Americans with disabilities remain undereducated and underemployed. Poverty rates are higher among Americans with disabilities than among their nondisabled peers." (footnotes omitted)).

¹²⁸ JOB ACCOMMODATION NETWORK, *supra* note 120, at 5.

workplace.¹²⁹ Rather than a solution for one employee, a ventilation analysis for the workplace would offer more structural improvement.

With respect to the third accommodation, no consideration is given to the pervasiveness of employees finding it difficult to concentrate in a shared work environment. One can also imagine that the cubical structure of the work environment poses many difficulties for many employees. Again, a structural assessment of the workplace would provide more long-term benefits for employees rather than solving the distraction problem for one employee.

The fourth accommodation request, of course, became universal for many employees during COVID-19.¹³⁰ But, in this example, it appears that working from home would only be provided as a disability request. No consideration is given to why the office as a work site is the default expectation.

With respect to the fifth accommodation request, many employees would likely find themselves less anxious and more productive at work if they could bring a dog to work.¹³¹ By limiting this kind of claim to those with “service animals,” we create a potential for fraud and a false dichotomy between disabled and nondisabled people.

The final accommodation example goes to one employee rather than instituting a cultural shift that should occur for all employees. Why do we assume that people can easily hear us when we are not even facing them while speaking? Further, communication misunderstandings can often be avoided for all employees by putting requests or summaries of conversations in writing.

The use of the accommodation frame allows us to continue to conceive of these kinds of requests as special, disability-related issues for those who choose to claim disability status and make the request in a post hoc fashion. If we want to achieve disability justice, then we need to change social policies on as broad a basis as possible. In the next section, I will suggest how the ADA could be used to achieve more structural change.

¹²⁹ See *Protecting Workers: Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace*, OCCUPATIONAL SAFETY & HEALTH ADMIN., U.S. DEP’T OF LAB., <https://www.osha.gov/coronavirus/safework> [<https://perma.cc/XW2P-QMQA>] (noting the danger of virus spread indoors as compared to outdoors and providing recommendations for ventilation in workplaces).

¹³⁰ See Kim Parker, Juliana Menasce Horowitz & Rachel Minkin, *COVID-19 Pandemic Continues to Reshape Work in America*, PEW RSCH. CTR. (Feb. 16, 2022), <https://www.pewresearch.org/social-trends/2022/02/16/covid-19-pandemic-continues-to-reshape-work-in-america> [<https://perma.cc/GZ9V-EXKM>] (detailing that the majority of workers with jobs that can be done from home are teleworking, even as workplaces have become available).

¹³¹ See Sophie Susannah Hall & Daniel Simon Mills, *Taking Dogs into the Office: A Novel Strategy for Promoting Work Engagement, Commitment, and Quality of Life*, 6 FRONTIERS IN VETERINARY SCI. 1, 14 (2019), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6513973> [<https://perma.cc/QH45-DXAD>].

II. CRITICAL EXAMINATION OF REASONABLE ACCOMMODATION REQUIREMENT

A. Not a "Lottery Ticket"

The law review literature is full of discussions about the reasonable accommodation requirement under the ADA.¹³² While much of the literature praises the requirement as an important source of "affirmative" rights which have otherwise been recently disfavored under civil rights law,¹³³ some authors suggest that the reasonable accommodation rule is so powerful and effective that it should be incorporated into other kinds of civil rights laws.¹³⁴ Few authors who advocate for disability rights focus on the problematic features of the reasonable accommodation framework.

While one can understand civil rights activists, who probably have not studied the courts' reasonable accommodation cases in depth, concluding that the reasonable accommodation framework should be incorporated into other civil rights statutes, close examination of this concept, as discussed above, suggests otherwise. For employees, the reasonable accommodation process is likely to merely be an occasion for some highly paid employees to be able to take advantage of additional benefits while lower paid employees attain no structural benefits.¹³⁵ These cases are not about ramps or curb cuts that would benefit a broad swath of disabled employees. They are about low- or no-cost individualized solutions. Nonetheless, I believe it is important to use all aspects of the ADA, including the reasonable accommodation rules, to find ways to create structural, ex ante changes that benefit as many people as possible.

As Rabia Belt and Doron Dorfman have explained, reasonable accommodations are "not a lottery ticket, winnings from which can be used as one wishes. They are intended to be tailor-made to individual needs and,

¹³² See Samuel R. Bagenstos, "Rational Discrimination," *Accommodation, and the Politics of (Disability) Civil Rights*, 89 VA. L. REV. 825, 828-30 n.9 (2003) (listing dozens of articles that discuss the distinction between antidiscrimination requirements and reasonable accommodation requirements).

¹³³ Writing in 1996, when the ADA was relatively new, Pamela Karlan and George Rutherglen praised the reasonable accommodation requirement found in the ADA as an exciting innovation in civil rights law. Karlan & Rutherglen, *supra* note 6, at 3. They praised it for insisting "upon discrimination in [disabled people's] favor." *Id.* at 3.

¹³⁴ Kimani Paul-Emile applauded the reasonable modification rules under the ADA as superior to the doctrine available under other civil rights laws. See Kimani Paul-Emile, *Blackness as Disability?*, 106 GEO. L.J. 293, 337-38 (2018). She argues that "[i]n contrast to colorblindness in the race context, the modification requirement constitutes mandated remedial action and is the primary means through which disability law makes real its antidiscrimination command." *Id.* at 326. Craig Konnoth agrees with Paul-Emile that disability claims can be more "equality enhancing" than claims brought under other civil rights laws because they mandate accommodations, do not require individuals to prove invidious intent, and do not allow reverse discrimination claims. Konnoth, *supra* note 6, at 1218-20.

¹³⁵ See *supra* Section I.B.

although they often can be suited to others, they are not one-size-fits-all.”¹³⁶ Citing the JAN report, they observe: “[r]ather than broad-scale social reform, accommodations in reality are more about changes such as providing small-bore items like ergonomic chairs.”¹³⁷ While I agree with Belt and Dorfman’s description of the status of accommodation case law, I believe we can push, as I will discuss below, to use the ADA to seek *ex ante* solutions that provide structural change rather than be satisfied with what they call “small-bore” post hoc changes.

One critique of the reasonable accommodation rules is worth close consideration because it reflects an unwarranted assumption that we need to conceive of reasonable accommodations as only constituting one-person-at-a-time remedies. Mark Kelman argues that only a subgroup of disabled people should be entitled to accommodations as a matter of “right” because “those seeking accommodation are making claims on real social resources that compete with all other social-resource claimants; all such claims cannot be met.”¹³⁸ Without citation to any studies, he says:

Requiring *universal* accommodation would obviously bankrupt whatever entities are required to pay the costs of accommodation: To pay all workers without regard to the input costs of making them produce as much as unsubsidized workers produce in order to ‘include’ everyone in their preferred setting is not a feasible strategy.¹³⁹

He asks the rhetorical question: “What would it be like to have ‘disability law’ that made no reference at all to whether the plaintiff is ‘disabled?’”¹⁴⁰ as if the answer is obvious—we would want to limit claims for modifications to rules, policies, or physical structures to those who allege they are disabled.

Kelman conceives of the goals of the ADA upside down. He asserts that providing accommodations “would not generate positive externalities,”¹⁴¹ because he only conceives of the benefits of accommodations in a highly individualized way. For example, he posits that it would be inappropriate to require an employer to “purchase[] equipment that would help either the injured or the weak lift more”¹⁴² if someone brought a claim to seek a modification of a heavy lifting requirement. Similarly, he uses the example of a “sight-impaired attorney” whose need for a reader would be an “inexorably

¹³⁶ Belt & Dorfman, *supra* note 127, at 182.

¹³⁷ *Id.*

¹³⁸ Mark Kelman, *Market Discrimination and Groups*, 53 STAN. L. REV. 833, 837 (2001).

¹³⁹ *Id.* at 858.

¹⁴⁰ *Id.* at 857.

¹⁴¹ *Id.* at 884.

¹⁴² *Id.* at 881.

fairly individuated”¹⁴³ accommodation, as if “readers” are always people rather than simple screen reading software that can benefit a wide range of people.

In fact, universal design *is* an important goal of civil rights law, and we should be seeking universal availability of equipment to assist with heavy lifting and screen reader software as our *ex ante* design so that people do *not* have to identify as disabled to enter a workplace or place of public accommodation that is readily accessible to them. I agree that we should ask, “[w]hat would it be like to have ‘disability law’ that made no reference at all to whether the plaintiff is ‘disabled,’”¹⁴⁴ to request that buildings are designed, and policies are created with the assumption that disabled people are everywhere.¹⁴⁵

B. Standardized Testing

The arena of standardized testing is an excellent area in which to see the limitations of a reasonable accommodation perspective. That is a particularly appropriate example because Mark Kelman (along with Gillian Lester) have written about disability accommodations in the standardized testing area.¹⁴⁶ The scope of our disagreement highlights the problem with Kelman’s traditional one-person-at-a-time conception of accommodations. Kelman and Lester argue that people with learning disabilities should not be considered to have valid “civil rights claims.”¹⁴⁷ They argue that these claims merely find “genesis in the grass-roots mobilization of largely white, middle-class parents in the late 1950s and early 1960s to gain resources for what they perceived as their ‘underachieving’ children.”¹⁴⁸ Consequently, courts and educational entities should not take seriously their claims for accommodations such as extended time, because they are unduly dismissive of the genuine need for people with learning disabilities to need extended time. I am receptive to their arguments that enforcement of the ADA can be a source of increased class privilege.¹⁴⁹ Nonetheless, I disagree with their central premise that there

¹⁴³ *Id.* at 884.

¹⁴⁴ *Id.* at 857.

¹⁴⁵ For a provocative explication of this point, see Ari Ne’eman, *What if Disability Rights Were for Everyone?*, N.Y. TIMES (Oct. 1, 2021), <https://www.nytimes.com/2021/10/01/opinion/disability-rights-biden-us.html> [<https://perma.cc/5KBC-VQG5>].

¹⁴⁶ See MARK KELMAN & GILLIAN LESTER, *JUMPING THE QUEUE: AN INQUIRY INTO THE LEGAL TREATMENT OF STUDENTS WITH LEARNING DISABILITIES* 6 (1997) (arguing that the society must make decisions about which students deserve additional resources).

¹⁴⁷ *Id.* at 226.

¹⁴⁸ *Id.* at 4.

¹⁴⁹ See RUTH COLKER, *DISABLED EDUCATION: A CRITICAL ANALYSIS OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT* 6 (2013) (arguing that the Individuals with Disabilities Education Act may have “increased educational inequity” by exacerbating inequitable allocation of resources).

is no such thing as a learning disability that should be considered a disability under federal law.¹⁵⁰

Fundamentally, I disagree with their premise that a universal design solution would not be available to help overcome those class biases and help us better attain disability justice. Instead of requiring one student at a time to come forward to request extended time accommodations, we should require testing entities to justify the time limits themselves under Title III of the ADA.¹⁵¹ As I discuss in a previous article, Section 12189 of Title III of the ADA, which is a type of reasonable accommodation requirement, states that testing entities must “offer alternative accessible arrangements” for disabled test takers and *also* requires testing entities to “offer such examinations . . . in a place and manner accessible to persons with disabilities.”¹⁵² If the examinations were offered under accessible conditions, such as ample time to complete the questions, then test takers would not need to make special requests for extended time. Further, the solution would be *ex ante* (built into the test design) rather than *post hoc* (requiring expensive disability claims). I doubt that testing entities could demonstrate that they need to make these exams highly speeded. A nonspeeded version of these exams may even provide better information on applicants’ abilities.¹⁵³ Further, from a disability justice lens, such an approach would make standardized testing more equitable for a range of people, including racial minorities, women, people with low socioeconomic status, older applicants, and applicants with disabilities.¹⁵⁴ In other words, the ADA can be used as a tool to require *ex ante* universal design principles that benefit a broad swath of society.

This argument is particularly relevant today as the College Board has announced that it will begin administering a new SAT in 2024 that is shorter (two hours rather than three hours) and entirely digital.¹⁵⁵ The College Board

¹⁵⁰ See KELMAN & LESTER, *supra* note 146, at 35 (“It is not obvious to us that there is some class of persons with a unique anatomical or physiological brain structure that causes difficulties in phonological functioning that lead them to read less well than one would expect given their general cognitive abilities.”).

¹⁵¹ See Colker, *Test Validity*, *supra* note 35, at 686-87 (arguing that the Title VII test validity principles of the Civil Rights Act of 1964 should be imported into the ADA).

¹⁵² 42 U.S.C. § 12189.

¹⁵³ For example, suppose two students take an exam. They both answer 80 of the 100 questions correctly. Student one answered every question. Student two answered 80 questions and left the last twenty blank. The teacher has no way to properly compare the two students because she has no information about student two’s mastery of the concepts tested on the last twenty questions. I therefore argue that everyone should be given ample time to complete an exam so we can measure their knowledge rather than their speed. Colker, *Test Validity*, *supra* note 35, at 729-30.

¹⁵⁴ *Id.* at 689.

¹⁵⁵ See Stephanie Saul, *Put Down Your No. 2 Pencils. Forever.*, N.Y. TIMES (Jan. 25, 2022), <https://www.nytimes.com/2022/01/25/us/sat-test-digital.html> [<https://perma.cc/K3MP-8BVJ>]

proclaimed that the new version of the SAT “will be easier to take, easier to give, and more relevant.”¹⁵⁶ Notice what they did not seek to argue—that it will be fairer to students from a disability justice perspective.

What can we learn from applying the ex ante disability justice framework suggested by this article?¹⁵⁷ The primary lesson is that the disability justice community should be joining with other progressive communities to argue for the *elimination* of all standardized testing for admission to college rather than merely helping students request post hoc accommodations on this deeply flawed exam.

This test has two fundamental flaws. First, the use of a purely digital test format will exacerbate the digital divide that already hurts lower income students.¹⁵⁸ Despite College Board’s claims that it will seek to level the digital playing field,¹⁵⁹ the reality is that students will still get flustered when they lose internet connection (or when they have none to begin with), and when they do not know how to use the loaner-for-the-day, while other students take their tests with expensive personal devices of their own.

(detailing changes to the college admission test made in response to criticisms, the adoption of test-optional regimes in many colleges and universities, and declining numbers of test takers).

¹⁵⁶ See Elissa Nadworny, *Starting in 2024, U.S. Students Will Take the SAT Entirely Online*, NPR (Jan. 25, 2022, 9:00 AM), <https://www.npr.org/2022/01/25/1075315337/new-digital-sat-college-admissions-test-requirement-2024-us> [<https://perma.cc/2B27-86SZ>] (describing the changes as the culmination of a reckoning with the relevance of college entrance exams).

¹⁵⁷ This argument has benefited from collaboration with Marci Lerner Miller, Partner, Potomac Law Group, PCCL, and co-counsel for plaintiffs in *Smith v. Regents of the University of California*. See Teresa Watanabe, *UC Must Immediately Drop Use of the SAT and ACT for Admissions and Scholarships*, *Judge Rules*, L.A. TIMES (Sept. 1, 2020, 6:58 PM), <https://www.latimes.com/california/story/2020-09-01/uc-may-not-use-the-sat-or-act-for-admissions-scholarship-decisions-for-now-judge-rules> [<https://perma.cc/7MA7-3EAX>] (describing the lawsuit brought against the UC system, contending that its standardized test requirement unlawfully discriminates against disabled, low-income, multilingual, and other minority students, and the resulting injunction).

¹⁵⁸ See Valerie Strauss, *College Board Says New Online AP Tests are Going Well – But Students Report Big Problems*, WASH. POST (May 15, 2020), <https://www.washingtonpost.com/education/2020/05/15/college-board-says-new-online-ap-tests-are-going-well-students-report-big-problems> [<https://perma.cc/85YN-T5R3>] (describing criticisms from students and parents who argue online testing is not fair to students who have no access to computers, internet, or quiet work spaces); Emily A. Vogels, *59% of U.S. Parents with Lower Incomes Say Their Child May Face Obstacles in Schoolwork*, PEW RSCH. CTR. (Sept. 10, 2020), <https://www.pewresearch.org/fact-tank/2020/09/10/59-of-u-s-parents-with-lower-incomes-say-their-child-may-face-digital-obstacles-in-schoolwork> [<https://perma.cc/8CD6-82QH>] (finding that the switch to remote learning during COVID-19 disproportionately disadvantaged lower income students who lacked the same digital access as their higher income peers).

¹⁵⁹ See Chris Quintana, *SAT Is Going Digital: Exam Will Be Online-Only, Shorter as Colleges Ditch Standardized Tests*, USA TODAY (Jan. 25, 2022, 7:30 PM), <https://www.usatoday.com/story/news/education/2022/01/25/sat-test-digital-online-college-board/9200482002> [<https://perma.cc/SD2S-KLDS>] (stating that the College Board vice president touted the changes as making the test as “flexible and accessible as possible”).

Second, the digital test is shorter because it relies on adaptive testing.¹⁶⁰ Students get different test questions on subsequent sections based on how they performed on earlier questions. Computer-adaptive testing has never been validated for neurodiverse students¹⁶¹ and has been a cause for concern among test developers for over a decade.¹⁶²

Even if some of these problems could be solved for individual students through post hoc accommodations, this article argues that the disability justice community should work with other progressive communities to eliminate the use of this and other standardized entrance exams for admissions purposes. That approach has been successful in California. The University of California eliminated the use of SAT and ACT scores when a judge ruled that students with disabilities had not been able to equally access the tests during the pandemic, and further questioned whether these exams were even reliable predictors of college performance for these students.¹⁶³ Without the use of test scores, the UC system then admitted its most diverse class in its history, despite being barred by California law from using race as a factor in admissions.¹⁶⁴ On January 26, 2022, California State University (CSU), the nation's largest public university system, indicated that it would be completing elimination of the use of the SAT and ACT in admissions for all twenty-three of its campuses.¹⁶⁵ One can anticipate a similar improvement in diversity.

¹⁶⁰ *Id.*

¹⁶¹ Neurodiverse students often benefit from different test-taking strategies that might not work effectively on adaptive testing. See Nicole Ofiesh, Erin Moniz & Joan Bisagno, *Voices of University Students with ADHD About Test-Taking: Behaviors, Needs, and Strategies*, 28 J. POSTSECONDARY EDUC. & DISABILITY 109, 111-12 (2015) (detailing various test-taking strategies used by students with ADHD among university students).

¹⁶² See WALTER D. WAY, JON. S. TWING, WAYNE CAMARA, KEVIN SWEENEY, STEPHEN LAZER & JOHN MAZZEO, SOME CONSIDERATIONS RELATED TO THE USE OF ADAPTIVE TESTING FOR THE COMMON CORE ASSESSMENTS 2, 6 (2010), <https://www.ets.org/s/commonassessments/pdf/AdaptiveTesting.pdf> [<https://perma.cc/2NUU-BXCS>] (describing benefits and challenges of the use of adaptive testing in statewide K-12 testing); Letter from CAST to Smaller Balanced Assessment Consortium 6-7 (June 12, 2013), https://www.cast.org/binaries/content/assets/common/publications/statements/cast_smarter_balanced_accommodations_draft_6.12.13.pdf [<https://perma.cc/J89J-9KM4>] (raising numerous accessibility concerns with computer adaptive testing, including a lack of research on its viability, down-leveling of test items, and restrictions on allowing test-takers to review or change their responses).

¹⁶³ See Watanabe, *supra* note 157 (describing the lawsuit and preliminary injunction, which noted that the pandemic has “greatly exacerbated” barriers to access faced by students with disabilities).

¹⁶⁴ See Scott Jaschik, *U of California Gets More Diverse Without SATs*, INSIDE HIGHER ED (July 26, 2021), <https://www.insidehighered.com/admissions/article/2021/07/26/u-california-admits-more-diverse-freshman-class-without-sats> [<https://perma.cc/UX7A-87HM>] (“Students from underrepresented racial and ethnic groups comprise 43 percent of admitted California freshmen at University of California campuses this year, the highest proportion . . . in UC history.”).

¹⁶⁵ See Jocelyn Gecker, *California State University Prepares to Drop SATs and ACTs*, ASSOCIATED PRESS (Jan. 26, 2022), <https://apnews.com/article/college-admissions-education-california-higher-education-university-of-california-7bc4e990f8389ec53ecaad2c96c7d821> [<https://perma.cc/58LM-44FX>] (discussing the change).

To be clear, this improvement in diversity occurs through the *elimination* of consideration of standardized test scores for admissions purposes, not by making them optional. The available evidence suggests that test-optional practices benefit wealthier students who are more likely to submit test scores.¹⁶⁶

As occurred in the California state system, disability law can be a sword to push for the elimination of standardized exams. Federal regulations do not permit the administration of unvalidated admissions tests that have a disproportionate impact against students with disabilities.¹⁶⁷ California¹⁶⁸ and New York¹⁶⁹ mandate the disclosure of SAT questions and answers, and both require evidence of validity and fairness for different student groups. As Sylvia A. Alva, Executive Vice Chancellor of Academic and Student Affairs at CSU, has indicated: “The test really remains the same,”¹⁷⁰ so CSU plans to continue with its plans to ditch the SAT despite the College Board’s changes to the test.

With the new SAT, College Board has the burden of proving that “shorter is better,” and not just for some students. Because it is likely to fail that test, universities should not be permitted to use this not-so-new remake of a flawed admissions test. An ex ante disability justice perspective highlights that conclusion.

III. COVID-19 LESSONS

In the previous sections, I argue that ex ante solutions to disability access problems are more structural and effective than post hoc solutions that are developed one person at a time after the barrier has already been put in place. In this section, I will use the K–12 masking controversy to show the range of possible responses under the ADA from more limited post hoc requests to broader ex ante structural changes. While I concede that attaining structural relief is challenging, I also think it is important that we recognize how the strategy that we employ will dictate the breadth of the possible outcome.

The story should be familiar to us. The CDC recommended masking in indoor spaces, including K-12 facilities to protect the public from the spread

¹⁶⁶ See Janet Lorin, *Wealthy Teens Tout Test Results Colleges No Longer Require*, BLOOMBERG WEALTH (Jan. 24, 2022, 9:00 AM), <https://www.bloomberg.com/news/articles/2022-01-24/wealthy-teens-tout-test-results-colleges-no-longer-require> [<https://perma.cc/YGF3-BKW3>] (noting that while schools have said students are not required to submit scores, it remains unclear what role test results play in admission decisions).

¹⁶⁷ 34 C.F.R. § 104.42(b)(2) (2021).

¹⁶⁸ See CAL. EDUC. CODE § 99153 (West 2022) (requiring submission of each version of the standardized test and corresponding answers).

¹⁶⁹ N.Y. EDUC. LAW § 342 (McKinney 2022) (requiring submission of the test questions and answers, as well as the rules for converting raw scores).

¹⁷⁰ Teresa Watanabe, *CSU Strongly Indicates It Will Permanently Scrap SAT, ACT Admission Requirement*, L.A. TIMES (Jan. 27, 2022, 5:00 AM), <https://www.latimes.com/california/story/2022-01-27/cal-state-university-moves-to-drop-sat-admission-requirement> [<https://perma.cc/V7FK-ZBUU>].

of COVID-19.¹⁷¹ In addition, the CDC published a study demonstrating that “[c]ounties without school mask requirements experienced larger increases in pediatric COVID-19 cases rates after the start of school compared with counties that had school mask requirements.”¹⁷² Further, studies demonstrated that a lack of classroom access during the first eighteen months of the pandemic disproportionately negatively affected the educational experiences of disabled children along with poor and minority children.¹⁷³ In addition, the federal government made funds available to states under the American Rescue Plan Act of 2021, which could be used to make schools safe during the COVID-19 pandemic.¹⁷⁴ Much of this funding had not yet been spent when schools reopened to in-person teaching in the fall of 2021.¹⁷⁵ Meanwhile, when schools reopened in the summer and fall of 2021, the vaccine was only available to children who were at least 12 years old,¹⁷⁶ leaving K-8 schools with few protections if mask mandates could not be put in place.

Despite those medical recommendations and educational findings, various state governors and state legislatures implemented policies to forbid schools from imposing mask mandates.¹⁷⁷ State governors and agencies

¹⁷¹ See *Guidance for Covid-19 Prevention in K-12 Schools*, CTRS. FOR DISEASE CONTROL & PREVENTION (Jan. 13, 2022), <https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/k-12-guidance.html> [<https://perma.cc/UQ2S-EZK3>] (“CDC recommends universal indoor masking by all[] students (ages 2 years and older), staff, teachers, and visitors to K-12 schools, regardless of vaccination status.”).

¹⁷² Samantha E. Budzyn, Mark J. Panaggio, Sharyn E. Parks, Marc Papazian, Jake Magrid & 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, 1377, <https://www.cdc.gov/mmwr/volumes/70/wr/mm7039e3.htm> [<https://perma.cc/UA6G-LUT7>].

¹⁷³ See OFF. OF CIV. RTS., U.S. DEP’T OF EDUC., *EDUCATION IN A PANDEMIC: THE DISPARATE IMPACTS OF COVID-19 ON AMERICA’S STUDENTS*, at iv (2021), <https://www2.ed.gov/about/offices/list/ocr/docs/20210608-impacts-of-covid19.pdf> [<https://perma.cc/2EXL-GXGD>] (observing disproportionate effects on students of color, non-native English speakers, students with disabilities, and LGBTQ+ students).

¹⁷⁴ See American Rescue Plan Act of 2021, Pub. L. No. 117-2, § 2001–2014, 135 Stat. 4, 19-29 (2021) (providing funding to address the learning loss and the social and emotional needs of children disproportionately impacted by COVID-19, including students with disabilities).

¹⁷⁵ Cory Turner, *Schools Are Getting Billions in COVID Relief Money. Here’s How They Plan to Spend It*, NPR (Sept. 1, 2021, 9:41 AM), <https://www.npr.org/2021/09/01/1033213936/survey-school-superintendents-federal-covid-relief-money-spending> [<https://perma.cc/Z2L6-ZFC6>].

¹⁷⁶ See Will Stone, Allison Aubrey & Joe Palca, *A Shot Against COVID for Kids Under 12—Your Questions Answered*, NPR (Aug. 18, 2021, 5:01 AM), <https://www.npr.org/sections/health-shots/2021/08/18/1027035486/covid-vaccine-children-under-12-your-questions-answered> [<https://perma.cc/ZL7S-BXSZ>] (“With the U.S. in the grips of a frightening surge of coronavirus cases, many parents are understandably eager to know when the COVID-19 vaccine will finally be available for children under 12.”).

¹⁷⁷ See Kimberlee Speakman, *These States Have Banned Schools From Requiring Covid Vaccination and Masks*, FORBES (July 16, 2021, 4:09 PM), <https://www.forbes.com/sites/kimberleespeakman/2021/07/16/these-states-have-banned-schools-from-requiring-covid-vaccination-and-masks/?sh=1183e76d23aa> [<https://perma.cc/KG8L-HXDQ>] (reporting that Florida,

threatened to cut all funds to schools that insisted on imposing mask mandates¹⁷⁸ and would not permit federal money to be used to implement mask mandates.¹⁷⁹

Disability rights advocates have attempted a range of legal arguments to make school children safer in states resisting masking requirements. I would like to consider these strategies from the most narrow—individual requests for reasonable accommodations, to the most broad—structural arguments for national masking mandates. We will see that disability rights arguments have even been difficult in the traditional individual post hoc setting but that there is some reason to believe that broad structural remedies are cognizable.

On July 30, 2021, Florida Governor Ron DeSantis issued an executive order requiring the Florida Department of Health and the Florida Department of Education to take actions that “protect parents’ right to make decisions regarding masking of their children in relation to COVID-19.”¹⁸⁰ Accordingly, on August 6, 2021, those departments issued rules stating that “the school must allow for a parent or legal guardian of the student to opt-out the student from wearing a face covering or mask.”¹⁸¹

In response to the Florida rules, parents of sixteen children with disabilities filed suit in federal court on August 6, 2021, seeking injunctive relief.¹⁸² The children attended a variety of public schools in Florida.¹⁸³ They argued “[t]he Governor’s most recent executive order preventing school

Tennessee, Alabama, Arkansas, Oklahoma, Montana, Arizona, and Utah have barred schools and universities from requiring vaccinations, while Vermont, South Carolina, Iowa, Arkansas, Oklahoma, Texas, Arizona, and Utah have banned schools from mandating masks). In a more recent article, The Pew Trust reported that eight states (Arizona, Arkansas, Iowa, Oklahoma, Florida, South Carolina, Texas and Utah) have enacted laws or issued executive orders prohibiting school districts from requiring students to wear masks. Christine Vestal, *10 States Have School Mask Mandates While 8 Forbid Them*, PEW (Aug. 10, 2021), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2021/08/10/10-states-have-school-mask-mandates-while-8-forbid-them> [<https://perma.cc/5WSP-MJZN>].

¹⁷⁸ See, e.g., Sarah Mervosh, *Florida Withholds Money from School Districts Over Mask Mandates*, N.Y. TIMES (Sept. 10, 2021), <https://www.nytimes.com/2021/08/30/us/florida-schools-mask-mandates.html> [<https://perma.cc/2SU9-KVPE>] (reporting that the Florida Department of Education withheld funds from two school districts that issued mask mandates).

¹⁷⁹ See Letter from Miguel A. Cardona, Sec’y of Educ., U.S. Dep’t of Educ., to Ron DeSantis, Governor of Fla. & Richard Corcoran, Comm’r of Educ., Fla. Dep’t of Educ. (Aug. 13, 2021), <https://oese.ed.gov/files/2021/08/Letter-from-Secretary-Cardona-FL-08-13-21.pdf> [<https://perma.cc/4AGL-EW2V>] (alleging that the Florida Department of Education made none of the American Rescue Plan dollars available to schools to safely reopen, opting instead to prioritize withholding funds from schools that adopted mask policies consistent with CDC guidance).

¹⁸⁰ Fla. Exec. Order 21-175 (July 30, 2021), <https://www.flgov.com/wp-content/uploads/2021/07/Executive-Order-21-175.pdf> [<https://perma.cc/3U3C-22YL>].

¹⁸¹ 47 Fla Admin. Reg. 3650, 3651 (Aug. 9, 2021).

¹⁸² See Complaint at 2-5, *Hayes v. DeSantis*, No. 1:21-CV-22863, 2021 WL 4236698, at *1 (S.D. Fla. Sep. 15, 2021).

¹⁸³ *Id.* at 10 (“The children whose parents are plaintiffs are all children who have an individualized education plan or 504 plan in the school districts in the counties in which they live.”).

districts from putting protections in place for students, such as a mask mandate or testing requirements, combined with the refusal to extend funding for distance learning, has tied the hands of school districts from acting and made it impossible for school districts to provide students with disabilities a free appropriate public education in the least restrictive environment.”¹⁸⁴ The district court denied the request for a preliminary injunction, finding that the plaintiffs were required to exhaust their remedies under the Individuals with Disabilities Education Act and that the plaintiffs had not demonstrated irreparable injury.¹⁸⁵

A similar lawsuit was filed in federal court in Texas after the Governor announced his policy prohibiting mask mandates.¹⁸⁶ The lawsuit asked for a temporary restraining order that requires the Governor and the named districts to cease violations of federal disability law by allowing local school districts and public health authorities to require masks for its students and staff as they determine is necessary.¹⁸⁷ In July 2021, the Texas Governor issued an emergency order contending again that he has the legal authority to make decisions about mask mandates.¹⁸⁸ On December 1, 2021, the Fifth Circuit refused to reject the Governor’s decision.¹⁸⁹

Such lawsuits have had some success in other states, although appeals are often pending.¹⁹⁰ But, even if successful, what would these lawsuits

¹⁸⁴ *Id.* at 12.

¹⁸⁵ *Hayes v. DeSantis*, No. 1:21-CV-22863-KMM, 2021 WL 4236698 at *5, *13 (S.D. Fla. Sep. 15, 2021).

¹⁸⁶ See Complaint at 2, *E.T. v. Abbott* (W.D. Tex. filed Aug. 17, 2021) (challenging Executive Order GA-38 issued by Texas Governor Greg Abbott on the grounds of violations of the ADA and Section 504 of the Rehabilitation Act).

¹⁸⁷ *Id.* at 36.

¹⁸⁸ See *Texas Supreme Court Sides with Governor Abbott, Blocks San Antonio Schools’ Mask Mandate*, CBS DFW (Aug. 26, 2021, 1:52 PM), <https://dfw.cbslocal.com/2021/08/26/1844exas-supreme-court-gov-abbott-blocks-san-antonio-schools-mask-mandate> [https://perma.cc/NV86-YVPT] (“In an emergency order issued last month, Abbott reaffirmed his ban on mask mandates by any state, county or local government entity.”).

¹⁸⁹ See *E.T. v. Paxton*, 19 F.4th 760, 771 (5th Cir. 2021) (granting an emergency motion that allowed the Texas Attorney General to enforce the Texas Governor’s executive order and staying a district court’s injunction that had previously prohibited enforcement); see also *Ritter v. State of Oklahoma*, No. CV-2021-1918, 2021 WL 4164453, at *1-2 (D. Okla. Sept. 8, 2021) (granting a temporary injunction to prevent the state from imposing sanctions on school district with mask mandates but also requiring school districts to allow parents to seek exemptions).

¹⁹⁰ Arizona’s ban on mask mandates was struck down by a state court. See *Ariz. Sch. Bds. Ass’n v. State of Arizona*, No. CV2021012741, 2021 WL 4487632, at *9 (Ariz. Super. Ct. Sept. 27, 2021) (striking down law as violating the state’s single subject rule). The Arizona Supreme Court declined to reinstate the rule. Bob Christie, *Arizona High Court Allows School Mask Ban Ruling to Stand*, ASSOCIATED PRESS (Sept. 29, 2021), <https://apnews.com/article/coronavirus-pandemic-business-courts-education-arizona-b8e5f33c32162e96d9e88fd6b89029cf> [https://perma.cc/WTG4-2ZVU]. Iowa’s ban on school mask mandates was temporarily struck down in September. See *ARC of Iowa v. Reynolds*, No. 4:21-CV-00264, 2021 WL 4166728, at *13 (S.D. Iowa Sept. 13, 2021) (granting a temporary restraining order against the enforcement of an Iowa statute banning mask mandates).

accomplish? They would remove a state barrier at the local school district level to imposing a mask mandate for the benefit of the individual plaintiffs named in the lawsuit. Because the school districts have not joined these lawsuits as parties, it does not necessarily impose a mask requirement on the local school district. It also does not mandate any policy at the state level. Children who do not attend the school districts named in the lawsuit would still be subject to the governor's prohibition on mask mandates. Even so, these lawsuits were unusual because they were filed on behalf of many children, not a single child.¹⁹¹ They were filed under the ADA and Section 504 of the Rehabilitation Act of 1973, rather than the Individuals with Disabilities Education Act, so that they could have broader scope than an individualized accommodation for one child.

The lack of success of these lawsuits, however, shows that it is hard to obtain relief even on an individualized basis. After losing his case because his clients did not seek to exhaust their remedies, the plaintiffs' lawyer in the Florida litigation "pointed out that it takes at least 75 days for administrative preconditions to be exhausted in Florida, meaning children with disabilities who would be seriously injured or killed by a COVID-19 infection would be unable to return safely to their school."¹⁹² In other words, the traditional one-student-at-a-time remedy is slow and ineffective.

These inherent problems with federal disability law—its slow, one-person-at-a-time, post hoc approach—supports a call for more ex ante structural approaches. While private plaintiffs, acting as private attorney generals may have difficulty achieving such structural reform, the federal government does have that authority. We should insist that they use it.

The Biden administration has inched towards this approach but has refrained from going as far as it could.¹⁹³ On August 18, 2021, President Biden

Tennessee's executive order against school mask mandates was struck down in federal court. *See* G.S. v. Lee, No. 21-CV-02552-SHL-atc, 2021 WL 4057812, at *8 (W.D. Tenn. Sept. 3, 2021) (granting a temporary restraining order against the enforcement of a Tennessee Code section banning mask mandates); R.K. v. Lee, No. 3:21-CV-00853, 2021 WL 5860924, at *27 (M.D. Tenn. Dec. 10, 2021) (prohibiting enforcement of the Tennessee Code section banning mask mandates "to the extent that it prohibits local health officials and schools from making quarantining decisions as they relate to public schools").

¹⁹¹ In the Texas case, for example, the plaintiffs live in Williamson County, Bexar County, Bell County, Medina County, Hays County, Travis County, Galveston County, Fort Bend County, Dallas County, Tarrant County, and Hidalgo County. Complaint at 6-8, *E.T. v. Abbott* (W.D. Tex. filed Aug. 17, 2021).

¹⁹² *See Federal Judge Declines to Block Florida Ban on Mask Mandates*, FLA. POL. (Sept. 16, 2021), <https://floridapolitics.com/archives/458024-federal-judge-declines-to-block-florida-ban-on-mask-mandates> [https://perma.cc/98HG-GFA6].

¹⁹³ Of course, any response by the federal government would have to withstand an argument that the federal government is acting beyond its regulatory or executive authority. *Compare* Nat'l Fed. of Indep. Bus. V. Dept. of Lab., Occupational Safety & Health Admin., 142 S. Ct. 661, 663 (2022) (per curiam) (staying enforcement of vaccine requirements for large employers) *with* Biden

issued a memorandum to the Secretary of Education named, “Ensuring a Safe Return to In-Person School for the Nation’s Children.”¹⁹⁴ The Memorandum mentioned the obligation of states that accepted money under the American Rescue Plan Act of 2021 to use science-based approaches to reopen schools safely.¹⁹⁵ It made no mention of the civil rights laws.¹⁹⁶ Later that day, Secretary of Education Miguel Cardona issued a blog post on the Department of Education’s website that mentioned the Office’s right “to investigate any state educational agency whose policies or actions may infringe on the rights of every student to access public education equally.”¹⁹⁷ Further, it mentioned that:

[T]he Department may initiate a directed investigation if facts indicate a potential violation of the rights of students as a result of state policies and actions. The Department will also receive and respond as appropriate to complaints from the public, including parents, guardians, and others about students who may experience discrimination as a result of states not allowing school districts to reduce virus transmission risk through masking requirements and other mitigation measures. As always, the Department’s Office for Civil Rights evaluates allegations of discrimination on a case-by-case basis, looking at the specific facts of each case.¹⁹⁸

This statement takes a range of positions from relatively narrow to broad. The emphasis on a “case-by-case basis” makes it sound like they might seek enforcement against one school district or state at a time. Similarly, the comments about receiving and responding to complaints sounds like a case-by-case approach. On the other hand, the Department recognizes its authority to direct an investigation against state policies and actions, without necessarily having received a complaint. That state-by-state approach appears to be the broadest authority conceptualized by the Secretary of Education.

It is hard to understand the benefits to this case-by-case or even state-by-state approach. COVID-19 is as contagious and harmful in Alabama as in Minnesota as in Maine. The science on masks is not dependent on geography.

v. Missouri, 142 S. Ct. 647, 650 (2022) (per curiam) (upholding vaccine mandate for staff at health care facilities). Because of the targeted nature of masking rules to protect a population with a low vaccination rate, it is likely such a policy would withstand judicial review.

¹⁹⁴ Memorandum on Ensuring a Safe Return to In-Person School for the Nation’s Children, 2021 DAILY COMP. PRES. DOC. 1 (Aug. 18, 2021).

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ Miguel Cardona, *Meeting the President’s Call to Support the Safe and Sustained Reopening of Schools*, U.S. DEP’T OF EDUC.: HOMEROOM (Aug. 18, 2021), <https://blog.ed.gov/2021/08/meeting-the-presidents-call-to-support-the-safe-and-sustained-reopening-of-schools/> [<https://perma.cc/5A4R-P2QV>].

¹⁹⁸ *Id.*

Further, the harm from not masking is dire and immediate.¹⁹⁹ Thus, we should abandon this conceptualization of reasonable accommodation as a highly individualized approach that is dependent on parents filing complaints on behalf of their school-age children if those children also qualify as someone who is disabled.

A broader approach can also help achieve broader disability justice goals. The COVID-19 pandemic has particularly harmed poor and minority communities.²⁰⁰ Poor and minority children have lost the most education during this pandemic.²⁰¹ An unsafe return to school disparately impacts their ability to receive a quality education. They, too, need a mask mandate and the Department of Education could use its enforcement authority under Title VI of the Civil Rights Act of 1964 to seek such a mandate because of the disparate impact that masking policies have on minority communities. The disparate impact tool under Title VI could be joined with the reasonable modification tool under the ADA and Section 504 of the Rehabilitation Act of 1973 to make schools safer for all children. We do not have to accept the futility of action for nondisabled children who face enormous risks from COVID-19 in an unmasked environment. We can see what the disability laws and civil rights laws have *in common* to achieve structural reform. In that sense, insights from one civil rights statute could inform progress in another civil rights arena.

Masking is the new ramp. It helps many people enter the building more safely.

CONCLUSION

In *The Public Insult Playbook*, I argue that structural civil rights reforms are essential to countering the right-wing public insults that can be anticipated when disadvantaged groups seek to take steps toward a more equitable society.²⁰² The masking controversy, and the difficulties of overcoming the right-wing playbook, highlights the importance of structural remedies.

¹⁹⁹ See *Science Brief: Community Use of Masks to Stop the Spread of SARS-CoV-2*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/science/science-briefs/masking-science-sars-cov2.html> [<https://perma.cc/EGW7-BZEH>] (Dec. 6, 2021) (reviewing many studies supporting the benefits of masking to reduce virus transmission).

²⁰⁰ See Julie Cunningham, *New Study Underscores the Role of Race and Poverty in COVID-19*, MASS. GEN. HOSP. (June 9, 2021), <https://www.massgeneral.org/news/press-release/New-study-underscores-the-role-of-race-and-poverty-in-covid-19> [<https://perma.cc/6Y2X-D6W6>] (discussing study finding disproportionate COVID-19 positivity rates among poor and minority communities).

²⁰¹ Wim Lan Vancker & Zachary Parolin, Comment, *COVID-19, School Closures, and Child Poverty: A Social Crisis in the Making*, 5 LANCET PUB. HEALTH E243, E243 (2020), [https://www.thelancet.com/journals/lanpub/article/PIIS2468-2667\(20\)30084-0/fulltext](https://www.thelancet.com/journals/lanpub/article/PIIS2468-2667(20)30084-0/fulltext) [<https://perma.cc/E9RG-CVTC>] (arguing that school closures due to the pandemic will exacerbate food insecurity and widen learning gap for poor students).

²⁰² RUTH COLKER, *THE PUBLIC INSULT PLAYBOOK: HOW ABUSERS IN POWER UNDERMINE CIVIL RIGHTS REFORM* 3 (2021).

When we think about overcoming the onslaught of misinformation from the anti-vaxxers and the anti-maskers (largely the same group of people),²⁰³ we see how difficult it is to create a safe environment for school children.²⁰⁴ While successful legal outcomes in fact patterns that are likely to be repeated often result in systematic reform, the masking controversy was likely to defy that pattern. With parents ripping masks off teachers,²⁰⁵ school superintendents could hardly insist that all the schools in their district comply with a mask mandate absent a specific court order regarding a specific school.

That is why a strong federal response was so needed in this situation. During the COVID pandemic,²⁰⁶ the Secretary of Education needed to institute an enforceable federal mask mandate that applied to all public schools that received federal financial assistance—which would be all public schools. Although such a move would have received resistance, it is not a good reason to fail to proceed. As we have seen with vaccine mandates, some of those who were initially hesitant to cooperate eventually do cooperate when requirements become stronger.²⁰⁷ To not even try is to give up any hope of structural change.

The one-person-at-a-time model for enforcing the reasonable accommodation rules stands in contrast to the architectural barriers rules that are required in Titles II and III of the ADA.²⁰⁸ While it is true that one has to be a person with a disability to challenge violation of those rules, it is the case that those rules help create broad structural change. From door handle design to heights for light switches to front door ramps and accessible parking spaces, those rules have transformed our physical structures.²⁰⁹ Few people

203 See Steven Taylor, Gordon J. G. Asmundson, *Negative Attitudes About Facemasks During the COVID-19 Pandemic: The Dual Importance of Perceived Ineffectiveness and Psychological Reactance*, PLOS ONE (Feb. 17, 2021), <https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0246317> [<https://perma.cc/M7D9-N44Y>] (finding through network analysis that anti-mask attitudes were significantly related to anti-vaccination attitudes).

204 See Doron Dorfman, *Pandemic “Disability Cons”*, 49 J.L. MED. & ETHICS 401, 403 (2021) (“[A]nti-maskers were coopting rules put in place to protect people with disabilities in a way that puts this vulnerable population at greater risk of contracting the virus.”).

205 See, e.g., Elisha Fieldstadt, *Texas Parent Rips Mask Off Teacher’s Face, Superintendent Says*, NBC NEWS (Aug. 18, 2021, 9:53 AM), <https://www.nbcnews.com/news/us-news/texas-parent-rips-teacher-s-mask-her-face-superintendent-says-n1277057> [<https://perma.cc/S5AX-5UUQ>] (describing an incident where a parent “ripped off a teacher’s face mask” and demanded that other educators remove their masks).

206 This sentence presumes the COVID pandemic has an end point.

207 See, e.g., Sharon Otterman & Joseph Goldstein, *Thousands of N.Y. Health Care Workers Get Vaccinated Ahead of Deadline*, N.Y. TIMES (Sept. 28, 2021), <https://www.nytimes.com/2021/09/28/nyregion/vaccine-health-care-workers-mandate.html> [<https://perma.cc/U2KV-2MF6>] (noting a significant increase in the number of health care workers who got vaccinated days before New York’s vaccination mandate went into place).

208 See, e.g., 42 U.S.C. § 12141–12150 (setting accessibility requirements for public transportation); 42 U.S.C. § 12183 (regulating accessibility requirements for new construction and alterations in public accommodations and commercial facilities).

209 See Abigail Abrams, *30 Years After a Landmark Disability Law, the Fight for Access and Equality Continues*, TIME (July 23, 2020, 9:03 AM), <https://time.com/5870468/americans-with-disabilities->

complain that the hundreds of pages for architectural design that are embodied in the enforcement provisions for those parts of the ADA²¹⁰ have promoted an “ableist society.” Instead, those rules have broadened accessibility in a way that makes it possible for many disabled people to live independently.²¹¹

Under Title III, we don’t install the ramp just for that moment a plaintiff seeks to access a building. We install the ramp permanently. Architects and builders are aware of these rules and tend to comply with them as a part of new construction or major renovations without waiting for a complaint to be filed. Disabled people don’t have to come out of the closet for ramps to be installed. They are part of the default expectations for new construction that are set *ex ante*.

Similarly, stronger *ex ante* rules under Title I and Title II can also provide a better opportunity for structural relief than the traditional model of incremental reasonable accommodation. The federal government can and must harness its enforcement powers under all civil rights laws to help achieve that kind of disability justice. Private plaintiffs should also seek broader reasonable accommodation solutions that further universal design rather than one-at-a-time remedies. We can both encourage people to come out of the closet to claim their disability status²¹² while also creating *ex ante* protections that do not require people to come out of the closet to attain disability justice.

act-coronavirus [<https://perma.cc/HA84-UJSG>] (“Under [the ADA], schools and workplaces are now required to have ramps, elevators, designated parking spots and curb cuts, and to provide accommodations for people with a range of disabilities, including those who are blind or deaf.”).

²¹⁰ See generally DEP’T OF JUSTICE, 2010 ADA STANDARDS FOR ACCESSIBLE DESIGN (2010) [<https://www.ada.gov/regs2010/2010ADASTandards/2010ADASTandards.pdf>] [<https://perma.cc/KNH7-DHVG>].

²¹¹ Nonetheless, I have written extensively about the limitations of the ADA Title III enforcement scheme. See COLKER, *supra* note 202, at 41-70.

²¹² See Eyer, *supra* note 38, at 556 (noting that there are other critical objectives of the disability rights movement, such as broadening social structures, augmenting accessible environments, and increasing supportive resources).

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