Disability Environmental Justice: How § 504 of the Rehabilitation Act Can Be Used for Environmental Justice Litigation

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Abstract

One of the largest problems facing environmental justice litigation is the lack of a private right of action for disparate impact discrimination under Title VI of the Civil Rights Act. This absence of a private right of action has effectively rendered federal anti-discrimination law a dead letter in remedying the inequitable distribution of environmental harms in most cases. However, in light of new scientific and legal developments, this Note proposes a novel litigation strategy to address the environmental harms for which Title VI provides no remedy.

Specifically, this Note proposes using § 504 of the Rehabilitation Act for future environmental justice litigation. In three parts, this Note discusses the legal and factual developments that pave the way for this litigation. Part I engages in statutory interpretation of § 504 to help answer two questions central to the circuit split between the Sixth and Ninth Circuits. First, does § 504 prohibit disparate impact discrimination? Second, assuming § 504 prohibits disparate impact, does the Rehabilitation Act provide a private right of action to enforce that prohibition? Part II moves from the legal questions to factual questions, examining current disparate impact discrimination research and potential future research conducive to environmental justice litigation. Drawing on the previous two sections, Part III discusses how to bring a disability-centered environmental justice case under § 504, and the potential benefits of bringing such a case.

Table of Contents

Introduction 403
I. Statutory Interpretation of the Rehabilitation Act of 1973. 405
A. *Relevant Background* 405

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B. *Section 504 of the Rehabilitation Act Prohibits Disparate Impact Discrimination* 410
1. *Section 504's Use of Passive Voice Indicates that Intent is Irrelevant* 411
2. *Section 504's Express Purposes, Findings, and Policies Indicate Disparate Impact Discrimination is Prohibited* 412
3. *Multiple Canons of Construction Indicate § 504 Prohibits Disparate Impact Discrimination* 416
a. *The Whole-Text and Surplusage Canons* 416
b. *The Related-Statutes Canon* 420
4. *The Desirability of a "Beneficial Disparate Impact" and Permissibility of a Disparate Impact Against Those "Not Otherwise Qualified" is Irrelevant to Whether § 504 Prohibits Disparate Impact Discrimination* 422
a. *"Beneficial Disparate Impact"* 422
b. *Those Not "Otherwise Qualified"* 423
C. *The Rehabilitation Act Provides a Private Right of Action for Disparate Impact Discrimination* 426
1. *Sandoval as Applied to the Rehabilitation Act of 1973* 426
2. *§ 505's History and Context as Compared to Titles VI and IX* 428
a. *The Unique History of § 505* 428
b. *Section 505's Unique History Provides Context for Its Text, Indicating That It Provides a Private Right of Action for Disparate Impact Discrimination* 431
3. *Contract Law also Indicates that a Prohibition on Disparate Impact Discrimination is Privately Enforceable* 432
II. Current and Future Disparate Impact Research for Bringing § 504 Environmental Justice Litigation 433
A. *Relevant Background Principles* 434
B. *Current Environmental Justice Research on Disability-Based Disparities in Pollution* 435
1. *Hazardous Waste Sites* 436
2. *PM 2.5 Exposure* 438
C. *Future Research Design for Use in Disability Environmental Justice Litigation* 439
1. *Alternative Location* 439
2. *Multiple Linear Regression Analysis* 441
3. *The "Chicken and Egg" Problem* 445
4. *The Underreporting Problem* 446

III. Bringing § 504 Environmental Justice Litigation and the Benefits of Doing So 446
A. The Framework for Proving a § 504 Disparate Impact Case 446
B. Proving a Prima Facie Disability Environmental Justice Case 448
C. Legal Strategy Concerns for Disability Environmental Justice Litigation. 450
1. Remaining "Disability NEPA" Concerns 450
2. Meaningful Access Concerns. 453
D. Affirmative Defenses. 458
1. Fundamental Alteration. 458
2. Undue Burden 460
E. Environmental Justice Benefits of Bringing the Case. 461
Conclusion 463

Introduction

"When you don't protect the least in your society, you place everybody at risk." Dr. Robert Bullard—the "father" of the environmental justice movement—spoke these words while accepting the 2019 Stephen Schneider Award for Outstanding Climate Science Communications.[1] Environmental justice is about resolving the inequitable distribution of environmental harms towards marginalized communities—the "least in society"—because such communities often have less power and fewer resources to resist polluting activities.[2] Environmental laws can compound this inequity by reinforcing a pre-existing incentive to pollute in the same locations.[3] This Note proposes a novel litigation strategy to address certain cases of this inequitable distribution of environmental harms.

A typical approach to stop discrimination is to sue for violations of federal civil rights statutes, but the lack of a private right of action for *disparate impact* under Title VI of the Civil Rights Act[4] makes this approach impractical in environmental cases. Most environmental justice claims would necessarily address disparate impact discrimination because environmental discrimination often occurs through the disproportionate allocation

[1] *Dr. Robert Bullard: The Father of Environmental Justice*, Climate One, at 39:46 (Dec. 12, 2019), https://www.climateone.org/audio/dr-robert-bullard-father-environmental-justice#:~:text=Robert%20Bullard%3A%20When%20you%20don,grocery%20store%20and%20flood%20protection [https://perma.cc/FSA5-E8WG].

[2] *See, e.g.*, Robert D. Bullard, *Dumping in Dixie: Race, Class, and Environmental Quality* 7 (3d ed. 2000).

[3] *See, e.g.*, Jonathan Skinner-Thompson, *Procedural Environmental Justice*, 97 Wash. L. Rev. 399, 412–38 (2022).

[4] "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d.

of pollution to marginalized communities through facially neutral policies like the permitting process.[5] However, the potentially relevant statutes, that otherwise prohibit discriminatory activity, generally do not provide a private right of action for disparate impact discrimination. For example, although many polluters are covered by Title VI's anti-discrimination provision, in *Alexander v. Sandoval*, the Supreme Court held that § 601, the rights-creating provision of Title VI, does not provide a private right of action for disparate impact discrimination.[6] While the federal government can bring disparate impact suits under § 602, a different provision of Title VI, historically it has not done so, functionally closing the door for environmental justice litigation under federal civil rights laws in most cases.[7]

However, new legal developments related to disability discrimination may have opened the door for environmental justice litigation under federal civil rights laws. While Title VI does not create a private right of action for disparate impact claims, the Supreme Court has not decided whether its sibling statute, § 504 of the Rehabilitation Act of 1973,[8] is similarly limited. The lack of a Supreme Court ruling paved the way for a recent split between the Sixth and Ninth Circuits over whether there is a private right of action for disparate impact under § 504. A private right of action for disparate impact under § 504 could have a profound impact on environmental justice litigation, potentially allowing for the use of a federal civil rights statute.

These new legal developments come at a fortuitous time for environmental justice lawyers because the evidence necessary to bring disability-based environmental justice litigation is becoming increasingly available. New research indicates that the location of environmental pollution can have disparate impacts on disabled persons. That new research, along with more developed and litigation-oriented future research, could form the backbone of a novel environmental justice litigation strategy. Furthermore, because of the often-intersectional nature of discrimination, this litigation may have the collateral effect of reducing environmental injustice for other marginalized groups.

This Note proposes using § 504 of the Rehabilitation Act for future environmental justice litigation. In three parts, this Note discusses the legal and factual developments that might pave the way for this litigation. Part I analyzes § 504 to help answer two questions central to the circuit split

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[5] Carlton Waterhouse, *Abandon All Hope Ye That Enter? Equal Protection, Title VI, and the Divine Comedy of Environmental Justice*, 20 Fordham Env't. L. Rev. 51, 93–102 (2009).

[6] Alexander v. Sandoval, 532 U.S. 275, 285–93 (2001).

[7] *See, e.g.*, Marianne E. Lado, *No More Excuses: Building a New Vision of Civil Rights Enforcement in the Context of Environmental Justice*, 22 U. Pa. J.L. & Soc. Change 281, 295–318 (2019).

[8] 29 U.S.C. § 794. For previous discussions on related issues in disability environmental justice, see generally, Michael S. Heyl, *Circumventing Environmental Policy: Does the Americans With Disabilities Act Provide Protection Where Environmental Statutes Don't?*, 18 J. Contemp. Health L. & Pol'y 323 (2002), and Britney R. Wilson, *Making Me Ill: Environmental Racism and Justice as Disability*, 170 U. Pa. L. Rev 1721 (2022).

between the Sixth and Ninth Circuits. First, does § 504 prohibit disparate impact discrimination? Second, assuming § 504 prohibits disparate impact, does the Rehabilitation Act provide a private right of action to enforce that prohibition? Part II moves from the legal questions to factual questions, examining current disparate impact discrimination research and potential future research to be used in environmental justice litigation. Drawing on the previous two sections, Part III discusses how to bring a disability-centered environmental justice case under § 504, and the potential benefits of bringing such a case.[9]

I. Statutory Interpretation of the Rehabilitation Act of 1973

To effectively bring private environmental justice litigation under § 504 of the Rehabilitation Act, it must be the case that § 504 prohibits disparate impact discrimination.[10] Moreover, that prohibition must be enforceable through a private right of action. To address both issues, Part I performs statutory interpretation of the Rehabilitation Act. It begins by discussing the current legal landscape regarding the existence of a private right of action for disparate impact. Next, it interprets § 504 to determine whether it prohibits disparate impact discrimination. Finally, it analyzes § 505—the Rehabilitation Act's enforcement provision—to determine if the Rehabilitation Act provides for a private right of action to enforce a prohibition on disparate impact.

A. *Relevant Background*

Before examining § 504 itself, it is important to understand both current caselaw and why this issue is so salient. There are four cases particularly relevant to this discussion. First, *Alexander v. Choate*, in which the Court discussed the possibility of § 504 prohibiting disparate impact

[9] Many of these claims could also be brought under Title II using state action, such as permitting programs, as a liability hook. While this Note focuses on § 504, there are unique benefits and drawbacks to a Title II claim. The main benefit is avoiding § 504's sole causation standard; thus, in most cases bringing a Title II claim would be easier to prove and more practical. However, one concern under a Title II claim is whether the Court would hold that the defendant (state) is entitled to sovereign immunity pursuant to the Eleventh Amendment. The Court might hold that Congress did not validly abrogate sovereign immunity using §5 of the Fourteenth Amendment. *See* Bd. of Trs. v. Garrett, 531 U.S. 356, 360–74 (2001). This is a concern given *Tennessee v. Lane*'s limited scope. 541 U.S. 509, 531 (2004) (stating "[b]ecause we find that Title II unquestionably is valid § 5 legislation as it applies to the class of cases implicating the accessibility of judicial services, we need go no further."). While Ex Parte Young, 209 U.S. 123 (1908), might be used for injunctive relief, *see Garrett*, 531 U.S. at 374 n.9; *see also* Joshua D. Blecher-Cohen, Note, *Disability Law and HIV Criminalization*, 130 Yale L. J. 1560, 1597 (2021), such a ruling would nevertheless be devastating for the ability to obtain relief under Title II.

[10] Of course, an intentional discrimination case could still be brought, but it would face the exact same problems that render it nearly impossible to win a private Title VI environmental justice case.

discrimination before ultimately declining to decide the question.[11] Second, *Alexander v. Sandoval*, in which the Court held that Title VI of the Civil Rights Act does not provide a private right of action for disparate impact discrimination.[12] Third, *Doe v. BlueCross BlueShield of Tennessee, Inc.*, in which the Sixth Circuit held § 504 does not create a private right of action for disparate impact discrimination.[13] Fourth, *Payan v. Los Angeles Community College District*, in which the Ninth Circuit split with the Sixth Circuit, and held § 504 creates a private right of action against disparate impact discrimination.[14]

First, in *Alexander v. Choate*, the Supreme Court considered whether § 504 prohibits disparate impact discrimination, but ultimately declined to decide the issue.[15] The *Choate* majority discussed two competing concerns. The first concern was that "much of the conduct that Congress sought to alter in passing the Rehabilitation Act would be difficult if not impossible to reach were the Act construed to proscribe only conduct fueled by a discriminatory intent."[16] For example, the erection of architectural barriers that prevent people in wheelchairs from accessing buildings is unlikely to be intentional, but the elimination of such barriers was one of the Act's central goals.[17] Furthermore, there was an extensive record demonstrating that Congress believed disability discrimination was most often "not of invidious animus, but rather of thoughtlessness and indifference—of benign neglect."[18] The second concern was that, should the Act reach *all* disparate impacts, problems might arise because disabled persons "typically are not similarly situated" to non-disabled persons.[19] The Court was concerned that this could turn § 504 into something like a National Environmental Policy Act ("NEPA") for disabled persons.[20] Practically speaking, federal fund recipients might need to evaluate the effect of many proposed policies, especially those already likely to affect disabled people, and consider alternatives. If the potential effects of policies on disabled persons were left unevaluated, recipients could risk liability for disparate impact discrimination due to a disparate impact on a person with some previously unforeseen disability.[21] The Court was worried this would create a "wholly unwieldy administrative and adjudicative burden."[22]

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[11] 469 U.S. 287, 292–301 (1985).

[12] *Sandoval*, 532 U.S. at 285–93.

[13] 926 F.3d 235, 241–43 (6th Cir. 2019).

[14] 11 F.4th 729, 735–37 (9th Cir. 2021).

[15] *Choate*, 469 U.S. at 292–301.

[16] *Id.* at 296–97.

[17] *Id.* at 297.

[18] *Id*. at 295.

[19] *Id.* at 298.

[20] *Id.* at 298–299; *see* 42 U.S.C. §§ 4321–4370m-12.

[21] *Choate*, 469 U.S. at 298.

[22] *Id*.

Given the potential implications of such a decision, the Court in *Choate* rejected the notion that § 504 covers *all* disparate impacts and *assumed, without deciding*, that it covers *some* disparate impacts.[23] The extent of coverage, whether it be 0% or 99.9%, remains undecided. This assumption allowed the Court to establish the "meaningful access" standard, which requires that an otherwise qualified individual with a disability "must be provided with meaningful access to the benefit that the grantee offers."[24] To "assure meaningful access, reasonable accommodations in the grantee's program or benefit may have to be made."[25]

Second, following *Choate*, until the early 2000s, various circuit courts considered whether § 504 prohibits disparate impact discrimination. These courts universally stated that it does.[26] However, in 2001, the Supreme Court decided *Sandoval*, which affirmed that Title VI does not provide a private right of action for disparate impact discrimination.[27] *Sandoval*'s clear statement that § 601—the rights-creating provision of Title VI—does not prohibit disparate impact discrimination and the majority's holding that Title VI does not create a private right of action for disparate impact discrimination *could* be read as overturning prior circuit precedent regarding § 504. This is because § 504 takes much of its language and its rights, remedies, and procedures from Title VI.[28]

Third, thirty-four years after *Choate* and eighteen years after *Sandoval*, in *Doe v. BlueCross BlueShield of Tennessee, Inc.*, the Sixth Circuit became the first of the federal courts of appeals to decide whether, post-*Sandoval*, § 504 could be read to prohibit disparate impact discrimination.[29] Writing for the majority, Chief Judge Sutton stated that § 504 does not prohibit disparate impact discrimination.[30] He explained that because § 504 was patterned off of Title VI, *Sandoval*'s holding that Title VI does not include a private right of action for disparate impact discrimination should control.[31] The Sixth

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[23] *Id*. at 299.

[24] *Id*. at 301.

[25] *Id*.

[26] *See, e.g.*, McWright v. Alexander, 982 F.2d 222, 228 (7th Cir. 1992); Crowder v. Kitagawa, 81 F.3d 1480, 1484 (9th Cir. 1996).

[27] *Sandoval*, 532 U.S. at 285–93.

[28] While other circuits have previously considered whether there is disparate impact liability under §504, those decisions were either reached prior to *Sandoval*, *see, e.g.*, *McWright*, 982 F.2d at 228, did not fully grapple with the *Sandoval*'s potential impact, *see* Mark H. v. Lemahieu, 513 F.3d 922, 936–39 (9th Cir. 2008), or have been abrogated on other grounds, *see* Robinson v. Kansas, 295 F.3d 1183, 1188 (10th Cir. 2002), *abrogated on other grounds as recognized by* Muscogee (Creek) Nation v. Pruitt, 669 F.3d 1159, 1167 n.4 (10th Cir. 2012). Additionally, even circuits that previously decided there is disparate impact liability left open whether post-*Sandoval* there is a private right of action to enforce disparate impact, or whether post-*Sandoval* disparate impact liability can exist under § 504 and Title II. *See, e.g.*, Schmitt v. Kaiser Found. Health Plan of Wash., 965 F.3d 945, 954 (9th Cir. 2020).

[29] 926 F.3d 235 (6th Cir. 2019).

[30] *Id*. at 241–43.

[31] *Id.* at 242.

Circuit contrasted the language in § 504 and Title VI from other anti-discrimination statutes such as Title VII, the Fair Housing Act ("FHA"), and Age Discrimination in Employment Act ("ADEA").[32] Chief Judge Sutton explained that, unlike § 504, these other statutes include effects-based language such as "otherwise adversely affect," giving rise to disparate impact liability.[33] The majority opinion also explained that because § 504 only applies to individuals who are "otherwise qualified," it allows disabled persons, who are not "otherwise qualified," to be subject to a disparate impact.[34] The opinion further stated that because § 504 allows some disparate impact in the determination of whether an individual qualifies for § 504 protections, there is good reason to believe that the Act does not prohibit disparate impact discrimination.[35] That is, § 504 "applies only to individuals who are 'otherwise qualified' for the program at issue," and in making that determination, the Act allows disabled persons to be disparately impacted by "legitimate job criteria."[36]

The Sixth Circuit also echoed the concerns of *Choate*—and took them a bit further—stating that many neutral policies disparately impact disabled persons, and those impacts may be *beneficial*. Thus, prohibiting disparate impact could lead to undesirable results for disabled persons.[37] As in *Choate*, the opinion warned that prohibiting disparate impact could create an "unwieldy administrative and adjudicative burden," and added that it might invite "fruitless challenges to legitimate, and utterly nondiscriminatory, distinctions[.]"[38] According to the Sixth Circuit, since disparate impact is not prohibited by § 504, there is not a corresponding private right of action for disparate impact discrimination.[39]

Finally, two years after *BlueCross*, in *Payan v. Los Angeles Community College District* ("LACCD"), the Ninth Circuit became the second federal court of appeals to decide *Sandoval*'s effect on § 504 and the closely-related Title II of the Americans with Disabilities Act ("ADA").[40] In *Payan*, the Ninth Circuit split with the Sixth Circuit as to whether § 504 prohibits disparate impact discrimination post-*Sandoval*.

The majority opinion—written by Judge Tallman and joined by Judge Callahan—held, first, that *Sandoval* does not disturb *Choate* or Ninth Circuit opinions that held that Title II and § 504 prohibit disparate impact,

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[32] *Id*. at 242.

[33] *Id*. at 243.

[34] *Id.*

[35] *Id*.

[36] *Id*.

[37] *Id.*

[38] *Id.* (citing *Choate*, 469 U.S. at 298).

[39] *See id*.

[40] 11 F.4th 729 (9th Cir. 2021); *see* 42 U.S.C. § 12131.

and second, that there is a private right of action for disparate impact under Title II and § 504.[41] The majority stated that *Sandoval* relied on the understanding that § 601—Title VI's rights-creating provision analogous to § 202 of Title II and § 504—prohibits only intentional discrimination.[42] As Judge Tallman explained, *Sandoval*'s understanding derived from previous cases stating § 601 goes no further than the Constitution,[43] and the Constitution itself only prohibits intentional discrimination.[44] However, unlike § 601, which protects traits for which the constitutional standard of review for discrimination is strict scrutiny, disability discrimination is analyzed under rational basis review.[45] The Court reasoned that *Sandoval*'s logic is therefore inapplicable to disability law claims.[46] The Court stated that—in contrast to Title VI—since the range of actions prohibited by § 504 and Title II is broader than what is constitutionally prohibited under rational basis review, the liability standard must not come from the Constitution, but the statutes themselves.[47] Upon interpreting the statute and considering its legislative history, Judge Tallman explained that Congress intended § 504 to cover intentional discrimination *and* discrimination of "benign neglect" and "thoughtless indifference," therefore encompassing disparate impact discrimination.[48]

Payan created a split between the Sixth and Ninth Circuits regarding whether, post-*Sandoval*, the Rehabilitation Act provides a private right of action for disparate impact discrimination. Although LACCD did not seek certiorari, the Supreme Court had the opportunity to resolve part of this split in *Doe v. CVS Pharmacy, Inc.*[49] In *CVS,* the Court agreed to hear the question of "[w]hether section 504 of the Rehabilitation Act, and by extension the ACA, provides a disparate-impact cause of action for plaintiffs alleging disability discrimination."[50] However, about a month before oral arguments the parties agreed to a dismissal, leaving the split unresolved.[51]

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[41] *Payan*, 11 F.4th at 737.

[42] *Id.* at 735–36.

[43] *Id.*; *Sandoval*, 532 U.S. at 280–82 (citing Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) and Guardians Ass'n. v. Civil Serv. Comm'n of N.Y.C., 463 U.S. 582 (1983)).

[44] *See Payan*, 11 F.4th at 735–36; Washington v. Davis, 426 U.S. 229, 238–39 (1976).

[45] *Payan*, 11 F.4th at 736–37.

[46] *Id.* at 737.

[47] *See id.*

[48] *Id.* at 737.

[49] *See* 982 F.3d 1204 (9th Cir. 2020).

[50] *See id.*; Petition for Writ of Certiorari at I, CVS Pharmacy, Inc. v. Doe, No. 20-1374 (U.S. Mar. 26, 2021).

[51] CVS Pharmacy, Inc. v. Doe, 142 S. Ct. 480 (2021); Michael Roppolo, *CVS withdraws Supreme Court case on disability rights, announces new partnership*, CBS News (Nov. 11, 2021, 6:01 PM), https://www.cbsnews.com/news/supreme-court-cvs-doe-withdraw-partnership/ [https://perma.cc/3ZFL-59TH].

B. Section 504 of the Rehabilitation Act Prohibits Disparate Impact Discrimination

To be a tool for environmental justice litigation, § 504 must, unlike its sister statutory provisions (e.g., § 601 of the Civil Rights Act), prohibit disparate impact discrimination. The starting point for any matter of statutory interpretation is the statute's text.[52] Section 504 states:

No otherwise qualified individual with a disability in the United States,[] shall, *solely by reason of her or his disability*, be *excluded* from the participation in, be *denied* the benefits of, or be *subjected to discrimination* under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.[53]

The question of whether § 504 prohibits disparate impact discrimination turns primarily on whether the phrase "by reason of" is about the action that causes the denial, exclusion, or discrimination or the intent behind such an action.[54] If "by reason of" refers to *intent*, then only intentional discrimination is prohibited, whereas if "by reason of" refers to *causation*, then both unintentional (disparate impact) and intentional (disparate treatment) discrimination are prohibited.

This Section makes several arguments for why "by reason of" refers to causation, and thus § 504 prohibits disparate impact discrimination.[55] First, § 504's use of passive voice suggests that the focus of § 504 is the action rather than the intent behind it, thus indicating that "by reason of" refers to causation. Second, the findings, purpose, and policy section of the Rehabilitation Act[56] provide context to § 504's language, including the phrase "by reason of," and indicate that § 504 prohibits disparate impact.[57] Third, several canons of construction indicate § 504 prohibits disparate impact discrimination. Finally, this Section argues that the remaining concerns about "beneficial disparate impact" and allowing disparate impact when determining whether someone is "otherwise qualified" discussed in *BlueCross* are irrelevant, inapplicable, and unrealistic.

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[52] *See* Williams v. Taylor, 529 U.S. 420, 431 (2000).

[53] 29 U.S.C. § 794 (emphases added).

[54] Simply looking to a dictionary like Webster's Second does not resolve this because, "by reason of" is defined as "because of" which again, begs the questions of causation versus intent. Webster's New International Dictionary 242 (2d ed. 1953) [hereinafter Webster's Second]. The Court used Webster's Second to interpreting Title II of the ADA, *see* Pa. Dep't of Corr. v. Yeskey, 524 U.S. 206, 211 (1998), which is read in concert with § 504.

[55] While this Note mainly uses a textualist method of statutory interpretation, it does not take a stance on textualism's normative value. Textualism is used because it is currently the dominant method of statutory interpretation. *See, e.g.*, William Eskridge, Brian Slocum, and Kevin Tobia, *Textualism's Defining Moment*, 123 Colum. L. Rev. 1611, 1614–24 (2023).

[56] 29 U.S.C. § 701

[57] 29 U.S.C. § 794(a).

1. Section 504's Use of Passive Voice Indicates that Intent is Irrelevant

According to the Supreme Court, the statutory use of passive voice provides evidence that an actor's intent is irrelevant.[58] The starting point when interpreting a statute is the statutory text, and the syntax Congress uses affects the meaning of the individual words comprising that text.[59] The choice of active or passive voice indicates what Congress intends a statute's focus to be.[60] Where Congress uses active voice, its primary concern is intent, whereas when it uses passive voice, the concern is merely the action.[61]

Section 504's use of passive voice shows Congress intended the focus of its prohibition to be the program or activity causing discriminatory effect, not the intent of the individual(s) excluding, denying, or discriminating.[62] This may be why federal criminal law—which is more concerned with intent—regarding deprivation of civil rights is written in active voice.[63] Congress's use of passive voice in § 504 should be given meaning, and that meaning is that intent is irrelevant to determining a violation. Thus, "by reason of" plausibly refers to causation.

As a counterpoint, one might cite *Wimberly v. Labor & Industrial Relations Commission*, which discusses how the Federal Unemployment Tax Act, despite using passive voice, has an intent standard.[64] The relevant provision states that "no person shall be denied compensation under such State law solely on the basis of pregnancy or termination of pregnancy[.]"[65]

However, while 26 U.S.C. § 3304(a)(12) uses similar language to § 504, *Wimberly*'s reasoning is inapplicable. First, *Wimberly*'s analysis relied in large part on legislative history,[66] something many current and former textualist justices disfavor, indicating that reliance on the reasoning of the

[58] *See* Dean v. United States, 556 U.S. 568, 572 (2009) ("The passive voice focuses on an event that occurs without respect to a specific actor, and therefore without respect to any actor's intent or culpability.").

[59] *See Williams*, 529 U.S. at 431–32.

[60] *See* Brief for the United States as Amicus Curiae Supporting Respondents at 12–13, CVS Pharmacy, Inc. v. Doe, No. 20-1374) (U.S. Oct. 28, 2021), 2021 WL 5045103, at *12–*13.

[61] *See Dean*, 556 U.S. at 572.

[62] If § 504 were written in active voice, it might read something like: No program or activity receiving federal financial assistance or conducted by any Executive agency or by the United States Postal Service, shall, solely by reason of disability, exclude from participation in, deny the benefits of, or subject to discrimination, a qualified individual with a disability in the United States, any such program or activity. . . .

[63] For example, "[w]hoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person in any State, Territory, Commonwealth, Possession, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such person being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens . . . ." 18 U.S.C. § 242.

[64] *See* 479 U.S. 511, 513 (1987).

[65] 26 U.S.C. § 3304(a)(12).

[66] *Wimberly*, 479 U.S. at 518–21.

decision may be less persuasive in front of the current Court.[67] Second, the Court's legislative history analysis occurred entirely in the context of this particular Act and is therefore inapplicable to other statutes, such as § 504.[68] Third, *Wimberly*'s brief discussion of the statutory text discussed it not in relation to "discrimination" but in the context of denying a specific benefit (compensation)—the only thing § 3304(a)(12) prohibits.[69] Section 504, by contrast, sweeps much more broadly, prohibiting recipients of federal funds from denying benefits to disabled persons generally, excluding them from "participation" in and—most importantly—"subject[ing them] to discrimination."[70] The broad prohibition against disability discrimination, which Congress understood to include unintentional discrimination, differentiates the text and context of § 504 from § 3304(a)(12).[71] Finally, *Wimberly* did not address the statute's use of the passive voice.[72] Still, in some cases, the argument that passive voice indicates that intent is irrelevant may be defeated by a conflicting express purpose.[73] Thus, it is important to analyze the context of a statutory provision in addition to its syntax.

2. *Section 504's Express Purposes, Findings, and Policies Indicate Disparate Impact Discrimination is Prohibited*

The "Findings; purpose; policy" section of the Rehabilitation Act further proves Congress intended to prohibit disparate impact discrimination. The Act's findings indicate that Congress understood most of the discrimination against persons with disabilities to include disparate impact discrimination. In response to those findings, Congress passed the Rehabilitation Act of 1973, which requires § 504 (a provision within the Act) to prohibit disparate impact discrimination to achieve the Act's *express* purpose. Congress then placed an obligation in the Act's policy section that, given the Act's purpose and findings, requires § 504 to prohibit disparate impact discrimination.

Unlike Title VI, the Rehabilitation Act has a statement of findings, purpose, and policy written into the text, which helps shed light on the meaning

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[67] *See, e.g.*, Conroy v. Aniskoff, 507 U.S. 511, 519 (1993) (Scalia, J., concurring); Wooden v. United States, 595 U.S. 360, 383 (2022) (Barrett, J., concurring); Digit. Realty Tr., Inc. v. Somers, 583 U.S. 149, 171–73 (2018) (Thomas, J., concurring); *see also* Eskridge et al., *supra* note 55, at 1622 n.99.

[68] *See Wimberly*, 479 U.S. at 517–21.

[69] *See id.* at 516–18.

[70] *Compare* 29 U.S.C. § 794 (emphases added), *with* 26 U.S.C. § 3304(a)(12).

[71] *See infra* pp. 9–16.

[72] Similarly, the jurisprudential quirk that resulted in Title VI being read as only prohibiting intentional discrimination also did not address the passive voice argument to determine whether disparate impact discrimination is prohibited. In fact, it ignored the language entirely. *See Choate*, 469 U.S. at 294 n.11; *see also* Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll., 600 U.S. 181, 303–10 (2023) (Gorsuch, J., concurring).

[73] *See* Rubin v. Islamic Republic of Iran, 830 F.3d 470, 478–80 (7th Cir. 2016).

of § 504.[74] The findings section elucidates what is protected under § 504. Part of the Act's findings state:[75]

[I]ndividuals with disabilities continually encounter various forms of discrimination in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and public services[.][76]

Congress passed an act with the express purpose of eliminating those barriers. That purpose, stated within the text, helps clarify what Congress intended § 504 to mean. Part of the Rehabilitation Act's Purpose section states that the Act intended "to empower individuals with disabilities to *maximize employment, economic self-sufficiency, independence, and inclusion and integration into society,* through . . . *the guarantee of equal opportunity*."[77] If the Act's purpose is inclusion, integration, guaranteeing equality of opportunity, and maximizing employment or economic self-sufficiency, then a program that did not cover disparate impact could never achieve these purposes.

Under an intent standard, covered entities would not be required to reasonably modify their practices, which also undermines the Act's express purpose. A claim that an entity failed to reasonably modify their practices does not rely on intent; rather, it is concerned with the effect of the policy on the individual.[78] Thus, under an intent standard, a host of acts that undermine the Act's purpose would be permissible.

For example, imagine Harvard Law School gave a quadriplegic student an examination that is required to be written by the student in pencil and paper. In response, that student asks for a reasonable accommodation where they use a scribe or use software to type their exam. If that student is then wrongfully denied such accommodation and sues to get their reasonable accommodation(s), success would be practically impossible under an intent standard. It would be absurd and antithetical to Congress's intent to require that the student prove the policy requiring students to write in pencil was intentionally created to exclude disabled persons.

In almost all cases like this exam case, there are perfectly legitimate reasons that might have caused the school to enact that policy. One could easily think that the required written exam policy was enacted with a fear

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[74] *See generally* 29 U.S.C. § 701.

[75] There are other portions of the findings that also seem to indicate disparate impact. For example, 29 U.S.C. § 701(a)(6) states, "the goals of the Nation properly include the goal of providing individuals with disabilities with the tools necessary to—(A) make informed choices and decisions; and (B) achieve equality of opportunity, full inclusion and integration in society, employment, independent living, and economic and social self-sufficiency, for such individuals[.]"

[76] 29 U.S.C. § 701(a)(5).

[77] 29 U.S.C. § 701(b)(1) (emphasis added); s*ee also* 29 U.S.C. § 701(b)(2) ("to maximize opportunities for individuals with disabilities, including individuals with significant disabilities, for competitive integrated employment").

[78] *See* Cinnamon Hills Youth Crisis Ctr., Inc. v. Saint George City, 685 F.3d 917, 922 (10th Cir. 2012).

of cheating in mind. Further, if the student had to prove intent upon being denied accommodations—which would be separate from the intent inquiry regarding the initial policy—the accommodations necessary for equal access could never be achieved. The denial is equally likely to be justified by strict adherence to a policy or cheating concerns. It seems unlikely—and would require a near-impossible standard of proof—to prove that the educator denied the accommodation solely because of the student's disability.

By not prohibiting disparate impact, § 504 would permit discrimination in a wide variety of areas, including architecture, transportation, and education. For example, if disabled persons are denied physical access to an important building, they are excluded from that building, let alone society, nor are they guaranteed equal opportunity as those who can walk into those buildings. Having the federal government financially assist entities using such buildings would not fulfill the stated purposes of the Act. Interpreting the Act to be so self-defeating by allowing such conduct when an alternative construction is available would not be faithful to Congress's intent.[79]

Congress then wrote into the Policy section a clear and obligatory requirement to achieve the Rehabilitation Act's express purpose, and if § 504 did not prohibit disparate impact, that obligation could not be met. The policy section of the Rehabilitation Act states:

> . . . [A]ll programs, projects, and activities receiving assistance under this chapter *shall be* carried out in a manner consistent with the principles of—(1) respect for individual dignity, personal responsibility, self-determination, and pursuit of meaningful careers, based on informed choice, of individuals with disabilities; (2) respect for the privacy, rights, and *equal access (including the use of accessible formats)*, of the individuals; *(3) inclusion, integration, and full participation of the individuals;* (4) support for the involvement of an individual's representative if an individual with a disability requests, desires, or needs such support; and *(5) support for individual and systemic advocacy and community involvement.*[80]

By using phrases like "shall be," Congress imposed an obligation that provides context for what other provisions are trying to achieve.[81] That phrase is also followed by several obligations like "equal access," "inclusion, integration, and full participation," and "support for individual and

[79] *See.* Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 63–65 (2012).

[80] 29 U.S.C. § 701(c)(1–5) (emphasis added).

[81] *Webster's Second*, *supra* note 54, at 1142 ("shall "1. [*v.t.*] Owe; be under obligation for.) (2. As an auxiliary verb followed by the infinitive without *to:* Am (is, are, etc.) obliged; must. Hence, am (is, are, etc.) to—forming future-tense phrases); *see also* Scalia & Garner, *supra* note 79, at 112–15 (discussing the mandatory/permissive canon, where whenever possible "shall" is read as mandatory).

systemic advocacy and community involvement"—all of which indicate an impact- and equity-focused framework.

If § 504 does not prohibit disparate impact, then the obligation arising from the policy section could not be achieved as it would allow programs receiving assistance to deny equal access, and prevent inclusion, integration, and full participation of disabled individuals. As *Choate* stated, most of what Congress sought to remedy, such as barriers to accessing buildings and transportation, would not be remedied if the statute did not cover disparate impact.[82] When people build a doorway too narrowly or make a website inaccessible, it is a fairly safe assumption that the design was not done while mustache twirling with hateful thoughts towards disabled persons. This contrasts with race discrimination, where denying someone access to a building requires intent in most cases. Even more absurd (and violative of the Act's stated policy goals of equal access and inclusion), the United States itself could violate the Act if an intent requirement is imputed. For example, the federal government would be free to design a federally administered and funded national train system where the trains are inaccessible to disabled people. This violation of the Act's policy and purposes is not what Congress intended, especially given that it singled out transportation in the findings section as an area of discrimination.[83]

One may argue that the findings section of the ADA, unlike the Rehabilitation Act, specifically includes the words "discriminatory effects," indicating that while Congress intended the ADA to prohibit disparate impact, it did not intend § 504 to do so. The relevant portion of the Findings section states:

> [I]ndividuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the *discriminatory effects* of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities[.][84]

The argument would be that, despite the near-identical wording in Title II and § 504, the different findings sections provide a different context; thus, Title II prohibits disparate impact, whereas § 504 does not.[85]

However, this argument confuses *sufficient* and *necessary* conditions for interpreting § 504 to prohibit disparate impact. Section 504's prohibition

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[82] *See Choate*, 469 U.S. at 296–98.

[83] *See* 29 U.S.C. § 701(a)(5).

[84] 42 U.S.C. § 12101(a)(5) (emphasis added).

[85] Atl. Cleaners & Dyers, Inc. v. United States, 286 U.S. 427, 433 (1932); *see also* Env't Def. v. Duke Energy Corp., 549 U.S. 561, 565–81 (2007).

of disparate impact discrimination is *necessary* to achieve the Rehabilitation Act's purpose and policy sections, created to address the Act's findings. In contrast, the words "discriminatory effects" in the ADA's findings section are *sufficient* to show that the ADA prohibits disparate impact.[86]

The ADA's additional findings are irrelevant to whether § 504 prohibiting disparate impact is a necessary condition for the Rehabilitation Act to achieve the express purpose and policy that follow from the Act's findings. The words of a later Congress in the context of a different statute do not bear on what the earlier Congress that passed § 504 believed the Act to prohibit.

Even if the words of the 101st Congress that passed the ADA could retroactively shed light on the meaning of the words the 93rd Congress that passed § 504, it would not necessarily indicate that the 93rd Congress understood § 504 to only prohibit intentional discrimination. First, the findings, purpose, and policy sections of the Rehabilitation Act are not dispositive on their own but instead provide context that indicates that the phrase "by reason of" refers to causation rather than intent. Second, when read properly, the ADA's use of the words "discriminatory effects" in its findings does not *change* the context; they merely provide additional information about the evaluation of discriminatory effects in the *same* context. Two different Congresses wrote the findings sections slightly differently,[87] but that does not mean they were discussing two different things. In fact, the inclusion of this language in the findings section, rather than in the purpose or policy sections, indicates that the later Congress conducted additional fact-finding on the areas in which disabled persons face discrimination. This additional fact-finding provides more context for carrying out the purpose of eliminating discrimination in these areas, ensuring equal access, and so on. Finally, it could be that the ADA's Congress chose to explicitly state in its findings what the Rehabilitation Act's Congress only stated implicitly.

3. *Multiple Canons of Construction Indicate § 504 Prohibits Disparate Impact Discrimination*

Multiple canons of construction indicate that "by reason of" implies a causation rather than intent standard, thus evidencing that § 504 prohibits disparate impact discrimination. These canons include the following: 1) the whole-text and surplusage canons, as using an intent standard would create surplusage, and 2) the related-statutes canon due to the relationship between Title VI, Title VII, the ADA, and § 504.

a. *The Whole-Text and Surplusage Canons*

This subsection will make a novel argument that, when taken together, the "whole-text canon" and "surplusage canon" strongly indicate Congress

[86] *See* 42 U.S.C. § 12101(a)(5).

[87] *Compare* 29 U.S.C. § 701(a)(5) *with* 42 U.S.C. § 12101(a)(5).

intended "by reason of" to refer to causation, not intent. The whole-text canon "calls on the judicial interpreter to consider the entire text, in view of its structure and the physical and logical relation of its many parts."[88] The surplusage canon provides that, in a statute, "if possible, every word and provision should be given effect[]."[89] Taken together, the canons support the proposition that the best reading of a statute is one that examines the statute as a whole and ensures every word is given effect. If an intent standard is used, the words "with a disability"[90] and "her or his,"[91] (which I will refer to as the "the possessive language") become superfluous, preventing the whole statute from being given meaning. To understand why the possessive language would be rendered superfluous, one must analyze a separate part of the whole text—which defines "disability"—and key differences between § 504 and other spending clause anti-discrimination statutes. However, viewing § 504 through a causation lens avoids the surplusage because the possessive language is given meaning.

By using possessive language and extending coverage to those "regarded as" having a disability, § 504 differs from its sibling intent-based spending clause anti-discrimination statutes,[92] such as 1) Title VI of the Civil Rights Act of 1964;[93] 2) Title IX of the Education Amendments Act of 1972;[94] 3) the Age Discrimination Act of 1975;[95] and 4) § 1557 of the Patient Protection and Affordable Care Act.[96] Unlike the other anti-discrimination statutes, Congress specifically used possessive adjectives, such as "her or

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[88] Scalia & Garner, *supra* note 79, at 167.

[89] *Id.* at 174.

[90] 29 U.S.C. § 794(a).

[91] *Id.*

[92] Spending clause anti-discrimination statutes are statutes that use Congress's spending power to "fix the terms on which it shall disburse federal money. . . ." Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981). That is, Congress renders entities that accept or use federal money subject to certain anti-discrimination laws like § 504, Title IX, and Title VI. This is in contrast to other anti-discrimination statutes where alternative constitutional powers are invoked in order to render all entities liable regardless of whether they accept federal funds. *E.g.*, the ADA or Title II of the Civil Rights Act, where Congress used the Commerce Clause and § 5 of the Fourteenth Amendment.

[93] 42 U.S.C. § 2000d ("No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.").

[94] 20 U.S.C. § 1681(a) ("No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . .").

[95] *See* 42 U.S.C. § 6102 ("[N]o person in the United States shall, on the basis of age, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any program or activity receiving Federal financial assistance . . .").

[96] 42 U.S.C. § 18116(a) ("Except as otherwise provided for in this title (or an amendment made by this title), an individual shall not, on the ground prohibited under title VI . . . , title IX . . . , the Age Discrimination Act of 1975 . . . , or [§ 504], be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity, any part of which is receiving Federal financial assistance . . . ").

his disability."[97] This language contrasts with the other statutes, which do not use phrases like "on the basis of *their* age" or "on the basis of *her or his* race." Beyond using possessive adjectives, Congress added further possessive language, including the words "with a disability," a status condition absent from the other statutes.

The statute's definition of disability sheds light on why § 504 uses possessive language, while similar statutes do not. Section 504 defines disability as: "(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment."[98] Of particular relevance is the "regarded as" prong, which Congress further explained in the ADA Amendments Act of 2008.[99] An individual is "regarded as" having a disability (and thus "has" a disability for the purposes of the statute) if they have been subjected to an ADA (or § 504) violation "because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity."[100]

If Congress wanted § 504 read identically to other spending clause statutes, the easiest way to do so would be to write: "No otherwise *qualified individual in the United States*, shall, solely *by reason of disability*, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination . . ." Congress could then add the "regarded as" prong to ensure those "regarded as" having a disability are also protected. In fact, Congress could have also chosen to borrow the language "on the ground of" or "on the basis of" from the other spending clause statutes therefore only adding "otherwise qualified," "solely," and changing the protected trait.

Yet, Congress did not write § 504 in the manner more closely aligned to the other statutes. Instead, Congress made the peculiar decision to add the possessive language and define a seemingly obvious term: "individual with a disability." In certain parts of the statute, including § 504, "individual with a disability" means "any person who has a disability as defined in [the ADA]."[101] "Has" is the third person singular of "have,"[102] which is defined as "to possess, as something which appertains to, is connected with, or affects, one; as, to *have* an ungrateful son, a fever, need of rest; to have one as a guest."[103] On its face, such a definition provision might seem redundant or

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[97] 29 U.S.C. § 794(a).

[98] Section 504 defines disability according to the definition provided by the ADA. 29 U.S.C. § 705(9)(B); 42 U.S.C. § 12102.

[99] ADA Amendments Act of 2008, Pub. L. No. 110–325, § 4, 122 Stat. 3555 (2008).

[100] 42 U.S.C. § 12102(3)(A).

[101] 29 U.S.C. § 705(20)(B).

[102] *Webster's Second*, *supra* note 54, at 1142.

[103] *Id.* at 1145. Similarly, "her or his" establish possession for the individual with a disability. The wording of § 504 states, "[n]o otherwise qualified *individual with a disability* in the United States . . . shall, solely by reason of *her or his* disability." 29 U.S.C. § 794(a) (emphasis added). "His" means "of or belonging to him or himself as possessor; due to him; inherent in him; associated or connected with him." *Webster's Second*, *supra* note 54, at 1182. "Her"

even tautological given that 29 U.S.C. § 705(9)(B) already defines "disability." If disability means X, then of course an individual with X is an individual who has X. Yet Congress, demonstrating the importance of the possessive language, chose to include the extra provision defining *possession* of a disability in addition to defining disability—which includes those "regarded as" having a disability.[104]

However, if § 504 is viewed through an intent standard, the inclusion of the "regarded as" prong makes the possessive language superfluous. The function of the possessive language under an intent standard would be to limit the intent standard. The possessive language would now require discrimination by reason of disability to occur to someone who possesses (or "has") a disability. If the "disability" is the result of the subjective belief of the discriminating entity, as is the case when someone is "regarded as" having a disability, then the disability does not *belong* to the qualified individual being discriminated against. It is not inherent in him or due to him; it is due to the belief of the individual discriminating against him. However, with the definitional inclusion of protection for those "regarded as," the language is deprived of its function under an intent standard. The possessive language would not impose a limitation requiring *actual* possession of a protected trait, and thus serves no purpose under an intent standard. Thus, removing the possessive language under the intent standard does not change the statute's function.

On the other hand, under a causation standard, the possessive language is given meaning because it limits the scope of causation. If the statute followed the language of the other spending clause statutes, reading, for example, "[n]o otherwise qualified individual in the United States shall, solely by reason of disability, be [discriminated against] . . ." but maintained a causation standard, then the liability created could be much broader than Congress intended. There may be cases where the disability of one individual acts as a but-for cause, denying another individual, with or without a disability, a benefit. For example, if a government employee has an epileptic seizure while transporting documents, and in the process, they fail to process a non-disabled person's benefits in time, the employee's disability would have denied the beneficiary their benefit.

Allowing the aforementioned example to result in a § 504 violation would be absurd. Thus, Congress would want to limit the causation standard through possessive adjectives. The sort of discrete events where disability may cause unforeseeable interferences, while rare, can happen, and

similarly means: of or belong to that female *person or thing personified) or herself as possessor; due to her; inherent in her; associated or connected with her; as, *her* lovely face; *her* piety; *her* classmates. *Webster's Second*, *supra* note 54, at 1166. Principles of statutory construction hold that adjectives modify the nearest-reasonable-referent. *See* Scalia & Garner, *supra* note 79, at 152–53. Therefore, the possessive adjectives here, "her or his," modify the nearest-reasonable-referent "qualified individual with a disability in the United States."

[104] *See* 42 U.S.C. § 12102(3)(A).

Congress sought to cabin liability in those cases. However, Congress chose not to provide for a proximate cause standard—which would incorporate foreseeability—instead opting for a "sole causation" standard.[105] That is, Congress preferred a determination of whether disability is the *exclusive cause* of an event.[106] Even if proximate cause had been used, there might still have been events where such an interference would be foreseeable, and so Congress chose to limit liability in another way. The statute's possessive adjectives limit the scope of liability, preventing a scenario where someone could bring a lawsuit because a person with a disability, because of their disability, denied them a benefit. This language ensures that the people protected by the statute are the people Congress sought to protect.

In comparison, an intent standard does not allow these scenarios to happen because there would be no intent to discriminate against the person who did not get their benefits. In fact, this may be why Title VI, which only prohibits disparate treatment, does not include possessive adjectives, whereas Title VII—the employment provision of the Civil Rights Act—which prohibits disparate impact, includes possessive adjectives.[107] Thus, in order to give meaning to the entire statute, the words "by reason of" must refer to causation, not intent, otherwise, either the "regarded as" prong in the definitions section of the statute or the possessive language in § 504 would be rendered superfluous.[108] Furthermore, the use of possessive adjectives is not the only way that Title VII and § 504 are related,[109] and this kind of a relationship between statutes provides yet another reason why § 504 prohibits disparate impact discrimination.

b. The Related-Statutes Canon

The related-statutes canon states that statutes that are related should be interpreted so that their interpretations are harmonious. Sometimes this idea is referred to as treating the statutes *in pari materia* (in a like matter).[110] Scalia and Garner explain the canon and its justification well:

> Any word or phrase . . . is part of a whole statute, and its meaning is therefore affected by other provisions of the same statute. It is also, however, part of an entire *corpus juris* [(body of law)]. So, if possible, it should no more be interpreted to clash with the rest of that corpus than it should be interpreted to clash with other provisions of the same law.[111]

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[105] *See* 29 U.S.C. § 794(a).

[106] *See infra* p. 25; *see also* Bledsoe v. TVA Bd. of Dirs., 42 F.4th 568, 578 (6th Cir. 2022).

[107] *See e.g.*, 42 U.S.C. § 2000e–2(a)(1); 42 U.S.C. § 2000e–2(b).

[108] *See* 29 U.S.C. § 705(20)(B); 42 U.S.C. § 12102(3)(A).

[109] E.g., Title VII is related to § 504 by way of Title I of the ADA because Title I takes its "powers, remedies, and procedures" from Title VII, 42 U.S.C. § 12117, and in turn Title I provides the standards for § 504 claims concerning employment, 29 U.S.C. § 794(d).

[110] Scalia & Garner, *supra* note 79, at 252.

[111] *Id.*

In the context of § 504, several relevant statutes and statutory provisions are intertwined: (1) The Rehabilitation Act; (2) Title VI of the Civil Rights Act; and (3) the ADA.[112] Facially, this creates a tension since § 601 of Title VI and the ADA—or at a minimum Title I of the ADA[113]—point in opposite directions regarding the existence of disparate impact liability under § 504. However, the unique text and context of § 504 differentiate it from § 601 and indicates that these rights-creating provisions were not intended to be read *in pari materia*, resolving any apparent tension.[114]

In fact, Justice Marshall's majority opinion in *Choate* cautioned against reading § 601 of Title VI and § 504 *in pari materia*.[115] First, Justice Marshall argued that the legal background against which Congress enacted § 504 encompassed an understanding of disparate impact liability.[116] Second, Marshall recognized that any limiting construction of Title VI was merely the result of *stare decisis*.[117]

Having resolved the tension between § 601 and § 504, the Court remains free to interpret § 504 and the ADA *in pari materia*. The Court indicated as much in *Raytheon Co. v. Hernandez*.[118] In *Raytheon*, Justice Thomas, writing for a unanimous court, stated, "[b]oth disparate-treatment and disparate-impact claims are cognizable under the ADA."[119] While Justice Thomas included a cite to Title I rather than the full ADA, the text of his opinion refers to the entire ADA, which includes Title II, the language of which is nearly identical to § 504.[120] The Court usually reads the two in concert, meaning that if Title II prohibits disparate impact, § 504 would also do so.[121]

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[112] While Title VII of the Civil Rights Act is similarly intertwined in this grouping of statutes, *see supra* pp. 15–16, for the purposes of this specific argument it is unnecessary to discuss that relationship.

[113] Title I is the provision of the ADA dealing with employment as compared to Title II which deals with the liability of public entities, and Title III which deals with public accommodations. For a useful comparison, Title I of the ADA is analogous to Title VII of the Civil Rights Act, Title II of the ADA is analogous to Title VI of the Civil Rights Act, and Title III of the ADA is analogous to Title II of the Civil Rights Act.

[114] *See supra* pp. 7–15.

[115] *Choate*, 469 U.S. at 294 n.11.

[116] *Id.*

[117] *See id.* at 293-94 (stating that the Court might not want to extend the ruling because the limiting construction of Title VI was mostly due to *stare decisis* post-*Bakke*, not because a majority of the Court in *Guardians* believed the interpretation to be correct).

[118] 540 U.S. 44, 53 (2003).

[119] *Id.* While the words "the ADA," as opposed to "Title I," indicate that the whole act should prohibit disparate impact, there is still an argument that *Raytheon* was referring only to Title I, not the entire ADA. In citing Title I, one might argue Thomas was limiting *Raytheon*'s holding to Title I. In fact, Justice Thomas uses the "see" signal, making it even more ambiguous, as it could mean that he is only referring to Title I and asking for an additional inference, or he is referring to the entire ADA.

[120] *See id.* (referring to "the ADA.").

[121] Due to the overlap in language between the ADA and § 504, the standards used, regulations, and affirmative defenses available, including the corresponding caselaw for both statutes, are often treated interchangeably unless there is a relevant difference. *See* McPherson v. Mich. High Sch. Athletic Ass'n, 119 F.3d 453, 459 (6th Cir. 1997); K.M. *ex rel.* Bright v. Tustin Unified

Even if *Raytheon* only decided that disparate impact claims are cognizable under Title I, in so doing, the Court created a logical chain between the ADA and § 504 that suggests that § 504 prohibits disparate impact discrimination. Section 504's operative language prohibits employment discrimination, and the standard for determining employment discrimination under § 504 is whether the conduct violates Title I.[122] Because disparate impact discrimination violates Title I, the operative language of § 504 must itself prohibit disparate impact.

4. *The Desirability of a "Beneficial Disparate Impact" and Permissibility of a Disparate Impact Against Those "Not Otherwise Qualified" is Irrelevant to Whether § 504 Prohibits Disparate Impact Discrimination*

This section will respond to the concerns stated in *BlueCross* that, first, there is a good reason to permit some disparate impact, and second, that the Act, by allowing some disparate impact against disabled persons, implies that disparate impact as a whole is not prohibited.[123]

a. *"Beneficial Disparate Impact"*

One may argue that there may be legitimate reasons to enact policies with a "beneficial disparate impact" on disabled persons and therefore disparate impact *discrimination*, should not be prohibited. This argument has roots in *Choate* and largely drives the holding in *BlueCross*;[124] however, this argument is entirely irrelevant. So-called "beneficial disparate impact" policies would not violate § 504 because the premise of a "beneficial disparate impact" being disparate impact *discrimination* is flawed, and the conclusion it means *all* disparate impacts should be permitted does not follow from that premise.

First, the terms "excluded from…participation" and "deni[al of] benefits" denote negative consequences.[125] A policy that helps people with disabilities would not result in denials or exclusions. If such policies did result in exclusion, that would seem to contradict the express purposes of the Act, which aim to promote inclusion, integration, and full participation.[126]

Second, due to "real differences" disability discrimination is intrinsically about equity, not equality. As a starting point, disability discrimination operates under the premise that there are actual physical differences

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Sch. Dist., 725 F.3d 1088, 1098 (9th Cir. 2013); Jones v. City of Monroe, 341 F.3d 474, 477 n.3 (6th Cir. 2003).

[122] 29 U.S.C. § 794(d).

[123] *See BlueCross*, 926 F.3d 235 at 243.

[124] *See id.* at 242.

[125] 29 U.S.C. § 794(a).

[126] *See* 29 U.S.C. § 701(b)(1).

between those with a given disability and those without.[127] This is quite different from other forms of discrimination like racial discrimination, where the premise of "real" differences is soundly rejected.[128] Such differences would then have to be accommodated to provide disabled people access to a society full of barriers. Only if the policy puts disabled individuals in a *less* favorable position would it be unlawful and discriminator, otherwise it is remedial. Whether something puts an individual in a more or a less favorable position is a question of fact, not law. As a result, this argument has no bearing on whether § 504 prohibits disparate impact discrimination; instead, it only indicates that certain fact patterns might not qualify as disparate impact discrimination.

For example, if the only way to access a courthouse is by going up four flights of stairs, someone with a wheelchair would not be able to access the courthouse. The fact that an institution treats both disabled and non-disabled individuals the same is not sufficient to avoid liability because it has the "same practical effect as outright exclusion."[129] Instead, institutions are *required* to treat disabled individuals *differently* reasonably modifying their practices. In the case of the stairs, a group or a single person is disparately impacted, i.e., they are negatively impacted in a way that others are not because of their disability. The corresponding remedy would be a reasonable accommodation, which is a highly fact-specific inquiry.[130]

Third, one may argue that there would be an administrative burden created by certain policies resulting in a negative disparate impact towards people with certain disabilities and a positive one towards others, but that does not mean the answer is to throw the baby out with the bathwater, eschewing disparate impact liability altogether. There may be instances when this conflict is just part of the nature of difference. The classic example is when one disabled individual requires a service dog and the other is highly allergic to dogs. The initial response is to be creative and try to figure out how to accommodate both individuals. Any failure to accommodate both individuals is often due to a lack of creativity, not possibility. In the event an accommodation for both individuals is not possible, the backstops provided by affirmative defenses or arguments over what is "reasonable" would limit liability.

b. Those Not "Otherwise Qualified"

The Sixth Circuit's argument in *BlueCross* does not hold water. That central argument is that disparate impact is not prohibited by the Act because employers can discriminate against some disabled persons in determining

[127] *See* Michael Ashley Stein, *Same Struggle, Different Difference*, 153 U. Pa. L. Rev., 579, 598–603 (2004).

[128] *Id.* at 612–13.

[129] *Lane,* 541 U.S. at 531 (discussing Title II of the ADA).

[130] US Airways, Inc. v. Barnett, 535 U.S. 391, 405 (2002).

whether they are "otherwise qualified" for a job.[131] This relies on the premise that in determining whether someone is otherwise qualified, "legitimate job criteria" may be used.[132] These criteria can have a disparate adverse effect that can in turn defeat a claim of discrimination because it would mean that the individual is not "otherwise qualified" as required by the Act.[133] For example, an airline may have an eyesight requirement which would have a disparate adverse effect on blind persons, but those blind persons would likely not be "otherwise qualified." However, this argument is built on both flawed premises and conclusions. First, the argument relies on a flawed premise that conflates "disparate *adverse effect*" with "disparate impact *discrimination*." Second, the argument's conclusion does not follow from that flawed premise, as allowing a disparate impact in the Act's process prior to being afforded protection tells you nothing about the rights afforded once you are protected. Third, the argument's conclusion is in contradiction with current Supreme Court jurisprudence.

First, this argument relies on the flawed premise that disparate *adverse effect* is the same as disparate impact *discrimination*. Many actions not prohibited by law can have disparate adverse effects for individuals with protected traits. For example, scholars have found that requiring a medical degree has a disparate adverse effect on Black people due to decades of discrimination in higher education.[134] But a policy having a disparate adverse effect does not mean it qualifies as illegal disparate impact *discrimination* prohibited by the Act. For example, under Title VII—which the Court has held prohibits disparate impact discrimination—an employer can justify an employment requirement that has a disparate adverse impact by arguing that it is a "bona fide occupational qualification."[135] This may be why *Crocker v. Runyon*[136]—which the *BlueCross* majority cites as the source of its argument—distinguishes Title VII's "bona fide occupational qualification" from § 504's "otherwise qualified" requirement, stating, "[the bona fide occupational qualification] provision has proven much less expansive in practice."[137] However, just because something is much less expansive in practice—likely at least partially due to the distinct natures of the protected traits—does not mean that the function is different. The function of both provisions is to permit disparate adverse effects if they are required for a job. That is, their function is to differentiate a disparate adverse effect from illegal disparate impact *discrimination*.

[131] *BlueCross*, 926 F.3d at 242.

[132] *Id.*

[133] *See id.*

[134] *See* Devin B. Morris et al., *Diversity of the National Medical Student Body—Four Decades of Inequities*, 384 New Eng. J. Med. 1661, 1661-67 (2021).

[135] 42 U.S.C. § 2000e-2(e).

[136] 207 F.3d 314, 321 (6th Cir. 2000).

[137] *Id.*

Chief Judge Sutton's opinion in *BlueCross* conflates these two distinct concepts of disparate adverse effect and disparate impact *discrimination* to argue that because one is permissible it indicates the other is as well. However, since they are two distinct concepts, the permissibility of one says nothing about the permissibility of the other. In fact, the whole point of the provision is to separate whether a practice with a disparate impact is also illegal disparate impact discrimination.

Second, even assuming that the flawed premise is correct, the conclusion the Sixth Circuit reaches does not necessarily follow from that premise. The Act allowing disparate impact against those not protected, i.e., those not "otherwise qualified," says nothing about the prohibited actions once one is within the scope of its protection.[138] Nor does allowing such disparate adverse effects in determining who is "otherwise qualified" say anything about the prohibited actions provided once someone is granted the Act's substantive rights.[139]

Third, even if the conclusion follows from the argument's flawed premise, *Raytheon* forecloses Chief Judge Sutton's reasoning. If allowing individuals to be "disparately affected by legitimate job criteria"[140] due to the requirement that they be "otherwise qualified" were sufficient to prevent disparate impact liability, then Title I would not have teeth and could not prohibit disparate impact. However, the Supreme Court held in *Raytheon* that, at a minimum, Title I of the ADA *does* create disparate impact liability.[141] Furthermore, Title I sets the standard for § 504,[142] and independently contains the requirement that an individual be "qualified,"[143] so, under current caselaw, that cannot be a sufficient condition.[144] The Sixth Circuit in *BlueCross* relied on *Crocker* a pre-*Raytheon* employment discrimination case that discussed in dicta how disparate impact liability is likely unavailable under § 504.[145] However, post-*Raytheon*, the majority's argument no longer comports with Supreme Court jurisprudence.

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[138] *See* Olmstead v. L.C. by Zimring, 527 U.S. 581, 598 n.10 (1999).

[139] *C.f.* United States v. Perez, 22 U.S. (9 Wheat.) 579, 579–80 (1824) (holding that while double jeopardy attaches once a verdict is given, it does not attach in cases where there is a mistrial and thus no verdict).

[140] *BlueCross*, 926 F.3d at 242 (citing *Crocker*, 207 F.3d at 321).

[141] *Raytheon*, 540 U.S. at 53.

[142] 79 U.S.C. § 794(d).

[143] 42 U.S.C. §12112(a).

[144] *See Raytheon*, 540 U.S. at 53.

[145] *BlueCross*'s discussion of disparate impact liability relied on a portion of *Crocker*; a case decided on March 22, 2000. *BlueCross*, 926 F.3d at 242 (citing *Crocker*, 207 F.3d at 321). *Crocker* was a § 504 employment discrimination case that discussed how disparate impact liability is likely unavailable under § 504 due to its "otherwise qualified" language and the fact that Title VII's bona fide occupational qualification is narrower than the "Rehabilitation Act's safe harbor provision for non-hiring." *Crocker*, 207 F.3d at 321. However, three years later in *Raytheon*, the Supreme Court held that Title I of the ADA, which has similar language and sets the standard for § 504 employment violations, §29 U.S.C. 794(d), prohibits disparate impact liability, in effect rejecting *Crocker*'s assertion that disparate impact liability is unavailable in a § 504 employment discrimination case. 540 U.S. at 53.

C. *The Rehabilitation Act Provides a Private Right of Action for Disparate Impact Discrimination*

Assuming that a disparate impact claim exists under § 504, the question remains whether there is a private right of action to enforce that claim. This section argues that yes, there is a private right of action for enforcement under a disparate impact theory. First, the logic of *Sandoval* indicates there is a private right of action. Second, the text and context of § 505 implies a private right of action, further confirming the right granted in § 504 is enforceable by private parties. Third, under a contract law analysis, there is a private right of action. In particular, a private right would benefit the public interest and disabled persons would have the right to enforce as third-party beneficiaries.

The relevant provision that provides a private right of action, § 505, states:

> The *remedies, procedures, and rights* set forth in title VI …, *shall be available* to any person aggrieved by any act or failure to act by any [covered entity] under [§504].[146]

This provision shows the intertwined nature of the Rehabilitation Act of 1973 and Title VI of the Civil Rights Act of 1964. Because Title VI creates a private right of action for intentional violations and § 505 makes the "remedies, procedures, and rights" from Title VI available to aggrieved persons, § 505 has been interpreted to create a private right of action for a violation of § 504.[147] However, Title VI does not contain a *private* right of action *for disparate impact*.[148] If Title VI governs the "remedies, procedures, and rights" of the Rehabilitation Act and Title VI does not contain a private right of action for disparate impact, it can be easy to jump to the conclusion that *Sandoval* controls and the Rehabilitation Act contains no private right of action for disparate impact discrimination. However, if one delves deeper into the history and text of the statute, that premise is misleading.

1. *Sandoval as Applied to the Rehabilitation Act of 1973*

First, the phrase "remedies, procedures, and rights" in the context of the Rehabilitation Act does not prevent a private right of action for disparate impact claims. Instead, it permits and possibly even requires a private right of action. There are fairly strong arguments that Congress intended the substantive provision of § 504 to prohibit disparate impact discrimination. The limitations provided by the affirmative right granted by Title VI are found in § 601—with which § 504 shares some language. § 601 prohibits only those

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[146] 29 U.S.C. § 794a(a)(2) (emphasis added) (citations omitted).

[147] Barnes v. Gorman, 536 U.S. 181, 184–85 (2002).

[148] *Sandoval*, 532 U.S. at 285–86.

acts that violate the Equal Protection Clause of the Fifth Amendment.[149] However, at the time of the passage of the Act, the constitutional limitations of discrimination based on disability had not yet been decided.[150] This indicates that constitutional limitations did not define the discrimination Congress sought to prohibit. Instead, as the Ninth Circuit discussed in *Payan*, the statute itself was to provide the relevant standard.

After the Court decided that government policies alleged to discriminate on the basis of disability is need only survive rational basis review,[151] Congress revisited both the Rehabilitation Act and the ADA, yet it chose to maintain the language of § 505.[152] If a violation were determined by the Constitutional standard, § 504 would be nearly meaningless, as disability is afforded no further protection than rational basis review, which is not much of a review.[153] Post-*Cleburne*, both acts are more protective than the Constitution alone.[154] Congress intended to go further than what the Court held the Constitution demands, which indicates "rights" in § 505 means the *exact* same methods of enforcement provided by Title VI. Thus, the most faithful interpretation is that the "right," taken from Title VI, is the private right of action for a statutory violation, and engaging in disparate impact discrimination would violate § 504. As a result, § 505 would provide a private right of action against disparate impact discrimination.

Second, the source of the prohibition on disparate impact that gives rise to a private right of action is fundamentally different than the statutory source in *Sandoval*. As Justice Scalia explained in *Sandoval*, there is a significant difference between inferring a private right of action in § 602 and § 601; the rights-creating language present in § 601 does not exist in § 602.[155] The disparate impact liability discussed in *Sandoval* came not from the substantive right (the guarantee of non-discrimination by a covered entity) in § 601, but rather as a result of regulations created under § 602 to effectuate § 601.[156] Absent the rights-creating language contained in § 601, the Court would not infer a private right of action.[157]

Here, the right is substantively created by § 504, not by regulations further effectuating a rights-creating provision; therefore, under *Sandoval*'s

[149] *Bakke*, 438 U.S. at 287.

[150] City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432, 445–46 (1985).

[151] *Id.*

[152] ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008). The ADA uses § 505 as the basis for its remedy provision. 24 U.S.C. § 12133.

[153] *See* F.C.C. v. Beach Commc'ns, Inc., 508 U.S. 307, 313 (1993) (stating "[i]n areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.").

[154] *See Garrett*, 531 U.S. at 368–74, 374 n.9; *Cleburne*, 473 U.S. at 445–46.

[155] *Sandoval*, 532 U.S. at 288.

[156] *Id*. at 281–82, 288–89.

[157] *Id*. at 288–89.

logic, there should be a private right of action. The source of the statutory violation was a distinguishing line throughout *Sandoval* as to why there is a private right of action under § 601, but not § 602.[158] While resolving a potential application of dispositive case law is important, equally if not more important is determining as a matter of first principle what a statute says upon analyzing its text and context.

2. *§ 505's History and Context as Compared to Titles VI and IX*

Congress passed § 505 in a context that indicates the "rights" granted therein include a private right of action for *full* enforcement of § 504. Unlike similar provisions in Title VI and Title IX, § 505 was not judicially implied upon the initial passage of the Rehabilitation Act to further effectuate its purposes. Instead, § 505 was created in response to executive abdication. Thus, when examined within its context, the text was meant to address a larger unique problem by making a stronger private right of action both necessary and implied.[159]

a. *The Unique History of § 505*

The history leading up to the passage of § 505 provides important context informing the meaning of its text. This context indicates § 505 was meant to include a private right of action for all violations of § 504—which would include disparate impact discrimination. The history of § 505 involves three different presidential administrations openly defying Congress and the courts in implementing a major legislative act. Over four years, the executive branch: 1) engaged in egregious foot-dragging on issuing implementing regulations; 2) refused to publish near-identical regulations between administrations despite court orders; 3) was responsible for public and congressional outcry over the lack of implementing regulations and ongoing harm to towards disabled persons; and 4) underenforced § 504.[160]

After passing the Rehabilitation Act of 1973, Congress expected implementing regulations be published and §504 be enforced, which the

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[158] *Id.* at 288–92.

[159] Compare this with the Title IX private right of action analysis in *Cannon*, wherein the court agreed with HEW's analysis that this would help effectuate the act covering resources gaps for enforcement they were already doing. Cannon v. Univ. of Chicago, 441 U.S. 677, 704–08, 708 n.42 (1979). Whereas here, the context of § 505 is in express rejection of HEW's thoughts, policies, and activity.

[160] *See, e.g.*, S. Subcomm. on the Handicapped of the Comm. on Human Resources, 95th Cong., Review of Programs for the Handicapped, 1977 5 (Comm. Print. 1978) (Statement of Senator Culver on February 7, 1977 calling the lack of regulations implementing §504 four years post-enactment "inexcusable"); 121 Cong. Rec. 32, 915 (1975) (Rep. Christopher J. Dodd entering a GAO report from August 14, 1975, into the record wherein the GAO described the general lack of knowledge and/or implementation of § 504 across HUD, HEW, GSA, DOD, Labor, and Agriculture); *See, e.g., id.* at 728–29 (April 3, 1978, testimony on behalf of the National Federation of the Blind, discussing the lack of § 504 enforcement despite the regulations issued in 1977 and calls for Congress to fix it).

Executive branch continuously refused to do. After the passage of § 504, the Department of Health Education and Welfare ("HEW") refused to issue regulations implementing it, citing internal statutory inconsistencies and § 504's sparse legislative history.[161] After the passage of a clarifying amendment in 1974, those inconsistencies were resolved, and HEW's Office of Civil Rights was supposed to write the regulations.[162] By July 1975, HEW's regulations were crafted, approved internally, and submitted to the Secretary of HEW for final approval.[163] OCR recommended that they be immediately published in their submitted form.[164] However, Secretary F. David Matthews used Executive Order 11821 as an excuse to delay the publication of regulations by requiring OCR and the Office of the Assistant Secretary for Planning and Evaluation to include an inflation impact assessment.[165]

The assessment was eventually completed, and regulations were resubmitted on March 11, 1976.[166] After facing congressional and public pressure to publish the regulations, on May 17, 1976, HEW published a draft of the regulations for comment.[167] Rather than initially publishing the regulations for comment in the form of a "notice of proposed rulemaking" ("NPRM"), HEW took the rare step—at the time—of first proposing the draft regulations in what Professor Richard K. Scotch refers to as a Notice of Intent to Publish Proposed Rules ("NIPRM").[168] This NIPRM looks similar to what today is called an Advance Notice of Proposed Rulemaking. After a 30-day comment period on the NIPRM, the agency made mostly minor changes.[169] Then, on July 16, 1976, HEW published an NPRM very similar to the original draft.[170] At almost the same time, on July 19, 1976, in *Cherry v. Matthews*—which was filed in June 1975—a federal court ordered HEW to publish the regulations, although a specific deadline for publication was not provided.[171]

However, continual delays prevented publication of the § 504 regulations during the end of the Ford Administration. The comment period for the NPRM was originally set to end on September 14, 1976, but was extended to October 14, 1976.[172] On January 10, 1977, after post-comment

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[161] Richard K. Scotch, From Good Will to Civil Rights 64–68 (Temp. Univ. Press 2d ed. 2001).

[162] *Id.* at 66–68.

[163] *Id.* at 80, 86–88.

[164] *Id.*

[165] *See id.* at 89–91.

[166] *Id.* at 91.

[167] *Id.* at 91–93.

[168] *Id.* at 93–94.

[169] *Id.* at 94–95.

[170] *Id.*

[171] Cherry v. Matthews, 419 F. Supp. 922, 924 (D.D.C. 1976).

[172] Scotch, *supra* note 161, at 95, 102.

period revisions, a final version was sent to Secretary Matthews to sign.[173] However, since his tenure was ending soon, he did not want to approve the regulations.[174] As such, on January 18, 1977, Secretary Matthews sent a letter to Senator Harrison Williams, Chairman of the Senate Committee on Labor and Public Welfare, asking if the proposed regulations followed Congress's intent.[175] This was seen as a final stalling tactic to avoid issuing the regulations.[176] That same day, litigants asked the judge in *Cherry* to order that the regulations be published.[177] The district court issued such an order on January 18, 1977, which the D.C. Circuit stayed the next day pending argument from the United States.[178]

On January 20, 1977, the Carter administration took over and President Carter appointed Joseph Califano as Secretary of HEW.[179] Both Califano's aide and the staff at OCR recommended that the January 10, 1977 regulations be immediately signed either as final or "interim" to take effect, but be reviewed later.[180] However, Califano refused to do so, delaying publication—ultimately for four months—to further study and potentially weaken the regulations.[181] This resulted in major public outcry, most famously evidenced by the mass protests known as the § 504 sit-ins.[182] During the sit-ins, disabled people nationwide picketed or occupied HEW's regional offices and its D.C. headquarters.[183] The most famous of these was the San Francisco sit-in, which started on April 5, 1977 and would go on for roughly 26 days. The sit-in was one of the longest occupations of a U.S. Federal Government building in history.[184] Eventually, on May 4, 1977, the implementing regulations were issued, roughly four months into the Carter Administration.[185] These regulations—with a few exceptions—were similar to the January 1977 and July 1975 regulations.[186] The main substantive

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[173] *Id.* at 102-03.

[174] *Id.*

[175] *Id.*

[176] *Id.*

[177] *Id.* at 103.

[178] *Id.* at 103.

[179] *Id.* at 103.

[180] *Id.* at 104–05

[181] *Id.* at 103–18

[182] *Id.* at 111–16.

[183] Locations include Atlanta, Boston, Chicago, Dallas, Denver, Los Angeles, Philadelphia, New York, and San Francisco. Judith Heumann & Kristen Joiner, Being Heumann: An Unrepentant Memoir of a Disability Rights Activist 86, 98–100 (2020).

[184] Julia Carmel, *Before the A.D.A., There Was Section 504*, N.Y. Times (July 22, 2020), https://www.nytimes.com/2020/07/22/us/504-sit-in-disability-rights.html [https://perma.cc/S4J3-554Y]; Britta Shoot, *The 1977 Disability Rights Protest That Broke Records and Changed Laws*, Atlas Obscura (Nov. 9, 2017), https://www.atlasobscura.com/articles/504-sit-in-san-francisco-1977-disability-rights-advocacy#:~:text=The%20504%20Sit%2DIn%20was,building%20in%20United%20States%20history [https://perma.cc/8RRP-E2U2].

[185] Scotch, *supra* note 161, at 103–18.

[186] *Id.* at 118–20.

differences involved exempting recipients with fewer than 15 employees from recordkeeping and the use of slightly less specific language, which made compliance easier.[187]

b. Section 505's Unique History Provides Context for Its Text, Indicating That It Provides a Private Right of Action for Disparate Impact Discrimination

If the executive branch was hostile to enforcement for political reasons, it seems unlikely that Congress believed private lawsuits would be an effective mechanism to get them to budge. Section 505 was added in the 1978 Rehabilitation Act amendments after this four-year battle among the three branches over implementing regulations.[188] This history provides context for the meaning of § 505. This provision was not meant to spur further executive action or to ensure *some* enforcement in the wake of executive abdication; it was meant to provide private litigants the ability to *fully* enforce their substantive right. Beyond being an extratextual reading into the mindset of individual congressmembers, which the Court *claims* it has sworn off,[189] reading § 505 as though it was only meant to spur more action or provide private parties the ability to partially enforce their rights is quite a stretch. In fact, the President could argue that this further justifies non-enforcement, since private parties could pick up the slack.

If Congress was concerned about the scope of private enforcement and "fruitless challenges to legitimate, and utterly nondiscriminatory, distinctions,"[190] Congress could have explicitly limited the private right of action. But it chose not to. Instead, § 505 was implemented to ensure the Act was *fully* enforced in case of another intergovernmental battle created by an executive unwilling or unable to implement § 504. It is not for the Court to rewrite a statute with extratextual concerns simply because it does not like the result.[191] Moreover, for those who care about legislative history, the legislative history seems to confirm this reading. For example, by 1976, congressmen such as Representative Dodd called for the inclusion of a private right of action for § 504 to ensure the provision's enforcement.[192]

[187] *Id.* at 117.

[188] Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, Pub. L. No. 95–602, sec. 120(a), § 505, 92 Stat. 2955, 2982–83 (1978).

[189] *Sandoval*, 532 U.S. at 287 ("Having sworn off the habit of venturing beyond Congress's intent, we will not accept respondents' invitation to have one last drink.").

[190] *BlueCross*, 926 F.3d at 242.

[191] *See* Bostock v. Clayton Cnty., Georgia, 590 U.S. 644, 653 (2020) ("When the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law, and all persons are entitled to its benefit.").

[192] 122 Cong. Rec. 4,852–53 (1976) ("I believe that there should be included a provision for the right of an individual to bring a private action for a section 504 violation. Such a right has been read into title VI by the court undoubtedly as a result of its recognition that even with a statutory enforcement mechanism, to rely entirely on the executive branch for the protection of one's civil rights in these days of bureaucratic quagmires can also render one's rights illusory at best").

Furthermore, the non-exclusive phrase "shall be available" used in § 505[193] provides an independent basis to support the conclusion that a private right of action for disparate impact is available and reinforces the broader construction evidenced by § 505's history. "[S]hall be available" does not necessarily mean that the rights, remedies, and procedures created by Title VI are the *exclusive* ones, as it establishes a floor rather than a ceiling. "Shall" implies either a mandatory obligation or a guarantee.[194] The idea that this is an "exclusive" guarantee is also not provided by the word "available." Several possible definitions in Webster's Second indicate "available" does not connote exclusivity:

> [*l*]*aw.* Valid; as, an *available* plea. . . . Such as one may avail oneself of; capable of being used to accomplish a purpose; usable; as, an *available* excuse. . . . At disposal; accessible or attainable; obtainable; as, tickets *available* on that day.[195]

Congress had the ability to create an exclusive construction as they did in other parts of the Rehabilitation Act and the ADA.[196] Congress could have modified the provision with the word "solely," such as "shall solely be available," or used the words "shall be *the* [remedy]" as they did in the ADA.[197] The absence of this language suggests that Congress intended for § 505 to provide a floor rather than a ceiling. Therefore, a private right of action for disparate impact discrimination is necessary to align the purposes, policy goals, and text in the context of § 504.

3. Contract Law also Indicates that a Prohibition on Disparate Impact Discrimination is Privately Enforceable

The Supreme Court often analogizes to contract law to interpret the Rehabilitation Act, and were they to do so here, § 505 would provide a private right of action for disparate impact discrimination. § 504 operates as a contractual provision to any agreement for federal assistance.[198] That is, if you want federal money, you must agree not to discriminate. If, unlike Title VI, § 504 creates a substantive right against disparate impact discrimination, that affirmative right is part of the initial contract. As a result, principles of contract law indicate that there should be a corresponding private right

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[193] 29 U.S.C. § 794a(a)(2).

[194] *Webster's Second*, *supra* note 54, at 2300 ("shall 1. [*v.t.*] Owe; be under obligation for.) (2. As an auxiliary verb followed by the infinitive without *to:* Am (is, are, etc.) obliged; must. Hence, am (is, are, etc.) to—forming future-tense phrases"); *see also* Scalia & Garner, *supra* note 79, at 112–15) (discussing how whenever possible "shall" is read as mandatory).

[195] *Webster's Second*, *supra* note 54, at 189.

[196] *See e.g.,* 29 U.S.C. § 794(a) ("shall, solely by reason of her or his disability").

[197] 42 U.S.C. § 12133 (emphasis added).

[198] *See* Cummings v. Premier Rehab Keller, *P.L.L.C.*, 596 U.S. 212, 219–220 (2021); *see also* Gebser v. Lago Vista Independent Sch. Dist., 524 U.S. 274 (1998).

of action to prohibit disparate impact discrimination because it favors the public interest and disabled persons have a right to enforce the "contract" as third-party beneficiaries.

First, contract law dictates that, given a choice between reasonable constructions, the interpretation favoring the public interest is preferred.[199] Assuming § 504 creates a substantive right against disparate impact discrimination, there is a reasonable construction that § 505 would include a private right of action provided by the substantive right.[200] The millions of disabled persons who would otherwise be discriminated against, as well as their families, friends, and the entire public, have an interest in reducing this discrimination. Given limited resources for government enforcement in relation to the vast number of cases, the public interest is best served by a private right of action. While some economic interests of the defendant may be implicated, Comment A of the Second Restatement of Contracts suggests those *economic* interests are legally irrelevant.[201] Comment A states that this principle "has *often* been relied on *to justify narrow construction of a grant* of a public franchise *or an agreement* for a tax exemption."[202] Much like how there are economic justifications for broader readings of tax exemptions favoring the public, one could argue that economic considerations should reduce liability. However, those considerations should be similarly foreclosed.

Second, there is a private right of action because disabled persons—as defined by the Rehabilitation Act—would have the right to fully enforce § 504 as beneficiaries of the "contract."[203] Disabled persons are the intended beneficiaries of the contract because the intention of the parties is to avoid discrimination against those parties, which would fall under the specific performance clause of Subsection 1(b).[204] Recipients of federal assistance have a duty to perform their promise of nondiscrimination to the intended beneficiaries, which those beneficiaries may enforce.[205]

II. Current and Future Disparate Impact Research for Bringing § 504 Environmental Justice Litigation

Assuming that the Rehabilitation Act provides a private right of action for disparate impact discrimination, to bring an environmental justice claim, plaintiffs would need evidence of a disparate impact on disabled persons for their § 504 claim. This section begins by examining background principles

[199] Restatement (Second) of Conts. § 207 (Am. L. Inst. 1981).

[200] *See supra* pp. 19–24.

[201] Restatement (Second) of Conts. § 207 cmt. A (Am. L. Inst. 1981).

[202] *Id.* (emphasis added).

[203] *See id.* § 2(4).

[204] *Id.* § 302.

[205] *Id.* § 304; *See also Barnes*, 536 U.S. at 187–89.

regarding the necessary evidence for a prima facie disability environmental justice case. It then analyzes current research around how pollution disparately impacts disabled persons. Finally, it discusses how to address gaps in the current scientific literature and design future research for a § 504 claim.

A. Relevant Background Principles

Proving the prima facie case of a disparate impact claim involves: 1) identifying the facially neutral policy or practice (pollution site locations) to challenge; 2) establishing adversity (pollution harms disabled individuals, lowers property prices, causes physical harm, etc.); 3) establishing disparity (disabled individuals are subjected to a disproportionate amount of pollution sites); and 4) establishing causation, often, this comes in the form of "statistical evidence of a kind and degree sufficient to show that the practice in question has caused [the harm.]"[206] Generally, to establish a prima facie disparate impact case, the observed disparity needs to be at least two standard deviations[207] from the expected mean under the null hypothesis of no disparate impact.[208] This roughly tracks the conventional test of statistical significance, which is a *p*-value of less than 5% ($p<.05$)[209] or roughly 1.96 standard deviations from the mean (assuming a normal distribution).

The word "solely" within § 504 sets the rigor of the causation standard for the prima facie case, making research design all the more important.[210] Section 504 uses the language "solely by reason of."[211] In this context, "solely" means "exclusively; to the exclusion of other purposes, persons, etc.; merely; entirely; wholly; as, done *solely* for money; a privilege granted *solely* to him; to rely *solely* on oneself."[212] The word "solely" thus creates

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[206] Watson v. Fort Worth Bank & Tr., 487 U.S. 977, 994 (1988); *see also* C. R. Div., U.S. Dep't Of Just., DOJ Title VI Legal Manual, § 7 (2021) [hereinafter *DOJ Manual*].

[207] "The standard deviation is a sort of mean deviation from the mean." David H. Kaye & David A. Freedman, *Reference Guide on Statistics*, *in* Reference Manual on Scientific Evidence 211, 239 (Fed. Jud. Ctr., 3d ed. 2011). "When the distribution follows the normal curve, about 68% of the data will be within 1 standard deviation of the mean, and about 95% will be within 2 standard deviations of the mean." *Id.* at 239 n.81.

[208] Hazelwood Sch. Dist. v. United States, 433 U.S. 299, 309 n.14 (1977) (citing Castaneda v. Partida, 430 U.S. 482, 496 n.17 (1977)).

[209] *p* is (the probability of an event happening, assuming your null hypothesis is true. Here, the null hypothesis is the number expected without discrimination. If that number is less than 5%, we would reject the null hypothesis. For example, if an investigator examining a corporation's employment practices assumed in a world without discrimination that 12% of employees hired would be Black, 12% of employees would be your null hypothesis. If the probability of observing the number of Black employees *actually* hired—assuming your null hypothesis is true—is less than 5%, you would reject the null hypothesis. Although a percentage of greater than 5% does not mean the investigator would accept the null hypothesis, as there still may be discrimination, Supreme Court precedent makes it difficult to use federal civil rights law absent meeting the 5% threshold.

[210] *See* 29 U.S.C. § 794(a).

[211] *Id.*

[212] *Webster's Second*, *supra* note 54, at 2393.

the standard of causation that must be proven. That is, to bring a prima facie case for disparate impact, the plaintiff would have to prove that disability is the exclusive cause of the action at issue. This heightened rigor means bringing a case under § 504 will require especially stringent statistical analysis for the fourth step of establishing causation.

Once the prima facie case is proven, the burden of proof shifts from the plaintiff to the defendant, and the defendant is given the opportunity to justify their policy or practice.[213] For § 504, the justification comes from various affirmative defenses; those relevant to this Note are the "fundamental alteration" and "undue burden" defenses. The fundamental alteration defense states that reasonable modifications are not required if the defendant "can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity."[214] The undue burden defense is a case-specific test that requires the defendant to show special circumstances in which a particular accommodation would create an undue financial or administrative burden.[215] It is a relative argument raised by the defendant based on their inability to administratively or financially afford a reasonable accommodation.[216] The relative nature of the undue burden defense means that where there are two otherwise identical businesses, and one is less profitable than the other, the more profitable business may be required to do more to accommodate a disabled person than the less profitable one.[217]

The multi-part burden-shifting framework means that litigants must account for possible affirmative defenses; thus, research design is important for ensuring success. It is particularly important that the research establishes the disparity, the significance of the relationship, and forecloses applicable affirmative defenses (undue burden and fundamental alteration). The intensive nature of needing to foreclose all those options means that the research can be exceedingly expensive, serving as a barrier to litigation.

B. Current Environmental Justice Research on Disability-Based Disparities in Pollution

Current academic research on disability-based disparate impact has moved in the right direction by establishing a statistically significant relationship between environmental hazards and disability, while also eliminating

[213] Texas Dep't of Hous. & Cmty. Affs. v. Inclusive Communities Project, Inc., 576 U.S. 519, 540–45 (2015).

[214] 28 C.F.R. § 35.130(b)(1)(7)(i) (discussing the fundamental alteration defense under Title II regulations).

[215] Se. Cmty. Coll. v. Davis, 442 U.S. 397, 412 (1979); *see also Choate*, 469 U.S. at 308 (discussing the administrative costs aspect of *Davis*, while reaffirming *Davis*'s undue burden analysis as important for determining what accommodations might be required under the meaningful access standard).

[216] *See Barnett*, 535 U.S. at 402 (discussing undue hardship—equivalent to undue burden—under Title I).

[217] *Cf. id.*

potential alternative causes for disparities. There are only a handful of studies exploring the correlation between disability and environmental pollution sites. The two most prominent were conducted by Dr. Jayajit Chakraborty. Dr. Chakraborty's studies analyze disability-based disparate impact in hazardous waste sites and PM 2.5 exposure. However, while the research is insightful, more work is necessary for it to be ready to be used in court—the "big stage."

1. Hazardous Waste Sites

In *Unequal Proximity to Environmental Pollution: An Intersectional Analysis of People with Disabilities in Harris County, Texas*, Dr. Chakraborty analyzed the relationship between hazardous pollution and disability in Harris County, Texas.[218] For his dependent variables, Chakraborty examined three pollution sources: 1) Superfund sites; 2) Treatment, Storage, and Disposal facilities ("TSD"); and 3) motor vehicle traffic.[219] For his independent variables, he used: 1) population density; 2) percentage of renter-occupied housing units; 3) median household income; and 4) percentage of people with a disability (derived from the American Community Survey ("ACS").[220] He then used EPA's EJScreen to assign proximity values to census tracts.[221] He used multivariable generalized estimating equations ("GEEs") to conduct statistical analysis.[222] After controlling for tract clustering and sociodemographic characteristics, Dr. Chakraborty found a positive and significant relationship—$p<.01$—between overall disability percentages and both TSD and Superfund sites.[223] These results indicate TSD and Superfund sites are significantly more likely to be located in areas in Harris County with a higher share of disabled individuals. That proximity to hazardous waste sites poses serious health risks, including adverse

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[218] Jayajit Chakraborty, *Unequal Proximity to Environmental Pollution: An Intersectional Analysis of People with Disabilities in Harris County, Texas*, 72 Pro. Geographer 521 (2020) [hereinafter *Unequal Proximity*].

[219] *Id.* at 525.

[220] Dr. Chakraborty uses the Census and American Community Survey as the basis for his data, which only includes non-institutionalized persons with disabilities. *Id.* at 523. During the early to mid-2000s, to align its definition of disability more closely with the models of disability used under the ADA and § 504, the ACS changed its definition of disability. *See* Matthew Brault, Sharon Stern, & David Raglin, Evaluation Report Covering Disability 2–5 (Jan. 3, 2007) (U.S. Census Bureau working paper), https://www.census.gov/content/dam/Census/library/working-papers/2007/acs/2007_Brault_01.pdf). The current ACS definition of disability covers six types (and any associated variables): 1) hearing difficulty; 2) vision difficulty; 3) cognitive difficulty; 4) ambulatory difficulty; 5) self-care difficulty; and 6) independent living difficulty. *How Disability Data are Collected from The American Community Survey*, U.S. Census Bureau (Nov. 21, 2021), https://www.census.gov/topics/health/disability/guidance/data-collection-acs.html [https://perma.cc/FST7-YQMY].

[221] *Unequal Proximity*, *supra* note 218, at 524.

[222] *Id*. at 525–26.

[223] *Id*. at 526–29.

prenatal outcomes, respiratory and heart diseases, psychosocial stress, and various adverse mental health effects.[224] No significant relationship was found between disability and motor vehicle traffic.[225]

Dr. Chakraborty then analyzed the data disaggregated by race, ethnicity, poverty status, and age. Both below and above the poverty line there was a significant statistical relationship between disability and pollution sources.[226] This may help in at least partially ruling out one of the strongest arguments for an alternative cause, socio-economic status. Moreover, there was some relationship between race, disability, and proximity to pollution sites that appeared when the disability subgroups were disaggregated by race (white, Black, Asian, or "other race"). For Superfund sites, there were significant positive relationships between proximity and the subgroups of Black disabled persons and disabled persons of "other race."[227] For TSD facilities there were significant negative relationships between proximity and the white and Asian disabled subgroups.[228] For traffic there was no positive significant relationship, but there was a negative significant relationship for those in the white disabled subgroup.[229] These relationships indicate disabled people of color can be put in "multiple jeopardy," wherein both their race and their disability each increase the likelihood they face environmental injustice.[230] Moreover, the research also helps demonstrate when accounting for other alternative causes and focusing the analysis within certain subgroups, the relationship between disability status and TSD and superfund sites still exists.

Dr. Chakraborty acknowledged some limitations of the study. First, he noted that proximity to environmental hazard sources does not necessarily represent actual human exposure or adverse effects—although it may be used as a proxy when other evaluative methods are unavailable.[231] Second, he noted that the ACS data is limited because it is: 1) self-reported; 2) only accounts for the noninstitutionalized population; 3) does not provide enough questions for robust definitions of disabilities; and 4) does not include factors that might contribute to disability.[232] The study also does not include longitudinal research to determine whether the waste came to places where

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[224] Rachel Morello-Frosch, Miriam Zuk, Michael Jerrett, Bhavna Shamasunder, & Amy D. Kyle, *Understanding the Cumulative Impacts of Inequalities in Environmental Health: Implications for Policy*, 30 Health Affairs 879, 881 (2011).

[225] *Unequal Proximity*, *supra* note 218, at 527.

[226] *Id*. at 528.

[227] *Id*.

[228] *Id*.

[229] *Id* at 529.

[230] *Id.* at 530.

[231] *Id*.

[232] *Id*.

disabled people live or the waste was there and then as a result, people became disabled.[233]

2. *PM 2.5 Exposure*

The design of Dr. Chakraborty's Particulate Matter ("PM") 2.5 research is similar to his hazardous waste site work, but on a grander scale. This was the first national scale study of PM 2.5 exposure for disabled persons in the U.S.[234] The analysis of PM 2.5 is particularly important as it is one of the seven criteria pollutants dangerous to public health or welfare that the EPA regulates under the Clean Air Act, alongside carbon monoxide, lead, nitrogen dioxide, ozone, PM 10, and sulfur dioxide.[235] Dr. Chakraborty's study analyzed 71,361 tracts with at least 500 persons, 200 housing units, and complete data for all variables.[236] Chakraborty used the ACS survey for his population data, census tracts for comparison, and GEEs for his statistical calculations.[237] He used v1 empirical models developed by the Center for Air, Climate and Energy Solutions ("CACES") to determine outdoor annual PM 2.5 concentrations. Positive relationships ($p < .001$) were observed between PM 2.5 exposure and the overall percentage of disabled persons.[238] That is, there was a strong (and statistically significant) positive correlation between whether someone was exposed to PM 2.5 and whether they lived in an area with a higher population of disabled persons. In essence, he more disabled people there were in an area, the more likely it is that the area was exposed to greater levels of PM 2.5. Those greater levels of exposure pose serious adverse health consequences, such as risk of higher rates of cardio-vascular disease,[239] heart attacks, asthma attacks, cancer, nervous system damage, and mortality.[240] The PM 2.5 research adds to the growing body of literature demonstrating disparities across pollution types, but like Chakraborty's other research, his PM 2.5 study does not provide all of the evidence necessary for litigation.

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[233] *Id.*

[234] Jayajit Chakraborty, *Disparities in Exposure to Fine Particulate Air Pollution for People with Disabilities in the US*, 842 Sci. Total Env't 1, 1 (2022).

[235] *See* 40 C.F.R. § 50 (2024); 42 U.S.C. § 7408.

[236] Chakraborty, *supra* note 234, at 2.

[237] *Id.*

[238] *Id.* at 3.

[239] *See generally*, C. Arden Pope III, Richard T. Burnett, Daniel Krewski, Michael Jerrett, Yuanli Shi, Eugenia E. Calle, & Michael J. Thun, *Cardiovascular Mortality and Exposure to Airborne Fine Particulate Matter and Cigarette Smoke* 120 Circulation 941 (2009).

[240] Reconsideration of the National Ambient Air Quality Standards for Particulate Matter, 88 Fed. Reg. 5558, 5581–91 (proposed Jan. 27, 2023) (to be codified at 40 C.F.R. pts. 50, 53, 58).

C. *Future Research Design for Use in Disability Environmental Justice Litigation*

While current research goes a long way toward establishing a disparate impact claim on the basis of disability for pollution, more needs to be done for the research to be sufficient for litigation. Future research would have to be tailored to prove not just that disabled persons face disparity generally, but that specific actions or policies of an entity covered by §504 illegally caused a disparate impact.[241]

This section will discuss improvements to research design to create a stronger case for legal causation and how to deal with current research gaps. First, designing new research with a control group comprised of potential alternative sites for the polluting activity would negate potential affirmative defenses and provide strong proof of causation. Second, using robust multiple regression analysis in future research would help prove sole causation and be easier to use in litigation than alternative models. Third, longitudinal research would help prove that an increased presence of disabled persons caused the polluting activity to occur rather than the polluting activity causing the increase. Finally, underreporting on disability, while a problem for data accuracy generally, is unlikely to affect any litigation.

1. *Alternative Location*

One of the most important aspects of the research design is that the data generated control for potential alternative causes of the choice of a specific location so it can be used to respond to affirmative defenses. Defendants could make arguments about location choice both in response to determining causation for the prima facie case and later as a justification for choosing a location. Using cost-comparable alternative locations as a control group would help prove a prima facie case by eliminating alternative causes, thus helping to establish sole causation. Moreover, the research could also be designed to account for potential arguments justifying location choices in response to a prima facie case.

First, incorporating cost-comparable alternative site locations to use as a control group will build on Dr. Chakraborty's work to help eliminate cost as both an alternative cause and as a justification vis-à-vis undue burden. Dr. Chakraborty's current data analyzes whether areas of high pollution correlate with higher rates of disability.[242] But to make a stronger causal argument, it is important to prove that an area has higher rates of disability and then control for cost-comparable alternate sites with lower rates of disability

[241] Pointing to a specific practice or policy will be important for any class action, as otherwise the class cannot be certified. *See* Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 352–59 (2011).

[242] Chakraborty, *supra* note 234, at 3.

that were not chosen. As environmental planning can span large areas, there would likely be many alternative tracts to choose from.

To create alternative location control groups, one might start by obtaining census tract data, as Dr. Chakraborty did in his research.[243] Then, a researcher could select two tracts where a feasible site could have been chosen for the project, such as a hazardous chemical dumping site. One tract (Tract A) would have a higher rate of disability, while the other (Tract B) would not. Comparing the two tracts and showing that the tract with a higher rate of disability was chosen for the site would strengthen the case for the statistical significance of the data. Another possible way to set up the regression—which may be less vulnerable to claims by the defendant that the sites are cherrypicked—would be to find all feasible sites, rather than just matching sites, and then conduct the analysis among the set of feasible control and treated sites to determine if disability is correlated with site choice. Either method would help combat the fundamental alteration defense because the researcher demonstrates that the location chosen was not necessary and that the program could have been implemented elsewhere, without engaging in discrimination.

Second, defendants may argue that alternative sites are far too costly, imposing an undue burden either: 1) at the initial site selection process or 2) after construction due to relocations. The control group would account for the site selection justification, leaving only the relocation justification. This relocation burden is likely the weaker of defendants' potential arguments, since if the planning and permitting process is still being done, the sunk cost is much lower and unlikely to be very persuasive. Additionally, the cost of moving something such as an entire TSD site might be incredibly expensive as it would involve hazardous waste transport.[244]

To account for the undue burden justification in relocation, conducting research on the comparative benefits to disabled persons of living in a less-polluted area, as compared to the one-time relocation cost, may be helpful. The high cost of medical care for disabled persons who might be uniquely vulnerable may drive up the costs of discrimination quickly. If increased pollution levels have a compounding effect to drive those costs up even higher, it may quickly become harder to argue relocation imposes an undue burden. A long-term economic study of the affected locality (or a similarly situated one) would help prove these claims.

However, undue burden is a fairly high threshold, and many potential polluters, such as large energy companies, have deep pocketbooks, perhaps limiting the utility of this affirmative defense. As such, the undue burden pill may be too much to swallow in the context of most environmental litigation.

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[243] *See id.* at 2.

[244] *See* Off. of Land and Emergency Mgmt., U.S. Env't Prot. Agency, Economic Assessment of the Potential Costs, Benefits, and Other Impacts of The Proposed Rulemaking to List Specific PFAS as RCRA Hazardous Constituents 88–91 (2024).

Still, since undue burden is relative, the argument may be more salient for defendants with fewer financial resources.

2. *Multiple Linear Regression Analysis*

When designing a study to compare statistical relationships for disparate impact, two key variables are the dependent and independent variable.[245] For example, in a potential disability-based environmental justice case, the dependent variable could be the number of polluting facilities permitted in a given tract, while the independent variable could be the percentage of people in that tract living with a disability. It is important to rule out alternative explanations even if a strong correlation between two variables is found. This is especially important in disparate impact litigation where proving causation is required.[246] The higher the burden of proof, the more alternative explanations need to be ruled out. Therefore, a method is needed to check against other independent variables that might be driving the correlation. Factors like race, gender, and socio-economic status would need to be ruled out as potential causes.

One of the most common methods for ruling out the relationship between alternative independent variables and the dependent variable is multiple regression analysis.[247] From a litigation strategy perspective, multiple regression analysis is a preferable model for research compared to other models like GEEs, as long as similar results are obtained. Multiple regression analysis is often used in litigation, which increases court familiarity and the precedent available to permit its use.[248] Multiple linear regression begins with collecting data, which may be represented by creating a scatter chart with the X and Y variables, and drawing a line called the "regression line" that best fits all the data.[249] The Y-axis represents the dependent variable (polluting facilities permitted), while the X-axis represents the independent variable of interest (such as disability). Multiple linear regression allows one to expand this model by including additional independent variables such as race, age, and socio-economic status to assess the relationship of interest, while controlling for other characteristics.[250] Such analysis would help

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[245] *See* Kaye & Freedman, *supra* note 207, at 219.

[246] *See* Presseisen v. Swarthmore Coll., 442 F. Supp. 593, 608–20 (E.D. Pa. 1977).

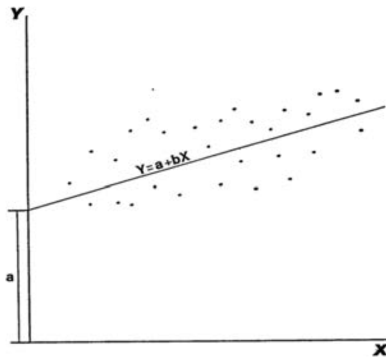
[247] *See*, *e.g.*, Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 980 F.3d 157, 180–82 (1st Cir. 2020), *rev'd*, 600 U.S. 181 (2023); Bazemore v. Friday, 478 U.S. 385, 394–400 (1986) (Brennan, J., concurring in part); McCleskey v. Kemp, 481 U.S. 279, 286–94 (1987); Marks v. Stinson, CIVIL ACTION NO. 93-6157, 1994 U.S. Dist. LEXIS 5273 (E.D. Pa. Apr. 26, 1994); Presseisen, 442 F. Supp. at 614–20; Moussouris v. Microsoft Corp., 311 F. Supp. 3d 1223, 1229 (W.D. Wash. 2018).

[248] *See* Michael O. Finkelstein & Bruce Levin, Statistics For Lawyers 399 (3d ed. 2015); sources cited *supra* note 248.

[249] *See* Kaye & Freedman, *supra* note 207, at 259–64.

[250] *See* Franklin M. Fisher, *Multiple Regression in Legal Proceedings*, 80 Colum. L. Rev. 702, 705–13 (1980).

determine, for example, whether the number of polluting facilities permitted in a census tract is positively associated with the share of individuals with disabilities even after accounting for the race, age, and socioeconomic composition of the tract's residents. If a significant correlation is still observed after ruling out the impact of other variables on the dependent variable, it may suggest a causal link.



Example of a regression analysis chart with a regression line.[251]

One goal of testing against different relevant independent variables is to find the independent variable that best explains the relationship, predicts the value of the dependent variable, and has the smallest rate of error.[252] This is sometimes called "goodness of fit."[253] When determining goodness of fit, a researcher examines how well any model constructed fits the data. Several measures are used to determine goodness of fit, including—most relevantly—the standard error of coefficient and *t*-statistic.[254]

The standard error of the coefficient is the estimated standard deviation, which helps determine the reliability or accuracy of the coefficient.[255] For example, it helps to determine how precisely the coefficient can estimate the relationship between the rate of disability and the number of polluting facilities permitted.

Plaintiffs will also need to know the "t-statistic," which is obtained by taking the ratio of the estimated coefficient to its standard error.[256] This is similar to a "z-score," which measures the number of standard deviations from the mean that a value is, but the difference is that multiple regression analysis is attempting to predict values using the standard error (or the estimated standard deviation) rather than the actual standard deviation. As discussed previously, courts generally require a z-score (or t-statistic in

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[251] *Id.* at 707, 716 n.24.

[252] *Id.* at 716–720

[253] *Id.* at 716–20.

[254] *Id.*

[255] *Id.* at 716.

[256] *Id.* at 716.

this case) of greater than 1.96 to establish a prima facie case of disparate impact.[257]

It is important to ensure that any studies conducted for litigation have robust regression analyses. Section 504's sole causation requirement[258] means that alternative causes need to be thoroughly ruled out. When considering possible alternative independent variables to rule out alternative causation, a plaintiff might attempt to anticipate every possible relevant alternative explanation and then do a regression analysis with those variables. For example, a researcher can test against socio-economic status, race, gender, highway location, or any other reasons one might choose to locate a polluting facility in each location. Proper econometric methodology requires specifying these variables in advance of performing any analysis.[259] As such, it is common for litigants to submit some initial research studying disparity generally to justify pleading a case, followed by the intensive regression analysis once relevant variables are determined during discovery.[260]

It is important not to erroneously include or exclude variables as this can render the model less accurate.[261] If a researcher erroneously omits certain variables, the results may overstate the coefficients of included variables, or if they include extraneous variables[262] the resultant model may be less precise.[263] Furthermore, it is critical not to include tainted variables, which can decrease accuracy and erroneously decrease the chance of finding a significant relationship.[264] Tainted variables come in two forms. First, they may be variables that are facially reasonable but suffer from the same problem plaguing the variable being tested.[265] For example, imagine plaintiffs bring a pay discrimination case two or three years after the passage of

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[257] *See, e.g.*, *Hazelwood*, 433 U.S. at 309 n.14 ("As a general rule for such large samples, if the difference between the expected value and the observed number is greater than two or three standard deviations,' then the hypothesis that teachers were hired without regard to race would be suspect.") (quoting *Castaneda*, 430 U.S. 482, 496-497 n.17 (1977)).

[258] 29 U.S.C. § 794(a).

[259] Fisher, *supra* note 250 at 734–34.

[260] *Compare* Second Amended Class Action Complaint at 4–13, *Moussouris*, 311 F. Supp. 3d 1223 (No. 15-cv-01483-JLR) (discussing anecdotal disparities in promotions between women and similarly situated men), *with* Redaction to Sealed Document Expert Report of Dr. Henry Farber Errata at 13–37, *Moussouris*, 311 F. Supp. 3d 1223 (No. 15-cv-01483-JLR), ECF No. 384 (discussing multiple different types of regression analyses that were used to examine disparities in pay, promotion, advancement, and performance reviews).

[261] *Id.* at 713–6.

[262] While extraneous variables are not intrinsically concerning because if there is no correlation between the extraneous variable and the X-value it would not impact the regression, the collateral risks associated with increased extraneous variables pose a threat to model precision. In particular, the more extraneous variables one adds, the greater the risk is that one of those variables if confounding or spurious, the inclusion of those confounding or spurious variables would of course decrease the model's precision. *See* Finkelstein & Levin, *supra* note 249 at 402.

[263] Finkelstein & Levin, *supra* note 248 at 400–402.

[264] *Id.* at 362, 365.

[265] *Id.*

Title VII (which outlawed racial discrimination in employment) against a company that only first started hiring Black employees after Title VII went into effect. Then during litigation, the defendant states the reason for the higher pay is years of experience with the company, not race. While years of experience may be generally a legitimate factor, here it would be tainted because Black people would also have less experience because of discrimination. Second, tainted variables may be so highly correlated with another factor that it acts as a proxy, skewing the data.[266] For example, in a racial discrimination case, if you included melanin levels as a variable, it would act as a proxy for race.[267] In litigation, it is often easiest to depose a decisionmaker to ask them what is driving their decision and then use those variables—if relevant and untainted—as part of the regression.[268]

Once the regression analysis is done, the job is not over. One needs to interpret the data and meaning of the correlation to determine whether it disproves the hypothesis. If, at the end of the day, a disparate impact of statistical significance towards disabled persons can be proven, even when accounting for alternative causes, it will help strengthen the overall case.

Bazemore v. Friday provides an example of multiple regression analysis in litigation.[269] In *Bazemore*, the plaintiffs brought a Title VII claim alleging that North Carolina State University's agricultural extension program engaged in racial discrimination by paying its salaried Black workers less than its white workers.[270] To prove this claim, the plaintiffs' expert prepared a multiple regression analysis after an Extension Service official shared during discovery that the factors determinative of salary were: education, tenure, job title, and job performance.[271] That regression examined the salaries from 1974, 1975, and 1981, checking for disparities against the independent variables of race, education, tenure, and job title.[272] The plaintiffs claimed the regressions demonstrated a disparity of statistical significance in 1974 and 1975 for the average Black employee's pay compared to a white employee with the same job title, education, and tenure.[273] The 1981 regression still showed a disparity, but it lacked statistical significance.[274] After hearing the evidence, the district court found for the defendants and stated that the plaintiffs did not carry their burden of proof.[275] The case was

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[266] *Id.*

[267] *See* Ewa Markiewicz & Olusola Clement Idowu, *Melanogenic Difference Consideration in Ethnic Skin Type: A Balance Approach Between Skin Brightening Applications and Beneficial Sun Exposure*, 13 Clinical, Cosm. and Investigational Dermatology 215, 215–16 (2020).

[268] *See, e.g.*, *Bazemore*, 478 U.S. at 398–99 (Brennan, J., concurring in part).

[269] *See id.*

[270] *Id*. at 388–92.

[271] *Id*. at 398–99.

[272] *Id.*

[273] *Id.* at 399, 399 n.9.

[274] *Id*. at 399.

[275] *Id*. at 386.

appealed to the Supreme Court, which vacated and remanded the decision to the Fourth Circuit.[276] On remand, the Fourth Circuit reversed the district court's judgement in part, holding that, on remand, the district court was to grant relief for some of the plaintiffs and hold further proceedings for others.[277]

3. The "Chicken and Egg" Problem

One of the remaining concerns for anti-discrimination litigation is the "chicken and egg" problem. Which came first: was the site located in a place with an already high incidence of disability or did an increase in disability rates occur after the creation of the pollution site? If the latter, the polluter could be in trouble for other reasons—they might be sued under tort law if causation is established—but it would provide some evidence that the defendant did not discriminate.[278]

Defense counsel may try and use the "chicken and egg" argument to avoid liability, but for practical purposes, they would need to frame this argument very carefully. The argument may not play well in front of a judge or jury made up of community members who might also be affected by the conduct or independently lose sympathy for the defendant. Done poorly, a jury might hear the defense attorney saying, "My client didn't discriminate against disabled people; after my client started polluting, everyone in the surrounding area became disabled." A needle would need to be threaded between stating that the higher rate of disability came afterward and that there is no causal relationship between the polluters' appearance and the higher rate. Otherwise, barring any immunities, the defendant is in a catch-22, as they must either: 1) risk a greater chance of liability under § 504 or 2) risk a greater threat of tort liability.[279]

For litigation purposes, it is important to design the study to help establish that a higher rate of disability predated the pollution-causing activity. One can accomplish this by comparing disability rates prior to and after the polluting activity to determine if the rates are similar. This would partially resolve the problem: if the rates of disability are substantially different, the case that the polluter caused the increase becomes stronger. If the rates are similar, a disparate impact claim is still possible since the site could have been chosen because of the higher disability rate, later exacerbated by the pollution. To analyze that potentiality a litigant might disaggregate the

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[276] *Id.* at 388.

[277] Bazemore v. Friday, 848 F.2d 476, 478 (4th Cir. 1988).

[278] *See* Curtis v. M&S Petroleum, Inc., 174 F.3d 661, 669–72 (5th Cir. 1999).

[279] Research comparing alternative sites with the location chosen may even be useful if repurposed for tort claims, as comparing the two similar tracts might provide some evidence for causation in tort.

data by type of disability to see if there are increases in the rates of specific disabilities or might examine the rate of certain healthcare expenditures.

4. *The Underreporting Problem*

One concern underlying any disability research is the underreporting of disability rates.[280] However, underreporting is unlikely to pose a substantial problem for the purposes of litigation because the research is being used as evidence of disparate impact discrimination under § 504.

If establishing disparate impact is the end goal, there is only one scenario where underreporting would make a difference. This scenario is where the delta between underreporting rates for each area is larger than the disparity demonstrated by the data that does exist—such that it is possible that there would be no significant disparity with full information. In other words, before one can determine that the inference is undermined, one would need to determine that the underreporting was *significant enough* to undermine a disparate impact claim. To use an extreme example, if the probability of the disparity in pollution faced by disabled versus nondisabled persons is five standard deviations from the mean and the difference in underreporting affected the number was only enough to make the probability four standard deviations, that is likely insufficient.[281]

III. Bringing § 504 Environmental Justice Litigation and the Benefits of Doing So

After discussing both the legal and factual questions of putting together a disability environmental justice case, the practical question of how to bring the case remains. First, this section will explain the framework for proving a § 504 disparate impact case. Second, it will discuss how to prove a prima facie case under that framework. Third, it will address legal strategy concerns likely to arise during litigation. Fourth, it will examine potential affirmative defenses to the prima facie case. Finally, it will analyze the benefits of disability environmental justice litigation—during and after litigation—for both disabled persons and other marginalized groups.

A. *The Framework for Proving a § 504 Disparate Impact Case*

If *Sandoval* is not controlling over § 504, the question then becomes: what is the framework for proving a case? The most natural framework for

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[280] *See* Tara Adam & Catharine Warner-Griffin, Nat'l Ctr. Educ. Stat., Use of Supports Among Students with Disabilities and Special Needs in College 1 (2022); *see also* Margaret Mbogoni & Angela Me, United Nations, Revising the United Nations Census Recommendations on Disability 10–15 (2002).

[281] *See Hazelwood*, 433 U.S. at 309 n.14.

litigation is the *Griggs v. Duke Power Co.* burden-shifting framework.[282] *Sandoval* explicitly acknowledged the overruling of *Lau v. Nichols*[283] in *Guardians* and *Bakke*.[284] *Lau* implicitly held that the substantive rights-creating provision of Title VI—§ 601—prohibits disparate impact litigation and, without explicitly saying it, applied the *Griggs* framework.[285] With § 504's prohibition on disparate impact discrimination it functions most analogously to Title VI under *Lau*, thus applying the *Griggs* framework as *Lau* implicitly did—and as has been applied in other civil rights statutes and even in § 504 employment claims—is the most natural reading.[286]

The *Griggs* framework places the initial burden of proof on plaintiffs to demonstrate that a facially neutral policy disparately impacts a protected class.[287] Assuming a plaintiff makes such a showing, the burden then shifts to the defendant to justify the policy. The framework for a § 504 case would be similar. The plaintiff would have to establish a prima facie case.[288] Then, the burden of proof would flip, and the defendant would have to present an affirmative defense available under § 504 to justify its policy.[289] The most relevant affirmative defenses in an environmental justice disparate impact case are "fundamental alteration"[290] and "undue burden."[291] If the defendant cannot prove an affirmative defense—or disprove the plaintiff's case—the defendant would be found liable. The remedy may come in the form of reasonable modification, which may involve stopping the polluting activity in the affected location.

An example of this burden-shifting framework in the environmental justice context is *South Camden Citizens in Action v. New Jersey Department of Environmental Protection*.[292] While *South Camden* is not a § 504 case, it was one of the last private Title VI disparate-impact cases prior to *Sandoval*.[293] In *South Camden*, St. Lawrence Cement Co., L.L.C. ("SLC") sought to build and operate a granulated blast furnace slag facility in a community

[282] Griggs v. Duke Power Co., 401 U.S. 424, 429–32 (1971).

[283] 414 U.S. 563 (1974).

[284] *See Sandoval*, 532 U.S. at 282, 285.

[285] *See Lau*, 414 U.S. at 566–68.

[286] *See e.g.*, *McWright*, 982 F.2d at 229 (discussing the *Griggs* framework's application to §504); *Griggs*, 401 U.S. at 429–32 (creating and applying the *Griggs* framework to Title VII); *Tex. Dep't of Hous. & Cmty. Affairs*, 576 U.S. 519, 530–31 (2015) (applying the *Griggs* framework to the Fair Housing Act); Smith v. City of Jackson, 544 U.S. 228, 233–43 (2005) (applying the *Griggs* framework to the ADEA); *see also DOJ Manual*, *supra* note 206, at Sec. VII.

[287] *Griggs*, 401 U.S. at 429–32.

[288] *Id.*

[289] *Id.*

[290] PGA Tour, Inc. v. Martin, 532 U.S. 661, 682 (2001).

[291] 28 C.F.R. § 36.104.

[292] 145 F. Supp. 2d 446 (D.N.J.), *modified and supplemented*, 145 F. Supp. 2d 505 (D.N.J. 2001), *rev'd*, 274 F.3d 771 (3d Cir. 2001).

[293] The initial preliminary injunction was issued on April 19, 2001, five days before *Sandoval* was released.

comprised of 91% people of color.[294] Because the facility would produce air pollution, SLC had to obtain a permit from the New Jersey Department of Environmental Protection ("NJDEP"), which the state ultimately granted.[295] The plaintiffs, residents of the neighborhood where the SLC facility was to be built, brought a disparate impact suit under Title VI.[296] Plaintiffs asked the court to rescind the permits for the SLC facility and enjoin NJDEP from issuing the SLC permits until NJDEP released a protocol to ensure Title VI compliance.[297] For the purposes of a preliminary injunction, the plaintiff established a prima facie case by introducing expert statistical evidence demonstrating that they would be adversely and disparately affected by the pollution.[298] After establishing the prima facie case, the burden shifted to the defendants to provide a "substantial legitimate justification" for the action.[299] The defendants presented three arguments: that the SLC facility was in compliance with environmental regulations, that SLC and NJDEP "consulted with the community," and that Camden needed the economic and social benefits provided by the facility.[300] Judge Orlofsky, who presided over the case, examined EPA regulations and practice and determined the defendants' arguments were not substantial legitimate justifications.[301] Judge Orlofsky's adoption and application of the *Griggs* burden-shifting framework *Camden* illustrates that such a framework is analytically relevant to an environmental justice disparate impact case under § 504.

B. Proving a Prima Facie Disability Environmental Justice Case

After completing the research discussed in Part II for the specific policy being challenged, a plaintiff has the necessary components to make out a prima facie case. As previously discussed, a prima facie case has four elements: 1) identification of a facially neutral policy or practice; 2) demonstration of adversity; 3) proof of disparity; and 4) establishment of causation.[302] If the research is conducted according to Part II's design, the plaintiff should have identified the policy or practice, e.g., the pollution site, and demonstrated adversity by showing how the pollution harms the plaintiffs. Additionally, the plaintiff should have demonstrated disparate impact by showing how the affected location has a higher rate of disability and causation by providing a regression analysis and comparisons with alternative sites.

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[294] *S. Camden,* 145 F. Supp. 2d at 450–51.
[295] *Id*. at 454–56.
[296] *Id*. at 481–82.
[297] *Id*. at 481.
[298] *Id*. at 481–95.
[299] *Id*. at 495–96.
[300] *Id*. at 496.
[301] *Id*. at 496–97.
[302] *See supra* pp. 25–26.

Section 504 imposes a high burden of proving *sole* causation.[303] The defendant may challenge the research design to disprove the prima facie case by arguing that *sole* causation is not met.

First, defendants may attack a claim of sole causation by highlighting flaws in the plaintiff's evidence. The defense may argue that the evidence is too attenuated to show causation. Plaintiffs may be able to find an action by an uncovered entity that can eventually be tied to a covered entity's actions, but the farther away that action is from the nexus of the activity that causes the disparate impact the harder it is to persuasively argue causation. For example, if the liability hook is that city zoning laws allow a polluter not covered by § 504 to locate their site in a manner that produces a disparate impact, a plaintiff might have to prove that the zoning laws were what allowed the polluting entity to be able to discriminate rather than the permitting process, availability of land, or other factors. The point of reference is now the zoning laws, distracting the issue and potentially broadening the number of available defenses. A factfinder may think it farfetched that the type of broad action in zoning started this causal chain for liability as opposed to a permitting process.

Second, defendants may attack a claim of sole causation by showing alternative causes. While the number of potential alternatives a defendant can raise may be infinite, the number of realistic alternatives is finite. The defendant would likely give reasons that are "neutral" with regard to protected traits like race, disability, or gender. It would not be strategic in a public trial to argue that the cause was that racial minorities live in the affected community. Defendants might make arguments about the relatively low price of land in the area, or they may try and highlight why people with disabilities cluster in particular places, such as areas with more accessible housing, hospitals, or other services. The use of multiple regression analysis, which allows one to control for multiple variables and alternative site locations, could help explain or disprove defendants' alternative cause arguments.

Third, defendants may dispute plaintiffs' choice of variables included in the regression analysis. In particular, defendants may want to include tainted variables[304] highly correlated with disability. For example, they may wish to include geographic areas with a high concentration of housing types highly correlated with disability. These areas may be tainted because they act as a proxy for disability, and therefore, plaintiffs should argue against their inclusion in any regression. Defendants may argue that failing to include these areas is an oversight, but including tainted variables will make

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[303] 29 U.S.C. § 794(a).

[304] Tainted variables are variables affected by or highly correlated with the existence of the phenomena being studied, and therefore will create false positives or negatives. For example, "in a price equation used to measure the effect of a price-fixing conspiracy[i]t is common in such an equation to include cost of production as a factor. But that factor would be tainted if the conspiracy itself raised costs by reducing the incentive for cost reduction." Finkelstein & Levin, *supra* note 248, at 425.

results less accurate and increase the likelihood of a false showing that discrimination did not occur solely because of disability.[305]

C. Legal Strategy Concerns for Disability Environmental Justice Litigation

Beyond the evidentiary hurdle described above, there are several concerns over legal strategy plaintiffs will have to account for during litigation. This section explores jurisprudential and practical litigation concerns that may arise—especially in environmental justice litigation—when interpreting whether disparate impact is prohibited by § 504. It then analyzes how *Choate*'s "meaningful access" standard may act as a barrier to litigation and how to address it.

1. Remaining "Disability NEPA" Concerns

A major concern echoed throughout the case law is that if § 504 broadly covers disparate impact it may become a "disability NEPA."[306] NEPA is an environmental statute that, broadly speaking, creates a procedural requirement that federal agencies write a report on the reasonably foreseeable environmental effects of any agency action that might "significantly affect[] the quality of the human environment[.]"[307] It also requires a report on a reasonable range of alternatives to the proposed action.[308] However, it does not require the government to take any specific action other than creating these reports. In *Choate*, Justice Marshall explicitly voiced the concern that because there are many different people with many different disabilities, almost *any* policy may affect people with disabilities.[309] Therefore, the argument goes, covered entities might need to do a NEPA-like report on the potential impact of their policy towards disabled persons writ large and on different disabilities for due-diligence purposes.[310] Otherwise, entities might enact a policy which inadvertently creates previously unforeseen liability due to its disparate impact towards certain disabled persons.[311] For example, perhaps certain standardized examinations have a disparate impact on some disabled persons because of the structure of the questions, akin to how the visual elements of logic games on the LSAT rendered the LSAT inaccessible for those with visual disabilities.[312] This "NEPA" concern

[305] See *supra* p. 32.

[306] *Choate*, 469 U.S. at 298–99.

[307] 42 U.S.C. § 4332 (c).

[308] *Id.*

[309] *Choate,* 469 U.S. at 298-99.

[310] *Id.*

[311] *Id.*

[312] *See* Ryan Prior, *A lawsuit argued the LSAT discriminates against the blind. Now it's changing for everyone*, CNN (Oct. 10, 2019), https://www.cnn.com/2019/10/10/us/lsat-blind-people-trnd/index.html [https://perma.cc/PKW7-NB4G].

becomes more salient for an environmental justice disparate impact claim given that NEPA is an environmental law. The litigator's job is to assuage these concerns.

First, and perhaps most obviously, the litigator could say "so what?" Any extra work would only be the result of covered entities' due diligence to avoid liability because their policies may result in discrimination, not because they failed to create a "disability NEPA." Entities should make sure that their policies do not discriminate, and if the text demands due diligence in service of that goal, all the better. Furthermore, these fears also seem not to have come to fruition. Liability for disparate impact discrimination against disabled persons has been available for decades in various circuit courts under Title I,[313] the Fair Housing Act ("FHA"),[314] and even § 504,[315] yet there has not been a flood of "disability NEPA" analyses done by any entity.[316] Congress has made this choice in its language; it is not for the Court to use unfounded fears to question Congress's policy choices.

Second, a litigator might explain that different applicable defenses limit disparate impact liability and the concern that this reading of § 504 would necessitate a "disability NEPA." For example, the undue burden defense would prohibit liability for entities unable to bear the burden of studying the impacts of proposed actions. Given the proportionality aspects embodied in determining what is "reasonable," concerns about constant large-scale alterations and endless liability seems overblown. Most of the big potential costs, such as site location or architecture, would be foreseeable (especially given that census data is readily available), insufficient for a prima facie disparate impact case, or run up against the fundamental alteration defense. Moreover, a NEPA-like analysis to avoid liability because an action might have otherwise unforeseeable effects individuals with hyper-specific disabilities, is not a realistic concern in a disparate impact case because there are likely few people living in a certain locality with a hyper-specific disability, thus you would not have a large enough sample size to establish a disparate impact towards a commonly definable group. Moreover, if there are very few individuals with that hyper-specific disability, it would likely result in an "unreasonable" accommodation, an undue burden,[317] or would not require

[313] *See, e.g.*, *Raytheon*, 540 U.S. at 53.

[314] *See, e.g.*, *Tex. Dep't of Hous. & Cmty. Affairs*, 576 U.S. at 530.

[315] *See, e.g.*, *McWright*, 982 F.2d at 228; Crowder, 81 F.3d at 1484.

[316] I encourage readers to think of a plausible policy or practice that would require some intense NEPA-like report to spot, would result in a statistically provable disparate impact up to court standards, be worth litigating given the expense of experts and fee shifting provisions applicable to § 504, 29 U.S.C. § 794a (b), not have a colorable applicable defense, and not have an analogous claim that might have otherwise appeared in a Title I or FHA case. How about three?

[317] For example, if there is some cost-benefit analysis entailed by the "reasonable" discussion, a massive structural overhaul just to potentially accommodate one individual person with a hyper-specific disability may not be reasonable or it may independently run into other defenses like undue burden or fundamental alteration.

large structural change to be of concern to potentially liable entities. Concerns over functionally creating a disability-NEPA requirement might be "scary" in theory but, in practice, are irrelevant, as liability over some disparate impact on a hyper-specific disability would be foreclosed by applicable defenses, not be statistically provable, or could be accommodated.

Third, collecting the necessary evidence to meet the sole causation standard and conducting the regression analysis explained above can be incredibly costly and act as a practical barrier preventing a "flood of litigation."[318]

Fourth, in the environmental law context, a plaintiff could argue that the "disability-NEPA" argument has less bite given § 504 regulations and the existence of NEPA itself. Section 504 requires the head of each federal agency to promulgate regulations to carry out § 504 rather than have one agency issue regulations applicable to all other agencies (like is done by the Department of Justice with Title II regulations).[319] Correspondingly, the EPA has issued § 504 regulations, which state that when determining the location of a site or facility, a recipient of aid or assistance may not make selections:

> (1) That have the effect of excluding handicapped persons from, denying them the benefits of, or otherwise subjecting them to discrimination under any program or activity that receives EPA assistance or (2) that have the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of the program or activity receiving EPA assistance with respect to handicapped persons.[320]

Additionally, the EPA has issued regulations stating:

> A recipient shall not use criteria or methods of administering any program or activity receiving EPA assistance which have the effect of subjecting individuals to discrimination because of their handicap, or have the effect of defeating or substantially impairing accomplishment of the objectives of such program or activity with respect to handicapped persons.[321]

These regulations already put the entities on notice that their facilities should avoid creating a disparate impact. Additionally, as President Biden rolls out the final "Phase 2" NEPA regulations, polluters may already have the benefit of a "disability" NEPA—NEPA itself.[322] The proposed Phase 2

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[318] *See* W. Va. Univ. Hosps. v. Casey, 499 U.S. 83, 106–10 (1991) (Stevens, J., dissenting).

[319] *Compare* 29 U.S.C. § 794(a) *with* 42 U.S.C. § 12134(a).

[320] 40 C.F.R. § 7.50(b).

[321] 40 C.F.R. § 7.50(c).

[322] *See CEQ Restores Three Key Community Safeguards during Federal Environmental Reviews*, The White House (Apr. 19, 2022), https://www.whitehouse.gov/ceq/news-updates/2022/04/19/ceq-restores-three-key-community-safeguards-during-federal-environmental-reviews/ [https://perma.cc/E6KX-H2K9].

regulations include disability within an environmental justice framework,[323] so a NEPA report may already provide the information necessary to avoid liability.[324]

Finally, while § 504's sole causation standard may present factual challenges, it could have legal advantages. The fears that §504 could become a disability-focused version of NEPA[325] embody a concern about the impact of unclear boundaries in disparate impact litigation. This may arise out of the Court's concern about a flood of litigation or potential defendants' concern about constant and unpredictable claims of liability.[326] However, environmental law regularly deals with line-drawing issues,[327] and a stricter "sole causation" standard would limit the number of disparate impact cases that could be successfully brought. This statutory limitation could comfort the Court.

2. *Meaningful Access Concerns*

There are two potential ways to argue this disparate impact case: as a per se violation of § 504 or by using the meaningful access standard. Arguing the case as a per se violation, much like one would frame a Fair Housing Act or ADA Title I case, would allow plaintiffs to avoid much of the reasonable accommodation analysis and take advantage of EPA regulations. However, assuming the "per se" argument is unavailable, it will be important to properly frame the factual question to account for the "meaningful access" standard.[328] Plaintiffs will unfortunately have to navigate unclear case law around the definition of a "reasonable accommodation." As they do so, plaintiffs may be able to take advantage of some clearer, friendlier D.C. Circuit caselaw to advance their case.

Given EPA regulations prohibiting disparate impact in site selection and the criteria for site selection,[329] a litigator would ideally want to argue

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[323] National Environmental Policy Act Implementing Regulations Revisions Phase 2, 88 Fed. Reg. 49924, 49986 (proposed July 31, 2023) (to be codified at 40 C.F.R. § 1508.1(k)).

[324] *See e.g.*, National Environmental Policy Act Implementing Regulations Revisions Phase 2, 88 Fed. Reg. 49924, 49977 (proposed July 31, 2023) (to be codified at 40 C.F.R. § 1502.14(f)).

[325] *Choate*, 469 U.S. at 298–99.

[326] *See BlueCross*, 926 F.3d at 242 (discussing *Choate*, 469 U.S. at 298).

[327] *See e.g.*, Transcript of Oral Argument at 10, Mass. v. EPA, 549 U.S. 497 (2007) (No. 05-1120) ("Same argument if the automobile emissions were 1 percent contributors?").

[328] This Note takes the meaningful access standard as a given, but there is a strong argument that if the standard for determining violation is causation, then the meaningful access standard should be limited. Section 504 contains three prohibited actions: 1) denying the benefits of; 2) excluding from participation in; and 3) subjecting to discrimination. In cases where a plaintiff is seeking access to a benefit or to participate in a program or activity (defined as essentially all operations of a grantee 29 U.S.C. § 794(b)), the standard is coherent. However, in cases of "subjecting to discrimination" or "pure discrimination" cases, the plaintiff would not be seeking "access" only a cessation of a harmful activity. In these cases, a straightforward disparate impact standard like in Title VII, seems more applicable.

[329] 40 CFR 7.50(b–c).

that the disparate impact is per se a violation of § 504, and therefore the site must be relocated. This could allow plaintiffs to avoid the need to argue for a reasonable accommodation, as the conduct would itself be illegal. The plaintiffs could then argue that the relevant timeframe for any affirmative defenses—like "undue burden" or "fundamental alteration"—should be at the point of the site selection process. In other words, plaintiffs would argue that it is irrelevant whether the suit is brought prior to construction or ten years after construction, as the analysis should take place when the initial violation (for example, site selection) occurs. A plaintiff might assert that the analysis for the "undue burden" affirmative defense should focus on whether changing the site selection at the planning stage would have been an undue burden.

Limiting this analysis to a fixed timeframe in the past would avoid perverse incentives. If a disparate-impact defendant was permitted to argue that relocating would be so expensive as to impose an undue burden, polluters would be incentivized to continually violate the Act to drive up the cost of a future remedy, thereby escaping liability.[330] The fixed timeframe would therefore help plaintiffs survive unreasonable accommodation challenges, even if the litigation is brought ten years after a polluting site is created.

If it cannot be argued that the conduct is per se illegal, the plaintiffs could use the meaningful access framework. The "meaningful access" standard requires that an otherwise qualified individual with a disability "must be provided with meaningful access to the [program or activity] that the grantee offers."[331] To "assure meaningful access, reasonable accommodations in the grantee's program or benefit may have to be made."[332] Thus, one would have to carefully frame the liability hook, as it will determine what constitutes a "reasonable accommodation" or whether "meaningful access" has been provided. A relatively easy liability hook might be an environmental program within a specific statute; for example, Title V permitting. Depending on the point at which one can best establish causation, one would then choose whether to sue the government or a private entity.

This framework involves: 1) proving that the defendant's conduct prevents persons with disabilities from gaining meaningful access to a benefit or program, and 2) proving that a reasonable accommodation could be made to provide meaningful access.[333] Generally, when a plaintiff identifies an obstacle impeding access to a benefit program, they will have established a

[330] *Cf.* Scott v. Harris, 550 U.S. 372, 385 (2007) (explaining how the Court is loath "to lay down a rule requiring the police to allow fleeing suspects to get away whenever they drive so recklessly that they put other people's lives in danger. It is obvious the perverse incentives such a rule would create: Every fleeing motorist would know that escape is within his grasp, if only he accelerates to 90 miles per hour, crosses the double-yellow line a few times, and runs a few red lights.").

[331] *Choate*, 469 U.S. at 301.

[332] *Id.*

[333] *Id.*

lack of meaningful access; however, if plaintiffs seek to expand the scope of the program or benefit, the expansion will likely not help establish a denial meaningful access.[334] Here, plaintiffs would not be seeking to expand any environmental program or activity; instead, plaintiffs would be seeking to gain meaningful access to the same health benefits as other non-disabled individuals.

After establishing that meaningful access is denied, plaintiffs would then have to prove that a reasonable accommodation could be made. They should similarly argue that the existence of "reasonable accommodations" should be considered at the time of the violation.[335] It is uncertain what makes an accommodation "reasonable." Some circuits take a cost-benefit analysis approach to this question.[336] These circuits also allow for the costs to somewhat exceed the benefits.[337] The Supreme Court has sent mixed messages on whether a cost-benefit analysis is the proper inquiry. In *Barnett*, the Court stated that a "reasonable accommodation" is one that is "feasible" or "plausible," which again begs the question of what is "feasible," and if that entails a cost-benefit analysis.[338] *Barnett* also stated that a "reasonable accommodation" is one that is *reasonable* in the "run of cases," but the meaning of the "run of cases" is unclear.[339] Since, circuit courts have generally taken a cost-benefit analysis approach in analyzing reasonable accommodations,[340] this Note will assume that is the applicable approach.

[334] *American Council of the Blind v. Paulson* compared multiple cases, most prominently Dopico v. Goldschmidt, 687 F.2d 644, 652 (2d Cir. 1982) and *Choate*, 469 U.S. at 303, to demonstrate the distinction between cases where plaintiffs seek to remove an impediment to access as compared to expanding a benefit. 525 F.3d 1256, 1267–68 (D.C. Cir. 2008). *Dopico* involved a class action seeking to make New York mass transit services to modify planning and designs to make those services more accessible to persons with mobility disabilities. *See* 687 F.2d at 646–51. Explaining why the fundamental alteration defense was inapplicable, Judge Newman stated "[t]he existing barriers to the 'participation' of the wheelchair-bound are incidental to the design of facilities and the allocation of services, rather than being integral to the nature of public transportation itself, just as a flight of stairs is incidental to a law school's construction but has no bearing on the ability of the otherwise qualified handicapped student to study law." *Id.* at 653. *Paulson* contrasted this with *Choate*, stating "[i]n *Choate*, the Supreme Court determined that the state was not required to expand its Medicaid benefits 'simply to meet the reality that the handicapped have greater medical needs.'" *Paulson*, 525 F.3d at 1268 (citing *Choate*, 469 U.S. at 303).

[335] *See supra* p. 39.

[336] Vande Zande v. Wis. Dep't of Admin., 44 F.3d 538, 542 (7th Cir. 1995); Borkowski v. Valley Cent. Sch. Dist., 63 F.3d 131, 136–38 (2d Cir. 1995); see also Michael Ashley Stein, The Law and Economics of Disability Accommodations, 53 Duke L. J. 79, 94–102 (2003). For a discussion on whether a cost-benefit analysis is appropriate, *see generally* Cass R. Sunstein, *Cost-Benefit Analysis without Analyzing Costs of Benefits: Reasonable Accommodation, Balancing, and Stigmatic Harms*, 74 Univ. Chi. L Rev. 895 (2007).

[337] *Vande Zande,* 44 F.3d at 542. Still, circuits with the cost benefit approach do not allow the costs to vastly exceed the benefits as that would result in an "unreasonable" accommodation. *Id.*

[338] *Barnett*, 535 U.S. at 401–03.

[339] *Id.* at 402.

[340] *See* sources cited *supra* note 336.

Regardless, there seems to be widespread agreement that there is a spectrum wherein many accommodations may be reasonable, and at some point, along that spectrum a requested accommodation would impose an undue burden or involve some other affirmative defense which shields the covered entity from having to provide the otherwise reasonable accommodation.[341] While it has not been decided by the Supreme Court what "feasible" means, circuit courts faced with the question have generally used some form of a cost-benefit analysis.[342]

The meaningful access framework was used to achieve a mass-scale accommodation in *American Council of the Blind v. Paulson*.[343] There, plaintiffs brought suit against the Secretary of Treasury because of "the Treasury Department's failure to design and issue paper currency that is readily distinguishable to the visually impaired."[344] Plaintiffs claimed that this denied them meaningful access to U.S. banknotes, which they believed were essential to "independent living."[345] Plaintiffs then proposed a variety of reasonable accommodations, including different tactile features, sizing, and shapes, that would allow them to use the currency.[346] They also sought declaratory and injunctive relief to prohibit the Treasury Secretary from manufacturing more than one billion dollars of the inaccessible currency and to require the Treasury to implement a plan for creating an electronic device that could identify bills to allow Plaintiffs access to existing currency.[347]

The D.C. Circuit held that the Treasury denied plaintiffs meaningful access to U.S. currency, that there were reasonable accommodations available, and those accommodations might not impose an undue burden on the Treasury.[348] Plaintiffs used evidence that accessible currency already existed in other countries to establish that the accommodation they sought was reasonable and imposed no undue burden.[349] Writing for the circuit court, Judge Rogers explained that modifying the currency would only cost a "fraction" of the bureau's budget and noted that the fact that other countries had made the transition despite its costs indicates that the accommodation was reasonable.[350] In its reasonable accommodation and undue burden analysis, the court also weighed heavily the large number of individuals that were being denied meaningful access.[351]

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[341] *See supra* notes 214–217 and accompanying text.

[342] *See* sources cited *supra* note 336.

[343] *Paulson*, 525 F.3d at 1259.

[344] *Id.*

[345] *Id.* at 1261.

[346] *Id.*

[347] *Id.*

[348] *Id.* at 1274.

[349] *Id.* at 1262–69.

[350] *Id.* at 1271–73.

[351] *Id.* at 1267.

An environmental justice case would be quite like *Paulson* in terms of the scale of the requested accommodation—and a regression analysis like the one described in Section II.C.ii *supra* would help prove its necessity and reasonableness. The case would entail arguing that a massive number of disabled persons were denied meaningful access to the health benefits of environmental programs, like the Clean Air Act, or that the disparate impact was per se unlawful vis-à-vis the EPA regulations.[352] Then, plaintiffs would propose alternative sites that could have been chosen, relocations, stoppage of the polluting activities, or other potential ways that the damage could be remediated. The regression analysis indicating the availability of alternative sites for the polluting activity might function similarly to the analogies to international currency that the *Paulson* plaintiffs used.[353] As in *Paulson*, it is likely that any modification would only be a fraction of the budget of the polluter.[354] Moreover, the more disabled persons that are disproportionately affected by current or future pollution, the more reasonable the accommodation will be.[355] Plaintiffs could also argue that the modification does not necessarily entail relocation, but instead the harm might be remedied through alternatives like increased filters beyond what would otherwise be required, in order to lower pollution levels and drive down the cost of any modification. Assuming plaintiffs successfully navigate the evidentiary and strategic challenges to prove their prima facie case, they would move to the next phase of the burden-shifting framework.

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[352] This is similar—but not identical—to a strategy that was successfully used in one of the very few disability environmental justice cases. Heather K. by Anita K. v. City of Mallard, 946 F. Supp. 1373 (N.D. Iowa 1996).

[353] *See Paulson*, 525 F.3d at 1259–62.

[354] For example, in 2023, Duke Energy (one of the largest power companies) reported $29.1 billion in revenue, $183.3 billion in assets, and $2.7 billion in profits. *Duke Energy*, Forbes, https://www.forbes.com/companies/duke-energy/?sh=2562d0c36f9b [https://perma.cc/ZMT8-MKE2] (last visited Feb. 1, 2024). Duke has repeatedly been fined large amounts including over $102 million in fines and restitution for committing federal environmental crimes while retaining that large profit and revenue. *Duke Energy agrees to remove coal ash in North Carolina*, Associated Press (Jan. 2, 2020), https://apnews.com/general-news-802d92f2b11a3838f60c899031b014af/ [https://perma.cc/FLB7-N3LV]. Moreover, Duke has also previously paid for multi-billion dollar settlements to clean up pollution sites across the entire state of North Carolina, demonstrating a capacity to pay for large scale remediation efforts. *See* Catherine Morehouse, *Duke coal ash clean up settlement shifts $1.1B in costs away from North Carolina ratepayers*, Utility Dive (Jan. 26, 2021), https://www.utilitydive.com/news/duke-coal-ash-clean-up-settlement-shifts-11b-in-costs-away-from-north-car/593925/ [https://perma.cc/ET7E-9XAY]; *see also* State *ex rel.* Utils. Comm'n v. Stein, 375 N.C. 870, 876–90 (2020). Furthermore, Duke routinely builds new large power plants that are a fraction of that yearly budget, *see e.g.*, *All fired up! Duke Energy's new $1.5 billion natural gas power plant opens to serve 1.8 million Floridians* Duke Energy (Nov. 30, 2018), https://news.duke-energy.com/releases/all-fired-up-duke-energy-s-new-1-5-billion-natural-gas-power-plant-opens-to-serve-1-8-million-floridians [https://perma.cc/MJB9-6734], which is likely cheaper than just relocating a plant.

[355] *See Paulson*, 525 F.3d at 1267.

D. Affirmative Defenses

After the plaintiff makes a prima facie case, the burden shifts to the defendant.[356] The defendant will likely assert one or more of several available affirmative defenses to justify their actions. Defendants are most likely to assert the fundamental alteration and the undue burden defenses. While the success of either defense is heavily fact-dependent,[357] this Note argues that the undue burden defense is more likely to succeed given the framing issues surrounding fundamental alteration.

1. Fundamental Alteration

The "fundamental alteration" affirmative defense is likely available under § 504.[358] The fundamental alteration defense states that reasonable modifications are not required if the defendant "can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity."[359] While the definition of a fundamental alteration is fuzzy, one of the themes that the Supreme Court has focused on is the essentiality of a given policy or activity to the overarching program of which it is a part.[360] As disability discrimination is about equity, the Supreme Court, in its fundamental alteration analysis, is similarly concerned with altering the program to a nature that would give disabled persons an unfair benefit.[361] That unfair benefit is just as inequitable as the disadvantage and thus fundamentally alters the nature of the program.

The fundamental alteration defense heavily relies on the facts of each case and how litigators frame the program. This is demonstrated by the following hypothetical: Imagine that New Jersey decides to build a new oil power plant to increase electricity for its citizens. OctavioOil, an oil power plant organization, applies for a permit to build a new oil power plant in Newark where its pollution would have a disparate impact on disabled persons. In response plaintiffs sue to enjoin New Jersey from permitting the plant, arguing that OctavioOil can instead build their power plant in Hoboken because there is an alternative site in Hoboken that produces no disparate impact.

In this hypothetical, how the program is framed may change whether forcing the relocation results in a fundamental alteration. If one says that the program is providing electricity to citizens of New Jersey, then having this

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[356] *See supra* p. 34.

[357] *See Paulson*, 525 F.3d at 1267–68; McGann v. Cinemark USA, Inc., 873 F.3d 218, 231 (3d Cir. 2017).

[358] *Choate*, 469 U.S. at 300 (citing *Davis*, 442 U.S. at 410).

[359] 28 C.F.R. § 35.130(b)(7)(i); *see also* 42 U.S.C. § 12201(f).

[360] *See PGA Tour*, 532 U.S. 661, 682–83 (2001).

[361] *Id.*

new plant in Newark is likely not essential to that scheme. If the program is building a new power plant in Newark, then requiring the power plant to be in Hoboken would be a fundamental alteration. There are other ways the program might be framed, with each framing providing a potentially different answer to whether the alteration is fundamental. A good heuristic is that the more broadly the program is framed, the less likely it is that an alteration is fundamental, and the more narrowly the program is framed, the more likely it is that an alteration is fundamental.

The framing (reference point) problem for determining whether an alteration is fundamental was central to *PGA Tour, Inc. v. Martin*.[362] In *PGA Tour*, golfer Casey Martin had a disability that prevented him from walking the course, so pursuant to Title III of the ADA, Martin sought a reasonable modification in the form of using a golf cart.[363] PGA tour argued that tournament rules required walking during the rounds, therefore allowing Martin to use a cart would "fundamentally alter the nature of the competition."[364] Justice Stevens wrote for the majority in a 7-2 decision which held that allowing Martin to use a cart is not a fundamental alteration.[365] The Court explained the use of a cart would not so fundamentally alter "an essential aspect of the game of golf that it would be unacceptable even if it affected all competitors equally."[366] Justice Stevens contrasted the use of a cart with "changing the diameter of the hole from three to six inches," the latter of which would fundamentally alter an essential aspect of golf.[367] The majority also stated that permitting Martin to use a cart would not fundamentally alter the competition's character by unfairly advantaging a disabled player.[368]

What constitutes the reference point for a fundamental alteration was a point of contention that Justice Scalia raised in his dissent.[369] He argued that the majority assumed the reference point to be the game of "classic" golf and on that premise the majority concluded that allowing the use of a golf cart would not create a fundamental alteration.[370] However, he noted that it could be equally valid to consider the new game of "PGA TOUR" golf as the reference point, in which walking is an essential aspect of the game.[371] Justice Scalia then compared the walking requirement to how the American League in baseball has a unique rule allowing for a designated hitter.[372]

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[362] *PGA Tour*, 532 U.S. 661.
[363] *Id.* at 668–69.
[364] *Id*. at 670–83.
[365] *Id*. at 690.
[366] *Id.* at 682.
[367] *Id.*
[368] *Id.* at 682–83.
[369] *Id*. at 699–700 (Scalia, J., dissenting).
[370] *Id*.
[371] *Id.*
[372] *Id.*

The dissenting opinion maintained that it is not the Court's role to define the essential rules of a game, as doing so would be arbitrary.[373]

This framing issue—what the program or activity is and whether an accommodation constitutes a fundamental alteration of that program or activity—is critical. One way to control the framing issue is by carefully choosing the defendant. In the environmental justice context, the choice of defendant—e.g., a government or a private entity group—may influence the framing of the issue. For instance, targeting a state power plant permitting program allows for a broader framing of the issue, while suing the power company itself would likely focus on the specific plant. Still, since the burden of proof falls on the defendant for this nebulous defense, it seems that it would only be a major concern in a few cases where the defendant can decisively win the framing debate.

2. *Undue Burden*

The stronger of the two potential defenses is the undue burden defense. Under § 504, if the defendant can demonstrate that a reasonable accommodation would impose undue financial or administrative burden on them, they are not obligated to provide the accommodation.[374] While there are not relevant regulations as to undue burden for § 504 in the context of disparate impact, the factors considered in employment law cases may be instructive.[375] Those factors are:

> (1) The overall size of the recipient's program or activity with respect to number of employees, number and type of facilities, and size of budget; (2) The type of the recipient's operation, including the composition and structure of the recipient's workforce; and (3) The nature and cost of the accommodation needed.[376]

Given the relationship between ADA and § 504 caselaw, examining how the ADA analyzes an undue burden can be insightful.[377] Similar factors also appear in the implementing regulations of Title III of the ADA, which deals with discrimination in public accommodation. Those factors are:

> (1) The nature and cost of the action needed…; (2) The overall financial resources of the site or sites involved in the action; the number of persons employed at the site; the effect on expenses and resources; legitimate safety requirements…; or the impact otherwise of the action upon the operation of the site; (3) The geographic separateness, and the administrative or fiscal relationship of the site

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[373] *Id.* at 700–01.

[374] *Davis*, 442 U.S. at 412.

[375] 28 C.F.R. § 42.511(a).

[376] 28 C.F.R. § 42.511(c).

[377] *See* sources cited *supra* note 121.

> or sites in question to any parent corporation or entity; (4) If applicable, the overall financial resources of any parent corporation or entity; the overall size of the parent corporation or entity with respect to the number of its employees; the number, type, and location of its facilities; and (5) If applicable, the type of operation or operations of any parent corporation or entity, including the composition, structure, and functions of the workforce of the parent corporation or entity.[378]

If litigation is initiated before construction or the reference point is locked in time, it is unlikely that the defendants will benefit much from the undue burden defense because plans are subject to change and significant costs have not yet been incurred. Assuming good quality research design and comparable alternative sites, an undue burden defense may not hold up. However, if the facility in question is already built, relocating a large, power plant or hazardous waste could cost millions or even billions of dollars.[379] Although large energy companies like Duke Energy may be able to handle the cost,[380] it would at the very least have a meaningful impact. The nature of undue burden is fact-specific, much like fundamental alteration. Without more information, it is difficult to predict the outcome. Nonetheless, it is an essential consideration if deciding to litigate this case.

E. Environmental Justice Benefits of Bringing the Case

The benefit of winning a case like this would first and foremost be stopping the ongoing disability discrimination in the specific case litigated. This would result in less pollution to the affected parties, and thus potentially less harm to a vulnerable population. Beyond the physical, discrimination offends the dignity of individuals as they become treated as less than.[381] The more that this type of behavior is resisted, the more society is shown that this behavior is unacceptable. This hopefully deters future discrimination and helps reaffirm the worth of marginalized individuals by directly remedying discrimination against disabled persons and indirectly providing some remediation for other marginalized groups.

The litigation—assuming it is successful—would provide direct injunctive relief to marginalized individuals. The timeframe of that aid would be contingent on litigation strategy and the fact pattern of the individual case. For example, if the case involves active pollution, such as air pollution from an identifiable source, plaintiffs may be able to obtain a preliminary injunction which would provide relief from harmful pollution during the litigation.

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[378] 28 C.F.R. § 36.104.

[379] *See* sources cited *supra* note 354.

[380] *See* sources cited *supra* note 354.

[381] *See* Heckler v. Mathews, 465 U.S. 728, 739–40 (1984).

To get a preliminary injunction, a plaintiff must establish that they: 1) are likely to succeed on the merits; 2) will likely suffer irreparable harm absent preliminary relief; 3) the balance of the equities favors them; and 4) that an injunction is in the public interest.[382] In most cases, the balancing of the equities is unlikely to be a large concern. While the financial resources of hazardous waste site operators may vary, large power companies running generators that cause air pollution will almost certainly have money; it is also likely that many other large-scale polluters are of similar means, and even if there are financial concerns those may be outweighed.[383] Thus, while it would be fact dependent, it is likely that when balancing the equities any burden would be vastly outweighed by the irreparable dignitary and health injury from pollution exposure to disabled persons who are already at high health risk.

The main hurdles for getting a preliminary injunction would be prongs one and four. Likelihood of success on the merits would be particularly challenging given the current legal uncertainty over whether there is a private right of action for disparate impact discrimination and § 504's sole causation standard. Good litigation strategy and quality research would help make a stronger argument for a likelihood of success on the merits. Any legal uncertainty would ideally be resolved before the environmental justice case is brought, where case law is already built up around a private right of action for disparate impact under § 504. As for causation, assuming some initial multi-regression analysis is done,[384] getting a preliminary injunction is possible. In fact, *South Camden* concerned whether to issue a preliminary injunction. In no small part due to plaintiffs having strong research, they were able to get a preliminary injunction, albeit for a limited time—thanks to *Sandoval*, which eliminated the private right of action for disparate impact discrimination that provided the underlying claim for the preliminary injunction.[385] If litigants obtain a preliminary injunction, relief could come within a few months.

This leaves the other potential prong of concern: whether the injunction is in the public interest. Realistically, meeting this prong is going to be very

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[382] Winter v. NRDC, Inc., 555 U.S. 7, 20 (2008).

[383] *See e.g.*, Env't Democracy Project v. Green Sage Mgmt., LLC, No. 22-cv-03970-JST, 2022 U.S. Dist. LEXIS 183387 (N.D. Cal. Aug. 23, 2022) (granting a preliminary injunction ordering a major cannabis manufacturer to cease operating diesel generators despite the potentially large economic loss to result from shutting down the generators); S. Fork Band Council of W. Shoshone v. United States DOI, 588 F.3d 718 (9th Cir. 2009) (holding that plaintiffs were entitled to a preliminary injunction for a NEPA violation despite potential economic harms); United States v. NCR Corp., 688 F.3d 833, 843-44 (7th Cir. 2012) (affirming the district court's granting of a preliminary injunction ordering defendant NCR corporation to finish cleaning up pollution in the Lower Fox River in a CERCLA pollution abatement action); *S. Camden*, 145 F. Supp. 2d 446 (granting a preliminary injunction halting construction of a polluting facility that grinds and processes granulated blast furnace slag).

[384] *See supra* pp. 28–32.

[385] *S. Camden.*, 145 F. Supp. 2d at 452, 472–97, *modified and supplemented*, 145 F. Supp. 2d 505 (D.N.J. 2001), *rev'd,* 274 F.3d 771 (3d Cir. 2001).

fact- and judge-dependent. For example, if the pollution comes from a generator and there are many other sources of electricity, it will be easier to argue that shutting down this generator is not going to harm "the public" in the form of power instability. In fact, it would actively help the public because people with disabilities—who are being discriminated against—are part of "the public." In closer cases, success will likely come down to the quality of advocacy done by the litigators and the judge's normative belief. How much weight a judge gives to the dignitary harm, the equality harm, and the acute health hazards towards disabled persons in comparison to the value of the polluting activity will depend on the judge's normative and policy choices.

Any injunctive relief would likely provide increased benefit to people of color. People of color disproportionately have disabilities due to a variety of factors, including socioeconomic status and environmental racism.[386] Along with that increased likelihood of disability, structural discrimination against those same individuals makes it more likely they are unable to either move or afford treatment, making them especially vulnerable. This compounds the effect of the disparate impact by reason of disability, and so remedying the disparate impact may provide an even greater benefit to those same people of color.

Beyond providing relief with a greater magnitude of effect, the litigation may also directly remedy some racial disparate impact. As stated earlier, Dr. Chakraborty's research discusses how disabled people of color can be put in "multiple jeopardy," wherein both their race and their disability each increase the likelihood they face environmental injustice.[387] By engaging in litigation that removes the discrimination faced on one of their marginalized identities, the chance of being put in "multiple jeopardy" reduces. Furthermore, it may be that the unknown reasons that cause this clustering of disabled people helps make this disparate impact possible by causing them to live in locations that have a higher proportion of people of color. If that clustering has overlap, the success of litigation would collaterally remedy some environmental racism.

Conclusion

Whether or not this litigation strategy works in practice, I hope it at least sparks a conversation about the often-undiscussed harms that lie at the intersection of disability and environmental justice and inspires more creative litigation strategies to fight environmental injustice.

I leave you with one parting thought that is exemplified throughout the Note: those with the power to make decisions, whether in law or policy,

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[386] *See* Antonella Zanobetti, et al., *Childhood Asthma Incidence, Early and Persistent Wheeze, and Neighborhood Socioeconomic Factors in the ECHO/CREW Consortium*, 176 JAMA Pediatrics 759, 763–65 (2022).

[387] *Unequal Proximity*, *supra* note 218, at 530.

can create environmental injustice through benign neglect. While it may seem like this injustice does not personally affect the powerful, their power is contingent on historical events, and an injustice towards one individual today can become an injustice towards another tomorrow. Only through conscious thought and action can these injustices be addressed. Given these historical contingencies, it is in the interest of justice, and in the personal interest of the powerful, to keep in mind how those who are most marginalized might be affected. Having those marginalized individuals in the room when decisions are being made will raise consciousness so to best avoid even "benign neglect" and resolve any injustices. There should be nothing about us without us.