

# THE AMERICANS WITH DISABILITIES ACT OF 1990 – AS AMENDED: REMEDYING THE BOUNDARY THAT CONGRESS OVERSTEPPED

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*“A few years’ experience will convince us that those things which at the time they happened we regarded as our greatest misfortunes have proved our greatest blessings.”*

- George Mason

## INTRODUCTION

Debora Culotta feared traveling over water.<sup>1</sup> Nevertheless, after twenty-seven years of service, her employer, Sodexo,<sup>2</sup> attempted to transfer her to a new position offshore.<sup>3</sup> Ms. Culotta believed this transfer was a ploy to force her to retire and, as a result, she quit.<sup>4</sup> Angry with Sodexo for discriminating against her “disability,” Ms. Culotta filed a lawsuit asserting a violation of the Americans with Disabilities Act (ADA), alleging her supervisors forced her to quit because they were aware of her fear.<sup>5</sup>

In response, Sodexo argued Ms. Culotta’s fear of traveling over water was not a “disability” and consequently did not fall under the

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<sup>1</sup> *Culotta v. Sodexo Remote Sites P’ship*, 864 F. Supp. 2d 466, 469 (E.D. La. 2012).

<sup>2</sup> Sodexo Remote Sites Partnership is a company that offers sustainable development and quality of life services to those who live and work offshore. In large font on the main page, Sodexo’s Remote Site’s website reads the title: “WORKING AT FAR-OFF LOCATIONS.” *Working at Far-Off Locations*, SODEXO, <http://sodexousa.com/usen/quality-life-services/on-site-services/remote-sites/offshore-operations.aspx> (last visited Aug. 8, 2014).

<sup>3</sup> *Culotta*, 864 F. Supp. 2d at 469.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* Note that Ms. Culotta’s supervisor had recently taken the position and may not have known that Ms. Culotta had any such preexisting fear. *Id.* The opinion does not make any mention as to whether any of Ms. Culotta’s coworkers regarded her as having such a fear. *See id.*

ADA's provisions.<sup>6</sup> Ms. Culotta countered that her fear substantially impaired her ability to work.<sup>7</sup> However, Ms. Culotta declined to accept other offers in similar positions and with the same employer, all of which did not require her to travel over water.<sup>8</sup> The court noted that Ms. Culotta's phobia did not significantly hinder her ability to perform any major life function.<sup>9</sup> Ultimately, the court barred her claim under the first prong of the "disability" definition because the phobia did not prevent her from performing the majority of jobs.<sup>10</sup>

Luckily for Ms. Culotta, however, Congress had recently amended the 1990 ADA.<sup>11</sup> Congress originally enacted the ADA with the goal of eliminating discrimination against individuals with disabilities.<sup>12</sup> The Act defined a disability as: (1) a physical or mental impairment that significantly limited at least one major life activity, (2) having a record of such impairment, or (3) being "regarded as" having an impairment.<sup>13</sup> In 2008, Congress broadened the scope of this definition by focusing on the "regarded as" prong, and removing an entire section delineating the disabled as a "discrete and insular minority."<sup>14</sup>

Before the newly broadened ADA Amendments Act (ADAAA) "regarded as" prong, Ms. Culotta's fear of traveling over water would not have been considered a disability at all.<sup>15</sup> However, after denying the condition was a disability under the first prong, the district court continued its ADAAA analysis and ultimately agreed with Ms.

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<sup>6</sup> *Id.* at 473-74.

<sup>7</sup> *Culotta v. Sodexo Remote Sites P'ship*, 864 F. Supp. 2d 466, 475 (E.D. La. 2012).

<sup>8</sup> *Id.* at 475-76 n.17.

<sup>9</sup> *Id.* at 475-76. The first prong of the ADAAA being "a physical or mental impairment that substantially limits one or more major life activities of such individual." 42 U.S.C. § 12102(1)(A) (Supp. II 2008).

<sup>10</sup> *Culotta v. Sodexo Remote Sites P'ship*, 864 F. Supp. 2d 466, 476 (E.D. La. 2012) (citing *Anderson v. N.D. State Hosp.*, 232 F.3d 634 (8th Cir. 2000)).

<sup>11</sup> See ADA Amendments Act of 2008, Pub. L. 110-325, 122 Stat. 3553 (2008) (codified as amended at 42 U.S.C. §§ 12101-12114 (2008)).

<sup>12</sup> 42 U.S.C. § 12101(a)(7), (b)(2) (Supp. II 1990); see also Amelia Michele Joiner, *The ADAAA: Opening the Floodgates*, 47 SAN DIEGO L. REV. 331, 360 (2010) (citing Alex B. Long, *Introducing the New and Improved Americans with Disabilities Act: Assessing the ADA Amendments Act of 2008*, 103 NW. U. L. REV. 217, 217 (2008)).

<sup>13</sup> 42 U.S.C. § 12102(2)(A)-(C) (Supp. II 1990).

<sup>14</sup> 42 U.S.C. §§ 12101(a), 12102(3) (Supp. II 2008); 42 U.S.C. §§ 12101(a)(7); 12102 (Supp. II 1990) (emphasis added); see also *Lloyd v. Hous. Auth. of Montgomery, Ala.*, 857 F. Supp. 2d 1252, 1263-64 (M.D. Ala. 2012) (noting that the expanded definition of disability "means that treatable yet chronic conditions like hypertension and asthma render an affected person just as disabled as a wheelchair-bound paraplegic—if only for the purposes of disability law.").

<sup>15</sup> See *Culotta*, 864 F. Supp. 2d at 476.

Culotta.<sup>16</sup> The court held Ms. Culotta sufficiently stated a claim regardless of whether her “impairment” limited or was perceived to limit one of her major life activities.<sup>17</sup>

As evidenced by Ms. Culotta’s case above, Congress drastically broadened the “disability” definition, such that most conditions now constituting disabilities fall outside the spirit of the law and purpose of the original ADA.<sup>18</sup> Today, courts deciding cases under the ADAAA are more inclined to find a reason to deem something—or rather anything—a disability.<sup>19</sup> In response, courts have turned simple phobias into disabilities, even if a person does not actually have a disability and even though it does not impair any major life functioning.<sup>20</sup>

The ADAAA places the focus on the employer.<sup>21</sup> It allows disgruntled employees to easily evade the guidelines that were once in place as the first step to proving a discrimination case: that a disability was actually present.<sup>22</sup> When Congress implemented the ADAAA, it removed the constraint of deciphering whether something was a disability by permitting courts to gloss over the “major” and “substantially limiting” terms in the language of the definition.<sup>23</sup> Nonetheless, courts deciding cases under the ADAAA analysis seem hesitant to use such

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<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> See Paul R. Klein, Note, *The ADA Amendments Act of 2008: The Pendulum Swings Back*, 60 CASE W. RES. L. REV. 467, 470-71 (2010).

<sup>19</sup> See Berard v. Wal-Mart Stores E., L.P., No. 8:10-cv-2221-T-26MAP, 2011 WL 4632062, at \*2 (M.D. Fla. Oct. 4, 2012); Culotta v. Sodexo Remote Sites P’ship, 864 F. Supp. 2d 466, 475-76 (E.D. La. 2012); Kravits v. Shinseki, No. 10-861, 2012 WL 604169, at \*6 (W.D. Pa. Feb. 24, 2012); Gibbs v. ADS Alliance Data Sys., Inc., No. 10-2421-JWL, 2011 WL 3205779, at \*3 (D. Kan. July 28, 2011); Bliss v. Morrow Enters. Inc., No. 09-cv-3064C PJS/JJK, 2011 WL 2555365, at \*5-6 (D. Minn. June 28, 2011).

<sup>20</sup> See Berard, 2011 WL 4632062, at \*2 (holding that a diabetic attack was a disability); Culotta, 864 F. Supp. 2d at 475-76 (holding that a fear of traveling over water was a disability); Kravits, 2012 WL 604169, at \*6 (holding that back pain and fibromyalgia were disabilities); Gibbs, 2011 WL 3205779, at \*3 (holding that a genuine issue of material fact existed as to whether carpal tunnel was a disability); Bliss, 2011 WL 2555365, at \*5-6 (holding that a broken arm was a disability).

<sup>21</sup> Karen R. Harned & Katelynn K. McBride, *The Amendments to the Americans with Disabilities Act: Bad for Business, Boon for the Disabled?*, 11 ENGAGE: J. FEDERALIST SOC’Y PRAC. GROUPS 99, 99 (2010).

<sup>22</sup> For example, a person must be “a qualified individual *with* a disability” to receive protection from the ADA. 42 U.S.C. § 12112(a) (Supp. II 1990) (emphasis added).

<sup>23</sup> See, e.g., Gibbs v. ADS Alliance Data Sys., Inc., No. 10-2421-JWL, 2011 WL 3205779, at \*3 (D. Kan. July 28, 2011) (citing 29 C.F.R. § 1630.2(i)(2), (j)(1)(i) (2012)).

broad terminology in case holdings without first explaining that the ADAAA encourages broad coverage.<sup>24</sup>

For instance, in deciding that carpal tunnel was a disability, the United States District Court for the District of Kansas stated—within a matter of two paragraphs—that the ADAAA: “lowered the bar,” “significant[ly] expanded” the terms, “favors ‘broad coverage,’ does ‘not intend[ ] to [create] ‘demanding’ standards,’ is ‘less demanding,’ and ‘is not meant to be ‘extensive.’”<sup>25</sup> The Court repeated similar statements numerous times within its disability analysis, showing some reluctance in its decision to deny the Defendant’s Motion for Summary Judgment.<sup>26</sup> However, such a holding was necessary under the new ADAAA analysis standards.<sup>27</sup>

Ultimately, the ADA itself has caused employers to fear hiring those who have even the slightest “disability,” instead increasing the rate of unemployment for those with real disabilities.<sup>28</sup> Now, nearly anyone can bring a disability claim and have a higher likelihood of success and, thus, those with actual disabilities who are in extreme need of coverage are given even less protection.<sup>29</sup> Because of the increase in plaintiffs’ success in litigation, let alone the increase in disability litigation generally, employers are left erring on the side of caution—not interviewing or hiring anyone with even a possible disability.<sup>30</sup> By using this method, employers are able to gain some control in facing such claims.<sup>31</sup>

The ADAAA has effectively made those with disabilities a majority.<sup>32</sup> Today, disabled individuals whom the original ADA

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<sup>24</sup> Gibbs, 2011 WL 3205779, at \*3.

<sup>25</sup> *Id.* at \*7-8.

<sup>26</sup> *Id.*

<sup>27</sup> See *id.*

<sup>28</sup> Kate S. Arduini, Note, *Why the Americans with Disabilities Act Amendments Act is Destined to Fail: Lack of Protection for the “Truly” Disabled, Impracticability of Employer Compliance, and the Negative Impact it Will Have on our Already Struggling Economy*, 2 DREXEL L. REV. 161, 168 (2009) (citing PETER BLANCK ET AL., IS IT TIME TO DECLARE THE ADA A FAILED LAW?, IN THE DECLINE IN EMPLOYMENT OF PEOPLE WITH DISABILITIES: A POLICY PUZZLE 301, 301 (David C. Stapleton & Richard V. Burkhauser eds., 2003)).

<sup>29</sup> Robin E. Shea, *New ADAAA Regs: The Untold Story!!!*, EMP’T & LABOR INSIDER (Apr. 4, 2011), <http://www.employmentandlaborinsider.com/discrimination/bah-humbug-what-nobody-else-will-tell-you-about-the-adaaa-regulations/>.

<sup>30</sup> Arduini, *supra* note 28, at 191.

<sup>31</sup> See *id.*

<sup>32</sup> Cf. 42 U.S.C. §12101(a)(7) (Supp. II 1990) (stating that “individuals with disabilities are a discrete and insular minority.”) (emphasis added).

intended to cover are falling among the large masses, either overlooked or simply not given a chance because of employers' ever-growing fears.<sup>33</sup> These people deserve greater protection than the ADAAA has given them.

This Comment argues that the recent amendments to the ADA force it well beyond its legislative purpose, and posits that further congressional amendments are necessary to reasonably narrow its scope. By completely removing, or at least, further limiting the "regarded as" prong, the ADA will more closely resemble its original purpose by covering those who truly deserve protection. Part I tracks the ADA's legislative history, the changes made through the amendment, and illustrates how courts' application of the ADA has changed over time. Part II discusses the ADAAA's overbreadth, the resulting problems from its broad coverage, and proposes that further amendment is necessary to conform the ADA to its original purpose.

## I. BACKGROUND

When Congress first passed the ADA, it was deemed, the "most sweeping anti-discrimination measure since the Civil Rights Act of 1964."<sup>34</sup> The ADA's stated purpose was "to provide *clear*, strong, *consistent*, enforceable standards addressing discrimination against individuals with disabilities" and to eliminate such discrimination.<sup>35</sup> In the original ADA, Congress noted that people with disabilities make up "a discrete and insular minority."<sup>36</sup> Specifically, Congress found that forty-three million Americans had physical or mental disabilities and noted that this number was continuing to increase.<sup>37</sup> The need to protect the disabled was clear because less than twenty-five percent of disabled men and only thirteen percent of disabled women had full-time jobs.<sup>38</sup>

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<sup>33</sup> See Arduini, *supra* note 28, at 168 (citing PETER BLANCK ET AL., IS IT TIME TO DECLARE THE ADA A FAILED LAW?, IN THE DECLINE IN EMPLOYMENT OF PEOPLE WITH DISABILITIES: A POLICY PUZZLE 301, 301 (David C. Stapleton & Richard V. Burkhauser eds., 2003)).

<sup>34</sup> Op-Ed., A Law for Every American, N.Y. TIMES, July 27, 1990, at A26, available at <http://www.nytimes.com/1990/07/27/opinion/a-law-for-every-american.html?scp=1&sq=a%20law%C20for%C20every%20american&st=cse> [hereinafter A Law for Every American].

<sup>35</sup> 42 U.S.C. § 12101(b)(1)-(2) (1990) (emphasis added).

<sup>36</sup> *Id.* § 12101(a)(7).

<sup>37</sup> *Id.* § 12101(a)(1).

<sup>38</sup> A Law for Every American, *supra* note 34, at A26.

Section A of this Part provides a brief summary of the original 1990 ADA. Section B discusses two Supreme Court cases that similarly tried to narrow the “disability” definition. Section C explains the changes that were made to the ADA in 2009. Section D concludes by discussing the courts increased vulnerability to accept anything as a disability and how this has changed the outcome of cases over time.

### A. *The “Disability” Definition of 1990*

The original ADA’s foundation, and most of the litigation pertaining to the ADA, rested on the definition of “disability.”<sup>39</sup> The ADA’s “disability” definition matched those used in the Rehabilitation Act of 1973 and the Fair Housing Amendments Act of 1988.<sup>40</sup> Because of its previous success, the drafters did not change the definition.<sup>41</sup> Little discussion or debate occurred in adopting the definition, but the decision was otherwise motivated by the political belief that forming a new definition would slow down the process in which the ADA would be signed into law.<sup>42</sup> In the ADA, disability is defined as: (1) a physical or mental impairment that significantly limits one or more major life activities, (2) having a record of such impairment, or (3) being “regarded as” having an impairment.<sup>43</sup>

#### 1. The Three Prongs of the “Disability” Definition

Under the 1990 ADA, a person needed to be “a qualified individual *with* a disability” to receive protection.<sup>44</sup> To have a “disability” under the first prong an individual had to have a physical or mental impairment.<sup>45</sup> Such impairments ranged from physiological disorders or cosmetic disfigurements to cardiovascular or reproductive

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<sup>39</sup> See generally Arduini, *supra* note 28, at 178-79 (explaining that courts place significant emphasis on the “disability” definition).

<sup>40</sup> H.R. REP. NO. 101-485, pt. 3, at 27 (1990), reprinted in 1990 U.S.C.C.A.N. 445, 450; see Brian K. Esser, Comment, *Beyond 43 Million: The “Regarded As” Prong of the ADA and HIV Infection—A Tautological Approach*, 49 AM. U. L. REV. 471, 478 (1999) (arguing that the ADA’s definition of disability was unoriginal).

<sup>41</sup> H.R. REP. NO. 101-485, pt. 3, at 27 (1990), reprinted in 1990 U.S.C.C.A.N. 445, 450.

<sup>42</sup> See Chai R. Feldblum, *Definition of Disability Under Federal Anti-Discrimination Law: What Happened? Why? And What Can We Do About It?*, 21 BERKELEY J. EMP. & LAB. L. 91, 129 (2000).

<sup>43</sup> 42 U.S.C. § 12102(1)(A)-(C) (Supp. II 1990).

<sup>44</sup> See *id.* at §12112(a) (1990) (emphasis added).

<sup>45</sup> H.R. REP. NO.101-485, pt. 3, at 28 (1990), reprinted in 1990 U.S.C.C.A.N. 445, 450.

problems, but did not include physical characteristics, like eye and hair color.<sup>46</sup> Next, the impairment had to substantially limit at least one major life activity.<sup>47</sup> Courts had difficulty interpreting the term “substantially limits” in terms of how significantly the impairment had to be limited and whether it had to prevent a person from performing one specific job or all jobs in general.<sup>48</sup> However, the ADA’s legislative history provided examples of major life activities, such as hearing, walking, breathing, and working.<sup>49</sup> Over time, courts decided that having a limited ability to perform one job did not equate with having a substantial limitation in working as a major life activity.<sup>50</sup>

Congress intended the second prong, or the “record of” prong, to cover individuals with a record of their impairment.<sup>51</sup> Few plaintiffs relied on documentation, and courts rarely used this prong in their analysis.<sup>52</sup> However, the third “regarded as” prong was the most controversial.<sup>53</sup> Even if a person did not have an actual impairment or disability, they were covered under the “regarded as” prong so long as someone else *thought* that they had any of the covered disabilities.<sup>54</sup> This prong focused on how another person perceived an individual who they thought had a disability, as well as the stigmas associated with such perception.<sup>55</sup> For example, the legislative history focused specifically on burn victims, stating that employers may fear the “negative reactions” to a person with severe burns and discriminate accordingly.<sup>56</sup> Therefore, the prong sought to protect people without an actual disability, but who were disabled by myths, fears, or stereotypes associated with their perceived impairment.<sup>57</sup>

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<sup>46</sup> *Id.* at 450-51.

<sup>47</sup> See *id.* at 451; see also Arduini, *supra* note 28, at 169 (noting that the term “substantial limitation” caused “considerable debate”).

<sup>48</sup> See *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 200 (2002), superseded by statute, ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008).

<sup>49</sup> H.R. REP. NO. 101-485, pt. 3, at 27 (1990), reprinted in 1990 U.S.C.C.A.N. 445, 451.

<sup>50</sup> *Id.*

<sup>51</sup> Having a record included having documentation, a history, or a physical record of such an impairment. *Id.* at 452.

<sup>52</sup> See Alex B. Long, *Introducing the New and Improved Americans with Disabilities Act: Assessing the ADA Amendments Act of 2008*, 103 NW. U. L. REV. COLLOQUY 217, 227 (2008).

<sup>53</sup> See Stephen F. Befort, *Let’s Try This Again: The ADA Amendments Act of 2008 Attempts to Reinvigorate the “Regarded As” Prong of the Statutory Definition of Disability*, 2010 UTAH L. REV. 993, 1000-01 (2010).

<sup>54</sup> H.R. REP. NO. 101-485, pt. 3, at 29 (1990), reprinted in 1990 U.S.C.C.A.N. 445, 452.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 452-53.

<sup>57</sup> *Id.* at 453.

The “regarded as” prong had one major hurdle: a plaintiff had to prove that his employer believed he had a physical or mental impairment that substantially limited a major activity.<sup>58</sup> Thus, the “regarded as” prong frequently referred back to the more difficult requirements of the first prong.<sup>59</sup> Conversely, the employee did not have to disprove the employer’s perceptions.<sup>60</sup> Moreover, because employers could not legally ask a current or potential employee if they had a disability, this prong was difficult for courts to interpret and even harder for plaintiffs to prove.<sup>61</sup>

## 2. The Legislative Purpose of the 1990 ADA

As then-President George H.W. Bush signed the ADA, which he considered a symbol of freedom “open[ing] ‘a once-closed door to a bright new era,’” over two thousand disabled advocates “cheered mightily” on the South Lawn of the White House.<sup>62</sup> Congress intended for the ADA to close the unemployment gap for the disabled: the “poorest . . . and largest minority in America.”<sup>63</sup> Ultimately, the goal was to allow the disabled to become a part of the “mainstream of American life.”<sup>64</sup>

President Bush promised to enforce the ADA’s intended goals “efficiently and vigorously.”<sup>65</sup> However, the initial version of the ADA proved unable to help those truly in need of its protection.<sup>66</sup> Courts found the ADA’s language unclear and plaintiffs had great difficulty in proving the existence of a disability, causing many lawsuits to end with the plaintiff losing on summary judgment.<sup>67</sup>

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<sup>58</sup> See Ani B. Satz, *Disability Discrimination After the ADA Amendments Act of 2008: Forward*, 2010 UTAH L. REV. 983, 983-84 (2010); see also Sutton v. United Air Lines, Inc., 527 U.S. 471, 489-90 (1999), superseded by statute, ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008).

<sup>59</sup> See 42 U.S.C. § 12102(2)(C) (Supp. II 1990).

<sup>60</sup> H.R. REP. NO. 101-485, pt. 3, at 31 (1990), reprinted in 1990 U.S.C.C.A.N. 445, 453. For instance, the employee would not have to prove that others would accept him or that his insurance would not increase per the beliefs of his employer. *Id.*

<sup>61</sup> See 42 U.S.C. § 12112(c)(4)(A) (Supp. II 1990).

<sup>62</sup> A Law for Every American, *supra* note 34, at A26.

<sup>63</sup> S. REP. NO. 101-116, at 9 (1989).

<sup>64</sup> See Presidential Statement on Signing the Americans with Disabilities Act of 1990, 26 WEEKLY COMP. PRES. DOC. 1165 (July 30, 1990), reprinted in 1990 U.S.C.C.A.N. 601, 602.

<sup>65</sup> *Id.*

<sup>66</sup> Arduini, *supra* note 28, at 166.

<sup>67</sup> See Harned & McBride, *supra* note 21, at 100.

## B. *The Supreme Court's Attempt to Narrow the ADA's Definition of "Disability" Through the "Regarded As" Prong*

As courts continued to apply the ADA, they made significant changes to the way they defined and interpreted "disability."<sup>68</sup> Courts rarely looked at whether discrimination actually occurred, instead focusing on whether a condition was a "disability" and the role of the word "impairment" in the three prongs of the definition.<sup>69</sup> Over time, courts began to narrow the scope of the "disability" definition, making it harder to prove.<sup>70</sup>

One of the Supreme Court cases that narrowed the disability definition used an individualized analysis for each case because of how much people differ.<sup>71</sup> The Supreme Court held it was necessary to employ a strict interpretation and demanding test to qualify individuals as disabled in view of the words "substantially limits" and "major life activities."<sup>72</sup> Thus, the Supreme Court interpreted "substantially limits" as a permanent or long-term impairment that "severely restrict[ed]" a person from engaging in their major life activities.<sup>73</sup> Another Supreme Court case—agreeing that an individualized inquiry was necessary—narrowed the ADA by disregarding people who could mitigate their impairments, such as through the use of corrective lenses.<sup>74</sup>

In these cases, the Supreme Court rejected the broad interpretation of the "regarded as" prong from the holding in *School Board of Nassau County v. Arline*.<sup>75</sup> The Supreme Court held that unless an employer perceived the impairment as substantially limiting one or

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<sup>68</sup> Letter from Jeff Rosen, Chair, Nat'l Council on Disability, to President Barack Obama, at 2 (July 23, 2013) (on file with Nat'l Council on Disability).

<sup>69</sup> *Id.*

<sup>70</sup> See *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184,198 (2002) (holding that "substantially limits" meant an impairment that severely restricted a person from important daily life activities); *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555, 565-66 (1999) (holding mitigating factors could remove an impairment from the protection of the ADA); *Murphy v. United Parcel Serv., Inc.*, 527 U.S. 516, 521 (1999) (finding that mitigating factors were important to the disability analysis); *Sutton v. United Air Lines Inc.*, 527 U.S. 471, 482-83 (1999) (finding that myopia was not a disability because it could be corrected by mitigating factors).

<sup>71</sup> *Toyota Motor Mfg.*, 534 U.S. at 198-99.

<sup>72</sup> *Id.* at 196-97; Kevin M. Barry, *Exactly what Congress Intended?*, 17 EMP. RTS. & EMP. POL'Y J. 5, 15 (2013).

<sup>73</sup> *Toyota Motor Mfg.*, 534 U.S. at 198.

<sup>74</sup> *Sutton*, 527 U.S. at 482-84, 487-89.

<sup>75</sup> Sch. Bd. of Nassau Cnty. v. Arline, 480 U.S. 273, 282-83 (1987); see also Barry, *supra* note 72, at 21.

more major life activities, the plaintiff could not qualify as disabled under the “regarded as” prong.<sup>76</sup> Thus, when working was the activity potentially affected by the perceived impairment, the employer had to believe it prohibited the plaintiff from performing *many* jobs as opposed to one distinctive job in order to qualify as disabled.<sup>77</sup> The focus of this analysis was on the employer’s beliefs, in terms of how they perceived the impairment, or lack thereof, to affect major life activities.<sup>78</sup> The Supreme Court further narrowed the “regarded as” prong by requiring the plaintiff to disprove the employer’s belief.<sup>79</sup>

### C. Congress Responds by Enacting the ADAAA and its Broadened Definition

Congress amended the ADA to reject the Supreme Court holdings and to remedy the increasing unemployment rates of the disabled.<sup>80</sup> Unlike other civil rights statutes, the ADA left employers fearing lawsuits and viewing the disabled as “lawsuits on wheels.”<sup>81</sup> The ADAAA—which is deemed the “most extensive change to employment law in the last decade”<sup>82</sup>—explicitly seeks “[t]o restore the intent and protections” of the 1990 ADA.<sup>83</sup> But in its attempt to address the ADA’s underinclusive nature after the Supreme Court

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<sup>76</sup> Sutton v. United Air Lines, Inc., 527 U.S. 471, 489 (1999).

<sup>77</sup> *Id.* at 491; see Barry, *supra* note 72, at 14.

<sup>78</sup> Dale Larson, *Unconsciously “Regarded As” Disabled: Implicit Bias and the Regarded-As Prong of the Americans with Disabilities Act*, 56 UCLA L. REV. 451, 462-63 (2008) (citing Nat’l Council on Disability, Policy Brief Series: Righting the ADA No. 15, The Supreme Court’s Decisions Discussing the “regarded as” Prong of the ADA Definition of Disability 8-11 (2003)).

<sup>79</sup> Barry, *supra* note 72, at 14 n.60 (quoting Nat’l Council on Disability, Righting the ADA 53 (2004), available at <http://www.ncd.gov/publications/2004/Dec12004>).

<sup>80</sup> See Robert C. Bird & John C. Knopf, *Do Disability Laws Impair Firm Performance*, 47 AM. BUS. L.J. 145, 152 (2010); see also ADA Amendments Act of 2008, Pub. L. No. 110-325, sec. 2(b)(2)-(5), 122 Stat. 3553, 3555; Julie Hofius, *How the ADA Handicaps Me*, CATO INST. (July 26, 2000), available at [http://www.cato.org/pub\\_display.php?pub\\_id=4639](http://www.cato.org/pub_display.php?pub_id=4639) (showing that the ADA decreased the disabled unemployment rate by only four percent).

<sup>81</sup> Hofius, *supra* note 80; see also Arduini, *supra* note 28, at 168 (citing THOMAS DE LEIRE, THE AMERICANS WITH DISABILITIES ACT AND THE EMPLOYMENT OF PEOPLE WITH DISABILITIES, IN THE DECLINE IN THE EMPLOYMENT OF PEOPLE WITH DISABILITIES: A POLICY PUZZLE 259, 273 (David C. Stapleton & Richard V. Burkhauser eds., 2003)).

<sup>82</sup> Arduini, *supra* note 28, at 161 (citing Denise Bleau, *The ADA Amendments Act of 2008*, 59 LAB. L.J. 277, 277 (2009)).

<sup>83</sup> Jeffrey Douglas Jones, *Enfeebling the ADA: The ADA Amendments Act of 2008*, 62 OKLA. L. REV. 667, 668 (2010).

holdings, Congress paid a serious price by simply “tinkering” with the “disability” definition in a counterintuitive, overinclusive manner.<sup>84</sup>

The ADAAA became effective on January 1, 2009.<sup>85</sup> It significantly broadened the “disability” definition and clarified that the determination as to whether a condition constituted a disability “should not demand [an] extensive analysis.”<sup>86</sup> Further, Congress designed the ADAAA to clear up confusion and leave less for the courts to interpret.<sup>87</sup>

In its attempt to broaden the ADA’s scope, Congress removed the language referencing the disabled as a minority group.<sup>88</sup> By removing this reference from the text of the ADAAA, Congress expanded the scope and range of those able to receive disability protection, from a defined “minority group” to an undefined, open-ended question. However, given that Congress included this fact in the original ADA may show that the legislature intended to narrow the extension of disability protection, thus, including fewer people.<sup>89</sup> Overall, the ADAAA made it easier to prove a substantial limitation, qualified more actions as major life activities, and ignored mitigating measures.<sup>90</sup>

The ADAAA broadened all parts of the “disability” definition.<sup>91</sup> Although the actual language of the disability prongs did not change, Congress changed the step-by-step analysis and redefined certain words within each.<sup>92</sup> The ADAAA “soften[ed]” the “substantially limits” language in the first prong by making the threshold lower than the Supreme Court’s “severely restricted” standard.<sup>93</sup> Additionally, it

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<sup>84</sup> *Id.*

<sup>85</sup> Harned & McBride, *supra* note 21, at 99 (citing *Rohr v. Salt River Project Agric. Improvement & Power Dist.*, 555 F.3d 850, 853 (9th Cir. 2009)).

<sup>86</sup> See ADA Amendments Act of 2008, Pub. L. 110-325, sec. (a)(1)(5) 122 Stat. 3553 (2008). The National Council on Disability, the federal agency pushing for the amendment, “emphasize[d] that the definition of disability should be construed in favor of broad coverage of individuals to the *maximum extent permitted* by the terms of the ADA.” Letter from Jeff Rosen, *supra* note 68, at 2 (emphasis added).

<sup>87</sup> See Barry, *supra* note 72, at 20.

<sup>88</sup> Compare 42 U.S.C. § 12101(a)(1), (7) (Supp. II 1990), with 42 U.S.C. § 12101(a)(1), (7) (Supp. II 2008).

<sup>89</sup> See *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 494-95 (1999) (Ginsburg, J., concurring).

<sup>90</sup> Satz, *supra* note 58, at 985 (citing ADA Amendments Act of 2008, Pub. L. 110-325, § 2(b)(4)-(6), 122 Stat. 3553 (2008); 42 U.S.C. § 12102 (4)(E)(i) (Supp. II 2008)).

<sup>91</sup> See 42 U.S.C. §§ 12101-12102 (2006 & Supp. II 2008).

<sup>92</sup> See *id.* § 12102.

<sup>93</sup> *Id.* §§ 12101(a)(8), (b)(4), 12102(1)(A); Harned & McBride, *supra* note 21, at 99, 101.

was no longer necessary for an activity to be “central to everyday life” in order for it to fall within the category of a major life activity.<sup>94</sup> The ADAAA added extensive lists, including non-exhaustive examples of major life activities and major bodily functions.<sup>95</sup> “[R]ather than requiring wholesale impairment of all activities” like the 1990 ADA, a disability was covered so long as it impaired at least one life activity.<sup>96</sup>

The most significant change was to the “regarded as” prong.<sup>97</sup> Under the ADAAA, a plaintiff no longer had to show that a disability limited or was perceived to limit a major life activity.<sup>98</sup> Additionally, the plaintiff did not have to show that his employer had a reasonable basis for the perception.<sup>99</sup> Under the original ADA, this prong was not an “automatic claim” when the plaintiff failed to show the substantial limitations of the perceived impairment.<sup>100</sup> Now, the “regarded as” prong “protects *nearly anyone* who is adversely treated based on *any* impairment—whether it is actual or perceived, and functionally limiting or not.”<sup>101</sup>

Although the ADAAA broadened the scope of the “regarded as” prong significantly, Congress attempted to limit its scope in two ways: (1) an impairment could not be “transitory *and* minor” and (2) no reasonable accommodation would be afforded to a person “disabled” under this prong only.<sup>102</sup> Transitory was defined as lasting six months or less.<sup>103</sup> However, Congress left “minor” undefined.<sup>104</sup> These signif-

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<sup>94</sup> 42 U.S.C. § 12102(2) (Supp. II 2008); Harned & McBride, *supra* note 21, at 99.

<sup>95</sup> “[M]ajor life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.” 42 U.S.C. § 12102(2)(A) (Supp. II 2008). Major life activities are now extended to incorporate major bodily functions, which “includ[e] but [are] not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.” 42 U.S.C. § 12102(2)(B) (Supp. II 2008).

<sup>96</sup> Harned & McBride, *supra* note 21, at 99 (citing 42 U.S.C. § 12102(1)(A) (Supp. II 2008)).

<sup>97</sup> Befort, *supra* note 53, at 994.

<sup>98</sup> Harned & McBride, *supra* note 21, at 99.

<sup>99</sup> *Davis v. NYC Dept. of Educ.*, 2012 WL 139255, at \*5 (E.D.N.Y. Jan. 18, 2012) (quoting *Darcy v. City of New York*, No. 06-CV-2246, 2011 WL 841375, at \*4 (E.D.N.Y. Mar. 8, 2011)).

<sup>100</sup> See *Robinson v. Global Marine Drilling Co.*, 101 F.3d 35, 37 (5th Cir. 1996).

<sup>101</sup> Barry, *supra* note 72, at 22 (emphasis added).

<sup>102</sup> 42 U.S.C. § 12102(3)(B) (Supp. II 2008); Befort, *supra* note 53, at 994-95.

<sup>103</sup> 42 U.S.C. § 12102(3)(B) (Supp. II 2008); *but see Davis*, 2012 WL 139255, at \*5-6 (denying defendants motion to dismiss when the condition lasted only three months).

<sup>104</sup> 42 U.S.C. § 12102(3)(B) (Supp. II 2008); Barry, *supra* note 72, at 23.

icant changes to the “regarded as” prong will nevertheless continue to allow many more plaintiffs to initiate lawsuits under the ADAAA.<sup>105</sup>

#### D. *The “Regarded As” Prong Before and After the ADAAA: A Case Comparison*

The change in the “regarded as” prong has led to additional cases and many more are making it past the summary judgment and motion to dismiss phases.<sup>106</sup> Most courts analyzing disability under the original ADA found the plaintiff was not “regarded as” disabled or generally, that they could not proceed in their case.<sup>107</sup> In contrast, most of the ADAAA cases found that the plaintiff *was* “regarded as” disabled or at least allowed them to continue beyond the preliminary phases.<sup>108</sup>

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<sup>105</sup> Arduini, *supra* note 28, at 183-84.

<sup>106</sup> Compare *Serednyj v. Beverly Healthcare, LLC*, 656 F.3d 540, 556 (7th Cir. 2011); *Milholland v. Sumner Cnty. Bd. of Educ.*, 569 F.3d 562, 567-69 (6th Cir. 2009); *Ruiz Rivera v. Pfizer Pharm., LLC*, 521 F.3d 76, 83 (1st Cir. 2008); *Talley v. Family Dollar Stores of Ohio, Inc.*, 542 F.3d 1099, 1106 (6th Cir. 2008); *Van v. Miami-Dade Cnty.*, 509 F. Supp. 2d 1295, 1300 (S.D. Fla. 2007); *Ivey v. District of Columbia*, 949 A.2d 607, 613 (D.C. 2008) for cases finding the employer did not regard the plaintiff as disabled under the original ADA analysis, *with* *Bordonaro v. Johnston Cnty. Bd. of Educ.*, 938 F. Supp. 2d 573, 579 (E.D.N.C. 2013); *Davis v. NYC Dept. of Educ.*, No. 10-cv-3812, 2012 WL 139255, at \*6 (E.D.N.Y. Jan. 18, 2012); *Lapier v. Prince George’s Cnty, Maryland*, No. 10-CV-2851AW, 2012 WL 1552780, at \*8 (D. Md. 2012); *Salev v. Caney Fork, LLC*, 886 F. Supp. 2d 837, 849-51 (M.D. Tenn. 2012); *Darcy v. New York*, No. 06-CV-2246, 2011 WL 841375, at \*3-4 (E.D.N.Y. Mar. 8, 2011); *Dube v. Texas Health & Human Servs. Comm’n*, No. SA-11-CV-354-XR, 2011 WL 3902762, at \*5 (W.D. Tex. Sept. 6, 2011); *Estate of Murray v. UHS of Fairmount, Inc.*, No. 10-2561, 2011 WL 5449364, at \*9 (E.D. Pa. Nov. 10, 2011), for cases finding that the employer regarded the plaintiff as disabled under ADAAA analysis.

<sup>107</sup> See *Harned & McBride*, *supra* note 21, at 100; see also *Serednyj*, 656 F.3d at 556 (granting summary judgment because the employer did not perceive plaintiff as unable to perform her work); *Milholland*, 569 F.3d at 567-68 (holding the employer did not believe the impairment substantially limited activities in a broad class of jobs); *Richardson v. Honda Mfg. of Alabama, LLC*, 635 F. Supp. 2d 1261, 1277 (N.D. Ala. 2009) (finding there was enough information for a factual dispute under the “regarded as” prong because the employer made an express statement that plaintiff was “ADA-qualified”); *Ruiz Rivera*, 521 F.3d at 82-87 (discussing that the employer could have regarded plaintiff as disabled after an express statement that her condition was not considered an ADA disability that substantially limited her life activities); *Talley*, 542 F.3d at 1106 (finding the employer did not believe osteoarthritis substantially impaired plaintiff’s ability to work); *Ivey*, 949 A.2d at 613 (holding the employer did not consider plaintiff’s obesity to substantially impair her ability to work); *Van*, 509 F. Supp. 2d at 1300-02 (finding the employer did not regard plaintiff as unable to perform a broad range of positions).

<sup>108</sup> *Bordonaro*, 938 F. Supp. 2d at 579 (denying the employer’s motion to dismiss because plaintiff sufficiently proved the employer excused her from specific job related tasks and suggested she apply for short term disability benefits); *Davis*, 2012 WL 139255, at \*6 (holding that the employer regarded plaintiff as disabled even though the impairment only lasted three months and was transitory); *Lapier*, 2012 WL 1552780, at \*8 (denying summary judgment

## 1. 1990 to 2009: The ADA

The Supreme Court heard sixteen ADA cases between 1998 and 2004 and the lower courts were similarly overloaded.<sup>109</sup> One court, in particular, stated that the ADA “had the potential of being the greatest generator of litigation ever, and . . . doubted whether Congress, in its wildest dreams or wildest nightmares, intended to turn every garden variety worker’s compensation claim into a federal case.”<sup>110</sup> Plaintiffs asserting ADA claims faced challenges in proving that their impairment was a disability.<sup>111</sup> In all ADA cases between 1992 and 1997, employees succeeded in only 7.89 percent.<sup>112</sup> This low success rate was primarily because of the “regarded as” analysis. Once a court found that an employer did not believe an impairment substantially interfered with a major life activity, the court’s inquiry stopped.<sup>113</sup> For instance, one court ruled although the plaintiff did have a disorder, the evidence was insufficient to show its “severity,

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because plaintiff’s evidence was sufficient to show that a blood disorder was more than minor and not transitory); *Saley*, 886 F. Supp. 2d at 849-53 (denying summary judgment even though the employer did not regard plaintiff’s iron “overload” as a substantially limiting disability, because such a belief was unnecessary to ADAAA analysis); *Darcy*, 2011 WL 841375, at \*3-4 (denying summary judgment because the employer *may* have regarded plaintiff as suffering from alcoholism and it was no longer necessary to prove substantial limitation); *Dube*, 2011 WL 3902762, at \*4-5 (denying rule 12(b)(6) motion to dismiss because there was not enough information alleged in the complaint to find that an impairment was transitory and minor); *Estate of Murray*, 2011 WL 5449364, at \*9 (finding plaintiff raised a genuine issue of material fact as to whether the employer regarded plaintiff as disabled, especially because the employer was no longer required to believe the impairment substantially limited a major life activity).

<sup>109</sup> See Befort, *supra* note 53, at 999-1000 (citing *Tennessee v. Lane*, 541 U.S. 509, 533-34 (2004). See also *Clackamas Gastroenterology Assoc., P.C. v. Wells*, 538 U.S. 440, 441-42 (2003); *Raytheon Co. v. Hernandez*, 540 U.S. 44, 55 (2003); *Barnes v. Gorman*, 536 U.S. 181, 189-90 (2002); *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 76 (2002); *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 406 (2002); *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 297 (2002); *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 198 (2002); *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 (2001); *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 690 (2001); *Albertson’s, Inc. v. Kirkingburg*, 527 U.S. 555, 577-78 (1999); *Murphy v. United Parcel Serv., Inc.*, 527 U.S. 516, 521 (1999); *Sutton v. United Air Lines*, 527 U.S. 471, 492-94 (1999); *Bragdon v. Abbott*, 524 U.S. 624, 647 (1998); *Cleveland v. Policy Mgmt. Sys. Corp.*, 526 U.S. 795, 805-07 (1999); *Pa. Dep’t of Corr. v. Yeskey*, 524 U.S. 206, 213 (1998).

<sup>110</sup> Befort, *supra* note 53, at 1000 (quoting *Pedigo v. P.A.M. Transp.*, 891 F. Supp. 482, 485 (W.D. Ark. 1994), *rev’d*, 60 F.3d 1300 (8th Cir. 1995)).

<sup>111</sup> Jones, *supra* note 83, at 667-68

<sup>112</sup> *Id.* at 691 (citing Study Finds Employers Win Most ADA Title I Judicial and Administrative Complaints, 22 MENTAL & PHYSICAL DISABILITY L. REP. (ABA) 403, 403-04 (1998)).

<sup>113</sup> *Robinson v. Global Marine Drilling Co.*, 101 F.3d 35, 37 (1996) (holding the employer did not regard a lung condition as substantially interfering with plaintiffs ability to breathe, so plaintiff was not “regarded as” having a disability).

duration, or permanency" on any major life activity.<sup>114</sup> Overall, the Supreme Court's narrow definition *increased* the plaintiff success rate by thirty-two percent.<sup>115</sup> However, employers were still winning over ninety percent of cases in 2008.<sup>116</sup>

## 2. 2009 to the Present: The ADAAA

Because courts cannot apply the ADAAA retroactively, few courts have used its analysis.<sup>117</sup> Thus, there are few statistics on plaintiff success rates.<sup>118</sup> Recently, however, using what little statistics are available, the National Council on Disability conducted a preliminary analysis and found that plaintiffs prevailed in more than three of four

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<sup>114</sup> Shalbert v. Marcincin, No. A.04-5116, 2005 WL 1941317, \*4-6 (E.D. Pa. Aug. 9, 2005) (finding there was insufficient evidence that the employer regarded the employee's anorexia as substantially impairing her ability to eat); *but see* Franchi v. New Hampshire Sch., 656 F. Supp. 2d 252, 257-60 (D.N.H. 2009) (finding an eating disorder was a disability under the ADAAA). For an overview of the inconsistent holdings between the ADA and the ADAAA *compare* Rivera v. Apple Indus. Corp., 148 F. Supp. 2d 202, 213-14 (E.D.N.Y. 2001) (holding that diabetic attacks and poor eye sight, even together, were not disabilities under the ADA), *with* Berard v. Wal-Mart Stores E., L.P., No. 8:10-cv-2221-T-26MAP, 2011 WL 4632062, at \*2 (M.D. Fla. Oct. 4, 2012) (finding that experiencing a diabetic attack while at work was a disability); *compare* Dave v. Lanier, 681 F. Supp. 2d 68, 76 (D.D.C. 2010) (holding asthma was not a disability because the employer did not regard it as a disability), *and* Murphy, 527 U.S. at 521-24 (ruling high blood pressure did not substantially limit any major life activity, was not "regarded as" substantially limiting, and consequently was not a disability under the ADA), *with* Lloyd v. Hous. Auth. of Montgomery, Ala., 857 F. Supp. 2d 1252, 1263-64 (M.D. Ala. 2012) (finding, even without evidence as to whether the condition substantially impaired plaintiff's major life activities, that asthma and high blood pressure could both be disabilities); *compare* Aquinas v. Fed. Express Corp., 940 F. Supp. 73, 78 (S.D.N.Y. 1996) (holding discomfort from fibromyalgia was not a disability, especially because it did not limit plaintiffs ability to perform her job), *with* Kravits v. Shinseki, No. 10-861, 2012 WL 604169, at \*6 (W.D. Pa. Feb. 24, 2012) (holding back pain and fibromyalgia were disabilities under the ADAAA); *compare* Mont-Ros v. City of W. Miami, 111 F. Supp. 2d 1338, 1356-57 (S.D. Fla. 2000) (holding sleep apnea was not a disability because it did not substantially limit plaintiff's ability to perform a major life activity and could be corrected through various measures), *with* Johnson v. Farmers Ins. Exch. No. CIV-11-963-C, 2012 WL 95387, at \*1 (W.D. Okla. Jan. 12, 2012) (holding sleep apnea could be a disability).

<sup>115</sup> Jones, *supra* note 83, at 692 (citing Michael H. Fox & Robert A. Mead, *The Relationship of Disability to Employment Protection Under Title I of the ADA in the United States Circuit Courts of Appeal*, 13 KAN. J.L. & PUB. POL'Y 485, 506 (2004)); *see also* ROBERT L. BURGDORF JR., NAT'L COUNCIL ON DISABILITY, A PROMISING START: PRELIMINARY ANALYSIS OF COURT DECISIONS UNDER THE ADA AMENDMENTS ACT 88 (2013) (stating some studies showed ninety-seven percent of plaintiffs had their ADA cases thrown out).

<sup>116</sup> Jones, *supra* note 83, at 692 (citing Sharona Hoffman, *Settling the Matter: Does Title I of the ADA Work?*, 59 ALA. L. REV. 305, 306 (2008)).

<sup>117</sup> Harned & McBride, *supra* note 21, at 100.

<sup>118</sup> See BURGDORF, *supra* note 115, at 87-88.

cases, generally, and six of seven circuit court cases.<sup>119</sup> Overall, courts using the ADAAA analysis tend to permit plaintiffs claims to go beyond the summary judgment stage more than they did under the ADA.<sup>120</sup> For instance, in *Davis v. NYC Department of Education*, the district court considered a back and shoulder injury a disability because the employer regarded the plaintiff as disabled, and even though it was unclear whether the injury was minor, it was transitory.<sup>121</sup> Similarly, in *Dube v. Texas Health and Human Services Commission*, the ADAAA allowed a plaintiff's case to survive a motion to dismiss because the complaint did not clarify whether her impairment was transitory and minor.<sup>122</sup> Ultimately, the ADAAA has left courts confused and questioning what constitutes a disability.<sup>123</sup>

## II. ANALYSIS

What President George H.W. Bush called a “‘sledgehammer’ to shatter a ‘shameful wall of exclusion’ . . . turned out to be more of a rubber mallet.”<sup>124</sup> Unfortunately, the ADAAA is unlikely to improve the ADA’s effectiveness.<sup>125</sup> Today, the ADAAA protects nearly everyone, regardless of how mild their “disability,” how insignificant their affected activity, and even those without an existing disability.<sup>126</sup> As a result, the ADAAA is unlikely to help the ADA meets its intended

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<sup>119</sup> *Id.* at 88-89 (also showing that six of ten cases found for the plaintiff under the ADAAA and more than half were successful on the merits, moving beyond the preliminary stages); *see also* Jana K. Terry, *The ADA Amendments Act Three Years After Passage: The EEOC’s Final Regulations and the First Court Decisions Emerge at Last*, 58-DEC FED. L. 49, 51 (2011) (“Several court decisions indicate that it will be easier for ADAAA plaintiffs to withstand motions to dismiss for failure to sufficiently allege a substantial limitation on a major life activity.”).

<sup>120</sup> *See* Terry, *supra* note 119, at 51.

<sup>121</sup> *Davis v. NYC Dept. of Educ.*, No. 10-cv-3912 (KAM)(LB), 2012 WL 139255, at \*6 (E.D.N.Y. Jan. 18, 2012).

<sup>122</sup> *Dube v. Texas Health & Human Servs. Comm’n*, No. SA-11-CV-354-XR, 2011 WL 3902762, at \*5 (W.D. Tex. Sept. 6, 2011).

<sup>123</sup> *See* Bliss v. Morrow Enters. Inc., No. 09-cv-3064C PJS/JJK, 2011 WL 2555365, at \*5-6 (D. Minn. June 28, 2011); Gesegnet v. J.B. Hunt Transp. Inc., No. 3:09-CV-828-H, 2011 WL 2119248 (W.D. Ky. May 26, 2011); *see also* Terry, *supra* note 119, at 53.

<sup>124</sup> Barry, *supra* note 72, at 9-10.

<sup>125</sup> Arduini, *supra* note 28, at 162.

<sup>126</sup> *See generally* Harned & McBride, *supra* note 21, at 99-100.

goal.<sup>127</sup> Accordingly, Congress may have to remove or limit the “regarded as” prong to correct the situation.<sup>128</sup>

Section A of this Part evaluates the broad scope of the ADAAA, its inability to “restore” the original ADA, and the repercussions from its failure. Section B discusses the over inclusive nature of the ADAAA. Section C looks at how the ADAAA has moved beyond the purpose of enacting disability discrimination legislation and even that of the original ADA. Section D argues that Congress must amend the ADA by removing the “record of” and “regarded as” prongs. It also discusses an alternative for Congress if complete removal of the “regarded as” prong is not possible, such as changing or limiting it further. Lastly, Section E discusses the future implications if the ADAAA is not amended.

#### A. *The ADAAA Has Gone Too Far: The Repercussions of the ADA Over Time*

Upon signing the ADA, President George H.W. Bush voiced “[f]ears that the ADA [wa]s too vague or too costly and w[ould] lead to an explosion of litigation [we]re misplaced.”<sup>129</sup> However, the 1990 ADA did not help the disabled nearly as much as President Bush or Congress intended.<sup>130</sup> In an attempt to remedy the lack of protection afforded by the original ADA, the ADAAA takes one step too many and will continue to result in increased litigation.<sup>131</sup> Unfortunately,

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<sup>127</sup> See Jones, *supra* note 83, at 668.

<sup>128</sup> See 42 U.S.C. § 12102(3)(B) (Supp. II 2008).

<sup>129</sup> Presidential Statement on Signing the Americans with Disabilities Act of 1990, 26 WEEKLY COMP. PRES. DOC. 1165 (July 30, 1990), reprinted in 1990 U.S.C.C.A.N. 601, 602.

<sup>130</sup> See, e.g., Littleton v. Wal-Mart Stores, Inc., 231 F. App’x 874, 877-78 (11th Cir. 2007) (per curiam) (finding that because a mentally impaired boy graduated from a special handicap school, he could not qualify as substantially limited in the major life activities of learning or thinking); see also Befort, *supra* note 53, at 999 (citing Stuart H. Bompey et al., *The Attack on Arbitration and Mediation of Employment Disputes*, 13 LAB. LAW. 21, 22 (1997)) (discussing that within four years of its enactment, employment cases in federal court alone increased by 128 percent); Stephen F. Befort & Holly Lindquist Thomas, *The ADA in Turmoil: Judicial Dissidence, the Supreme Court’s Response, and the Future of Disability Discrimination Law*, 78 OR. L. REV. 27, 29-30 (1999) (explaining that over 108,000 disability discrimination charges were brought between 1992 and 1998).

<sup>131</sup> See Gibbs v. ADS Alliance Data Sys., Inc., No. 10-2421-JWL, 2011 WL 3205779, at \*3 (D. Kan. July 28, 2011) (showing Congress “lowered the bar” on the disability inquiry); Arduini, *supra* note 28, at 168, 192 (discussing how the broadened definition encompassed more individuals who will be able to survive summary judgment and, subsequently, companies will have increased litigation costs).

the disabled individuals to whom the original ADA intended to protect will remain unprotected and unemployed.<sup>132</sup> It is even arguable that the ADAAA harmed the disabled far more than the original ADA,<sup>133</sup> because no disability is truly covered when every impairment, or lack thereof, is deemed a disability.<sup>134</sup>

The ADAAA did not redefine physical or mental impairment, but significantly expanded the definition of major life activity and the conditions that qualify under the “regarded as” prong, while also diminishing the substantial limitation standard.<sup>135</sup> Thus, it is now easier to qualify as disabled, even under the first prong, when many more physical or mental impairments are considered to substantially limit the ability to perform at least one major life activity.<sup>136</sup> Pursuant to the ADAAA, an extensive disability analysis is unnecessary because “when disability determinations are close, courts [are urged] to ignore doctrine and give plaintiffs a pass,” ultimately creating a default rule and making it easier for plaintiffs to win cases regardless of whether their impairment is an actual disability.<sup>137</sup>

The ADAAA generates more questions than answers.<sup>138</sup> For instance, under the ADAAA’s broad “disability” definition, courts assume that every problem or impairment qualifies regardless of whether it falls within the purpose of the original ADA.<sup>139</sup> In *Gesegnet v. J.B. Hunt Transport Inc.*, the court assumed the plaintiff’s bipolar and anxiety disorders were disabilities, but doubted whether there was enough evidence to prove it actually impaired a basic life function.<sup>140</sup> Accordingly, the ADAAA’s broad scope has driven

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<sup>132</sup> Arduini, *supra* note 28, at 168, 180-81 (addressing the increased rate of unemployment for individuals with disabilities); Shea, *supra* note 29 (explaining that nearly everyone has a valid cause of action and more individuals are now successful in claiming that their “disability” should be covered).

<sup>133</sup> Arduini, *supra* note 28, at 162.

<sup>134</sup> See Klein, *supra* note 18, at 470-71 (explaining that the ADAAA goes too far and “fall[s] outside the spirit of the statute.”).

<sup>135</sup> Jones, *supra* note 83, at 671 n.21.

<sup>136</sup> *Id.* at 671.

<sup>137</sup> *Id.* at 669-70.

<sup>138</sup> Klein, *supra* note 18, at 470-71 (discussing how several portions of the ADAAA generate more questions than answers).

<sup>139</sup> See *Bliss v. Morrow Enters. Inc.*, No. 09-cv-3064C PJS/JJK, 2011 WL 2555365, at \*5-6 (D. Minn. June 28, 2011); *Gesegnet v. J.B. Hunt Transp. Inc.*, No. 3:09-CV-828-H, 2011 WL 2119248 (W.D. Ky. May 26, 2011).

<sup>140</sup> *Gesegnet*, 2011 WL 2119248; see also *Bliss*, 2011 WL 2555365 at \*5-6 (expressing serious doubt as to the finding that a broken arm was a disability).

judges to make quick and simple assumptions.<sup>141</sup> One article even advises to “[a]lways assume that everyone has an ADAAA ‘disability’ [because] [y]ou will be right 99.9 percent of the time, and the rest of the time you’ll be erring on the right side.”<sup>142</sup>

A direct result of the broader “disability” definition is that employers are now less inclined to hire a disabled person.<sup>143</sup> Today, employers are forced to follow case law to track the types of individuals and disabilities surviving summary judgment and posing a risk for expensive litigation.<sup>144</sup> However, companies prefer not to face any ADA claims at all, increasing unemployment for the disabled.<sup>145</sup>

Broadening the “disability” definition allows more cases to survive summary judgment, increasing the frequency and costs of litigation for businesses.<sup>146</sup> Previously, businesses had more techniques for avoiding ADA litigation, such as training supervisors and human resources personnel to refrain from making assumptions as to whether an individual was substantially limited by a disability.<sup>147</sup> However, the ADAAA has erased these safeguards for employers to use, such that employers become “susceptible to ADA claims,” even without any wrongdoing.<sup>148</sup>

Consider a hypothetical scenario where Lynn works for a company called Beta.<sup>149</sup> Lynn has HIV, but is not limited in any major life activity nor does she have a history of health issues.<sup>150</sup> Lynn is frequently late for work, does not perform her daily job duties, and has a low performance rating.<sup>151</sup> Beta wants to terminate Lynn because of her failure to show up for work on time and complete assignments.<sup>152</sup>

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<sup>141</sup> See *Bliss*, 2011 WL 2555365 at \*5-6; *Gesegnet*, 2011 WL 2119248.

<sup>142</sup> Shea, *supra* note 29; see also *Berard v. Wal-Mart Stores E., L.P.*, No. 8:10-cv-2221-T-26MAP, 2011 WL 4632062, at \*2 n.22 (M.D. Fla. Oct. 4, 2012) (recognizing that under the ADAAA, courts gloss over the question of whether an impairment is or should even be considered a disability).

<sup>143</sup> Arduini, *supra* note 28, at 182; see also Hofius, *supra* note 80 (stating although “[t]he physical obstacles have been removed, [ ] they have been replaced with a more daunting obstacle: the employer’s fear of lawsuits.”).

<sup>144</sup> Arduini, *supra* note 28, at 191.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at 192.

<sup>147</sup> *Id.* at 194.

<sup>148</sup> *Id.*

<sup>149</sup> This hypothetical is based on a Law Review Article. *See id.*

<sup>150</sup> See Arduini, *supra* note 28, at 194.

<sup>151</sup> *See id.*

<sup>152</sup> *See id.*

Beta does not believe that Lynn's HIV contributed to her downfall at work.<sup>153</sup> Under the ADA, so long as Lynn's supervisor or other managerial staff does not regard her as substantially limited in one or more major life activity, Beta can dismiss her without fearing a lawsuit.<sup>154</sup> Conversely, under the ADAAA, Lynn has a higher chance of surviving summary judgment because she needs only *some* evidence that Beta regarded her as disabled.<sup>155</sup>

While employers previously avoided potentially frivolous ADA "regarded as" claims with some success, the ADAAA's broader "regarded as" prong will do more harm than good.<sup>156</sup> As a result, employers will—possibly even more strictly—continue to avoid hiring the disabled because of the increased liability under the ADAAA.<sup>157</sup> In at least some cases, this may mean that employers retain "underperforming individuals, thereby decreasing efficiency and adversely impacting other, more capable, individuals."<sup>158</sup>

#### B. *The ADAAA is Too Broad: No Coverage for the Truly Disabled*

Courts recognize that cases decided under the ADA would likely come out differently had they been decided under the ADAAA.<sup>159</sup> The terms Congress defined in the ADAAA are so broad as to include almost all illnesses, minor ailments, and even a temporary sprained ankle.<sup>160</sup> The ADAAA even includes episodic or in-remission impairments so long as they are disabilities in their active phase.<sup>161</sup>

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<sup>153</sup> See *id.*

<sup>154</sup> *Id.* at 194-95 (citing *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 489 (1999)).

<sup>155</sup> *Id.* at 195 (citing Stephanie Wilson & E. David Krulewicz, *Disabling the ADAAA*, N.J. Law., Feb. 2009, at 37).

<sup>156</sup> Arduini, *supra* note 28, at 195-96. The costs of increasing unemployment outweigh the benefits of allowing everyone disability protection and, thus, those people the original ADA intended to cover should be afforded such benefits. *Id.*

<sup>157</sup> *Id.* at 202.

<sup>158</sup> *Id.* at 195-96.

<sup>159</sup> *Kemp v. Holder*, 610 F.3d 231, 236 (5th Cir. 2010).

<sup>160</sup> See generally *Moore v. Jackson Cnty. Bd. of Educ.*, 979 F. Supp. 2d 1251, 1261 (N.D. Ala. 2013) (finding that even a temporary broken ankle was a disability under the ADAAA); *Lloyd v. Hous. Auth. of Montgomery*, Ala., 857 F. Supp. 2d 1252, 1263-64 (M.D. Ala. 2012) (stating asthma and high blood pressure could be disabilities under the ADAAA).

<sup>161</sup> *Satz, supra* note 58, at 985-86.

Pre-ADAAA analysis of the first prong consisted of: (1) a physical or mental impairment (2) that substantially limited (3) one or more major life activities.<sup>162</sup> While the ADAAA does not define physical or mental impairments,<sup>163</sup> the Equal Employment Opportunity Commission (EEOC) defines these terms in a broad sweeping list.<sup>164</sup> When considered with the wide-ranging “major life activities” and “major bodily functions,” it is difficult to imagine an impairment that would not qualify as a disability within the most stringent first prong.<sup>165</sup> The ADAAA extends the “disability” definition so far that courts no longer need to consider the severity or even the existence of a limitation on a major life activity at all.<sup>166</sup>

One of the key reasons for the ADA amendment was to define “substantially limits,” however, the ADAAA failed to do so.<sup>167</sup> Thus, courts using the broad ADAAA are forced to construe the same word more broadly without any additional guidance as to how it should be interpreted.<sup>168</sup> Additionally, Congress stated the ADAAA’s purpose was to reject the Supreme Court’s narrow rulings.<sup>169</sup> Although the ceiling is somewhat clearer in ADAAA disability analysis, courts have no guidance as to what is too forgiving and are left to err on the side of caution, interpreting everything as a disability.<sup>170</sup>

Courts rarely mention the “record of” prong in ADA lawsuits.<sup>171</sup> However, when they do, opinions simply cite to the “record of” prong in one sentence, stating whether or not a record of an impairment existed.<sup>172</sup> Overall, having a record of an impairment is not a dispositive factor.<sup>173</sup>

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<sup>162</sup> 42 U.S.C. § 12102(1)(A) (Supp. II 2008).

<sup>163</sup> *Id.* § 12102.

<sup>164</sup> 29 C.F.R. § 1630.2(h) (2012).

<sup>165</sup> See 42 U.S.C. § 12102(2) (Supp. II 2008).

<sup>166</sup> See Harned & McBride, *supra* note 21, at 99.

<sup>167</sup> See Klein, *supra* note 18, at 471.

<sup>168</sup> See *id.*

<sup>169</sup> Harned & McBride, *supra* note 21, at 99.

<sup>170</sup> See *Bliss v. Morrow Enters. Inc.*, No. 09-cv-3064C PJS/JJK, 2011 WL 2555365, at \*5-6 (D. Minn. June 28, 2011); *Gesegnet v. J.B. Hunt Transp. Inc.*, No. 3:09-CV-828-H, 2011 WL 2119248 (W.D. Ky. May 26, 2011).

<sup>171</sup> See *Long, supra* note 52, at 227.

<sup>172</sup> See, e.g., *Johnson v. Farmers Ins. Exch.*, No. CIV-11-963-C, 2012 WL 95387, at \*1 (W.D. Okla. Jan. 12, 2012); *Ivey v. District of Columbia*, 949 A.2d 607, 612 (D.C. 2008).

<sup>173</sup> JOSH FRIEDMAN, CAUSE OF ACTION TO RECOVER DAMAGES UNDER AMERICANS WITH DISABILITIES ACT (42 U.S.C.A. §§ 12101 ET SEQ.) FOR EMPLOYMENT DISCRIMINATION FOR HAVING A “RECORD OF” A DISABILITY OR BEING “REGARDED AS DISABLED”, 16 CAUSES OF ACTION 2d 153 (2001).

In terms of the “regarded as” prong, the constraint to fulfill part of the first prong was removed.<sup>174</sup> The ADAAA “regarded as” prong allows abuse of the system because the ADA drafters most likely did not anticipate protecting many conditions that now qualify as disabilities.<sup>175</sup> Taking a step even further, the focus of this prong moved away from what the employer perceived to simply *how* the plaintiff was treated.<sup>176</sup> Pre-ADAAA, activists and observers viewed the “regarded as” prong as a “major weapon in this arsenal, providing a safety valve of coverage for many individuals who did not otherwise qualify as having a current, functionally limited disability.”<sup>177</sup> However, the ADA does not provide “safety.”<sup>178</sup>

While Congress added a “limitation” on the “regarded as” prong, its actual purpose is transparent and will not fasten any real protection from allowing every disability to qualify.<sup>179</sup> For instance, Congress placed an “and” between the words “transitory” *and* “minor,” so two separate conditions needed to be met for a disability to be disqualified.<sup>180</sup> Even with these “limitations,” plaintiffs have found ways to qualify as disabled even without meeting both conditions.<sup>181</sup> Further, while these limitations are supposedly an attempt to counteract the overly broad “regarded as” prong, Congress failed to provide any guidance as to the definition of “minor.”<sup>182</sup>

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<sup>174</sup> See *supra* Part I.C.

<sup>175</sup> Arduini, *supra* note 28, at 184.

<sup>176</sup> Befort, *supra* note 53, at 1018 (quoting Chai R. Feldblum, Kevin Barry & Emily A. Benfer, *The ADA Amendments Act of 2008*, 13 TEX. J. C.L. & C.R. 187, 236 (2008)).

<sup>177</sup> Befort, *supra* note 53, at 999 (citing Chai R. Feldblum, *Definition of Disability Under Federal Anti-Discrimination Law: What Happened? Why? And What Can We Do About It?*, 21 BERKELEY J. EMP. & LAB. L. 91, 157 (2000)).

<sup>178</sup> See Shea, *supra* note 29.

<sup>179</sup> See, e.g., *Davis v. NYC Dept. of Educ.*, 2012 WL 139255, at \*6 (E.D.N.Y. Jan. 18, 2012) (holding the impairment was a disability because it was transitory, even though it was unclear if it was minor); *Dube v. Texas Health & Human Servs. Comm'n*, No. SA-11-CV-354-XR, 2011 WL 3902762, at \*5 (W.D. Tex. Sept. 6, 2011) (finding it was unclear from the complaint whether the impairment was transitory *and* minor); see also *Hodges v. District of Columbia*, 959 F. Supp. 2d 148, 154 (D.D.C. Aug. 12, 2013) (having a temporary impairment did not stop plaintiff from bringing forth an ADA claim).

<sup>180</sup> 42 U.S.C. § 12102(3)(B) (Supp. II 2008).

<sup>181</sup> See *supra* Part I.C.2; see also *Hodges*, 2013 WL 4047197, at \*4-5 (showing a plaintiff could bring an ADA claim even though the impairment was temporary); *Davis*, 2012 WL 139255, at \*6 (holding an impairment was transitory and, thus, qualified as a disability); *Dube*, 2011 WL 3902762, at \*5 (finding the complaint did not clarify whether the impairment was transitory and minor).

<sup>182</sup> Barry, *supra* note 72, at 23 (citing 42 U.S.C. § 12102(3)(B) (Supp. II 2008)).

President Bush promised a law that would not produce much expense or litigation.<sup>183</sup> Nevertheless, Congress, within a matter of years, failed to keep this promise, creating even more questions for the courts to discuss, debate, and decide.<sup>184</sup> Unfortunately this means that the disabled are no longer truly protected because nearly anyone can “qualify.”<sup>185</sup> Overall, the ADAAA has not made the process any more efficient for the courts or fair for the disabled.

### C. *The ADAAA Has Moved Away from its Original Purpose and as a Result, Opened the Floodgates*

Congress’s intention to keep the “judicial door” open for the “truly disabled” is easy to understand.<sup>186</sup> However, it is unclear whether the ADAAA has effectively carried out this intent by providing broad coverage in every area of the “disability” definition.<sup>187</sup> It is also unclear whether those who are *truly* disabled and deserving of ADA protection are actually receiving the security they need.<sup>188</sup>

The ADAAA’s “disability” definition is “largely divorced” from the analysis of whether a condition is severe enough to be “deserv[ing] of the [disability] designation.”<sup>189</sup> Ambiguity persists within the ADA itself and its corresponding case law.<sup>190</sup> However, like the ADA’s drafters who simply adopted an old definition, Congress—on its second attempt—failed to address the “disability” definition leaving its language fully intact.<sup>191</sup> Overall, Congress failed to restructure and restore the ADA to its original purpose.<sup>192</sup>

It is clear from the language and history of the ADA that Congress did not intend such a sweeping scope.<sup>193</sup> In *Sutton v. United Air*

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<sup>183</sup> See Presidential Statement on Signing the Americans with Disabilities Act of 1990, 26 WEEKLY COMP. PRES. DOC. 1165 (July 30, 1990), reprinted in 1990 U.S.C.C.A.N. 601, 601.

<sup>184</sup> See 42 U.S.C. §§ 12101-12102 (2006 & Supp. II 2008); Barry, *supra* note 72, at 23.

<sup>185</sup> See Arduini, *supra* note 28, at 184.

<sup>186</sup> Joiner, *supra* note 12, at 361 (emphasis added).

<sup>187</sup> See *id.*

<sup>188</sup> See generally *id.* at 361-63.

<sup>189</sup> Jones, *supra* note 83, at 669.

<sup>190</sup> Allison Ara, *The ADA Amendments Act of 2008: Do the Amendments Cure the Interpretation Problem of Perceived Disabilities?*, Comment, 50 SANTA CLARA L. REV. 255, 256 (2010) (citing 42 U.S.C. § 12102(2)(B) (Supp. II 2008)).

<sup>191</sup> Ara, *supra* note 190, at 256.

<sup>192</sup> *Id.* (citing 42 U.S.C. § 12102(4)(A) (Supp. II 2008)); see also Jones, *supra* note 83, at 669.

<sup>193</sup> 42 U.S.C. § 12101(a)(1), (7) (Supp. II 1990).

*Lines*, the Supreme Court stated that one hundred million people used corrective eye measures and noted that this number was definitely not accounted for within the forty-three million already considered disabled.<sup>194</sup> If Congress intended to include such an expansive range of individuals, the number originally cited in the ADA would have been much greater.<sup>195</sup>

Similarly, Congress intended the ADA to cover only those persons truly in need, or it would not have referred to them as a “discrete and insular minority” of forty-three million people.<sup>196</sup> Yet, Congress decided to delete this language from the ADAAA.<sup>197</sup> This raises the question as to whether the congressional intent, in making the amendment, was actually to restore the ADA to its original purpose, or whether the ADAAA was solely a “desperate” effort to counteract narrow judicial holdings and increasing unemployment rates.<sup>198</sup>

Congress moved even further away from the ADA’s original purpose through its broad interpretation of the “regarded as” prong.<sup>199</sup> The “regarded as” prong includes language referring to “such an impairment,” aiding the belief that the ADA drafters intended this prong to incorporate some of the first prong’s elements.<sup>200</sup> However, the ADAAA notes that the “regarded as” prong is met even if the impairment does not limit or is not perceived to limit a major life activity.<sup>201</sup> Not only does this move the ADAAA further from the

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<sup>194</sup> Sutton v. United Air Lines, Inc., 527 U.S. 471, 487 (1999); *see also* 42 U.S.C. § 12102(4)(E) (i) (Supp. II 2008) (where the ADAAA removed the ameliorative measures language, allowing courts to consider impairments that could be mitigated under the ADAAA analysis); *see also* Chamberlain v. Valley Health Sys., Inc., 781 F. Supp. 2d 305, 311-12 (W.D.W. Va. 2011) (finding plaintiff’s vision issues could be “regarded as” a disability); Gil v. Vortex LLC, 697 F. Supp. 2d 234, 237-39 (D. Mass. 2010) (holding that plaintiff was disabled because of vision problems, even without showing limitations from his vision).

<sup>195</sup> Barry, *supra* note 72, at 12 (quoting Sutton v. United Air Lines, Inc., 527 U.S. 471, 487 (1999)).

<sup>196</sup> 42 U.S.C. § 12101(a)(7) (Supp. II 1990); Arduini, *supra* note 28, at 181-82; *see also* Barry, *supra* note 72, at 13 (stating, “Congress’ use of the phrase ‘discrete and insular minority’ was ‘a telling indication of its intent to restrict the ADA’s coverage to a confined, and historically disadvantaged, class.’” (citing Sutton v. United Air Lines, Inc., 527 U.S. 471, 494-95 (1999) (Ginsburg, J., concurring))).

<sup>197</sup> Compare 42 U.S.C. § 12101(a)(1), (7) (Supp. II 1990), with 42 U.S.C. § 12101(a) (Supp. II 2008).

<sup>198</sup> Arduini, *supra* note 28, at 181-82.

<sup>199</sup> *See* ADA Amendments Act of 2008, Pub. L. 110-325, § 2(b)(1), 122 Stat. 3553 (2008); Barry, *supra* note 72, at 22.

<sup>200</sup> *See* Ara, *supra* note 190, at 274 (citing 42 U.S.C. § 12102(1)(A), (C) (Supp. II 2008)).

<sup>201</sup> Ara, *supra* note 190, at 273-74 (citing 42 U.S.C. § 12102(3)(A) (Supp. II 2008)).

ADA's original purpose, but it may also push courts to define "impairment" themselves, ultimately leading to additional litigation and the assumption that any condition is a qualified impairment.<sup>202</sup>

The "drastic broadening" of the ADAAA continues to protect disabilities that the original drafters never before considered to substantially limit even one major life activity, such as the fear of flying over water or an internet addiction.<sup>203</sup> As a result, the ADAAA is far removed from the ADA's original purpose and neither of these conditions would have qualified under the 1990 ADA.<sup>204</sup> The repercussions from the ADAAA are endless.<sup>205</sup> Such examples include decreased employer profits, increased liability, and endangered employer security.<sup>206</sup> Most importantly, although broadening the "disability" definition has opened the courts' doors to conditions outside those the original drafters considered, employers have simultaneously closed their doors to the disabled in fear of facing litigation.<sup>207</sup> This consequence surely cannot be the end result for an act designed to protect the disabled from discrimination.

Mental problems,<sup>208</sup> irritable bowel syndrome,<sup>209</sup> heart attacks,<sup>210</sup> and misdiagnosed conditions<sup>211</sup> are now all valid claims under the ADAAA.<sup>212</sup> However, it appears that Congress may have been aware of the overly broad implications of the ADAAA when it added the "transitory" and "minor" limitations to the "regarded as" prong.<sup>213</sup> Unfortunately, these limitations do not effectively prevent plaintiffs

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<sup>202</sup> Ara, *supra* note 190, at 275.

<sup>203</sup> See Culotta v. Sodexo Remote Sites P'ship, 864 F. Supp. 2d 466, 476 (E.D. La. 2012); Arduini, *supra* note 28, at 192 (citing Blake R. Bertagna, *The Internet–Disability or Distraction? An Analysis of Whether "Internet Addiction" Can Qualify as a Disability Under the Americans with Disabilities Act*, 25 HOFSTRA LAB. & EMP. L.J. 419, 435 (2008)).

<sup>204</sup> Arduini, *supra* note 28, at 192-93 (citing Blake R. Bertagna, *The Internet–Disability or Distraction? An Analysis of Whether "Internet Addiction" Can Qualify as a Disability Under the Americans with Disabilities Act*, 25 HOFSTRA LAB. & EMP. L.J. 419, 480-81(2008)).

<sup>205</sup> See *supra* Part II.A.

<sup>206</sup> Arduini, *supra* note 28, at 193 (citing Blake R. Bertagna, *The Internet–Disability or Distraction? An Analysis of Whether "Internet Addiction" Can Qualify as a Disability Under the Americans with Disabilities Act*, 25 HOFSTRA LAB. & EMP. L.J. 419, 430-32 (2008)).

<sup>207</sup> Arduini, *supra* note 28, at 182.

<sup>208</sup> Newberry v. E. Tex. State Univ., 161 F.3d 276, 279 (5th Cir. 1998).

<sup>209</sup> Workman v. Frito-Lay, Inc., 165 F.3d 460, 463, 467 (6th Cir. 1999).

<sup>210</sup> Weber v. Strippit, Inc., 186 F.3d 907, 910 (8th Cir. 1999).

<sup>211</sup> Kaplan v. City of N. Las Vegas, 323 F.3d 1226, 1231 (9th Cir. 2003).

<sup>212</sup> Ara, *supra* note 190, at 277 (citing 42 U.S.C. § 12102(3)(A) (Supp. II 2008)).

<sup>213</sup> 42 U.S.C. § 12102(3)(B) (Supp. II 2008).

from bringing forth so-called “disabilities” that Congress did not intend to include within the ADA’s scope.<sup>214</sup>

The concern that the ADA should cover only truly disabled people persists with the enactment of the ADAAA.<sup>215</sup> In 1986, the court in *Forisi v. Bowen* discussed that the purpose and intent of the ADA would be impaired if it was extended to protect minor or everyday impairments.<sup>216</sup> Thus, it should be evident that the original drafters did not wish to extend protections to those who are not truly disabled.<sup>217</sup> At this juncture, however, the ADAAA allows many individuals to bring claims that courts would not have considered seriously under the 1990 ADA.<sup>218</sup>

#### D. *The Final Amendment: The “Regarded As” Prong as a Remedy to the Boundary that Congress Overstepped*

The ADAAA failed to resolve several confusing sections under the ADA’s original “disability” definition and left many questions unanswered.<sup>219</sup> In particular, Congress failed to recognize the reason why the ADA was ineffective at increasing employment, such that employers believed they were less likely to face lawsuits for not hiring the disabled than if they fired them.<sup>220</sup> Congress also neglected to change the substance of the “disability” definition, instead defining specific words within the definition and further increasing confusion.<sup>221</sup>

Congress must revisit the “disability” definition for the ADA to meet its original intended purpose.<sup>222</sup> As a preliminary measure, the

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<sup>214</sup> See generally Culotta v. Sodexo Remote Sites P’ship, 864 F. Supp. 2d 466, 475-76 (E.D. La. 2012); Bliss v. Morrow Enters. Inc., No. 09-cv-3064C PJS/JJK, 2011 WL 2555365, at \*7-9 (D. Minn. June 28, 2011); Gordon Good, Comment, *The Americans with Disabilities Act: Short-Term Disabilities, Exceptions, and the Meaning of Minor*, 37 U. DAYTON L. REV. 99, 122 (2011) (citing Stephen F. Befort, *Let’s Try This Again: The ADA Amendments Act of 2008 Attempts to Rein-vigorate the “Regarded As” Prong of the Statutory Definition of Disability*, 2010 UTAH L. REV. 993, 1027 (2010)).

<sup>215</sup> Joiner, *supra* note 12, at 364.

<sup>216</sup> Forrisi v. Bowen, 794 F.2d 931, 934 (4th Cir. 1986).

<sup>217</sup> See Joiner, *supra* note 12, at 363 (quoting Michael J. Puma, *Respecting the Plain Language of the ADA: A Textualist Argument Rejecting the EEOC’s Analysis of Controlled Disabilities*, 67 GEO. WASH. L. REV. 123, 145 (1998)).

<sup>218</sup> See Arduini, *supra* note 28, at 192.

<sup>219</sup> Jones, *supra* note 83, at 669.

<sup>220</sup> Arduini, *supra* note 28, at 181-82; see also Ara, *supra* note 190, at 273.

<sup>221</sup> See Ara, *supra* note 190, at 273-74.

<sup>222</sup> See Arduini, *supra* note 28, at 178-79.

“record of” prong should be moved outside of the “disability” definition because it does not help define what constitutes a disability. The main focus must be on the “regarded as” prong because the ADAAA qualified mitigated conditions as disabilities and also removed the necessity to meet the elements of the first prong.<sup>223</sup> One possible remedy is to remove the “regarded as” prong entirely so that the “disability” definition is more precise and less elastic. A second option would be to constrict the scope of the “regarded as” prong so that floods of possibly frivolous lawsuits do not frustrate the ADA’s goal.

### 1. Moving the “Record of” Prong

The “record of” prong is not dispositive in most case analyses.<sup>224</sup> Simply, it provides an unnecessary issue for courts to analyze in an already demanding ADA caseload.<sup>225</sup> This prong tends to focus more on proving that a condition existed in the past and, if it did,<sup>226</sup> how severe its limitations were<sup>227</sup> or whether someone was mistaken for having a disability.<sup>228</sup> It is not a way to distinguish one condition from another to ascertain whether a disability is present.<sup>229</sup> Additionally, there are other concerns with the “record of” prong, such as confidentiality of records, evidentiary concerns in proving the recorded condition substantially limited major life activities, and financial concerns in having to provide enough documentation and testimony to prove that significant limitations existed.<sup>230</sup> Nevertheless, the focus for defining “disability” should not be on whether one has the proper documentation to *prove* that a condition existed, but rather that the condition existed at all and whether it constituted an eligible “disability.”

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<sup>223</sup> *Id.* at 183-84 (discussing that the perceived impairment no longer needed to meet the “substantial limitation” language and the employer no longer needed to believe the employee was prohibited from working in a large range of jobs to qualify under the “regarded as” prong).

<sup>224</sup> See *supra* Part II.B.2; Alex B. Long, *Whatever Happened to the ADA’s “Record Of” Prong?*, 81 WASH. L. REV. 669, 688 (2006).

<sup>225</sup> Befort, *supra* note 53, at 1000 (quoting Pedigo v. P.A.M. Transp., 891 F. Supp. 482, 485 (W.D. Ark. 1994), *rev’d*, 60 F.3d 1300 (8th Cir. 2995)).

<sup>226</sup> See Feldblum, *supra* note 42, at 118, 128.

<sup>227</sup> 29 C.F.R. § 1630.2(j)(4)(ii) (2012).

<sup>228</sup> Long, *supra* note 224, at 682.

<sup>229</sup> See Feldblum, *supra* note 42, at 118, 128.

<sup>230</sup> BURGDORF, *supra* note 115, at 97.

A “definition” is a “description of a thing by its properties.”<sup>231</sup> Black’s Law Dictionary explains that “[a stipulative] definition . . . clarifies a [word] with uncertain boundaries or [ ] includes or excludes specified items from the ambit of th[at word].”<sup>232</sup> Proof, on the other hand, is defined as an “establishment or refutation of an alleged fact by evidence.”<sup>233</sup>

The “record of” prong does not help clarify a term, nor does it exclude certain conditions from coverage under the ADA.<sup>234</sup> Having a record simply provides a basis of proof from which to establish that a condition was present.<sup>235</sup> Once established, the condition can be assessed for whether it is a disability by means of how substantially it limits a major life activity.<sup>236</sup> As a result, the “record of” prong is assumed within the first prong.<sup>237</sup> Therefore, because ADA analysis already places significant emphasis on the “disability” definition, it is unnecessary to add more confusion with the misplaced “record of” prong.<sup>238</sup>

## 2. Removing the “Regarded As” Prong

Similarly, the “regarded as” prong is misplaced within the “disability” definition. It produces more uncertainty and litigation than the original ADA.<sup>239</sup> Congress attempted to fix the problems that the ADA faced, but failed to solve them and instead created additional problems through its alterations.<sup>240</sup> Because courts are left with significant doubt as to what constitutes an impairment and a disability,

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<sup>231</sup> *Definition*, THELAWDICTIONARY.ORG, <http://thelawdictionary.org/definition/> (last visited Aug. 9, 2014) (defining the word “definition”).

<sup>232</sup> BLACK’S LAW DICTIONARY 515 (10th ed. 2014).

<sup>233</sup> *Id.* at 1409.

<sup>234</sup> See generally Feldblum, *supra* note 42, at 118, 128.

<sup>235</sup> *Id.* at 128.

<sup>236</sup> 29 C.F.R. § 1630.2(k)(1)-(2) (2012).

<sup>237</sup> See *id.*

<sup>238</sup> See Arduini, *supra* note 28, at 178-79.

<sup>239</sup> See Good, *supra* note 214, at 122 (Stephen F. Befort, *Let’s Try This Again: The ADA Amendments Act of 2008 Attempts to Reinvigorate the “Regarded As” Prong of the Statutory Definition of Disability*, 2010 UTAH L. REV. 993, 1027 (2010)).

<sup>240</sup> Befort, *supra* note 53, at 1023, 1027 (asking questions, such as: “Do Individuals Who are Regarded As Disabled Need a Reasonable Accommodation to be Qualified for the Job?” and what is “transitory and minor?”).

under the “regarded as” prong, they prefer to err on the side of caution and find that most anything is a disability.<sup>241</sup>

If Congress removed the “regarded as” prong entirely, courts would be left with the ADAAA’s broad, yet refined definition of disability under the first prong.<sup>242</sup> Although the ADA would be less inclusive by removing the “regarded as” prong, it would still further the goal of protecting the truly disabled.<sup>243</sup> Realistically, there is a reasonable argument to include people who are “regarded as” impaired because they are disabled by the way others view them.<sup>244</sup> However, people “regarded as” impaired should not be included within the ADA because they are not *truly* disabled.

Removing the “regarded as” prong would likely resolve many problems that persist under the ADAAA.<sup>245</sup> Employers would be less reluctant to hire disabled individuals, which would decrease the unemployment rate.<sup>246</sup> Additionally, litigation rates and costs would decrease because fewer individuals would be able to bring claims.<sup>247</sup>

It is clear that the drafters borrowed the ADA’s definition from the Rehabilitation Act and did not adjust it to meet the ADA’s more ambitious goals.<sup>248</sup> Consequently, Congress needed to amend the ADA to reflect its original intentions,<sup>249</sup> but once again failed to change the language of the “disability” definition.<sup>250</sup> Removing the “regarded as” prong would put the ADA back in line with such intentions. This is not to say that the “regarded as” prong has no place in ADA analysis, but that it is an improper way to define disability, especially because the prong makes it possible to qualify as disabled without having an actual disability.<sup>251</sup>

In passing the ADAAA, no significant changes were made to afford those with *true* disabilities the protection they deserved under

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<sup>241</sup> See, e.g., *Culotta v. Sodexo Remote Sites P'ship*, 864 F. Supp. 2d 466, 476 (E.D. La. 2012).

<sup>242</sup> The broad “maximum exten[sion]” of the definition covers all three prongs. 42 U.S.C. § 12102(1)(A), (4)(A) (Supp. II 2008).

<sup>243</sup> See Arduini, *supra* note 28, at 181, 184.

<sup>244</sup> H.R. REP. No. 101-485, pt. 3, at 30 (1990), reprinted in 1990 U.S.C.C.A.N. 445, 452-53.

<sup>245</sup> See *supra* Part II.A; see also Arduini, *supra* note 28, at 184 (discussing that the “regarded as” prong allows “abuse” because of its broad extension).

<sup>246</sup> See Arduini, *supra* note 28, at 191.

<sup>247</sup> See *id.*

<sup>248</sup> H.R. REP. No. 101-485, pt. 3, at 27 (1990), reprinted in 1990 U.S.C.C.A.N. 445, 450.

<sup>249</sup> Joiner, *supra* note 12, at 367.

<sup>250</sup> Ara, *supra* note 190, at 256.

<sup>251</sup> Barry, *supra* note 72, at 22.

the ADA because Congress failed to recognize why the ADA was unsuccessful in the first place.<sup>252</sup> If the “regarded as” prong is removed from the ADAAA “disability” definition, cases like Ms. Culotta’s<sup>253</sup> will not make it to court, and those with conditions that significantly impair their daily lives, who actually need the ADA’s protection, will have their day in court.<sup>254</sup> Most importantly, employers will no longer contribute to the increasing unemployment rate out of fear that it is easier not to hire disabled people than to hire them and risk litigation if the employer has to fire them later for non-discriminatory reasons.<sup>255</sup>

### 3. In the Alternative, the “Regarded As” Prong Must be Substantially Limited

Given the bipartisan nature of Congress and how difficult it is to pass amendments, especially those related to sensitive subjects like the ADA,<sup>256</sup> there is a viable change that can be made to the “regarded as” prong. First, the “regarded as” prong must be assessed on a case-by-case basis to promote the best analysis and ultimate determination of whether the ADA should cover a particular disability.<sup>257</sup> Second, the prong should not focus on the duration of an impairment, as the ADAAA “transitory and minor” limitation attempted to do.<sup>258</sup> If a person is discriminated against because of a supposed impairment, why should it matter how long the perceived disability lasted? Why has Congress placed a minimum by which to analyze similar conditions under the “regarded as” prong, but not the first prong? Ultimately, duration should not matter.

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<sup>252</sup> See *supra* Part II.D; see also Ara, *supra* note 190, at 273; Arduini, *supra* note 28, at 181-82.

<sup>253</sup> Culotta v. Sodexo Remote Sites P’ship, 864 F. Supp. 2d 466, 469 (E.D. La. 2012).

<sup>254</sup> Satz, *supra* note 58, at 987 (mentioning that many plaintiffs cannot obtain adequate counsel to represent their ADA claims, possibly because of the lack of resources remaining from the broad overreach).

<sup>255</sup> Arduini, *supra* note 28, at 182-83; see also Ara, *supra* note 190, at 273.

<sup>256</sup> It took over two years to enact the ADA, H.R. REP. NO. 101-485, pt. 3, at 24-25, (1990), reprinted in 1990 U.S.C.C.A.N. 445, 446-47, and almost five years to enact the ADAAA. See Letter from Jeff Rosen, *supra* note 68, at 2 (stating the NCD released a report about “Righting the ADA” in 2004 and the ADAAA was not effective until 2009).

<sup>257</sup> See Joiner, *supra* note 12, at 336.

<sup>258</sup> 42 U.S.C. § 12102(3)(B) (Supp. II 2008).

After *Sutton*, this prong was problematic because of the difficulty to prove an employer's belief about a person.<sup>259</sup> Employers could not inquire about a disability or condition if they wanted to clear up a rumor, making it even more difficult to prove.<sup>260</sup> Thus, Congress placed the focus on discrimination, instead of the employer's belief.<sup>261</sup> However, Congress missed the mark by completely disregarding discrimination in the "disability" definition.<sup>262</sup> In a patronizing attempt to reverse the Supreme Court's narrow holding, Congress, itself, may have even believed the "regarded as" prong was too broad, placing limitations on it without applying such limits to the other prongs.<sup>263</sup>

If Congress will not remove this overbroad prong from the "disability" definition, it should amend the "regarded as" prong to: being "regarded as" having a physical or mental impairment that has caused the individual to receive substantial discrimination in the workplace.<sup>264</sup> Although it is difficult to prove one's mindset, it should not be hard to prove the repercussions and actions that result from such a mindset.<sup>265</sup> Additionally, including the "physical or mental impairment" language from the first prong will force courts to analyze disabilities that are more likely to fall under and qualify as a disability with the first prong.<sup>266</sup>

Substantial discrimination should be defined within the ADA as an adverse action, which causes a person to suffer because of exclusion, termination, or ridicule in the work place.<sup>267</sup> With this amendment, courts would no longer be left questioning the prong's

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<sup>259</sup> Barry, *supra* note 72, at 21-22.

<sup>260</sup> See Hofius, *supra* note 80.

<sup>261</sup> Ara, *supra* note 190, at 273 (citing Steny H. Hoyer, *Hoyer: Aggressive Action Needed to Restore the Intent of the Americans with Disabilities Act* (Oct. 21, 2004), available at <http://www.democraticwhip.gov/content/hoyer-aggressive-action-needed-restore-intent-americans-disabilities-act>).

<sup>262</sup> See 42 U.S.C. § 12102(1)(A)-(C), (3)(B) (Supp. II 2008).

<sup>263</sup> *Id.* § 12102(3)(B).

<sup>264</sup> See Ara, *supra* note 190, at 273 (citing Steny H. Hoyer, *Hoyer: Aggressive Action Needed to Restore the Intent of the Americans with Disabilities Act* (Oct. 21, 2004), available at <http://www.democraticwhip.gov/content/hoyer-aggressive-action-needed-restore-intent-americans-disabilities-act>).

<sup>265</sup> See Barry, *supra* note 72, at 22.

<sup>266</sup> Ara, *supra* note 190, at 279 (citing *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 489 (1999)); see also 42 U.S.C. § 12102(1)(A) (Supp. II 2008).

<sup>267</sup> See Kevin Barry, *Toward Universalism: What the ADA Amendments Act of 2008 Can and Can't Do for Disability Rights*, 31 BERKELEY J. EMP. & LAB. L. 203, 219 (2010) (citing Chai R. Feldblum, *Definition of Disability Under Federal Anti-Discrimination Law: What Happened? Why? And What Can We Do About It?*, 21 BERKELEY J. EMP. & LAB. L. 91, 101-02 (2000)).

language.<sup>268</sup> In regard to Ms. Culotta,<sup>269</sup> her claim would not have made it into court because her employer asked her to work offshore in a new position. While Ms. Culotta alleged that her employer forced her to quit by asking her to work offshore, Ms. Culotta—having other job options—chose to quit.<sup>270</sup> Cases like Ms. Culotta’s illustrate why the “regarded as” prong must be removed or substantially limited for the ADA’s scope to cover only those with actual disabilities in need of protection.

#### 4. Potential Problems and Weaknesses

Some believe that the “regarded as” prong is an “elegant resolution to a paradigmatic civil rights problem.”<sup>271</sup> However, there is nothing elegant about protecting those who do not actually need protection, and in turn not giving enough to the truly disabled and whom Congress designed the ADA to protect.<sup>272</sup> The “regarded as” prong advocates claim that it is suitable within the analysis because once employers realize that they have made a mistaken perception, the individual “regarded as” disabled will no longer need protection.<sup>273</sup> However, this turns the court into a babysitter, forcing it to keep watch for the very instance that employers were given notice and ending any potential damages at that time.

Others believe that the “regarded as” prong can only be used when a plaintiff is unable to qualify under the other prongs.<sup>274</sup> However, this misplaced reality of the prong is exactly the problem. Instead of finding that a condition does not qualify as a disability, plaintiffs asserting disability claims with conditions that Congress had not originally intended for the ADA to cover will simply be analyzed under the “regarded as” prong because of its lower standards.<sup>275</sup> Advocates of the “regarded as” prong may argue that the amended language is too narrow, neglecting to protect those who have stigma-

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<sup>268</sup> See Befort, *supra* note 53, at 1022-23.

<sup>269</sup> Culotta v. Sodexo Remote Sites P’ship, 864 F. Supp. 2d 466, 469 (E.D. La. 2012).

<sup>270</sup> *Id.*

<sup>271</sup> Thomas N. Abbott, Comment, *Kaplan and “Regarded As”: Does the ADA Discriminate Between Real and Perceived Disability?*, 39 LOY. L.A. L. REV. 883, 904 (2006).

<sup>272</sup> See *supra* Part II.B.

<sup>273</sup> Abbott, *supra* note 271, at 904.

<sup>274</sup> Long, *supra* note 224, at 724-25.

<sup>275</sup> Shea, *supra* note 29 (explaining that the EEOC is actually encouraging people to sue under the “regarded as” prong because of how easy it is to qualify as disabled).

tized conditions.<sup>276</sup> However, people who are significantly impaired because of stigmas, fears, and myths will still be covered so long as their condition qualifies under the elements of the first prong.<sup>277</sup> Regardless, the focus should be less on the stigma and what others think, and more on the actual condition or disability and the adverse treatment. Advocates of the ADAAA “regarded as” prong applaud its “progress” because the amended version blurs the line between the “us” and “them” in disability analysis.<sup>278</sup> But despite the possibility that the ADAAA does blur such a distinction, it does so at a large cost to disability analysis instead protecting every single person who can conceive of a possible condition.<sup>279</sup> There is no protection for anyone when anything and everyone is protected. However, this problem will be resolved if the proposed “regarded as” prong is amended to protect people harmed in the workplace by adverse actions or severe discrimination.

#### E. Future Implications and Potential Problems

Without a change, employers will continue to face challenges in settling copious amounts of ADA cases, rather than risk facing a large judgment and other expenses from litigating potentially moot claims because of the ADAAA’s broad scope.<sup>280</sup> As a result, employers will continue to refrain from hiring disabled individuals.<sup>281</sup> Under the ADAAA, it is unlikely that an employer will obtain summary judgment.<sup>282</sup> As time progresses, new conditions will pose additional problems for employers and the courts.<sup>283</sup> These problems are among

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<sup>276</sup> See generally Barry, *supra* note 267, at 272-73; see also Jones, *supra* note 83, at 692 (citing Michael H. Fox & Robert A. Mead, *The Relationship of Disability to Employment Protection Under Title I of the ADA in the United States Circuit Courts of Appeal*, 13 KAN. J.L. & PUB. POL’Y 485, 506 (2004)) (discussing that after the Supreme Court narrowed the “disability” definition, the success rate for plaintiffs actually increased at least thirty-two percent).

<sup>277</sup> H.R. REP. NO. 101-485, pt. 3. at 30 (1990), reprinted in 1990 U.S.C.C.A.N. 445, 452.

<sup>278</sup> Barry, *supra* note 267, at 208-09.

<sup>279</sup> See Arduini, *supra* note 28, at 184.

<sup>280</sup> Jones, *supra* note 83, at 669.

<sup>281</sup> Arduini, *supra* note 28, at 191.

<sup>282</sup> Jones, *supra* note 83, at 669 (citing Sharona Hoffman, *Settling the Matter: Does Title I of the ADA Work?*, 59 ALA. L. REV. 305, 327-29 (2008)).

<sup>283</sup> See, e.g., Complaint at 2-3, Whittaker v. Ams. Car-Mart Inc., No. 1:13-CV-00108-SNLJ (E.D. Mo. July 19, 2013), ECF No. 1, available at [http://www.manatt.com/uploadedFiles/Content/4\\_News\\_and\\_Events/Newsletters/AdvertisingLaw@manatt/Whittakerv.AmericasCar-MartInc..pdf](http://www.manatt.com/uploadedFiles/Content/4_News_and_Events/Newsletters/AdvertisingLaw@manatt/Whittakerv.AmericasCar-MartInc..pdf) (bringing forth an ADA disability discrimination action based on obesity).

the many that will persist if the ADAAA is not amended once more.<sup>284</sup>

For instance, obesity is one of the many conditions that may “lead to abuse under the broadened ‘regarded as’ prong.”<sup>285</sup> Just weeks after the American Medical Association (AMA) announced that obesity was a qualified disease, a Missouri employee filed a lawsuit against his employer for violating the ADAAA because his weight was pretext for his termination.<sup>286</sup> The news of this obesity case has incited fear in experts that this could be the “first of an avalanche of cases alleging discrimination based on obesity.”<sup>287</sup>

If the proposed amendment is not enacted, this will likely become a large problem under the ADAAA, not only because obesity is visible and consequently, discrimination is inevitable, but because of the social biases that are associated with obesity.<sup>288</sup> The rate of obesity is also drastically increasing.<sup>289</sup> Currently, the obesity rate encompasses more than thirty percent of the population.<sup>290</sup> Thus, without this proposed amendment there will be an unimaginable amount of employees with a new way to sue their employers.<sup>291</sup> Without any amendment “this confluence [may very well] devastate American businesses.”<sup>292</sup>

In direct consequence, and as more conditions qualify as disabilities, employers will have a more substantial burden in providing reasonable accommodations.<sup>293</sup> Under the proposed amendment, conversely, courts would have the leeway to decide when accommodations are necessary, “allow[ing] for judicial discretion in deciding

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<sup>284</sup> See Jones, *supra* note 83, at 669-70 (explaining the many problems with the ADAAA).

<sup>285</sup> Arduini, *supra* note 28, at 195.

<sup>286</sup> Complaint at 2-3, *Whittaker*, No. 1:13-cv-00108-SNLJ; Tim Gould, *First ADA Suit Since AMA’s Obesity Policy: Is this the Start of Something Big?*, HR MORNING (Aug. 23, 2013), <http://www.hrmorning.com/first-ada-suit-since-amas-obesity-policy-is-this-the-start-of-something-big/>.

<sup>287</sup> Gould, *supra* note 286.

<sup>288</sup> See Arduini, *supra* note 28, at 195 (citing Kari Horner, Comment, *A Growing Problem: Why the Federal Government Needs to Shoulder the Burden in Protecting Workers from Weight Discrimination*, 54 CATH. U. L. REV. 589, 592 (2005)).

<sup>289</sup> Arduini, *supra* note 28, at 195 (citing American Sports Data, Inc., *Fitness and Fatness Boom? The New American Paradox: Exercise and the Ballooning of the Nation*, <http://www.americansportsdata.com/pr-obesityresearch-bmi.asp> (last visited Aug. 14, 2014)).

<sup>290</sup> Gould, *supra* note 286; see also Arduini, *supra* note 28, at 195 (showing the obesity rate is near thirty-four percent).

<sup>291</sup> Gould, *supra* note 286.

<sup>292</sup> Arduini, *supra* note 28, at 195.

<sup>293</sup> Jones, *supra* note 83, at 669.

whether reasonable accommodation is warranted.”<sup>294</sup> This would allow for the proposed amendments case-by-case analysis.<sup>295</sup> Otherwise, and without the proposed amendment, employers will continue to view the disabled as “lawsuits on wheels.”<sup>296</sup>

## CONCLUSION

“Some day a truly level playing field will exist for people with disabilities. But this will not occur by passing laws that cast [individuals] as [ ] victim[s] in need of protection.”<sup>297</sup> However, that day is not today. The ADAAA continues to cast the disabled in this light, especially under the “regarded as” prong, by protecting those who fall victim to the stigmas, myths, and fears associated with such conditions.<sup>298</sup>

Both Congress and the courts must be willing to face this issue head on and consider the aforementioned proposed amendment, or else history from the past twenty-one years, “similar in scope (but opposite in effect),” may very quickly repeat itself.<sup>299</sup> By removing the nondispositive “record of” prong, and either removing or rewriting the “regarded as” prong, courts may begin to accommodate the truly disabled instead of protecting everyone. With these proposed changes, the ADA will be more on track, providing “a *clear* and *comprehensive* national mandate for the elimination of discrimination against individuals with disabilities.”<sup>300</sup>

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<sup>294</sup> Ara, *supra* note 190, at 280.

<sup>295</sup> See *supra* Part II.D.3; see also Joiner, *supra* note 12, at 336.

<sup>296</sup> Hofius, *supra* note 80.

<sup>297</sup> *Id.*

<sup>298</sup> See H.R. REP. No. 101-485, pt. 3, at 30 (1990), 1990 U.S.C.C.A.N. 445, 452.

<sup>299</sup> See Klein, *supra* note 18, at 489-90.

<sup>300</sup> ADA Amendments Act of 2008, Pub. L. 110-325, § 2(a)(1), 122 Stat. 3553 (2008) (emphasis added).

