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DISABLING DISPARATE IMPACT CLAIMS: RECOGNIZING LONG-COVID AS A DISABILITY WILL PROTECT AFFECTED WORKERS AS RETURN TO THE OFFICE MANDATES MOUNT

Michael Hatch

INTRODUCTION

A child suffering from severe hearing loss is denied reasonable accommodations to attend a public school.[1] A Tennessee Medicaid Program shortened its inpatient coverage period which resulted in a patient being forced to pay medical expenses because their disability would keep them in the hospital longer than a patient not suffering from a disability.[2] A medical insurance company forcing an HIV patient to pick up medicine from a pharmacy miles away from his home because the insurance company would not cover the medical costs at his local pharmacy.[3] A school, removing its mask mandate and forcing children with disabilities to return to in-person learning activities and risk being exposed to COVID-19 regardless of how feasible it would have been to continue with the school's own partial mask mandate policy.[4] In all but one of these situations, the person with a disability was not afforded any redress under the Americans with Disabilities Act[5] (ADA) or Section 504 of the Rehabilitation Act.[6]

Flash forward to today and as the United States looks to put COVID-19 behind it, employers are slowly but surely making the pivot to return-to-office (RTO) mandates.[7] The impact of such a dramatic shift will inevitably lead to some segments of the population being forced to make a decision: lose their job because they do not want to return to in-person activities or return-to-office (RTO) and risk their health because they are a at a greater risk for contracting COVID-19.[8] This shift will ultimately force Americans who should qualify as persons with a disability under the ADA[9] or Section 504 of the Rehabilitation Act[10] to resort to the law to file disparate impact claims to secure reasonable accommodations from their employers.[11] As courts across the country are currently divided on whether these disability-related disparate impact claims should be recognized, the impending consequences of

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[1] *See* Se. Cmty. Coll. v. Davis, 442. U.S. 397, 400-02 (1979).
[2] *See* Alexander v. Choate, 469 U.S. 287, 289-92 (1984).
[3] *See* Doe v. BlueCross BlueShield of Tenn. Inc., 926 F.3d 235, 237-38 (6th Cir. 2019).
[4] *See* Doe v. Perkiomen Valley Sch. Dist., 585 F. Supp. 3d 668, 674-79 (E.D. Pa. 2022).
[5] Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101 – 12213.
[6] Rehabilitation Act of 1973, 29 U.S.C. §§ 701 – 799.
[7] Gabe Cohen, *Companies Want Remote Employees to Return to the Office*, 11 NEWS (June 9, 2022, 1:38 PM), https://www.kktv.com/2022/06/09/companies-want-remote-employees-return-office/.
[8] Christopher Bacon, *"But I Don't Want to Come Back to the Office!"*, JD SUPRA (June 5, 2020) https://www.jdsupra.com/legalnews/but-i-don-t-want-to-come-back-to-the-93296/.
[9] 42 U.S.C. § 12102.
[10] 29 U.S.C. § 705(20).
[11] *Cf.* Doe v. Perkiomen Valley Sch. Dist., 585 F. Supp. 3d 668, 688, 690-94, 705-07 (E.D. Pa. 2022).

these decisions will affect millions of Americans regarding their the choice (or lack thereof in some situations) as RTO employment looms large.[12]

The current ambiguity created by the Supreme Court will leave District and Appellate Courts with wide latitude to decide what disparate impact disability claims will be cognizable under the ADA and Section 504. Disparate impact disability claims allow for reasonable accommodations in the workplace and other public settings for those who can establish their disability impairs a major life activity and that the accommodation requested would not put an undue burden or hardship on the entity being forced to provide it. Disparate impact disability claims need to be construed with a uniform statutory interpretation of the ADA and Section 504 of the Rehabilitation Act by the courts. Currently, the Court has limited disparate impact disability claims under the guise of trying to curtail laws to their primary statutory intent and keep them within manageable bounds which has not allowed for the reasonable expansions of disability accommodations to those facing differing treatment to workplace policies resulting from newly recognized disabilities.[13] Unless the Supreme Court steps in to offer greater clarity, the ADA and Section 504 will almost likely fail to protect a new class of persons with disabilities: those suffering from Long-COVID who are being forced to RTO activates while still at risk of becoming extremely sick.

While employers are ready to make the push to return to in-person activities[14], those suffering from Long-COVID might be left with the ultimate choice: refuse RTO requirements and risk their job or return to the office and risk their life. With choices like that available, the Court needs to reconsider its jurisprudence on disparate impact claims and clearly delineate the legal boundaries of disparate disability impact claims amidst a continuing global health crisis. Recognizing disparate impact claims for those suffering from Long-COVID will allow persons living with this disability to continue to participate in society while being provided reasonable accommodations from their employers in order to continue to safely perform their jobs while protecting their own health.

This note will explore exactly what Long-COVID is and its prevalence throughout the United States and how many people will likely be affected by RTO mandates. I will then illustrate what the Supreme Court and other Appellate and District Courts across the country consider an "individual with a disability" for purposes of being able to assert a disparate impact claim under

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[12] *See Disability Impacts All of Us*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/ncbddd/disabilityandhealth/infographic-disability-impacts-all.html (May 15, 2023).

[13] Alexander v. Choate, 469 U.S. 287, 292 (1984).

[14] *See* Alex Sherman, *Making Sense of Why Executives Are Eager to Get Employees Back in the Office*, CNBC, https://www.cnbc.com/2022/03/08/return-to-office-why-executives-are-eager-for-workers-to-come-back.html (Mar. 9, 2022, 11:45 AM).

the ADA and Section 504 of the Rehabilitation Act. Analyzing current precedent established by both the Supreme Court and other federal courts, I will attempt to delineate the current standard the federal judiciary utilizes to determine whether to recognize a disparate impact disability claim and the requirement for a reasonable accommodation for those suffering from Long-COVID. After parsing very muddied and unclear language from the Court, I will make it clear as to why Long-COVID should be recognized as a disability for the purposes of filing a disparate impact claim either under the ADA or Section 504. Recognition of these claims will allow Americans suffering from Long-COVID to continue to work remotely and be just as productive, if not more productive, than if they were forced to return to the workplace and risk both their physical and mental health because of America's collective corporate culture's push to return to in-person activities.

Long-COVID is continuing to affect millions of Americans[15] and could just as easily affect you or someone you know like it has changed the lives of Susan and Mark, a fictional but all too realistic married couple living in New York City, who both work at Goldman Sachs. Susan is forty-six years old, and Mark is fifty-one years old, and they have been married for eight years. They have two small children, Rose who is four and a newborn, Jackson. They live at the Wimbledon in the Upper East Side at 200 East 2nd Street. Susan has worked at Goldman for the past elven years and Mark has been employed by the company for the past fourteen years. They were both diagnosed with COVID-19 in February of this year. This was Mark's third time catching the virus while this was Susan's first diagnosis. They both are up to date on their vaccinations and continue to follow recommended CDC guidelines when it comes to diagnosing and testing based on symptoms. In the past few weeks, they have both been experiencing a mix of symptoms including brain fogginess, dizziness when they stand, continual muscle pain, a lingering cough, and not quite a full sense of taste and smell.[16] They went to their local family doctor and have been told they are suffering from Long-COVID.

They both work in Goldman as Risk and Exam Managers for Goldman's Financial crime Compliance Department. This job, Susan has been doing since 2017 and Mark since 2015, involves duties primarily associated with performing global financial crime risk assessments; managing and coordinating AML and other FCC regulatory audits and inquiries; monitoring relevant regulatory updates; performing policy and procedure development

[15] *See* Press Release, Ctr. for Disease Control & Prevention, Nearly One in Five Am. Adults Who Have Had COVID-19 Still Have "Long COVID" (June 22, 2022), https://www.cdc.gov/nchs/pressroom/nchs_press_releases/2022/20220622.htm.
[16] Leslie P. Francis & Michael Ashley Stein, *Long COVID and Physical Reductionism*, Petrie-Flom Center at Harvard Law School (Apr. 19, 2022) https://blog.petrieflom.law.harvard.edu/2022/04/19/long-covid-physical-reductionism-disability/.

and management; and oversight of the FCC new activity processes, among their other responsibilities. When the COVID-19 Pandemic hit, they were ordered to work from home which did not really impact their day-to-day job duties since most of their work is done via computer. Their jobs entail mostly phone calls with clients, Zoom meetings with other members of the compliance team, and the occasional document singing (which was accomplished via email during the heights of the Pandemic). The company set them up with secured network connections so they could work from home, and they continued their work throughout the Pandemic. Since the advent of the Pandemic, both Susan and Mark have gotten raises for their exceptional performance. They have been able to actually work more from home considering they have no commute because their office is now a few steps away.

Recently, Goldman has been campaigning to force all its employees to return to work in-person five days a week.[17] Now, after not being able to shake the symptoms of Long-COVID and feeling nervous about returning to in-person work and possibly catching COVID-19 again and suffering from even worse symptoms in the future, Susan and Mark must make a choice. They love their jobs and know they can effectively work from home and don't understand why they are being forced to put their health at risk in order to continue to do a job they have been doing remotely for the past three years. They must now make a choice: return to work and risk their health and maybe not be around to see their beautiful children grow up or be fired and must look for another job and risk their livelihoods. If only there was a way the legal system could provide Susan and Mark with a remedy to file a claim to have a reasonable accommodation made for them so they could continue to work from home and have some policies in place in the in-person work environment to better protect their health.

To protect the millions of people suffering from Long-COVID[18], like my fictional but realistic couple from New York, the Supreme Court needs to reconsider its limitation of disparate impact disability claims while recognizing a new class of Americans with disabilities: those suffering from Long-COVID. By changing its limiting jurisprudence, the Court can force employers to provide reasonable accommodations to protect those with Long-COVID by offering options such as working from home or other reasonable accommodations so those with Long-COVID can continue to participate in society amid a push to return to in-person workplaces.

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[17] Geoff Colvin, *Goldman Sachs Is Ordering Employees Back to the Office 5 Days (or More) a Week. Inside CEO David Solomon's Mission to End Hybrid Work*, FORTUNE (Mar. 10, 2022, 4:22 PM), https://fortune.com/2022/03/10/goldman-sachs-office-hybrid-remote-work-david-solomon/.

[18] Ctr. for Disease Control & Prevention, *supra* note 15.

I. CURRENT DISABILITY GUIDELINES FOR PUBLIC AND PRIVATE WORKPLACES

Under Title I of the ADA[19], private employers, state and local governments, and labor unions are prohibited from discriminating against qualified individuals with disabilities.[20] The Rehabilitation Act of 1973[21] defines an "individual with a disability" as someone who: has a physical or mental impairment substantially limiting one or more major life activities and has a record of such an impairment, or is regarded as having such an impairment.[22] Section 504[23] specifically requires agencies and federal contractors receiving federal financial assistance to include reasonable accommodation for employees with disabilities; program accessibility; effective communication with people who have hearing or vision disabilities; and accessible new construction and alterations.[24]

The Center for Disease Control (CDC) has estimated over sixty-one million people in America are living with a disability, which is about twenty-six percent of all adults.[25] This number will likely continue to rise with the growing number of people who have been recognized as suffering from Long-COVID.[26] The CDC also reports persons with disabilities have a harder time affording and maintaining healthcare because of healthcare's rising costs.[27] These rising costs and lack of coverage have led to many barriers for working age adults in accessing healthcare.[28] This lack of affordability, coupled with inadequate protection by the Supreme Court, will force those suffering from disabilities, including those suffering from Long-COVID, to risk their health in order to return to work if their employer begins to mandate an RTO policy.

In relation to COVID-19, the CDC has published a list of medical conditions that if an individual has one, they are more likely to get seriously ill from COVID-19.[29] The CDC has determined the more underlying health conditions a person has, the more likely they are to become sicker from

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[19] U.S. Dep't Just. Civ. Rts. Div., *Information and Technical Assistance on the Americans with Disabilities Act,* ADA.GOV, https://www.ada.gov/ada_title_I.htm.
[20] *Id*; 42 U.S.C. §§ 12132, 12181.
[21] 29 U.S.C §§ 701-799.
[22] 29 U.S.C. § 705(20); *see also The Rehabilitation Act of 1973*, PACER'S NAT'L PARENT CTR. ON TRANSITION AND EMP., https://www.pacer.org/transition/learning-center/laws/rehab.asp (last visited May 14, 2024).
[23] U.S. Dep't Just., *Guide to Disability Rights Laws*, ADA.GOV, https://www.ada.gov/cguide.htm# anchor65610 (Feb. 28, 2020).
[24] *Id.*
[25] *Disability Impacts All of Us*, *supra* note 12.
[26] Ctr. for Disease Control & Prevention, *supra* note 15.
[27] *Id.*
[28] *Id.*
[29] *People with Certain Medical Conditions*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html (May 11, 2023).

COVID-19 than others without such conditions.[30] Some factors the CDC has identified that can help to limit one's exposure to being infected with COVID-19 include shortening the time near an infected individual and mask wearing.[31] The CDC also recommends increasing space and distance with others when possible if you are forced to be in close contact with other individuals.[32] Long-COVID has recently been identified as a disability that qualifies as an underlying health condition that would make one more susceptible to contracting COVID-19.[33]

Last Summer, the Biden administration formally classified Long-COVID as a disability according to the Department of Health and Human Services guidelines for defining a disability.[34] Long-COVID is when people who have experienced COVID-19 continue to have new or recurring symptoms at a later time.[35] However, even with this Health and Human Services classification, Long-COVID is proving to be difficult to accommodate in the workplace, an issue that will continue to become prevalent as more and more businesses return to RTO activities with less social distancing and masking requirements.[36] Long-COVID has also been identified as more likely to develop in those people who have an underlying disability or health issue.[37] However, as stated on the press release by the Department of Health and Human Services, this recognition of Long-COVID as a disease has no effect of law.[38] Brookings Metro has estimated nearly sixteen million Americans likely

[30] *Factors that Affect Your Risk of Getting Very Sick from COVID-19*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/coronavirus/2019-ncov/your-health/risks-getting-very-sick.html (May 11, 2023).
[31] *Understanding Exposure Risks*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/coronavirus/2019-ncov/your-health/risks-exposure.html (Aug. 22, 2022).
[32] *How to Protect Yourself and Others*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html (July 6, 2023).
[33] U.S. Dep't Health & Hum. Servs., *Guidance on "Long COVID" as a Disability Under the ADA, Section 504, and Section 1557*, U.S. DEP'T HEALTH & HUM. SERVS., https://www.hhs.gov/civil-rights/for-providers/civil-rights-covid19/guidance-long-covid-disability/index.html [https://archive.ada.gov/long_covid_joint_guidance.pdf] (July 26, 2021).
[34] *Id.*
[35] *Id.*
[36] Andrea Hsu, *Millions of Americans Have Long COVID. Many of Them Are No Longer Working*, NPR (July 31, 2022, 7:00 AM), https://www.npr.org/2022/07/31/1114375163/long-covid-longhaulers-disability-labor-ada.
[37] *Long COVID or Post-COVID Conditions*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/coronavirus/2019-ncov/long-term-effects/index.html (July 20, 2023).
[38] *Id.*

have Long-COVID today and nearly four million have been kept out of work or have been forced to reduce their hours because of the disease.[39]

While recognized as a disability by the Department of Health and Human Services in certain situations depending upon the effects on affected individual, Long-COVID has not been recognized as disability by the Supreme Court under the ADA and Section 504 of the Rehabilitation Act.[40] Long-COVID is the continued suffering of symptoms more than three months of after contracting COVID-19.[41] There many common symptoms of Long-COVID such as fatigue, difficulty thinking or concentrating, headaches, dizziness on standing, chest pains, and a cough.[42] In addition, those suffering from Long-COVID could also be at risk to suffer long term damage to major organs including the heart, lungs, kidney, skin, and brain.[43] However, as noted earlier, to be considered an "individual with a disability" under either of these provisions, a person suffering from Long-COVID must be someone who has a physical or mental impairment substantially limiting one or more major life activities and has a record of such an impairment.[44] Once Long-COVID is recognized by the Court or Congress as a disability under these provisions, the individual will have a major life activity impaired by Long-COVID so they will be entitled to an accommodation under the ADA or Section 504.[45]

Since the expiration of all government-mandated stay-at-home orders, a majority of businesses have the right to set their own policies and therefore refusing to go back to work due to lack of social distancing policies, mask guidance, or vaccination requirements could lead to an employee being fired.[46] In every state in the country except for Montana an employee in the United States can be considered an "at-will" employee.[47] Being an "at-will" employee[48] means an employer can fire the employee for any reason (except

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[39] Katie Bach, *New Data Shows Long Covid is Keeping as Many as 4 Million People out of Work*, BROOKINGS (Aug. 24, 2022), https://www.brookings.edu/research/new-data-shows-long-covid-is-keeping-as-many-as-4-million-people-out-of-work/.
[40] U.S. Dep't Health & Hum. Servs., *supra* note 33.
[41] Ctr. for Disease Control & Prevention, *supra* note 15.
[42] *Id.*
[43] *Id.*
[44] 29 U.S.C. § 705(20).
[45] *Id.*
[46] Danielle Abril, *Ask Help Desk: What Happens if You Refuse to Go Back to the Office?*, WASH. POST, https://www.washingtonpost.com/technology/2022/04/08/return-to-office-employee-rights/ (Apr. 8, 2022, 8:00 AM).
[47] *At-Will Employment – Overview*, NAT'L CONF. STATE LEGISLATURES [hereinafter *At-Will Employment*], https://www.ncsl.org/research/labor-and-employment/at-will-employment-overview.aspx (last updated Apr. 15, 2008).
[48] Kathryn A. Edwards, *Mass Long-COVID Disability Threatens the Economy: Edwards*, ALM | LAW.COM, (Dec. 7, 2022, 1:09 PM), https://www.law.com/dailybusinessreview/2022/12/07/mass-long-covid-disability-threatens-the-economy-edwards/.

an illegal one) without incurring any liability.[49] While the employee does have some similar power, that being the ability to quit at any time without any adverse retaliation by the employer[50], for those suffering from disabilities such as Long-COVID who are now being forced to make a choice between their health and their job, the power struggle in these decisions heavily favors the employer. However, in certain situations, the ADA and Section 504[51] of the Rehabilitation Act have provided some with remedies.[52] However, given the growing number of courts denying disparate impact claims on the basis of a disability[53], coupled with the current movement towards returning to in-person activities[54], many Americans with health concerns, such as Long-COVID, will likely be put in a compromising position in order to retain their job.[55]

To be considered a disability under the ADA and Section 504 of the Rehabilitation Act, a person with a disability must meet certain criteria.[56] The ADA defines a disability as a physical or mental impairment limiting one or major life activities of an individual, a record of such impairment, or being regarded as having such impairment.[57] A physical impairment has been interpreted to include any physiological disorder affecting one or more body systems while a mental impairment or psychological disorder can include anything related to emotional or mental illness.[58] Major life activities has been understood to include a broad range of activities including, but is not limited to, caring for oneself, performing manual tasks, walking, standing, sleeping, breathing, and thinking.[59] Under both the ADA and Section 504 of the Rehabilitation Act it should be noted that in order for reasonable accommodations to be required to protect the individual suffering from the disability, it must be proven that a major daily life activity is impaired by the disability.

Therefore, if Long-COVID were recognized by the Court as a disability, the impact of Long-COVID will be assessed on a case-by-case basis in order to safeguard against boundless claims of people suffering from the disorder.[60]

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[49] *At-Will Employment*, *supra* note 47.
[50] *Id.*
[51] Alexander v. Choate, 469 U.S. 287, 309 (1985).
[52] Doe v. Perkiomen Valley Sch. Dist., 585 F. Supp. 3d 668, 686-87, 707 (E.D. Pa. 2022).
[53] Doe v. BlueCross BlueShield of Tenn., Inc., 926 F.3d 235, 241-42 (6th Cir. 2019).
[54] *See* Josh Moody, *Most Colleges Resume In-Person Classes,* INSIDE HIGHER ED (Jan. 5, 2022), https://www.insidehighered.com/news/2022/01/06/colleges-resuming-person-classes-amid-omicron.
[55] Ridley Sch. Dist. v. M.R., 680 F.3d 260 (3d Cir. 2012).
[56] *Id.*
[57] 42 U.S.C. §§ 12102(1)(A)-(C).
[58] 28 C.F.R. §§ 35.108(b), 36.105(b) (2023); *see also* 45 C.F.R. 92.102(c) (2023).
[59] 42 U.S.C. § 12102(2)(A).
[60] *Id.*

Claims for disparate impact can be recognized under either the ADA or Section 504 because they are judged under the same legal standards and the same remedies are available under both acts.[61] The language of both acts track each other and the definition of a disability in the ADA is substantially equivalent to the definition in Section 504 of the Rehabilitation Act.[62] Those suffering from Long-COVID typically deal with a wide array of symptoms significantly impacting or substantially limiting one or more of their daily life activities.[63] These symptoms can affect a person's physical or mental health, such as the physical symptoms of tiredness, dizziness, shortness of breath, and tiredness or fatigue or the mental symptoms such as the anxiety related to returning to in-person activities and being put a greater risk of contracting COVID-19 or other debilitating diseases.[64] To be considered a disability under the ADA or Section 504, substantially limits has been broadly construed in the past and has always been based upon the way the disability affects the person.[65]

This lack of guidance by the Supreme Court as to reasonable accommodations afforded to those asserting disparate impact disability claims under the ADA and Section 504 has led to a split in courts across this country. By not answering the question that will affect millions of Americans as of now[66], and one that is a number that will certainly continue to grow over time, the Court is not allowing the laws in question to be interpreted to their true intent. By reconsidering its jurisprudence, the Court will help to provide millions of Americans suffering from Long-COVID an opportunity to continue to participate in society even though they are not equally situated with their peers to return to the office in the manner many companies are trying return to.[67]

II. THE SPLIT: COURTS DIVERGED ON DISPARATE CLAIM RECOGNITION

While this is a delicate balance the courts are attempting to strike, the Supreme Court has severely limited the avenues people with disabilities have to file disparate impact claims in order to receive reasonable accommodations when dealing with disabilities in the workplace.[68] Until such a time arrives that the Supreme Court reverses this limiting precedent, employers will not be forced to alter their business structures and processes, even minimally, to

[61] Kemp v. Holder, 610 F.3d 231, 234 (5th Cir. 2010).
[62] *Id.*
[63] U.S. Dep't Health & Hum. Servs., *supra* note 33.
[64] *Id.*
[65] *Id.*
[66] *See* Ctr. for Disease Control & Prevention, *supra* note 15.
[67] *See* Nick Niedzwiadek, *How long Covid intersects with disability policy*, POLITICO (Nov. 21, 2022, 10:00 AM), https://www.politico.com/newsletters/weekly-shift/2022/11/21/how-long-covid-intersects-with-disability-policy-00069668.
[68] Alexander v. Choate, 469 U.S. 287, 305 (1985).

accommodate individuals with disabilities being forced to return the workplace and participate in in-person activities.[69] The current ambiguity issued by the Supreme Court will leave District and Circuit Courts with wide latitude to decide what disparate impact disability claims will be cognizable under the ADA and Section 504.

Disparate impact claims, when being asserted against facially neutral employer and government entity policies, need to be construed with a uniform statutory interpretation of the ADA and Section 504. Disparate impact claims, as to be differentiated from disparate treatment claims, involve a form of discrimination that is unintentional and applicable to all people, such as the requirement of an RTO policy.[70] This policy, while enforceable against all individuals, negatively impacts those in a protected class, such as a having a disability, in a negative manner. Compare that to a disparate treatment, which is when intentional discriminatory policies are used against individuals in a protected class to treat them differently than others not in a protected class.[71] Currently, those suffering from Long-COVID have not been afforded a legal avenue to address claims against employers enforcing these RTO mandates that could negatively impact their health and ultimately force them to make the choice between their job or their health, a choice those not suffering from a disability would not have to make. Given these RTO policies and mandates apply to all individuals, the claims for those suffering from Long-COVID that they will be negatively impacted due to health concerns and the fact that Long-COVID has impaired their ability to perform a major life activity qualify as disparate impact claims not the intentional, disparate treatment claim. Unless the Supreme Court steps in to offer greater clarity, the ADA and Section 504 might fail to protect a new class of persons with disabilities: those suffering from Long-COVID who are being forced to return to in-person activates while still at risk of becoming extremely sick.

A. Southeastern Community College v. Davis: Laying the Groundwork for Limiting Disparate Impact Claims

In 1979, the Supreme Court reviewed a matter of first impression as to whether Section 504 of the Rehabilitation Act of 1973 forbade schools from imposing physical qualifications for admission to their clinical trainings.[72] Respondent suffered from a serious hearing disability and sought to be trained as a registered nurse at the College Parallel Program of Southeastern

[69] *Id.* at 299.
[70] *ADA National Network, Legal Update on ADA Claims of Disparate Impact vs. Disparate Treatment*, ADA NATIONAL NETWORK (last updated Sept. 2023), https://adata.org/event/legal-update-ada-claims-disparate-impact-vs-disparate-treatment.
[71] *Id.*
[72] Se. Cmty. Coll. v. Davis, 442. U.S. 397, 400 (1979).

Community College.[73] After a medical examination, it was determined she suffered from a "bilateral, sensori-neural hearing loss" and a change in her hearing aid was recommended which would allow her to detect sounds almost as well as a person with normal hearing would be able to.[74] However, the improvement in the hearing aid would not allow her to discern among different sounds sufficiently to understand normal speech and thus would not be qualified for nursing study because of her hearing disability, thus the college denied her admissibility to the program.[75] The hearing limitations were determined to interfere with respondent's ability to safely care for patients which was the determining factor in denying respondent admission to the college.[76]

The trial court determined respondent's disability would indeed prevent her in numerous situations from being unable to function properly and would lead to potential future danger to patients.[77] However, the court ultimately determined the respondent was an otherwise qualified individual with a disability protected against discrimination by Section 504.[78]

Upon review, the Court of Appeals for the Fourth Circuit believed Section 504 required the school to reconsider the plaintiff's application for admission to the program without regard to her disability.[79] The court ultimately reasoned the District Court had erred in taking respondent's handicap into account in determining whether she was otherwise qualified for the program rather than just looking at her academic and technical qualifications, of which respondent in this case did not possess.[80]

The Supreme Court granted certiorari and determined Section 504 requires only that an otherwise qualified individual with a disability cannot be excluded from participation in a federally funded program solely by reason of their disability.[81] The Court also determined an otherwise qualified individual is one who is able to meet all of the program's requirements in spite of their disability.[82] The Court therefore determined the other qualifications that a person with a disability may be required to meet could include physical qualifications and without such qualifications that person with a disability could be denied access to such a federally funded program.[83] The Court determined respondent's inability to participate in the nursing program in all

[73] *Id.*
[74] *Id.* at 401.
[75] *Id.* at 401-02.
[76] *See id.*
[77] *Id.* at 403.
[78] *Davis*, 442 U.S. at 402.
[79] *Id.* at 404.
[80] *Id.*
[81] *Id.* at 404-05
[82] *Id.* at 406.
[83] *Id.* at 407.

customary ways was not discrimination based on the respondent's disability because it was clear the respondent could not participate in the program unless the standards were lowered.[84] Section 504 does not require an institution to lower its standards to accommodate an individual with a disability but is meant to ensure an "otherwise qualified" individual with a disability is a person that is able to meet all the requirements of a program and is able to perform all the essential functions of the program in spite of their disability would not be discriminated against.[85] This determination thus limited a person with a disability from seeking accommodations in programs in which they were not already situated in a similar position to a person without a disability thus setting the stage for decisions to come regarding disparate impact claims for individuals with disabilities.

B. Alexander v. Choate: The Supreme Court Takes a Different Statutory Analysis of Section 504 Disrate Impact Claims

In 1985, the Supreme Court upheld a Tennessee Medicaid program instituting a shorter period for inpatient hospital days that the Tennessee Medicaid program would pay on behalf of a Medicaid recipient.[86] The complaint was a class action suit brought by Tennessee Medicaid recipients who argued the proposed 14-day limitation on the inpatient coverage would have a discriminatory effect on persons with disabilities.[87] Petitioners argued nearly 25% of all persons with disabilities were hospital patients who used Medicaid required more than 14 days of treatment compared to the 7.8% of persons without disabilities who required more than 14 days of inpatient care.[88] They argued this change in the program would violate Section 504 of the Rehabilitation Act which provides:

> No otherwise qualified handicapped individual shall, by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.[89]

The major thrust of Petitioners' argument was that any limitation on the number of inpatient days covered would have a greater negative impact on persons with disabilities, thus discriminating against them on the basis of

[84] *Davis*, 442 U.S. at 412-13.
[85] *Id.* at 406.
[86] Alexander v. Choate, 469 U.S. 287, 289 (1985).
[87] *Id.*
[88] *Id.* at 290.
[89] *Id.* at 289 (citing 29 U.S.C. § 794).

their disability.[90] The ultimate issue before the Court was whether this type of disparate impact claim was cognizable under Section 504.[91]

The Supreme Court determined any interpretation of Section 504 must respond to two countervailing considerations: the need to give effect to its statutory objectives and the desire to keep the law within manageable bounds.[92] The Court relied on language from *Southeastern Community College v. Davis,* a case which determined the refusal to modify an existing program might become unreasonable and discriminatory where that refusal to accommodate the needs of a disabled person amounts to discrimination against persons with disabilities.[93] The Court reasoned that *Davis* struck a balance incorporating the statutory rights of persons with disabilities into society while also preserving the rights and integrities of federal programs.[94] While a recipient of federal funds is not required to engage in fundamental modifications to accommodate persons with disabilities, it may be required to make reasonable changes.[95]

As for the Tennessee Medicaid limitation, the Court determined the reduction in the inpatient coverage period was neutral on its face and did not use any criteria having a particular exclusionary effect on persons with disabilities.[96] Section 504 does not force the State to change its definition of a benefit being offered to the public simply to meet the fact that persons with disabilities have greater needs.[97] Section 504 seeks to assure evenhanded treatment and the opportunity for the handicapped to participate in and benefit from programs receiving federal assistance.[98] Section 504 does not guarantee persons with disabilities equal results from the provisions instituted by Medicaid.[99] The Court determined Tennessee's Medicaid benefit of 14 days of coverage was equally accessible to both persons with disabilities and those without.[100] The Court determined the provision to reduce the inpatient coverage period was neutral on its face and would affect all persons equally, thus it did not violate Section 504.[101] Section 504 does not guarantee persons with disabilities adequate health care by providing them with more

[90] *Id.* at 290.
[91] *Choate*, 469 U.S. at 292.
[92] *Id.* at 299.
[93] *Id.* at 299-300; *see* Se. Cmty. Coll. v. Davis, 442. U.S. 397, 412-13 (1979).
[94] *Choate*, 469 U.S. at 301; *see Davis*, 442 U.S. at 412-13.
[95] *Davis*, 442 U.S. at 412-13.
[96] *Choate*, 469 U.S. at 301.
[97] *Id.* at 303.
[98] *Id.* at 304.
[99] *Id.*
[100] *Id.* at 309.
[101] *Id.*

coverage than persons without disabilities, it just seeks to offer them an equal opportunity to the programs.[102]

C. Doe v. BlueCross BlueShield of Tenn. Inc.: The 6th Circuit Limits the Reach of Disparate Impact Disability Claims

In 2019, the U.S. Court of Appeals for the 6th Circuit determined a BlueCross BlueShield policy forcing an HIV patient to pick up medicine from a specific pharmacy and not his local pharmacy was not a disparate impact claim that could be recognized as discrimination against persons with a disability under Section 504.[103] Petitioner was HIV-positive and received his health insurance from BlueCross.[104] BlueCross imposed requirements as to where people can get their medication from and petitioner was forced to change the pickup location of his HIV medicine from his local pharmacy to a different pharmacy covered by BlueCross' specialty pharmacy network that provides the higher priced and more specialty medicines Petitioner requires due to his disability.[105] Petitioner was forced to fill his prescription either through mail order to be covered through BlueCross' special network or he could continue to pick it up at his local pharmacy, but BlueCross would no longer cover the medication's costs.[106]

Petitioner filed a class action against BlueCross alleging the company discriminated against him and other HIV-positive beneficiaries in violation of the ADA and Section 504 of the Rehabilitation of Act.[107] When analyzing petitioner's claim under Section 504 the court restated the requirements to state a claim which are as follows:

> 1. Petitioner must prove that he has a disability. 2. That he is otherwise qualified for participation in a health program or activity.
> 3. That he is being excluded from participation in, denied the benefits of, or subject to discrimination under the program solely by reason of his disability.
> 4. And, that the program receives federal assistance.[108]

The Court determined that plan's specialty medications list that requires pickup at a specialty network pharmacy is neutral on its face and even

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[102] *Choate*, 469 U.S. 287 at 309.
[103] Doe v. BlueCross BlueShield Tenn., Inc., 926 F.3d 235, 240 (6th Cir. 2019).
[104] *Id.* at 237.
[105] *Id.*
[106] *Id.* at 238.
[107] *Id.*
[108] *Id.* at 241.

though some of the medicines on the list are used by persons with disabilities, many are not.[109] Petitioner argues the common trait of high costs among the specialty medication, that while not discriminatory on its face, discriminates against persons with a disability because it causes a disparate impact.[110] The Court concluded that the Supreme Court in *Choate* rejected a boundless notion that all disparate impact complaints sustain the prima facie case needed under Section 504.[111] The 6th Circuit determined because many well-intended policies disparately affect the disabled that the petitioner's proposed theory under Section 504 might lead to a "wholly unwieldy administrative and adjudicative burden" if claims similar to petitioner's were recognized as disparate impact claims.[112]

The Court then analyzed petitioner's claim he was denied access to a local pharmacy by BlueCross under Title II of the ADA.[113] The Court determined while a pharmacy would count as a place of public accommodation under the Act, it ruled BlueCross doesn't operate petitioner's local pharmacy in any relevant way and therefore there was no violation by BlueCross pursuant to Title II of the ADA.[114] The only aspect of the pharmacy BlueCross controlled was how much petitioner paid out of pocket for his HIV medicine; it did not control the hours of the pharmacy, access to the pharmacy, or the pharmacy's policies and therefore could not be held responsible for discrimination on behalf of the pharmacy.[115]

D. Doe v. Perkiomen Valley Sch. Dist.: Disparate Impact Claims Recognized When Irreparable Harm Will be Done

In a recent 3rd Circuit decision, the United States District for the Eastern District of Pennsylvania held the plaintiffs were entitled to injunctive relief against a school district's attempt to lift a mask mandate.[116] The Court determined plaintiffs were entitled to this relief because they met the burden under the ADA and Section 504 of the Rehabilitation Act to establish that: they were a qualified individual with a disability, they would be excluded from participation in or denied the benefits of services or programs of the public entity, and were subjected to discrimination because of their disability.[117] Plaintiffs, with underlying medical risks due to their medical disabilities, were

[109] *BlueCross*, 926 F.3d at 241.
[110] *Id.*
[111] Alexander v. Choate, 469 U.S. 287, 299 (1985).
[112] *Id.* at 298.
[113] *BlueCross*, 926 F.3d at 243.
[114] *Id.* at 243-44.
[115] *Id.*
[116] Doe v. Perkiomen Valley Sch. Dist., 585 F. Supp. 3d 668, 706 (E.D. Pa. Feb. 7, 2022).
[117] *Id.* at 686-87, 706.

at heightened risk of serious illness or death if they contracted COVID-19.[118] The school district, by transitioning from a required indoor mask policy to an optional indoor mask policy between January 3rd, 2021 and January 24th, 2021, directly conflicted with CDC guidance on mask wearing for the transmission rates of the school's county.[119] Petitioners filed suit alleging the optional masking policy discriminated against their disabled children and violated Title II of the ADA and Section 504 of the Rehabilitation Act because it had the effect of excluding the children of the opportunity to participate in the services of the school district.[120]

The District Court determined the same substantive standard is applicable to both the ADA and Section 504 and under both the plaintiff must establish:

> 1. That they are a qualified individual with a disability.
> 2. That they will be excluded from the participation in or denied tube benefits, services, programs, or activities of the public entity, or subject to discrimination by the public entity.
> 3. And, that such exclusion, denial, or discrimination occurred by reason of their disability[121]

To prove one has been excluded from the participation in or denied the benefits, services, programs, or activities of the public entity, or subject to discrimination by the public entity, a plaintiff must either prove disparate treatment, disparate impact, or prove a failure to make a reasonable accommodation occurred.[122] The court relied on a previous 3rd Circuit opinion which held that ADA's, and thus Section 504's, protections extended beyond cases in which there was deliberate, intentional, or overt discrimination as well as affirmative animus. The Court further determined any, even if not intentional discrimination, could lead to a disparate impact claim under either piece of legislation.[123]

To assert a disparate impact claim, the plaintiff must prove the government's facially neutral practice has the effect of denying meaningful access to public services by persons with disabilities.[124] Meaningful access requires an evenhanded opportunity for persons with disabilities to participate in and benefit from programs but does not necessarily guarantee

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[118] *Id.* at 693.
[119] *Id.* at 675, 678.
[120] *Id.* at 679.
[121] *Id.* at 686-87.
[122] *Perkiomen*, 585 F. Supp. 3d at 687.
[123] Helen L. v. DiDario, 46 F.3d, 325, 335 (3d Cir. 1995).
[124] *Perkiomen*, 585 F. Supp. 3d at 688.

them equal results.[125] The Court relied on medical statistics and analysis to determine that children with disabilities with similar medical conditions as the Plaintiffs would be at a heightened risk of contracting COVID-19 and that universal masking meaningfully lowers such risks when the community transmission of COVID-19 is substantial or high.[126] The Court determined the optional masking policy in the school's Transition Plan prevented the Plaintiffs from meaningfully accessing the benefits of in-person education because of the plaintiffs' real risk of contracting a serious illness.[127]

The Court then analyzed the question of whether a reasonable accommodation had been made by the school district to allow for the Plaintiffs' meaningful access to the benefits of in-person education.[128] The test to determine whether an accommodation is reasonable is to see whether or not the accommodation modifies the essential nature of the program or imposes an undue burden or hardship in light of the overall program.[129] The public entity does not need to make a fundamental or substantial change to the program to accommodate a person with a disability.[130] The Court determined that universal masking requirements was a reasonable accommodation and the school district could impose the previous universal masking policy it had in place and that would not be a fundamental alteration to the school's operating procedures.[131]

In order for the Plaintiffs to sustain the injunction against the school district and end the optional masking policy and return to universal indoor masking policy, they must produce evidence showing they will be irreparably harmed should relief be denied.[132] To show irreparable harm, a plaintiff must demonstrate there is a potential for harm and that an injunction is the only way to protect the plaintiff from harm.[133] The alleged harm must be likely, not just merely possible, however the injury need only be likely, it need not be certain to occur.[134] The Court, after considering medical guidance from the CDC and other sources, determined the plaintiffs showed evidence of a high likelihood of irreparable harm in the form of a heightened risk of serious illness and death, and the inability to access the benefits of education should the optional masking policy remain in effect.

Finally, the Court had to balance the potential injury to the plaintiffs without an injunction to the potential injury to the defendant with an

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[125] *Id.* at 689.
[126] *Id.* at 693-94.
[127] *Id.*
[128] *Id.* at 694-95.
[129] *Id.*
[130] *Perkiomen,* 585 F. Supp. 3d at 695.
[131] *Id.* at 695.
[132] *Id.* at 699.
[133] *Id.*
[134] *Id.*

injunction before making its decision.[135] The Court reasoned even though the Defendants' have an interest in deference to their policy choices for their school district, since the Plaintiffs have a likelihood of success on the merits of their claims, the Defendants' interest does not outweigh the potential and likely harm that will be inflicted on the Plaintiffs without the injunction.[136] The Court ultimately enjoined the school district from moving to the optional masking policy[137] set out in Phase 2 of its program up until a time when the CDC issued new guidance or when the community transmission rates of COVID-19 changed for the school district's county to prevent further risk to those students suffering from an underlying disability caused by COVID-19.[138]

III. LONG-COVID ACCOMMODATIONS CAN BE REASONABLE AND PROVIDED BY EMPLOYERS TODAY

A. The Court Can Make Reasonable Accommodations for those Suffering from Long-COVID in a Remote Workforce

In *Choate*, the Supreme Court's interpretation of the ADA and Section 504 was to allow for the statutory objectives of the laws to be carried out while also trying to keep the laws within manageable bounds.[139] However, in 1985, it seems highly unlikely the Court envisioned such a global and interconnected economy in which millions of jobs could be accomplished outside of the traditional office setting. The current interpretation that a regulation or policy must, on its face, be discriminatory against an individual with a disability[140] will inevitably lead to people suffering from Long-COVID being left out of the workforce as businesses return to in-person activities or will force those suffering from Long-COVID to risk exposure to becoming sick and possibly dying. While the Court's goal of keeping the disparate impact disability claims within manageable bounds was designed to prevent courts from expanding the legislature's intent of the law, it is now time for the Court to recognize that this narrow interpretation of the law is failing to protect those the law was

[135] *Id.* at 702.
[136] *Perkiomen*, 585 F. Supp. 3d at 704.
[137] *Id.* at 706.
[138] Doe v. Perkiomen Valley Sch. Dist., No. 22-cv-287, 2022 U.S. Dist. LEXIS 44246, at *5 (E.D. Pa. Mar. 14, 2022) ("[P]laintiffs no longer face a substantial risk of serious illness and/or death should they attend school in-person under an optional masking policy, nor is there a reasonable probability that Plaintiffs would be denied meaningful access to the benefits of their education without injunctive relief. Plaintiffs can no longer show a likelihood of success on the merits of their disparate impact claims under the ADA and Section 504 or that they will likely suffer irreparable harm absent injunctive relief.").
[139] Alexander v. Choate, 469 U.S. 287, 299 (1985).
[140] *Id.* at 309.

designed to protect, Americans with disabilities.[141] As companies continue to enact facially neutral policies with the goal being to increase productivity and profits, such policies will negatively impact Americans with disabilities, specifically those suffering from Long-COVID. Those suffering from Long-COVID do not face the symptoms and struggles of the disease until three months after contracting COVID-19 and can continue to suffer from those symptoms for years after diagnosis of Long- COVID.[142] Further examination of other courts' interpretations of the ADA and Section 504 of the Rehabilitation Act will illustrate how the Court can recognize disparate impact disability claims under these acts and continue to adhere to the intent of the legislature by providing Americans with disabilities an equal opportunity to participate in a continually changing workforce amid a global health crisis.

1. The Court Should Allow for Recognition of Disparate Impact Amid Technological Advances in Society

In *Davis*, the Court acknowledged there may be situations in the future in which an institution's insistence on past practices would deprive a qualified individual with a disability from participating in that institution's programs.[143] By recognizing that such technological advances would allow individuals with disabilities to participate in programs without enforcing an undue burden on the State[144], the Court has allowed for many permissible arguments that could be made for future workplace accommodations. In *Davis*, the Court admits that refusal to modify an existing program might become unreasonable and discriminatory[145] which is precisely the situation our economy and country is facing today: individuals suffering from Long-COVID who are now unable to RTO because of their disability but can perform essentially the same job functions while working from home. To further link the *Davis'* Court's ruling to the present-day situation with Long-COVID, the Court in *Davis* noted that Southeastern's unwillingness to make "major adjustments" to its nursing program did not constitute discrimination.[146] However, corporations across America operated with record profit margins with an abundance of remote workers and thus cannot hide behind the Court's "major adjustments" argument considering it was a practice in place for over a year in multiple

[141] *See* 42 U.S.C. § 12101; *see also* 29 U.S.C. § 794.
[142] U.S. Dep't Health & Hum. Servs., *Guidance on "Long COVID" as a Disability Under the ADA, Section 504, & Section 1557*, https://www.ada.gov/long_covid_joint_guidance.pdf (last reviewed July 26, 2021).
[143] Se. Cmty Coll. v. Davis, 442 U.S. 397, 412 (1979).
[144] *Id.* at 412.
[145] *Id.* at 412-13.
[146] *Id.* at 413.

industries (and continues to be a prevalent practice today across many industries).

In attempting to resolve the split between the *Perkiomen Valley School District* and *BlueCross BlueShield of Tennessee* rulings, one must look the Court's jurisprudence on disparate impact claims coupled with a plain language reading of the statutes involved. As noted earlier, the Court's reasoning in the *Choate* decision was to keep any interpretation of Section 504 (and similarly the ADA) responsive to two other considerations, which were to give effect to the statutory objectives of those acts and to keep Section 504 within manageable bounds.[147] This interpretation was by no means final, and one that could be altered in the future given the development of our nation's economy, public school environment, and the possibility that the workplace may change in the next thirty-eight years. The Court even noted that in *Davis*, the decision upon which the *Choate* Court relied, that there were some circumstances under which a refusal to modify an existing program might become unreasonable and discriminatory when such refusal to accommodate the needs of a person with a disability would be discrimination based on that disability.[148] *Davis*, and subsequently *Choate*, now ultimately requiring an otherwise qualified individual with a disability must be provided with meaningful access to a benefit a grantee (whether that be a business, public entity, or government institution) offers.[149] The benefit cannot be denied to those individuals with a disability whom are entitled to the benefit and any reasonable accommodations must be made in the grantee's program to assure meaningful access to such benefits.[150] While the Court in *Choate* ultimately ruled the limitation in access to Medicaid services would not deny the plaintiff's meaningful access, that same reasoning can be used to help accommodate those suffering from Long-COVID in today's global economy. A reasonable accommodation is one that does not require "fundamental" or "substantial" modifications to accommodate those individuals with a disability.[151] After nearly two years of a complete change to many companies' business models due to COVID-19 and a continuing change in how companies operate in world trying to move on from COVID-19, an accommodation to allow certain employees suffering from Long-COVID to work remotely does not seem unreasonable. The ultimate question is whether such accommodations can be made without a substantial or fundamental change to the company's business model and whether denying such an accommodation would deny the individual suffering from Long-COVID the ability to equally participate in their job moving forward.

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147 Alexander v. Choate, 469 U.S. 287, 299 (1985).
148 *Id.* at 300.
149 *Id.* at 301.
150 *Id.*
151 *Id.* at 300.

B. Those Suffering from Long-COVID who File a Disparate Impact Claim Will Not Negatively Impact their Employer's Business Model

1. The Employee-Employer Disconnect About Working from Home

Amid a global health crisis, employers are justifying the push to return to in person work settings by arguing employees are more productive in person than when working remotely because of the benefits and capabilities associated with returning to the office.[152] However, the disconnect between corporate executives and employees when it comes to returning to the office is glaringly stark.[153] In a recent survey, nearly three-quarters of all executives wanted to return to the office three to five days a week compared with one-third of all employees.[154] Among executives and employees who worked completely or mostly remotely during the pandemic, 44% of executives said they want to come back to the office everyday while only 17% of employees reported the same feelings.[155] The factors that have resulted in this disconnect include the differences in office set-up and the greater feasibility afforded to many executives in being able to come to the office every day without any other social or home-life constraints.[156] Executives argue employees working together and seeing each other work in the office will lead to goal contagion in which employees will strive to work better because they are witnessing others in the office achieving certain results. However, while executives want to see their offices filled and have more control over their employees while working, employees have been able to witness these companies still making profits for two years during the pandemic which has led them to ask the question as to why do they (the employees) need to return to the office at all?[157] Nearly 39% of employers are requiring employees to be in the office full-time post pandemic, but only 29% of employees want to return to the office.[158] With the argument being productivity, as employers continue to make this push to return to the office, those suffering from Long-COVID can make their best argument that working from home is a reasonable accommodation so long as

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[152] Alex Sherman, *Making sense of why executives are eager to get employees back in the office*, CNBC (Mar. 8, 2022, 1:43 PM), https://www.cnbc.com/2022/03/08/return-to-office-why-executives-are-eager-for-workers-to-come-back.html.
[153] *See id.*
[154] *Id.*
[155] *Id.*
[156] *Id.*
[157] *Id.*
[158] OWL LABS, STATE OF REMOTE WORK 2021, at 3 (5th ed. 2021), https://resources.owllabs.com/ hubfs/SORW/SORW_2021/owl-labs_state-of-remote-work-2021_report-final.pdf.

productivity does not drop and the company does not have to make a fundamental change to running its business.

2. Who Will Be Able to Work Remotely

Not only are employees working from home for health concerns related to COVID-19, but a majority of employees are working from home by choice rather than necessity.[159] Of the six in ten U.S. workers who say their jobs can be done remotely, over 80% of them say they have been working from home since before the spread of the Omicron variant.[160] 61% of respondents who can work remotely say they are doing so because it is their choice versus the 38% that are working from home because their workplace is unavailable for them to report.[161] Only 42% of respondents they are working from home because of COVID-19[162] concerns, and 76% of respondents say they are working from home now because of a preference and the convenience it affords them.[163] While working from home is a new experience for 57% of the respondents, nearly 44% say working from home has made it easier for them to finish their work and meet deadlines and 72% say their output level of production has not been affected.[164]

While the argument against allowing disparate impact disability claims to be recognized under the ADA and Section 504 is that too many claims would flood[165] the courts, most U.S. workers do not have a job allowing them to work fully remote and will be forced to go into the "office" regardless of the Court changing its jurisprudence relating to disparate impact claims for those suffering from Long- COVID.[166] Roughly 50% of these Americans are at least somewhat or very concerned with COVID-19 when returning to the office and nearly 47% are still as concerned as they were before the Omicron variant began to spread.[167] However, those Americans will not likely be able to succeed on a disparate impact disability claim because their job requires in person involvement and such a change to the company's business model would involve a "fundamental" or "substantial" modification to accommodate those with a disability, such as Long-COVID.[168]

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[159] Kim Parker et al., *COVID-19 Pandemic Continues to Reshape Work in America*, Pew Research Center, Feb. 16, 2022, at 1, 4, https://www.pewresearch.org/social-trends/wp-content/uploads/sites/3/2022/02/PSDT_2.16.22_covid_work_report_clean.pdf.
[160] *Id.*
[161] *Id.*
[162] *Id.*
[163] *Id.* at 5.
[164] *Id.*
[165] Alexander v. Choate, 469 U.S. 287, 299 (1985).
[166] KIM PARKER ET AL., *supra* note 159, at 5-6.
[167] *Id.* at 6.
[168] *See Choate*, 469 U.S. at 300.

3. Employee Production and Company Profits

Recent studies have reported productivity while working remotely is higher than productivity from working in an office setting. On average, those who work from home spend ten minutes less day a being unproductive, work one more day a week, and are 47% more productive.[169] In a recent Owl Labs Remote Work report, 90% of respondents that worked from home during the pandemic were at least equally or even more productive than when compared to the office.[170] Furthermore, over 84% of those respondents said they would like to continue working remotely after the Pandemic ends and they would be willing to take a lesser salary to do so.[171] Overall, the survey produced results expressing employees who were able to work from home remotely were happier, more productive, and were provided a better family life balance.[172] Nearly one in four workers said they would quit their job if they were not allowed to remotely after the pandemic.[173] Employees, by removing commute time and the interactions associated with "water cooler" conversations with other co-workers, actually work more at home versus in the office. 55% of respondents said they work more remotely than in the office. Compare that to the 33% saying they work the same number of hours and the 12% saying they work less at home than in the office.[174]

If employers are requiring employees to return to the office because they are concerned with employees' productivity and efficiency, employers should take note that flexibility is a key factor in employees making career changing choices.[175] In the same Owl Labs Remote Work report, 32% of respondents said they would quit their job if they were not able to work remotely going forward.[176] More than half (56%) would look for a new job offering more flexibility.[177] In terms of efficiency, those who worked from home during the pandemic and would not be able to do so moving forward, 58% would expect a pay raise and if they did not get one, nearly 50% would stay in their current job role but would be less willing to go the extra mile for the company.[178]

In Quarter 4 of 2021, the Bureau of Economic Analysis estimated the United States' real gross domestic product (GDP) increased at an annual rate

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[169] *Surprising Working from Home Productivity Statistics (2023)*, APOLLO TECHNICAL (Jan. 3, 2023), https://www.apollotechnical.com/working-from-home-productivity-statistics.
[170] OWL LABS, *supra* note 158, at 2.
[171] *Id.*
[172] *See id.* at 3.
[173] *Id.*
[174] *Id.* at 18.
[175] *See id.* at 6.
[176] OWL LABS, *supra* note 158, at 6.
[177] *Id.*
[178] *Id.*

of 6.9% in the fourth quarter of 2021.[179] When GDP was broken down by industry groups contribution, the top two groups were information and professional, scientific, and technical services which are professions that can most likely be done remotely for a majority of Americans working in those sectors.[180] The increase in GDP percentage growth was led by private sector services and the contributions were widespread; the leading contributors to the increase were finance and insurance (led by Federal Reserve banks, credit intermediation, and related activities) and professional, scientific, and technical services and information (led by data processing, internet publishing, and other information services).[181] As the United States' economy shifts to one more focused on information technology companies and the services they offer, employers' perceptions of what the typical "office" will look like in the future will be rapidly changing to a more hybrid and possibly fully remote environment.

Furthermore, the Hutchins Center on Fiscal and Monetary Policy at the Brookings Institution's data reflects participation in the labor force among those with disabilities (both COVID related and existing disabilities) sharply increased with the increasing availability of remote work.[182] Between 2020 and 2022, labor force participation among those with a disability in the age range of 16- to 44-years-old increased by roughly 13% while also increasing among the age range of those aged 45– to 64-year-old by roughly 5%.[183] While it is true those suffering from Long-COVID are more likely to participate in the labor force than those with other "existing disabilities," those suffering from long COVID are less likely to participate in the labor force than if they had never become ill.[184] All of the relevant data is suggesting the average number of workers with disabilities participating in the labor force has actually increased since the start of the pandemic, increasing by 1.5 million to 3 million.[185] This data, having been collected while remote work has been a prevalent option among nearly all industries, suggests the option of remote work (versus a mandatory RTO policy) makes individuals more likely to participate in the labor force with a disability if having the option of remote work. The data also suggests that contrary to corporate executives' claims of

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[179] BUREAU OF ECONOMIC ANALYSIS, U.S DEP'T COM., GROSS DOMESTIC PRODUCT (THIRD ESTIMATE), CORPORATE PROFITS, AND GDP BY INDUSTRY, FOURTH QUARTER AND YEAR 2021, at 1 (2022), https://www.bea.gov/sites/default/files/2022-03/gdp4q21_3rd.pdf.
[180] *Id.* at 5.
[181] *Id.* at 7-8.
[182] Louise Sheiner & Nasiha Salwati, *How Much is Long COVID Reducing Labor Force Participation? Not Much (So Far)* 1, 5 (Hutchins Ctr. On Fiscal & Monetary Policy at Brookings, Working Paper No. 80, 2022).
[183] *Id.* at 5.
[184] *Id.* at 7.
[185] *Id.* at 2.

reduced productivity among remote workers, remote workers' hours worked only reduced minimally, somewhere between 2.2% and 3.4%.[186]

As this data suggests, working remotely does not necessarily equate to a company losing profits, production, or any overall efficiency of its business model. Offering remote work, when possible, to persons suffering from Long-COVID will not result in a fundamental business change model for many sectors of the economy. As proven from the advent of the Pandemic until now, many companies have continued to operate, at least equally as profitable, by offering remote work to many of its employees. By extrapolating this business logic, companies can continue to offer those suffering from Long-COVID a reasonable accommodation to work from home in order to protect them and the risk they face at contracting COVID-19 by being forced to return to the office.

4. Reasonable Accommodation Options for those Suffering from Long-COVID

> We do not suggest that the line between a lawful refusal to extend affirmative action and illegal discrimination against handicapped persons will always be clear. It is possible to envisions situations where an insistence on continuing past requirements and practices might arbitrarily deprive genuinely qualified handicapped persons of the opportunity to participate in a coveted program. Technological advances can be expected to enhance opportunities to rehabilitate the handicapped or otherwise to qualify them for some useful employment. Such advances also may enable attainment of these goals without imposing undue financial and administrative burdens upon a State. Thus, situations may raise where a refusal to modify an existing program might become unreasonable and discriminatory.[187]

No, this language was not the words of the Court in recent times, but it is language from *Southeastern Community College* in 1979. The Court, even then, had the foresight to imagine a world in which reasonable accommodations could be made for those suffering from disabilities to allow them to participate in the programs most Americans free from a disability

[186] *Id.* at 11.
[187] Se. Cmty. Coll. v. Davis, 442. U.S. 397, 412 (1979).

have the ability to any given day. Why then has the Court been so far behind in allowing a greater number of Americans affected by disabilities reasonable accommodations in the workplace under the ADA and Section 504 of the Rehabilitation Act through disparate impact disability claims? It seems that *Choate* may provide the answer to that by the Court hiding behind its desire to give effect to its statutory objectives and the desire to keep the law within manageable bounds.[188] And I agree, establishing Long-COVID as a disability for the purposes of the ADA and Section 504 of the Rehabilitation is no easy task, but it is one that can and must be done by the Supreme Court of the United States to further enshrine disability rights and the ability of those impaired by a disability to file disparate impact claims in order to protect their health and their employment as the world attempts to transition back to full in person activities. Affording those who suffer from Long-COVID who also have a major life activity impaired by the disease to be afforded reasonable accommodations in the workplace will allow for them to protect their health while also being able to contribute to society by continuing to engage in their employment.

Currently, Long-COVID can be considered a disability under federal civil rights laws if it substantially limits one or more major life activities.[189] As noted, a major life activity can be considered a wide range of activities such as but not limited to caring for oneself, performing manual tasks, walking, standing, sitting, interacting with others, and working.[190] Even if the impairment can be treated and subdued with medicine, the disability is still considered to impair a major life activity if it would substantially limit the person in performing a major life activity when the symptoms are prevalent.[191] As identified by the Department of Health and Human Services, Long-COVID can be considered to impair a major life activity, and thus considered a disability for the purposes of Title I and Title II of the ADA and Section 504 of the Rehabilitation Act, in any of the following three scenarios:

> A person with long COVID who has lung damage that causes shortness of breath, fatigue, and related effects is substantially limited in respiratory function, among other major life activities.
>
> A person with long COVID who has symptoms of intestinal pain, vomiting, and nausea that have lingered for months is substantially limited in gastrointestinal function, among other major life activities.

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[188] Alexander v. Choate, 469 U.S. 287, 299 (1985).
[189] U.S. DEP'T HEALTH & HUM. SERVS., *supra* note 142.
[190] *Id.*
[191] *Id.*

> A person with long COVID who experiences memory lapses and "brain fog" is substantially limited in brain function, concentrating, and/or thinking.[192]

In any of these three scenarios, someone suffering from Long-COVID who was afforded the ability to work remotely would be able to protect their health to better resist contracting COVID-19 and other illnesses affecting their deteriorating health because they suffer from Long-COVID. Being forced to return to the office and work alongside other co-workers and risk further contracting COVID-19 or another illness that would only exacerbate the current symptoms would only lead to potentially more devastating outcome for those suffering from Long-COVID. Providing employees suffering from Long-COVID the ability to work remotely considering mask mandates in the office are no longer enforced will allow for those suffering from Long-COVID to protect their health while continuing to manage their disability and continue to perform their job duties just as well as if they were working in the office.

Furthermore, the Department of Labor has noted that the 2008 ADA Amendments have expanded the definition of major life activities, redefined what "regarded as" having a disability encompasses, and clarifies what types of illnesses the term "disability" includes, such as if the disability is transitory or episodic in nature.[193] As noted earlier, major life activities now includes a wide range of activities including but not limited to caring for one self, performing manual tasks, standing, lifting, walking, concentrating, thinking, communicating, and working; possibly any of these functions could be impaired by one suffering from Long-COVID and those symptoms could continue to be compounded by being forced to return to work and interact with others and thus risk contracting another illness that could exacerbate their symptoms.[194] With the ADAAA and the current ambiguous interpretation left open by the *Choate* and *Southeastern* Courts, the Supreme Court today should reverse its limiting precedent and recognize Long-COVID as a disability to protect Americans suffering from the illness and allow them to equally patriciate in today's changing society.

Turning to the *Choate* Court's concern about keeping the law within reasonable and manageable bounds concern, as the Department of Health and Human Services has noted, Long-COVID is not always a disability. It will need to be assessed and administered on a case-by-case diagnosis for each individual in order to determine if its symptoms truly impair a major life

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[192] *Id.*

[193] Off. Fed. Cont. Compliance Programs, U.S. Dep't Labor, *ADA Amendments Act of 2008 Frequently Asked Questions*, https://www.dol.gov/agencies/ofccp/faqs/americans-with-disabilities-act-amendments (last updated Jan. 1, 2009).

[194] *Id.*

activity.[195] Therefore, employers' concerns employees will be using the disease in order to decrease work hours, lower production, or abstain from returning to work will prove to have less merit seeing as each person claiming the disparate impact claim will have to prove to a court they are truly impaired in a major daily life activity. Furthermore, the ADA has identified what is considered a reasonable accommodation and has provided examples to what such reasonable accommodations employers can provide for employees who require them in order to accommodate their disability.[196] A reasonable accommodation has been defined as "any change to the application or hiring process, to the job, to the way the job is done, or the work environment allowing a person with a disability who is qualified for the job to perform the essential functions of that job and enjoy equal employment opportunities. Accommodations are considered 'reasonable' if they do not create an undue hardship or a direct threat."[197] The safeguard for employers that the accommodation is not reasonable if it creates an undue hardship or a direct threat should be all that employers need to feel confident that their business will not be unduly burdened by Americans asserting a right they should have to work safely while suffering from a disability. Examples of reasonable accommodations include but are not limited to a change in job tasks, allowing a flexible work schedule, and providing aid or a service to employees to increase access.[198]

CONCLUSION

By forcing employers who are attempting to enforce RTO mandates, such as Goldman Sachs, the Supreme Court can better protection millions of employees like my fictional couple, Susan and Mark. They, like tens of millions of Americans, suffer from Long-COVID and have lingering symptoms including brain fogginess, dizziness upon standing, and fatigue and tiredness will only continue to get worse should they be exposed to more disease and possibly another exposure of COVID-19. By allowing Susan and Mark to asset a claim under the ADA or Section 504 of the Rehabilitation Act, they could file a disparate impact disability claim and seek the reasonable accommodations they need to effectively protect their health while continuing to perform their jobs. Allowing them to work remotely would not be considered an undue burden or hardship given the evidence of prior success of remote work in their industry during the height of the Pandemic coupled with the enormous profits and efficiency levels Goldman Sachs and thousands of other companies had

[195] U.S. DEP'T HEALTH & HUM. SERVS., *supra* note 142.
[196] ADA National Network, *Reasonable Accommodations in the Workplace* (Feb. 1, 2023), https://adata.org/factsheet/reasonable-accommodations-workplace.
[197] *Id.*
[198] *Id.*

during the Pandemic when remote work was at its highest levels. Furthermore, by allowing them to work from because of their disability which impairs a major life activity through the lingering symptoms of brain fogginess, fatigue and tiredness, and limited respiratory functions, they can protect themselves against further infection from COVID-19 and other diseases negatively impacting their future health.

The Supreme Court, in recognizing Long-COVID as a disability, and analyzing these cases on a case-by-case approach, can continue to protect companies in being able to effectively run their businesses and continue to reach record profits while also protecting the millions of Americans suffering from Long-COVID and not force them to return to the office just for the sake of returning if it means that employee's desk could be just another empty chair in a few short months.