

DISABILITY “IDENTITY THEFT,” UNMASKED:
EXPLORING RECENT FALSE CLAIMS OF DISABILITY, THE
HARM, AND POTENTIAL SOLUTIONS

Stephanie Berger*

INTRODUCTION

Headlines and viral videos about disability “identity theft”—or willingness to claim disability identity to obtain “small disability perks”¹—have become increasingly common. “Woman claiming to be from ‘Freedom to Breathe Agency’ gets into viral exchange with store employee over mask policy” read one headline about a video viewed by millions on social media of a woman confronting a store employee over face mask requirements during the early months of the COVID-19 pandemic.² This woman and others protested face mask requirements by falsely claiming they had disabilities that exempted them from wearing masks.³ These stories cover fraud in many forms, from the example mentioned above, to people misrepresenting pets as assistance animals, to suspicions about whether handicapped parking placards are legitimate, or to whether a student really needs more time for an exam.⁴ Fear of people falsely claiming to have disabilities

* Adjunct Professor of Law, George Mason University Antonin Scalia Law School; Trial Attorney, U.S. Department of Justice, Civil Rights Division, Disability Rights Section; J.D., 2013, Harvard Law School. The comments, thoughts, and opinions in this Article are those of the author and are not associated with the Department of Justice.

¹ See Doron Dorfman, *Fear of the Disability Con: Perceptions of Fraud and Special Rights Discourse*, 53 LAW & SOC’Y REV. 1051, 1054 (2019) [hereinafter Dorfman, *Disability Con*] (using this phrase to describe the benefits that can be obtained by faking disability).

² Aris Folley, *Woman claiming to be from ‘Freedom to Breathe Agency’ gets into viral exchange with store employee over mask policy*, THE HILL (Aug. 9, 2020), <https://thehill.com/blogs/blog-briefing-room/news/511255-woman-claiming-to-be-from-freedom-to-breathe-agency-gets-into/>. See *infra* Section III(A) for further discussion of face mask fraud.

³ *Id.*

⁴ See, e.g., Katrin Tilbury, *Fake Service Dogs, Real Problems*, AP NEWS (May 16, 2018), <https://apnews.com/article/1a28f8e528424fdca2040ea8139e3014> (discussing service animal fraud); Christina Morales, *Mask Exemption Cards From the ‘Freedom to Breathe Agency’? They’re Fake*, N.Y. TIMES (June 18, 2020), <https://www.nytimes.com/2020/06/28/us/fake-face-mask-exemption-card-coronavirus.html?smid=FB-share> (discussing face mask fraud); Jaclyn Greenberg, *What To Know Before You Judge Someone For Using A Disability Accessible Parking*

has taken hold in society. It can be difficult to know which rumors of this disability identity theft are myths versus which have truth to them. However, people in at least some instances do pretend to have disabilities, and as these lies hurt people with actual disabilities, much attention has been paid to develop ways to potentially combat this fraud.

People with disabilities⁵ have faced a long history of discrimination and marginalization, with disability traditionally seen by many as a negative characteristic.⁶ Although discrimination also exists based on other fundamental aspects of people's identities, such as their race, color, national origin, and gender, false claims of these identities in order to receive benefits under the law are uncommon. So, what makes disability different?

This Article examines disability identity theft to determine why it occurs, whether it causes harm, and potential solutions to the problem. First, it looks at several reasons why people falsely claim disability but do not falsely claim membership in other protected classes. These reasons include: (1) disability's different treatment under the law (especially the Americans with Disabilities Act) than that of other protected classes; (2) the existence of hidden or invisible disabilities; (3) the pervasive lens of the medical model of disability; and (4) limits to people's sense of ethics that would otherwise keep them from perpetrating fraud. Second, this Article considers the question of whether there is any actual harm in people pretending to have disabilities. Third, this Article explores timely instances of disability identity theft. Although many fears of disability fraud may be exaggerated, there are two contexts—efforts to avoid wearing face masks during the COVID-19 pandemic and misrepresenting pets as service ani-

Spot, HUFFINGTON POST (June 29, 2021), https://www.huffpost.com/entry/disabled-parking-placard-accessibility_n_60d8b00ae4b0996083acc780 (editorial discussing personal experience with being questioned about the validity of a disability parking placard); Peter Greene, *Fake Learning Disabilities And The Tyranny Of Testing Time*, FORBES (Mar. 16, 2019), <https://www.forbes.com/sites/petergreene/2019/03/16/fake-learning-disabilities-and-the-tyranny-of-testing-time/?sh=593b7f0b7bbf> (discussing potential abuse of disability testing accommodations).

⁵ For consistency with most sources cited, this Article uses "person-first" language; that is, language that places individuals first, rather than defining them by their disabilities. However, a growing number of disability advocates and scholars disagree with this approach and instead prefer "identity-first" language to emphasize people with disabilities as a social minority, highlight disability as a social concern, and encourage disability culture. For a discussion of disability language in contemporary society, see Romel W. Mackelprang et al., *DISABILITY: A DIVERSITY MODEL APPROACH IN HUMAN SERVICE PRACTICE* 19-23 (4th ed. 2022).

⁶ See, e.g., Derek Warden, *The Americans with Disabilities Act at Thirty*, 11 CAL. L. REV. ONLINE 308, 309-11 (2020) (discussing disability discrimination prior to the ADA's passage).

mals—in which documented disability fraud under the ADA has recently occurred. In both areas, this Article looks at the problem, how the ADA and other relevant laws apply, and recent case law on the issue, before discussing potential solutions to fraudulent claims of disability identity. The solutions Section begins by considering problematic proposals for requiring proof or certification of the disability or need for accommodation, codifying and better enforcing punishment for fraud, and potentially making other changes to the ADA. This Article concludes by suggesting that the only tenable solution requires changes in attitudes toward disability and how society addresses the varied needs of its members.

BACKGROUND

I. REASONS WHY PEOPLE FAKE DISABILITY MORE THAN MEMBERSHIP IN OTHER PROTECTED CLASSES

The willingness to falsely claim disability identity likely exists for several reasons. To begin, the law treats disability differently than other protected classes, making it easier to fake. Additionally, the invisible or hidden nature of many disabilities contributes to possible fraud. Also, the historical view of disability as an illness or medical condition may make people more willing to treat it as a characteristic that can be faked instead of a core identity. And finally, although people may know it is wrong to pretend to have a disability, they may not see the harm in availing themselves of disability rights laws because they cannot see a victim in their actions.

A. *Disability Treated Differently Under the Law Than Other Protected Classes*

The Americans with Disabilities Act (ADA)⁷ differs from other civil rights laws. First, unlike other statutes that merely prohibit dis-

⁷ 42 U.S.C. § 12101. This Article will predominately focus on the protections and rights afforded to individuals under Titles II and III of the ADA. Section 504 of the Rehabilitation Act of 1973, 23 U.S.C. § 794, prohibits discrimination on the basis of disability in programs conducted by federal agencies and in programs receiving federal financial assistance, and is typically interpreted to provide the same coverage as the ADA. In addition, other laws that provide benefits to or prohibit discrimination against individuals with disabilities, such as the Air Carriers Access Act, Fair Housing Act, and Social Security Act, are briefly mentioned in this Article, but are not discussed in as much detail.

crimination, the ADA provides some level of “positive rights” for people with disabilities.⁸ The ADA prohibits discrimination against people with disabilities in employment (Title I);⁹ state and local government services, programs, and activities (Title II);¹⁰ and public accommodations, which are typically places where people can purchase goods and services (Title III).¹¹ But the ADA not only prohibits malicious exclusion from these settings; it also places affirmative obligations on entities to remove barriers, provide program access, and provide reasonable accommodations and modifications to people with disabilities.¹² From helping a customer shop, to providing a sign language interpreter, to constructing a new building with a ramp in addition to stairs, measures required under the law for people with disabilities can range from quick fixes to costly endeavors. And while disputes still exist in many situations as to precisely what the ADA requires,¹³ this redistributive aspect of the ADA imbues it with a different kind of power than merely proscriptive statutes. Therefore, while pretending to be a different gender or ethnicity will not typically provide benefits under the law, pretending to have a disability could mean you are entitled to something more, or exempt from something you wish to avoid. Some individuals thus feel justified in faking a disability either because they believe that individuals with disabilities should not be given “special” treatment or simply because they want access to that same treatment.

⁸ See Mackelprang et al., *supra* note 5, at 12-13; Doron Dorfman, *(Un)usual Suspects: Deservingness, Scarcity, and Disability Rights*, 10 U.C. IRVINE L. REV. 557, 560-61 (2020) [hereinafter Dorfman, *(Un)usual Suspects*].

⁹ 42 U.S.C. §§ 12111-12117.

¹⁰ *Id.* §§ 12131-12134.

¹¹ *Id.* §§ 12181-12189.

¹² See regulations on barrier removal under Title III, 28 C.F.R. § 36.304; program access under Title II, 28 C.F.R. § 35.150; reasonable accommodations under Title I, 29 C.F.R. § 1630.9; and reasonable modifications under Titles II and III, 28 C.F.R. §§ 35.130(b)(7)(i), 36.302. Although many of the principles and theories discussed in this Article also apply in the employment (Title I) and state and local government (Title II) contexts, this Article focuses on Title III, where we most easily find examples of disability fraud. For this reason, the rest of this Article refers specifically to Title III law and regulations, although other parts of the Title I and Title II law and regulations typically provide similar, or the same, coverage.

¹³ For example, lower courts are currently split over whether Title III's protection for places of public accommodation applies to websites. Compare Cullen v. Netflix, Inc., 880 F. Supp. 2d 1017, 1024 (N.D. Cal. 2012) (holding that Title III does not cover Netflix because it offers services only online), with Nat'l Ass'n of the Deaf v. Netflix, Inc., 869 F. Supp. 2d 196, 201-02 (D. Mass. 2012) (holding that Title III does cover Netflix).

Second, while other civil rights statutes do not contain definitions for their protected classes, the ADA provides a rather detailed definition of disability. For example, Title VI of the Civil Rights Act of 1964 prohibits discrimination based on race, color, or national origin in any program or activity that receives federal funds or other federal financial assistance.¹⁴ These characteristics are not defined in the statute, perhaps because they are considered immutable and obvious. In contrast, under the ADA, a person with a disability is defined as someone with a physical or mental impairment that substantially limits one or more of their major life activities, a record of such an impairment, or a person who is regarded as having such an impairment.¹⁵ During the years immediately following the ADA's passage in 1990, the courts narrowed their interpretation of disability so much as to render it almost meaningless, leading to the passage of the ADA Amendments Act (ADAAA) in 2008.¹⁶ The ADAAA's purpose was to reinstate the broad scope of protection for people with disabilities by clarifying whether someone has a disability under the ADA. The ADAAA says that this question should not be a burdensome analysis.¹⁷

However, to help make the analysis even more straightforward, the ADA regulations now contain detailed considerations regarding what constitutes a disability.¹⁸ For example, the determination of whether an impairment substantially limits a "major life activity" includes considering the conditions under which the individual performs it, and the duration of time it takes the individual to perform it compared to most people in the general population.¹⁹ In addition, the regulations list specific "predictable assessments," or conditions that will in virtually all cases be considered disabilities, such as deafness, blindness, intellectual disabilities, autism, cancer, cerebral palsy, diabetes, HIV, and post-traumatic stress disorder (PTSD).²⁰ Despite the ADA's goal of making it easier to determine disability, however, many ADA cases are still dismissed based on the question of whether

¹⁴ 42 U.S.C. § 2000d.

¹⁵ See 42 U.S.C. § 12102(1); 28 C.F.R. § 36.105.

¹⁶ See Pub. L. No. 110-325, 122 Stat. 3553 (2008).

¹⁷ See Pub. L. No. 110-325, 122 Stat. 3553 (2008) (current version at 42 U.S.C. §§ 12102(4), 12101(b)(5)); 28 C.F.R. § 36.105(d)(1)(i).

¹⁸ See 28 C.F.R. § 36.105.

¹⁹ See *id.* § 36.105(d)(3)(i).

²⁰ See *id.* § 36.105(d)(2).

an individual even has a disability,²¹ unlike claims under other civil rights laws, such as Title VI, which rarely focus on whether the individual possesses the protected characteristic.

In addition, although this Article focuses on the ADA, it is worth noting that other areas of the law provide a concrete definition of “disability,” albeit different from the ADA’s. For example, the Social Security Act defines “disability” for the purpose of disability benefits as an “inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months.”²² And the Individuals with Disabilities Education Act (IDEA), which covers education, defines a child with a disability as a child “with intellectual disabilities, hearing impairments—including deafness, speech or language impairments, visual impairments—including blindness, serious emotional disturbance, . . . orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities.”²³

Although including definitions of disability in statutes may make disability easier to prove, it may also have the unintended effect of encouraging disability fraud. As discussed above, the ADAAA made clear that the ADA’s definition of disability is meant to provide “broad coverage . . . to the maximum extent” permissible under the law.²⁴ People may thus feel emboldened to seek protections under the ADA, even though they do not fall under the law’s scope, knowing that the law discourages others from questioning their status. Additionally, an individual can claim certain conditions or limitations that would be difficult for others to question, unless they can request proof, which the law often prohibits.²⁵ Unfortunately, this also causes more public suspicion into the validity of people’s disabilities.²⁶

²¹ See generally Nicole Buonocore Porter, *Explaining “Not Disabled” Cases Ten Years After the ADAAA: A Story of Ignorance, Incompetence, and Possibly Animus*, 26 GEO. J. ON POVERTY L. & POL’Y 383, 385 (2019) (explaining that post-ADAAA, many courts still perform this threshold inquiry incorrectly).

²² 42 U.S.C. § 423(d)(1)(A).

²³ 20 U.S.C. § 1401(3)(A)(i).

²⁴ 42 U.S.C. § 12102(4)(A).

²⁵ See, e.g., *infra* Section III(B)(2) (discussing the prohibition on requesting service animal certification).

²⁶ See *infra* Section II.

B. *Hidden or Invisible Disabilities*

Hidden or invisible disabilities also make faking a disability easier. The Invisible Disabilities Association defines an invisible disability as “a physical, mental, or neurological condition that is not visible from the outside, yet can limit or challenge a person’s movements, senses, or activities.”²⁷ These can include conditions like chronic pain or fibromyalgia, Crohn’s disease, lupus, diabetes, depression, mental illness, and intellectual or developmental disorders.²⁸ Because no one knows if someone has an invisible disability unless the person discloses it, we cannot track exactly how many people have these kinds of disabilities.²⁹ People may not know that a coworker, friend, or even family member has an invisible disability unless they share or happen to be showing outward signs of it, such as a during a flare up of a chronic condition.³⁰

Sadly, society tends to be more dismissive of invisible disabilities since there is a “common misconception about how disability should manifest itself—being clearly visible and easily detectable—thus, presumably, signaling a higher degree of deservingness.”³¹ Individuals with invisible disabilities may therefore face skepticism because their disabilities are not easily identifiable. However, the hidden nature of such disabilities also makes them easier to falsify, since a person who is willing to fraudulently assert an invisible disability can also feign outrage at anyone who questions their claim.

Misrepresenting oneself as a member of other protected classes seems to occur less often, but there have been a few recent notable examples. For example, Rachel Dolezal, a former college instructor and activist, received harsh media attention in 2015 for presenting herself as a black woman despite having no black ancestry.³² Nonethe-

²⁷ INVISIBLE DISABILITIES ASSOCIATION, <https://invisibledisabilities.org/what-is-an-invisible-disability/> (last visited May 16, 2022).

²⁸ See *id.*

²⁹ See Andrew Solomon, *What Happens When You’re Disabled but Nobody Can Tell*, N.Y. TIMES (July 10, 2020), <https://www.nytimes.com/2020/07/10/style/invisible-disabilities.html>.

³⁰ See Naomi Gingold, *People With ‘Invisible Disabilities’ Fight for Understanding*, NAT’L PUB. RADIO (Mar. 8, 2015), <https://www.npr.org/2015/03/08/391517412/people-with-invisible-disabilities-fight-for-understanding>; Solomon, *supra* note 29.

³¹ Dorfman, *(Un)usual Suspects*, *supra* note 8, at 563.

³² See Kirk Johnson et al., *Rachel Dolezal, in Center of Storm, Is Defiant: ‘I Identify as Black,’* N.Y. TIMES (June 16, 2015), <https://www.nytimes.com/2015/06/17/us/rachel-dolezal-nbc-today-show.html>.

less, fraud regarding other protected classes is likely harder to perpetuate because it is easier to identify a person's race, national origin, or gender, for example.

C. *The Lens of the Medical Model*

Society has historically viewed disability through the lens of the medical model. Now disfavored, the medical model sees people with disabilities as weak and sick, and disability as something that needs to be treated as a medical condition.³³ This model tends to encourage paternalism and custodialism, as many people see illness as a reason an individual cannot care for themselves or contribute fully to society.³⁴ Contrast the medical model with the more commonly accepted social model, which “posits that disability is not something that is inherent in the body of the person with a disability; instead, disability results from the interaction between an individual’s physical or mental characteristics and the social choices and attitudes that attach disadvantage to those characteristics.”³⁵ Whereas the medical model focuses on providing care for a disability, or treating a disability as a condition, the social model focuses on looking at the ways that society puts some people at an advantage over others.³⁶ Advocates for the social model find that the “language [of disability antidiscrimination law] has become rooted in assisting individuals with disabilities to fit into existing systems rather than in fixing the systems that disable and use an able body standard.”³⁷

In addition, while disability bears resemblance to other minority identities, it is also experienced differently. In terms of similarities, people of color, women, and LGBTQ people, among others, have all faced marginalization and oppression, and been denied opportunities just as those with disabilities have. Sexism and racism are pernicious in many of the same ways ableism is, including the perpetuation of stereotypes and negative beliefs.³⁸ However, while communities and

³³ See, e.g., Angélica Guevara, *The Need to Reimagine Disability Rights Law Because the Medical Model of Disability Fails Us All*, 2021 WIS. L. REV. 269, 277-79 (2021); see also Bradley A. Areheart, *When Disability Isn't “Just Right”: The Entrenchment of the Medical Model of Disability and the Goldilocks Dilemma*, 83 IND. L.J. 181, 185-92 (2008).

³⁴ See, e.g., SAMUEL R. BAGENSTOS, *DISABILITY RIGHTS LAW* 10 (3d ed. 2010).

³⁵ *Id.*

³⁶ See *id.*; see also Guevara, *Reimagine Disability Rights Law*, *supra* note 33, at 280-84.

³⁷ *Id.* at 287.

³⁸ See Mackelprang, *supra* note 5, at 13-14.

families of color, for example, often pass down a shared culture and pride in identity to their children, the same is not always true for children with disabilities, who are more likely to be raised by families and in communities in which their disability makes them an outlier.³⁹ Families of people with disabilities may in fact perpetuate negative stereotypes by focusing on their children's need for protection and medical treatment, thus reinforcing custodialism and the medical model. Although public disability visibility has increased in recent years, people with disabilities may not experience the same built-in formulation of their disability identity as those belonging to other protected classes.⁴⁰ As a result, some people may also have less respect for disability as a culture, making them willing to pretend disability while they would not be willing to claim a race or gender other than their own.

Disability activists aim to strengthen the disability community and use laws like the ADA to move society closer to the social model. However, these efforts have not yet fully changed the longstanding medical-focused attitudes toward people with disabilities. Furthermore, even full recognition of the social model would not change the existence of the medical aspect of disability; many disabilities do, in fact, require some level of medical treatment or management. As a result, some people may look at faking disability as the same thing as "faking sick" to get out of a work or social obligation—something that one should not technically do, but that is not morally reprehensible.

D. *Limits to Our Sense of Ethics*

The concept of "bounded ethicality" means that people's ethics have a limit; if they cannot see a victim who suffers, then they feel better about taking actions even when society calls those actions "wrong."⁴¹ Bounded ethicality also leads people to overestimate their righteousness by limiting their ability to see tension between their self-interest and others' welfare.⁴² For example, as discussed in more detail below,⁴³ people who do not want to wear face masks during

³⁹ See *id.* at 135-38.

⁴⁰ See *id.* at 142-46.

⁴¹ See Doron Dorfman, *Suspicious Species*, 2021 U. ILL. L. REV. 1363, 1385-87 (2021) [hereinafter Dorfman, *Suspicious Species*].

⁴² See *id.* at 1385.

⁴³ See *infra* Section III(A).

periods of increased risk of COVID-19 transmission may not see the harm in falsely claiming that they have disabilities; disability rights protections are not a scarce resource, and availing themselves of disability accommodations does not directly remove anyone else's ability to do the same. Those who misrepresent pets as assistance animals may also apply the same logic, feeling they have not directly harmed anyone, instead they are simply circumventing rules that are unfair or should not apply to them. People may also justify their actions because they feel they have rightfully fooled or thwarted big businesses, greedy management companies, or other more abstract entities—not actual people, and not people with disabilities.⁴⁴ However, these actions still indirectly harm people with disabilities.⁴⁵

II. BUT, WHAT'S THE HARM?

Even if people are more willing to fake a disability than membership in other protected classes, does it matter? More specifically, does faking disability to obtain certain benefits cause any injury, or is it a “victimless crime?” Unfortunately, false claims of disability identity do cause concrete harm.

Those who fake disability contribute to a negative cycle in which others, because they have heard about or experienced false claims of disability, may think that people who do have disabilities are also faking them. Professor Doron Dorfman writes about society's harmful belief in the existence of overwhelming numbers of people engaging in a “disability con.”⁴⁶ People are now far more likely to doubt the truthfulness of individuals with disabilities. As Dorfman discusses, it is difficult to assess how much of a “kernel of truth” there is to these now pervasive fears that people are faking disability.⁴⁷ However, the actual prevalence of the disability con is less critical than how prolific it is in people's minds.⁴⁸ And while it is unknown precisely how many people are faking a disability, a belief in disability cons negatively affects people who have disabilities. Dorfman found that 58 percent

⁴⁴ See Dorfman, *Suspicious Species*, *supra* note 41, at 1386-87.

⁴⁵ See *infra* Section II.

⁴⁶ See generally Dorfman, *Disability Con*, *supra* note 1, at 1053.

⁴⁷ See *id.* at 1055.

⁴⁸ See *id.*

of people with disabilities surveyed agreed that there are situations in which they worry others may be skeptical of their disabilities.⁴⁹

Fear of the disability con does not just reinforce negative feelings toward people with disabilities—it also leads to negative actions toward them. People with disabilities report hostility from others who question whether their disability status is legitimate.⁵⁰ Even when people with disabilities do not face open doubt, their past experiences can cause them to hesitate to go to public places or to eschew the use of benefits for fear that they will be harassed.⁵¹

For example, individuals who use service animals for psychiatric disabilities like PTSD may experience questioning when taking their dogs in public. Such individuals do not fit the stereotypical image of a blind person with a seeing-eye dog, and this paired with media coverage of untrained dogs wearing fake service animal vests into stores and restaurants may lead to doubt of legitimate service animals.⁵² People with invisible disabilities also suffer skepticism, such as those with mobility disabilities who need parking placards because they cannot walk long distances, but still have been questioned because they do not use a wheelchair.⁵³

A timely example in the context of the COVID-19 pandemic includes individuals with hidden disabilities that were considered qualifying conditions to obtain vaccination earlier than it was available to members of the general population, before vaccine availability was widespread. These individuals sometimes faced both intrusive questions from people who wanted to know how they qualified early, and feelings of shame because others believed that they were lying about having a disability to “cut the line.”⁵⁴

⁴⁹ See *id.*

⁵⁰ See, e.g., Andrew Pulrang, *We Need to Stop Patrolling the Borders of Disability*, FORBES (June 30, 2020), <https://www.forbes.com/sites/andrewpulrang/2020/06/30/we-need-to-stop-patrolling-the-borders-of-disability/?sh=26f051792ae1>.

⁵¹ See Dorfman, *Disability Con*, *supra* note 1, at 1080-82 (discussing interviews with individuals with disabilities hesitant to seek benefits).

⁵² See, e.g., Caroline J. Cordova, *Preventing the Delegitimization of Service Animals: A Proposal to Keep Service Animal Law from Going to the Dogs*, 23 CHAP. L. REV. 247, 261 (2020); Pulrang, *supra* note 50.

⁵³ See, e.g., Gingold, *supra* note 30.

⁵⁴ See Tara Parker-Pope, ‘How Did You Qualify?’ For the Young and Vaccinated, Rude Questions and Raised Eyebrows, N.Y. TIMES (Mar. 26, 2021), <https://www.nytimes.com/2021/03/26/well/live/vaccine-shaming-medical-privacy.html>.

Again, in the context of COVID-19, there will likely be an increase in individuals who require some form of long-term accommodations because of its lasting symptoms, a condition which has been referred to as “long-COVID.”⁵⁵ In addition, some individuals may develop disabilities as a result of having COVID.⁵⁶ Individuals who are willing to fake COVID-related disabilities to gain advantage could cast doubt on accommodations for those who actually need them—such as testing accommodations for those with difficulty concentrating because of impaired memory, or modifying a policy for someone who cannot stand in line for long periods of time because of difficulty breathing from lung damage.⁵⁷

III. RECENT INSTANCES OF DISABILITY FRAUD

There are many areas in which concerns of disability fraud arise. Although it is impossible to know the actual prevalence of disability fraud,⁵⁸ this Section focuses on two areas where there have been recent cases: face mask fraud during the COVID-19 pandemic and fraud regarding assistance animals.

A. *Attempts to Circumvent Face Mask Requirements During the COVID-19 Pandemic*

Throughout the COVID-19 pandemic, advice has shifted regarding the use of face masks, leading to ever-changing mandates—or mandates against mandates—by federal, state, and local governments.⁵⁹ These mandates sometimes complement and sometimes con-

⁵⁵ See U.S. Dep’t of Just. & U.S. Dep’t of Health and Human Servs., *Guidance on “Long COVID” as a Disability Under the ADA, Section 504, and Section 1557*, https://www.ada.gov/long_covid_joint_guidance.pdf.

⁵⁶ See *id.* (citing *Post-COVID Conditions*, CTRS. FOR DISEASE CONTROL AND PREVENTION (Sept. 16, 2021), https://www.cdc.gov/coronavirus/2019-ncov/long-term-effects/index.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Flong-term-effects.html).

⁵⁷ See *id.*

⁵⁸ See *supra* Part II.

⁵⁹ See, e.g., Michelle Price, *Big cities drop more COVID-19 measures in push for normalcy*, ABC NEWS (Mar. 4, 2022), <https://abcnews.go.com/Health/wireStory/nyc-lift-school-mask-rules-vaccine-mandates-dining-83251971> (discussing cities lifting mask mandates); Jonathan Wolfe, *The Great School Unmasking*, N.Y. TIMES (Mar. 4, 2022), <https://www.nytimes.com/2022/03/04/briefing/the-great-school-unmasking.html> (discussing states like Texas and Florida that have fought to ban mask mandates).

flict with the overlapping policies of entities like schools and businesses, which has both exacerbated confusion and emboldened negative responses by those who disagree with how mask policies have been implemented.⁶⁰ Some people have invoked the ADA as a reason they should have access to public accommodations without complying with face mask policies in places where and during times they are required.

1. The Problem: A False Sense of Entitlement to Access, Without a Legal Basis

Some people who do not want to wear a face mask in public accommodations where masks are required, either because of political or personal beliefs, falsely claim disability because they believe it to be a “get out of jail free” card.⁶¹ However, while some people legitimately cannot wear face masks because of disability, even those with actual disabilities typically are not legally entitled to enter businesses without a mask while valid face mask mandates are in place.

Some individuals with disabilities cannot wear a face mask either at all or for the extended time required to do standard things like shop in a store, attend a concert or meeting, or visit a place providing a service, like a hairdresser or a doctor’s office. These may include people with breathing disabilities, individuals with PTSD who cannot stay calm when their faces are covered, people with autism who are sensitive to touch, people with mobility disabilities who may not be able to put on or remove a face mask without assistance, or individuals who use assistive technology or a ventilator that requires uncovered use of their mouth.⁶² The Center for Disease Control (CDC) previously stated that masks should not be worn by a person who cannot safely

⁶⁰ See, e.g., Yuki Noguchi, *With mask mandates expiring, businesses bet on their own policies*, NPR (Feb. 27, 2022), <https://www.npr.org/sections/health-shots/2022/02/27/1082879539/with-mask-mandates-expiring-businesses-bet-on-their-own-policies> (discussing businesses choosing to continue mask requirements despite mandates being lifted); Catherine Thorbecke, *Why businesses can still require masks after states drop mandates*, ABC NEWS (Mar. 10, 2021), <https://abcnews.go.com/Business/businesses-require-masks-states-drop-mandates/story?id=76363007> (discussing tensions faced by businesses that require masks after mandates are lifted).

⁶¹ See Elizabeth Pendo et al., *Resolving Tensions Between Disability Rights Law and Covid-19 Mask Policies*, 80 MD. L. REV. ONLINE 1, 5, 11 (2020); Pulrang, *supra* note 50.

⁶² See *The ADA and Face Mask Policies*, SE. ADA CTR. (Mar. 10, 2022), <https://adasoutheast.org/disability-issues/ada-and-face-mask-policies>.

wear a mask for disability-related reasons,⁶³ and more recently has stated that people with disabilities or their caregivers can best assess whether they need to wear a mask.⁶⁴

Of course, it is not always easy for a business to determine who is a person with a disability—especially given the prevalence of people with invisible disabilities.⁶⁵ People who do not want to wear face masks have attempted to exploit this. For example, one organization calling itself the “Freedom to Breathe Agency” sells “Face Mask Exempt” cards which state “[w]earing a face mask poses mental and/or physical risk to me. Under the [ADA], I am not required to disclose my condition to you.”⁶⁶ The card provides a “violation reporting number” that is the Department of Justice’s (DOJ) ADA information hotline, staffed by employees in the DOJ’s Disability Rights Section who are then tasked with explaining the falsehood of the card.⁶⁷ The cards also originally bore the DOJ’s logo, lending it even more false credibility.

In response, the DOJ issued a “COVID-19 ALERT” stating:

The Department of Justice has been made aware of postings or flyers on the internet regarding the [ADA] and the use of face masks due to the COVID-19 pandemic, many of which include the Department of Justice’s seal. These postings were not issued by the Department and are not endorsed by the Department. The Department urges the public not to rely on the information contained in these postings⁶⁸

In addition, the DOJ issued a press release stating, “[t]he ADA does not provide a blanket exemption to people with disabilities from complying with legitimate safety requirements necessary for safe operations.”⁶⁹

⁶³ *Improve the Fit and Filtration of Your Mask to Reduce the Spread of COVID-19*, CTRS. FOR DISEASE CONTROL AND PREVENTION (Apr. 26, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/mask-fit-and-filtration.html>.

⁶⁴ *Use and Care of Masks*, CTRS. FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/about-face-coverings.html>.

⁶⁵ See Pendo, *supra* note 61, at 5.

⁶⁶ See, e.g., Morales, *supra* note 4, at 1-2.

⁶⁷ See *ADA Information Line*, U.S. DEP’T OF JUST., <https://www.ada.gov/info/line.htm>.

⁶⁸ *COVID-19 ALERT: Fraudulent Face Mask Flyers*, U.S. DEP’T OF JUST., https://www.ada.gov/covid-19_flyer_alert.html.

⁶⁹ *Department of Justice Warns of Inaccurate Flyers and Postings Regarding the Use of Face Masks and the Americans with Disabilities Act*, U.S. DEP’T OF JUST., <https://www.justice.gov/opa/pr/departement-justice-warns-inaccurate-flyers-and-postings-regarding-use-face-masks-and>.

2. How the ADA Applies to Face Mask Policies

In actuality, the ADA does not provide a wholesale exemption from wearing a mask when one is reasonably required. Under the ADA, public accommodations have the right to impose necessary eligibility criteria neutrally to all clients or customers, including legitimate safety requirements, even if that means people with disabilities will be excluded.⁷⁰ Such safety requirements must be based on actual risks and not stereotypes.⁷¹ Prior to the widespread availability of vaccinations, and also during waves of particularly virulent strains like Omicron, it was likely legitimate under the ADA to deny entry to individuals who either could not or refused to wear masks in indoor public places. This is because of the risk they would spread the COVID-19 virus, as explained by the CDC and other public health organizations.⁷² The result of this consideration may change, however, in light of changing guidance from the CDC regarding the importance of masking to reduce the spread of COVID-19.⁷³

When a business or service validly excludes people because of legitimate safety requirements, it will still be required to provide people with disabilities reasonable modifications, if possible, unless doing so would be unduly burdensome or expensive. This means changing their policies, practices, or procedures to provide alternative goods or services.⁷⁴ Examples of reasonable modifications to a face mask policy could include providing customers curbside pickup, no-contact delivery, or offering services by telephone or video call. These obligations exist even if the individual is known to have COVID-19—even though they are likely to be considered a direct threat to the health

⁷⁰ See 28 C.F.R. §§ 36.301(a)-(b); 28 C.F.R. § 36, App. C (preamble guidance).

⁷¹ See *id.* § 36.301(b).

⁷² See, e.g., *Omicron Variant: What You Need to Know*, CTRS. FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/variants/omicron-variant.html> (recommending wearing a mask in high transmission areas).

⁷³ See Berkeley Lovelace Jr. & Erika Edwards, *Indoor mask use no longer necessary across most of the U.S., CDC says*, NBC NEWS (Feb. 25, 2022), <https://www.nbcnews.com/health/health-news/cdc-indoor-masking-no-longer-necessary-us-rcna17686> (discussing CDC changing its guidance on mask requirements in February 2022). At the time of this Article's review and publication, the CDC was in the process of relaxing its masking recommendations, while acknowledging that increased masking may be necessary again in the future. See *id.* ("We want to give people a break from things like mask wearing when levels are low, and then have the ability to reach for them again should things get worse in the future.").

⁷⁴ See 28 C.F.R. § 36.302(a).

and safety of others—if the reasonable modification can still be provided safely.⁷⁵

Those making false disability claims appear not to understand the ADA, which does not provide them the means to accomplish their anti-mask goals. Their false claims also muddy the waters for those who legitimately cannot wear a face mask because of a disability by causing confusion for public accommodations. These businesses likely want to do the right thing, but they do not know how to deal with those who refuse to wear masks when required, and they cannot determine how to separate those who are individuals with disabilities actually entitled to reasonable modifications from those who are faking.

3. Recent Cases about Challenges to Face Mask Policies

Although the ADA does not actually provide anti-maskers with the means to avoid wearing masks in public when they are mandated, there have still been several cases brought by individuals claiming discrimination because of public accommodations' mask requirements. Courts tend to dismiss these cases for two reasons. First, plaintiffs have not sufficiently alleged disability, either because of lack of understanding of the law or because they were invalidly claiming disability identity. Second, if the plaintiff did have a disability, they could not enter the store without a mask because wearing a face mask during the beginning of the pandemic was a legitimate safety requirement.

There have been numerous challenges under Title III of the ADA to face mask requirements where the court found that the plaintiff did not sufficiently allege a disability. Some of these plaintiffs were people who did not actually have disabilities. For example, in *Prager v. Allina Health*, the plaintiff visited a health clinic and was told he would not be treated unless he put on a face mask.⁷⁶ The district court found that the plaintiff did not sufficiently allege a disability, as instead of claiming he had any particular condition, he stated only that he was a “disabled American” and was “forced against his will to wear a mask, in fact a blue mask known to contain graphene in nano-sized breathable particles which cause severe lung damage,” and that “by being forced to wear the dangerous mask . . . [he] experienced imme-

⁷⁵ See 28 C.F.R. § 36.208 (direct threat provision).

⁷⁶ See 2021 WL 4895277, at *1 (D. Minn. Oct. 20, 2021).

diate difficulty in breathing, had a lowered oxygen intake and an increased CO₂ intake . . . experienced hypoxia . . . [and] may have breathed in graphene particles.”⁷⁷ The court found this insufficient to support an ADA claim and also found that the plaintiff had failed to allege any adverse action taken against him, saying that instead, it appeared that the clinic had “acted to enforce an important public health policy to ensure [plaintiff’s] safety and the safety of those around him.”⁷⁸

Similarly, in *Pletcher v. Giant Eagle*, the district court held that a preliminary injunction was not necessary against a grocery store’s mask policy.⁷⁹ In this consolidated action, plaintiffs claimed that Giant Eagle’s mask policy requiring customers to wear face coverings violated the ADA, and they sought an injunction to permit them to shop without a mask.⁸⁰ Giant Eagle responded that it already provided reasonable modifications to its mask policy, including allowing other face coverings for those who could not wear masks such as face shields, as well as other means to access groceries such as curbside service, home delivery, and personal shoppers.⁸¹ As a preliminary matter, the plaintiffs’ claims failed because they did not establish they were people with disabilities who could not wear face masks or shields.⁸² In particular, one of the plaintiffs posted statements on social media that he was able to wear a mask but did not want to, stating “I’m in excellent health . . . I have a right to refuse wearing a mask. No one can legally make me ‘[b]uy’ masks.”⁸³ He also wrote:

I do what the hell I want. I go outside when I want. If stores won’t welcome (sic) in they lose my business. I’m not wearing a mask and I’m not social distancing. This is my country and I’m a free man. Anyone that tries to take that for (sic) me is a tyrant.⁸⁴

The plaintiff also repeatedly entered Giant Eagle stores without a mask to cause a scene, leading to his arrest for disorderly conduct.⁸⁵

⁷⁷ *Id.* at *1, 3 (internal quotation marks omitted).

⁷⁸ *Id.* at *3.

⁷⁹ See 2020 WL 6263916, at *3-6 (W.D. Pa. Oct. 23, 2020).

⁸⁰ See *id.* at *1.

⁸¹ See *id.*

⁸² See *id.* at *3.

⁸³ *Id.* (internal quotation marks omitted).

⁸⁴ *Id.* at *4 (internal quotation marks omitted).

⁸⁵ See *Pletcher*, 2020 WL 6263916, at *5.

In other COVID-19 face mask cases dismissed for insufficiently alleging a disability, it is not as clear whether the plaintiffs were perpetuating disability fraud or simply did not understand the pleading requirements.⁸⁶

In other cases, plaintiffs have sufficiently pled disability, but have not proven that the public accommodation must then provide them unmasked access. For example, in *Hernandez v. El Pasoans Fighting Hunger*, the district court found that a food bank could appropriately exclude an individual with a disability who could not wear a mask.⁸⁷ Although the court found that the plaintiff had sufficiently alleged the disabilities of asthma and PTSD, it also found that he had not alleged discrimination because the food bank offered him a reasonable modification—home delivery of food or access to a “mobile pantry” allowing him to pick up food without entering. Finding the plaintiff was not entitled to enter without a mask,⁸⁸ the court dismissed the complaint with prejudice.⁸⁹ Other courts have held that, where face shields are allowed as a reasonable modification to a face mask policy, the plaintiff must explain why the face shield does not alleviate the plaintiff’s inability to comply.⁹⁰

Unfortunately, controversy over face masks not only hurts people with actual disabilities because it perpetuates stereotypes,⁹¹ but it also puts people with disabilities’ lives in danger as they tend to be most vulnerable to suffering serious effects, including death, if they contract the virus.⁹² As the CDC has changed its guidance on face masks to be less rigid and an increasing number of states and localities have lifted

⁸⁶ See, e.g., *Cangelosi v. Sizzling Caesars LLC*, 2021 WL 291263, at *4 (E.D. La. Jan. 28, 2021); *Smith v. Henry’s Holdings, LLC*, 2021 WL 4993065, at *1 (E.D. Cal. Oct. 27, 2021); *Warner v. Delano*, 2021 WL 5507160, at *2 (N.D. Cal. Nov. 24, 2021); *Reinoehl v. Whitmer*, 2021 WL 320727, at *4 (W.D. Mich. Jan. 22, 2021), *report and recommendation adopted*, 2021 WL 1165695, at *1 (W.D. Mich. Mar. 26, 2021).

⁸⁷ See 2021 WL 2763827, at *3-6 (W.D. Tex. July 1, 2021).

⁸⁸ *Id.* at *3-4.

⁸⁹ *Id.* at *6.

⁹⁰ See, e.g., *Hernandez v. Roche*, 2021 WL 4205610, at *5 (W.D. Tex. Sept. 16, 2021) (motion to dismiss granted because plaintiff with asthma and PTSD did not explain why he could not wear a face shield); *Giles v. Sprouts Farmers Mkt., Inc.*, 2021 WL 2072379, at *6 (S.D. Cal. May 24, 2021) (same).

⁹¹ See *supra* Section II.

⁹² See *People with Disabilities*, CTRS. FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/ncbddd/humandevlopment/covid-19/people-with-disabilities.html#:~:text=all%20people%20with%20serious%20underlying,severely%20ill%20from%20COVID%2D19>.

mask mandates, many people with disabilities feel forgotten and abandoned.⁹³ Recently, the CDC Director made an incendiary comment about it being “really encouraging news” that most people who die from COVID-19 have comorbidities—which are often disabilities, or health issues, caused by disabilities. Many disability rights groups have responded by calling for mask mandates to be reinstated to protect the most vulnerable members of society.⁹⁴ Regardless, recommendations to wear face masks will ebb and flow as more virulent or vaccine-resistant strains of COVID-19 spread in different communities.⁹⁵ Although the analysis of whether mask policies are legitimate safety requirements under the ADA may be affected by these considerations, the potential for damage from disability fraud will unfortunately remain high.

B. *Misrepresenting Pets as Disability Assistance Animals*

Confusion is common over “assistance animals”—a term used here to encompass both service animals and emotional support animals under the various laws that cover them. While some individuals may simply be unsure about what rights they have regarding their animal—which is not surprising, given that these rights change depending on where the individual is, and thus which law applies—others intentionally try to utilize the confusion to skirt the rules and gain access for a pet or a type of assistance animal where it does not belong.

1. The Problem: Combination of Confusion and Intentional Circumvention of Assistance Animal Laws

News stories abound regarding people fraudulently presenting their pet as a service animal or emotional support animal, either to try

⁹³ See Marisa Kabas, *Disabled Americans Feel Abandoned by CDC. Now, CDC Is Desperate to Make Amends*, ROLLING STONE (Jan. 11, 2022), <https://www.rollingstone.com/politics/politics-news/covid-cdc-disability-comorbidity-anger-1282759/>.

⁹⁴ See DREDF's *Open Letter to CDC and Director Rochelle P. Walensky*, DISABILITY RTS. EDUC. & DEF. FUND (Jan. 9, 2022), <https://dredf.org/2022/01/11/dredfs-open-letter-to-cdc-and-director-rochelle-p-walensky/>.

⁹⁵ See *COVID-19 by County*, CTRS. FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/your-health/covid-by-county.html> (making the recommendation to wear a face mask as a precaution only when a community's COVID-19 threat level is high).

to gain entrance to a public accommodation,⁹⁶ to circumvent no-pet policies in housing,⁹⁷ or to allow their animal to travel in the cabin of an airplane.⁹⁸ Even individuals with the best intentions find themselves in confusing situations where their animal is not allowed. For example, in *Mayle v. City of Chicago*, a recent Seventh Circuit case, the court found that a hog trained to mitigate an individual's bipolar disorder was not a service animal under the ADA, because no matter how well-trained the hog was, only dogs can be service animals under the ADA's regulations.⁹⁹

2. How the ADA and Other Laws That Address Assistance Animals Apply

The ADA, Fair Housing Act (FHA), and Air Carriers Access Act (ACAA) each treat assistance animals differently. Under the ADA regulations, a public accommodation must generally allow access for a service animal, which is defined as a dog trained to perform work or tasks for the benefit of an individual with a disability.¹⁰⁰ Emotional support animals—pets that merely provide comfort for an individual with a disability, but have not been trained to perform work or tasks related to the disability—are not service animals under the ADA. Neither are any animals other than dogs.¹⁰¹ While the drafters of the ADA regulations recognized that some individuals with disabilities may choose to use animals that are not dogs, they also recognized that “[s]ome individuals who are not individuals with disabilities have claimed, whether fraudulently or sincerely (albeit mistakenly), that their animals are service animals covered by the ADA, to gain access to hotels, restaurants, and other places of public accommodation.”¹⁰²

⁹⁶ See, e.g., Tilbury, *supra* note 4; Mark Davis, *Is that service dog a fake? Under federal law, you can't even ask*, CHI. TRIB. (Nov. 3, 2017), <https://www.chicagotribune.com/lifestyles/ct-service-dog-fake-20171103-story.html>.

⁹⁷ See, e.g., Farah Stockman, *People Are Taking Emotional Support Animals Everywhere. States Are Cracking Down.*, N.Y. TIMES (June 18, 2019), <https://www.nytimes.com/2019/06/18/us/emotional-support-animal.html>.

⁹⁸ See, e.g., Christopher Mele, *Is That Dog (or Pig) on Your Flight Really a Service Animal?*, N.Y. TIMES (May 1, 2018), <https://www.nytimes.com/2018/05/01/travel/service-animals-planes.html?searchResultPosition=1>.

⁹⁹ See 803 F. App'x 31, 32-33 (7th Cir. 2020).

¹⁰⁰ 28 C.F.R. §§ 36.302(c)(1), 36.104.

¹⁰¹ *Id.* § 36.104. But see § 36.302(c)(9) (which also allows miniature horses under some circumstances).

¹⁰² 28 C.F.R. § 36, App. A (regulatory preamble).

The ADA regulations, therefore, limit service animals to dogs in part to “help to ensure that the fraudulent or mistaken use of other animals not qualified as service animals under the ADA will be deterred.”¹⁰³

Although public accommodations may not ask for certification that a dog is a service animal, they may ask whether the dog is required because of a disability and what work or task it has been trained to perform.¹⁰⁴ In addition, they may exclude the dog if it is not under its handler’s control or not housebroken.¹⁰⁵

In contrast, the Fair Housing Act allows for “assistance animals”—which includes both service animals and emotional support animals—in housing. Emotional support animals can be other animals besides dogs and those which can merely comfort an individual with a disability—they do not have to be trained to do anything related to the disability.¹⁰⁶ Landlords may ask tenants to provide documentation that their animal is an assistance animal, not just a pet.¹⁰⁷

And finally, the Air Carriers Access Act has its own unique differences. Until recently, it referred to all animals being used by individuals with disabilities as “service animals,” and allowed access to airplane cabins for both animals trained to perform tasks for individuals with disabilities and for emotional support animals who merely provide comfort.¹⁰⁸ The ACAA did not previously limit species except for dangerous animals. The ACAA also required some advance notification or documentation for all animals.¹⁰⁹ However, the Department of Transportation recently changed its policies because of mass confusion and abuse. The regulations are now similar

¹⁰³ *Id.*

¹⁰⁴ *Id.* § 36.302(c)(6). These inquiries are not allowed when it is “readily apparent” that the dog is trained to do work or perform tasks for an individual with a disability (e.g., the dog is observed guiding an individual who is blind).

¹⁰⁵ *Id.* § 36.302(c)(2).

¹⁰⁶ U.S. DEPT OF HOUS. & URB. DEV., FHEO-2013-01 2, 9 (2013) (implementing 42 U.S.C. §§ 3601-3619 (2012)); 73 Fed. Reg. 63834, 63835 (Oct. 27, 2008) (same); see, e.g., Tiffany Lee, *Criminalizing Fake Service Dogs: Helping or Hurting Legitimate Handlers*, 23 ANIMAL L. 325, 332-34 (2017) (discussing FHA).

¹⁰⁷ FHEO-2013-01 at 4-5.

¹⁰⁸ 14 C.F.R. §§ 382.117, 382.3 (2009) (Dep’t of Transp. regulations implementing the disability non-discrimination provisions of the ACAA, 49 U.S.C. § 41705 (2012)); see, e.g., Lee, *supra* note 106, at 331-34.

¹⁰⁹ See Lee, *supra* note 106, at 332-33.

to the ADA's; they define service animals only as dogs, and they no longer permit animals that merely provide emotional support.¹¹⁰

Moreover, while these laws vary in the level of documentation that can be requested from assistance animal owners, none of them require visible identification that the animal is being used by a person with a disability. No collars, tags, or vests are required by law. However, "[p]utting a vest on an assistance dog is [] an extra-legal norm that has become ingrained with handlers of legitimate assistance dogs and with those who put vests on their pets."¹¹¹ In other words, people with disabilities who use service animals sometimes feel pressure to use these identifiers to signal the dog's validity to other people, even though the identifiers carry no legal weight. And those perpetrating service animal fraud either mistakenly believe that such identifiers give them legal coverage, or they know that using a fake vest or credential will help lend credibility to their intentional con. Fake certifications and identifications can be purchased easily online, allowing individuals to quickly reach the bounds of their ethicality because they know misrepresenting their animal is "wrong," but also know that other people are doing it.¹¹² Even when the personnel at a public accommodation can tell that a dog is not a service animal because of its poor behavior, these fake identifiers make them fearful of asking the dog's owner to remove them, lest they make a mistake and run afoul of the ADA. These public accommodations may then become distrustful of anyone who enters with a dog, causing increased stigma against people with disabilities.¹¹³

3. Recent Cases about Potential Service Animal Fraud

There have been many cases regarding service animal access under the ADA, but this Section focuses on two: one case demonstrates fraudulent misrepresentation of a service animal, and the other shows how such fraud has been noted by the courts to cast doubt on legitimate service animals.

¹¹⁰ *U.S. Department of Transportation Announces Final Rule on Traveling by Air with Service Animals*, U.S. DEPT OF TRANSP. (Dec. 2, 2020), <https://www.transportation.gov/briefing-room/us-department-transportation-announces-final-rule-traveling-air-service-animals>.

¹¹¹ Dorfman, *Suspicious Species*, *supra* note 41, at 1366.

¹¹² See Cordova, *supra* note 52, at 259-60 (discussing how easily fake service animal certificates and equipment can be purchased online).

¹¹³ See *id.* at 262.

In *Lerma v. California Exposition & State Fair Police*, the court granted summary judgment to the defendant, a water park, which the plaintiff claimed violated the ADA by refusing entrance to her service dog.¹¹⁴ This case is a clear example of an individual misrepresenting a pet as a service animal. The plaintiff attempted to bring a cocker spaniel puppy into the park, and when she was asked what task the dog was trained to perform, she responded, “all I have to tell you is it’s a service dog and I’m going to sue you.”¹¹⁵ The ADA does not grant legal protection to puppies in training to become service dogs, as they are not yet fully trained to perform work or tasks related to an individual’s disability.¹¹⁶ However, the plaintiff’s puppy was not even in training—she admitted that she just wanted to bring it to the park to make her feel better and because her children wanted it there.¹¹⁷

In contrast to the fraudulent service animal in *Lerma*, the district court in *Hurley v. Loma Linda University Medical Center* found that it was a violation of the ADA for a public accommodation to ask an individual for certification for her service dog.¹¹⁸ Hurley, an individual with PTSD, was involved in an altercation with other family members while visiting her grandfather in the hospital, and security was called.¹¹⁹ The security guard doubted that Hurley’s service animal was legitimate because she had no visible disability.¹²⁰ He did not observe the dog performing any tasks at the time.¹²¹ The security guard asked Hurley several times whether she had any documentation that the dog was a service animal, which upset Hurley and caused her to become belligerent.¹²² The security guard asked Hurley to leave, and she had a panic attack.¹²³ Although the court found that Hurley was appropriately asked to leave because of her conduct, it also found that the officer’s request for documentation violated the ADA’s regulation prohibiting such inquiries.¹²⁴ However, the court also opined:

¹¹⁴ 2014 WL 28810, at *4 (E.D. Cal. Jan. 2, 2014).

¹¹⁵ *Id.* (internal quotation marks omitted).

¹¹⁶ *See supra* Section III(B)(2).

¹¹⁷ *Lerma*, 2014 WL 28810, at *5.

¹¹⁸ 2014 WL 580202, at *8 (C.D. Cal. Feb. 12, 2014).

¹¹⁹ *Id.* at *1-2.

¹²⁰ *Id.* at *2.

¹²¹ *Id.* at *1-3.

¹²² *Id.* at *3.

¹²³ *Id.*

¹²⁴ *Hurley v. Loma Linda Univ. Med. Ctr.*, 2014 WL 580202, at *4, 8 (C.D. Cal. Feb. 12, 2014).

[T]his regulation—intended to assist the disabled—often causes more harm than good. Unsurprisingly, there is widespread fraud regarding service animals, as this regulation precludes law enforcement and personnel such as Casey from investigating whether purported service animals are what their owners say they are The resulting distrust of individuals with service animals, as Casey exhibited here, is rational—and only harms the genuinely disabled, such as Hurley.¹²⁵

Some would not agree with the court's statement that the ADA's ban on excessive inquiries and requests for certification is to blame for service animal fraud, as discussed *infra* Section IV(A). But the *Hurley* court does correctly highlight the public controversy regarding fraudulent service animals, and that such fraud harms actual people with disabilities.

ANALYSIS

I. POTENTIAL SOLUTIONS: WHAT WILL NOT WORK, AND WHAT MIGHT

Proposals for solving disability fraud typically fall into a few categories. These include changing the law to require proof or certification, strengthening deterrence of bad behavior through punishment, and making changes to the law or regulations to provide stronger disincentives for faking disability. This Section discusses why each of these solutions would be more problematic than beneficial and instead posits that the only way to truly combat fraud is through lasting changes to attitudes and society.

A. *Requiring Proof or Certification*

The ADA prohibits requesting certification from service animals' handlers.¹²⁶ However, some states operate optional service animal registries, and numerous scholars have suggested that federal law be amended to require certification to deter fraud.¹²⁷ For example, some

¹²⁵ *Id.* at *8.

¹²⁶ See *supra* Section III(B)(2).

¹²⁷ See, e.g., Cordova, *supra* note 52, at 268-69 (advocating for incorporating certification system as part of ADA); Ansley Fantaski, *No Pets Allowed: The Need to Address Increasing Abuses of Assistance Animal Regulations Under Federal Law*, 36 GA. ST. U. L. REV. 939, 963-67

have suggested adding mandatory standards for all service dogs to meet.¹²⁸ This would give formal training organizations specific requirements to meet before certifying a dog for use by a person with a disability. Individuals who train their own service animals could take them to these organizations to pass certification tests.¹²⁹

However, a formalized certification system would raise serious privacy and autonomy concerns. For example, the drafters of the ADA considered requiring individuals who use service animals for hidden psychiatric disabilities—and whose need for a service animal is therefore not always readily apparent—to carry a doctor's note as proof of their service animal's legitimacy.¹³⁰ The drafters rejected this suggestion, stating that it would:

require persons with disabilities to obtain medical documentation and carry it with them any time they seek to engage in ordinary activities of daily life in their communities—something individuals without disabilities have not been required to do. Accordingly, the Department has concluded that a documentation requirement of this kind would be unnecessary, burdensome, and contrary to the spirit, intent, and mandates of the ADA.¹³¹

In addition, requiring certification would impose a financial burden on individuals with disabilities as it would either necessitate professional training or, at the least, require that they pay professional organizations to administer certification tests. The law does not currently require that service animals receive professional training,¹³² and indeed, some individuals train their service animals themselves. For this reason, the ADA's regulatory drafters also rejected a certification requirement, stating “[a] training and certification requirement would increase the expense of acquiring a service animal and might limit access to service animals for individuals with limited financial resources.”¹³³

(2020); Sande Buhai, *Preventing the Abuse of Service Animal Regulations*, 19 N.Y.U. J. LEGIS. & PUB. POL'Y 771, 796 (2016).

¹²⁸ See Cordova, *supra* note 52, at 270.

¹²⁹ *Id.*

¹³⁰ See 28 C.F.R. § 36, App. A (regulatory preamble).

¹³¹ *Id.*

¹³² See *supra* Section III(B)(2).

¹³³ 28 C.F.R. § 36, App. A (regulatory preamble).

The Ninth Circuit discussed the unfair financial burden that service animal certification would impose in *C. L. v. Del Amo Hospital, Inc.*, a case of first impression regarding whether service animal certification could be required.¹³⁴ The court noted:

A ruling that service animals cannot be qualified under the ADA if an expert is not able to certify the animal based on the standards of a private organization would have the effect of denying legally protected access to public accommodations for persons who . . . need service animals to mitigate the effects of their disabilities in these spaces. Importing a certification requirement would not create certainty for whether a dog is truly a service animal. Instead, it would multiply litigation over which certifications are judicially valid. Under the ADA, the proper focus is on whether a service animal will consistently and reliably help a person with a disability in performing activities of daily living.¹³⁵

Even if requiring certification for service animals sounds reasonable, doing so could lead to proposals to require proof of disability in other areas. The ADA regulations enumerate places where proof can be requested, such as for testing accommodations,¹³⁶ and places where it cannot, such as when purchasing accessible seating at events like concerts or sports games.¹³⁷ This careful balance reflects the need to intrude as little as possible in the lives of people with disabilities. Of course, most individuals willingly—or for some, begrudgingly—trade off some privacy for access to public accommodations. For example, some stores and restaurants have required that individuals show proof of vaccination from COVID-19 to enter. However, intrusions into privacy that burden everyone equally are different than those that would place an additional burden only on people with disabilities. Suppose the government approves proposals to require proof of disability in more areas. This would tip the scale toward distrust and skepticism of people with disabilities and away from a belief in the importance of dignity and equality. For example, individuals with disabilities could be required to carry doctor's notes proving their need for reasonable modifications. This would surely make it easier for stores and restau-

¹³⁴ 992 F.3d 901, 914-15 (9th Cir. 2021).

¹³⁵ *Id.*

¹³⁶ See 28 C.F.R. § 36.309(v).

¹³⁷ See *id.* § 36.302(f).

rants to determine what to do during what might otherwise be tense situations. However, this reduction of stress for public accommodations would come at the expense of people with disabilities, who would both bear the actual cost and time expense of obtaining such notes and the burden of potentially feeling inferior and distrusted every time they engaged in the basic activities of public life.

B. *Codifying and Better Enforcing Punishment*

Most states now have misdemeanor statutes regarding service animal fraud.¹³⁸ These statutes either prohibit the use of false service animal identifiers like vests or harnesses or misrepresentation that the animal is a service animal generally.¹³⁹ But advocates must be wary of calls for more robust enforcement of these statutes or extending these laws to cover other forms of disability fraud, such as false claims of inability to wear a face mask during the COVID-19 pandemic. People with disabilities already face unfair policing by others who doubt the validity of their disability identity, especially when their disabilities are invisible.¹⁴⁰ Increased civil or criminal punishment for disability fraud would embolden more people to question and harass people with disabilities. In turn, enforcing such laws could lead to increased stigma and cause people with disabilities to be afraid to request reasonable modifications. In addition, as awareness of police brutality increases,¹⁴¹ advocates should be cautious about encouraging a solution that would increase involvement with law enforcement and the criminal justice system.¹⁴² Such involvement can be particularly dangerous for people with disabilities, especially for individuals who require reasonable modifications to communicate, or individuals with mental health disabilities or cognitive disabilities who may not act in ways an officer would expect or be properly trained to handle.¹⁴³

¹³⁸ See, e.g., Cordova, *supra* note 52, at 256-57 (discussing fraud laws).

¹³⁹ See *id.*

¹⁴⁰ See *supra* Section II.

¹⁴¹ See generally Jordan Martin, *Breonna Taylor: Transforming A Hashtag into Defunding the Police*, 111 J. CRIM. L. & CRIMINOLOGY 995, 995-96 (2021) (discussing the movement to defund the police in response to increased police brutality against Black women).

¹⁴² See generally Jamelia N. Morgan, *Policing Under Disability Law*, 73 STAN. L. REV. 1401, 1402 (2021) (explaining how viewing disability under the medical model harms people with disabilities in policing cases).

¹⁴³ See *id.* at 1431-55.

Advocates should hesitate to embrace a solution to disability fraud that may be unfairly punitive and may put lives in danger.

C. Other Changes to the Law or Regulations

In addition to separate fraud prevention laws, the ADA or its regulations could be amended to more specifically address disability fraud. While statutory changes to the ADA could ostensibly be made, the amount of time and level of political capital needed to do so would be a significant obstacle. Modifying the ADA regulations would be easier, but would still require the DOJ to take action.¹⁴⁴ However, what changes would deter fraud, and would it be worth adopting those changes?

The ADA regulation on event ticket sales provides an example of addressing fraud. Although a public accommodation may not require proof of disability, the regulations state that it may "investigate the potential misuse of accessible seating where there is good cause to believe that such seating has been purchased fraudulently."¹⁴⁵ As the regulatory guidance regarding this provision states, "[c]urbing fraud is a goal that public accommodations and individuals with disabilities share. Steps taken to prevent fraud, however, must be balanced carefully against the privacy rights of individuals with disabilities. Such measures also must not impose burdensome requirements upon, nor restrict the rights of, individuals with disabilities."¹⁴⁶

Similar language could be added as a more general provision of the ADA regulations, applying these measures to all instances of fraud instead of just ticket sales. However, a regulatory provision without any enforcement mechanism likely will not affect actual fraud deterrence. Adding a more robust enforcement mechanism would also create the same problems as increased penalties and policing discussed above.¹⁴⁷ Thus, changes to the ADA are unlikely to remedy disability fraud without causing more problems than they solve.

¹⁴⁴ The ADA directs the Attorney General to promulgate regulations to carry out the non-transportation provisions of Title III. 42 U.S.C. § 12186(b).

¹⁴⁵ See 28 C.F.R. § 36.302(f)(8)(iii).

¹⁴⁶ See *id.* at App. A (regulatory preamble).

¹⁴⁷ See *supra* Section IV(B).

D. *The Best Solution: A Change in Attitude*

The best way to address a problem sometimes requires changing attitudes instead of changing laws. To combat service animal fraud, advocates have proposed increased education for the public about what service animals are and are not, and for public accommodations so that they can better understand when it is proper to exclude dogs that are not service animals and feel empowered to do so without fear of legal repercussions.¹⁴⁸ However, fewer proposals exist to educate the public regarding the actual harm created by disability fraud. Public service campaigns and educational efforts could give people an “ethical nudge” by identifying their actions’ victims.¹⁴⁹ For example, a campaign could show how interactions with misbehaving pets that are misrepresented as service animals lead businesses and members of the public to doubt legitimate service animals. This would remind people that such misrepresentation hurts individuals with disabilities by increasing mistrust and stigma.

In addition to public service campaigns, advocates must engage in efforts to move away from viewing disability through the lens of the medical model and instead toward the promise of the social model.¹⁵⁰ Disability should be viewed not as a problem to be solved, but as just one aspect of an individual’s identity. Instead of looking at disability as a status that sometimes confers special rights because it must be accommodated, advocates should consider changes to society that could benefit all, including those who happen to have disabilities. Despite providing some level of affirmative rights,¹⁵¹ the ADA stops far short of creating actual positive rights like a more human rights-based framework for disability justice would.¹⁵² Equal opportunity, autonomy, and self-actualization should be seen as inherent rights instead of political or civil rights.

¹⁴⁸ See, e.g., Fantaski, *supra* note 127, at 967-68 (advocating for required personnel training for places of public accommodation).

¹⁴⁹ See Dorfman, *Suspicious Species*, *supra* note 41, at 1386, 1407-09 (discussing the concept of an “ethical nudge”).

¹⁵⁰ See, e.g., Dorfman, *Disability Con*, *supra* note 1, at 1084-85 (advocating that we “renew efforts to orient access and disability rights as civil rights, not ‘special rights.’”); see generally Guevara, *supra* note 31.

¹⁵¹ See *supra* Section I(A).

¹⁵² See generally Michael Ashley Stein & Penelope J.S. Stein, *Beyond Disability Civil Rights*, 58 HASTINGS L.J. 1203, 1205-06 (2007).

Under the social model, the key inquiry would be what changes to make to society to provide better access to everyone. If everyone, regardless of whether they have a disability, is entitled to a certain treatment, that treatment is no longer a “perk” that requires fraud to access. For example, the social model would not stop some individuals from circumventing face mask requirements during a pandemic as a political statement. But if the services that are now provided as reasonable modifications for people who cannot wear face masks—curb-side service, order-ahead service, use of personal shoppers, etc.—became free for everyone, fraud to obtain them would be unnecessary. Indeed, access to these services has already increased as the pandemic goes on. However, efforts to increase convenience motivated by a sense of social good instead of businesses’ desire to increase profits might yield even more accessible results.

In the area of assistance animals, where fraud is motivated by people’s desire to bring their pet or emotional support animal to more places, a solution could include integrating these beloved animals more fully into our daily lives. If well-behaved animals were given increased access to public places, and animal behavioral training was available to all without a high financial burden, fraud in this area would be unnecessary—and both people with disabilities with service animals and people who love their pets would benefit.

Admittedly, some of the changes that the social model would require seem difficult, if not impossible, to implement within society’s current structures. But that does not change the worthiness of reframing the approach to addressing disability.

CONCLUSION

Recent documented instances of disability fraud regarding face masks during the COVID-19 pandemic and pets misrepresented by their owners as service animals demonstrate that there is at least some validity to fears of the disability con. And yet, overblown fears lead to an increase in harmful stereotypes of people with disabilities as fakers or manipulators. The resulting doubts and harassment decrease people with disabilities’ capability to participate fully in their communities. Proposed solutions that create systems of proof and punishment may make us feel better if they prevent the ADA and other disability rights laws from being manipulated. But they will come at the cost of increased stigma and other potentially harmful effects against people

with disabilities. These burdens should not be placed on the very people that the law is designed to protect. Instead, advocates should broaden their vision beyond specific civil rights laws and legal solutions to look at how to change attitudes and perhaps the very structure of society. Only by reframing the focus from asking who is deserving of special treatment to asking how to better accommodate everyone's needs and desires can society genuinely move past the problem of disability identity theft.
