THE SOCIAL MODEL'S CASE FOR INCLUSION: "MOTIVATING FACTOR" AND "BUT FOR" STANDARDS OF PROOF UNDER THE AMERICANS WITH DISABILITIES ACT AND THE IMPACT OF THE SOCIAL MODEL OF DISABILITY ON EMPLOYEES WITH DISABILITIES

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INTRODUCTION

In enacting the Americans with Disabilities Act (ADA),[1] Congress intended "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[2] Prior to the ADA, sixty-six percent of disabled individuals of working age did not have a job but wanted to work.[3] As of the twentieth anniversary of the ADA, forty-one percent of disabled individuals still report difficulty finding or keeping a job.[4] According to studies conducted in 2010, a majority of companies report hiring disabled employees within the past three years.[5] Despite these seeming strides towards increased employment opportunities, the percentage of disabled employees was estimated to be as low as two percent of the workforce.[6] These numbers suggest that there remains a dire need for employment protections and assistance for disabled Americans.[7]

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1 42 U.S.C. §§ 12101–12213 (2012).

2 Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 2, 104 Stat. 327, 328.

3 *See id.* According to Senate reports prior to the ADA's passing, "[t]wo-thirds of all disabled Americans between the age of 16 and 64 are not working at all; yet, a large majority of those not working say that they want to work. Sixty-six percent of working-age disabled persons, who are not working, say that they would like to have a job." S. REP. NO. 101-116, pt. IV, at 8 (1989).

4 MATTHEW W. BRAULT, U.S. CENSUS BUREAU, AMERICANS WITH DISABILITIES: 2010, at 4 (2012), *available at* http://www.census.gov/prod/2012pubs/p70-131.pdf.

5 HARRIS INTERACTIVE, KESSLER FOUND./NOD, SURVEY OF EMPLOYMENT OF AMERICANS. WITH DISABILITIES 8 (2010), *available at* http://www.2010DisabilitySurveys.org/octsurvey/pdfs/surveyresults.pdf ("Around six in ten (56%) employers have hired someone with a disability in the past three years . . . .").

6 *Id.* ("[O]f the 56% of managers and executives who estimated what percentage of new hires in the past three years was people with disabilities, the average was 2%.").

7 *See Twenty Years of Impact: Americans with Disabilities Act Transforming Workplace, Bruyère Says*, CORNELL U. ILR NEWS CENTER (June 22, 2010), http://www.ilr.cornell.edu/news/ada_062210.html ("The disparity in workforce participation rates for people with disabilities confirms the importance of our increased vigilance to minimize workplace barriers and maximize labor market opportunities . . . ." (internal quotation marks omitted)); *see also* Susanne M. Bruyère et al., *Comparative Study of Workplace Policy and Practices Contributing to Disability Nondiscrimination*, 49 REHABILITATION PSYCHOL. 28, 28 (2004) (finding the population with disabilities' "low employment rate represents a loss of income and social and

While disability provisions must be adhered to in the workplace,[8] it is also essential that courts fiercely protect these rights. Conflicting recent judicial activity in ADA cases shows it is unclear to what extent disabled plaintiffs are given the full force and effect of law in cases against their employers. Several studies have documented low success rates of disabled employees seeking redress in federal courts.[9] According to a 1998 ABA-commissioned study, the reason for the overwhelming number of employer successes appears to "lie[] in the gap between what Congress claimed it was doing in enacting the ADA and what interpretation of the actual language of the Act allows."[10]

This finding speaks to the heart of a pressing, ongoing matter of contention among today's courts: the appropriate standard of proof required by the ADA. On September 25, 2008, President George W. Bush approved and signed into law[11] the Americans with Disabilities Act Amendments Act of 2008 (ADA Amendments Act).[12] According to the language of the original ADA, "[n]o covered entity shall discriminate against a qualified individual with a disability *because of* the disability of such individual,"[13] whereas under the ADA Amendments Act, covered entities cannot discriminate "*on the basis of* disability."[14] The difference in meaning between the phrases "because of" and "on the basis of," within the context of the ADA Amendments Act, is still unresolved by courts, resulting in a federal circuit split for the appropriate standard of proof.[15]

Over the course of the ADA's history, the circuits have utilized three distinct standards of proof: (1) the "solely because of" standard,

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economic participation for people with disabilities, as well as a significant loss of willing and able talent to . . . organizations").

8 42 U.S.C. § 12112(a) (2012) ("No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.").

9 *See* Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 99–100 (1999) ("[D]efendants prevail in more than ninety-three percent of reported ADA employment discrimination cases decided on the merits at the trial court level." (footnote omitted)); *Study Finds Employers Win Most ADA Title I Judicial and Administrative Complaints*, 22 MENTAL & PHYSICAL DISABILITY L. REP. 403, 403 (1998) ("The primary result . . . [of the study] revealed that employers prevailed in approximately 92 percent of the final case decisions . . . .").

10 *Study Finds Employers Win Most ADA Title I Judicial and Administrative Complaints*, *supra* note 9, at 405.

11 Press Release, Office of Press Sec'y, President Bush Signs S. 3406 into Law (Sept. 25, 2008), *available at* 2008 WL 4359444.

12 ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (codified as amended in scattered sections of 42 U.S.C.).

13 Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 102, 104 Stat. 327, 328 (emphasis added).

14 42 U.S.C. § 12112(a) (2012) (emphasis added).

15 *See infra* Part I.B–C.

(2) the "but for" standard, and (3) the "motivating factor"[16] standard.[17] These standards provide thresholds used to prove an employer has discriminated against an employee because of disability and has thus violated the ADA. While courts no longer follow the "solely because of" standard, the majority of circuits have adopted the "motivating factor" standard.[18] It is important to note, however, that three, possibly four,[19] circuits have adopted the "but for" standard. The current circuit split breeds rampant confusion and unnecessary uncertainty. This Note argues that, unless Congress chooses to act, the appropriate standard of proof in ADA Amendments Act cases is the "motivating factor" standard, because it is most in line with the congressional intent of the ADA Amendments Act: protecting a broad number of disabled individuals through the incorporation of the "social model" of disability's ideals.

Part I reviews the development and acceptance of the "medical" and "social" models of disability and discusses the past and current circuit splits regarding the correct standard of proof. Part II examines the ways current circuits have addressed the issue of proof. Part III analyzes the impact of the social model of disability on the creation of the ADA and outlines the intersection between the ADA Amendments Act's legislative history and the social model. Part IV proposes that the language of the ADA Amendments Act, and the broad, inclusive principles behind the social model of disability, support the notion that the "motivating factor" standard is the correct standard of proof for ADA Amendments Act cases.

I. BACKGROUND

A. *Medical and Social Models of Disability: Public Understanding of Disability Before the ADA*

Throughout the twentieth century, the majority of legal scholars and lawmakers viewed disabilities in the workplace through the lens provided by the "medical model" of disability.[20] Under the medical

16 The "motivating factor" standard is also referred to as the "mixed motive" standard.

17 The three standards of proof are discussed at length, *infra* Part I.

18 The Second, Third, Fourth, Fifth, and Ninth Circuits have all adopted the "motivating factor" standard. *See infra* Part II.B.

19 *See infra* notes 71–72 and accompanying text.

20 *See* James Leonard, *The Equity Trap: How Reliance on Traditional Civil Rights Concepts Has Rendered Title I of the ADA Ineffective*, 56 CASE W. RES. L. REV. 1, 3–4 (2005); *see also* Mary Crossley, *Reasonable Accommodation as Part and Parcel of the Antidiscrimination Project*, 35 RUTGERS L.J. 861, 876 (2004) (discussing the medical model of disability as an understanding of "disability" as a "an innate, biological trait that leaves the disabled individual

model, disabilities were considered a medical condition to be either cured or eased by government welfare programs.[21] This model further assumed that the lasting medical condition of disability halted productivity and the ability to participate in the workplace in a meaningful way.[22] Under this model, incapacity, and the resulting barriers to "normal" societal participation, were considered almost exclusively the products of the disabled individual's impairments, without any meaningful influence from external forces.[23] As disabled individuals were stigmatized for their "innate" impairments, legal scholars posited that public policy measures highlighting these differences might have served to dishearten disabled individuals attempting to find their place within society.[24] Disability advocates thus vocalized deep concerns regarding the biases of disability caseworkers and the inherent "culture of dependence" produced by welfare programs.[25]

in need of assistance to remediate the effects of the disability," and since there is "neither social cause nor social responsibility" associated with the individual's disability, "any efforts that society undertakes in response to disabled people may be characterized as charitable efforts to respond to their neediness"); Laura L. Rovner, *Disability, Equality, and Identity*, 55 ALA. L. REV. 1043, 1049 (2004) ("In keeping with the predominant view of disability as a medical condition, these programs and organizations were designed to 'help' those who had impairments that were associated with incapacity—in particular, the incapacity to support oneself through work. Consequently, these programs and statutes typically focused on 'fixing' the disabled person, usually in some way that would enable him to return to work, rather than on the ways that society might instead fix itself to adapt to the spectrum of individual ability." (footnotes omitted)); Richard K. Scotch, *Models of Disability and the Americans with Disabilities Act*, 21 BERKELEY J. EMP. & LAB. L. 213, 214 (2000) ("For over a hundred years, disability has been defined in predominantly medical terms as a chronic functional incapacity whose consequence was functional limitations assumed to result from physical or mental impairment. This model assumed that the primary problem faced by people with disabilities was the incapacity to work and otherwise participate in society." (footnote omitted)); Jonathan C. Drimmer, Comment, *Cripples, Overcomers, and Civil Rights: Tracing the Evolution of Federal Legislation and Social Policy for People with Disabilities*, 40 UCLA L. REV. 1341, 1348 (1993) ("[E]ven if a person with a disability endeavors to be cured, she still carries a stigma that excuses her from normal role obligations of being a parent, a worker, or a responsible adult in the community. In essence, society treats her disability as a fundamental negation of her personhood as well as her citizenship, and all she can strive for is to minimize the 'symptoms' of her disability through rehabilitation in an effort to participate in the community to the greatest degree allowable." (footnotes omitted)).

21 Leonard, *supra* note 20, at 3–4.

22 Scotch, *supra* note 20, at 214.

23 *Id.*

24 Leonard, *supra* note 20, at 3–4 (scholars have noted that "public policy that views individuals with disabilities as permanently 'sick,' however well intentioned, runs the risk of dispiriting and dehumanizing its would-be beneficiaries"); *see also* Drimmer, *supra* note 20, at 1371 n.128 ("[I]nforming an individual with a disability that services to minimize the effects of the disability are necessary before societal contribution can be achieved seems to issue a message of inferiority—a concept completely contrary to self-esteem.").

25 *See supra* note 24.

In contrast, the "social model" of disability,[26] developed in the 1970s, was an outgrowth of the civil rights movements of the 1950s and 1960s[27] as a direct response to the pervasive influence of the medical model.[28] The social model highlights a considerable shift from acknowledging only innate disability factors to looking at a disabled individual's highly complex relationship to society as a whole.[29] This model considers disabilities not only in accordance with mental and physical impairments, but also in relation to influential environmental factors, cultural attitudes, and social biases that affect the ways disabled individuals are both permitted and able to partake in society.[30] Further, this model highlights that perceptions of human ability, and aptitude for particular "major life activities,"[31] including employment, stem from social constructions and learned social norms and beliefs.[32] The social model of disability thus takes into account natural and artificial barriers to societal integration, both of which can turn into "self-fulfilling prophecies" for failed longevity in the workplace.[33]

Congress adopted the ADA after the social model movement had already been largely accepted and promoted.[34] The enactment of the ADA is considered a watershed moment for disability advocates attempting to frame disability not as a purely medical condition, but rather as a civil rights issue to be considered under the umbrella of antidiscrimination rights.[35] The social model's influence can be seen in the language of the Findings and Purposes section of the ADA, as well as

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26 Also referred to as the "civil rights" model. *See* Drimmer, *supra* note 20, at 1355–56 ("[T]he civil rights model attempts to unmask the false objectivity that allows society to label some of its members 'disabled' and treat those citizens as less than equal.").

27 *Id.* at 1355.

28 Kevin Barry, *Toward Universalism: What the ADA Amendments Act of 2008 Can and Can't Do for Disability Rights*, 31 BERKELEY J. EMP. & LAB. L. 203, 211 (2010) ("The modern American disability rights movement—and its articulation of the social model of disability—arose in the 1970s, largely in response to the medical model of disability. Building on the success of the independent living movement, which consisted largely of people with physical impairments who demanded 'independence' from medical and rehabilitation centers, and 'integration' through the formation of independent living centers, the disability rights movement sought to reframe disability as a primarily social condition." (footnote omitted)).

29 *See* Leonard, *supra* note 20, at 4 ("Under the 'social model' of disability, impairments arise from the interaction between a person and her environment. Individuals with disabilities experience impediments to success because society has erected barriers to their participation in society." (footnote omitted)).

30 Scotch, *supra* note 20, at 214.

31 42 U.S.C. § 12102(2)(A) (2012) ("[M]ajor life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, *and working*." (emphasis added)).

32 Scotch, *supra* note 20, at 215.

33 *Id.* (discussing how frequent marginalization can turn into "self-fulfilling prophecies").

34 See *infra* notes 80–84 for a discussion of the disability rights movement's incorporation of the social model of disability in the 1960s and 1970s.

35 Leonard, *supra* note 20, at 3.

in the general societal barriers to success the statute strives to break down.[36] In attempting to right a societal wrong in the form of deeply entrenched disability discrimination, the ADA intended to assist and protect the rights of as broad of a sector of the disabled population as possible, a goal which was only further bolstered and reaffirmed by the 2008 enactment of the ADA Amendments Act.[37]

B. *Past Circuit Split: "Solely Because Of" Versus "Motivating Factor"*

When the ADA was first enacted, legislative commentary seemed to point to the use of a "solely because of" standard for ADA cases,[38] borrowing the standard of proof from the Rehabilitation Act of 1973 (Rehabilitation Act).[39] According to this standard, disabled employees were required to show the adverse employment action had occurred "solely because of" their disability.[40] In particular, courts held that, to state a claim under the ADA, a plaintiff must show: "(1) that he has a

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36 Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 2, 104 Stat. 327, 328. Section 2 of the ADA attributes disability discrimination to societal factors, "including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities." *Id.* § 2(a)(5).

37 *Id.* § 2(b)(1) (stating the purpose of the ADA is "to provide a clear and comprehensive national mandate for the *elimination of discrimination* against individuals with disabilities" (emphasis added)); *see* 42 U.S.C. § 12102(4)(A) (2012) ("The definition of disability in this chapter shall be construed in favor of broad coverage of individuals under this chapter, to the maximum extent permitted by the terms of this chapter.").

38 *See, e.g.*, Statement by President George Bush upon Signing S. 933, 26 WEEKLY COMP. PRES. DOC. 1165 (July 30, 1990), *reprinted in* 1990 U.S.C.C.A.N. 601, 601 ("The Administration worked closely with the Congress to ensure that, wherever possible, existing language and standards from the Rehabilitation Act were incorporated into the ADA. . . . Because the Rehabilitation Act was enacted 17 years ago, there is already an extensive body of law interpreting the requirements of that Act. Employers can turn to these interpretations for guidance on how to meet their obligations under the ADA."); H.R. REP. NO. 101-485, pt. III, at 48 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 471 ("Administrative complaints filed under this title and the Rehabilitation Act should be dealt with in a manner to avoid duplication of efforts, and to prevent inconsistent or conflicting standards.").

39 *See* 29 U.S.C. § 794. The Rehabilitation Act of 1973 was the first legislation aimed at bettering the lives of disabled individuals. *See* NAT'L COUNCIL ON DISABILITY, EQUALITY OF OPPORTUNITY: THE MAKING OF THE AMERICANS WITH DISABILITIES ACT 11 (reprt. ed. 2010), *available at* http://www.ncd.gov/publications/2010/equality_of_Opportunity_The_Making_of_the_Americans_with_Disabilities_Act. The Rehabilitation Act was intended to "extend rehabilitation services to all persons with disabilities, give priority to those with severe disabilities . . . and coordinate federal disability programs," which included the development of federal affirmative action programs for the hiring, promotion, and retention of disabled individuals. *Id.* The Rehabilitation Act of 1973 prohibits discrimination "*solely by reason of* her or his disability." 29 U.S.C. § 794(a) (emphasis added).

40 *See* Zukle v. Regents of the Univ. of Cal., 166 F.3d 1041, 1045 n.11 (9th Cir. 1999); *see also* Sandison v. Mich. High Sch. Athletic Ass'n, 64 F.3d 1026, 1036 (6th Cir. 1995).

disability; (2) that he is otherwise qualified for the employment or benefit in question; and (3) that he was excluded from the employment or benefit due to discrimination *solely on the basis of* the disability."[41] A showing of any legitimate, non-discriminatory cause for the adverse employment action would stop any chances of recovery under the ADA.[42] The vast majority of circuits initially adopted the "solely because of" standard in ADA cases.[43]

In contrast, under the "motivating factor" standard, disabled employees must show that the disability discrimination was a contributing factor to the adverse employment decision.[44] The "motivating factor" standard allows for the disability discrimination to be simply one aspect of, as opposed to the sole cause of, the harmful employment outcome.[45] The "motivating factor" standard is therefore much less strict and less exclusive than the highly stringent "solely because of" standard.

Prior to the start of the twenty-first century, there existed a federal circuit split between the "solely because of" standard and the "motivating factor" standard.[46] The common trend among the circuits employing a "solely because of" standard was to impart the plain meaning and congressional intent of the Rehabilitation Act's "solely because of" standard to be the correct standard for the ADA.[47] These courts often stated that the Rehabilitation Act and the ADA should be

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41 Doe v. Univ. of Md. Med. Sys. Corp., 50 F.3d 1261, 1265 (4th Cir. 1995) (emphasis added) (citing Gates v. Rowland, 39 F.3d 1439, 1445 (9th Cir. 1994)).

42 *See, e.g.*, Despears v. Milwaukee Cnty., 63 F.3d 635, 636 (7th Cir. 1995) (explaining plaintiff's recognized disability of alcoholism was not the sole cause of the adverse employment action). "[A] cause is not a compulsion (or sole cause); and we think the latter is necessary to form the bridge that [plaintiff] seeks to construct between his alcoholism and his demotion. If being an alcoholic he could not have avoided becoming a drunk driver, then his alcoholism was the *only* cause of his being demoted, and it would be as if the employer's regulation had said not that you must have a valid driver's license to be a maintenance worker but that you must not be an alcoholic. But [plaintiff's] alcoholism was not the only cause of his being convicted of drunk driving. Another cause was his decision to drive while drunk." *Id.*

43 *See, e.g.*, Wong v. Regents of the Univ. of Cal., 192 F.3d 807, 816 (9th Cir. 1999); Still v. Freeport-McMoran, Inc., 120 F.3d 50, 51–52 (5th Cir. 1997); *Sandison*, 64 F.3d at 1036; *Despears*, 63 F.3d at 636; McDonald v. Pennsylvania, 62 F.3d 92, 94–95 (3d Cir. 1995); *Doe*, 50 F.3d at 1265; White v. York Int'l Corp., 45 F.3d 357, 363 (10th Cir. 1995).

44 *See* 42 U.S.C. § 2000e-2(m) ("[A]n unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, *even though other factors also motivated the practice*." (emphasis added)); John L. Flynn, Note, *Mixed-Motive Causation Under the ADA: Linked Statutes, Fuzzy Thinking, and Clear Statements*, 83 GEO. L.J. 2009, 2010 (1995).

45 *See infra* note 55.

46 *See generally* Seam Park, Comment, *Curing Causation: Justifying a "Motivating-Factor" Standard Under the ADA*, 32 FLA. ST. U. L. REV. 257 (2004) (discussing the "solely because of" standard and "motivating factor" standard circuit split).

47 *Id.* at 260–61.

"interpreted consistently"[48] and should require the same "substantive standards for determining liability."[49] All seven circuits have since discarded the "solely because of" standard, with the Sixth Circuit changing from the "solely because of" standard of proof most recently.[50]

C. *Current Circuit Split: "But For" Versus "Motivating Factor"*

After the "solely because of" standard fell out of use, a federal circuit split emerged between the "but for" standard and the "motivating factor" standard. According to the "but for" standard, disabled employees must show that "but for" the disability discrimination, the adverse employment action would not have occurred.[51] To establish a "but for" case, a disabled employee must therefore prove that the workplace discrimination was a necessary factor for the negative employment result that occurred.[52] A number of judges claim that the "but for" standard is nearly as limiting as the "solely because of" standard.[53] Even if the "but for" standard is not considered to be as strict

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48 *See* Zukle v. Regents of the Univ. of Cal., 166 F.3d 1041, 1045 n.11 (9th Cir. 1999) (internal quotation marks omitted).

49 *See* McDonald v. Pennsylvania, 62 F.3d 92, 94–95 (3d Cir. 1995) ("Congress made clear its intention that identical standards were to be applied to both [the Rehabilitation Act and the ADA]. 42 U.S.C. § 12117(b) provided that enforcement agencies were to develop procedures to ensure that complaints are resolved in the same manner so as to avoid duplication of effort and imposition of inconsistent or conflicting standards under the Disabilities and Rehabilitation Acts. Whether suit is filed under the Rehabilitation Act or under the Disabilities Act, the substantive standards for determining liability are the same." (footnote omitted)); *see also* Park, *supra* note 46, at 261 (2004) ("The court justified establishing the same standard of liability under both the ADA and the Rehabilitation Act by explaining that [b]ecause the language of the two statutes is substantially the same, they should be interpreted consistently" (alteration in original) (internal quotation marks omitted)).

50 The Sixth Circuit's change in precedent from the "solely because of" standard to the "but for" standard occurred in May 2012 in *Lewis v. Humboldt Acquisition Corp.*, 681 F.3d 312, 321 (6th Cir. 2012).

51 *See* Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 168 (2009) (defining "but for" causation); *see also* Price Waterhouse v. Hopkins, 490 U.S. 228, 240 (1989) ("But-for causation is a hypothetical construct. In determining whether a particular factor was a but-for cause of a given event, we begin by assuming that that factor was present at the time of the event, and then ask whether, even if that factor had been absent, the event nevertheless would have transpired in the same way.").

52 *Lewis*, 681 F.3d at 323 (Clay, J., concurring in part and dissenting in part) (describing the "but for" standard as "[t]he doctrine that causation exists only when the result would not have occurred without the [relevant] conduct. In other words, but-for cause means that the relevant factor was *necessary* for the consummation of an event" (alteration in original) (citation omitted)).

53 *Id.* ("While the but-for standard may lessen the burden on plaintiffs seeking to prove disability-based discrimination when compared with the sole-cause standard, it barely does so."); *id.* at 331 (Stranch, J., concurring in part and dissenting in part) ("The remedies [for women, minorities, and those with disabilities] should be the same; no more, no less. The majority's decision makes an ADA plaintiff's remedy decidedly less."). Others have argued that the "but for" standard might provide room for the existence of legitimate, non-discriminatory

as the "solely because of" standard, circuits that adopt the "but for" standard would still be creating a legal benchmark much closer to the "solely because of" standard than to the "motivating factor" standard. A minority of circuits currently follow the "but for" standard.[54]

Under the "motivating factor" standard, there is no requirement that the disability discrimination is the sole cause, the main cause, or even the most important cause for the decision—the discrimination need only be one factor among many.[55] Thus, unlike in the "but for" standard, there is no established value judgment or hierarchy of reasons built into the definition of the "motivating factor" standard.[56] So long as there is a taint of illegitimate discrimination on the adverse action, the entire interaction is condemned and can be considered discriminatory.[57] The majority of circuits currently follow the "motivating factor" standard for ADA cases.[58]

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reasons, as long as the disability discrimination is shown to be the "determinative reason" for the adverse action. *See* Bran Noonan, *The Impact of* Gross v. FBL Financial Services, Inc. *and the Meaning of the But-For Requirement*, 43 SUFFOLK U. L. REV. 921, 928 (2010) ("Indeed, but-for causality requires an employee to identify the determinative reason, the driving force behind the adverse action, but the requirement *theoretically* allows employers to have illegitimate reasons, as long as those reasons were not the determinative cause of the adverse decision." (emphasis added)). It is important to note, however, that the courts have yet to decide a but-for standard case in favor of the plaintiff in a situation where there have been legitimate, non-discriminatory reasons as well.

54 *See Lewis*, 681 F.3d at 321; Serwatka v. Rockwell Automation, Inc., 591 F.3d 957, 962 (7th Cir. 2010); Bones v. Honeywell Int'l, Inc., 366 F.3d 869, 878 (10th Cir. 2004). It is contested whether the Eleventh Circuit also follows the "but for" standard in *McNely v. Ocala Star-Banner Corp.*, 99 F.3d 1068, 1077 (11th Cir. 1996). See *infra* notes 70–71 and accompanying text for a discussion of the ambiguity surrounding the Eleventh Circuit's selection of a standard of proof.

55 Title VII of the Civil Rights Act of 1964 provides the only statutory language to specify a definition for "motivating factor" in the various civil rights statutes (the Rehabilitation Act of 1973, the ADA, or the Age Discrimination in Employment Act of 1967 (ADEA)). *See* 42 U.S.C. § 2000e–2(m) (2012). The statutory language includes "other factors" but provides no definition for these words, which lends itself to a broad statutory interpretation of the other types of factors—legitimate or illegitimate—that could have led to the adverse action. This broad language also highlights the fact that there is no established hierarchy for contributing factors in order for a claim to rise to the level of a sufficient motivating factor.

56 *Id.*

57 *Id.*

58 *See* Pinkerton v. Spellings, 529 F.3d 513, 519 (5th Cir. 2008); Head v. Glacier Nw., Inc., 413 F.3d 1053, 1063–65 (9th Cir. 2005); Shellenberger v. Summit Bancorp, Inc., 318 F.3d 183, 187–88 (3d Cir. 2003); Parker v. Columbia Pictures Indus., 204 F.3d 326, 336–37 (2d Cir. 2000); Baird v. Rose, 192 F.3d 462, 470 (4th Cir. 1999).

II. CIRCUIT APPROACHES TO THE ISSUE OF PROOF

A. *Circuits Applying the "But For" Standard: The Few and Fierce*

The circuits that apply the "but for" standard put forth three main arguments for this adherence. First, some circuits argue Title VII of the Civil Rights Act of 1964 (Title VII)'s "motivating factor" standard cannot be imparted to the ADA because there is no language explicitly incorporating the motivating factor standard.[59] Second, courts posit that, since the Supreme Court established in an Age Discrimination in Employment Act (ADEA)[60] case that the words "because of" demanded the "but for" standard, then the ADA's use of the same "because of" language requires the ADA to follow a "but for" standard of proof as well.[61] Finally, circuits have decided that the plain meaning of the words

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59 The Supreme Court's ruling in *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009), an Age Discrimination in Employment Act case, prohibited a "motivating factor" standard in ADEA cases since Title VII's explicit "motivating factor" language is not present in the ADEA. *Id.* at 167–68. The Seventh Circuit in *Serwatka*, 591 F.3d 957, held that, just as the ADEA's lack of "motivating factor" language prohibited use of a "motivating factor" standard, so too the Amendments Act's lack of "motivating factor" language cannot allow the use of a "motivating factor" standard of proof in Amendments Act cases. *See id.* at 962 ("*Gross* makes clear that in the absence of any additional text bringing mixed-motive claims within the reach of the statute, the statute's 'because of' language demands proof that a forbidden consideration—here, the employee's perceived disability—was a 'but for' cause of the adverse action complained of."). In a similar discussion to that of the Seventh Circuit in *Serwatka*, the Sixth Circuit has held that, despite the fact that the Amendments Act includes language linking its remedies to that of Title VII, the "motivating factor" standard language is not expressly in the Amendments Act and should not be imported without congressional approval. *See Lewis*, 681 F.3d at 317 ("The words 'a motivating factor' appear nowhere in the ADA but appear in another statute: Title VII. For the same reasons we have no license to import 'solely' from the Rehabilitation Act into the ADA, we have no license to import 'a motivating factor' from Title VII into the ADA."); *see also id.* at 319 ("A section of the ADA . . . cross-references Title VII: 'The powers, remedies, and procedures set forth in sections 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9 of [Title VII] shall be the powers, remedies, and procedures this subchapter provides to the [EEOC], to the Attorney General, or to any person alleging discrimination on the basis of disability in violation of any provision of this chapter, or regulations promulgated under section 12116 of this title, concerning employment.' But this cross-reference, which predates the 1991 amendments, accounts for the reality that the ADA does not have any enforcement provisions of its own. . . . Congress took the same path with the coordination provision of Title II of the ADA, which incorporates '[t]he remedies, procedures, and rights' of section 505 of the Rehabilitation Act. Just as the provisions of the ADA incorporating the Rehabilitation Act's enforcement provisions do not bring that Act's standard of care into the ADA, neither does the provision of the ADA incorporating Title VII's enforcement provisions." (alterations in original) (citations omitted)).

60 29 U.S.C. § 623. The ADEA was enacted in 1967 to combat age discrimination in the workplace against individuals aged forty and older. *Id.* § 631. The ADEA intended to address "the setting of arbitrary age limits regardless of potential for job performance," the high incidence of unemployment amongst older workers looking to continue working, and the existence of persistent, arbitrary discrimination against older workers. *Id.* § 621.

61 *See Lewis*, 681 F.3d at 314, 321 ("The ADEA and the ADA bar discrimination 'because of' an employee's age or disability, meaning that they prohibit discrimination that is a 'but-for'

"because of" entails a determining factor affecting the outcome, which the courts interpreted to imply that the "but for" standard of proof is the correct standard of proof for ADA cases.[62]

The Eleventh Circuit's application of the "but for" standard illustrates the confused reasoning even amongst those circuits that have adopted the "but for" standard. An examination of the circuit's approach is helpful in illuminating the need for further guidance as to the correct standard of proof in ADA cases. In *McNely v. Ocala Star-Banner Corp.*,[63] Bernard McNely, a twelve year employee of the Ocala Star-Banner daily newspaper, brought claims against his employer under the ADA, alleging that the corporation refused to accommodate him, and subsequently terminated him, after surgery rendered McNely disabled.[64] At trial, the jury found that McNely was considered disabled under the ADA, he had proven he was able to perform the functions of his job, the employer was able to provide reasonable accommodations for McNely, and the accommodations would not have placed an undue hardship upon the corporation.[65] Yet, the jury found for the employer based on jury instructions that required the adverse employment decision to be *solely* because of the employee's disability.[66]

McNely appealed the jury decision, alleging that the jury should have been instructed on a "but for" standard of proof and not a "solely because of" standard.[67] The Eleventh Circuit reversed and agreed with McNely's contentions, holding the "solely because of" standard should not be imported into the ADA from the Rehabilitation Act's standard of proof language, as this incorporation is not supported by the ADA's plain language or legislative history.[68] While the Eleventh Circuit differentiated the "but for" standard from the "solely because of" standard, the circuit did not mention or address the possibility of applying a "motivating factor" standard instead.[69] In addition, though

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cause of the employer's adverse decision. The same standard applies to both laws." (citation omitted) (internal quotation marks omitted)).

62 *See* McNely v. Ocala Star-Banner Corp., 99 F.3d 1068, 1077 (11th Cir. 1996) ("In everyday usage, 'because of' conveys the idea of a factor that made a difference in the outcome. The ADA imposes a 'but for' liability standard.").

63 *Id.*

64 *Id.* at 1070–71.

65 *Id.* at 1071.

66 *Id.* A high-ranking executive at Ocala Star-Banner informed McNely that, "his suspension and termination had 'resulted from [his] repeated belligerent, abusive and insubordinate conduct towards [the executive] and others at the Ocala Star-Banner.'" *Id.*

67 *Id.*

68 *Id.* at 1074–75.

69 It is possible that the plaintiff did not raise the notion of a "motivating factor" standard and simply requested the "but for" standard as opposed to the "solely because of" standard, and the Eleventh Circuit decided to address only the plaintiff's requested standard as opposed to bringing up an entirely different standard of proof to follow. In the alternative, the Eleventh Circuit might have considered the "motivating factor" standard too far of a stretch from the

the court eventually stated that the correct ADA standard of proof is the "but for" standard,[70] the language actually used by the court seems to comport more with the meaning of the "motivating factor" standard.[71] The Eleventh Circuit's inconsistent, complicated analysis highlights the lack of clear consensus among those circuits that have adopted the "but for" standard of proof.

B. *Circuits Applying the "Motivating Factor" Standard: The Comfortable Majority*

While a minority of circuits currently require a "but for" standard of proof in ADA cases,[72] the majority of circuits have held that the correct ADA standard is actually the "motivating factor" standard. The circuits that apply the "motivating factor" standard put forth five main arguments for this adherence. First, the circuits argue that the language linking the remedies[73] of Title VII and the ADA dictates that the "motivating factor" standard is the correct standard for ADA cases as well.[74] Second, circuits have argued that the identical causal language—

"solely because of" standard and therefore attempted to address and adopt the "but for" standard of proof as a less drastic transition of standards.

70 *Id.* at 1077 ("[T]he 'because of' component of the ADA liability standard imposes no more restrictive standard than the ordinary, everyday meaning of the words would be understood to imply. In everyday usage, 'because of' conveys the idea of a factor that made a difference in the outcome. The ADA imposes a 'but for' liability standard."). The language used by the court seems to combine the notion of a contributing factor akin to the "motivating factor" standard with the "but for" standard.

71 Some courts have even interpreted the court's decision to be supporting the "motivating factor" standard and not necessarily the "but for" standard, or at the least that the Eleventh Circuit does not subscribe to the "but for" standard but in fact created a new hybrid standard combining the "motivating factor" and "but for" standards. *See* Lewis v. Humboldt Acquisition Corp., 681 F.3d 312, 324–25 (6th Cir. 2012) (Clay, J., concurring in part and dissenting in part) (stating that, "[s]ignificantly, a majority of our sister circuits have embraced the motivating-factor standard in reviewing ADA claims" and then citing to *McNely* within the ensuing string citation, further claiming that *McNely* holds "that 'motivating factor' and 'but for' constitute the same standard").

72 See *supra* Part I.C for explanations of three of the four circuits. The Tenth Circuit also appears to have adopted the "but for" standard, although this choice is not explicit and the Circuit provides very little explanation as to why. *See* Bones v. Honeywell Int'l, Inc., 366 F.3d 869, 878 (10th Cir. 2004) ("Bones' ADA claim fails as a matter of law because she did not establish that her termination was *based on* her alleged disability. To establish such a causal connection, Bones must provide some evidence that her disability was a determining factor in Honeywell's decision to terminate her.").

73 *See generally* Flynn, *supra* note 44 (providing an in-depth explanation of the implications of linked statutes). A linked statute is "a statute that incorporates by specific reference the provisions of another statute. A linked statute is different from a statute that is modeled on another law in that the modeled statute reproduces the existing law verbatim, or in a slightly modified manner, while the linked statute incorporates the existing law by reference." *Id.* at 2010 n.11.

74 *See* Baird v. Rose, 192 F.3d 462, 470 (4th Cir. 1999) ("Section 794a specifically makes the remedies available under Title VII applicable to actions under the ADA. . . . Title VII recognizes

"because of"—in both Title VII and the ADA, as opposed to the language linking the two statutes, determines that Title VII's "motivating factor" standard covers ADA cases.[75] The third argument advanced is that the ADA's congressional intent favors the "motivating factor" standard.[76] Fourth, circuits have argued that the "motivating factor" standard is most in line with the plain language of the ADA.[77] Finally, circuits have argued that the "motivating factor" standard best aligns with their existing precedent in ADA cases.[78]

Ever since the ADA's creation, and the lack of language explicitly choosing a standard of proof for the statute, there has been extensive judicial debate as to the ADA's correct standard of causation. For the sake of uniformity, consistency of application, and better understanding of the causation thresholds for both employees and employers, it is time for the Supreme Court to adopt a uniform standard of proof that optimizes the achieving of the goals and intentions of Congress in enacting the ADA.

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as an unlawful employment practice discrimination that 'was a motivating factor for any employment practice, even though other factors also motivated the practice.' Thus, if a plaintiff claiming discrimination under § 12132 demonstrates that his or her disability played a motivating role in the employment decision, the plaintiff is entitled to relief." (citations omitted)).

75 *See* Parker v. Columbia Pictures Indus., 204 F.3d 326, 337 (2d Cir. 2000) ("[T]he 'substantially identical . . . causal language' used in Title VII and the ADA indicates that the expansion of Title VII to cover mixed-motive cases should apply to the ADA as well." (second alteration in original) (citation omitted)).

76 *See id.* at 337 ("The elimination of the word 'solely' from the causation provision of the ADA suggests forcefully that Congress intended the statute to reach beyond the Rehabilitation Act to cover situations in which discrimination on the basis of disability is one factor, but not the only factor, motivating an adverse employment action."); *see also* Head v. Glacier Nw., Inc., 413 F.3d 1053, 1065 (9th Cir. 2005) (holding the "'motivating factor' standard is most consistent with . . . the purposes of the ADA").

77 *See Head*, 413 F.3d at 1065 ("We agree with our sister circuits that a 'motivating factor' standard is most consistent with the plain language of the statute . . . .").

78 *See id.* ("[T]he 'motivating factor' standard comports with our existing precedent"); *see also* Pinkerton v. Spellings, 529 F.3d 513, 519 (5th Cir. 2008) ("We confirm today that the *Soledad* [*v. U.S. Dep't. of Treasury*, 304 F.3d 500, 503–04 (5th Cir. 2002)] rule is controlling here: 'Under the ADA, discrimination need not be the sole reason for the adverse employment decision, [but] must actually play a role in the employer's decision making process and have a determinative influence on the outcome.'" (alteration in original) (internal quotation marks omitted)). The Third Circuit has not explicitly adopted the "motivating factor" standard. However, the court has held that a plaintiff's evidence would have been sufficient under either the narrower "but for" standard or the broader "motivating factor" standard. *See* Shellenberger v. Summit Bancorp, Inc., 318 F.3d 183, 187 (3d Cir. 2003). By establishing that an employee's evidence can be sufficient under the less stringent "motivating factor" standard of proof, the Third Circuit essentially adopted the "motivating factor" standard. *See, e.g.*, Steaveson v. Hargett, 1998 WL 658353, at *2 n.3, (10th Cir. Sept. 15, 1998) ("Because petitioner's claim fails under either the broader . . . standard or the narrower . . . standard, we will assume, without deciding, that the broader standard applies."). This decision laid the groundwork for future plaintiffs to establish discriminatory evidence that satisfies the "motivating factor" standard but falls short of the casual connection required for the "but for" standard of proof.

III. THE SOCIAL MODEL OF DISABILITY AND EVOLUTION OF THE ADA

The previous circuits that have selected the "motivating factor" standard to be the ADA's correct standard of proof have reached the right conclusion through incorrect reasoning. The "motivating factor" standard is not the correct standard because of language incorporating the standards of other statutes or because of similar purposes of other civil rights statutes. Rather, courts should have chosen the "motivating factor" standard based on the need for the application of the social model of disability to ADA cases. The social model dictates an inclusive, broad interpretation of both disability itself and the societal barriers and prejudices disabled individuals face daily. The social model was significantly influential in both the ADA's initial creation and the passage of the ADA Amendments Act. Thus, it best fits Congress's remedial intent. In addition, the social model simultaneously correctly addresses both the new realities of covert, as well as overt, disability discrimination in the modern workplace and the need to provide more effective legal remedies for disabled employees.

A. *The Social Model's Influence on the Creation of the ADA*

Prior to the enactment of the ADA in 1990, the medical model of disability had been largely shunned in the public sphere, and the social model of disability had become the new lens through which to analyze, politicize, and assist America's disabled population.[79] As disability rights advocates worked to shift the disability paradigm from internal differentiating qualities to external societal defects,[80] one of the methods employed was to draw parallels with—and employ some of the attention-grabbing methods of—the African-American civil rights movement.[81] Disability rights advocates positioned the movement's

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79 See *supra* Part I.A for a discussion of the evolution from the medical model to the social model of disability.

80 *See* Leonard, *supra* note 20, at 4 ("No doubt resentful of the medical view of disability, theorists within the disability rights movement have attempted to recast disability as a social phenomenon. . . . treat[ing] the lack of accommodations for persons with disabilities as a form of social negligence caused by a failure to appreciate their particular needs.").

81 *See* Rovner, *supra* note 20, at 1059 ("In the early 1970s, disability advocates began to borrow some of the methods and approaches of the African-American civil rights movement in an effort to describe the experience of disability in the Unites States and what legislative requirements needed to be in place to improve that experience. Recognizing the important role that public protests, marches, acts of civil disobedience, and lawsuits had played in the movement for racial equality, disability rights advocates began employing some of these types of measures in their efforts to secure legal guarantees of equality."); *see also* Matthew Diller, *Judicial Backlash, the ADA, and the Civil Rights Model*, 21 BERKELEY J. EMP. & LAB. L. 19, 34 (2000) ("The struggle of African Americans for equality serves in many ways as the prototype of a successful movement combining political mobilization and activism with litigation and

cause within the realm of public understanding of civil rights movements by adopting civil rights vocabulary,[82] bringing together a broad range of individuals under a unifying, protectable class of disabled individuals,[83] and establishing links between disability rights and other civil rights movements that had already been afforded legal protections and national acknowledgement.[84] These civil rights links began to solidify the connection between civil rights and disability rights, and appeared to promote enhanced legal remedies for societal discrimination against disabled individuals.[85]

The government as a whole, and Congress in particular, listened to these changing sentiments and civil rights charges, and incorporated the ideals of the social model into the language of the ADA.[86] The incorporation of the social model and previous civil rights actions can particularly be seen in the language of the ADA's Findings and Purposes section,[87] as well as in the ADA's legislative history.

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legislation to bring about major social changes. . . . [and i]t is not surprising that other groups [including the disability rights movement] sought to adapt the civil rights model for advocacy, legislation and litigation to their own struggles for equality.").

82 *See* Diller, *supra* note 81, at 34–35 (discussing how the utilization of previous civil rights movements "has furnished a vocabulary and a frame of reference through which people with disabilities can articulate—and others can understand—the difficulties that they face in seeking to participate fully in society"); *see also* Rovner, *supra* note 20, at 1059 ("In particular, disability advocates have 'employ(ed) the language from (other civil rights) movements, decrying patterns of hierarchy and subordination based upon physical differences.'" (alteration in original) (quoting Mary Crossley, *The Disability Kaleidoscope*, 74 NOTRE DAME L. REV. 621, 660 (1999)).

83 *See* Diller, *supra* note 81, at 35 ("The benefits of reliance on the civil rights model can be seen on many levels: it has helped to mobilize people with disabilities and forge them into a distinct and vocal political constituency.").

84 *Id.* ("[T]he civil rights framework establishes a set of legal relationships between those who act on biases and those who are treated adversely as a result. The key concept is the idea of discrimination—the principle that it is improper for employers or public accommodations to act on biases, hostility or stereotypes relating to the group in question. Under the civil rights rubric, the discriminator is a wrongdoer who has violated legal and social norms, while the person discriminated against is a victim entitled to redress. Thus the civil rights framework suggests the legal prohibition on discrimination as a principal solution to inequality." (footnote omitted)); *see also* Drimmer, *supra* note 20, at 1376 ("Through [the enactment of legislation such as the Civil Rights Act of 1964, and the Civil Rights Act of 1968], which sought to protect the dignity and rights of African-Americans, people with disabilities saw the potential for integration into mainstream society.").

85 *See supra* note 84.

86 *See* Diller, *supra* note 81, at 31 ("The ADA explicitly adopts a civil rights approach to the problems that people with disabilities encounter in the workplace."); *see also* Scotch, *supra* note 20, at 216 ("The ADA can be seen as more than a specific protection from discrimination—it is also a policy commitment to the social inclusion of people with disabilities.").

87 Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 2, 104 Stat. 327, 328 ("The Congress finds that . . . historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem; . . . individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies,

Various statements in the ADA's legislative history highlight the pervasive influence of the social model on the proposal and enactment of the legislation. The social model's influence is particularly evident in the use of politically charged language and repeated statements that disabled individuals have faced external, societal discrimination. Specifically, when analyzing the necessity of the ADA, Senators incorporated and relied on civil rights messages provided by disability rights advocates, occasionally going so far as to quote famous African-American civil rights advocates, such as Rosa Parks and Reverend Dr. Martin Luther King, Jr., to establish direct, meaningful comparisons.[88] Senators further cited specific Commission on Civil Rights findings to highlight the need for disability discrimination legislation.[89] President George H.W. Bush also framed the struggles of disabled individuals in the context of outside oppression finally giving way to "a bright new era of equality, independence, and freedom"[90] and discussed the new freedoms as being directly in line with the goals of the United States Declaration of Independence.[91] Thus, through discussions of segregation, victimization, and society-induced isolation, the ADA's

failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities; [and] . . . individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society . . . .").

88 S. REP. NO. 101-116, pt. IV, at 5–6 (1989) ("One of the most debilitating forms of discrimination is segregation imposed by others. Timothy Cook of the National Disability Action Center testified: As Rosa Parks taught us, and as the Supreme Court ruled thirty-five years ago in *Brown v. Board of Education*, segregation 'affects one's heart and mind in ways that may never be undone. Separate but equal is inherently unequal.'" (internal quotation marks omitted)); *see also id.* at 18 (discussing witness testimony of a vision for America's future, stating, "Martin Luther King had a dream. We have a vision. Dr. King dreamed of an America 'where a person is judged not by the color of his skin, but by the content of his character.' ADA's vision is of an America where persons are judged by their abilities and not on the basis of their disabilities." (internal quotation marks omitted)).

89 *Id.* at 7 ("The U.S. Commission on Civil Rights recently concluded that: 'Despite some improvements . . . [discrimination] persists in such critical areas as education, employment, institutionalization, medical treatment, involuntary sterilization, architectural barriers, and transportation.' The Commission further observed that 'discriminatory treatment of handicapped persons can occur in almost every aspect of their lives.'" (alterations in original)).

90 Remarks on Signing the Americans with Disabilities Act of 1990, 2 PUB. PAPERS 1067 (July 26, 1990), *available at* http://bushlibrary.tamu.edu/research/public_papers.php?id=2108&year=1990&month=7. In describing the achievements of the ADA, President Bush further stated that, "[t]hree weeks ago we celebrated our nation's Independence Day. Today we're here to rejoice in and celebrate another 'independence day,' one that is long overdue." *Id.*

91 *Id.* ("Our success with this act proves that we are keeping faith with the spirit of our courageous forefathers who wrote in the Declaration of Independence: 'We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights.'").

legislative history incorporates the social model's approach to disability discrimination as a byproduct of external environmental factors and pressures that had long relegated disabled individuals to the sidelines of society.

The legislative history's use of language divorcing internal and external aspects of disability discrimination highlights Congress's acceptance of—and agreement with—society's role in the disabled community's collective isolation, dependence, and subordination. Senate reports on the ADA highlight the injustice of automatically equating disability with inferiority and utilizing perceived physical, mental, or emotional differences to exclude disabled individuals from full participation in society.[92] Further, President Bush's remarks also highlight the role society has played in disability discrimination, commanding that, "[t]ogether, we must remove the physical barriers *we* have created and the social barriers that *we* have accepted,"[93] with no mention of any reason for excluding these individuals other than external biases and barriers.

Just as the influence of the social model of disability can be seen in the legislative history of the ADA, the ADA's language itself has codified notions of social neglect and broad employment assistance. Specifically, the Findings and Purposes section of the ADA highlights the need for action to eradicate a long history of societal discrimination against disabled individuals.[94] The statute's stated examples include intentional discrimination through the creation and continued existence of societal barriers, exclusionary requirements for participation in jobs and other standard societal activities, and a lack of sufficient modifications for individuals with disabilities.[95] As Professor James Leonard has previously noted, this language typifies "social neglect,"[96] showing that

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92 S. REP. NO. 101-116, pt. IV, at 14 ("Discrimination has many different effects on individuals with disabilities. Arlene Mayerson of the Disability Rights Education and Defense Fund testified about the nature of discrimination against people with disabilities: 'The discriminatory nature of policies and practices that exclude and segregate disabled people has been obscured by the unchallenged equation of disability with incapacity and the gloss of 'good intentions.' The innate biological and physical 'inferiority' of disabled people is considered self-evident. This 'self-evident' proposition has served to justify the exclusion and segregation of disabled people from all aspects of life. The social consequences that have attached to being disabled often bear no relationship to the physical or mental limitations imposed by the disability.'").

93 Remarks on Signing the Americans with Disabilities Act of 1990, *supra* note 90 (emphasis added).

94 Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 2, 104 Stat. 327, 328.

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

96 *See* Leonard, *supra* note 20, at 4–5.

society has failed to accommodate and welcome disabled individuals into a multitude of common, daily societal rituals, including that of the workplace.

The legislation's use of words recognizing social isolation and societal barriers further entrenches the ADA in the social model's philosophy and evinces congressional intent to overcome these impediments.[97] Congress described not only the history of disability discrimination but also the current state of discrimination as of the ADA's enactment, acknowledging disability discrimination persisting in "such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services."[98] In describing the current state of discrimination, the Findings and Purposes section further describes the isolated, powerless state of disabled individuals in terms suggesting lack of control, outside influences and biases, and the difficulties of establishing a meaningful place within a society that actively isolates and excludes such individuals.[99] The ADA's language of civil rights issues, coupled with the struggles of individuals with disabilities, point to the lasting influence of the social, civil rights message with which the ADA was infused.[100]

Some legal scholars have argued that it is an oversimplification to state that the social model was the *sole* influence upon the enactment of the ADA.[101] While the social model had become the pervasive mode through which to analyze and understand disabilities by the time of the ADA's enactment, the medical model[102] had not disappeared entirely, and was still followed and believed to be correct by some disability

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97 *See* Drimmer, *supra* note 20, at 1397 ("As opposed to acts in previous years, where Congress cited only restoration and national productivity as reasons for legislation, Congress acknowledged the history of isolation and segregation of people with disabilities . . . .").

98 Americans with Disabilities Act of 1990 § 2.

99 *See* Rovner, *supra* note 20, at 1061 ("The 'Findings and Purposes' section of the statute identifies people with disabilities as a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society.").

100 *Id.* at 1061–62 ("Viewed together, the characterization of people with disabilities and the description of the types of discrimination they encounter fully support the notion that disability is a condition marked by the kind of subordination and second-class citizenship that many scholars have taken to be the appropriate target of civil rights laws." (internal quotation marks omitted)).

101 *See* Crossley, *supra* note 20, at 865 n.17 ("[I]t may oversimplify history to suggest that the ADA's enactment was based solely on civil rights principles. As Professor Samuel Bagenstos has demonstrated, welfare reform sentiments also animated legislators' support for the ADA.").

102 See *supra* Part I.A for an explanation of the medical model of disability.

rights advocates, scholars, and courts.[103] Further, some legal scholars have argued that maintaining a rigorous, strict divide between the medical and social models of disability places too much emphasis on the "origins of differences"—whether internal and medical or external and social—and ends up "divert[ing] attention from the effects of difference" and does little to "reduce the disadvantages of 'difference.'"[104] However, the purposeful incorporation of civil rights language and social model ideals highlights the fact that eliminating the effects of society's crippling biases against disabled individuals, rather than simply providing additional support for inherently incapable individuals, was the legislation's main purpose.[105]

B. *2008 Amendments to the ADA and the Social Model's Continued Influence*

Just as the ADA's legislative history and language were heavily influenced by the social model of disability, the ADA Amendments Act remains at least as entrenched in the social model, if not more so.[106] Some key areas where the ADA Amendments Act broadened the definition of, and the subsequent inclusion of, disabled individuals within the meaning of the statute, include the "regarded as" prong of the statute's definition of disability;[107] the "mitigating measures" limitation

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103 For an analysis of the lingering influence of, and continued support for, the medical model of disability, see 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, 185–225 (2008). *See generally* Leonard, *supra* note 20, at 1–2 (claiming "it was a mistake to base disability policy in the workplace on traditional civil rights principles"); David A. Weisbach, *Toward a New Approach to Disability Law*, 1 U. CHI. LEGAL F. 47 (2009) (suggesting the medical model offers a better approach to disability legislation than the social model).

104 Martha T. McCluskey, *How the Biological/Social Divide Limits Disability and Equality*, 33 WASH. U. J.L. & POL'Y 109, 112 (2010) ("Categorizing difference along [the biological or social] divide has little benefit for efforts to reduce the disadvantages of 'difference,' because both biology and society can be amenable to or resistant to change; both are subject to political and moral interpretation. . . . The focus on separating essential from contingent difference . . . implicitly reinforces the idea of 'true' difference as non-ideological and non-political. Any harms (or benefits) associated with that difference then appear natural and normal rather than unjust.").

105 *See* Crossley, *supra* note 20, at 865 n.17 ("[T]he statutory purposes articulated by Congress in the statute itself clearly speak to the 'elimination of discrimination' as the law's central purpose."); *see also* Ruth Colker, *The Mythic 43 Million Americans with Disabilities*, 49 WM. & MARY L. REV. 1, 4 n.7 (2007) (discussing how Congress adopted an "anti-subordination" model when enacting the ADA, a model which "seeks to eliminate the power disparities . . . through the development of laws and policies that directly redress those disparities").

106 For a discussion of the intensive negotiations leading up to the ADA Amendments Act's introduction and passing, along with the desire to remedy the extremely high threshold of disability qualifications and strict construction of the ADA's language by various courts since the ADA's passing, see Barry, *supra* note 28, at 251–72.

107 Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 3, 104 Stat. 327.

on recovery and the relationship with the "reasonable accommodation" requirement;[108] and the expansion of the number and types of "major life activities" that can be affected in order to qualify as disabled under the ADA Amendments Act.[109]

1. Broadening the "Regarded As" Prong of the Disability Definition

According to the original ADA, one of three definitions of disability covered included "being regarded as having such an impairment."[110] Congress intended for this definition to be interpreted broadly, but after a number of Supreme Court decisions narrowing the span of this definition, Congress further clarified the meaning of "regarded as" in the ADA Amendments Act to ensure the definition would be interpreted broadly and inclusively.[111] The Statement of Senate Managers emphasized the sweeping goals behind these expansions by stating that, "unfounded concerns, mistaken beliefs, fears, myths, or prejudice about disabilities are often just as disabling as actual impairments," and the broadening of the ADA Amendments Act's language was meant to curb discrimination based in these inappropriate societal biases.[112] Through the use of terms alluding to external prejudices creating barriers still faced by disabled individuals, the Managers' statements successfully highlight the social model's influence on the ADA Amendments Act.

2. Rejecting the Supreme Court's "Mitigating Measures" Limitation

Before the ADA Amendments Act, in cases like *Sutton v. United Air Lines, Inc.*,[113] the Supreme Court severely limited the universe of individuals considered disabled under the ADA by concluding that a decision of disability qualification should include consideration of whether the individual had taken any "mitigating measures" to combat their disability. Mitigating measures "correct for, or mitigate, a physical or mental impairment," and can include anything from hearing aids for

108 *Id.* § 101(9).

109 *Id.* § 3.

110 *Id.*

111 ADA Amendments Act of 2008, Pub. L. No. 110-325, § 3, 122 Stat. 3553 ("An individual meets the requirement of 'being regarded as having such an impairment' if the individual establishes that he or she has been subjected to an action prohibited under this Act because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.").

112 110 CONG. REC. S8842 (daily ed. Sept. 16, 2008) (statement of Managers).

113 527 U.S. 471 (1999).

the hearing-impaired to glasses for the vision-impaired and other assistive methods to cope with or curb the effects of the disability.[114]

To correct this Court-created, highly stringent requirement, Congress specifically did away with any notion of coverage restrictions based on mitigating measures, changing the language of the ADA Amendments Act so that a court must determine an individual's disability status "without regard to the ameliorative effects of mitigating measures."[115] Congress took a strong stance on this issue, explaining that mitigating measures should not be a consideration in an individual's coverage under the ADA or in determining whether an individual deserves a "reasonable accommodation" at work.[116] Specifically, Congress discussed the unacceptable "Catch-22" situation created by the ADA's requirement, when disabled individuals must choose between seeking mitigating measures for their disability and maintaining their disability status—and the accompanying protections associated with that designation—under the ADA.[117]

By denouncing the Supreme Court's strict requirements against mitigating measures, Congress sought to further combat the medical model's position that disabled individuals should be viewed as having internal, intrinsic disabilities that, once mitigated against, are no longer eligible for workplace reasonable accommodations. Rather, Congress adopted the social model's notion that the availability of reasonable accommodations to disabled individuals is necessary to combat societal prejudices against the degrees of disability of individuals after taking mitigating measures. Congress further acknowledged that the mitigating measures requirement was a disguised way to further discriminate against disabled individuals in the workplace by forcing them to choose between mitigating measures and reasonable accommodations.[118]

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114 *Id.* at 482.

115 ADA Amendments Act of 2008 § 3.

116 110 CONG. REC. S8349–50 (daily ed. Sept. 11, 2008) (statement of Sen. Harkin).

117 *Id.* ("[T]he Supreme Court decisions have led to a supreme absurdity, a Catch-22 situation that so many people with disabilities find themselves in today. For example, the more successful a person is at coping with a disability, the more likely it is the Court will find that they are no longer disabled and therefore no longer covered under the ADA. If they are not covered under ADA, then any request that they might make for a reasonable accommodation can be denied. If they do not get the reasonable accommodation, they cannot do their job; and they can get fired and they will not be covered by the ADA and they will not have any recourse. . . . I want to get a job. But I want the coverage of ADA. But I have to give that up if I use medication or use an assistive device—an absolute absurdity.").

118 *See supra* notes 116–117.

3. Expanding the Types of "Major Life Activities" Affected and Covered

To be considered an actual disability covered under the ADA, "an impairment must substantially limit one or more *major life activities* of an individual."[119] While the original ADA provided neither a definition nor a descriptive list of major life activities that could be affected, Congress allowed the United States Equal Employment Opportunity Commission (EEOC) to devise a working definition. The EEOC then crafted an illustrative list of "major life activities."[120] The EEOC defined major life activities as "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."[121] However, this short list led to confusion regarding whether the list was in fact exhaustive, and whether other types of activities could or could not be included. In the ADA Amendments Act, Congress chose to create its own non-exhaustive list of major life activities that was broader, more inclusive, and was inserted directly into the text of the statute.[122] In addition, the ADA Amendments Act now includes as major life activities operations of "major bodily function[s], including, but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions."[123] Such a list had not previously been mentioned or incorporated into the statute.

Congress further turned the ADA Amendments Act's requirements into a significantly different and more inclusive standard by rejecting the Supreme Court's holding, in cases like *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*,[124] that the types of major life activities affected "need to be interpreted strictly to create a demanding standard for qualifying as disabled."[125] Congress changed the text of the statute to create a less stringent standard, specifically stating that one purpose of the ADA Amendments Act's changes was to reject the Supreme Court's strict interpretations of the terms "substantially

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119 Alex B. Long, *Introducing the New and Improved Americans with Disabilities Act: Assessing the ADA Amendments Act of 2008*, 103 NW. U. L. REV. COLLOQUY 217, 221 (2008) (emphasis added).

120 *Id.* at 221–22.

121 *Id.* at 222 n.29 (internal quotation marks omitted).

122 ADA Amendments Act of 2008, Pub. L. No. 110-325, § 3, 122 Stat. 3553 ("[M]ajor life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.").

123 *Id.*

124 534 U.S. 184 (2002).

125 *Id.* at 197.

limited" and "major life activities" that constricted the number of individuals who qualified as disabled.[126] By removing barriers to being considered disabled, Congress acknowledged that one form of societal bias is in strictly defining who is determined "disabled enough" to receive the benefits of disability status, thus highlighting the influence of the social model on the sheer numbers of disabled individuals newly covered by the ADA Amendments Act.[127]

With the incorporation of a number of additional major life activities, coupled with the explicit rejection of the Supreme Court's demanding standards, Congress honed the ADA Amendments Act to further create a far-reaching, inclusive piece of legislation to cover and protect as many disabled individuals as possible.

C. *The ADA Amendments Act's Shift from "Because Of" to "On the Basis Of": A Broadening of Inclusion Based in Social Model Principles*

The legislators behind the ADA Amendments Act's enactment intended for the sweeping changes to the ADA to be inclusive, broadening, and founded in the ideals of the social model of disability. On a number of occasions throughout the ADA Amendments Act's legislative history, legislators mentioned the parallels between the civil rights movements of the past and the continued struggles of the disabled community even after the ADA's enactment.[128] Legislators acknowledged that the ADA brought important changes in the lives of disabled Americans, but there was still a great deal of work to be done regarding inclusion and incorporation of more individuals and more cases of disability discrimination to effectively fulfill the ADA's original

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126 ADA Amendments Act of 2008 § 2 (One of Congress's stated purposes was "to reject the standards enunciated by the Supreme Court in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002), that the terms 'substantially' and 'major' in the definition of disability under the ADA 'need to be interpreted strictly to create a demanding standard for qualifying as disabled,' and that to be substantially limited in performing a major life activity under the ADA 'an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives[.]'").

127 Drimmer, *supra* note 20, at 1355–56 ("Above all, the civil rights model attempts to unmask the false objectivity that allows society to label some of its members 'disabled' and treat those citizens as less than equal.").

128 *See* 110 CONG. REC. S9626 (daily ed. Sept. 26, 2008) (statement of Sen. Reid) ("We are all part of a nation built on the promise of equal rights, justice, and opportunity for everyone. Eighteen years ago, we took a historic step toward fulfilling that promise with the passage of the original [ADA]. Unfortunately, we didn't expect then that Supreme Court decisions would narrow the law's scope contrary to congressional intent."); *see also* 110 CONG. REC. S7523 (daily ed. July 26, 2008) (statement of Sen. Reid) ("[T]his legislation was intended to prohibit discriminatory job decisions in the same spirit of the other great civil rights laws of our country.").

purpose.[129] The ADA Amendments Act's legislative history further emphasizes that the definition of disability, thresholds for qualification, and the number of victims covered under the statute must be broadened, in line with the goal to right society's wrongs towards disabled individuals and to restore basic civil rights and essential equalities to disabled Americans.[130]

In line with these broad remedial goals founded in the social model's ideals, the legislators behind the ADA Amendments Act changed the statute's language from prohibiting discrimination "because of" disability to prohibiting discrimination "on the basis of" disability. The legislative history explicitly states that one of the reasons for this language shift was to "[a]lign[] the construction of the [ADA] with Title VII of the Civil Rights Act of 1964."[131] The ADA Amendments Act's drafters further highlight this connection between the word usage of Title VII[132] and the ADA Amendments Act, stating, "[t]he bill amends Section 102 of the ADA to mirror the structure of [the] nondiscrimination protection provision in Title VII of the Civil Rights Act of 1964."[133]

Some circuits have highlighted the importance of this congressional connection between Title VII and the ADA Amendments Act. By emphasizing the similarities between the congressional intent behind both Acts, these circuits conclude that Title VII's standard of proof, the "motivating factor" standard, is the correct standard of proof for the ADA as well.[134] Other circuits, however, have held that, following

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129 *See* 110 CONG. REC. S7769 (daily ed. July 30, 2008) (statement of Sen. Leahy) ("We have before us a historic opportunity to restore the ADA's original intent and reclaim the basic rights it extended to persons with disabilities."); 110 CONG. REC. H6074 (daily ed. June 25, 2008) (statement of Rep. Nadler) ("This legislation is long overdue. Countless Americans with disabilities have already been deprived of the opportunity to prove that they have been victims of discrimination, that they are qualified for a job, or that a reasonable accommodation would afford them an opportunity to participate fully at work and in community life.").

130 *See* 110 CONG. REC. E1376 (daily ed. June 26, 2008) (statement of Rep. Capps) ("One of the most fundamental principles of our great nation is that all people, regardless of color, gender, or ability have the right to life, liberty, and the pursuit of happiness. The ADA was passed to further this principle, and to ensure equal opportunity and access for individuals with disabilities.").

131 110 CONG. REC. S8344 (daily ed. Sept. 11, 2008) (statement of the Managers).

132 42 U.S.C. § 2000e (2012).

133 110 CONG. REC. S8347 (daily ed. Sept. 11, 2008) (statement of the Managers). The managers further highlight that the amendments "change[] the language from prohibiting discrimination against a qualified individual 'with a disability because of the disability of such individual' to prohibiting discrimination against a qualified individual 'on the basis of disability.' This ensures that the emphasis in questions of disability discrimination is properly on the critical inquiry of whether a qualified person has been discriminated against on the basis of disability, and not unduly focused on the preliminary question of whether a particular person is a 'person with a disability.'" *Id.*

134 *See, e.g.*, Parker v. Columbia Pictures Indus., 204 F.3d 326, 337 (2d Cir. 2000) ("Like the ADA, Title VII prohibits employers from discriminating 'because of' any protected characteristic, including 'race, color, religion, sex, or national origin.' In the Civil Rights Act of

Gross v. FBL Financial Services, Inc.,[135] the Supreme Court does not condone taking the standard of proof from one statute and applying it to another statute without explicit permission, in the form of parallel language or text linking[136] the two statutes and their respective standards of proof.[137] These circuits argue that the "motivating factor" standard cannot thus automatically be imparted to the ADA Amendments Act simply because it has been fully incorporated into Title VII, which is a similar yet distinct congressional statute.[138]

The ADA Amendments Act's legislative history does not explicitly provide reasoning for, or language choosing, either the "motivating factor" standard or the "but for" standard, nor does it explicitly impart Title VII's standard of proof into the ADA Amendments Act. However, the statute's language and stated goals place the ADA Amendments Act firmly within the category of remedial civil rights statutes, and the coverage of remedial legislation is meant to be interpreted broadly and inclusively.[139] As the "motivating factor" standard is the broader standard of proof that covers a greater number of disabled individuals by making the standard of proof for discrimination less rigorous, it appears that the ADA Amendments Act's legislative history, based in correcting societal barriers against integration, favors the "motivating factor" standard of proof over the more stringent, more difficult to prove "but for" standard of proof.

1991, Congress clarified the Title VII 'because of' causation standard by amending the statute explicitly to impose liability on employers where discrimination 'was a motivating factor for any employment practice, even though other factors also motivated the practice.' Although that amendment does not, by its terms, apply to violations of the ADA, nothing in either the language or purpose of either statute suggests that Congress intended different causation standards to apply to the different forms of discrimination. Rather, the 'substantially identical . . . causal language' used in Title VII and the ADA indicates that the expansion of Title VII to cover mixed-motive cases should apply to the ADA as well." (alteration in original) (citations omitted)).

135 557 U.S. 167 (2009).

136 See *supra* note 73 for John L. Flynn's discussion of the implications of linking statutes.

137 *See* Lewis v. Humboldt Acquisition Corp., 681 F.3d 312, 318–19 (6th Cir. 2012) ("*Gross* resolves this case. No matter the shared goals and methods of two laws, it explains that we should not apply the substantive causation standards of one antidiscrimination statute to other anti-discrimination statutes when Congress uses distinct language to describe the two standards. Just as we erred by reading the 'solely' language from the Rehabilitation Act into the ADA based on the shared purposes and histories of the two laws so we would err by reading the 'motivating factor' language from Title VII into the ADA." (citation omitted)); *see also* Serwatka v. Rockwell Automation, Inc., 591 F.3d 957, 961 (7th Cir. 2010) ("Although the *Gross* decision construed the ADEA, the importance that the court attached to the express incorporation of the mixed-motive framework into Title VII suggests that when another anti-discrimination statute lacks comparable language, a mixed-motive claim will not be viable under that statute.").

138 *See supra* note 137.

139 *See* 110 CONG. REC. H6074 (daily ed. June 25, 2008) (statement of Rep. Nadler) (stating that the ADA Amendments Act "lowers the burden of proving that one is disabled enough to qualify for coverage. It does this by directing courts to *read the definition broadly, as is appropriate for remedial civil rights legislation*" (emphasis added)).

IV. PROPOSAL

According to data compiled by the National Council on Disability (NCD), national surveys of employers suggest that at least twenty percent of employers believe direct discrimination and biases affect disabled employee hiring rates, and that these prejudices have affected the employment opportunities for disabled individuals at their own firms.[140] The NCD report further highlights that, in addition to direct discrimination, a number of aspects of corporate culture, including "organizational practices and the attitudes of managers, supervisors, and coworkers," can negatively affect the employment of disabled individuals.[141] These societal, deeply engrained biases can manifest themselves in the workplace in a number of ways. Specifically, deeply rooted prejudices can lead to discomfort around disabled individuals, which can result in reluctance to hire and retain disabled individuals.[142] In addition, managers and company officers may subscribe to false stereotypes about the types of work disabled individuals can and cannot perform, which may become a barrier to entry to certain employment positions.[143] Moreover, employers may develop predetermined notions about the lack of interpersonal or social skills of disabled individuals, which can lead to a preconceived bias against disabled individuals in teamwork settings and in coworker dispute situations.[144]

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140 NAT'L COUNCIL ON DISABILITY, EMPOWERMENT FOR AMERICANS WITH DISABILITIES: BREAKING BARRIERS TO CAREERS AND FULL EMPLOYMENT 20 (2007), *available at* http://www.ncd.gov/publications/2007/Oct2007. The NCD reports that this percentage of employers might be artificially low due to "the 'social desirability' bias in surveys that leads respondents to avoid acknowledging prejudicial attitudes." *Id.*

141 *Id.*

142 *Id.* ("Personnel managers and supervisors may be personally uncomfortable around people with disabilities, and this discomfort may be manifested in a reluctance to hire, retain, or promote.").

143 *Id.* ("Employers may hold strong stereotypes about the type of jobs or industries that are appropriate for people with certain types of disabilities and may have strong biases about the attitudes, aspirations, and potential for further human capital development of workers with disabilities. For instance, among 13 laboratory experiments, 10 found that evaluators were overly pessimistic about the future performance and promotion potential of employees with disabilities . . . ."); *see also* Carrie Griffin Basas, *Back Rooms, Board Rooms—Reasonable Accommodation and Resistance Under the ADA*, 29 BERKELEY J. EMP. & LAB. L. 59, 101–02 (2008) ("In the world of work, the identification of people with disabilities as un- or under-productive employees and charitable hires shapes both employers' and employees' attitudes. Low expectations mean that people with disabilities are never quite the employees a savvy leader would want. Is it discrimination if it is truthful? Ah, this is the very question that pervades the hiring environment for people with disabilities—a question that is, or should be, shameful to ask in the context of race and gender. It is nonetheless at the core of choosing or eliminating a job candidate with a disability." (footnotes omitted)).

144 NAT'L COUNCIL ON DISABILITY, *supra* note 140, at 20 ("Employers may believe that a worker with a disability will not be well accepted by coworkers and therefore will be less productive in teamwork situations.").

In today's complex workplace, where direct disability discrimination occurs alongside more subtle manifestations of societal biases in the form of prejudiced corporate cultures, the "but for" standard of proof is no longer a viable standard of proof for ADA Amendments Act cases. Since the "but for" standard only accounts for situations where the adverse employment decision would not have occurred "but for" the disability discrimination, the standard fails to adequately account for prejudices against the disabled individual that are well hidden yet still deeply embedded in society as a whole, and in corporate culture in particular. Rather, the realities and complexities of overt and covert, potentially subconscious disability discrimination within the modern workplace require a multi-faceted, more inclusive approach to considering the contributing factors to adverse employment decisions. The "motivating factor" standard is the only standard that provides an effective legal remedy for disabled individuals that accounts for a combination of factors, including the continuously present societal biases against disabled individuals in the workplace and the varied forms within which this discrimination can manifest.

In order to provide much-needed clarity and consistent, uniform application of the ADA Amendments Act, in line with the original ADA's stated goals, the "motivating factor" standard should be the ADA Amendments Act's universally accepted standard of proof. The "motivating factor" standard is broader and more inclusive than the "but for" standard of proof, and best achieves Congress's goals of covering and protecting disabled Americans who have been discriminated against in the workplace for far too long. The "motivating factor" standard is also the standard of proof most in line with the ADA Amendments Act's commitment to the social model of disability, which encourages the removal of outside societal barriers to the success of disability plaintiffs.

Advocates of the "but for" standard argue the "motivating factor" standard cannot be incorporated into the ADA Amendments Act simply because Congress included the "motivating factor" language in Title VII's standard of proof.[145] Consequently, since the Supreme Court interpreted the words "because of" to mean "but for" causation in ADEA cases, this same standard must apply for ADA Amendments Act cases.[146] However, just as Title VII's standard of proof cannot be simply imparted to the ADA Amendments Act, so too the Supreme Court's interpretation of the ADEA's standard of proof cannot be imparted to the ADA Amendments Act. Rather, the "motivating factor" standard is the appropriate standard for the ADA Amendments Act based on the broad, inclusive coverage dictated by the social model of disability and

145 *See supra* note 137; *infra* note 159.

146 *See supra* note 145.

the modern-day realities of the existence of a combination of overt and covert forms of disability discrimination in the workplace.

Advocates of the "but for" standard have also expressed concern that the "motivating factor" standard will open the floodgates of litigation and create a number of frivolous lawsuits.[147] This fear does not effectively take into account the fact that, under a "but for" standard of proof, the number of ADA Amendments Act cases might prove to be deceptively low, as the number of individuals Congress intended to be covered would fail to be included in the Court's narrow threshold of qualified individuals. While the ADA was intended to cover at least forty-three million Americans with disabilities,[148] studies have shown that, following the Supreme Court's previous narrow interpretations of the ADA's standards as being stringent as opposed to broad and inclusive,[149] the number of individuals covered has actually been closer to 13.5 million, a much smaller number.[150] As the number of individuals actually covered comes closer to the originally intended number of forty-three million, and there are now at least fifty-four million disabled individuals in America,[151] it makes sense that the number of lawsuits might increase. However, there is no indication that this increase would not simply be proportionate relative to the correct number of individuals being covered, just as Congress intended.[152]

There are also still threshold questions that must be affirmatively answered before the issue of causation is even addressed in an ADA Amendments Act case, thus reducing the number of cases that reach the courtroom even when there is a broader standard of proof applied like the "motivating factor" standard.[153] Before a case even reaches the issue of causation, a plaintiff must prove: (1) she has a qualifying disability or is "regarded as" having a disability; (2) the employer had notice of the

147 *See* Park, *supra* note 46, at 278 (discussing the "popular belief" that the "motivating factor" standard opens the floodgates of litigation).

148 Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 2, 104 Stat. 327, 328.

149 *See supra* Part III.B.

150 *See* Colker, *supra* note 105, at 7 ("Under the guise of the statutory tool of 'plain meaning,' the Court has transformed Congress's first finding—that it intends to cover at least 43 million Americans—to mean that Congress intends to cover no more than 43 million Americans. In fact, the approach chosen by the Court only results in about 13.5 million Americans receiving statutory coverage, with those individuals typically being so disabled that they are not qualified to work even with reasonable accommodations. This narrow interpretation, which contradicts the plain statutory language of the ADA, essentially erases the statute's employment discrimination provisions." (footnotes omitted)).

151 *Facts for Features: 20th Anniversary of Americans with Disabilities Act*, U.S. CENSUS BUREAU (May 26, 2010), https://www.census.gov/newsroom/releases/archives/facts_for_features_special_editions/cb10-ff13.html.

152 *See* Colker, *supra* note 105, at 20 ("With regards to the ADA, Congress has explicitly stated that the scope of coverage should protect at least 43 million Americans in order for the ADA to have effective workplace protection. Congress should not have to waste its time with legislative amendments to repeat this basic mandate." (footnote omitted)).

153 *See* Park, *supra* note 46, at 276.

disability; (3) the plaintiff could perform the job's functions with reasonable accommodations that would not incur undue hardship on the employer; and (4) the employer did not provide reasonable accommodations.[154] Only once these threshold factual requirements have been proven does the case even arrive at the issue of causation, thus serving as a barrier against potentially excessive litigation with the "motivating factor" standard.[155]

CONCLUSION

Since the ADA's enactment, federal circuit splits have continuously evolved regarding the appropriate standard of proof for ADA cases. In fact, one of the only consistent aspects of the ADA to date has been the existence of disparate causation standards. This constant uncertainty breeds rampant confusion amongst employers and employees alike, and produces significantly different case results simply depending on which circuit the cases happen to fall within. These discrepancies can no longer be tolerated. Congress has failed thus far to revise the ADA Amendments Act's causation language; thus, it is time for the Supreme Court to resolve these differences and select a universally applicable standard of proof for the ADA Amendments Act.

Courts have often chosen to follow either the "motivating factor" standard or the "but for" standard by citing to statutory language indicating that the ADA is most in line with, or has been directly linked to,[156] other statutes with clearer or more established standards of proof. These comparisons have included references to Title VII,[157] the Rehabilitation Act,[158] and the ADEA.[159] However, as the Supreme Court

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154 *See* Bones v. Honeywell Int'l, Inc., 366 F.3d 869, 878 (10th Cir. 2004); *see also* Parker v. Columbia Pictures Indus., 204 F.3d 326, 332 (2d Cir. 2000).

155 Park, *supra* note 46, at 276 (discussing how these factual considerations prior to causation should be sent to a jury when there are "genuine issues of material fact," yet studies have shown that in ADA cases, "judges are routinely deciding fact-intensive [ADA] cases without sending them to the jury." (alteration in original) (internal quotation marks omitted)). These judge-made decisions highlight a trend in ADA cases: That judges are "abusing the summary judgment standard by creating a higher threshold of proof for ADA plaintiffs." *Id.* The implications of the high rate of summary judgment decisions in ADA cases, and the reasons behind them, are beyond the scope of this Note. However, this trend does indicate that fewer Amendments Act cases will pass the summary judgment phase, whether the standard of proof is the broader "motivating factor" standard or the more stringent "but for" standard.

156 For an explanation of linked statutes see *supra* note 73, and Flynn, *supra* note 44, at 2010–11.

157 *See, e.g.*, *Parker*, 204 F.3d at 336–37 ("Although the ADA includes no explicit mixed-motive provision, a number of other circuits have held that the mixed-motive analysis available in the Title VII context applies equally to cases brought under the ADA. We agree with the analysis in these cases . . . ." (citations omitted)).

158 *See* Zukle v. Regents of the Univ. of Cal., 166 F.3d 1041, 1045 n.11 (9th Cir. 1999) ("There is no significant difference in analysis of the rights and obligations created by the ADA and the

aptly put in *Gross*,[160] a court cannot impart the language of one statute onto another without explicit congressional consent.

This Note proposes that the correct standard of proof is the "motivating factor" standard, not because the ADA Amendments Act's standard of proof is to be interpreted as other statutes have been interpreted. Rather, the ADA Amendments Act's well-established commitment to the social model of disability and civil rights principles dictates that the "motivating factor" standard is the standard most in line with the congressional intent of broadening the ADA Amendments Act. It is also the standard that most effectively turns a societal commitment against disability discrimination in the workplace into a legally enforceable right with a consistent remedy.

Rehabilitation Act. Thus, courts have applied the same analysis to claims brought under both statutes and courts routinely look to Rehabilitation Act case law to interpret the rights and obligations created by the ADA[.]" (citations omitted)); *see also* McDonald v. Pennsylvania, 62 F.3d 92, 94–95 (3d Cir. 1995) ("Congress made clear its intention that identical standards were to be applied to both Acts. . . . Whether suit is filed under the Rehabilitation Act or under the Disabilities Act, the substantive standards for determining liability are the same.").

159 *See* Lewis v. Humboldt Acquisition Corp., 681 F.3d 312, 321 (6th Cir. 2012) (likening the standard of proof in the ADA to the ADEA and choosing the "but for" standard for ADA cases); *see also* Serwatka v. Rockwell Automation, Inc., 591 F.3d 957, 962 (7th Cir. 2010) ("Like the ADEA, the ADA renders employers liable for employment decisions made "because of" a person's disability, and *Gross* construes "because of" to require a showing of but-for causation. Thus, in the absence of a cross-reference to Title VII's mixed-motive liability language or comparable stand-alone language in the ADA itself, a plaintiff complaining of discriminatory discharge under the ADA must show that his or her employer would not have fired him but for his actual or perceived disability; proof of mixed motives will not suffice.").

160 557 U.S. 167, 173–75 (2009) ("[T]he Court's interpretation of the ADEA is not governed by Title VII decisions . . . .").