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COMMENTS

Revitalizing the Law That “Preceded the Movement”: Associational Discrimination and the Rehabilitation Act of 1973

Bianca G. Chamusco†

INTRODUCTION

Give me a place to stand on, and I can move the earth.

—Archimedes¹

A deaf man is admitted to the hospital for emergency surgery. The hospital, unable to locate an available American Sign Language interpreter, relies on the man’s children to communicate with him. As the man’s health declines, the children become increasingly overwhelmed by their task. Forced to miss school in order to translate unfamiliar medical terminology for their dying father, the children later sue the hospital on their own behalf; they allege that the hospital has discriminated against them based on their association with a disabled person in violation of both the Americans with Disabilities Act of 1990² (ADA) and the Rehabilitation Act of 1973.³ Do they have a case?⁴

To be sure, this is not the prototypical lawsuit under either Act. In the normal course of events, the father, a disabled individual, will have standing to sue on his own behalf.⁵ But in a quirk

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¹ Archimedes, *The Works of Archimedes* xix (Cambridge 1897) (T.L. Heath, ed). It is highly unlikely, of course, that Archimedes had *legal* standing in mind when he wrote these famous words.

² Pub L No 101-336, 104 Stat 327, codified at 42 USC § 12101 et seq.

³ Pub L No 93-112, 87 Stat 355, codified at 29 USC § 701 et seq.

⁴ This hypothetical is loosely based on the facts of *Loeffler v Staten Island University Hospital*, 582 F3d 268, 271–74 (2d Cir 2009), discussed in Part II.B.

⁵ See 29 USC § 794a(a)(2); 42 USC § 12188.

of both statutes, nondisabled plaintiffs may *also* sue—not to vindicate their father’s rights⁶ but to litigate their own. This somewhat neglected provision, known as “associational standing,”⁷ has resulted in substantial judicial confusion both at the district-court level⁸ and in the circuit courts of appeals,⁹ especially in the Rehabilitation Act context.

This Comment seeks to resolve the confusion by defining the scope of standing under the Rehabilitation Act. It does so, first, by engaging with the Rehabilitation Act’s statutory language and recent Supreme Court precedent interpreting that same language as it arises in different statutory contexts. Second, this Comment considers standing under the Rehabilitation Act with an eye toward that Act’s uneasy entanglement with the ADA. Even though Congress intended the ADA to bolster the Rehabilitation Act’s efficacy as a safeguard for disability rights,¹⁰ scholars have noted that the incentives for bringing suit under the ADA are too weak on their own to lead to adequate enforcement.¹¹ Because the Rehabilitation Act authorizes remedies that are unavailable under the ADA, the Rehabilitation Act appears to be uniquely poised to effectuate the antidiscrimination aims of both statutes.

This Comment is organized as follows: Part I summarizes the history of disability antidiscrimination statutes in federal court from the end of World War I to the present and outlines the areas in which the modern statutes overlap. Part II delves into the Supreme Court’s competing standing doctrines and considers

⁶ While courts generally bar litigants from suing to enforce the legal rights of others, there are limited exceptions. See generally Brian Charles Lea, *The Merits of Third-Party Standing*, 24 Wm & Mary Bill Rts J 277 (2015). See also *Allen v Wright*, 468 US 737, 750–56 (1984). While third-party standing is important to the law of standing generally, it is not relevant to associational standing because associational plaintiffs seek to vindicate their *own* rights in court—not the rights of others.

⁷ Note that “associational standing” in this context means standing to sue for discriminatory acts toward a person as a result of that person’s association with a disabled individual. For the purposes of this Comment, the term “associational” does not reach entities or organizations. For an explanation of this other type of associational standing as it relates to advocacy organizations, see generally Kelsey McCowan Heilman, Comment, *The Rights of Others: Protection and Advocacy Organizations’ Associational Standing to Sue*, 157 U Pa L Rev 237 (2008).

⁸ See, for example, *Collins v Dartmouth-Hitchcock Medical Center*, 2015 WL 268842, *8 (D NH). See also Part II.C.

⁹ Compare, for example, *Loeffler*, 582 F3d at 279, with *McCullum v Orlando Regional Health-Care System, Inc.*, 768 F3d 1135, 1143 (11th Cir 2014). See also Part II.

¹⁰ See Part I.C.

¹¹ See, for example, Samuel R. Bagenstos, *Law and the Contradictions of the Disability Rights Movement* 124–28 (Yale 2009); Ruth Colker, *The Disability Pendulum: The First Decade of the Americans with Disabilities Act* 183 (NYU 2005).

the recent circuit split on the associational standing issue in the Rehabilitation Act context. In the process, it surveys the arguments for both a broad and a narrow interpretation of the Rehabilitation Act’s scope. Part III contemplates a solution born of statutory interpretation and economic analysis. Part III.A observes the necessity, in light of two recent Supreme Court opinions authored by Justice Antonin Scalia,¹² of formally importing the zone-of-interests test into disability law. Finally, Part III.B argues that this zone of interests, once the test is adopted, should be wide. Interpreting the Rehabilitation Act’s standing provision broadly not only better accords with the Act’s statutory language, but it would also aid in deterring discriminatory conduct toward disabled individuals and their associates, potentially leading to expanded protections for the largest minority group¹³ in the United States.

I. DISABILITIES IN FEDERAL COURT: A HISTORY

The Rehabilitation Act prohibits discrimination against otherwise-qualified individuals with disabilities by programs receiving federal financial assistance.¹⁴ It was a landmark piece of legislation when it was finally ratified in 1973, but its passage into law was by no means assured. Despite the bill’s strong support in the Senate, President Richard Nixon twice vetoed it,¹⁵ and regulations enforcing the Act were not issued until 1977—a full four years after the Act had been passed and only after much legislative “foot-dragging” had ensued.¹⁶ It is thus not a stretch to, like Professor Ruth O’Brien, call its presence on the books “an accident of history”¹⁷—a historic victory for the disability rights movement even if it proved less effective at combating discrimination than originally hoped.¹⁸

¹² See generally *Thompson v North American Stainless, LP*, 562 US 170 (2011); *Lexmark International, Inc v Static Control Components, Inc*, 134 S Ct 1377 (2014).

¹³ See Mark C. Weber, *Understanding Disability Law* v (LexisNexis 2007).

¹⁴ See Rehabilitation Act § 504, 87 Stat at 394, 29 USC § 794(a).

¹⁵ Ruth O’Brien, *Crippled Justice: The History of Modern Disability Policy in the Workplace* 121–22 (Chicago 2001).

¹⁶ *Id* at 126–28.

¹⁷ *Id* at 5.

¹⁸ See Susan Gluck Mezey, *Disabling Interpretations: The Americans with Disabilities Act in Federal Court* 24 (Pittsburgh 2005) (noting that, by the late 1980s, disability rights advocates had become convinced that § 504 was “inadequate to achieve their goal of removing barriers to . . . full participation in society” because “there was never a real commitment to enforce it”).

The Rehabilitation Act was not Congress's first attempt to secure rights for individuals with disabilities, and it is only one of several federal disability discrimination statutes in force today.¹⁹ While this Comment focuses primarily on the Rehabilitation Act and its role in ensuring access to federally funded programs and activities (particularly in the healthcare arena and with the goal of offsetting some of the ADA's statutory defects),²⁰ the Act cannot be understood in isolation from its counterparts or without reference to the political environment at the time of its birth. Accordingly, this Part considers the Rehabilitation Act's origins in light of a shift in public perception from hostility toward or pity for individuals with disabilities to a push for substantive legal protections. Framing the rise of disability rights litigation in conjunction with the demands of African Americans and women for equal protection under the Constitution²¹ is critical for understanding how the Rehabilitation Act was drafted and has since been adjudicated.²²

A. From Pathology to Civil Rights

The Rehabilitation Act has its roots in the post-World War I Vocational Rehabilitation Act,²³ which provided for "vocational rehabilitation and return to civil employment" for disabled veterans.²⁴ Congress followed up the 1918 law with the Smith-Fess

¹⁹ While the most significant are the Rehabilitation Act of 1973 and the ADA of 1990, others include the Architectural Barriers Act of 1968 (ABA), Pub L 90-480, 82 Stat 718, codified at 42 USC § 4151 et seq, and the Individuals with Disabilities Education Act of 1975 (IDEA), Pub L No 101-476, 104 Stat 1103, codified at 20 USC § 1400 et seq. Federal programs may be subject to overlapping statutory provisions of two or more of these laws. See Laura Rothstein, *Disability Discrimination Statutes or Tort Law: Which Provides the Best Means to Ensure an Accessible Environment?*, 75 Ohio St L J 1263, 1271 (2014).

²⁰ For a discussion of the ADA's enforcement challenges stemming from its remedial scheme, see Part III.C. This Comment does not address employment discrimination under the Rehabilitation Act. For a comprehensive analysis of workplace discrimination under the various disability discrimination laws, see generally O'Brien, *Crippled Justice* (cited in note 15).

²¹ The political advocacy of these groups gave rise to the Civil Rights Act of 1964, Pub L No 88-352, 78 Stat 241, codified as amended at 42 USC § 2000e et seq, and the Voting Rights Act of 1965, Pub L No 89-110, 79 Stat 437, codified at 52 USC § 10101 et seq, among other pieces of legislation.

²² See Mezey, *Disabling Interpretations* at 9 (cited in note 18).

²³ 40 Stat 617 (1918).

²⁴ 40 Stat at 617. These programs offered rehabilitation, job training, and job placement resources for individuals "who, in the general consciousness, would be a burden on many employers." Thomas B. Heywood, Note, *State-Funded Discrimination: Section 504 of the Rehabilitation Act and Its Uneven Application to Independent Contractors and Other Workers*, 60 Cath U L Rev 1143, 1150 (2011).

Act²⁵ in 1920, which extended vocational rehabilitation to civilians with physical disabilities and sought to “offer[] limited services for the physically handicapped.”²⁶ As admirable as these early efforts were, they were examples of what historians have called the “medical model” or “social pathology model” of disability,²⁷ models both premised on the belief that it was the disabled person—not society or one’s physical environment—who must change.²⁸

It was not until the 1966 publication of a now-famous law review article that the turning tide of the disability rights movement became clear.²⁹ Professors Jacobus tenBroek and Floyd W. Matson described a movement away from “custodialism” and toward “integrationism,” which they saw as part of a larger reconceptualization of the meaning of equality in American society.³⁰ Whereas before the disabled were seen as the “other, [individuals] to be cured, or if they could not be cured, to be isolated”³¹ and institutionalized, efforts by African Americans and women to secure civil rights guarantees under the Constitution inspired disability rights activists to seek similar protections for themselves.³² These efforts ushered in a new, rights-based approach to antidiscrimination advocacy that marked “a shift from charity to civil rights.”³³

²⁵ 41 Stat 735 (1920), repealed by the Rehabilitation Act of 1973, Pub L No 93-112, 87 Stat 355, codified at 29 USC § 701 et seq.

²⁶ HR Rep No 93-244, 93d Cong, 1st Sess 3 (1973). See also Chai R. Feldblum, *Definition of Disability under Federal Anti-Discrimination Law: What Happened? Why? And What Can We Do about It?*, 21 Berkeley J Empl & Labor L 91, 95–96 (2000).

²⁷ See, for example, John Gliedman and William Roth, *The Unexpected Minority: Handicapped Children in America* 27 (Harcourt 1980); Harlan Hahn, *The Politics of Physical Differences: Disability and Discrimination*, 44 J Soc Issues 39, 39 (1988).

²⁸ See 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, 1347–48 (1993).

²⁹ See generally Jacobus tenBroek and Floyd W. Matson, *The Disabled and the Law of Welfare*, 54 Cal L Rev 809 (1966).

³⁰ See id at 833–40.

³¹ Weber, *Understanding Disability Law* at 1 (cited in note 13) (discussing the publication of the tenBroek and Matson article and the shift in public perception that prompted it).

³² See tenBroek and Matson, 54 Cal L Rev at 833 (cited in note 29); Mezey, *Disabling Interpretations* at 9 (cited in note 18); Feldblum, 21 Berkeley J Empl & Labor L at 97 (cited in note 26).

³³ Robert L. Burgdorf Jr, *The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 Harv CR-CL L Rev 413, 426 (1991) (detailing the shift in society’s conception of its obligations to the disabled community).

Real change for disabled individuals, however, would not come easily. Congress had two avenues at its disposal for addressing disability discrimination: it could either attempt to introduce new legislation that addressed only disability discrimination issues, or it could amend the race-based civil rights statutes already in existence to additionally prohibit discrimination on the basis of disability.³⁴ Both strategies presented significant drawbacks. The creation of new, freestanding legislation for disability rights would be time-consuming and could backfire if people interpreted those efforts as a signal that disabled individuals were somehow unworthy of protection under the existing antidiscrimination laws. But amending existing laws would also be difficult, as provisions drafted to address race discrimination might not work well in the disability context.³⁵ For one thing, a person's disability status may be relevant to assessing one's capabilities in situations in which one's race or gender do not matter.³⁶

Ultimately, Congress opted to try both strategies. In the 1970s, Senators Hubert Humphrey (D-Minn) and Charles Percy (R-Ill) and Representative Charles Vanik (D-Ohio) proposed amending Title VI of the Civil Rights Act of 1964,³⁷ which prohibited discrimination only on the basis of "race, color, religion, sex, [and] national origin,"³⁸ to include disability as a protected category.³⁹ Opposition to extending civil rights protections to include disabled people was so strong, however, that efforts to include them alongside the other protected classes failed.⁴⁰ Some politicians were wary of "diluting" the hard-won civil rights that had so recently been enshrined into law, and they expressed anxiety at the prospect of bringing the Civil Rights Act back onto the Senate floor lest political maneuvering gut the legislation.⁴¹ The Justice Department thus suggested to Humphrey that the language from

³⁴ Colker, *The Disability Pendulum* at 10 (cited in note 11).

³⁵ See *id.* at 10–11.

³⁶ If, for example, a warehouse position requires the ability to lift at least fifty pounds, the warehouse supervisor may legitimately refuse to hire an individual who cannot meet that requirement even if the reason she cannot meet it is a disability.

³⁷ Pub L No 88-352, 78 Stat 241, codified as amended at 42 USC § 2000e et seq.

³⁸ See Civil Rights Act of 1964 §§ 701–716, 78 Stat at 253–66.

³⁹ See Colker, *The Disability Pendulum* at 11 (cited in note 11).

⁴⁰ See O'Brien, *Crippled Justice* at 132–33 (cited in note 15).

⁴¹ See Lennard J. Davis, *Enabling Acts: The Hidden Story of How the Americans with Disabilities Act Gave the Largest US Minority Its Rights* 10 (Beacon 2015).

the failed attempt to amend the Civil Rights Act be added instead to the planned 1972 update of the Vocational Rehabilitation Act.⁴²

B. The Rehabilitation Act of 1973

The Rehabilitation Act's enumerated purposes included Congress's desire to "provid[e] vocational rehabilitation services . . . for the benefit of [handicapped] individuals" and to "initiate and expand services to groups of handicapped individuals . . . who have been underserved in the past."⁴³ Three sections of the Rehabilitation Act are particularly relevant to effectuating those ends. Section 501 pertains only to employment and establishes a federal Interagency Committee whose role is to oversee compliance with the Equal Employment Opportunity Commission guidelines for the hiring, placement, and advancement of individuals with disabilities in the federal government.⁴⁴ Section 501 additionally requires federal agencies to implement affirmative action plans for the hiring, placement, and advancement of such individuals.⁴⁵ Later legislation provides for a private right of action against any federal employer who fails to do so.⁴⁶ Section 503 mandates that every contract with the United States for an amount totaling \$10,000 or more include a provision requiring affirmative action to employ qualified individuals with disabilities.⁴⁷ Courts have unanimously concluded that § 503, unlike § 501, neither confers a private right of action nor imposes a duty on contractors to hire disabled individuals.⁴⁸

The most famous and impactful provision of the Rehabilitation Act, however, is and has been § 504.⁴⁹ Interestingly, this section,

⁴² See O'Brien, *Crippled Justice* at 133 (cited in note 15). The original 1920 Vocational Rehabilitation Act was due for a reworking, as disabled soldiers were beginning to return from the Vietnam War. See Davis, *Enabling Acts* at 10 (cited in note 41).

⁴³ Rehabilitation Act § 2, 87 Stat at 357.

⁴⁴ See Rehabilitation Act § 501(a), 87 Stat at 390, 29 USC § 791(a).

⁴⁵ See Rehabilitation Act § 501(b), 87 Stat at 390, 29 USC § 791(b).

⁴⁶ Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, Pub L No 95-602, 92 Stat 2955, codified in various sections of Title 29. See also 29 USC § 794a(a)(1).

⁴⁷ 29 USC § 793(a). At the time of enactment, the contract amount was \$2,500. See Rehabilitation Act § 503, 87 Stat at 393.

⁴⁸ Section 503 simply requires federal agencies to make and enforce contracts containing the affirmative action language. See, for example, *Clemmer v Enron Corp*, 882 F Supp 606, 611 (SD Tex 1995).

⁴⁹ See Sharon Barnartt and Richard Scotch, *Disability Protests: Contentious Politics 1970-1999* 166 (Gallaudet 2001).

which contains the Rehabilitation Act's most important and enduring language, was born with little fanfare. Most of Congress's attention during the committee hearings on the Act was focused on budgetary concerns,⁵⁰ not the forty-one words of § 504 that would go on to form the backbone⁵¹ of the ADA: "No otherwise qualified handicapped individual in the United States . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."⁵² Congress was so focused on those other concerns, in fact, that virtually no discussion of § 504 occurred in the committee hearings. The provision was not part of the first House resolution for the bill:⁵³ legislative aides working for Senators Alan Cranston (D-Cal) and Harrison Williams (D-NJ) had inserted the section at the last stage of the policymaking process⁵⁴ as a nod to Title VI of the Civil Rights Act's sweeping antidiscrimination language. The Senate version, which did include the nondiscrimination language, was accepted in conference with only the notation "[t]he House recedes" and no further discussion.⁵⁵

The legislature's silence on § 504 was an immediate source of uncertainty for courts attempting to apply the new law,⁵⁶ and the confusion surrounding the drafters' intent persists today. Professor Ruth O'Brien has identified § 504 as an "unanticipated consequence"⁵⁷ of the drafting process. Professor Robert Burgdorf Jr has described its creation as "shrouded in [] mystery."⁵⁸ And disability rights activist Marca Bristo has characterized it as an "anomaly of history" and a "law [that] preceded the movement."⁵⁹

⁵⁰ See Colker, *The Disability Pendulum* at 12 (cited in note 11).

⁵¹ See 42 USC § 12132.

⁵² Rehabilitation Act § 504, 87 Stat at 394, 29 USC § 794. While § 504 did not initially provide that private individuals may sue to enforce the statute, the section was amended in 1978 to incorporate Title VI of the Civil Rights Act, which does provide for such a right. Amendments of 1978 § 120, 92 Stat at 2982, 29 USC § 794a.

⁵³ See Colker, *The Disability Pendulum* at 12 (cited in note 11).

⁵⁴ See O'Brien, *Crippled Justice* at 107 (cited in note 15).

⁵⁵ See Colker, *The Disability Pendulum* at 12 (cited in note 11).

⁵⁶ See Robert L. Burgdorf Jr, "Substantially Limited" Protection from Disability Discrimination: The Special Treatment Model and Misconstructions of the Definition of Disability, 42 Vill L Rev 409, 421 (1997) (describing § 504 as "a disaster from a drafting standpoint").

⁵⁷ O'Brien, *Crippled Justice* at 5 (cited in note 15).

⁵⁸ Burgdorf, 42 Vill L Rev at 419 (cited in note 56).

⁵⁹ See Mezey, *Disabling Interpretations* at 13 (cited in note 18). Congress's silence on the intent behind § 504 continues to have consequences for courts attempting to define its proper scope. See Part II.

Nevertheless, after a period of wrangling over the budgetary aspects of the bill and two vetoes, President Nixon finally signed the Rehabilitation Act into law on September 26, 1973.⁶⁰

The Act as implemented, however, provided far less protection than disability rights advocates had originally hoped for and anticipated.⁶¹ The first major challenge facing the movement was that the resulting regulations promulgated by the United States Department of Health, Education, and Welfare (HEW) were self-enforcing;⁶² Congress had not committed enforcement authority to an executive branch agency like the Equal Employment Opportunity Commission.⁶³ This meant that private litigation became the primary means of implementing § 504,⁶⁴ with responsibility for interpreting those mysterious forty-one words falling to the federal courts.⁶⁵ While this might not ordinarily have posed a problem for the movement, the courts at that time "could not be described as strong proponents of promoting disability rights, particularly in the workplace."⁶⁶ And there was an additional, procedural reason for the advocacy community to be worried. Relying on private lawsuits to effectuate the ends of § 504 was significantly more cumbersome, time-consuming, and expensive than an administrative enforcement regime would have been.⁶⁷

Unfortunately, the Supreme Court's holdings in the decade following the Rehabilitation Act's enactment validated those concerns and further constrained the antidiscrimination effort.⁶⁸ A line of cases beginning with *Southeastern Community College v Davis*⁶⁹ "dealt a severe blow" to disability rights activists "for whom section 504 was a central part of their policy aspirations."⁷⁰

⁶⁰ See O'Brien, *Crippled Justice* at 123 (cited in note 15). Nixon held a signing ceremony in order to "counter the assertions of those who claim[ed] that [his] vetoes" of the two prior versions of the bill meant that his administration was "rejecting the handicapped." *Id.* at 123 n 89.

⁶¹ See Drimmer, Comment, 40 *UCLA L Rev* at 1387 (cited in note 28); Timothy M. Cook, *The Americans with Disabilities Act: The Move to Integration*, 64 *Temple L Rev* 393, 394 (1991).

⁶² See O'Brien, *Crippled Justice* at 128 (cited in note 15).

⁶³ Mezey, *Disabling Interpretations* at 15 (cited in note 18).

⁶⁴ See *id.*

⁶⁵ See *id.*

⁶⁶ O'Brien, *Crippled Justice* at 109 (cited in note 15).

⁶⁷ See *id.* at 130.

⁶⁸ See Mezey, *Disabling Interpretations* at 18 (cited in note 18).

⁶⁹ 442 US 397 (1979).

⁷⁰ Mezey, *Disabling Interpretations* at 19 (cited in note 18). At issue in *Davis* was whether an applicant to an educational program must be evaluated on her qualifications without regard to her disability and whether the Rehabilitation Act required the school to

The decade that followed was a “generally conservative and restrictive” period for disability rights litigation, as the Court proved suspicious of, and even downright hostile to, claims arising under the newly enacted antidiscrimination statutes (including but not limited to § 504).⁷¹ Although the trend toward a narrow reading of the Rehabilitation Act’s provisions later reversed itself,⁷² the disability rights community was already looking ahead to the possibility of a more robust and generous successor statute that would cover more than just recipients of federal funds.⁷³

Despite the Rehabilitation Act’s difficult birth and the hostility surrounding early attempts at enforcement, it is not quite accurate to call the Act a failure. While its overall impact has been comparatively modest thanks to its application only to programs receiving federal funds, its symbolic importance has been great.⁷⁴ It was nevertheless clear in the first decade after enactment that more action was needed in order to bring private enterprise within the purview of federal disability law. To that end, and as a “culmination of the increased awareness of the rights of people with disabilities,” in 1990, President George H.W. Bush signed the ADA into law.⁷⁵

C. The Americans with Disabilities Act of 1990

The ADA is a comprehensive civil rights bill modeled after the Civil Rights Act of 1964. It incorporates large sections of the text of the Rehabilitation Act. In fact, the ADA specifically provides that it should be read in conjunction with the Rehabilitation

accommodate her disability without regard to cost. The Court held that the school was not required to accommodate a disability if it would work a “fundamental alteration in the nature of the program,” as the Rehabilitation Act was not intended to create “undue financial and administrative burdens.” *Davis*, 442 US at 410, 412.

⁷¹ *Mezey, Disabling Interpretations* at 18 (cited in note 18). In *Board of Education of the Hendrick Hudson Central School District v Rowley*, 458 US 176 (1982), for example, the Court reversed both courts below to find that Congress had only intended disabled children to “benefit” from the educational services provided under the Education for All Handicapped Children Act of 1975, not to reach their “maxim[um] . . . potential ‘commensurate with the opportunity provided [nonhandicapped] children.’” *Id.* at 198. Although there were a few exceptions, the Supreme Court jurisprudence of this era, for the most part, narrowed the parameters of disability rights legislation whenever possible.

⁷² *Mezey, Disabling Interpretations* at 22 (cited in note 18).

⁷³ *Id.* at 24.

⁷⁴ Barnartt and Scotch, *Disability Protests* at 167 (cited in note 49).

⁷⁵ See Drimmer, Comment, 40 UCLA L Rev at 1397 (cited in note 28).

Act⁷⁶ in order to “assure equality of opportunity, full participation, independent living, and economic self-sufficiency” for disabled individuals.⁷⁷ Congress’s motivation for passing additional protective legislation was the recognition that even with the Rehabilitation Act in place, disabled individuals often lacked legal recourse to redress the discrimination they faced. As the Rehabilitation Act’s nondiscrimination requirements are tied to the receipt of federal funds, there was a great risk of unequal treatment when it was the only comprehensive federal disability statute in existence. In the absence of state laws prohibiting discrimination against disabled individuals, two programs that were exactly alike except for their sources of funding could be treated differently under state and federal law. Furthermore, programs that received no federal funding were able to escape the purview of the Rehabilitation Act entirely.⁷⁸ Based on the belief that § 504 and its regulations were “neither comprehensive nor well-enforced,” disability rights activists advocated for a broader law.⁷⁹ The ADA was the result.

The ADA comprises five titles. Title I governs employment and applies to private employers, state and local governments, labor unions, and employment agencies.⁸⁰ It prohibits “discrimination against a qualified individual on the basis of disability” in hiring, firing, and promotion decisions, as well as “other terms, conditions, and privileges of employment.”⁸¹

Title II builds on the Rehabilitation Act’s prohibition of discrimination in the administration of federally funded programs and extends it to “public entities”—all programs operated by state and local government agencies, including those that do not receive federal money.⁸² Using language modeled after § 504, Title II provides that “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public

⁷⁶ See ADA § 501, 104 Stat at 369, 42 USC § 12201(a) (“[N]othing [in the ADA] shall be construed to apply a lesser standard than the standards applied under [the Rehabilitation Act].”).

⁷⁷ ADA § 2, 104 Stat at 329, 42 USC § 12101(a)(7).

⁷⁸ See Mezey, *Disabling Interpretations* at 72 (cited in note 18).

⁷⁹ *Id.*

⁸⁰ See ADA § 101, 104 Stat at 330, 42 USC § 12111 et seq. The employment title is not within the scope of this Comment. See note 20.

⁸¹ ADA § 2, 104 Stat at 238, 42 USC § 12112(a).

⁸² See ADA § 201, 104 Stat at 337, 42 USC § 12131 et seq.

entity, or be subjected to discrimination by any such entity.”⁸³ Although Title II contains no express associational discrimination provision, a number of courts have read one in.⁸⁴

Title III covers twelve enumerated categories of privately funded programs including places of lodging, recreation, sales, education, and entertainment.⁸⁵ Within each category are further examples of covered entities, such as hotels, libraries, restaurants, parks, zoos, and private schools.⁸⁶ Title III also expressly bars associational discrimination.⁸⁷

Titles IV and V of the ADA are somewhat more obscure. Title IV addresses telephone and television access for people with hearing and speech disabilities and requires that telecommunications companies provide relay services for the hearing or speech-impaired.⁸⁸ Title V sets forth miscellaneous provisions, including an anti-retaliation provision, and authorizes attorney’s fees for prevailing parties.⁸⁹

D. The Rehabilitation Act and the ADA in Concert

Because both the Rehabilitation Act and the ADA remain in force today, many programs are subject to their overlapping statutory provisions. For example, a student center at a public university receiving state and federal funds would be subject to both § 504 of the Rehabilitation Act and Title II of the ADA.⁹⁰ A private vendor with a license to operate within the student center, such as a fast food restaurant or a bookstore, would also be subject to the ADA’s Title III.⁹¹ The programs most likely to be affected by the Rehabilitation Act (and therefore most likely to be subject to the multiple overlapping provisions of that Act and the ADA) tend to be institutions of higher education and healthcare institutions, because these entities are by far the most likely to receive federal

⁸³ ADA § 202, 104 Stat at 337, 42 USC § 12132.

⁸⁴ See, for example, *Cortez v City of Porterville*, 5 F Supp 3d 1160, 1165 (ED Cal 2014); *Innovative Health Systems, Inc v City of White Plains*, 117 F3d 37, 47 (2d Cir 1997) (“Although courts generally should be reluctant to conclude that the omission of language in one part of a statute that is included in another is unintentional . . . there is extensive support in this instance to read the specific examples of discrimination from the other two titles into Title II.”).

⁸⁵ See ADA § 302, 104 Stat at 355, 42 USC § 12182(a).

⁸⁶ See *Mezey, Disabling Interpretations* at 109 (cited in note 18).

⁸⁷ See ADA § 302, 104 Stat at 355, 42 USC § 12182(b)(1)(E).

⁸⁸ See ADA § 302, 104 Stat at 355, 47 USC § 225 et seq.

⁸⁹ See ADA § 503, 104 Stat at 370, 42 USC § 12203 et seq.

⁹⁰ See Rothstein, 75 Ohio St L J at 1271 (cited in note 19).

⁹¹ *Id.* Both of the foregoing examples are Professor Laura Rothstein’s.

funding.⁹² The uncertain overlap of the ADA and the Rehabilitation Act has resulted in confusion over whether and how the statutes differ in coverage and remedies.

In order to avoid dismissal of the entire case based on an incorrect choice of claim, plaintiffs frequently bring claims under both statutes.⁹³ In most cases, however, litigating an ADA claim and a Rehabilitation Act claim will yield the same result: if one statute is found to have been violated, the other will likely be found to have been violated as well. This is the natural consequence of the statutes applying a similar standard when determining whether discrimination has occurred.⁹⁴

While most courts read the substantive requirements of the Rehabilitation Act and the ADA to be consistent with each other in the majority of cases, differences in the statutes' remedies and enforcement mechanisms do exist.⁹⁵ Both the Rehabilitation Act and Title II of the ADA allow for compensatory damages, attorney's fees, and costs, for example, while Title III of the ADA provides only for injunctive relief.⁹⁶ Because of the differences in statutory language and available remedies, some circuits resist reflexively conflating the statutes. These courts recognize that a Rehabilitation Act claim may succeed when an ADA claim would fail. To provide one example, the Tenth Circuit has decided that while the Rehabilitation Act incorporates the ADA's substantive standards

⁹² See *id.* at 1270. See also, for example, Kellie Woodhouse, *Impact of Pell Surge* (Inside Higher Ed, June 12, 2015), archived at <http://perma.cc/66FA-LZDN> (reporting that federal funding has surpassed state spending as the main source of public funding in higher education, contributing nearly \$76 billion to universities in 2013); Mary A. Laschober and James C. Vertrees, *Hospital Financing in the United States*, in US Congress, Office of Technology Assessment, *Hospital Financing in Seven Countries* 135, 136 (GPO 1995) (delineating the many sources of financing for hospital services, including the federal Medicare program and the joint federal-state Medicaid program).

⁹³ See, for example, *Henrietta D. v Bloomberg*, 331 F3d 261, 264 (2d Cir 2003) (alleging violations of both statutes); *Wisconsin Community Services, Inc v City of Milwaukee*, 465 F3d 737, 740 (7th Cir 2006) (same); *C.O. v Portland Public Schools*, 679 F3d 1162, 1166 (9th Cir 2012) (same).

⁹⁴ See, for example, *Cummings v Norton*, 393 F3d 1186, 1190 n 2 (10th Cir 2005) (“Because the language of disability used in the ADA mirrors that in the Rehabilitation Act, we look to cases construing the Rehabilitation Act for guidance when faced with an ADA challenge.”) Some courts go even further and hold that compliance with one statute necessarily means compliance with the other. See, for example, *Thompson v Williamson County*, 219 F3d 555, 557 n 3 (6th Cir 2000) (“Because the ADA sets forth the same remedies, procedures, and rights as the Rehabilitation Act, . . . claims brought under both statutes may be analyzed together.”).

⁹⁵ See Rothstein, 75 Ohio St L J at 1270 (cited in note 19).

⁹⁶ See *id.* at 1302–03. The difference in available remedies has consequences for the incentive structure for filing suit. See Part III.C.

for determining *what conduct* constitutes employment discrimination, it does not incorporate the definition of *who is covered* under the Act.⁹⁷ Thus, because only the ADA has a built-in exception for employers with fewer than fifteen employees, a plaintiff in the Tenth Circuit may prevail on an employment discrimination claim under the Rehabilitation Act against an employer with only five employees.⁹⁸ The Ninth Circuit has similarly decoupled the standing requirements of the Rehabilitation Act from Title I of the ADA and has held that independent contractors can bring employment discrimination claims under the Rehabilitation Act even though they are precluded from doing so under the ADA.⁹⁹

Much less frequently discussed are the complex ways in which the Rehabilitation Act and ADA Titles II and III interact with regard to the doctrine known as statutory standing. The precise contours of the population entitled to sue under each statute are one area of potential divergence between the laws. Section 120a of the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978,¹⁰⁰ which amends the language of the original § 504 and is codified at 29 USC § 794a, prescribes the following: “The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 . . . shall be available to *any person aggrieved* by any act or failure to act by any recipient of Federal assistance.”¹⁰¹ Meanwhile, Title II of the ADA provides that “[t]he remedies, procedures, and rights set forth in section 794a [of the Rehabilitation Act] shall be the remedies, procedures, and rights this subchapter provides to *any person alleging discrimination* on the basis of disability”¹⁰² in violation of the antidiscrimination provisions of Title II. Title III in turn states that “[t]he remedies and procedures set forth in [the antidiscrimination provision] of this title are the remedies this subchapter provides to *any person who is being subjected to discrimination* on the basis of disability in violation of this subchapter.”¹⁰³ Because the language is similar but not identical, there is room for parties to debate whether the Rehabilitation Act, Title II of the ADA, and Title III of the ADA afford standing to identical groups of people.

⁹⁷ See *Schrader v Fred A. Ray, MD, PC*, 296 F3d 968, 972 (10th Cir 2002).

⁹⁸ See *id.* at 969.

⁹⁹ See, for example, *Fleming v Yuma Regional Medical Center*, 587 F3d 938, 939 (9th Cir 2009).

¹⁰⁰ Pub L No 95-602, 92 Stat 2955, codified as amended in various sections of Title 29.

¹⁰¹ Amendments of 1978 § 505, 92 Stat at 2983, 29 USC § 794a(2) (emphasis added).

¹⁰² ADA § 203, 104 Stat at 337, 42 USC § 12133 (emphasis added).

¹⁰³ ADA § 308, 104 Stat at 363, 42 USC § 12188(a) (emphasis added).

With the precise bounds of standing under the Rehabilitation Act still undefined, it should not be surprising that a circuit split has arisen over who is entitled to bring suit. While the Second Circuit interprets the Rehabilitation Act's broad language as extending standing as broadly as Article III permits, the Eleventh Circuit reads the Act's standing provision as coextensive with the ADA, leading to a more restrictive interpretation that focuses on locating a cause of action under the statute, not merely a concrete and particularized injury.

II. THE PROPER SCOPE OF ASSOCIATIONAL STANDING UNDER THE REHABILITATION ACT: A CONTROVERSY

As Professor Joseph Vining famously wrote, it is impossible to read the federal standing decisions "without coming away with a sense of intellectual crisis. Judicial behavior is erratic, even bizarre. The opinions and justifications do not illuminate."¹⁰⁴ Other scholars have been less charitable still. Alternately criticized as "a word game played by secret rules"¹⁰⁵ and a "largely meaningless 'litany' recited 'before the Court . . . chooses up sides and decides the case,'"¹⁰⁶ frustrations with the standing doctrine have led to frequent pushes for reform, reconceptualization, and even outright abolishment.¹⁰⁷

This confusion about the contours of the standing doctrine is perhaps more understandable if one considers the law's current state of flux. A number of Supreme Court decisions handed down within the last five years have endeavored to clarify the intricacies of standing;¹⁰⁸ in so doing, they have cast the shape of the

¹⁰⁴ Joseph Vining, *Legal Identity: The Coming of Age of Public Law* 1 (Yale 1978). See also Erwin Chemerinsky, *A Unified Approach to Justiciability*, 22 Conn L Rev 677, 677 n 1 (1991).

¹⁰⁵ William A. Fletcher, *The Structure of Standing*, 98 Yale L J 221, 221 (1988), citing *Flast v Cohen*, 392 US 83, 129 (1968) (Harlan dissenting).

¹⁰⁶ Fletcher, 98 Yale L J at 221 (cited in note 105), citing Abram Chayes, *The Supreme Court 1981 Term—Foreword: Public Law Litigation and the Burger Court*, 96 Harv L Rev 4, 22, 23 (1982).

¹⁰⁷ See, for example, Fletcher, 98 Yale L J at 223 (cited in note 106) (arguing for the abolition of the injury requirement as a preliminary jurisdictional question in favor of an early determination on the merits); Richard M. Re, *Relative Standing*, 102 Georgetown L J 1191, 1195 (2014) (contending that courts should—and already do—award standing on a "relative," as opposed to an "adequacy," basis).

¹⁰⁸ See, for example, *Spokeo, Inc v Robins*, 136 S Ct 1540, 1550 (2016) (reaffirming the importance of an alleged injury's "concreteness" in the standing analysis and clarifying that "bare procedural violations" do not satisfy the demands of Article III).

current doctrine into further doubt.¹⁰⁹ With an eye toward synthesizing the newer standing cases and the older opinions, Part II.A outlines the several formulations of the standing doctrine as they currently exist. Parts II.B and II.C explicate the circuit split that has arisen over the scope of the Rehabilitation Act's associational standing provision.

A. The Standing Doctrine's Several Faces

The three tenets of constitutional standing are now well recognized: To have standing under Article III's "case or controversy" requirement,¹¹⁰ each claimant who asserts a cause of action must demonstrate (a) an "injury in fact"—an invasion of a legally protected interest which is . . . concrete and particularized . . . [and] actual or imminent, not conjectural or hypothetical."¹¹¹ He must also show (b) "a causal connection between the injury and the conduct complained of," and—finally—(c) it must be "likely," as opposed to "merely 'speculative,'" that "the injury will be redressed by a favorable decision."¹¹² For a federal court to have jurisdiction over a case, these three nonwaivable elements *must* be satisfied; if no plaintiff can satisfy all of them at the outset of the litigation, the case must be dismissed before reaching the merits.¹¹³

Before the Supreme Court's *Lexmark International, Inc v Static Control Components, Inc*¹¹⁴ decision in 2014, federal courts had imposed additional constraints on the judicial power when "rule[s] of self-restraint"¹¹⁵ might counsel the judiciary to avoid adjudicating certain claims.¹¹⁶ Known as "prudential principles" or the "prudential standing doctrine," these principles, though jurisdictional, were usually considered waivable as long as Congress explicitly communicated its intent to override them.¹¹⁷ Although there was some lingering confusion pre-*Lexmark* over which specific principles counted as prudential—and thus were required to

¹⁰⁹ See Bradford C. Mank, *Prudential Standing Doctrine Abolished or Waiting for a Comeback?: Lexmark International, Inc. v. Static Control Components, Inc.*, 18 U Pa J Const L 213, 263 (2015) (indicating that the Supreme Court's recent standing decisions "answer[] some questions, but leave many for another day").

¹¹⁰ See US Const Art III, § 2, cl 1.

¹¹¹ *Lujan v Defenders of Wildlife*, 504 US 555, 560 (1992) (quotation marks omitted).

¹¹² *Id* at 560–61.

¹¹³ See *Friends of the Earth, Inc v Laidlaw Environmental Services (TOC), Inc*, 528 US 167, 180 (2000).

¹¹⁴ 134 S Ct 1377 (2014).

¹¹⁵ *Barrows v Jackson*, 346 US 249, 255 (1953).

¹¹⁶ Mank, 18 U Pa J Const L at 220 (cited in note 109).

¹¹⁷ See *Gladstone, Realtors v Village of Bellwood*, 441 US 91, 99–100 (1979).

be either satisfied or waived at the outset of the litigation—and which counted as a nonjurisdictional part of the merits,¹¹⁸ the broad strokes of the prudential standing doctrine were generally agreed on. Courts customarily construed the doctrine to include default prohibitions on raising a third party’s legal rights in court,¹¹⁹ litigating generalized grievances,¹²⁰ and countenancing a complaint that fell outside the “zone of interests” sought to be protected by the statute in question.¹²¹ This last principle, known variously as “statutory standing” or “zone of interest” standing, was predicated on the idea that Congress authorizes only certain types of plaintiffs to sue under certain statutes.¹²²

Even prior to *Lexmark*, there were murmurs of a coming change. The Court had inconsistently applied the prudential standing doctrine in at least two cases, contradicting itself—albeit arguably in dicta—about whether prudential standing was a mandatory jurisdictional issue that required dismissal of a plaintiff’s case at the outset of the litigation if its requirements were not met or whether it was truly a merits issue. The stakes of this determination were rather high: if the prudential standing doctrine were to be reclassified as part of the merits, it would allow a court to continue hearing the case even if these previously jurisdictional “principles of prudence” could not be satisfied¹²³—a move that would allow far more plaintiffs into court. The Court had seemed to imply the former in *Warth v Seldin*¹²⁴ when it had described the prudential standing doctrine as serving an essential gatekeeping function by preventing federal courts from deciding certain questions more appropriately addressed by the political process.¹²⁵ But in *Allen v Wright*,¹²⁶ the Court had appeared to

¹¹⁸ See generally, for example, Bradford C. Mank, *Is Prudential Standing Jurisdictional?*, 64 Case W Reserve L Rev 413 (2013) (delineating the uncertainties of the doctrine).

¹¹⁹ See *Warth v Seldin*, 422 US 490, 499 (1975).

¹²⁰ See *id.*

¹²¹ See *Association of Data Processing Service Organizations, Inc v Camp*, 397 US 150, 153 (1970). See also Part III.A.

¹²² See, for example, *Steel Co v Citizens for a Better Environment*, 523 US 83, 97 n 2 (1998) (identifying the question of statutory standing as “whether this plaintiff has a cause of action under the statute”); *Davis v Passman*, 442 US 228, 240 n 18 (1979) (distinguishing the concepts of Article III standing and cause of action, and noting for the purposes of statutory standing that “[w]hether petitioner has asserted a cause of action . . . depends not on the quality or extent of her injury, but on whether the class of litigants of which petitioner is a member may use the courts to enforce the right at issue”).

¹²³ See Mank, 64 Case W Reserve L Rev at 426–29 (cited in note 118).

¹²⁴ 422 US 490 (1975).

¹²⁵ *Id.* at 500.

¹²⁶ 468 US 737 (1984).

conclude the latter—that Article III standing, as the “most important” doctrine and the “core component” of the standing inquiry, might alone define the nondiscretionary limits on who may bring a case in federal court.¹²⁷

The Court ultimately did not go so far as to reclassify *all* of the prudential standing requirements as part of the merits of a case. It chose to uphold prudential standing as a jurisdictional category. But in 2014, the Court conceded that pre-*Lexmark* case law had improperly categorized the zone-of-interests inquiry as a prudential standing requirement in the first place.¹²⁸ Deeming the “prudential standing . . . label misleading,”¹²⁹ Justice Scalia declared that “this inquiry” into the zone of interests sought to be protected by the statute—which the Court admittedly had previously treated as “effectively jurisdictional”—is more properly classified as a merits issue.¹³⁰ Now, post-*Lexmark*, the answer to the question posed by the zone-of-interests test—the question whether a particular plaintiff has a congressionally approved cause of action under the applicable statute—no longer determines whether a court has the *power* to hear the case. Rather, the question itself is now part of the substantive merits of a claim. And because the answer to the question is no longer a matter of bare adjudicative jurisdiction but is instead the case’s beating heart, plaintiffs who would have seen their claims dismissed much earlier under the pre-*Lexmark* scheme are now newly entitled to a chance to prove the substance of their claims.¹³¹

Just because the zone-of-interests inquiry was downgraded from a standing requirement to a merits question, however, does not mean that it is not a necessary part of a court’s analysis. Conceding that characterizing the zone-of-interests test as a matter of “statutory *standing*”¹³² was also “misleading” (albeit less misleading than the language of prudential standing because it at

¹²⁷ *Id.* at 750–51.

¹²⁸ *Lexmark*, 134 S Ct at 1387.

¹²⁹ *Id.* at 1386.

¹³⁰ *Id.* at 1387 n 4.

¹³¹ Adequately demonstrating that one’s claim falls within the zone of interests that Congress intended to protect requires one to demonstrate proximate (or legal) cause between the injury complained of and conduct sued on. See note 203 and accompanying text.

¹³² For those unfamiliar with the term, “statutory standing” is a bit of a paradox. Despite the first half of its name, “statutory *standing*” once was capable of resolution prior to establishing Article III jurisdiction. And despite the other half of its name, “*statutory standing*” resembles the merits inquiries that courts have always performed, insofar as it analyzes the validity of the plaintiff’s substantive claims. As Professor Richard M. Re writes, “[t]his beast is neither fish nor fowl. It’s time to ditch ‘statutory standing’ as, well, what it

least “correctly place[d] the focus on the statute”),¹³³ Scalia clarified that the zone-of-interests limitation “*always* applies and is never negated” when adjudicating statutorily created causes of action.¹³⁴ Thus, after *Lexmark*, federal courts *must* ask at the merits stage whether a statute creating a private right of action authorizes a particular plaintiff to sue.¹³⁵ While the significance of this recategorization may be more psychological than practical, the move sends a clear message to judges that they cannot simply dismiss a case at the outset for failing to satisfy the zone-of-interests test.¹³⁶

Interestingly, these two varieties of “standing”—Article III standing on the one hand and the previously prudential zone-of-interests “standing” inquiry (still sometimes known by the slight misnomer “statutory standing”¹³⁷) on the other—have come up against each other in the context of Rehabilitation Act associational standing. The next two Sections explore the emerging circuit split over the proper scope of associational standing under the Rehabilitation Act.

B. The Second Circuit’s Broad Interpretation of Standing: Constitutional Minimum

The first appellate court to consider the scope of associational standing under the Rehabilitation Act was the Second Circuit in *Loeffler v Staten Island University Hospital*.¹³⁸ In 1991, Robert Loeffler, a deaf individual, was admitted to Staten Island University Hospital for heart surgery. His family attempted to get an American Sign Language (ASL) interpreter at that time, but none

always was: the merits. The Court does so, in *Lexmark*.” Richard M. Re, *The Doctrine Formerly Known as “Statutory Standing”* (Re’s Judicata, Aug 27, 2014), archived at <http://perma.cc/36W4-5ZM4>.

¹³³ *Lexmark*, 134 S Ct at 1387 n 4 (emphasis added).

¹³⁴ *Id* at 1388.

¹³⁵ The exact contours of the statute’s zone of interests, however, remain open to debate by the parties.

¹³⁶ See *Lexmark*, 134 S Ct at 1388. The obligation to hear the case past the pleading stage is in line with “the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them.” *Colorado River Water Conservation District v United States*, 424 US 800, 817 (1976).

¹³⁷ See Re, *The Doctrine Formerly Known As* (cited in note 132); Radha A. Pathak, *Statutory Standing and the Tyranny of Labels*, 62 Okla L Rev 89, 95 (2009) (recognizing the strangeness of the term).

¹³⁸ 582 F3d 268 (2d Cir 2009).

was provided, and Robert's children Bobby (age nine at the time) and Kristy (age twelve) ended up providing interpretation.¹³⁹

Four years later, Robert was admitted to the hospital for another heart procedure. The hospital again failed to provide an ASL interpreter, and interpreting for Robert again fell to Bobby, then thirteen. When Robert suffered a stroke after surgery, Bobby explained to the doctor that he did not "feel comfortable" interpreting for his father and that he "[did not] understand some of the terms."¹⁴⁰ While the doctor assured Bobby that he was "doing just fine," Bobby later testified that he found the experience of being responsible for relaying medical information "amazingly overwhelming" and "traumatiz[ing]."¹⁴¹ He also confided to his sister that he "felt responsible for failing to help his father."¹⁴² Both Bobby and his sister missed school in order to remain on duty as interpreters.¹⁴³

After the ordeal was over, the Loefflers sued for injunctive relief under the ADA and for monetary damages under the Rehabilitation Act.¹⁴⁴ Because neither Kristy nor Bobby was a disabled person within the meaning of the statutes, their discrimination claims were based on an associational discrimination theory: they alleged that the hospital discriminated against them not because *they themselves* were disabled, but because they were "associated with their disabled parents."¹⁴⁵ The district court dismissed Kristy and Bobby's associational discrimination claims under the Rehabilitation Act for lack of standing because neither child had personally been denied any services at the hospital.¹⁴⁶

The Second Circuit, however, reversed, holding that Kristy and Bobby in fact had standing to bring their associational claims under the Rehabilitation Act.¹⁴⁷ The court stated that nondisabled parties bringing associational claims need prove only an "independent injury causally related to the denial of federally required services" to a disabled person with whom the nondisabled plaintiffs

¹³⁹ *Id.* at 271.

¹⁴⁰ *Id.* at 272.

¹⁴¹ *Id.* at 272-73.

¹⁴² *Loeffler*, 582 F3d at 273.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Loeffler v Staten Island University Hospital*, 2007 WL 805802, *6 (EDNY).

¹⁴⁶ *Id.* at *7.

¹⁴⁷ *Loeffler*, 582 F3d at 279.

are associated—that is, satisfy Article III’s injury requirement.¹⁴⁸ By virtue of “being compelled to provide sign language interpretation, forced truancy from school, and involuntary exposure to their father’s suffering,” both children were injured in an Article III sense and thus were “person[s] aggrieved” within the meaning of the statute.¹⁴⁹ Citing dicta from *Innovative Health Systems, Inc v City of White Plains*,¹⁵⁰ construing the Rehabilitation Act’s standing language as broadly as is constitutionally permissible, the Second Circuit held that “the injury need not necessarily be limited to an inability to provide services to disabled persons.”¹⁵¹ A person bringing an associational discrimination claim is *not* required to prove that they were “excluded from participation in, denied the benefit of, or discriminated against under a federally assisted program” as long as their injury causally results from such a denial to someone else.¹⁵²

In so holding, the Second Circuit focused on the statutory language, noting that the text—“*any person aggrieved by any act or failure to act*”¹⁵³—plainly included nondisabled individuals within its scope. This language, to the court, evinced on its face “a congressional intention to define standing to bring a private action under [the Rehabilitation Act] . . . as broadly as is permitted by Article III.”¹⁵⁴ In other words, the *Loeffler* court concluded that a person can be *aggrieved* by the denial of benefits (that is, have their legal rights adversely affected) without actually being *denied* the benefits themselves.

¹⁴⁸ *Id.* (Wesley concurring). A majority of the panel concluded that the children did have standing to bring an associational claim under the Rehabilitation Act. The concurring opinion of Judge Richard Wesley constitutes the opinion of the court on this issue only. See *id.* at 277 (Jacobs) (“For the reasons set forth in the concurring opinion of Judge Wesley, a majority of this panel concludes that the children do have standing . . . I dissent . . . My reasons are set forth in a separate, dissenting opinion.”).

¹⁴⁹ *Id.* at 279 (Wesley concurring).

¹⁵⁰ 117 F3d 37 (2d Cir 1997).

¹⁵¹ *Loeffler*, 582 F3d at 282 (Wesley concurring), citing *Innovative Health Systems*, 117 F3d at 47.

¹⁵² *Loeffler*, 582 F3d at 282 (Wesley concurring).

¹⁵³ See 29 USC § 794(a).

¹⁵⁴ See *Loeffler*, 582 F3d at 280 (Wesley concurring) (quotation marks omitted), quoting *Innovative Health Systems*, 117 F3d at 47. Conspicuously lacking from the court’s pre-*Lexmark* analysis is any discussion of whether associational plaintiffs, though injured, are necessarily entitled to recovery under the statute. This marks the point at which the Second and Eleventh Circuits diverge, as the Eleventh Circuit’s interpretation of this issue came down shortly after *Lexmark* was decided. While *Lexmark* may be partially to blame for the split and does mandate a new approach to handling the associational standing question, it does not foreclose the result reached in *Loeffler*. For a discussion of this issue, see Part II.C.

The dissent, however, expressed concern with this broad standard and noted that prior cases, including *Innovative Health Systems*, dealt with nondisabled plaintiffs who were *denied* benefits, “albeit on the basis of their association with disabled persons.”¹⁵⁵ Kristy and Bobby, by contrast, were denied no services. The dissent argued that the majority’s rule would have wide-ranging and unwise implications: “Once a breach of duty is found under the RA, everybody and his mother (literally) will be able to submit a bill for services or injuries.”¹⁵⁶ Forecasting a cycle of unending liability in which a hospital “might have to pay twice or many times over for each service it failed to afford,” the dissent foresaw liability in a case in which “a relative prepares a gluten-free meal that a hospital lacks resources to provide, and thereby incurs expense, or gets burned on the stove.”¹⁵⁷

C. The Eleventh Circuit’s Stricter Standard of Recovery: Cause of Action

In contrast to the Second Circuit’s interpretation of the Rehabilitation Act’s “any person aggrieved” language as coextensive with Article III standing, the next appellate court to address the scope of the provision took a more restrictive tack. Purportedly following the newly issued¹⁵⁸ *Lexmark* decision’s mandate to locate a cause of action under the statute, the Eleventh Circuit in *McCullum v Orlando Regional Healthcare Systems, Inc.*¹⁵⁹ diverged sharply from the *Loeffler* court’s generous conception of associational standing. *McCullum* presented facts very similar to those in *Loeffler*: At fourteen years old, D.F., who is deaf and mute, was diagnosed with ulcerative colitis and was hospitalized for several weeks while undergoing treatment.¹⁶⁰ In order to communicate with him, the staff at both hospitals used written notes and visual aids and also relied on his parents and deaf sister, who communicated with him via sign language.

¹⁵⁵ *Loeffler*, 582 F3d at 284 (Jacobs dissenting). In *Innovative Health Systems*, an outpatient drug and alcohol rehabilitation center was denied a building permit by the city zoning board on account of the center’s connection with individuals meeting the statutory definition of disability. See *Innovative Health Systems*, 117 F3d at 40.

¹⁵⁶ *Loeffler*, 582 F3d at 287 (Jacobs dissenting).

¹⁵⁷ *Id.* (Jacobs dissenting).

¹⁵⁸ *Lexmark* came down five years after *Loeffler* was decided and six months before *McCullum*. It is at least partially to blame for the circuit split. See Part III.

¹⁵⁹ 768 F3d 1135 (11th Cir 2014).

¹⁶⁰ *Id.* at 1138.

After D.F. was discharged from the hospital, his parents sued both on their own behalf and on behalf of D.F. and his deaf sister, alleging discrimination on the basis of disability under both the ADA and the Rehabilitation Act.¹⁶¹ The district court dismissed the individual claims brought by D.F.’s parents and sister for lack of standing,¹⁶² reasoning that their stress and frustration at being unable to communicate effectively did not constitute a cognizable injury under either the Rehabilitation Act or the ADA.¹⁶³ The parents then appealed the dismissal of their associational discrimination claim. They appealed to the Second Circuit’s decision in *Loeffler*, arguing that the district court interpreted the standing requirements of the Rehabilitation Act and the ADA too narrowly.¹⁶⁴

On appeal, the Eleventh Circuit affirmed, rejecting *Loeffler* and holding that D.F.’s parents and sister lacked statutory standing under both acts because they were not “personally excluded, personally denied benefits, or personally discriminated against because of their association with a disabled person.”¹⁶⁵ In reaching this conclusion, the court purported to heed *Lexmark*’s directive to determine whether “under a proper construction of the statute . . . [their] claim . . . fall[s] within the cause of action created by the statute.”¹⁶⁶ To determine the statute’s “proper construction,” the court read the ADA’s standing language—declaring it “discriminatory to exclude or otherwise deny equal goods, services, . . . or other opportunities to any individual” because of that individual’s association with a disabled person—back into the Rehabilitation Act and construed the two statutes as having the same preliminary jurisdictional standard.¹⁶⁷ As the court noted, the ADA expressly instructs that “nothing in this chapter shall be construed to apply a lesser standard than the standards applied

¹⁶¹ *McCullum v Orlando Regional Healthcare System, Inc.*, 2013 WL 1212860, *1 (MD Fla).

¹⁶² For a reminder on the standing-versus-merits confusion surrounding statutory standing, see Part II.A. See also text accompanying note 122. The district-court and appellate decisions in the *McCullum* litigation straddle the period pre- and post-*Lexmark*, so even though *Lexmark* redefined this cause of action-driven type of “standing” as a merits issue, the courts may be applying the terminology inconsistently. Here, the Eleventh Circuit dismissed the associational claims for lack of a cause of action.

¹⁶³ *McCullum*, 2013 WL 1212860 at *5.

¹⁶⁴ *McCullum*, 768 F3d at 1141.

¹⁶⁵ *Id.* at 1143.

¹⁶⁶ *Id.* at 1145.

¹⁶⁷ *Id.* at 1142, quoting 42 USC § 12182(b)(1)(E).

under title V of the Rehabilitation Act of 1973.”¹⁶⁸ Because the ADA permits suits by nondisabled plaintiffs only when they have suffered exclusion, denial of benefits, or discrimination because of their association with a disabled person, allowing standing for injuries beyond personal exclusion, personal denial of benefits, and personal discrimination would mean that the Rehabilitation Act was functioning as a ceiling on protection from discrimination instead of a floor, in direct contradiction to Congress’s instructions.¹⁶⁹

Relatedly, the court observed that allowing nondisabled plaintiffs to seek relief under the Rehabilitation Act for injuries other than exclusion, denial of benefits, and discrimination that they themselves experienced would mean that nondisabled individuals have *more* rights under the Rehabilitation Act and ADA than the disabled possess. The logic is that while disabled individuals can recover only if they are personally excluded, denied benefits, or discriminated against on the basis of their disability, nondisabled plaintiffs would be able to recover for both the personal denial of benefits and services as well as for more attenuated injuries.¹⁷⁰ The *McCullum* court considered this definitive proof of their narrow interpretation of both acts given that “Congress enacted both laws to promote the rights of the disabled.”¹⁷¹ Reading this intention narrowly, the court appeared to assume that promoting the rights of the disabled foreclosed granting greater rights to nondisabled plaintiffs even if those additional rights broadly furthered the law’s antidiscrimination mission. Expressly rejecting the Second Circuit’s reasoning in *Loeffler*, the Eleventh Circuit asserted that the associational standing provision of the Rehabilitation Act “should not be interpreted irrespective” of § 794(a).¹⁷² Because the court’s interpretation of congressional intent led it to believe that nondisabled plaintiffs only had standing to sue if personally denied benefits or services, D.F.’s parents and sister did not have a cause of action and were not entitled to recovery.¹⁷³

McCullum’s narrowing of the scope of associational standing has gained traction at the district-court level. In *Collins v*

¹⁶⁸ *McCullum*, 768 F3d at 1142, quoting 42 USC § 12201(a).

¹⁶⁹ *McCullum*, 768 F3d at 1143.

¹⁷⁰ See 29 USC § 794(a); 42 USC § 12182.

¹⁷¹ *McCullum*, 768 F3d at 1144.

¹⁷² *Id* (quotation marks omitted).

¹⁷³ Finally, the Eleventh Circuit expressed disagreement with the Second Circuit’s factual determination that “nondisabled persons are denied benefits when a hospital relies on them to help interpret for a deaf patient.” *Id*.

Dartmouth-Hitchcock Medical Center,¹⁷⁴ a district court in New Hampshire confronted a set of facts similar to those at issue in both *Loeffler* and *McCullum*: Colleen Collins, who has had hearing loss since childhood, began seeing Dr. James Saunders in 2009 to inquire about replacing her failing cochlear implant.¹⁷⁵ Colleen and her doctor communicated primarily through voice and lip reading; no ASL interpreter took part in their presurgical appointments.¹⁷⁶ In 2011, Colleen was scheduled for surgery. Colleen's sisters, Ruth and Debra, accompanied her, but Saunders was not able to replace the implant at the time because of an unexpected complication during surgery. As a result, Colleen was left completely deaf, and she and the doctor communicated through written notes and through Debra. It fell to Debra to explain to Colleen what was happening and to reassure her panicking sister that she was "not going to die."¹⁷⁷ Debra and Ruth subsequently brought an associational discrimination claim against the hospital under the Rehabilitation Act and the ADA, alleging discrimination on the basis of their association with their deaf sister.¹⁷⁸

Citing *McCullum*, the court dismissed Ruth and Debra's associational discrimination claims for lack of standing. The court held that "[p]ersons who are not themselves disabled have standing to bring a claim under the ADA only if [they were] *personally* discriminated against or denied some benefit because of [their] association with a disabled person."¹⁷⁹ The court further held that the Rehabilitation Act allows claims by nondisabled individuals only if they "suffer injury because they were subjected to conduct proscribed by the Act"—that is, they were "excluded from the participation in, . . . denied the benefits of, or . . . subjected to discrimination under any program or activity receiving Federal financial assistance."¹⁸⁰ Thus, the court essentially conflated standing under the Rehabilitation Act and the ADA, reading the provisions of both statutes to be coextensive with one another.

A district court in Minnesota came to the same conclusion in *Durand v Fairview Health Services*.¹⁸¹ In that case, Shaun Durand

¹⁷⁴ 2015 WL 268842 (D NH).

¹⁷⁵ *Id.* at *1.

¹⁷⁶ *Id.* at *1–2.

¹⁷⁷ *Id.* at *2–4.

¹⁷⁸ *Collins*, 2015 WL 268842 at *4.

¹⁷⁹ *Id.* at *8.

¹⁸⁰ *Id.* (emphasis added and quotation marks omitted).

¹⁸¹ 2017 WL 217649 (D Minn).

was admitted to the intensive care unit at Fairview Ridges Hospital after an exacerbation of his congestive heart failure.¹⁸² Shaun, who was not deaf, was accompanied by his deaf parents—Roger and Linda—and his hearing sister, Priscilla.¹⁸³ As in the *Loeffler*, *McCullum*, and *Collins* cases, however, the defendant hospital repeatedly failed to provide an ASL interpreter to the family.¹⁸⁴ Linda and Roger thus relied on Priscilla to sign the information that the doctor was conveying.¹⁸⁵ Priscilla later claimed to have experienced “stress and anxiety while having to serve as healthcare agent and [facilitator of] communications” for her parents, and she claimed that her discomfort was “multiplied by the fact that she [did] not know sign language fluently and was dealing with her grief and other emotions while watching her brother die.”¹⁸⁶

Citing both *McCullum* and *Collins*, the court dismissed Priscilla’s Rehabilitation Act and ADA claims: under either statute, nondisabled plaintiffs may only recover for “the exclusion, denial of benefits, or discrimination that they themselves suffer[ed].”¹⁸⁷ Absent “evidence in the record of any benefit, good, or service that Fairview denied *Priscilla* based on her association with Roger and Linda,” her injury was not actionable under either statute.¹⁸⁸ Agreeing with the Eleventh Circuit, the court reasoned that the narrow approach “best hews to the statutory language” and “heeds the Supreme Court’s admonition that the law must balance ‘two powerful but countervailing considerations—the need to give effect to the statutory objectives and the desire to keep [the statutes] within manageable bounds.’”¹⁸⁹

* * *

One gets the sense that the Second and Eleventh Circuits are engaging with each other at cross-purposes. While the Second Circuit asks only whether an associational plaintiff can demonstrate

¹⁸² *Id.* at *1.

¹⁸³ *Id.*

¹⁸⁴ *Id.* at *2–3. Roger and Linda identified at least three instances in which Shaun received medical treatment without an interpreter present.

¹⁸⁵ *Durand*, 2017 WL 217649 at *2.

¹⁸⁶ *Id.* at *7.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Durand*, 2017 WL 217649 at *7, quoting *Alexander v Choate*, 469 US 287, 298–99 (1985).

an injury in fact that comes within the broad reaches of Article III,¹⁹⁰ the Eleventh Circuit circumscribes standing to those who themselves have been denied a disability-related benefit or been personally subjected to the discrimination proscribed by the Act.¹⁹¹ The latter standard—by requiring a plaintiff to demonstrate not only that he was injured by the defendant’s conduct but also that he has a claim under the statute for which Congress intended to allow recovery—imposes a significantly higher burden on a would-be plaintiff than a standard requiring only the allegation of an injury in fact.

III. WALKING JUSTICE SCALIA’S TIGHTROPE: A PROPOSAL

As discussed in Part II.A, Justice Scalia, in *Lujan v Defenders of Wildlife*,¹⁹² set out the three Article III or “constitutional” requirements for demonstrating standing to sue: an injury in fact, a causal connection, and a likelihood that the injury will be redressed by a favorable decision on the merits.¹⁹³ Even when Article III standing requirements are satisfied, however, additional “prudential” requirements often apply; while Congress may waive them, they must do so explicitly.¹⁹⁴ These requirements are based not on the Constitution but on principles of prudent judicial administration and include further, self-imposed limitations on the judicial power, including the general prohibition against raising another person’s legal rights in court¹⁹⁵ and the rule barring adjudication of generalized grievances more appropriately addressed by the political process. Finally, the requirement that a plaintiff’s complaint fall within the “zone of interests” protected by the law invoked, while no longer an issue of prudential standing, is nevertheless mandatory for statutorily created causes of action and is never negated.¹⁹⁶

Neither circuit in this split used the language of prudential standing. Further, neither circuit purported to consider whether associational plaintiffs fall within the zone of interests sought to be protected by the Rehabilitation Act. Nevertheless, the Second and Eleventh Circuits appear to have employed competing tests

¹⁹⁰ See *Loeffler*, 582 F3d at 280 (Wesley concurring). See also Part II.A.

¹⁹¹ See *McCullum*, 768 F3d at 1143. See also Part II.B.

¹⁹² 504 US 555 (1992).

¹⁹³ *Id.* at 560.

¹⁹⁴ See *Gladstone, Realtors v Village of Bellwood*, 441 US 91, 99–100 (1979).

¹⁹⁵ See note 6 and accompanying text.

¹⁹⁶ See *Lexmark*, 134 S Ct at 1386.

when determining which plaintiffs may sue under an associational discrimination theory. Per *Loeffler*, the Second Circuit asks only whether an associational plaintiff can demonstrate a constitutional injury.¹⁹⁷ Meanwhile, the Eleventh Circuit, in and following *McCullum*, attempts to locate a cause of action under the statute in addition to a constitutionally cognizable injury.¹⁹⁸ By requiring a plaintiff to prove that she belongs to the class of people that Congress intended the statute to protect—that is, that the statute expressly prohibits discrimination *against her personally*—the latter standard restricts disability discrimination protection to a smaller class of would-be plaintiffs.

This Part argues that neither circuit was entirely correct in its analysis. It is true that interpreting the Rehabilitation Act's standing provision as broadly as the Constitution permits would secure greater access to the courts for individuals with disabilities and their families and would thus be an enticing proposition for the disability rights community. The *Lexmark* decision, however, likely forecloses that mode of analysis: *Loeffler's method*, if not its *result*, is likely dead. Post-*Lexmark*, federal courts adjudicating claims arising under statutorily created causes of action *must* confine recovery to the class of plaintiffs for whom Congress intended to authorize suit.¹⁹⁹ It is unlikely, therefore, that the *Loeffler* court could now grant recovery for an injury satisfying Article III requirements without undertaking a zone-of-interests analysis—an analysis that in turn relies on the traditional tools of statutory interpretation.²⁰⁰ And, to that end, while statutory language identical to that in the Rehabilitation Act conferring standing on “any person aggrieved” has traditionally been interpreted broadly by the courts,²⁰¹ recent, post-*Loeffler* Supreme Court jurisprudence²⁰² counsels against reading the phrase “any person aggrieved” to be coextensive with Article III's injury requirement.

At the same time, these recent cases suggest that the *McCullum* court's reading of the phrase was unduly narrow. While the Eleventh Circuit did recognize the necessity of performing a

¹⁹⁷ See *Loeffler*, 582 F3d at 280 (Wesley concurring). See also Part II.B.

¹⁹⁸ See *McCullum*, 768 F3d at 1143. See also Part II.C.

¹⁹⁹ See *Lexmark*, 134 S Ct at 1388. See also Part II.A.

²⁰⁰ *Lexmark*, 134 S Ct at 1387.

²⁰¹ See *Federal Election Commission v Akins*, 524 US 11, 19 (1998) (“History associates the word ‘aggrieved’ with a congressional intent to cast the standing net broadly.”).

²⁰² See, for example, *Thompson v North American Stainless, LP*, 562 US 170, 177 (2011). See also Part III.A.

cause-of-action analysis in light of *Lexmark*, it fell short in implementing that test in the analytically precise manner necessary to reach the right conclusion. That is, in neglecting to explicitly and thoroughly define the applicable zone of interests in the decision, the court declined to consider whether the class of people that Congress authorized to sue under the Rehabilitation Act might include associational plaintiffs injured in an Article III sense by discriminatory conduct without personally being denied benefits or services. After all, although the zone-of-interests inquiry is now a mandatory aspect of resolution on the merits for statutory claims, the precise contours of the interests that Congress intended to protect are open to debate. The width of the zone, in other words, remains contested. In performing an underdeveloped cause-of-action analysis that failed to take into account the flexibility of the zone's contours, however, the Eleventh Circuit adopted a narrow standard without considering the Rehabilitation Act's facially broad language and its history as a piece of civil rights-era legislation.

A more compelling interpretation of the Rehabilitation Act's standing provision would avoid the extremes of both Article III standing and the *McCullum* court's narrow statutory construction, incorporating a lenient zone-of-interests test that recognizes the viability of suits brought by associational plaintiffs while simultaneously confining standing to those plaintiffs who can demonstrate injuries sufficiently related to the defendant's conduct to satisfy proximate (or legal) cause.²⁰³ It is not the case that a standing regime more restrictive than Article III would necessarily sound a death knell for associational plaintiffs in disability discrimination cases. The zone-of-interests test as formulated in *Lexmark* is one of flexible breadth that varies according to the provisions of law at issue.²⁰⁴ Courts should prefer a lenient test in the Rehabilitation Act context given the plain language of the Act, the substantial latitude that Congress has granted the courts in adjudicating the Act, and the advantages that a lower bar to entry to federal court would have for deterring discriminatory behavior.

Part III.A proceeds by considering the Supreme Court precedent on statutes that, like the Rehabilitation Act, confer standing

²⁰³ That is, the plaintiff should be able to show not only that the defendant's conduct *in fact* caused her injury, but also that the harm flowing from the defendant's conduct bears some reasonable relationship to that conduct. See Restatement (Third) of Torts § 29 (2010); *Lexmark*, 134 S Ct at 1390–91.

²⁰⁴ *Lexmark*, 134 S Ct at 1389.

on “any person aggrieved.” It advocates for adopting a common usage of the phrase that recently found favor in an employment discrimination case arising under Title VII of the Civil Rights Act. It further argues that courts should be generous in construing the dimensions of the zone of interests sought to be protected by the Rehabilitation Act. Such a generous standard would afford protection for associational plaintiffs while also alleviating the *Loeffler* dissent’s concerns about limitless liability for a single injury. Part III.B argues that adopting a broad standard for standing—a position that can be achieved by incorporating a lenient version of the zone-of-interests test—would also aid in deterring discriminatory behavior and potentially lead to expanded protections for individuals with disabilities.

A. A Middle Ground

With a zone-of-interests inquiry now mandatory for every statutorily created cause of action, the first step of the merits determination is to ask whether the plaintiff “falls within the class of plaintiffs whom Congress has authorized to sue.”²⁰⁵ That question “requires [the court] to determine the meaning of the congressionally enacted provision creating a cause of action . . . apply[ing] traditional principles of statutory interpretation.”²⁰⁶

When interpreting statutes, the Supreme Court typically lets plain language be its guide. Dictionaries are consulted.²⁰⁷ And “any person” usually means “any person.” In *United States v Gonzales*,²⁰⁸ for instance, Justice Sandra Day O’Connor stated that “[r]ead naturally, the word ‘any’ has an expansive meaning that is, ‘one or some indiscriminately of whatever kind.’”²⁰⁹

To that end, and in conjunction with the dictionary definitions of “any”²¹⁰ and “every,”²¹¹ the Court has historically interpreted statutory language conferring standing on “any person aggrieved” to mean just that—“any person” adversely affected by the proscribed conduct may sue. In one early antidiscrimination

²⁰⁵ *Id.* at 1387.

²⁰⁶ *Id.* at 1388.

²⁰⁷ See generally John Calhoun, Note, *Measuring the Fortress: Explaining Trends in Supreme Court and Circuit Court Dictionary Use*, 124 *Yale L J* 484 (2014).

²⁰⁸ 520 US 1 (1997).

²⁰⁹ *Id.* at 5.

²¹⁰ Merriam-Webster defines “any” as “one or some indiscriminately of whatever kind.” *Merriam-Webster’s Collegiate Dictionary* 56 (11th ed 2005).

²¹¹ Merriam-Webster defines “every” as “being each individual or part of a group without exception.” *Merriam-Webster’s Collegiate Dictionary* at 433 (cited in note 210).

case, *Trafficante v Metropolitan Life Insurance Co*,²¹² one black and one white resident of an apartment complex filed suit to enjoin the owner’s discriminatory housing practices that disadvantaged black applicants.²¹³ Because Title VIII of the Civil Rights Act of 1968²¹⁴ (the Fair Housing Act) authorizes suit by “[a]ny person who claims to have been injured by a discriminatory housing practice . . . (hereafter “person aggrieved),”²¹⁵ both plaintiffs argued that they had standing to sue notwithstanding their race.²¹⁶ Citing the Third Circuit’s opinion in *Hackett v McGuire Brothers, Inc*,²¹⁷ the Supreme Court agreed that even the white resident had standing; even though he himself was not the *target* of the owner’s discrimination, the deprivation of an opportunity to live in a racially integrated community made him an “aggrieved” person under the statute.²¹⁸ Eight years later, the Supreme Court reaffirmed *Trafficante*’s expansive interpretation of “any persons aggrieved,” indicating in *Gladstone, Realtors v Village of Bellwood*²¹⁹ that even “test” plaintiffs in the fair housing context had standing under Title VIII because the language of the statute evinced a congressional intent to extend standing as “broad[ly] as is permitted by Article III of the Constitution.”²²⁰

The next two cases to interpret “any person” did so outside the context of antidiscrimination law. In *Bennett v Spear*,²²¹ ranch operators and irrigation districts filed suit under the citizen-suit provision of the Endangered Species Act²²² (ESA), which authorizes “any person [to] commence a civil suit.”²²³ The plaintiffs contended that the Fish and Wildlife Service’s proposed use of reservoir water to protect an endangered species of fish would result in less water available for their irrigation needs, thereby harming

²¹² 409 US 205 (1972).

²¹³ *Id.* at 206–08.

²¹⁴ Pub L 90-284, 82 Stat 81, codified at 42 USC § 3601 et seq.

²¹⁵ Fair Housing Act § 810(a), 82 Stat at 85 (emphasis added).

²¹⁶ *Trafficante*, 409 US at 206 n 1 (emphasis added), quoting Fair Housing Act § 810(a), 82 Stat at 85, 42 USC § 3610(a).

²¹⁷ 445 F2d 442, 446 (3d Cir 1971) (explaining that “the language ‘a person claiming to be aggrieved’ shows a congressional intention to define standing as broadly as is permitted by Article III of the Constitution”).

²¹⁸ See *Trafficante*, 409 US at 211–12.

²¹⁹ 441 US 91 (1979).

²²⁰ *Id.* at 109. The plaintiffs’ theory of Article III injury was based on allegations that they had been deprived of the “social and professional benefits of living in an integrated society.” *Id.* at 111.

²²¹ 520 US 154 (1997).

²²² Pub L No 93-205, 87 Stat 884 (1973), codified as amended at 16 USC § 1531 et seq.

²²³ *Bennett*, 520 US at 164, quoting ESA § 11, 87 Stat at 900, 16 USC § 1540(g).

their commercial activities and violating the ESA.²²⁴ After surveying previous interpretations of broad statutory language, the Supreme Court found standing: even though the plaintiffs sought to *prevent* the application of environmental restrictions rather than to sue private violators of those restrictions or assert their underenforcement, Scalia, citing *Trafficante*, concluded that Congress's use of the phrase "any person" demonstrated a congressional intent to expand standing to the maximum permitted under Article III.²²⁵ And in *Federal Election Commission v Akins*,²²⁶ the Court granted standing to a group of voters who were denied certain campaign finance information, this time citing *Bennett* and remarking in the process that "[h]istory associates the word 'aggrieved' with a congressional intent to cast the standing net broadly—beyond the common-law interests and substantive statutory rights upon which 'prudential' standing traditionally rested."²²⁷

More recent Supreme Court jurisprudence, however, counsels against taking the continued viability of the expansive interpretation for granted. Newer cases suggest instead that courts should walk a tightrope between the extremes of Article III standing and a rigid construction of the class of plaintiffs authorized to sue under a given statute. In *Thompson v North American Stainless, LP*,²²⁸ an employee brought an action against his employer for a retaliatory firing decision under Title VII of the Civil Rights Act.²²⁹ Scalia, writing for a unanimous Court, sharply criticized dicta in the *Trafficante* opinion (a Title VIII case) that suggested that statutory language conferring standing to "any person aggrieved" in the Title VII context would *also* reach as far as permitted by Article III.²³⁰ Deeming that notion "too expansive" and "ill-considered,"²³¹ the Court instead proposed treading a middle course.

Like the warring circuits behind *Loeffler* and *McCullum*, the *Thompson* parties disagreed on how to construe Congress's "any person aggrieved" language. At one extreme, the plaintiff-employee argued for an interpretation as expansive as the Constitution

²²⁴ *Bennett*, 520 US at 160.

²²⁵ *Id.* at 165.

²²⁶ 524 US 11 (1998).

²²⁷ *Id.* at 19.

²²⁸ 562 US 170 (2011). This case was decided after *Loeffler* but before *McCullum*, *Collins*, and *Durand*.

²²⁹ *Thompson*, 562 US at 172.

²³⁰ *Id.* at 176.

²³¹ *Id.*

would allow.²³² This is the position that the *Loeffler* court advanced. At the other extreme, the defendant-employer argued that “person aggrieved” was a term of art that referred only to the employee who was the *subject* of the retaliatory conduct—a position analogous to the *McCullum* court’s narrow reading of the class of people entitled to sue under the statute.²³³ Like the defendant-hospital in *McCullum*, the defendant-employer in *Thompson* urged the Court to construe that class narrowly to encompass only those who were *personally* subject to the discriminatory conduct proscribed by the act—here, those who suffered retaliation *personally*.²³⁴ The Court rejected both arguments, the former on the grounds that it would lead to a never-ending cycle of liability²³⁵ and the latter as inconsistent with the statute’s text.²³⁶ If Congress had intended to restrict standing solely to the target of retaliatory conduct, the Court reasoned, “it would more naturally have said ‘person claiming to have been *discriminated against*’ rather than ‘person claiming to be *aggrieved*.’”²³⁷

The Court thus announced a middle course that manages both to avoid the extremity of equating “person aggrieved” with Article III standing and yet is “fully consistent” with the Court’s application of the term in *Trafficante*: a generously construed zone of interests that recognizes that individuals can be “aggrieved” by discrimination without themselves being subject to the precise discriminatory conduct that the act prohibits.²³⁸ Indeed, the breadth of this test as announced was expansive, enabling suit by any plaintiff with an interest “*arguably* sought to be protected by the statute” and denying standing only if “the plaintiff’s interests are *so marginally related to or inconsistent with* the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit.”²³⁹ The expansive language of the *Thompson*-endorsed zone of interests, which

²³² See *id.* at 175.

²³³ See *Thompson*, 562 US at 177.

²³⁴ See *id.*

²³⁵ These are the same concerns raised by the dissent in the Second Circuit’s *Loeffler* decision. See *Loeffler*, 582 F3d at 287 (Jacobs dissenting) (expressing dismay at the majority’s evident lack of a limiting principle).

²³⁶ See *Thompson*, 562 US at 177–78.

²³⁷ *Id.* at 177 (emphasis added).

²³⁸ *Id.* (citations omitted). Although this case prefigures *Lexmark*’s adoption of a mandatory zone-of-interests test for all statutorily created causes of action, see Part II.A, Scalia, who authored both opinions, applies that test here.

²³⁹ *Id.* at 178 (emphasis added and citations omitted).

amounts almost to a default rule in favor of inclusion in that case, indicates that the breadth of the zone can be quite wide indeed.

It is worth emphasizing that *Thompson*, because it interprets an entirely different statute, is not binding on the associational standing issue under the Rehabilitation Act. While *Thompson* endorsed a wide zone in the Title VII context, principles of statutory interpretation must ultimately drive the determination of the proper zone of interests in the Rehabilitation Act context. To that end, the next Section argues that the zone of interests for associational plaintiffs under the Rehabilitation Act should be interpreted broadly based on the Act's statutory language.

B. A Wide Zone of Interests

The zone-of-interests test is not only required but also desirable insofar as it presents an elegant solution to the *Loeffler* dissent's concerns about unlimited liability: proximate cause. Unlike the Article III injury test, which requires only that the injury complained of be fairly traceable to the defendant's conduct, the zone-of-interest inquiry requires a plaintiff's injury to be proximately caused by the defendant—that is, it requires the injury flowing from the defendant's conduct to bear a sufficiently close relationship to that conduct that it would not be unfair to hold the defendant accountable.²⁴⁰ Courts and scholars have long recognized that the “fairly traceable” standard is more lenient than proximate cause.²⁴¹ Indeed, because the latter is ultimately a matter of best-guess line drawing driven by policy considerations,²⁴² it offers built-in protection against attenuated injuries—exactly the sort of marginal, too-remote claims that compose the *Loeffler* dissent's “hypothetical list of horrors.”²⁴³

Using the proximate cause standard, courts would be able to deny standing to associational plaintiffs with injuries too attenuated and unforeseeable to countenance—such as a relative who burns herself on the stove while preparing a gluten-free meal that a hospital was obligated but failed to provide—while affording

²⁴⁰ See *Lexmark*, 134 S Ct at 1390 (describing proximate causation as the question “whether the harm alleged has a sufficiently close connection to the conduct the statute prohibits”).

²⁴¹ See, for example, Steven G. Davison, *Standing to Sue in Citizen Suits against Air and Water Polluters under Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 17 Tulane Env'r L J 63, 66–67 (2003).

²⁴² See Restatement (Third) of Torts § 29 (2010).

²⁴³ See *Loeffler*, 582 F3d at 283 (Wesley concurring) (describing the dissenting judge's list of negative consequences).

standing to those plaintiffs whose injuries flow directly and foreseeably from the discriminatory conduct.²⁴⁴ Drawing an equivalent line is not possible using the “fairly traceable” standard, however, as that element merely requires a showing that there is a “substantial likelihood” that the defendant’s conduct caused the plaintiff’s injury.²⁴⁵ The latter standard will be satisfied by remote as well as direct injuries.²⁴⁶

An analogy to tort law may be instructive on this point. Recall the classic hypothetical from first-year Torts, straight from the pages of the Restatement (Third): Richard, a hunter, hands his loaded shotgun to his neighbor’s three-year-old daughter. The daughter drops the shotgun, breaking her toe. Although Richard is negligent for giving a small child a loaded deadly weapon, the risk that made Richard’s conduct negligent is that she would shoot someone with the gun, not that she would hurt herself by dropping it (assuming, as the Restatement does, that the gun was not especially heavy or unwieldy). Her broken toe is outside the scope of Richard’s liability—that is, proximate cause bars her recovery for this unforeseen injury even though Richard’s negligence was its cause in fact.²⁴⁷ In the standing context, the “fairly traceable” standard functions similarly to cause in fact by sweeping within its purview *all* injuries that are causally related to the

²⁴⁴ Under this formulation, foreseeable stress, anxiety, and annoyance that results from a hospital’s reliance on family members to convey medical information to deaf patients should satisfy proximate cause.

²⁴⁵ Davison, 17 *Tulane Envir L J* at 66 (cited in note 241). The “fairly traceable” standard appears to be essentially the same as but-for causation in that it asks whether the defendant *in fact* caused the plaintiff’s injury, regardless of the foreseeability of harm. See Luke Meier, *Using Tort Law to Understand the Causation Prong of Standing*, 80 *Fordham L Rev* 1241, 1253 (2011). Proximate cause, by contrast, is concerned with reasonableness: Is there a close enough connection between the defendant’s action and the plaintiff’s injury that it makes sense to hold the defendant accountable? To continue with the example from above, most courts would probably find the meal-preparing relative’s burns to be too unforeseeable and tenuously connected to the hospital’s failure to provide gluten-free meals to consider it reasonably responsible. On the other hand, a family member’s mental anguish stemming from conscription into ASL translation is likely a foreseeable result of a hospital’s failure to provide accommodations for the hard of hearing.

²⁴⁶ While the Supreme Court has never explicitly defined the “fairly traceable” standard as coextensive with a cause-in-fact analysis, a number of decisions support the analogy. See Meier, 80 *Fordham L Rev* at 1241–59 (cited in note 245) (collecting cases). See also, for example, *Duke Power Co v Carolina Environmental Study Group, Inc.*, 438 US 59, 74 (1978) (finding a “fairly traceable” connection by deferring to the district court’s conclusion that a but-for causal link existed); *Allen*, 468 US at 737 (questioning the existence of a but-for causal link between the plaintiff’s injury and the alleged illegal conduct and declining to find a “fairly traceable” injury on those grounds).

²⁴⁷ Restatement (Third) of Torts § 29, cmt d, illus 3 (2010).

defendant's conduct²⁴⁸—a prospect that would surely alarm any court concerned with the lack of a limiting principle. The proximate cause standard, by contrast, contains a built-in safety valve. It would allow a court to grant standing for injuries for which the scope of the risk was foreseeable but deny it for attenuated injuries—those for which holding the defendant accountable would be unreasonable, inefficient, or unfair. A court employing a proximate cause standard in the associational standing context, therefore, could comfortably grant standing to Bobby Loeffler and to D.F. McCullum's parents without fear of tumbling down a slippery slope toward the meal-preparing relative.

In *Lexmark*, it is true, Scalia emphasized that not every zone-of-interests inquiry will merit the “lenient approach” and “generous review provisions” afforded to the claims in that case.²⁴⁹ While the test as formulated in *Lexmark* was “not especially demanding” and gave “the benefit of any doubt . . . to the plaintiff,” the Court noted that the breadth of the zone of interests will necessarily “var[y] according to the provisions of law at issue.”²⁵⁰ Thus, it would be theoretically possible, if not desirable, to define the Rehabilitation Act's zone of interests narrowly—perhaps as narrowly as the Eleventh Circuit construed the standing provision in *McCullum*.²⁵¹ A narrow zone-of-interests standard could reflect that Congress intended the Rehabilitation Act to protect only disabled individuals, so only those who have “suffer[ed] injury because they were subjected to conduct proscribed by the Act”—that is, they were personally excluded, denied benefits, or subjected to discrimination on the basis of their own or an associate's disability—would have standing.²⁵²

There are, however, persuasive reasons why the Rehabilitation Act's zone of interests should be construed broadly. One is the formulation of the test itself. In *Lexmark*, Scalia posed the question as one of “determin[ing] the meaning of the congressionally enacted provision . . . apply[ing] traditional principles of statutory interpretation.”²⁵³ Thus, courts should look first to the dictionary

²⁴⁸ See note 261 and accompanying text.

²⁴⁹ *Lexmark*, 134 S Ct at 1389.

²⁵⁰ *Id.*

²⁵¹ See *McCullum*, 768 F3d at 1143.

²⁵² *Collins*, 2015 WL 268842 at *8. An even more extreme zone-of-interests test might disallow associational suits altogether. This approach, however, would run counter to congressional intent on the issue, as the ADA expressly provides for associational suits and the two Acts' substantive provisions are generally to be read together. See Part I.C.

²⁵³ *Lexmark*, 134 S Ct at 1388.

definitions of the statutory language at issue—here, “any person aggrieved by any act or failure to act”²⁵⁴—for guidance. *Black’s Law Dictionary* defines “aggrieved party” broadly to encompass “a party whose . . . rights have been affected by another person’s actions.”²⁵⁵ Coupled with the expansiveness of the term “any,” nothing in that definition provides support for a narrow reading.

Applying those principles to the associational discrimination cases under the Rehabilitation Act surveyed above demonstrates the impact that a properly broad zone of interests would have on the associational standing question. While the *Loeffler* court relied on an overly expansive interpretation of the language in the statute, the result in that case is consistent with a lenient zone-of-interests inquiry. *McCullum*, *Collins*, and *Durand*, however, should have come out differently. The injuries of the plaintiffs in those cases were not so “marginally related to or inconsistent with the purposes implicit in the statute” as to bar recovery for their direct and foreseeable harms²⁵⁶—unlike the claims of the *Loeffler* dissent’s hypothetical meal-preparing relative, which will be blocked by proximate cause no matter the width of the zone of interests.²⁵⁷

C. Detering Discriminatory Behavior

There is another benefit to adopting a wide zone-of-interests test when interpreting the Rehabilitation Act: deterrence. As John Briggs recognized, “an award of compensatory damages in an action brought by an individual handicapped person against a discriminatory program enhances the opportunities available to *all* handicapped persons.”²⁵⁸ This principle holds true more generally as well: the threat of having to pay damages—regardless of to whom they are owed—affects the cost-benefit calculations in which entities engage when deciding whether to comply with the

²⁵⁴ 29 USC § 794a(a)(2). See also Part III.A.

²⁵⁵ *Black’s Law Dictionary* 1232 (Thomson Reuters 10th ed 2014).

²⁵⁶ *Thompson*, 562 US at 178 (citations omitted).

²⁵⁷ This is the same as saying that the meal-preparing relative’s injuries *are* so “marginally related to or inconsistent with” the statutory purpose as to fall outside the zone of interests.

²⁵⁸ John D. Briggs, Note, *Safeguarding Equality for the Handicapped: Compensatory Relief under Section 504 of the Rehabilitation Act*, 1986 Duke L J 197, 203 (emphasis added).

law.²⁵⁹ The availability of compensatory relief under antidiscrimination statutes, then, “deters discrimination” by “encourag[ing] federally funded programs to provide the legislatively mandated” opportunities and services for disabled people.²⁶⁰ It provides a mechanism for effectuating congressional purpose²⁶¹ when the incentives for complying with the statute are too weak on their own to deter rational noncompliance.²⁶²

A number of prominent scholars and disability rights activists have taken issue with the ADA’s injunction-only remedial scheme in the public accommodations (Title III) context.²⁶³ While compensatory relief is available under Title II of the ADA, it is not available under Title III.²⁶⁴ Title III’s injunctive relief scheme, moreover, requires a showing that the disabled individual is likely to return to the hospital and face the same conduct that led to the injury in the first place.²⁶⁵ This is particularly problematic in the healthcare context because it leads to systematic underdeterrence. In emergency rooms, for example, where an individual is relatively unlikely to return (at least compared to one’s favorite haunts, such as a mall or a movie theater), there is less incentive for the hospital to provide the statutorily mandated services upfront. This is because a plaintiff will nearly always be unable to show a likelihood of returning and being re-injured by the discriminatory conduct.²⁶⁶

The incentives to provide the statutorily mandated services are even weaker under Title III in the context of associational claims. In the case of a plaintiff who is injured in fact by discriminatory conduct on the basis of her association with a disabled person, the plaintiff must be prepared to make two separate showings, both supported by a preponderance of the evidence. She

²⁵⁹ See, for example, A. Mitchell Polinsky and Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 Harv L Rev 869, 873 (1998) (“Our conclusions . . . flow from the basic principle that, to achieve appropriate deterrence, injurers should be made to pay for the harm their conduct generates.”).

²⁶⁰ Briggs, 1986 Duke L J at 203 (cited in note 258).

²⁶¹ *Id.* at 204.

²⁶² See note 268.

²⁶³ See, for example, Colker, *The Disability Pendulum* at 183 (cited in note 11) (chronicling the systematic underenforcement of the ADA and observing that the remedial scheme of Title III has been ineffective at eliminating barriers).

²⁶⁴ See Rothstein, 75 Ohio St L J at 1302–03 (cited in note 19).

²⁶⁵ See *McCullum*, 768 F3d at 1145 (denying recovery on the ADA claim because the plaintiff could not show a substantial likelihood of returning to the hospital and being reinjured).

²⁶⁶ See *id.*

must be able to (a) show a substantial likelihood that the disabled individual with whom she is associated will again be injured by the discriminatory conduct complained of—a proposition that, as discussed above, is surprisingly difficult in its own right; and (b) she must show a substantial likelihood that she *herself* will be re-injured by that discriminatory conduct.²⁶⁷ Consider the meal-preparing relative from the *Loeffler* dissent, for whom this task is likely prohibitive. Not only would she need to show that the hospital would fail a second time to provide a gluten-free meal, she would need to show that the task of meal preparation would again fall to her. And—crucially—she would need to show that in the process of preparing this meal she is likely to burn herself again, a possibility so speculative as to be ridiculous.²⁶⁸ By definition, pleading and proving an associational discrimination claim under Title III will never be *less* difficult than pleading and proving a regular discrimination claim because the associational claim relies on the regular discrimination claim. Most likely, it will be a great deal more difficult.

Unlike Title III of the ADA, the Rehabilitation Act provides for compensatory damages.²⁶⁹ Because this gives private plaintiffs a greater incentive to sue, the Rehabilitation Act is already a better candidate than Title III to incentivize compliance with federal antidiscrimination law. But rejecting the Eleventh Circuit's artificially narrow reading of associational standing under the Rehabilitation Act and authorizing a broader class of associational plaintiffs would go even further toward incentivizing federally funded programs to invest up front in the opportunities and services for people with disabilities already required by law. Simply put, any statute that does not allow for associational standing is allowing some defendant institutions to refrain from internalizing negative externalities. Under a model that recognizes a wide zone of interests for the Rehabilitation Act, a governmental entity that discriminates against a person with a disability might

²⁶⁷ See *id.*

²⁶⁸ See *Loeffler*, 582 F3d at 287 (Jacobs dissenting). To be sure, blocking the meal-preparing relative's Title III claims certainly seems like the correct result in this case given the attenuated nature of her injuries. The potential for abuse in the injunction-only scheme, however, becomes apparent if one considers the incentives that businesses have to not comply voluntarily with the law. Because businesses are not forced to internalize all costs under the current system, a business might make the quite rational calculation that the financial cost of making its building handicapped accessible is likely to outweigh the potential gain from increased business from customers with disabilities. This is arguably not the sort of cost-benefit efficiency that the law should indulge.

²⁶⁹ See Rothstein, 75 Ohio St L J at 1302 (cited in note 19).

find itself with two claims against it with respect to the same set of facts—one from the person with a disability herself and the other from the nondisabled person that accompanied the person with a disability. The threat of having to pay more than one set of damages under the Rehabilitation Act, then, would force the defendant to internalize those externalities, perhaps deterring injuries that the ADA's relative toothlessness²⁷⁰ would not. Put differently, increasing the number of plaintiffs and bolstering their rights under the Rehabilitation Act may help remedy the weaknesses inherent in the ADA's remedial scheme.

CONCLUSION

This Comment has argued that neither the Second nor the Eleventh Circuit was entirely correct in its analysis of the scope of statutory standing under the Rehabilitation Act. While statutory language conferring standing on "any person aggrieved" has traditionally been interpreted broadly by the courts, recent Supreme Court jurisprudence suggests that reading the phrase "any person aggrieved" to be coextensive with Article III's injury requirement is too generous. At the same time, these cases suggest that the *McCullum* court's reading of the phrase was unnecessarily restrictive.

A more compelling interpretation of the Rehabilitation Act's standing provision would avoid both of these extremes and incorporate a lenient zone-of-interests test—one that recognizes the viability of suits brought by associational plaintiffs while simultaneously conferring standing only on those plaintiffs who can demonstrate injuries sufficiently related to the defendant's conduct to satisfy proximate cause. Such an interpretation of the zone-of-interests test is permissible under Justice Scalia's flexible formulation, which varies according to the provision of law at issue. This Comment has argued that courts should prefer a lenient test in the Rehabilitation Act context given the plain language of the Act, the substantial latitude that Congress has granted the courts in adjudicating the Act, and the advantages that a lower bar to entry to federal court would have on deterring discriminatory behavior.

²⁷⁰ See Bagenstos, *Contradictions of the Disability Rights Movement* at 124–28 (cited in note 11) (noting the systemic problem of ADA underenforcement and arguing that the incentives for bringing suit under the ADA are too weak to lead to full enforcement).