

# An “Affirmative” Change to the ADA’s Title I Direct Threat Defense

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#### I. INTRODUCTION TO THE DIRECT THREAT DEFENSE

*“The question of who bears the burden of establishing that an individual’s disability poses a direct health or safety threat to the disabled employee or others is not a simple one.”<sup>1</sup>*

In 2000, Steven Bradley lived in the rural town of Hardin, Missouri, just outside of Kansas City.<sup>2</sup> Diagnosed with cerebral palsy, Mr. Bradley used either a wheelchair or crutches depending on his current needs.<sup>3</sup> He worked a regular “9 to 5” as a proofreader for Banta Publishing, Inc.<sup>4</sup> But after seeing a Wal-Mart commercial featuring employees with disabilities, Mr. Bradley applied for a part-time “Greeter/Customer Assistant” position.<sup>5</sup> Wal-Mart did not offer him the job.<sup>6</sup>

By February of 2001, Wal-Mart expanded its Richmond store into a Wal-Mart Supercenter.<sup>7</sup> The growth required more employees, and Mr. Bradley decided to submit another application, this time for an “Associate/Any Department” position.<sup>8</sup> During his interview, Wal-Mart managers asked Mr. Bradley about his physical ability to work and then told him that he was “be[tter] suited for a greeter job.”<sup>9</sup> Mr. Bradley did not receive a job offer because of his cerebral palsy

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1. *Rizzo v. Child.’s World Learning Ctrs., Inc.*, 213 F.3d 209, 212 (5th Cir. 2000).

2. *EEOC v. Wal-Mart Stores, Inc.*, 477 F.3d 561, 563 (8th Cir. 2007); Press Release, EEOC, Wal-Mart to Pay \$300,000 to Rejected Job Applicant with Disability (Apr. 17, 2008), <https://www.eeoc.gov/newsroom/wal-mart-pay-300000-rejected-job-applicant-disability-0> [hereinafter EEOC Press Release].

3. *Wal-Mart Stores, Inc.*, 477 F.3d at 563.

4. *Id.* at 563 n.1.

5. EEOC Press Release, *supra* note 2; *Wal-Mart Stores, Inc.*, 477 F.3d at 563.

6. *Wal-Mart Stores, Inc.*, 477 F.3d at 563.

7. *Id.*

8. *Id.*

9. *Id.* at 564.

diagnosis and use of a wheelchair and crutches.<sup>10</sup> Wal-Mart defended its decision by claiming that Mr. Bradley would pose a direct threat of harm to himself or to customers.<sup>11</sup>

Mark Walker worked as a railroad engineer for Union Pacific Railroad Company from 2005 to 2019.<sup>12</sup> To ensure the safe operation of railways, federal regulations require railroad engineers to undergo color vision acuity testing every 3 years.<sup>13</sup> Mr. Walker underwent multiple color vision acuity tests.<sup>14</sup> But after an inaccurate secondary test, Union Pacific terminated Mr. Walker’s employment even though he “could perform all his essential job functions, including discerning colors.”<sup>15</sup> Union Pacific supported the legality of its decision to fire Mr. Walker by asserting that Mr. Walker posed a significant threat to safety in the workplace as a result of his failed test.<sup>16</sup> The court noted that Union Pacific’s defenses were based on a “purported policy” requiring subsequent testing after initial failure.<sup>17</sup> “However, firing qualified,

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10. *Id.* at 562, 571. Coincidentally, this case solidified direct threat as an affirmative defense under the Eighth Circuit.

11. *See id.* at 572 (finding Wal-Mart failed to explain how Bradley’s use of a wheelchair or other reasonable accommodations posed a greater risk of harm compared to customers who similarly use such devices).

12. *Walker v. Union Pac. R.R. Co.*, No. 3:22-cv-1011, 2024 U.S. Dist. LEXIS 229608, at \*1, (D. Or. Dec. 19, 2024).

13. 49 C.F.R. § 240.201(c). If a Union Pacific engineer fails the primary test, they may then perform a secondary field test. *Walker*, 2024 U.S. Dist. LEXIS 229608, at \*10–11.

14. *Walker*, 2024 U.S. Dist. LEXIS 229608, at \*1.

15. *Id.* at \*2.

16. *Walker v. Union Pac. R.R. Co.*, No. 3:22-cv-01011, 2023 U.S. Dist. LEXIS 236179, at \*29–30 (D. Or. Dec. 18, 2023).

17. *Walker*, 2024 U.S. Dist. LEXIS 229608, at \*2 n.1. The FRA must approve the first test. *Id.* at \*10. If the employee fails the first test, they may then undergo an additional test, which can be either an ophthalmologic referral, a field test, or another color test. *Id.* at \*10–11. Union Pacific chose to create a field test, which is not a scientific test. *Id.* at \*11. Field tests are meant to be reliable and must “reasonably match actual operating or working conditions.” *Id.* Union Pacific implemented the Light Cannon Test in 2016 but did not validate it with human studies until 2020. *Id.* at \*14, 29. Mr. Walker took a pre-2020 version of the test, which he failed. *Id.* at \*18, 24. The pre-2020 tests had a 26.5% failure rate for “persons with normal color vision.” *Id.* at \*30.

experienced employees for failing an invalid test . . . does nothing to promote safety, and violates the ADA.”<sup>18</sup>

Bradley and Walker’s stories illustrate larger issues. Individuals with disabilities experience higher unemployment rates than individuals without disabilities.<sup>19</sup> In 2024, individuals with disabilities comprised about 13% of the U.S. population.<sup>20</sup> Among the individuals participating in the labor market, 22.7% had a disability, whereas 65.5% did not.<sup>21</sup> And among comparably educated individuals, those with a disability were less likely to be employed than those without a disability.<sup>22</sup> Further, the 2024 unemployment rate of individuals with disabilities nearly doubled that of their non-disabled counterparts.<sup>23</sup>

Congress enacted Title I of the Americans with Disabilities Act (“ADA”) to protect individuals with disabilities from employment-related disability discrimination.<sup>24</sup> However, Congress provided a narrow exception within Title I called the “direct threat” defense.<sup>25</sup> This defense allows employers to terminate employees or refuse to hire individuals if they pose a significant safety risk in the workplace.<sup>26</sup>

Employers use the direct threat defense more broadly than Congress intended. This unintended misuse of Title I’s direct threat provision stems primarily from two factors. First, federal circuits disagree

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18. Press Release, EEOC, EEOC Sues Union Pacific Railroad for Disability Discrimination (Oct. 2, 2023), <https://www.eeoc.gov/newsroom/eeoc-sues-union-pacific-railroad-disability-discrimination-0>. Walker’s jury trial against Union Pacific was scheduled for February 10, 2025, but the case was settled in January 2025. *Walker*, 2024 U.S. Dist. LEXIS 229608, at \*2; *Walker v. Union Pac. R.R. Co.*, 3:22-cv-01011, 2025 Jury Verdicts LEXIS 53465 (Jan. 31, 2025). Walker was one of twenty-one engineers previously employed by Union Pacific who were terminated based on a perceived disability. *EEOC v. Union Pac. R.R. Co.*, No. 23-cv-3030, 2024 U.S. Dist. LEXIS 118841, at \*2 n.2 (D. Minn. July 8, 2024).

19. See Press Release, U.S. Bureau of Labor Statistics, Persons with a Disability: Labor Force Characteristics Summary (Feb. 25, 2025, at 10:00 ET), <https://www.bls.gov/news.release/disabl.nr0.htm>.

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. 42 U.S.C. § 12101.

25. *Id.* § 12113(b).

26. *Id.* §§ 12111(3), 12113(b).

over which party bears the burden of proof in a direct threat analysis.<sup>27</sup> Although Congress intended the direct threat defense to apply narrowly, some circuits have expanded its scope.<sup>28</sup> In these circuits, employees must prove that they do not pose a direct threat of harm to themselves or others.<sup>29</sup> Other circuit courts maintain a plaintiff-friendly approach, requiring employers to prove the individual poses a direct threat of harm to self or to others.<sup>30</sup> Second, even when courts establish direct threat as an affirmative defense, they routinely provide employers and employer witnesses deference when determining significant risk of harm.<sup>31</sup>

This Note urges Congress to amend the ADA to incorporate direct threat as a statutory defense and add factors for courts to use when faced with competing expert testimony. Part II discusses the history of the ADA, the employment provision, establishing a prima facie claim for discrimination, the direct threat provision, and the circuit split. Part III focuses on the implications of the Supreme Court’s decisions in *School Board of Nassau County v. Arline*<sup>32</sup> and *Bragdon v. Abbott*<sup>33</sup>

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27. See *EEOC v. Steel Painters, LLC*, 433 F. Supp. 3d 989, 1003 (E.D. Tex. 2020) (listing cases on both sides of the circuit split).

28. Congress intended the ADA as a broad mandate of protection; thus, it only makes sense to apply its defenses narrowly.

By accounting for both the benefits and the costs of employing the disabled, the ADA makes an explicit judgment that, *at some point*, the need to protect others trumps the disabled individual’s right to work. “Recognizing that the need to protect public health may at times outweigh the rights of disabled individuals, Congress created a *narrow* exception to [the ADA’s] broad prohibition against discrimination.”

Brian S. Prestes, *Disciplining the Americans with Disabilities Act’s Direct Threat Defense*, 22 BERKELEY J. EMP. & LAB. L. 409, 417 (2001) (emphasis added) (quoting *Montalvo v. Radcliffe*, 167 F.3d 873, 876 (4th Cir. 1999)). See Jeffrey A. Van Detta, “*For the Love of God! Open This Door!*”: *Individual Rights Versus Public Safety Under the “Direct Threat” Standard of the Americans with Disabilities Act After Three Decades of Litigation*, 6 BELMONT L. REV. 147, 161–66 (2019) (discussing the nature of the circuit split).

29. See *Steel Painters, LLC*, 433 F. Supp. 3d at 1003.

30. *Id.*

31. Van Detta, *supra* note 28, at 168 (discussing cases in which courts increasingly deferred to employers).

32. 480 U.S. 273 (1987).

33. 524 U.S. 624 (1998).

and examines the judiciary's tendency to favor employer-retained medical experts over those presented by employees. Part IV offers two solutions—one directed to Congress and the other directed to courts. Part V briefly concludes.

## II. THE FUNCTIONALITY OF TITLE I'S DIRECT THREAT DEFENSE

*“There’s a huge gap between what the law was intended to do and what the experience of employees with disabilities really [is].”*<sup>34</sup>

The ADA is far from perfect.<sup>35</sup> The direct threat defense significantly weakens the ADA. Instead of balancing the interests of individuals with disabilities and employers, the direct threat provision creates an imbalance that favors employers to the detriment of individuals with disabilities.<sup>36</sup> Section II.A discusses the history of the ADA—its predecessors, original purpose, and amendments. Section II.B focuses on Title I, the employment provision, and discusses common forms of

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34. Wendy Lu, *What a “Human-Centered” Approach Can Do for Workers with Disabilities*, N.Y. TIMES (July 21, 2023), <https://www.nytimes.com/2023/07/19/business/disability-accommodations-workplace.html>.

35. The ADA falls short in protecting people with disabilities who are also people of color or have low incomes. Stephanie Pappas, *Despite the ADA, Equity Is Still Out of Reach*, MONITOR ON PSYCH., Nov.–Dec. 2020, at 38, 39. Thirty-five years after the ADA, tones of ableism run rampant in ordinary conversation, with many individuals using the “R-word” slur. *Why the R-Word Is the R-Slur*, SPECIAL OLYMPICS <https://www.specialolympics.org/stories/impact/why-the-r-word-is-the-r-slur> (last visited Jan. 7, 2026). Likewise, many federally funded programs shirk their responsibility of equity and inclusion until litigation forces them to act. *See, e.g.*, Lee Sherwood, *Settlement Reached in Tennessee Deaf Prisoner Case*, DISABILITY RTS. TENN. (Mar. 5, 2025), <https://www.disabilityrightstn.org/settlement-reached-in-tennessee-deaf-prisoner-case>. In 2020, Disability Rights Tennessee advocated on behalf of deaf Tennesseans incarcerated in state-run facilities. These individuals were denied sign language interpreters and other auxiliary aids that would have enabled them to communicate with fellow inmates, corrections officers, and other personnel. Without these accommodations, deaf inmates were denied participation in prison programs, medical appointments, religious services, and required parole processes—all of which hearing individuals could participate in freely. *Id.*

36. In other discrimination contexts, courts balance the interests of the parties. *See generally* Niswander v. Cincinnati Ins. Co., 529 F.3d 714, 723 (6th Cir. 2008) (applying a balancing approach to a discrimination claim under Title VII of the Civil Rights Act of 1964).

workplace discrimination. Section II.C outlines prima facie claims for discrimination under the ADA and the defenses available to combat liability. Section II.D discusses the direct threat provision, dividing it into three subparts that reflect its connection to the Rehabilitation Act, Title III case law, and EEOC regulations. Section II.E outlines the current split regarding which party bears the burden of proving an individual poses a direct threat to safety. Though individuals with disabilities now receive widespread protections, an overall tumultuous beginning to these protections contributed to the ongoing confusion of the direct threat provision. An examination of the ADA’s history reflects the many hurdles that individuals with disabilities faced before its enactment—and continue to face despite its protections.

### A. History of the ADA

The enactment of the ADA in 1990 ushered in a new era of civil rights protections.<sup>37</sup> Marginalized groups did not receive large-scale federal protections from discrimination until the Civil Rights Act of 1964.<sup>38</sup> But the Civil Rights Act did not protect individuals with disabilities.<sup>39</sup> Nearly ten years later, federal lawmakers expanded discrimination protections to handicapped individuals under the Rehabilitation Act of 1973 (“Rehab Act”).<sup>40</sup> Although the Rehab Act created new

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37. See 42 U.S.C. § 12101(a)(3) (finding persistent discrimination in “critical areas,” including employment, housing, and education); see also George H.W. Bush, Remarks at the Signing of the Americans with Disabilities Act (July 26, 1990), [https://archive.ada.gov/ghw\\_bush\\_ada\\_remarks.html](https://archive.ada.gov/ghw_bush_ada_remarks.html) (“[E]very man, woman, and child with a disability can now pass through once-closed doors into a bright new era of equality, independence, and freedom.”).

38. The Civil Rights Act of 1964 was promulgated “to provide injunctive relief against discrimination in *public* accommodations, to authorize the Attorney General to institute suits to protect constitutional rights in *public* facilities and *public* education, to extend the Commission on Civil Rights, [and] to prevent discrimination in *federally assisted* programs.” Civil Rights Act of 1964, Pub. L. No. 88–352, 78 Stat. 241 (1964) (emphasis added).

39. 42 U.S.C. § 2000d (proscribing discrimination by federally funded programs based on race, color, and national origin). Specifically, Title VII of the Civil Rights Act covers equal employment opportunity. It mandates that employers shall not discriminate against an individual based on their “race, color, religion, sex, or national origin.” *Id.* § 2000e-2(a).

40. Melanie D. Winegar, Note, *Big Talk, Broken Promises: How Title I of the Americans with Disabilities Act Failed Disabled Workers*, 34 HOFSTRA L. REV. 1267,

protections in the employment setting, those protections applied only to federally funded programs and services.<sup>41</sup> Using the Rehab Act as its blueprint, the ADA expanded protections for individuals with disabilities into the private sector,<sup>42</sup> shielding them from discrimination in employment, public services, and public accommodations.<sup>43</sup> Although many individuals with disabilities experience discrimination through

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1269 (2006). Before the Rehab Act, the Vocational Rehabilitation Act of 1954 stressed that agencies should work together to rehabilitate handicapped individuals. Office of Vocational Rehabilitation, *Vocational Rehabilitation Act Amendments*, SOC. SEC. BULL., Oct. 1954, at 16, 17.

41. Winegar, *supra* note 40; *Fact Sheet: Your Rights Under Section 504 of the Rehabilitation Act*, U.S. DEP'T OF HEALTH AND HUM. SERV. OFF. FOR CIV. RTS. (2006), <https://www.hhs.gov/sites/default/files/ocr/civilrights/resources/factsheets/504.pdf> [hereinafter *Fact Sheet*]; see Masood, *Examining 50 Years of the Rehabilitation Act of 1973 – Section 501*, SMALL BUS. EXCH. (July 4, 2023), <https://www.sbeinc.com/cms.cfm?fuseaction=news.detail&articleID=6041&pageID=31> (noting 1973 as the year employment discrimination was first addressed in the Rehab Act).

42. *Employment Protections Under the Rehabilitation Act of 1973: 50 Years of Protecting Americans with Disabilities in the Workplace*, EEOC, <https://www.eeoc.gov/employment-protections-under-rehabilitation-act-1973-50-years-protecting-americans-disabilities> (last visited Jan. 7, 2026); see Winegar, *supra* note 40. The ADA also adopted the use of person-first language. *Rehabilitation Act of 1973 (Original Text)*, EEOC, <https://www.eeoc.gov/rehabilitation-act-1973-original-text> (last visited Jan. 7, 2026). Person-first language is used throughout this Note. The use of this language emphasizes the person, rather than the disability, to promote destigmatization. *Person-first and Destigmatizing Language*, NIH, <https://www.nih.gov/nih-style-guide/person-first-destigmatizing-language> (last visited Mar. 12, 2026). It describes “what the person ‘has’ rather than what the person ‘is’ and avoids using labels” (i.e., “a person with diabetes, not a diabetic”). *Id.*

43. Individuals with disabilities experience isolation and segregation. 42 U.S.C. § 12101(a)(2)–(3).

institutionalization,<sup>44</sup> inaccessibility to public spaces,<sup>45</sup> and segregation in educational settings,<sup>46</sup> this Note focuses on discrimination in the employment context.<sup>47</sup>

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44. *Olmstead: Community Integration for Everyone*, ARCHIVE.ADA.GOV, [https://archive.ada.gov/olmstead/olmstead\\_about.htm](https://archive.ada.gov/olmstead/olmstead_about.htm) (last visited Jan. 9, 2026). In *Olmstead v. L.C.*, two women voluntarily received inpatient psychiatric care at a state hospital. 527 U.S. 581, 593 (1999) (establishing a landmark decision). Upon completion of their mental health treatment, both were informed that they could reintegrate into the community. However, the women were institutionalized *several years* after completing their treatment. *Id.* The Supreme Court held that unjustified segregation of persons with a disability constitutes discrimination in violation of Title II. *See id.* at 607.

45. *See e.g., Guide to the ADA Accessibility Standards*, U.S. ACCESS BD., <https://www.access-board.gov/ada/guides/chapter-4-entrances-doors-and-gates/> (last visited Jan. 9, 2026); *ADA Compliance Brief: Restriping Parking Spaces*, U.S. DEP'T OF JUST. CIV. RTS. DIV. (Feb. 28, 2020), <https://www.ada.gov/resources/restriping-parking-spaces/>.

46. *See, e.g., NAT'L COUNCIL ON DISABILITY, IDEA SERIES: THE SEGREGATION OF STUDENTS WITH DISABILITIES* 13 (2018), <https://www.ncd.gov/assets/uploads/docs/ncd-segregation-swd-508.pdf>; 34 C.F.R. § 300.320 (2026) (stating that an individualized education plan requires a child with disabilities “[t]o be educated and participate with other children with disabilities and nondisabled children”).

47. For example, Melissa Gates, a woman with physical impairments, moved from New Jersey to Maryland to obtain help from a nonprofit disability employment agency. Within six months, she secured federal employment after applying unsuccessfully for twenty years. Notably, “simple steps can be taken to correct seemingly innocent mistakes that lead to the exclusion of disabled candidates,” such as implicit bias training. Implementing accessible hiring practices gives individuals with disabilities a “fair shot at jobs across industries.” Kiara Alfonseca, *Workplace Inaccessibility Is Keeping Disabled People from Jobs*, ABC NEWS (July 1, 2022, at 09:21 CT), <https://abcnews.go.com/Business/workplace-inaccessibility-keeping-disabled-people-jobs/story?id=85555429>. In 2024, the Bureau of Labor Statistics released a report on the intersection of individuals with disabilities and the employment population. Notably, for *all educational groups*, “unemployment rates were much higher for people with a disability than for those with no disability.” Additionally, some individuals with disabilities were classified as “discouraged workers” because “they believe there are no jobs available or there are none for which they would qualify.” *Persons with a Disability: Labor Force Characteristics—2024*, BUREAU OF LAB. STATS. (Feb. 22, 2025, at 10:00 ET), <https://www.bls.gov/news.release/pdf/disabl.pdf>. Though more individuals with disabilities are employed with the rise of work-from-home policies, the gap in employment rates between people with disabilities and people without disabilities remains largely the same over the years. *See* Rob Wile, *Employment Among People with Disabilities Hits Post-Pandemic High*, NBC NEWS (July 7, 2023, at 15:34

Despite the strong protections the ADA initially provided to individuals with disabilities, subsequent case law weakened its effect, spurring Congress to revisit the legislation. In 2008, Congress amended the ADA to effectively overrule multiple Supreme Court cases that limited the scope of the ADA's protections.<sup>48</sup> After the 2008 amendments, more Americans qualified as individuals with disabilities.<sup>49</sup> As a result,

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CT), <https://www.nbcnews.com/business/economy/jobs-for-people-with-disabilities-hit-new-post-pandemic-high-rcna93084>.

48. See *ADA Amendments Act of 2008*, EEOC, <https://www.eeoc.gov/statutes/ada-amendments-act-2008> (last visited Jan. 9, 2026). The ADA superseded two Supreme Court cases, re-expanding the ADA's definition of disability. In *Sutton v. United Air Lines, Inc.*, the petitioners had severe myopia, but their vision could be corrected to 20/20 with glasses or contact lenses. 527 U.S. 471, 475 (1999). Both petitioners were denied employment as pilots because of their uncorrected vision. Petitioners alleged that severe myopia substantially limited them, qualifying them as having a disability. *Id.* at 476. The Court ruled that "disability . . . is to be determined with reference to corrective measures." *Id.* at 488. The Supreme Court held that petitioners were not persons with disabilities because they could "function identically to individuals without a similar impairment" with corrective eyewear. *Id.* The second case Congress effectively overruled was *Toyota Motor Manufacturing, Ky., Inc. v. Williams*, 534 U.S. 184 (2002). After working at one of Toyota's manufacturing plants, Williams was diagnosed with carpal tunnel syndrome. *Id.* at 187. Toyota initially moved Williams to another task, but Williams later developed shoulder tendonitis. Toyota refused to accommodate her again. *Id.* at 189. The Court said that a substantial limitation of major life activities focuses on the inability to "perform the variety of tasks central to most people's daily lives," not the inability "to perform the tasks associated with her specific job." *Id.* at 200–01. Accordingly, because Williams could still brush her teeth and do laundry—all things that are "central to most people's daily lives"—she did not experience a substantial limitation despite her inability to perform her daily job duties. *Id.* at 201–02.

49. For example, individuals who use "mitigating measures" such as medication and corrective eyewear can qualify as having a disability after the ADA Amendments Act. *Supreme Court Cases: Olmstead and Sutton Trilogy*, ADA NAT'L NETWORK (1999), <https://adata.org/ada-timeline/supreme-court-olmstead-supreme-court-sutton-trilogy>. *Cf. Sutton*, 527 U.S. at 488 (holding that individuals do not qualify as having a disability under the ADA when corrective measures allow them to function comparably to individuals without a disability).

The result of the Court's rulings on mitigating measures turns the ADA's definition of disability into an instrument for screening out large groups of individuals with disabilities from the coverage of the Act, and thereby insulating from challenge many instances of the pervasive unfair and unnecessary discrimination that the law sought to prohibit.

more people now receive protection from workplace disability discrimination and stereotyping. The ADA stands as a cornerstone of civil rights law, affirming the nation’s commitment to equality, dignity, and full participation for people with disabilities.

### B. Title I’s Purpose

Title I of the ADA covers employment.<sup>50</sup> It prohibits employers with more than fifteen employees from discriminating against qualified individuals based on a disability.<sup>51</sup> Among other situations, employers cannot discriminate against a qualified individual during the application, hiring, or termination process.<sup>52</sup> Discrimination of qualified individuals includes classifying the individual in a way that adversely affects their opportunities or excludes them from equal jobs or benefits because of their disability.<sup>53</sup> Although Title I protects qualified individuals, its language still provides employers with defenses to discrimination claims.

Employers discriminate based on disability when they implement overprotective rules.<sup>54</sup> Under the guise of protecting the individual, an employer may decide that an individual’s risk of harm to self is too great to justify continued employment.<sup>55</sup> Yet threat-to-self rules can deprive an individual with a disability of the “opportunity to assume the standard workplace risks that others [are] permitted to assume.”<sup>56</sup> Discrimination against qualified individuals also occurs when an employer refuses to provide reasonable accommodations or uses

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NAT’L COUNCIL ON DISABILITY, RIGHTING THE ADA 44 (Robert L. Burgdorf, Jr. ed., 2004), <https://www.ncd.gov/assets/uploads/reports/2004/ncd-righting-the-ada-2004.pdf>.

50. 42 U.S.C. § 12112.

51. *Id.* §§ 12111(5), 12112.

52. 42 U.S.C. § 12112(a).

53. *See id.* § 12112(b).

54. *Id.* § 12101(a)(5). Such overprotective rules are examples of workplace paternalism. Norman Daniels, *Chevron v. Echazabal: Protection, Opportunity, and Paternalism*, 93 AM. J. PUB. HEALTH 545, 546 (2003).

55. *See Daniels, supra* note 54, at 545. The Supreme Court in *Chevron v. Echazabal* established that the ADA’s direct threat provision encompassed a threat to self as proffered by the EEOC. 536 U.S. 73, 76 (2002).

56. Daniels, *supra* note 54.

qualification standards that screen out individuals with disabilities.<sup>57</sup> A reasonable accommodation appears feasible, meets the employee's needs, allows the employee to perform the position's essential functions, and allows the employee equal access to participate in the "benefits and privileges of employment."<sup>58</sup> One example of a reasonable accommodation is an employer allowing a store clerk to sit while they assist customers at the cash register.<sup>59</sup>

An employer's use of exclusionary criteria contributes to workplace discrimination.<sup>60</sup> An employer uses exclusionary criteria when they ask a prospective employee about their physical or mental capabilities to screen out disabled individuals.<sup>61</sup> As a result, the ADA prohibits employers from questioning a prospective employee about their health until the employer has made a conditional offer of employment.<sup>62</sup> But when safety is a primary issue, an employer may screen out or exclude an individual as a direct threat.<sup>63</sup> Although individuals with disabilities are afforded more protections today than ever before, the ADA's current scheme remains wanting.

### *C. Structure of a Title I Disability Claim*

An individual must establish a prima facie case of disability discrimination to receive protections under Title I.<sup>64</sup> First, the individual

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57. 42 U.S.C. §§ 12112(b)(5)–(6), 12101(a)(5).

58. Such a solution is "common-sense" and "removes a workplace barrier." *Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the ADA*, EEOC (Oct. 17, 2002), <https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada>.

59. *Id.*

60. *See* 42 U.S.C. § 12101(a)(5).

61. *Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations*, EEOC (Oct. 10, 1995), <https://www.eeoc.gov/laws/guidance/enforcement-guidance-preemployment-disability-related-questions-and-medical#>.

62. *Id.* Some situations allow this exclusion if deemed consistent with business necessity. *Id.* at n.19.

63. *Id.* at n.22.

64. *See* Seam Park, Comment, *The Causation Standard Under the ADA: Justifying a "Motivating-Factor" Standard Under the ADA*, 32 FLA. ST. U. L. REV. 257, 259 (2004).

must prove their status as a “qualified individual.”<sup>65</sup> Their claim must then survive any defenses asserted by the employer.<sup>66</sup> “Qualified individual” status requires a disability as defined broadly by the ADA.<sup>67</sup>

The term “disability” means, with respect to an individual—(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment . . . .<sup>68</sup>

Thus, the ADA not only assigns “disability” to individuals who have an impairment that limits daily life activities, but also to individuals who are perceived simply as having a disability<sup>69</sup> or those who have a previous disability diagnosis.<sup>70</sup> For ADA disability determination, “major life activities” include but are not limited to “seeing, hearing, eating,”<sup>71</sup> and “sleeping, concentrating, thinking, and working, and

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65. For an example of the prima facie analysis, see *Lovejoy-Wilson v. NOCO Motor Fuel, Inc.*, 263 F.3d 208, 216–17 (2d Cir. 2001). The term “qualified individual” is found in 42 U.S.C. § 12111(8).

66. See *Hurd v. Union Pac. R.R. Co.*, No. 8:23CV201, 2025 U.S. Dist. LEXIS 39072, at \*29 (D. Neb. Mar. 4, 2025) (determining first, the qualified individual analysis, and then the direct threat defense).

67. See *Slomcenski v. Citibank, N.A.*, 432 F.3d 1271, 1280 (11th Cir. 2005) (quoting 42 U.S.C. § 12102(2)).

68. 42 U.S.C. § 12102(1).

69. In *Howell v. Merritt Co.*, Ms. Howell was hired by Merritt Co. to clean houses. 585 N.W.2d 278, 279 (Iowa 1998). Just three days after being hired, Ms. Howell was terminated. This was one day after she wore a TENS unit, which alleviates back spasms and headaches, to work. *Id.* Howell filed her claim under Iowa’s version of the ADA, but the court noted that it “look[s] to the ADA and cases interpreting its language when considering disability discrimination claims under [Iowa’s] civil rights act because of the similarity of legal principles and analytical framework.” *Id.* at 279–80. The court determined that a fact finder could conclude that Howell was terminated based on a perception of disability because of her TENS unit. This suggested to the court that Merritt Co., in terminating Howell, relied on stereotypes that the ADA sought to prevent. *Id.* at 281.

70. See *Raytheon Co. v. Hernandez*, 540 U.S. 44, 53 (2003) (“[T]he Court of Appeals agreed . . . that the [employer] refused to rehire [plaintiff] because it regarded [him] as being disabled and/or because of [his] record of a disability.” (citation omitted)).

71. 42 U.S.C. § 12102(2).

‘the operation of a major bodily function’ such as digestive, bowel, neurological, and brain functions.”<sup>72</sup> Major life activities are activities central to daily living.

Additionally, a qualified individual must be able to perform “with or without reasonable accommodation . . . the essential functions of the employment position that [the] individual holds or desires.”<sup>73</sup> Employers determine the essential functions of a job.<sup>74</sup> Job descriptions posted on employment forums or that are otherwise readily accessible constitute evidence of essential functions.<sup>75</sup> In general, the plaintiff “must satisfy the employer’s requirements for the job, such as education, employment experience, skills or licenses.”<sup>76</sup> Because of the essential nature of these employment functions, the plaintiff must be able to complete them “with or without reasonable accommodation.”<sup>77</sup>

Reasonable accommodations allow qualified individuals “to participate in the job application process, to perform the essential functions of a job, or to enjoy benefits and privileges of employment equal to those enjoyed by employees without disabilities.”<sup>78</sup> Reasonable accommodations may include, among other things, “job restructuring” or “reassignment to a vacant position.”<sup>79</sup> Employers must provide reasonable accommodations unless they can prove doing so would cause undue hardship—that an accommodation requires “significant difficulty or expense” compared to the financial capability of the employer, the size of the business, and how many people the business employs.<sup>80</sup> Once a plaintiff satisfies the above requirements, they have established

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72. *Klimek v. CentraCare Health Sys.*, No. 22-cv-3231, 2025 U.S. Dist. LEXIS 54612, at \*21 (D. Minn. Mar. 25, 2025) (quoting 42 U.S.C. § 12102(2)).

73. 42 U.S.C. § 12111(8).

74. *Id.*

75. *Id.*

76. *The ADA: Your Employment Rights as an Individual with a Disability*, EEOC, <https://www.eeoc.gov/publications/ada-your-employment-rights-individual-disability> (last visited Jan. 10, 2026).

77. *Id.*

78. *Id.*

79. 42 U.S.C. § 12111(9).

80. EEOC, *supra* note 76; 42 U.S.C. § 12111(10).

their prima facie claim as a qualified individual. But employers may still succeed by using one of the defenses offered under Title I.<sup>81</sup>

Title I offers three defenses to employment discrimination. First, an employer can use the affirmative defense of undue hardship to counter a plaintiff’s prima facie claim as a qualified individual.<sup>82</sup> Additionally, once a plaintiff proves their status as a qualified individual, employers may invoke the defenses of business necessity and direct threat.<sup>83</sup> An employer is only permitted to impose qualification standards that otherwise exclude a person with a disability if they are “job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation.”<sup>84</sup> For example, an employer may require an employee to submit to a medical examination, but the exam must be “limited to determining the existence of an ADA disability and the functional limitations that require reasonable accommodation.”<sup>85</sup> Examinations outside this scope do not align with business necessity. Employers can also require employees to obtain certifications as a condition of employment.<sup>86</sup> Certifications or other prerequisites that relate to the essential functions of the job fulfill the business necessity defense.<sup>87</sup> Employers may also assert the direct threat defense, which claims that the employee poses “a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation.”<sup>88</sup> While undue hardship and business necessity are considered affirmative defenses,<sup>89</sup> circuit courts are divided on which party bears the burden of proving the existence of a direct threat.<sup>90</sup>

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81. See 42 U.S.C. § 12111(3) (codifying the direct threat defense); *id.* § 12113(a) (codifying the business necessity defense).

82. 42 U.S.C. § 12111(10).

83. *Id.* §§ 12113(a), 12111(3).

84. 42 U.S.C. § 12113(a).

85. EEOC, *supra* note 58.

86. See *Bay v. Cassens Transp. Co.*, 212 F.3d 969, 974 (7th Cir. 2000).

87. See *id.* (stating that claimant’s failure to obtain the required Department of Transportation certification necessary for the position was “fatal to his ADA claim”).

88. 42 U.S.C. § 12111(3).

89. The employer must prove undue hardship. *Id.* § 12112(b)(5)(A).

90. See *EEOC v. Steel Painters LLC*, 433 F. Supp. 3d 989, 1003 (E.D. Tex. 2020) (collecting Circuit Courts of Appeals cases observing the split).

#### D. Direct Threat

Inconsistent provisions within the ADA have produced a circuit split, with courts disagreeing about whether an employer or employee bears the burden of proving a direct threat to safety.<sup>91</sup> Direct threat appears under a provision of Title I called “Defenses” and allows an employer’s qualification standard for employment to “include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace.”<sup>92</sup> Some courts interpret this language as an affirmative defense because the protection is offered under a section called “Defenses.”<sup>93</sup> Other courts contend that a plaintiff must prove they “shall not pose a direct threat” as part of their prima facie claim as a qualified individual.<sup>94</sup> All circuits, however, examine case law from the Rehab Act, Title III, and the EEOC for their reasoning.

##### i. The Rehabilitation Act and *Arline*

Before the ADA’s enactment, the Rehab Act protected individuals with disabilities in several federally funded public contexts:

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91. See *Branham v. Snow*, 392 F.3d 896, 906 n.5 (7th Cir. 2004) (noting confusion because direct threat appears under “Defenses,” suggesting an affirmative defense while also being classified as a “qualification standard,” suggesting that the plaintiff must demonstrate requisite safety as part of the qualified individual analysis (quoting 42 U.S.C. § 12113)).

92. 42 U.S.C. § 12113(b). Direct threat is also a defense under Title III. *Id.* § 12182(3).

93. 42 U.S.C. § 12113.

94. Additionally, some courts state the burden depends on whether the employment activity is inherently dangerous. See *Warren v. UPS, Inc.*, 518 F.3d 93, 99–100 (1st Cir. 2008) (citing *EEOC v. Amego, Inc.*, 110 F.3d 135, 144 (1st Cir. 1997)); *Jarvis v. Potter*, 500 F.3d 1113, 1122 (10th Cir. 2007). Individuals working inherently dangerous jobs are required to prove they are not a direct threat, but when the occupation is not inherently dangerous, the burden of proof is on the employer. *Jarvis*, 500 F.3d at 1122. This requires courts to first determine whether an employment position is inherently dangerous before deciding which party bears the burden of proving direct threat. See *Branham*, 392 F.3d at 906 (referencing in footnote five that while some courts place the burden on plaintiffs completely, other courts first determine if the employment opportunity requires, as a qualification standard, that the employee does not pose a risk of harm to others).

education, employment, and public access.<sup>95</sup> The Supreme Court in *School Board of Nassau County v. Arline* determined that the Rehab Act did not require an employer to hire an individual who poses a significant risk to others.<sup>96</sup> Gene Arline worked as an elementary school teacher for nearly fifteen years.<sup>97</sup> Before her tenure, Ms. Arline lived with latent tuberculosis for twenty years.<sup>98</sup> During the last two years of her employment, Ms. Arline’s tuberculosis became active again.<sup>99</sup> The school board terminated her employment at the end of the school year because of her active tuberculosis.<sup>100</sup> The Supreme Court granted certiorari<sup>101</sup> and addressed (1) whether a person with tuberculosis qualified as “handicapped” under the Rehab Act and (2) if handicapped under the Rehab Act, whether the person was “otherwise qualified” for the employment position.<sup>102</sup>

The Court determined that Ms. Arline met the Rehab Act’s standard for “handicapped” but remanded the factual question of whether she was “otherwise qualified” for the position.<sup>103</sup> The Court determined that, under the Rehab Act, the direct threat provision requires a factual analysis that considers whether a plaintiff is a qualified individual for employment.<sup>104</sup> The Court decided that the factual

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95. 29 U.S.C. § 701. However, the Rehab Act did not cover the private sector as the ADA does. See Winegar, *supra* note 40.

96. See 480 U.S. 273, 287 (1987).

97. Deborah L. Slowata, *Quantifying a Direct Threat: Risks That Health Care Providers Must Take While Treating Infectious Patients*—Bragdon v. Abbott, 20 PACE L. REV. 569, 573 (2000); *Arline*, 480 U.S. at 276.

98. Slowata, *supra* note 97.

99. *Id.*

100. *Id.*

101. At the trial level, the court determined that Ms. Arline was not handicapped because it was “difficult . . . to conceive that Congress intended contagious diseases to be included within the definition of a handicapped person.” *Arline*, 480 U.S. at 277. But the Eleventh Circuit reversed and held that infectious diseases fall within the scope of section 504 of the Rehab Act. The Court of Appeals then remanded the case to determine whether Ms. Arline was otherwise qualified for her job. The Supreme Court then granted certiorari and affirmed. *Id.*

102. *Id.* at 275.

103. *Id.* at 288–89.

104. *Id.* at 287. The Court provided a list of required factors to determine whether a person with a disability due to a contagious disease is otherwise qualified. These factors include “reasonable medical judgments . . . about (a) the nature of the risk . . . , (b) the duration of the risk . . . , (c) the severity of the risk . . . , and (d) the

analysis includes reasonable medical judgments about the nature of the risk of harm, the duration and severity of that risk, and the probability that harm will occur to others.<sup>105</sup>

ii. Title III of the ADA and *Bragdon*

After *Arline*, the Supreme Court decided *Bragdon v. Abbott*, which involved the direct threat defense under Title III of the ADA.<sup>106</sup> Courts commonly reference Title III's direct threat defense in tandem with Title I's direct threat defense.<sup>107</sup> In *Bragdon*, the petitioner dentist refused to treat a patient with HIV in his office due to the risk of HIV transmission, but failed to present evidence that treating the patient in a hospital would be any safer.<sup>108</sup> Though diagnosed with HIV in 1986, Sidney Abbott was asymptomatic when she went to the dentist for a routine examination in 1994.<sup>109</sup> Following general practice, Ms. Abbott completed patient registration forms upon arrival and disclosed her positive HIV status.<sup>110</sup> During her examination, the dentist discovered a cavity that needed filling.<sup>111</sup> In accordance with the dental office's policy against filling cavities for HIV-positive patients, the dentist informed Ms. Abbott that the filling could not take place at the office and offered instead to fill the cavity at a local hospital.<sup>112</sup> The dentist told Ms. Abbott the procedure itself would not cost more than it would at the dental office.<sup>113</sup> But he also informed Ms. Abbott of her

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probabilities the disease will be transmitted and will cause varying degrees of harm." *Id.* at 287–88 (quoting Brief for American Medical Association as Amicus Curiae in Support of Neither Party at 19, *Sch. Bd. of Nassau Cnty. v. Arline*, 480 U.S. 273 (1987) (No. 85-1277)).

105. *Id.* at 288.

106. 524 U.S. 624 (1998).

107. *See, e.g.*, *Dadian v. Vill. of Wilmette*, 269 F.3d 831, 841 (7th Cir. 2001) (showing support to the cross-application that often occurs in Titles I, II, and III (citing *Washington v. Indiana High Sch. Athletic Ass'n, Inc.*, 181 F.3d 840, 848 (7th Cir. 1999))).

108. *Bragdon*, 524 U.S. at 651.

109. *Id.* at 628.

110. *Id.* at 628–29.

111. *Id.* at 629.

112. *Id.*

113. *Id.*

responsibility to pay for the use of the hospital’s facilities.<sup>114</sup> Ms. Abbott refused this “accommodation” and filed a claim under Title III of the ADA for discrimination based on her status as an individual with HIV.<sup>115</sup>

The *Bragdon* Court first determined that an HIV diagnosis fits within the ADA’s definition of disability.<sup>116</sup> The Court reasoned that HIV constitutes a physical impairment<sup>117</sup> and can substantially limit at least one major life activity,<sup>118</sup> and that the physical impairment substantially limited the major life activity that Ms. Abbott asserted.<sup>119</sup> Next, the Court addressed whether Ms. Abbott posed a significant risk of harm to others.<sup>120</sup> As a healthcare provider, the dentist had a “duty to assess the risk of infection based on the objective, scientific information available to him and others in his profession” regardless of the dentist’s subjective belief.<sup>121</sup> Thus, the *Arline* and *Bragdon* holdings require courts to assess a Title III direct threat defense by looking at

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114. *Id.*

115. *Id.* (stating “public accommodation” includes the “professional office of a health care provider” (quoting 42 U.S.C. § 12181(7)(F))).

116. *Id.* at 631.

117. *Id.* at 637.

118. *Id.* at 639.

119. *Id.* at 641. This is the first time the Supreme Court held that HIV is a disability under the ADA, including asymptomatic HIV—a “critical victory” for people who are HIV positive. *Bragdon v. Abbott*, GLAD LAW GLBTQ LEGAL ADVOCATES & DEFENDERS, <https://www.glad.org/cases/bragdon-v-abbott> (last visited Feb. 7, 2026).

120. *Bragdon*, 524 U.S. at 648–49.

121. *Id.* at 649. Moreover, the Court determined that the dentist’s “belief that a significant risk existed, even if maintained in good faith, would not relieve him from liability.”

[P]etitioner receives no special deference simply because he is a health care professional. It is true that *Arline* reserved “the question whether courts should also defer to the reasonable medical judgments of private physicians on which an employer has relied.” At most, this statement reserved the possibility that employers could consult with individual physicians as objective third-party experts. It did not suggest that an individual physician’s state of mind could excuse discrimination without regard to the objective reasonableness of his actions.

*Id.* at 649–50 (quoting *Sch. Bd. of Nassau Cnty. v. Arline*, 480 U.S. 273, 288 n.18 (1987)).

whether the discriminatory actions were “reasonable in light of the available medical evidence.”<sup>122</sup>

The direct threat analysis requires objective medical evidence.<sup>123</sup> Healthcare professionals may cite their own credible sources, but “public health authorities,” such as the CDC and NIH, must also be considered when assessing reasonableness.<sup>124</sup> When the dentist in *Bragdon* testified that a hospital could better prevent the transmission of HIV but failed to support his claim with any proof, he thus failed to establish any objective medical evidence that showed treating Ms. Abbott in the hospital would be any less likely to transmit HIV than in the dental office.<sup>125</sup> In rejecting the petitioner’s argument, the *Bragdon* Court held that the existence of a significant risk of harm must be grounded in objective reasonableness or reasonable medical judgment.<sup>126</sup>

The *Bragdon* and *Arline* Courts used the Equal Employment Opportunity Commission’s (“EEOC”) promulgated guidelines for establishing direct threat, which require an examination of the (1) duration of the risk; (2) nature and severity of the potential harm; (3) likelihood that the potential harm will occur; and (4) imminence of the potential harm.<sup>127</sup> In accordance with these decisions, the *Bragdon* Court intended to create a high standard that service providers must

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122. *Id.* at 650.

123. *Id.* at 649.

124. *Id.* at 650.

125. *Id.*

126. It is the party who refuses to accommodate or provide treatment who bears the burden of proof. *Id.* at 649.

127. Van Detta, *supra* note 28, at 192–93. See *Bragdon*, 524 U.S. at 650 (establishing that the general approach to analyzing significant risk is that of an objective medical reasonableness standard); *Sch. Bd. of Nassau Cnty. v. Arline*, 480 U.S. 273, 287–88 (1987) (settling that the Rehab Act’s direct threat analysis requires reasonable medical judgments on the nature of the risk, duration of the risk, severity of the risk to third parties, and the likelihood of harm to third parties); see also Craig Barkley & Robyn Dupont, *Disability Discrimination and Reasonable Accommodation: Medical Inquiries, Leave and Telework*, EEOC (Nov. 2021), <https://www.eeoc.gov/disability-discrimination-and-reasonable-accommodation-medical-inquiries-leave-and-telework>.

overcome to use direct threat as a means to discriminate lawfully based on disability.<sup>128</sup>

iii. Equal Employment Opportunity Commission and *Echazabal*

Just a few years after *Bragdon*'s hopeful step forward for the disability community, the EEOC and the Supreme Court in *Chevron U.S.A., Inc. v. Echazabal* made it harder for individuals with disabilities to gain and retain employment.<sup>129</sup> The EEOC promulgated its own regulations and interpretation of the ADA's direct threat defense, stating, “[a]n employer may require, as a qualification standard, that an individual not pose a direct threat to the health or safety of himself/herself or others.”<sup>130</sup> The Supreme Court thereafter sought to determine whether to give effect to the EEOC's threat-to-self regulation.<sup>131</sup> It held that the EEOC did not exceed the scope of permissible rulemaking under the ADA, thus upholding the regulation.<sup>132</sup> The National Council on Disability disagreed with this decision, stating:

the NCD opposes the EEOC's addition of a danger-to-self provision, because it invites paternalistic conjecturing by employers and their physicians about perceived dangers to individuals with disabilities, often based on ignorance and misconceptions about particular

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128. See Tory L. Lucas, *Disabling Complexity: The Americans with Disabilities Act of 1990 and Its Interaction with Other Federal Laws*, 38 CREIGHTON L. REV. 871, 913 (2005) (stating that *Bragdon* created a “high hurdle for those wishing to assert the direct threat defense against an individual with a disability who seeks to work”).

129. Compare *Bragdon*, 524 U.S. 624 (establishing direct threat as an affirmative defense), with *Chevron U.S.A., Inc. v. Echazabal*, 536 U.S. 73 (2002) (expanding the direct threat defense to encompass threat to self).

130. 29 C.F.R. app. § 1630.2(r).

131. See *Echazabal*, 536 U.S. at 76.

132. *Id.* at 78. Following the overturning of *Chevron* deference, it is unclear whether the threat to self will remain part of the direct threat analysis. See *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 412–13 (2024) (“*Chevron* is overruled. . . . And when a particular statute delegates authority to an agency consistent with constitutional limits, courts must respect the delegation, while ensuring that the agency acts within it.”). However, it should be noted that the overturning of *Chevron* does not automatically “call into question prior cases that relied on the . . . framework.” *Loper Bright Enters.*, 603 U.S. at 412.

conditions, and fosters perceptions that individuals with disabilities are commonly irrationally self-destructive. The Court's acceptance of the EEOC provision raises the distressing possibility of the more prevalent use of such overprotective health standards in the future.<sup>133</sup>

The *Echazabal* Court reiterated, however, that “[t]he direct threat defense must be ‘based on a reasonable medical judgment that relies on the most current medical knowledge and/or the best available objective evidence,’” and individualized assessments.<sup>134</sup> The Court then stated that the EEOC acted “within the reasonable zone when it saw a difference between rejecting workplace paternalism and ignoring specific and documented risks to the employee himself, even if the employee would take his chances for the sake of getting a job.”<sup>135</sup> But there is concern that “this form of risk determination can be misused and abused” and provide an “individualized, scientific cover to stereotyping and thus discrimination.”<sup>136</sup> Reasonable minds disagree over whether the Court's holding was sound.<sup>137</sup>

Despite the 2008 amendments to the ADA and the Supreme Court's landmark rulings, the direct threat circuit split persists. Most circuits follow the *Bragdon* standard and require defendant-employers to show that the qualified individual poses a significant risk of harm to self or others.<sup>138</sup> The circuit courts disagree on how much deference

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133. NAT'L COUNCIL ON DISABILITY, *supra* note 49, at 81–82.

134. *Echazabal*, 536 U.S. at 86.

135. *Id.*

136. Daniels, *supra* note 54, at 548.

137. *See id.* at 545 (“Critics of the Supreme Court ruling argue that the legislative language of the ADA explicitly noted risks to third parties as acceptable grounds for disqualifying workers with disabilities from ADA protection but deliberately omitted any mention of risks to the workers themselves.”). However, “Chevron and its allies argued . . . that congressional intent could not have precluded individualized medical assessments of risks to individuals.” *Id.* Thus, there is a conflict between “legitimate goals of workplace environmental protection legislation and the intent to ward off discriminatory behavior.” *Id.* at 546.

138. The individual analysis involved includes a determination of the essential function of the job and whether the employer can offer a reasonable accommodation. *See Lucas, supra* note 128, at 887 (“The court began its analysis by stating its oft-repeated principle that regular attendance is an essential job function.”); EEOC, *supra* note 76 (“Reasonable accommodation is any change or adjustment to a job or work

they should give the employer’s physician when assessing expert testimony.<sup>139</sup> To determine significant risk of harm, employers and their medical experts follow the EEOC’s individualized analysis.<sup>140</sup> Employees may also have their own physician complete this analysis to challenge their employer’s determination, in hopes of retaining their employment. But due to the great deference given to employers, employers may disregard any analysis made by the individual’s physician—even if equally reasonable—in favor of their own and with minimal judicial oversight once litigation begins.<sup>141</sup> When courts allow this level of deference, more individuals face an unjustified risk of discrimination. As a result, the statutory scheme and case law fall short of Title I’s purpose to provide equal employment opportunity.<sup>142</sup>

### E. An Expansive Circuit Split

The direct threat circuit split spans three decades.<sup>143</sup> Currently, four distinct approaches to the direct threat defense divide the circuits, all of which focus on the burden of proof.<sup>144</sup>

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environment that permits a qualified applicant or employee with a disability to participate in the job application process, to perform the essential functions of a job, or to enjoy benefits and privileges of employment equal to those enjoyed by employees without disabilities.”).

139. See Van Detta, *supra* note 28, at 187 (comparing the Seventh Circuit’s approach with the Tenth Circuit’s).

140. See, e.g., EEOC v. Wal-Mart Stores, Inc., 477 F.3d 561, 571 (8th Cir. 2007); see Barkley & Dupont, *supra* note 127.

141. See, e.g., Knapp v. Nw. Univ., 101 F.3d 473, 484–85 (7th Cir. 1996) (establishing that universities have “the right to determine that an individual is not otherwise medically qualified to play without violating the Rehabilitation Act” and that the court’s role after such a finding is limited).

142. 42 U.S.C. § 12101.

143. Van Detta, *supra* note 28, at 147.

144. See, e.g., Moses v. Am. Nonwovens, Inc., 97 F.3d 446, 447 (11th Cir. 1996); *Wal-Mart Stores, Inc.*, 477 F.3d at 571; Warren v. UPS, 518 F.3d 93, 99 (1st Cir. 2008); Felix v. Wis. Dep’t of Transp., 828 F.3d 560, 569 (7th Cir. 2016); Wurzel v. Whirlpool Corp., 482 F. App’x 1, n.14 (6th Cir. 2012).

Burden of Proof	Circuits
Plaintiff's burden as part of the qualified individual analysis	Eleventh <sup>145</sup>
Employer's burden as an affirmative defense	Second, Seventh, Eighth, <sup>146</sup> Ninth <sup>147</sup>
Modified: Plaintiff's burden when essential functions of the employment <i>necessarily</i> implicate the safety of others	First, Tenth <sup>148</sup>
Undecided	Third, Fourth, Fifth, Sixth, D.C. <sup>149</sup>

145. *Moses*, 97 F.3d at 447.

146. *Lovejoy-Wilson v. NOCO Motor Fuel, Inc.*, 263 F.3d 208, 219–20 (2d Cir. 2001); *Felix*, 828 F.3d at 569; *Wal-Mart Stores, Inc.*, 477 F.3d at 571.

147. The Ninth Circuit's case history leaves the burden of proof unclear. The *Bates* court ruled that it is the employer's burden when they expressly include a qualification standard of safety in the employment description. *Bates v. UPS*, 511 F.3d 974, 992–93 (9th Cir. 2007). In *Echazabal v. Chevron U.S.A., Inc.*, direct threat is tied to the employer's qualification standard when it "is shown to be job-related for the position in question and is consistent with business necessity." 336 F.3d 1023, 1027 (9th Cir. 2003) (quoting 42 U.S.C. § 12112(b)(6)). This qualification standard may include a workplace safety requirement. *Id.* (quoting 42 U.S.C. § 12113(b)). The "may" language suggests that direct threat is an affirmative defense when safety is a qualification standard; otherwise, it remains the plaintiff's burden to prove. However, the court then states the burden is an affirmative defense, leaving much room for confusion on the Ninth's Circuit's position. *Id.* In *Dark v. Curry County*, the court used direct threat as an affirmative defense, but the facts of the case indicate that Dark was employed as a heavy machinery construction operator, a role that presumably requires the ability to operate such equipment safely. 451 F.3d 1078, 1081, 1091 (9th Cir. 2006). In comparison, another Ninth Circuit case held the direct threat provision is strictly an affirmative defense. *Nunes v. Wal-Mart Stores, Inc.*, 164 F.3d 1243, 1247 (9th Cir. 1999).

148. *Warren*, 518 F.3d at 99–100 (citing *EEOC v. Amego, Inc.*, 110 F.3d 135, 144 (1st Cir. 1997)); *Jarvis v. Potter*, 500 F.3d 1113, 1122 (10th Cir. 2007) (citing *McKenzie v. Benton*, 388 F.3d 1342, 1354 (10th Cir. 2004)).

149. *Van Detta*, *supra* note 28, at 163; *Rizzo v. Child's World Learning Ctr. Inc.*, 213 F.3d 209, 212 (5th Cir. 2000); *Taylor v. Rice*, 451 F.3d 898, 905–06 n.14 (D.C. Cir. 2006); *Hartmann v. Graham Packaging Co.*, No. 1:19-cv-488, 2022 U.S. Dist. LEXIS 12888, at \*31 n.10 (S.D. Ohio Jan. 25, 2022) (stating that sometimes the burden is placed on the plaintiff as a qualified individual, but other times it is placed

The Eleventh Circuit treats direct threat as part of the plaintiff’s prima facie claim, consistent with the older Rehab Act analysis.<sup>150</sup> Under this approach, an employer determines (before a lawsuit is filed) that an employee poses a direct threat, ostensibly based on objective and reasonable medical evidence.<sup>151</sup> Once an employer raises the defense, the plaintiff must show that they can perform the essential functions of the job safely despite the symptoms of their disability.<sup>152</sup> This means that a person with a disability cannot qualify for a position if they pose a direct threat that cannot be mitigated by reasonable accommodation.<sup>153</sup> Therefore, this approach to the direct threat defense improperly intertwines with the qualified individual analysis by focusing on “whether the plaintiff can perform the essential functions of [the] job.”<sup>154</sup> One rationale for placing the burden on the plaintiff is that employers will mitigate legal exposure by conducting an “individualized assessment” into the employee’s “present ability” and any possible accommodation before termination.<sup>155</sup> This rationale fails, however,

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on the defendant as an affirmative defense) (citing *Denoewer v. Union City Indus.*, 611 F. Supp. 3d 458, 481 (S.D. Ohio 2020)).

150. *Moses*, 97 F.3d at 447; *Sch. Bd. of Nassau Cnty. v. Arline*, 480 U.S. 273, 288 (1987).

151. *See Bosarge v. Mobile Area Water & Sewer Servs.*, No. 20-14298, 2022 U.S. App. LEXIS 2046, at \*22–23 (11th Cir. Jan. 24, 2022) (“An employer’s determination . . . [of] direct threat . . . must be based on ‘reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence.’” (quoting 29 C.F.R. § 1630.2(r)); *Moses*, 97 F.3d at 448 (stating that plaintiff’s employer knew the employee’s seizures were uncontrolled at termination).

152. *See Moses*, 97 F.3d at 448 (stating that plaintiff failed to prove any reasonable accommodations could have made his workplace safer); *Bosarge*, 2022 U.S. App. LEXIS 2046, at \*25 (stating it would be hazardous to allow plaintiff to continue operating work vehicles based on their symptoms, not their MS diagnosis).

153. *EEOC v. St. Joseph’s/Candler Health Sys., Inc.*, No. 4:20-cv-112, 2022 U.S. Dist. LEXIS 37741, at \*20 (S.D. Ga. Mar. 3, 2022) (citation omitted).

154. *Todd v. Fayette Cnty. Sch. Dist.*, 998 F.3d 1203, 1216 n.9 (11th Cir. 2021) (citing *Waddell v. Valley Forge Dental Assocs. Inc.*, 276 F.3d 1275, 1280 (11th Cir. 2001)).

155. *See Moses*, 97 F.3d at 448 (“We are confident that although the ADA does not mandate a pretermination investigation, the possibility of an ADA lawsuit will, as a matter of practice, compel most employers to undertake such an investigation before terminating a disabled employee.”); *see also* 29 C.F.R. § 1630.2(r) (requiring direct

because it allows employers to define risk unilaterally and shifts the burden of disproving speculative future harm onto the employee, contrary to the ADA's purpose.

The Second, Seventh, Eighth, and Ninth Circuits analyze direct threat as an affirmative defense that the employer must prove, aligning with Title III's approach.<sup>156</sup> These circuits offer three justifications. First, the ADA's legislative history rejects a requirement that a plaintiff "prove that he or she poses no risk."<sup>157</sup> Second, "[e]ven for employees who do pose a direct threat, an employer must make reasonable accommodations."<sup>158</sup> For practical reasons, the court places the burden on the defendant because the defendant is already required to assess whether a reasonable accommodation exists that would eliminate the safety risk.<sup>159</sup> Some courts recognize safety as an attribute of business

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threat analysis to include an individualized assessment of the ability to safely perform essential employment functions).

156. *Lovejoy-Wilson v. NOCO Motor Fuel, Inc.*, 263 F.3d 208, 219–20 (2d Cir. 2001); *Felix v. Wisconsin Dep't of Transp.*, 828 F.3d 560, 569 (7th Cir. 2016); *EEOC v. Wal-Mart Stores, Inc.*, 477 F.3d 561, 571 (8th Cir. 2007). For a discussion on the Ninth Circuit, see *supra* note 147.

157. *Lovejoy-Wilson*, 263 F.3d at 220 (quoting H.R. REP. NO. 101-485, pt. 3, at 46 (1990)); see also *Wal-Mart Stores, Inc.*, 477 F.3d at 571 (supporting direct threat as an affirmative defense by citing to the *Lovejoy-Wilson* court's use of ADA legislative history).

158. *EEOC v. AIC Sec. Investigations, Ltd.*, 55 F.3d 1276, 1284 (7th Cir. 1995) (citing 42 U.S.C. § 12113(a)); see *Dadian v. Vill. of Wilmette*, 269 F.3d 831, 840–41 (7th Cir. 2001) (concluding that a public entity bears the burden of proof tied to reasonable accommodation); *Wal-Mart Stores, Inc.*, 477 F.3d at 571–72 (citing the *Dadian* decision as support for adopting direct threat as an affirmative defense in the Eighth Circuit).

159. See *AIC Sec. Investigations*, 55 F.3d at 1284; see also *Van Detta*, *supra* note 28, at 172 ("[The ADA] requires a form of affirmative action—reasonable accommodation—which in and of itself is a substantial limitation on employer prerogative."). Supporting this, the Seventh Circuit in *Dadian* stated, "[w]e have interpreted [42 U.S.C. § 12113] to mean that it is the employer's burden to show that an employee posed a direct threat to workplace safety that could not be eliminated by a reasonable accommodation." *Dadian*, 269 F.3d at 841. This section of Title I provides, in relevant part,

[i]t may be a defense to a charge of discrimination under this Act that an alleged application of qualification standards . . . that . . . denies a job or benefit to an individual with a disability has been shown to be job related and consistent with business necessity. . . . The term "qualification standards" may include a requirement that an

necessity, blending it with the direct threat defense.<sup>160</sup> The ADA “explicitly recognizes as a defense to [employment disability discrimination] . . . qualification standards . . . ‘consistent with business necessity.’”<sup>161</sup> Safety in the workplace “would obviously be consistent with business necessity: a safe workplace is a paradigmatic necessity of operating a business.”<sup>162</sup> Thus, “any defense based on a qualification standard [including safety] that adversely affects the disabled must be consistent with business necessity.”<sup>163</sup> This framing offers a rationale for excluding individuals who pose a safety risk, but it risks legitimizing exclusionary practices under the guise of necessity, even where accommodations might have mitigated the risk. Placing the burden of proof on the defendant would provide the most protection for individuals with disabilities.

The First and Tenth Circuits take a modified approach, requiring the plaintiff to show that they do not present a direct threat of harm only when an essential function of their employment necessarily implicates

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individual shall not pose a direct threat to the health or safety of other individuals in the workplace.

*Dadian*, 269 F.3d at 841 (quoting 42 U.S.C. § 12113).

160. See *AIC Sec. Investigations*, 55 F.3d at 1283–84 (discussing safety as consistent with business necessity, then placing the burden on the employer in the jury instructions); see also Stephen F. Befort, *Direct Threat and Business Necessity: Understanding and Untangling Two ADA Defenses*, 39 BERKELEY J. EMP. & LAB. L. 377, 378 (2018) (noting that some courts apply the two defenses interchangeably).

161. *Felix*, 828 F.3d at 569 (citing 42 U.S.C. § 12113(a)). Further, the *Dadian* court stated that Title I

specifically provides that “[i]t may be a defense to a charge of discrimination . . . [based on] qualification standards . . . that . . . denies a job or benefit to an individual with a disability [if it is] job related and consistent with business necessity. . . . ‘[Q]ualification standards’ may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace.” We have interpreted this provision to mean that it is the employer’s burden to show that an employee posed a direct threat to workplace safety that could not be eliminated by a reasonable accommodation.

*Dadian*, 269 F.3d at 841.

162. *AIC Sec. Investigations*, 55 F.3d at 1283.

163. *Id.* These circuits mandate the individualized assessment found in 29 C.F.R. § 1630.2(r) as part of the employer’s affirmative defense.

the safety of others; otherwise, the burden is placed on the defendant.<sup>164</sup> This approach arises in industries such as healthcare, where the “failure to perform an essential function” necessarily causes a risk to others.<sup>165</sup> Allowing a holding otherwise would weaken the plaintiff’s burden of proving qualification standards when the position “necessarily entails risks to others, than when the job does not.”<sup>166</sup> The First Circuit in *EEOC v. Amego, Inc.* stated that a plaintiff’s failure to perform correctly, causing risk to others, does not prevent the ability to perform from being a qualification standard.<sup>167</sup> The Court reasoned that Congress did not intend to lessen the plaintiff’s burden for such qualification standards.<sup>168</sup> The Court concluded by stating “[t]here may be other cases under Title I where . . . direct threat is not tied to . . . essential job functions but is purely a matter of defense, on which the defendant would bear the burden.”<sup>169</sup>

Circuit splits are problematic for several reasons. They undermine the bedrock principles of “uniformity, consistency, and predictability,” resulting in “different outcomes under the same federal law merely because of the geographic location” of the case.<sup>170</sup> Leaving circuit splits unresolved allows “different rules [to] decide who gets what

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164. See *Warren v. UPS*, 518 F.3d 93, 99–100 (1st Cir. 2008) (citing *EEOC v. Amego, Inc.*, 110 F.3d 135, 144 (1st Cir. 1997)); *Jarvis v. Potter*, 500 F.3d 1113, 1122 (10th Cir. 2007). For the Third, Fourth, Fifth, Sixth, and D.C. Circuits, the issue remains unresolved. *Van Detta*, *supra* note 28, at 163; *Rizzo v. Child.’s World Learning Ctr. Inc.*, 213 F.3d 209, 212 (5th Cir. 2000); *Hartmann v. Graham Packaging Co.*, No. 1:19-cv-488, 2022 U.S. Dist. LEXIS 12888, at \*31 n.10 (S.D. Ohio Jan. 25, 2022); *Parker v. Hartogensis*, No. 17-00520, 2020 U.S. Dist. LEXIS 258134, at \*31 n.10 (D.C. Cir. Mar. 23, 2020).

165. *EEOC v. Amego, Inc.*, 110 F.3d 135, 144 (1st Cir. 1997).

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.* This dictum sounds as though a direct threat is only placed on the defendant when essential job functions are not at issue. If an employment function is not essential, then the employer cannot use direct threat as a defense because employers must remove non-essential aspects or provide other reasonable accommodation. The Court likely intended to tie the essential job function back to necessity, but did not do so explicitly.

170. Jonathan M. Cohen & Daniel S. Cohen, *Iron-ing out Circuit Splits: A Proposal for the Use of the Irons Procedure to Prevent and Resolve Circuit Splits Among United States Courts of Appeals*, 108 CAL. L. REV. 989, 990 (2020).

at whose expense.”<sup>171</sup> Such an outcome “raise[s] questions of fundamental fairness”<sup>172</sup> and the legitimacy of federal courts because they “harm the normative principle of blind justice.”<sup>173</sup> The current divide over the direct threat defense encapsulates all of the issues endemic to circuit splits.

### III. THE CIRCUIT SPLIT AND ITS ENTANGLEMENT WITH EMPLOYER DEFERENCE

The direct threat circuit split conflicts with the ADA’s purpose of ensuring equal and widespread employment opportunities for individuals with disabilities.<sup>174</sup> Without uniformity among the federal circuits, disabled individuals’ ADA rights hinge on where they file their lawsuits. This section investigates the nature, origin, and cause of the direct threat circuit split. Section III.A analyzes how and why some circuits encapsulate direct threat within the qualified individual analysis. Section III.B then provides context for the affirmative-defense approach to the direct threat provision. Section III.C continues the affirmative defense analysis by examining how some circuits that apply the affirmative defense allow great deference to employers’ medical experts, frustrating the ADA’s purpose.

#### A. Direct Threat as Part of the Qualified Individual Analysis

Many courts analyzing the direct threat defense place the burden of proof on the plaintiff.<sup>175</sup> The ADA adopted *Arline*’s direct threat analysis, attempting to strike a balance between protecting individuals with disabilities from discrimination and protecting other employees

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171. Deborah Beim & Kelly Rader, *Legal Uniformity in American Courts*, 16 J. EMPIRICAL LEGAL STUD. 448, 448 (2019).

172. Cohen & Cohen, *supra* note 170, at 997.

173. Beim & Rader, *supra* note 171, at 450.

174. *See* 42 U.S.C. § 12112.

175. *See* *Montalvo v. Radcliffe*, 167 F.3d 873, 878 (4th Cir. 1999) (citing *Doe v. Univ. of Md. Med. Sys. Corp.*, 50 F.3d 1261, 1267 (4th Cir. 1995)); *EEOC v. Amego, Inc.*, 110 F.3d 135, 143 (1st Cir. 1997) (stating that if a direct threat cannot be corrected by reasonable accommodation, then the employee cannot complete the required functions of the employment and thus is not otherwise qualified for the position).

and customers from harm.<sup>176</sup> Under *Arline*'s approach, a person cannot qualify for employment when they pose a significant risk of harm in the workplace.<sup>177</sup> Courts applying *Arline* place the direct threat analysis within the qualified individual analysis.<sup>178</sup> Looking to the language of the ADA, the "otherwise qualified" analysis generally requires a plaintiff to first prove that they are disabled under the ADA.<sup>179</sup> The plaintiff must then prove that they "meet normal and essential eligibility requirements" of the position, including performing essential functions with or without reasonable accommodations.<sup>180</sup> Thus, a person is not qualified if they cannot perform the essential functions of the job.<sup>181</sup> Despite its codification, the *Arline* decision<sup>182</sup> does not comport with the ADA's mission of protecting individuals with disabilities. Plaintiffs generally do not have the resources to prove that they do not pose a direct threat of harm for every facet of their employment function.<sup>183</sup>

The ADA also allows employers to implement "qualification standards."<sup>184</sup> This language appears to relate to the qualified individual analysis, but it does not.<sup>185</sup> As a qualification standard, an employer may require "that an individual . . . not pose a direct threat to the health or safety of other individuals in the workplace" so long as the

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176. Prestes, *supra* note 28, at 414; Sch. Bd. of Nassau Cnty. v. Arline, 480 U.S. 273, 287–88 (1987); Amego, 110 F.3d at 143 (suggesting that *Arline*'s codification places the direct threat burden on plaintiffs as part of their qualification analysis); Bragdon v. Abbott, 524 U.S. 624, 649 (1998) (citing *Arline*, 480 U.S. at 287).

177. See *Arline*, 480 U.S. at 288 (remanding the "otherwise qualified" analysis because there was no evidence of duration or severity of the condition, likelihood of transmission to others, or whether these could be overcome by a reasonable accommodation).

178. Sharmia-Washington v. Garland, No. 5:23cv166, 2024 U.S. Dist. LEXIS 194936, at \*24 (N.D. Fla. Sep. 23, 2024) (citing 29 C.F.R. § 1630.2(r), promulgated by the EEOC to implement and enforce the ADA).

179. 42 U.S.C. § 12112(b)(5).

180. *Fact Sheet*, *supra* note 41.

181. See 42 U.S.C. § 12111(8); Jarvis v. Potter, 500 F.3d 1113, 1121 (10th Cir. 2007).

182. *Arline*, 480 U.S. at 273.

183. Van Detta, *supra* note 28, at 164–65.

184. 42 U.S.C. § 12113(a)-(b).

185. See EEOC v. Amego, Inc., 110 F.3d 135, 142–44 (1st Cir. 1997).

qualification is job-related, consistent with business necessity, and cannot be corrected by a reasonable accommodation.<sup>186</sup>

Though employers can implement safety qualification standards, the creation of such standards does not shift the burden of proving safety to employees. This would be an inaccurate application of the ADA’s purpose and intent.<sup>187</sup> Congress listed the term “qualification standards” under a provision titled “Defenses,” stating that such standards “may be a defense to a charge of discrimination.”<sup>188</sup> Congress included qualification standards in the ADA to allow employers to notify prospective employees of a position’s requisite safety levels. This is why workplace qualification standards function as an affirmative defense, even if they appear related to the qualified individual analysis.<sup>189</sup> Interpreting the ADA to treat the direct threat defense as anything else subverts the statute’s core purpose.

### B. Direct Threat as an Affirmative Defense

Congress included employment protections in the ADA to effectuate a broader goal of leveling the playing field between individuals with disabilities and their non-disabled counterparts.<sup>190</sup> Despite the ADA’s ambiguity, Congress intended the direct threat provision to function as an affirmative defense by expressly listing it under “Defenses.”<sup>191</sup> Congress would not have created a separate section for it

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186. 42 U.S.C. § 12113(a).

187. The ADA was meant to regulate employer conduct and induce employers to end discrimination. NAT’L COUNCIL ON DISABILITY, *supra* note 49, at 43.

188. 42 U.S.C. § 12113(a); *Amego*, 110 F.3d at 142 (“The rub is that the language about ‘qualification standards’ under Title I appears in a section of the statute entitled ‘Defenses.’”).

189. *See Branham v. Snow*, 392 F.3d 896, 906 n.5, 909 (7th Cir. 2004) (holding direct threat as an affirmative defense while acknowledging the circuit split stems from the multiple interpretations of “Defenses” and “qualification standard”).

190. *See* 42 U.S.C. § 12101.

191. *See id.* § 12113; *see also Lovejoy-Wilson v. NOCO Motor Fuel, Inc.*, 263 F.3d 208, 220 (2d Cir. 2001) (noting that the ADA’s legislative history suggests that a plaintiff does not need to “prove that he or she poses no risk.” (quoting H.R. REP. NO. 101-485, pt. 3, at 46 (1990))); *Echazabal v. Chevron U.S.A., Inc.*, 226 F.3d 1063, 1066 n.2 (9th Cir. 2000) (noting that direct threat is not explicitly listed as an affirmative defense, but “[n]evertheless, it is clear that Congress intended the provision to define the terms of such defense”) (emphasis added); *Van Detta*, *supra* note 28, at

otherwise. The plain language of the statute supports this by stating, “[i]t may be a *defense* to a charge of discrimination.”<sup>192</sup> Congress did not include a negative defense when it created this section, nor did Congress require an employee to prove that they satisfied their employer’s safety qualification standards. Because employers are better positioned to assess performance and safety risks, interpreting the ADA’s direct threat provision as a part of the qualified individual analysis distorts the statute’s design and defeats its purpose.<sup>193</sup> Treating direct threat as an affirmative defense accords with the treatment of undue hardship and business necessity as affirmative defenses, creating uniformity.<sup>194</sup>

EEOC regulations align with the majority approach to the circuit split—placing the burden of proof on employers as an affirmative defense.<sup>195</sup> The EEOC advises employers to make an “individualized assessment of the individual’s present ability [to perform safely] the essential functions of the job.”<sup>196</sup> Though neither the EEOC nor the ADA mandates employers to conduct a “pretermination investigation,” courts recognize that “the possibility of an ADA lawsuit will, as a matter of practice, compel most employers to undertake such an investigation before terminating a disabled employee.”<sup>197</sup> This individualized assessment must be based on reasonable, current, and objective medical evidence, similar to that of the assessments in *Arline* and *Bragdon*.<sup>198</sup> This assessment also considers the nature of the risk of harm: how an employee with a disability could cause harm while

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163–64 (stating that the statute’s language establishes Congress’ intention that direct threat is an affirmative defense). *Cf. Amego*, 110 F.3d at 142 (1st Cir. 1997) (stating that the snag to direct threat as part of the qualified individual analysis is that it “appears in a section of the statute entitled ‘Defenses’”).

192. 42 U.S.C. § 12113(a) (emphasis added).

193. *See Niles v. N.Y.C. Hum. Res. Admin.*, No. 22-cv-6307, 2024 U.S. Dist. LEXIS 22588, at \*25 (E.D.N.Y. Feb. 7, 2024) (asserting that the direct threat provision allows for employers to have a defense after a plaintiff has established their disability).

194. *See supra* text accompanying notes 170–74 (discussing how uniformity contributes to equal and fair justice and the legitimacy of the courts).

195. *See* 29 C.F.R. § 1630.2(r).

196. *Id.*

197. *Moses v. Am. Nonwovens, Inc.*, 97 F.3d 446, 448 (11th Cir. 1996).

198. *Bragdon v. Abbott*, 524 U.S. 624, 650 (1998); *Sch. Bd. of Nassau Cnty. v. Arline*, 480 U.S. 273, 288 (1987).

performing required job duties, and how this harm impacts their own safety and the safety of coworkers.<sup>199</sup>

Direct threat, properly understood as an affirmative defense, receives even more support from the House of Representatives Judiciary Committee, a committee discharged with, among other things, considering and reporting on civil rights legislation.<sup>200</sup> One House Judiciary Report stated that an individual with a disability “cannot be disqualified on the basis of a physical or mental condition unless the *employer* can demonstrate the applicant’s disability poses a direct threat to others in the workplace.”<sup>201</sup> This 1990 report, published the same year the ADA was enacted, demonstrates that Congress always intended direct threat to function as an affirmative defense. Unless and until Congress amends the ADA, the Supreme Court should settle the circuit split to effectuate the ADA’s legislative intent.<sup>202</sup>

### *C. How Employer Deference Contributes to Discrimination*

Interpreting direct threat as an affirmative defense is not enough. Despite placing the burden of proof on employers, courts often give excessive deference to the employer’s expert. The best exemplification of this unfairly deferential approach occurs when an employee’s expert testimony matches the reasonableness of the employer’s expert testimony.<sup>203</sup>

An employer’s reasonable belief that a significant risk of harm exists should not be enough to justify a ruling in favor of the

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199. 29 C.F.R. § 1630.2(r).

200. *See Committee on the Judiciary*, HOUSE JUDICIARY COMM. REPUBLICANS, <https://judiciary.house.gov/about/subcommittees/committee-judiciary-117th-congress> (last visited Feb. 14, 2026).

201. *Stafne v. Unicare Homes*, 266 F.3d 771, 779 (8th Cir. 2001) (Lay, J., dissenting) (quoting H.R. REP. No. 101-485, pt. 3, at 46 (1990)) (emphasis added).

202. Additionally, this approach to the direct threat analysis has considerable support from many of the circuits, and, in general, the employer is in a better position to bear the burden of proof.

203. *See Knapp v. Nw. Univ.*, 101 F.3d 473, 485 (7th Cir. 1996) (discussing competing expert testimony but ultimately giving deference to the discriminating institution); *EEOC v. Beverage Distributors, Co.*, 780 F.3d 1018, 1021–22 (10th Cir. 2015) (holding that an employer only needs a reasonable belief that an employee poses a direct threat to lawfully terminate them based on their disability).

employer.<sup>204</sup> Allowing this level of deference undermines the adversarial system.<sup>205</sup> In *EEOC v. Beverage Distributors, Co.*, Michael Sungaila, who is legally blind, received an offer for a higher-paying position conditioned on passing a physical examination.<sup>206</sup> After passing the examination, Mr. Sungaila requested accommodations to mitigate the risks associated with his decreased vision.<sup>207</sup> In response, Beverage Distributors rescinded the employment offer, alleging an inability to reasonably accommodate.<sup>208</sup>

At trial, the jury deliberated over whether Beverage Distributors met its burden of proof for direct threat. The trial court provided jury instructions requiring Beverage Distributors to prove by a preponderance of the evidence that “Mr. Sungaila’s employment . . . posed a significant risk of substantial harm to the health or safety of Mr. Sungaila and/or other employees; and . . . [s]uch a risk could not have been eliminated or reduced by reasonable accommodation.”<sup>209</sup> The trial court ruled in favor of Mr. Sungaila.<sup>210</sup> On appeal, Beverage Distributors argued that the standard of proof given to the jury was erroneous.<sup>211</sup> The Tenth Circuit agreed, stating that requiring proof by a preponderance of the evidence obligated the defendant to prove “more than what was

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204. See *Bragdon v. Abbott*, 524 U.S. 624, 649 (1998) (requiring risk assessments to be “based on medical or other objective evidence”). *Contra Beverage Distributors, Co.*, 780 F.3d at 1022 (holding only for a reasonable belief standard).

205. See generally Leslie Thomas, *The Adversarial System of Justice—A Flawed Approach?*, COUNS. MAG. (May 2023), <https://www.counselmagazine.co.uk/articles/the-adversarial-system-of-justice-a-flawed-approach-> (“The system is designed . . . to ensure that both sides are able to vigorously advocate for their positions and that the truth is ultimately revealed through the adversarial process.”) Allowing great deference to employers could prevent employees from entering the adversarial process. Some individuals may reasonably believe they simply do not stand a chance while others balance the idea of litigation costs with prospective litigation outcomes.

206. *Beverage Distributors, Co.*, 780 F.3d at 1019.

207. *Id.*

208. *Id.* At the trial level, Beverage Distributors Co. asserted direct threat as an affirmative defense, stating that there was no reasonable accommodation that could be offered to Mr. Sungaila to mitigate a significant risk of harm. *Id.* at 1020.

209. *Id.* at 1021.

210. *Id.* at 1020.

211. *Id.*

legally necessary.”<sup>212</sup> Beverage Distributors was not required to prove that Mr. Sungaila actually posed a direct threat—only that it reasonably believed he did.<sup>213</sup> This decision significantly lowered the standard for asserting a direct threat defense.<sup>214</sup>

By eliminating the need to prove an actual threat, the Tenth Circuit enshrined an employer-focused standard that disregards medical opinion.<sup>215</sup> By allowing employers to rely on a reasonable belief that an employee might pose a safety risk, the Tenth Circuit explicitly ignored the objective medical evidence requirement established in *Arline*, *Bragdon*, and *Echazabal*<sup>216</sup> and thus endangered critical ADA protection.<sup>217</sup>

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212. *Id.* at 1021.

213. *Id.*

214. In turn, this provides a “sigh of relief for employers, as it keeps the bar for a direct threat defense to ADA claims low, provided an employer conducted a reasonable assessment of the employee/applicant’s disability before making the decision.” Brittany Blackburn Koch, *ADA “Direct Threat” Defense Just Got a Little Easier*, NAT’L L. REV. (Apr. 22, 2015), <https://natlawreview.com/article/ada-direct-threat-defense-just-got-little-easier>.

215. *See Beverage Distributors, Co.*, 780 F.3d at 1022; Van Detta, *supra* note 28, at 178 (“This changes the fundamental nature of the ‘direct-threat’ defense from . . . expert medical testimony necessary to prove that an employee or applicant in fact constitutes a direct threat—a truly objective inquiry—to a standard of what the employer ‘reasonably believes . . .’”).

216. *Sch. Bd. of Nassau Cnty. v. Arline*, 480 U.S. 273, 288 (1987) (stating that courts should defer to reasonable medical judgments when determining significant safety risks); *Bragdon v. Abbott*, 524 U.S. 624, 663 (1998) (Rehnquist, C.J., concurring) (following the *Arline* Court’s respect for official medical judgment); *Chevron U.S.A., Inc. v. Echazabal*, 536 U.S. 73, 86 (2002) (“The direct threat defense must be ‘based on a reasonable medical judgment that relies on the most current medical knowledge and/or the best available objective evidence.’” (citing 29 C.F.R. § 1630.2(r))). While these cases seemingly allow any medical or objective evidence, rather than “objective medical evidence,” this evidence cannot be simply medical evidence based on a physician’s subjective opinion. It must be objective.

217. *See EEOC v. Mod. Grp., Ltd.*, 725 F. Supp. 3d 577, 618 (E.D. Tex. 2024) (“The jurisprudence on individualized assessments cautions employers against relying on ‘perceptions of a disability based on myth, fear or stereotype’ and requires them to evaluate employees in their ‘actual state.’” (quoting *Sutherland v. Edison Chouest Offshore, Inc.*, No. 19-414, 2020 U.S. Dist. LEXIS 165158, at \*8 (E.D. La. Sep. 10, 2020))).

Few direct threat defense cases ever reach a jury.<sup>218</sup> This stems from the assumption that juries cannot properly balance conflicting medical opinions.<sup>219</sup> Applying the reasonable belief standard, the employer only needs to show that the jury would not find their analysis of direct threat objectively unreasonable.<sup>220</sup> This allows for discrimination that Title I sought to prevent. Thus, even if the plaintiff and their own physician provide objectively reasonable evidence, that evidence is not enough to trigger a “battle of the experts.”<sup>221</sup>

Rehab Act cases, like *Knapp v. Northwestern University*, also involve competing expert testimony and are often used in ADA analysis because of their similarities.<sup>222</sup> In *Knapp*, the Seventh Circuit adopted the Ninth Circuit’s direct threat standard that required a “showing of a reasonable probability of substantial harm.”<sup>223</sup> *Knapp* involved a collegiate basketball player who was prohibited from playing due to his medical condition, and both parties’ experts disagreed on the likelihood that substantial harm would occur if he were allowed to play.<sup>224</sup> The lower court determined that the responsibility to decide which expert testimony was more persuasive falls upon the courts.<sup>225</sup> The Seventh Circuit disagreed, stating that “medical determinations of this sort are best left to team doctors and universities as long as they are made

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218. And some legal scholars believe that sending these cases to the jury would not necessarily better resolve the employer-leaning rulings. Van Detta, *supra* note 28, at 198.

219. *Id.* A similar concern persists in medical malpractice cases, where juries have been described as “incompetent” and making decisions that are “not based on a thorough understanding of the medical facts.” Neil Vidmar, *Juries and Medical Malpractice Claims: Empirical Facts Versus Myths*, 467 *CLINICAL ORTHOPAEDICS & RELATED RSCH.* 367, 367 (2008).

220. Jarod S. Gonzalez, *On the Edge: The ADA’s Direct Threat Defense and the Objective Reasonableness Standard*, 105 *MARQ. L. REV.* 513, 538 (2019).

221. *Price v. WG Yates & Sons Constr. Co.*, No. 4:15cv419, 2017 U.S. Dist. LEXIS 219449, at \*5 (N.D. Fla. Mar. 27, 2017).

222. 101 F.3d 473 (7th Cir. 1996).

223. *Id.* at 483 (quoting *Mantolete v. Bolger*, 767 F.2d 1416, 1422 (9th Cir. 1985)).

224. *Id.* at 483–84. Specifically, the experts disagreed “on the effect of the passage of time on the likelihood that [the player] would suffer another sudden cardiac death.” *Id.* at 484.

225. *Id.*

with reason and rationality.”<sup>226</sup> A defendant needs only to check the boxes to secure judgment in their favor.<sup>227</sup> Under this framework, a defendant must (1) consider the plaintiff’s medical history and the likelihood and severity of harm, and (2) “rationally and reasonably” review the expert’s medical opinions, regardless of a conflict in medical opinion.<sup>228</sup> This ensures “it will be the *rare case* . . . where a court may substitute its judgment for that of the [defendant’s] physicians.”<sup>229</sup> Employers can cherry-pick expert opinions even when presented with equally rational and reasonable evidence from both sides. This places a limited role upon the courts, grants the defendant a substantial amount of deference, and leaves the plaintiff without recourse.<sup>230</sup> A better approach under the Rehab Act framework is found in *Davis v. Meese*.<sup>231</sup> The *Davis* court stated that “[b]ecause of the divergence of medical opinion expressed by the experts, obviously complete deference cannot logically be given to each expert. Only by assessing the relative merit and strength of the opinions can a proper determination be made.”<sup>232</sup>

In further contrast to *Knapp*, the court in *EEOC v. Outokumpu Stainless USA, LLC* faced conflicting medical testimony regarding whether the plaintiff posed a direct threat.<sup>233</sup> The court found a genuine issue of material fact as to whether the plaintiff posed a direct threat of harm when considering “the differing opinions between the relevant physicians.”<sup>234</sup> The court also noted conflicting expert evidence regarding whether the employer performed an individualized assessment on the employee’s ability to perform the job’s functions without posing a

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226. *Id.*

227. *See id.* at 484–85.

228. *Id.* at 484.

229. *Id.* at 485.

230. *See EEOC v. Modern Group*, 725 F. Supp. 3d 577, 618 (Tex. E.D. 2024) (stating the objective reasonableness standard does not require a “correct conclusion” (quoting *Nall v. BNSF Ry. Co.*, 917 F.3d 335, 346 n.8 (5th Cir. 2019))); *Knapp*, 101 F.3d at 485 (“In closing, we wish to make clear that we are *not* saying Northwestern’s decision necessarily is the right decision. We say only that it is not an illegal one under the Rehabilitation Act.”).

231. *Davis v. Meese*, 692 F. Supp. 505 (E.D. Pa. 1988).

232. *Id.* at 520.

233. No. 20-521, 2022 U.S. Dist. LEXIS 158073, at \*31–36 (S.D. Ala. Sep. 1, 2022).

234. *Outokumpu*, 2022 U.S. Dist. LEXIS 158073, at \*36.

significant risk of harm.<sup>235</sup> The issue of how much deference “reasonable medical judgments of private physicians on which an employer has relied” is apt for change.<sup>236</sup>

#### IV. ENSURING GREATER PROTECTIONS

To better protect individuals with disabilities from discrimination in the workplace, the direct threat defense must be treated as an affirmative defense.<sup>237</sup> However, an amendment to the ADA or a ruling by the Supreme Court does not suffice to eliminate this discrimination. Employers and their physicians must have less deference in their direct threat analysis. First, Congress should amend the ADA by expressly enumerating direct threat as an affirmative defense and adding specific factors for courts to utilize when confronted with conflicting expert medical testimony. In the meantime, the Supreme Court should settle the circuit split by holding direct threat as an affirmative defense. Additionally, courts should apply a burden-switching framework to the EEOC objective medical reasonableness factors. This would split the factors between the employer’s medical expert and the plaintiff’s physician, combining them for a comprehensive approach to the direct threat analysis.

##### A. An “Affirmative” Change to the Statutory Language

Congress should amend the ADA to state explicitly that a direct threat is an affirmative defense. The elimination of disability discrimination requires clear, comprehensive, and enforceable standards.<sup>238</sup> The simplest way to update the language is to add “affirmative” to the definition of qualification standard:

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235. *Id.* at \*36–41.

236. *Bragdon v. Abbott*, 524 U.S. 624, 663 (1998) (Rehnquist, C.J., dissenting) (citing *Sch. Bd. of Nassau Cnty. v. Arline*, 480 U.S. 273, 288 n.18 (1987)).

237. *See Van Detta*, *supra* note 28, at 164 (“[The] use of the word ‘qualified’ does not in some talismanic way transform what the statute sets forth as a defense to be proven by admittedly discriminating employers into a new component of proving that one is a qualified individual with a disability . . .”).

238. This circuit split spans three decades, steadily approaching four. *See id.* at 147 (stating in its title that direct threat litigation spans three decades).

[it] may be [*an affirmative*] *defense* to a charge of discrimination under this chapter that an alleged application of qualification standards . . . [that] otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation, as required under this subchapter. . . . The term “qualification standards” may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace.<sup>239</sup>

Alternatively, the Maine legislature drafted its direct threat defense as follows.

*It is a defense* to a charge of discrimination under this subchapter that an alleged application of qualification standards . . . that . . . otherwise deny a job or benefit to an individual based on protected class status has been shown to be job-related and consistent with business necessity. . . .<sup>240</sup>

By removing the permissible “may” in favor of a definitive, this language provides greater protection to individuals with disabilities and ensures that the ADA meets its legislative intent.<sup>241</sup> An update to Title I’s direct threat language is a significant yet insufficient first step, given the amount of deference provided to employer-backed physicians.

### *B. Giving Deference to the Treating Provider*

Courts that ensure employers and their medical experts receive less deference provide critical protections to individuals with disabilities and their right to work. Two proposed solutions could resolve the variable deference given to an employer’s physician and a plaintiff’s treating physician. The first includes amending Title I of the ADA to

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239. 42 U.S.C. § 12113(a)–(b) (emphasis added).

240. ME. REV. STAT. ANN. tit. 5, § 4573-A(1) (2025) (emphasis added).

241. See 42 U.S.C. § 12101(b)(1).

incorporate language from other regulations that address medical deference. For example, the Social Security Administration considers conflicting medical opinions when determining whether a person meets the requirements for Social Security benefits.<sup>242</sup> An amendment to Title I could follow a similar framework when conflicting medical opinions are both well supported and consistent with the record.<sup>243</sup> When this occurs, a court would consider three additional factors before deciding: (1) the relationship between the plaintiff and their medical provider, (2) the specialization of the medical provider, and (3) any other factors that “tend to support or contradict a medical opinion.”<sup>244</sup> This solution provides greater deference to the treating provider while still considering the objective reasonableness of determinations made by the employer’s physician.

An alternative solution divides the substantial risk factors between the parties.<sup>245</sup> Two justifications underlie this solution. First, the employer understands the needs of the workplace and the expected level of safety.<sup>246</sup> Second, a plaintiff’s treating physician often has a deeper understanding of the plaintiff’s ability, placing them in a better position to make the required assessment.<sup>247</sup> This solution functions as

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242. 20 C.F.R. § 404.1520c.

243. *See id.* § 404.1520c(b)(3). A consideration of the relationship with the plaintiff includes the length of the treatment relationship, frequency of examinations, purpose of the treatment relationship, extent of the treatment relationship, and examining relationship. Notably, the “examining relationship” portion of this text states, “[a] medical source may have a better understanding of your impairment(s) if he or she examines you than if the medical source only reviews evidence in your folder.” *Id.* § 404.1520c(c)(3)(v). Additionally, the Federal Coal Mine Health and Safety Act, which provides compensation for miners diagnosed with Black Lung Disease, has a similar provision for giving treating physicians greater deference. *Id.* § 718.104(d).

244. 20 C.F.R. § 404.1520c(c)(5).

245. *See* Sch. Bd. of Nassau Cnty. v. Arline, 480 U.S. 273, 287–88 (1987).

246. *Branham v. Snow*, 392 F.3d 896, 906 n.5 (7th Cir. 2004) (“The [employer] is certainly in the best position to furnish the court with a complete factual assessment . . . of the demands of the position.”).

247. The employee’s physician has a comprehensive knowledge of the plaintiff’s medical history, the general risks and symptoms associated with their disability, and the actual outward manifestations of the plaintiff’s ability to perform the job function with or without creating a substantial risk of harm. Additionally, though this is not a true burden-shifting framework because it occurs pre-litigation, burden shifting is common under ADA litigation. *See, e.g., DeLuca v. Winer Indus. Inc.*, 53 F.3d 793, 796–97 (7th Cir. 1995).

a part of the “individualized assessment of the individual’s present ability to safely perform the essential functions of the job.”<sup>248</sup> Thus, the employer would complete the assessment before litigation, when the employer believes a substantial risk of harm exists. Once the employer and the employer’s physician establish a belief that the plaintiff presents a substantial risk of harm, the employer would then request the employee provide them with documentation from their treating physician regarding the likelihood that potential harm would occur, its imminence and severity, and how long the risk may last.<sup>249</sup> This solution may eliminate litigation by allowing the parties to decide together whether a substantial risk of harm exists.<sup>250</sup>

If the employer believes the treating physician’s determination does not meet the objective reasonableness standard and consequently terminates the employee, a court will then examine whether the employer sought information from the treating physician. Under this framework, the defendant has the burden of proving that the treating provider’s medical opinion was not objectively reasonable and that the employer’s own physician’s determination was. By placing greater deference on the treating physician, the employer maintains a higher burden of proof, thus mitigating instances of disability discrimination that circumvent the protections of the ADA.

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248. *Nall v. BNSF Ry. Co.*, 917 F.3d 335, 343 (5th Cir. 2019) (citing *Chevron U.S.A., Inc. v. Echazabal*, 536 U.S. 73, 86 (2002)).

249. *See* 42 U.S.C. § 12112(d)(4)(A) (stating a covered entity can ask employees to submit to medical examinations that are consistent with business necessity). The employer would likely need to provide the employee with a copy of the necessary safety requirements of the position for the treating physician to use in their consultation.

250. This approach resembles the interactive process. It is intended as an extension of the interactive process, but can also stand separate from it when the interactive process is not utilized. The EEOC recommends that employers and employees utilize the interactive process to determine reasonable accommodations together. *Reasonable Accommodation: An Effective Interactive Process All Employee Resource*, U.S. DEP’T OF THE INTERIOR, <https://www.doi.gov/sites/default/files/employee-resource-effective-interactive-process.pdf> (last visited Mar. 19, 2026). The employee should be able to state what problems they face with the workplace barrier, though they do not need to specify a precise accommodation. EEOC, *supra* note 58 (emphasizing questions 1–5). During the interactive process, an employer can ask the employee to provide reasonable documentation related to their disability when the disability is not obvious; this allows the perfect opportunity for the employee to provide their expert’s medical opinion. *Id.*

Some scholars propose a three-party review, requiring both employer and employee physicians to conduct a full individual analysis.<sup>251</sup> If the parties disagreed with each other's analysis, the parties would mutually select a third medical expert for a third review.<sup>252</sup> Although workable, this solution requires great expense. Hiring a third expert may deter plaintiffs from pursuing recourse because of the costs associated with hiring an expert and the need to minimize expenses while unemployed. Or, if the cost falls solely on the employer, then biases towards the paying party may be at play. As a result, litigating after an initial disagreement and termination may be preferred by the employee, considering the free services offered by the EEOC.<sup>253</sup>

## V. CONCLUSION

Under the current circuit split, many individuals with disabilities experience needless termination from their employment, causing greater disparity to a group already often overlooked.<sup>254</sup> Though intended as widespread protection,<sup>255</sup> the ADA's vague language leaves it open for the courts to interpret, which opposes the ADA's purpose of providing a clear and comprehensive mandate.<sup>256</sup> The ADA intended to ensure that individuals with disabilities were treated equally under the law. Yet the variety of interpretations seen across the circuits inadequately protects these individuals, disadvantaging some simply because of the circuit in which they filed. Even in the circuits that treat direct threat as an affirmative defense, the amount of deference granted to employers and their physicians often conflicts with the purpose of the ADA. This demands a two-part fix: first, a correction to Title I's

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251. Van Detta, *supra* note 28, at 206–07.

252. *Id.*

253. See *Frequently Asked Questions*, EEOC, <https://www.eeoc.gov/youth/frequently-asked-questions> (last visited Feb. 15, 2026).

254. See 42 U.S.C. § 12101(a)(4) (“[U]nlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse . . .”).

255. *Id.* § 12101(b)(1)–(2) (“It is the purpose of this Chapter . . . to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities . . . [and] to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities.”).

256. *Id.*

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flawed direct threat provision, and second, a reassessment of the deference that shields employers from scrutiny.